

1 COPYRIGHT ROYALTY TRIBUNAL

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4 Monday, March 31, 1980

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7 2000 L Street, N.W.
8 Suite 500
9 Washington, D.C.

10 Whereupon, the Tribunal convened at 10:00 a.m.,
11 pursuant to notice.

12 PRESENT:

13 MARY LOU BURG, Chairwoman

14 THOMAS C. BRENNAN, Commissioner

15 DOUGLAS E. COULTER, Commissioner

16 CLARENCE L. JAMES, JR., Commissioner

17 FRANCES GARCIA, Commissioner

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20 ORIGINAL

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1 CHAIRWOMAN BURG: Good morning everyone. I think
2 before we start out what I ought to do is swear in the witnesses
3 at one time. Whoever will be testifying this morning, would
4 you please stand.

5 (All witnesses sworn.)

6 As I understand, you have come to an arrangement that
7 BMI will start out first this morning.

8 MR. DUNCAN: For the record, I am Charles T. Duncan
9 representing Broadcast Music in these proceedings. With me is
10 BMI general counsel Edward Chapin, BMI vice president for licens-
11 ing Alan Smith, and Mr. Paul Rosenthal who is the BMI manager
12 of clearance of logging.

13 As the Tribunal knows, the issue before you this morn-
14 ing is the broad breakdown of cable distribution as between
15 Sports, NCAA, Music and other claimants. In support of BMI's
16 case, we propose to call Richard Link whose statement has
17 already been presented to you and ask Dr. Link very briefly to
18 summarize his statement as you have submitted.

19 As you know from reading it is asking for a 17 percent
20 share of the allocation through the music group collectively.

21 Mr. Chapin, do you have anything you would like to
22 add?

23 MR. CHAPIN: Not at this time.

24 MR. DUNCAN: If it is in order, I would call Dr.
25 Link.

1 MR. SCHEINER: I have a preliminary matter relating
2 to the case of BMI. Essentially, the bottom line is I am asking
3 that you reject, not accept the proffered testimony that has
4 been exchanged.

5 The reason for it with the background first is on
6 the receipt of Dr. Link's statement. I noted and you will note,
7 too, that it essentially relies on two surveys. First is a
8 selection of 144 cable systems. Second for his term program
9 music content a survey of 40 television stations.

10 Neither of those surveys was submitted with a state-
11 ment of Dr. Link. On Wednesday last week, I called counsel of
12 BMI and requested the underlying surveys. On Thursday, I filed
13 a formal request, copies of which were circulated to the
14 parties and the Tribunal.

15 That request makes reference to Section 301.51i or
16 little one of your rules. I also made reference particularly to
17 the requirement and admonition of the chairman at page 25 of
18 our February session that any surveys, any statistical data was
19 required to be submitted with the testimony of the parties.

20 BMI, the statement is completely inadequate in that
21 regard and fails to meet either the rules or the Tribunal's
22 specific admonition. Were it not for the fact that we have
23 another representative of Music interest present which is mak-
24 ing a claim on behalf of all music interest, my request for
25 striking the BMI testimony would pose a difficult problem for

1 you, but we do have such other independent testimony.

2 Under the circumstances, I respectfully urge that you
3 reject Dr. Link's testimony.

4 MR. DUNCAN: May I be heard?

5 CHAIRWOMAN BURG: Mr. King.

6 MR. KING: For the record, I am Gordon King, Coudert
7 Brothers representing the National Association of Broadcasters.
8 I join in Mr. Scheiner's motion. It was not until yesterday
9 at 3 o'clock that I got my hands on the direct statement of
10 BMI.

11 We did not hear that they had filed a statement until
12 sometime last Thursday. In spite of efforts throughout
13 Thursday and Friday to obtain the statement, we did not get it
14 until yesterday afternoon. I understand that Mr. Popham got a
15 copy late Friday.

16 We were supposed to have had these statements on
17 Monday.

18 CHAIRWOMAN BURG: Mr. Duncan.

19 MR. DUNCAN: As to the last representation, I don't
20 know the reason for that. We filed the copies, and we served
21 the parties. I don't know why they were not received. As to
22 the objection, the Tribunal's rules 301.51 provides that the
23 admissibility standard is relevance and materiality.

24 The rule states evidence which is relevant and
25 material shall be admissible. That is 301.51a. It is true

1 that (h) and (i) talk about studies and analyses and statistical
2 studies were offered in evidence. But we are not offering
3 studies, analyses or statistical studies in evidence.

4 We are offering the living expert opinion testimony
5 of a witness whom we hope to qualify. He tells in his state-
6 ment what he did. How many channels he analyzed, how they were
7 selected and that sort of thing. He is fully subject to cross-
8 examination as to anything he says.

9 The fact that the working papers were not sought to
10 be introduced that anything would go to the weight of the
11 witness' testimony and not to its admissibility.

12 Based on the rules Mr. Scheiner has cited, I submit
13 to the Tribunal that Dr. Link is entitled to testify.

14 CHAIRWOMAN BURG: Any commissioners have a statement?
15 Excuse us for a five-minute recess, please.

16 (A five-minute recess was taken.)

17 CHAIRWOMAN BURG: Back on the record.

18 Mr. Scheiner, your objection is overruled. Proceed,
19 Mr. Duncan.

20 MR. KING: Madaam Chairman, if I may.

21 CHAIRWOMAN BURG: Mr. King.

22 MR. KING: On behalf of the NAB, we would be severely
23 prejudiced if we would be in a position to cross-examine at
24 this time. As I stated, it was not until late yesterday that
25 the NAB even saw the direct case filed by BMI. I think that we

1 at least would have an opportunity to appear to ASCAP.

2 There is economic testimony apparently in the BMI
3 presentation. There will be an economist here to testify. I
4 think we should have the opportunity to testify, to have our
5 own economist to assist us in preparing for cross-examination.
6 We have not had that opportunity.

7 If the Tribunal is overruling the motion to strike,
8 I would respectfully urge that they reschedule this so ASCAP
9 goes first and perhaps BMI go on tomorrow morning after we have
10 had an opportunity to review this with our people.

11 MR. DUNCAN: May I be heard?

12 CHAIRWOMAN BURG: Mr. Duncan.

13 MR. DUNCAN: We can produce Dr. Link. I don't think
14 BMI's case should be prejudiced. To my knowledge, it was time-
15 ly filed and served. Copies were available here. Copies were
16 available in my office if I got a telephone call which I did
17 not receive.

18 I don't think the order should upset the presentation.
19 If the NAB is severely prejudiced, we will produce Dr. Link at
20 a later time. But we have our people here, and we are ready
21 to go.

22 CHAIRWOMAN BURG: Mr. Duncan, we will leave the order
23 as it is if you will agree to have Dr. Link to come back
24 tomorrow.

25 MR. DUNCAN: I think I misstated. Dr. Link tomorrow

1 is involved in NBC polling work for the Wisconsin primary.
2 That is really the reason he asked to go first today so he
3 could get back to New York.

4 We will produce him at a mutually convenient time.
5 I will represent that to you for NAB's cross-examination.

6 CHAIRWOMAN BURG: Mr. King.

7 MR. KING: I am not sure what we are going to be do-
8 ing this morning. If BMI is going on, we are going to be ex-
9 pected to cross-examine. Our position is we are not now in a
10 position to do that because we have been severely prejudiced.

11 I want to clarify for the record that throughout
12 Friday we made every effort to get a copy of this statement
13 through BMI's offices. We called New York's office the first
14 thing in the morning. We were told we would have it that after-
15 noon. When nothing happened, I called to New York. They said
16 they did not have it there.

17 I would have to call the Washington office. I called
18 the Washington office. I made arrangement with the Federal
19 Express to have it Saturday morning. It never arrived. In the
20 meantime, I called ASCAP because I was told they had a copy.
21 The memoranda they sent over was the jukebox proceedings.

22 I think we have made every effort to get this thing
23 and be in a position to get it this morning. It is not our
24 fault that we did not get the statement until yesterday.

25 COMMISSIONER BRENNAN: Mr. King, would you be

1 satisfied if you had an opportunity at a later date to question
2 Dr. Link?

3 MR. KING: It is more than Dr. Link. There are two
4 other people here. It is an analysis of their entire statement
5 so we can have the benefit of expert economic help in preparing
6 the cross-examination of their direct case. I think it is more
7 than Dr. Link.

8 We are having this looked at right now, we hope. We
9 have mailed it to somebody. They should have it this morning.
10 We have every expectation that we would be able to proceed the
11 first thing in the morning. I think it is more than a question
12 of having Dr. Link.

13 I think if everybody here to testify this morning
14 would be available, we have no objection.

15 COMMISSIONER BRENNAN: Mr. Duncan is nodding his head.

16 MR. DUNCAN: The other two witnesses we do not plan to
17 call. We planned to have them here as resource people, if
18 necessary. Of course, if other witnesses are called, we will
19 produce them also.

20 COMMISSIONER BRENNAN: Mr. King, is that agreeable
21 to you, now?

22 MR. KING: Yes. Thank you. It is.

23 MR. DUNCAN: At this time with your permission, I
24 would like to call Dr. Link and ask your instructions. From
25 where would you like him to testify? I have questions to

1 qualify him.

2 Whereupon,

3 RICHARD F. LINK

4 was called as a witness, after having previously been duly
5 sworn, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. DUNCAN:

8 Q Dr. Link, for the record, will you state your name?

9 A Richard F. Link.

10 Q What is your occupation and profession?

11 A I am a statistician.

12 Q Where are you employed?

13 A I work for a firm, Richard F. Link and Associates.

14 Q Is that a firm you founded?

15 A Yes.

16 Q How long have you been with that firm?

17 A The firm was founded about a year ago.

18 Q How many years have you been a statistician?

19 A Approximately, 25-30 years.

20 Q Would you state briefly for the Tribunal what your
21 educational qualifications are in terms of degrees received and
22 the institutions from which they were received?

23 A I have a Ph.D. in mathematics from Princeton, a mas-
24 ters degree from Princeton and the University of Oregon, math,

25

1 and a bachelor of science from the University of Oregon.

2 Q Would you state for the Tribunal what your experience
3 has been?

4 A I worked as a consultant for various groups for
5 several years. I have talked at the Oregon State University
6 for six or seven years. I am currently in the last ten or 15
7 years been working with Broadcast Music, with NBC News election
8 unit, with the New York Daily News.

9 I am active with the Ernst & Whinney Consulting Firm.
10 I have done some sampling work for the Federal Trade Commission
11 and the Department of Energy, for the Offices of Science and
12 Technology as part of the Wild Ridge Report.

13 Q Your list of credentials which was attached to your
14 statement, you are the co-author of three books and the co-
15 editor of six?

16 A Yes.

17 Q A number of publications are listed, some 34 in all?

18 A Yes. That is correct.

19 Q Those are your credentials?

20 A Yes.

21 MR. DUNCAN: Without burdening the record, I submit
22 the witness as qualified.

23 BY MR. DUNCAN:

24 Q Dr. Link, you did prepare a statement which is
25 attachment A to BMI's direct case?

1 A That is correct.

2 Q Would you summarize that statement for the benefit of
3 the Tribunal?

4 A Yes. Basically what I was attempting here was to
5 assess the amount of music being used on this cable. Basically,
6 the assessment came from putting together two separate distinct
7 pieces of information.

8 One was an examination of some cable systems in terms
9 of the numbers of distant cable and other usage. A survey of
10 144 cable systems was looked at. From this, there were identi-
11 fied some 1,073 active channels which excluded service and pay
12 TV channels and excluded local TV.

13 745 were distant TV. Automated with music, 169; auto-
14 mated without music, ten channels; non-automated TV local
15 access, et cetera, 62 channels; and 87 channels radio.

16 This analysis of channel utilization of course has no
17 information on program content. For this purpose, I had refer-
18 ence to a survey that was based on the 1975-76 television sea-
19 son. It used the FCC compositeweek, the FCC composite week for
20 that period.

21 The day of the FCC composite week was expanded into a
22 week itself. Forty-nine days all together were analyzed. The
23 precise dates were included in the statement. The sample sta-
24 tions that were analyzed was a random sample of approximately
25 40 stations. They were selected in the analysis by virtue of

1 the fact that they fell into BMI's normal TV logging sample.

2 This sampling is a sampling of TV stations chosen by
3 Ernst & Whinney, independent auditors, as part of an on-going
4 service to BMI. These stations were analyzed for program con-
5 tent and in particular the program content was divided into
6 those parts which utilize music and those parts which did not
7 utilize music.

8 Approximately 2,400 local television program hours
9 with reference to 3,030 separate programs were reviewed. Of
10 these programs, approximately 515 hours were using music or
11 roughly 21 percent or 21.5 percent of the total time.

12 So basically putting the two results together, one
13 had 69 percent of the active channels surveyed, 745 divided by
14 1,073, where TV stations music was estimated to comprise 21.5
15 percent of the time, and the product of these two numbers was
16 15 percent or .15.

17 So, the 15 percent contribution came from this cable
18 television transmission. We did not try to get an estimate of
19 music usage for radio. However, general experience is it usual-
20 ly constitutes 95 percent of the total radio time.

21 There seemed to be no way that television could get
22 the percentage below 5 percent by any weighting scheme you
23 might devise. In terms of being conservatively used, a 2 per-
24 cent figure as the percentage applicable to radio for cable
25 signal retransmission for purposes of being conservative was

1 used.

2 Fifteen percent for television and 2 percent for esti-
3 mated radio content combined to give us the result that music
4 contributed to roughly 17 percent to the over-all distant
5 cable signal retransmissions.

6 Q Is that your conclusion?

7 A Yes.

8 Q That is your opinion?

9 A That is my opinion. Yes.

10 MR. DUNCAN: That is all I have, Madaam Chairman.

11 COMMISSIONER BRENNAN: The performing rights societies
12 in the congressional hearings have maintained that their status
13 is different from other claimants; namely, that the performing
14 rights societies are not concerned with an exclusive license
15 and are not concerned with protecting marketing positions.

16 Therefore, it could be argued that the cable compul-
17 sory license does considerably less damage to musical copy-
18 write owners than to other claimants in this proceeding.
19 Consequently, we should allocate a very small share of the
20 royalties to the performing rights societies.

21 Would you comment on that argument?

22 THE WITNESS: Basically, I do not claim to be an ex-
23 pert in this area. However, I can comment in the following
24 sense. The use of music which is a product of the affiliates
25 of the performing arts societies is a product like any other

1 product that appears and has economic value, just as any other
2 product that appears.

3 I don't believe that the argument that music is be-
4 cause it does not represent a special or competitive interest
5 as opposed to an affiliate switch receives royalties for their
6 work should say that therefore music is less valuable in this
7 context than any other context.

8 COMMISSIONER BRENNAN: Have you had a chance to
9 examine the formulas advanced in this proceeding by other
10 claimants?

11 THE WITNESS: I have not examined these formulas in
12 detail. No.

13 COMMISSIONER COULTER: Dr. Link, when you say music
14 is used, what do you mean by that? Does that mean it is part
15 of another program?

16 THE WITNESS: Basically, the music usage referenced
17 here is the sum of the music usage that is contents fee, your
18 usage. So-called background usage. The feature usage is
19 where music is the principle or primary focus. Background
20 music is where it is part of another on-going action.

21 For instance, background music frequently is used
22 to highlight or heighten dramatic expense or otherwise illus-
23 trate what is going on in the scene.

24 COMMISSIONER COULTER: Background usage is counted
25 in your allocation? In other words, 515 hours as the time it

1 is being played?

2 THE WITNESS: That is correct. Background and
3 feature.

4 COMMISSIONER COULTER: Background you are equating
5 with feature in your calculations?

6 THE WITNESS: Yes.

7 COMMISSIONER COULTER: As far as time is concerned.

8 THE WITNESS: Yes.

9 COMMISSIONER COULTER: The other question is feature.
10 Could you give an example of what would constitute feature?

11 THE WITNESS: Yes. If a variety show for example a
12 performer is giving a song, a Frank Sinatra, where essentially
13 the focus is on the performer, the orchestra, this would be an
14 example of usage.

15 COMMISSIONER COULTER: In both, you would have to
16 agree it is at that time a part of another program?

17 THE WITNESS: Yes.

18 CHAIRWOMAN BURG: Mr. Scheiner.

19 MR. SCHEINER: May I examine the witness at this
20 time?

21 CHAIRWOMAN BURG: Yes.

22 CROSS-EXAMINATION

23 BY MR. SCHEINER:

24 Q Dr. Link, my questions will go principally to your
25 methodology. As a preliminary question, I would like to know,

1 understand the thrust of your testimony. Assume that the
2 amount of time that you came up with was not 20 odd percent,
3 but rather 100 percent.

4 Is it your testimony that if feature music and back-
5 ground music totals 100 percent of the time that BMI would be
6 entitled to 100 percent of the cable royalty fund?

7 A That is a very hypothetical question. Because of
8 the fact it is fairly clear that music does not constitute 100
9 percent of the time, but only approximately the 20 percent of
10 the time that we indicated.

11 I don't know what award would be like with a music
12 constituting 100 percent of the time. Frankly, I don't know
13 how I would testify.

14 Q Doctor, the question was extremely hypothetical, but
15 it was intended to test your position and your analysis. So,
16 I will repeat.

17 If we had background music on 100 percent of the
18 time, would your analysis compel you to claim a 100 percent
19 of the cable royalty fund on behalf of Music?

20 A Is there going to be anything on the TV other than
21 for instance news broadcasts?

22 Q There will be a picture on the screen in my
23 hypothetical.

24 A Is this a moving picture?

25 Q Yes.

1 A From what source? This is in your hypothetical
2 example.

3 Q Let me ask you, Doctor. How did you evaluate, give
4 weight to the source in your analysis on page 4 of your testi-
5 mony when you multiplied .69 by .217 to come up with 15 per-
6 cent? What did you include in your hypothetical?

7 A This was the normal TV programming as analyzed as
8 indicated with the information on page 3.

9 Q Doctor, I am asking you to make the same assumption
10 with respect to my hypothetical question. You have normal TV
11 programming. You have music 100 percent of the time.

12 A You have normal TV programming with music 100 percent
13 of the time?

14 Q Yes.

15 A The reason why I am unable to answer your question
16 as a hypothetical is I cannot envision what that would be like.

17 Q Doctor, what did you mean by normal TV programming?

18 A That which appeared in the analysis.

19 Q Would you explain that, please?

20 A Sure. The analysis included some 3,000 hours worth
21 of programming that went out on the air. The music usage or
22 nonusage was recorded for each of the times these programs
23 were going out on the air. It was a combination of mixtures
24 from music programs to movies to you name it.

25 Q Did you weight feature music differently from

1 background music?

2 A As I indicated, no. This was total music usage.

3 Q You are unable to answer my question in the hypo-
4 thetical I gave you?

5 A Yes.

6 Q Doctor, as I indicated I am principally interested
7 in your methodology. Would you turn to the first page of
8 attachment A, the last sentence of the second paragraph.

9 It states and I quote "It should be noted that the
10 TV Factbook data were organized by state and that this method
11 of selection assured a broad geographic coverage." Do you
12 regard such an assurance as important to your methodology?

13 A All things being equal, a survey which guarantees
14 national coverage would have more surface validity, probably
15 would have more actual accuracy and therefore is a reasonable
16 component to be included.

17 Q I take it the answer is affirmative?

18 A I think the answer is what I said.

19 Q Are you aware that cable systems pay sums into the
20 royalty fund in effect on different bases?

21 A I am not aware in detail of the economics of cable
22 systems.

23 Q Are you aware that, do you know what a DSE is?

24 A No.

25 Q Do you know what distant signal equivalent is?

1 A Not technically, no.

2 Q Do you have any understanding of the term?

3 A I could make up all sorts.

4 Q All right. Is it not important, Doctor, to assure
5 a selection or assure a sample which is representative of the
6 different categories of cable systems based on the amounts of
7 money that is paid into the cable royalty fund by the cable
8 systems?

9 A It depends on your philosophy of sampling. I be-
10 lieve BMI had a philosophy of sampling that their interest is
11 in numbers. For instance, in sampling radio stations et cetera
12 they have no economic considerations. They do have music us-
13 age program content entering into the sampling philosophy,
14 but not monies.

15 Q Is that your view?

16 A Yes. I subscribe to that.

17 Q If I understand your testimony, it is on the one
18 had important to get a sample on a broad representative geo-
19 graphic basis but that it is completely irrelevant to the
20 sample to get cable systems selected on a representative basis
21 in the light of the nature and basis and amount of monies paid
22 by the cable system into the royalty fund?

23 MR. DUNCAN: I object to the question on the grounds
24 it mischaracterizes the witness' testimony and argumentative.

25 CHAIRWOMAN BURG: Mr. Scheiner, would you rephrase

1 that question, please.

2 BY MR. SCHEINER:

3 Q Doctor, are you aware that cable systems are divided
4 into three categories in terms of the basis and amount paid
5 into the royalty fund?

6 A As I told you, I am not aware of the details of the
7 economic system of the cable system.

8 Q Do you know the difference between form one, form
9 two and form three statement of account?

10 A To the extent that that would require knowledge of
11 the economic system, no.

12 Q Do you know what a statement of account is?

13 A In terms of this, no, sir.

14 Q Is it fair to say that you completely ignored any
15 information or data relating to the amounts paid by cable sys-
16 tems in devising your sample for your first survey?

17 A That is a true statement. If I may point out to you,
18 sir, the implications are that the fraction of activity TV
19 stations is bound to be somewhere between zero and 100. If
20 there were no distant TV stations in my sample, presumptively
21 music would be much higher because of an implication of more
22 radio et cetera.

23 On the other hand if the sample came up with 100 per-
24 cent distant TV channels, the music usage would be 21.5 percent
25 which is higher than the 17 percent that we had. What I

1 believe is that the implications of what fraction and how these
2 things are counted get in there is somewhat irrelevant to all
3 the economic conditions that you have been talking about.

4 Yes. I believe it is quite worthwhile ignoring
5 these things.

6 Q Would you turn to the first page of your statement
7 where there is some descriptive material concerning your sur-
8 veys of 144 systems. That describes conditions to the top of
9 the second page.

10 A Right.

11 Q Is it correct, Doctor, looking at the first full
12 paragraph on page 2 that you distinguish between local and
13 distant signals solely and exclusively on the basis of contour
14 maps in the television fact book?

15 A Those were the basic reasons for determining.
16 Actually the one had to use the contour maps in conjunction
17 with other more detailed information to try to make decisions
18 as to whether or not something was distant or not distant.

19 Q Your statement only reflects on the television fact
20 book. You now refer to other more detailed information. What
21 are you referring to?

22 A Rand McNally type maps.

23 Q What would that do for you?

24 A It would identify some town which was, had a televi-
25 sion station in the cable system which the particular page in

1 the fact book may or may not have shown. Remember the fact
2 book only shows the local area.

3 It does not for instance if I had a contour map
4 associated with say Indiana and this cable system is picking
5 up Atlanta, that contour map itself does not show Atlanta on
6 it. One could either say it is common knowledge Atlanta is a
7 distance from Indiana or one could make reference to a map.

8 Q I know, but how did you use that information? What
9 did you do in terms of your own analysis?

10 A The contour maps were the basis for making a judg-
11 ment on whether or not the system was distant or not distant.

12 Q In your answer, were you referring to the television
13 fact book?

14 A I am referring to whether a TV station being carried
15 by cable was a local station or a distant station.

16 Q How did you determine that?

17 A As I say, by the contours.

18 Q And nothing else or something else?

19 A In terms of the contours aided by a detail map where
20 necessary. We make a judgment. By and large, the judgment
21 was made that if something was dubious, one treated it as
22 local. One tried to be conservative in terms of distant
23 signals.

24 Q Sorry, Doctor. I don't understand. Give me an
25 example of a dubious answer from the television fact book

1 that made it necessary to resort to Rand McNally, and tell me
2 what you did when you did so.

3 A Again, this has to do with the area associated with
4 the fact book and the cables that were these channels being
5 brought in by a given cable system.

6 Q What is your definition of a distant signal?

7 A We obtained the definition beyond the outer contour
8 in the TV fact book.

9 Q Which contour?

10 A The outer contour. The B contour, I believe.

11 Q Do you know the FCC's definition of a distant signal?

12 A No.

13 Q I take it you are not aware that the FCC defines a
14 distant signal in terms of size of markets. You are not aware
15 of that, are you?

16 A Since I answered no to the previous question, I
17 think that would be a reasonable assumption.

18 Q I presume you are equally unaware that in the top
19 100 markets, the FCC does not define a distant signal in terms
20 of contours big or small. You are not aware of that, are you?

21 A No, sir.

22 Q If I am correct, Doctor, does it not absolutely
23 follow that your analysis of distant signals bears no relation-
24 ship to the FCC definition of distant signals?

25 A I think that the statement no relationship would be

1 a trifle strong.

2 Q The fact is you just don't know do you?

3 A The question is what fraction of cable TV is in the
4 large markets as opposed to a fraction in the small markets.
5 Again, I don't know the answer to that.

6 Again for this purpose, one was trying to get some
7 reasonable estimate of fraction of distant TV to apply to
8 music content so that one could then add some contribution to
9 radio again to the extent that the fraction of TV goes down
10 presumptively the radio content goes up.

11 Q Doctor, are you aware that if a signal would other-
12 wise be classified as a distant signal but is significantly
13 viewed that it is then classified by the Commission as a local
14 signal?

15 A Sir, I have told you that I am not aware of the
16 details of these definitions.

17 Q Well just to put a cap on this, have you heard the
18 terms significantly viewed as a definition of local or distant
19 signals?

20 A No.

21 Q Again, I refer to page 2 of your testimony. Is it
22 correct that you excluded the network affiliated stations
23 from your analysis?

24 A No.

25 Q It is not?

1 A On page 2?

2 Q On page 2, you list 745 distant TV. Can you explain
3 what that is?

4 A Those are the channels defined in the manner which I
5 have indicated to you including network and so-called local
6 channels. Again, identification of whether something was a
7 network channel or a local channel was self identified in the
8 book.

9 Q You have included so-called network channels in this
10 study?

11 A There are stations which were affiliated with net-
12 works as well as stations not affiliated with networks in this
13 745.

14 Q Can you tell me what the breakdown is?

15 A Not off hand, but I could get it for you, sir. My
16 guess at the moment is roughly --- I should not guess.

17 Q Did you distinguish in any fashion between so-called
18 network channels and non-network channels?

19 A You mean between affiliated network channels?

20 Q Yes.

21 A No.

22 Q I note on page 2 four other categories than distant
23 TV. Were those categories included in your analysis?

24 A Basically, these other categories were excluded to
25 the extent that no formal assessment was made. Radio you will

1 note, channels constitute approximately 8 percent. The so-
2 called automated music channels constitute approximately 15
3 percent.

4 The other channels, the ten channels automated with-
5 outmusic and the 62 channels non-automated I think essentially
6 can be said excluded these. 169, some 20 percent of the
7 channels we said had music usage of roughly 2 percent.

8 Q This table excludes local channels; does it not?

9 A As we define them, yes.

10 Q These, the first category, automated with music, is
11 that local or distant?

12 A I am not sure how you define it.

13 Q I am sorry?

14 A We did not define it as being local. We defined it
15 as being something which may be relevant.

16 Q I don't understand that at all, Doctor. Where did
17 you get these 169 channels?

18 A These were channels described by the cable as being
19 automated channels with music. There was no information in
20 terms of where the signal came from. Presumptively, they
21 would be the sort of channel -- and this was a presumption on
22 my part -- that one sees on a cable system which gives royal-
23 ties, programming with a music background.

24 Q Doctor, am I correct that you went to the TV services
25 fact book if that is the right designation and the legend

1 saying automated with music? That was included?

2 A That is correct.

3 Q That is the only inquiry that you made?

4 A That is correct.

5 Q If it is listed there, you included it?

6 A That is correct.

7 Q In terms of whatever fashion you define local and
8 distant, you did not attempt to make any determination whether
9 that is local or distant?

10 A How are you defining local and distant?

11 Q Doctor, you tell me how you are defining it. I am
12 suggesting you made no determination whatsoever on any basis
13 whether it was local or distant in any fashion? Is that
14 right?

15 A In terms of the automated with music?

16 Q Yes.

17 A Again, it was presumed to be information generated
18 by the cable system, not normal TV programming.

19 MR. SCHEINER: I respectfully request that the
20 witness be directed to answer the question.

21 MR. DUNCAN: I think he did.

22 MR. SCHEINER: The question was did he make any.

23 MR. DUNCAN: I think the answer is clear.

24 CHAIRWOMAN BURG: Would you rephrase the answer,
25 Dr. Link.

1 THE WITNESS: Yes. We categorize the channels as
2 being local TV channels, distant TV channels. Channels auto-
3 mated with music, without a determination as to whether they
4 were local or distant channels automated without music with
5 nothing, the local or distant TV, local TV and radio without
6 determination of whether they were local or distant.

7 BY MR. SCHEINER:

8 Q Thank you, Doctor.

9 Doctor, I am on page 3 of your statement. I note
10 that your program music content was based upon the 1975-1976
11 television season?

12 A Yes.

13 Q Are you aware of what year we are concerned with in
14 this proceeding for the contribution of the cable royalty
15 fund?

16 A It is my general impression 1978.

17 Q Can you explain why you picked the period of times
18 of several years earlier than the year we are concerned with?

19 A Again, the presumption here was that the television
20 programming was not so dynamic that the programming in '78 was
21 so different than the programming in '75-'76. The information
22 that is used here was obtained after a relatively extensive
23 study and represented a great deal of work.

24 We did not have comparable information available nor
25 could we have obtained the same depth of study for the 1978

1 season.

2 Q Are you responsible for the sample of approximately
3 40 stations which were studied?

4 A As stated in earlier material here, this sample was
5 a sample drawn by interest.

6 Q Could you tell me the purpose?

7 A It was done as part of the logging process.

8 Q What does that mean?

9 A This was part of the process that BMI obtains infor-
10 mation in house for analysis for the purpose of paying
11 affiliates.

12 Q How often is that study done?

13 A Which study, sir?

14 Q The one we are referring to, the 40 station sample.

15 A BMI receives information from some number of stations
16 weekly. Mr. Rosenthal can give you precise numbers, but that
17 is an on-going weekly thing.

18 Q Would it follow you would have available to you
19 data for 1978?

20 A Like this?

21 Q Yes.

22 A No, sir.

23 Q Why not?

24 A Because as I said, this was for the purpose of BMI's
25 logging which is for the purpose of paying affiliates. We did

1 not as a normal course of events pay attention to other music
2 distribution.

3 Q Looking at page 4 of your statement, I note "Approximately
4 mately 2,400 local television program hours" and it goes on to
5 comprise some 3,030 separate programs were thus reviewed.

6 I don't understand that, Doctor. Let me explain my
7 difficulty. The testimony in the preceding page adds up to 49
8 days of programming. I assumed 20 hours operation per day. I
9 multiplied 49 by 20 by 40 stations, and I came up with 39,200
10 hours.

11 If I assumed a half hour programs, I come up with
12 78,400 programs. Can you explain how you arrived at that
13 analysis of 2,400?

14 A I am sorry, sir. Would you do that again?

15 Q Forty-nine times 20 times 40.

16 A All right.

17 Q I multiplied that by two. I assumed the average
18 duration of the program to be half an hour.

19 A Yes.

20 Q I came up with 78,400. I don't understand the num-
21 bers on page 4 where you say approximately 2,400 local televi-
22 sion programs et cetera. Could you tell me how that was
23 arrived at?

24 A Again, the details of the hours arrived at could be
25 given to you by Mr. Rosenthal. I will point out to you you

1 have presumed in there a 20 hour day and also you will notice
2 the work local television program hours, there are not any
3 network programs in there.

4 Q Are you saying, Doctor, that you excluded network
5 programs?

6 A I am saying there were no network programs in this
7 analysis.

8 Q Why did you exclude the network hours?

9 A Again as I told you, we used this information because
10 an extensive amount of hours had gone into it. The network
11 had not been included in it and were not excluded but had not
12 been included in this particular analysis.

13 MR. SCHEINER: I have nothing further at this time.

14 CHAIRWOMAN BURG: With the exception of Mr. King,
15 does anyone else have any questions of Mr. Richard Link repre-
16 senting the character claimants?

17 MR. DANNAY: I unfortunately did not have the benefit
18 of receiving BMI papers.

19 CROSS-EXAMINATION

20 BY MR. DANNAY:

21 Q I do want to ask you a few questions based on the
22 testimony I heard you give. You mentioned two kinds of usages
23 of music in programs. I think you identified them as one
24 feature usage and two background usage.

25 Could you elaborate a bit on what you mean by each

1 of those and tell me whether there are any other categories of
2 usage of music in programs?

3 A Again, the so-called feature usage is where the per-
4 formance is essentially the only thing that is going on along
5 with the scene et cetera. The background music is overlay to
6 enhance dramatic content of a program.

7 Q Is there any other category of usage music in pro-
8 grams that you can identify?

9 A There is theme usage which is the beginning music
10 which is a signature. There may be others, but none come to
11 me at the moment.

12 Q Do you have at hand or are you aware of any profile
13 or breakdown of those categories of usage in programs in terms
14 of percentages, 50 percent feature. Do you have figures
15 available at the moment.

16 A I have no figures available at the moment.

17 Q Do you have a rough approximation you can give based
18 on your experience?

19 A I would hesitate to give numbers off the top of my
20 head.

21 Q Do you know whether BMI offers a breakdown on pro-
22 files of breakdown of those usages in its papers?

23 A There is certainly none in this. I believe it cer-
24 tainly would be possible to get a breakdown.

25 Q Let me ask you more generally would the background

1 usage be substantial percentages of the usage of music in
2 programming?

3 A I believe it would be certainly significant. Yes.

4 Q Would it probably out weigh if percentage were avail-
5 able, the feature usage? Would the percentage that you would
6 assign to the best of your knowledge to the background usage
7 likely to be greater than the percentage that you would assign
8 to feature?

9 A In background music, my guess is probably yes.

10 Q Is it your contention or knowledge that music would
11 form a part of virtually all the programs that would appear on
12 television and carry on cable?

13 A That was not our contention. No.

14 Q What percentage of programs to your knowledge would
15 include no music at all?

16 A Absolutely none, never?

17 Q Well, I am just trying to get some reading of the
18 extent to which music forms a part of the programs, which
19 forms a part of your claim. I am trying to ascertain whether
20 music forms a part of every program or whether there would be
21 some percentage of programs which music does not appear at
22 all?

23 A There may be some programs importance which music
24 never appears although off hand it would be difficult to
25 identify them. Certainly music plays a greater role on some

1 programs than others.

2 Q Well, is it your testimony that music in all likeli-
3 hood appear in virtually all programs in some form background
4 or whatever?

5 A At some point, music creeps in in very strange
6 places. Yes.

7 Q I believe you acknowledged in response to a question
8 of a commissioner music is an element included in programs but
9 of course music is not itself a program?

10 A As I said, I have no technical knowledge on this
11 matter. However, I answered the commissioner's question in
12 that regard. Yes.

13 Q Does the claim BMI is making limited to the music
14 itself and it does not impress any other programming elements
15 or indeed even the program itself as a whole; is that correct?

16 A BMI is making a claim for its affiliates for the use
17 of music.

18 Q But it is just for the music itself not for any of
19 the other programming elements or the program as a whole?

20 A Yes.

21 Q Let me ask a question for the record which I think
22 is obvious. The music which does appear in the programs is
23 recognizable as the music, prior to its appearance in the
24 programming. It undergoes no particular change in its pro-
25 gram? Music. It is immediately recognizable in its essential

1 form?

2 A I do not know how to respond to that.

3 Q You have heard music on programs. Is it different
4 than the forms of music you have heard outside the television
5 context?

6 A I believe use of music is quite different than out-
7 side the television context.

8 Q Is the music in a different form and no longer
9 recognizable?

10 A The question as to whether or not the music is
11 recognizable, I believe it is recognizable inside or outside.
12 The question is whether or not it had the same connotations?

13 Q No, no. The basic characters.

14 A What do you mean by character?

15 Q Whatever would be the appeal to the listener. Would
16 that change at all as it is used in television programs or is
17 it essentially the same notes, composition?

18 A We are talking about the same notes or the appeals?

19 Q No. The notes.

20 A The notes I believe would be the same.

21 Q That is really all my questions. Thank you.

22 One last question. Is BMI and its affiliates claim
23 based at all on any share of the cable audience itself or
24 based essentially on the share of time which the music is
25 carried?

1 A It is basically based on the share of time as
2 indicated.

3 Q The share of cable audience is not a factor in your
4 testimony?

5 A In my testimony, that is correct.

6 Q Is there any element in your testimony, in your
7 written statement regarding the popularity or appeal of music
8 with cable subscribers, what they want to hear? Does that
9 form an element of your direct statement?

10 A Not in my direct statement. No, sir.

11 MR. DANNAY: That is all. Thank you.

12 CHAIRWOMAN BURG: Do any other category of claimants
13 have questions of Dr. Link.

14 MR. LLOYD: David Lloyd. I am here along with my
15 colleagues for the Sports claimers.

16 CROSS-EXAMINATION

17 BY MR. LLOYD:

18 Q In calculating the amount of time devoted to music,
19 Dr. Link, did you distinguish between the music in the public
20 domain on music or which there were presently valid copyrights?

21 A I am not 100 percent sure, but I believe the music
22 we are talking here is subject to copyright. I would have to
23 double-check that.

24 Q It was music subject to or was it copyrighted?

25 A Music copyrighted.

1 Q Under standards of '75, '76 or in '78?

2 A Again, I would have to get counsel to answer that
3 question. I would not be content to ---

4 CHAIRWOMAN BURG: You have a question?

CROSS-EXAMINATION

5 MR. SOUTHMAYD: I am Jeff Southmayd appearing on
6 behalf of the Christian Broadcast Network. Dr. Link, I have
7 not had an opportunity to review your written testimony. We
8 have not received it or any of the other of the major claimants
9 besides major league sports.

10 Do I understand your data is based on the 1976 FCC
11 composite week and data BMI has for the year 1975?

12 A The program content with respect to music data?

13 Q Yes.

14 A Yes.

15 Q Can you explain why your data is '75 data for funds
16 for reprogramming in 1978?

17 A I am sorry. Could you repeat that?

18 Q The funds that are the basis for this proceeding
19 were paid by cable systems ---

20 CHAIRWOMAN BURG: That has been covered.

21 MR. SMITHMAYD: My question is whether Dr. Link
22 could explain your use of 1975 data in this proceeding concern-
23 ing royalties paid for the year 1978.

24 MR. DUNCAN: I would not object, but that has been
25 asked and answered.

1 MR. SOUTHMAYD: Can we be enlightened on the answer
2 when the transcript comes out?

3 CHAIRWOMAN BURG: Yes. Any other questions?

4 COMMISSIONER COULTER: Dr. Link, I would like to ask
5 you a couple more questions. You are aware that our job is
6 to divide up 100 percent of the royalties? It is not related
7 simply to the music share?

8 THE WITNESS: Yes, sir.

9 COMMISSIONER COULTER: I suspect that you are aware
10 of the claims before us now, the sums asked for are greater
11 than 100 percent?

12 THE WITNESS: That would not come as a surprise to
13 me. No.

14 COMMISSIONER COULTER: You indicated that you were
15 not specifically aware of the formulas proposed by other
16 categories of claimants. But are you generally aware that a
17 couple of them have also based their formulas on time?

18 THE WITNESS: No. I have not reviewed it in that
19 depth.

20 COMMISSIONER COULTER: It is broadcasters base their
21 formula on time?

22 THE WITNESS: Right.

23 COMMISSIONER COULTER: The Program Syndicators do.
24 They weight it, but they also have a strong increment of time
25 in their formula?

1 THE WITNESS: Right.

2 COMMISSIONER COULTER: Since you have music usage
3 occurring concurrently with other programs as you indicated
4 before; is that correct?

5 THE WITNESS: That is correct.

6 COMMISSIONER COULTER: We obviously with these
7 different formulas have overlapping times?

8 THE WITNESS: Yes.

9 COMMISSIONER COULTER: How would you propose under
10 the circumstances that we resolve that dilemma?

11 THE WITNESS: Perhaps if each of the other claimants
12 could also furnish you with a fraction time music is used in
13 each of their claims, you might be able to have some equitable
14 calculation claimant by claimant vis-a-vis their claims, music
15 claims and music are a result of some of those calculations.

16 COMMISSIONER COULTER: In the formula proposed, you
17 are not making any claim for a fraction. You are claiming
18 100 percent of the time that music is used?

19 THE WITNESS: To the extent that we have discounted
20 in a rather arbitrarily but large fashion the fraction time
21 allocated to radio, that is not true. To the extent that we
22 have not discounted that time allocated to TV, it is true.

23 COMMISSIONER COULTER: Okay. The bulk here is tele-
24 vision. You nevertheless for the percentage that you consider
25 music being used are asking for 100 percent?

1 THE WITNESS: Of that time.

2 COMMISSIONER COULTER: Exactly.

3 THE WITNESS: Yes, sir.

4 COMMISSIONER COULTER: So, whatever percentage in
5 answering my previous question you said the other people
6 should present some fraction to avoid this overlap. Yet, in
7 your proposal here you are not doing so. Am I clear?

8 THE WITNESS: Yes.

9 COMMISSIONER COULTER: That I am clear or that my
10 former expression is correct?

11 THE WITNESS: Your expression is correct.

12 COMMISSIONER COULTER: You admit that legitimately
13 causes us a problem. If there is perhaps an obligation on you
14 to work up some fraction.

15 THE WITNESS: This gets into an area as you can tell
16 we have avoided which was a attempt to come up with an arbi-
17 trary evaluation of the contribution of the music economically
18 and the contribution of programming materials et cetera, three
19 times.

20 I am sure you are quite well aware that this is an
21 area which is at best vague and under present circumstances
22 would be extremely contentious. I agree that we have avoided
23 this area, but I think if directed to think about it whether
24 or not we could come up with something we felt comfortable,
25 I cannot answer at the moment.

1 COMMISSIONER COULTER: One final question. You have
2 made a survey which produced a fraction, your various fractions.
3 In your survey, did you discover other usages? It was a com-
4 plete survey I understand. Did you breakdown how the other
5 categories emerged?

6 THE WITNESS: You are not referring to ---

7 COMMISSIONER COULTER: The 85 percent left over. You
8 have a survey which produced these figures. I assume you
9 would have to have figures on the other categories?

10 THE WITNESS: You are now referring to the '75-'76
11 survey in terms of the program content or the categories re-
12 ferred to on page 2? We have two surveys here. Which are
13 you referring to?

14 COMMISSIONER COULTER: The survey that you used ini-
15 tially. Maybe you could elaborate for me. You produced a
16 survey which indicated so much music usage; is that correct?

17 THE WITNESS: This is now the '75-'76 television
18 survey?

19 COMMISSIONER COULTER: Is that the one you used?

20 THE WITNESS: That determined music content in terms
21 of fraction of time.

22 COMMISSIONER COULTER: Did that survey produce the
23 usage by other categories?

24 THE WITNESS: I think there is a breakout. I am not
25 sure of what the details are.

1 COMMISSIONER COULTER: Would it be possible to submit
2 the details of that to us? We need to solve the problem
3 totally.

4 THE WITNESS: I would have to check with ---

5 MR. DUNCAN: If it is available, we will certainly do
6 that.

7 COMMISSIONER JAMES: Am I to understand that you in
8 this survey in response to Commissioner Coulter's questions
9 you came up with 15 percent for the total music allocation; is
10 that correct?

11 THE WITNESS: For TV, yes.

12 COMMISSIONER JAMES: All I am dealing with now is
13 relating to one thing, television. Do you know what the other
14 categories of the claimants are?

15 THE WITNESS: Sports, motion pictures.

16 COMMISSIONER JAMES: You do know what they are. Out
17 of that 85 percent remaining, you have now in response to
18 Commissioner Coulter's question have allocation of what the
19 other divisions should be?

20 THE WITNESS: No.

21 COMMISSIONER JAMES: If you are getting music, it is
22 15. Do you know how much sports was on?

23 THE WITNESS: I don't believe our breakout worked
24 like that.

25 COMMISSIONER JAMES: That was your question,

1 Commissioner?

2 COMMISSIONER COULTER: Yes. First, do you have it?
3 If you don't have it, could you ultimately have it provided?

4 THE WITNESS: I am not trying to be wishy-washy.
5 I don't remember the precise categories we have. I am not
6 sure that they line up with the categories you are interested
7 in. My suspicion is they would not exactly.

8 The reason why I am dancing is I am not sure how much
9 effort it would be to turn things around.

10 MR. DUNCAN: If there is no other cross-examination
11 questions, I have no redirect.

12 CHAIRWOMAN BURG: Would you come up to the microphone,
13 please.

14 MS. HILL: Good morning. I am Janice Hill with
15 National Public Radio. We have not had a chance to see the
16 written statement. I would reserve our right upon examination
17 to ask questions at a later time.

18 I have one rhetorical question. You did say your
19 radio number, your 2 percent number was an arbitrary
20 determination by you?

21 THE WITNESS: Yes. From being down from the percent-
22 age one might calculate otherwise.

23 MS. HILL: That is all.

24 CHAIRWOMAN BURG: Mr. Duncan.

25 MR. DUNCAN: We have nothing further.

1 That is an approach which approximates what would
2 happen in the marketplace were their sales to cable systems,
3 were there no compulsory license. The other approach advocated
4 by the Broadcasters and by Broadcast Music, Incorporated is
5 a mechanistic approach.

6 That suggests that no judgments should be exercised
7 by the Tribunal. The NAB has always had a neurasthenic
8 reaction to any suggestion that a governmental body make any
9 appraisal of the merits or the value of their programs.

10 In their statements, they say you have to treat all
11 copyrighted works alike. All treated equal otherwise there
12 would be a very constitutional program. They don't go into
13 that. We think that is nonsense. We think it leads to a
14 silly conclusion.

15 If you look at the statute, if you look at Section
16 111D4, you find that the statute says that the royalties
17 deposited shall be distributed to those among the following
18 copyright owners who claim that their works were the subject
19 of secondary transmissions by cable systems.

20 Who are they? Any such owner whose works was includ-
21 ed in secondary transmission made by a cable system of a non-
22 network television program. If this language is read literal-
23 ly, I suggest we are missing a very important claiming group,
24 the advertising agencies.

25 They own 20 to 25 percent of copyrighted materials

1 CHAIRWOMAN BURG: Thank you, Dr. Link.

2 Mr. Korman.

3 MR. KORMAN: May we present our case from here?

4 CHAIRWOMAN BURG: Yes. We will have a five-minute
5 recess.

6 (A five-minute recess was taken.)

7 CHAIRWOMAN BURG: Mr. Korman, you may proceed.

8 MR. KORMAN: I am Bernard Korman representing ASCAP,
9 Fred Koenigsberg and Ben Zelenko and the witness, Dr. Fagan.
10 His assistant is with him.

11 Our statement was joined in by SESAC and Mr.
12 Ciancimino, and he is also at the table and will speak if
13 everything has not already been said at the conclusion of our
14 presentation

15 Let me begin by saying in response to a suggestion
16 that Commissioner Coulter made that it is the duty of the par-
17 ties to try to assist the Tribunal. We are here to help you.
18 We come with a proposal that as one of its advantages is
19 general applicability to all claimants. That is all except
20 the Broadcasters for whom we will decide a share of zero.

21 We will suspect that they will not agree that that is
22 a proper share. Basically what we have are two different
23 approaches to this problem. One of them supported by ASCAP
24 and SESAC and by the Sports people would also be supported by
25 the Program Syndicators had they figured out a way to do it.

1 that is broadcasted. Why aren't they here? I won't claim
2 full credit, but I was with a lawyer representing the adver-
3 tising agency and I was speaking on compulsory licenses, on
4 the new act.

5 The lawyer said to me we are in for a lot of money.
6 I said, "No. I don't think so. Look at the legislative his-
7 tory." Apparently, he looked at it, and he has not shown up.

8 I think it is clear Congress did not intend 20 to 25
9 percent of the compulsory license fees to be paid by adver-
10 tisers or the advertising agencies who pay the broadcasters
11 to include their announcements in their programs, announcements
12 which I suggest the cable systems would be happy to delete if
13 they were permitted to do so.

14 They certainly would not pay in El Paso, Texas to
15 hear about a local advertisement special about a Los Angeles
16 bakery. With that, I will turn to the witness.

17 Whereupon,

18 PAUL FAGAN

19 was called as a witness, and having been previously sworn, was
20 examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. KORMAN:

23 Q Dr. Fagan, you have been here before. The Tribunal
24 knows you well by now, but there are those in the room who do
25 not. Would you briefly review for us your educational

1 background after high school and sketch out your work experi-
2 ence up to today?

3 A Yes. I received a bachelors and masters degreee
4 from the University of Kentucky and Ph.D. in economics from
5 Columbia. The first years after college, I taught at the
6 University of Kentucky. I taught courses at Columbia, and
7 finally I taught at the graduate school at New York University.

8 While I was going to Columbia, I worked for a con-
9 sulting firm, Joel Dean Associates, from 1955 to '65. One
10 account was the ASCAP account. Joel Dean Associates was
11 assigned to review the ASCAP survey of performances and rede-
12 sign that survey which that organization did.

13 It was put in effect to ASCAP in the fall of 1958.
14 When I was teaching at New York University and also working
15 part-time for Joel Dean Associates, ASCAP went to Joel Dean
16 and asked them to find for them a liaison person on a survey.

17 They wanted someone in house to make sure the survey
18 was going according to design. I ended up being that liaison
19 person working half time until the spring of 1962. It was
20 on a part-time basis and thereafter on a full-time basis.

21 Q Dr. Fagan, have you in the course of your employment
22 with ASCAP been involved with negotiations with users where
23 the question was what is the fair value to the user of an
24 ASCAP license?

25 A Yes. As I mentioned before, my first assignment was

1 one as a liaison person on the survey. Back in the early part
2 of '62, there was some negotiations that came up with respect
3 to the radio networks which was my first involvement in the
4 negotiating process, negotiating licenses.

5 Q To cut it short, you have negotiated with various
6 users including radio, television broadcasters, network and
7 local, hotels, background, college universities, the Shrine,
8 the symphony orchestra and others.

9 In connection with the ASCAP statement, did you par-
10 ticipate in the preparation of it?

11 A Yes, I did.

12 Q Was there any other economist who also participated?

13 A Yes. The Robert Nathan Associates participated in
14 the production of that statement. The individuals Anderson
15 and Cohen.

16 Q How is value normally determined?

17 A Economists normally think economic value as being
18 determined in a marketplace. A value which buyers and sellers
19 through their transactions determine it by ascertaining the
20 prices that they sell at.

21 Q Have you a suggestion as to how the Tribunal might
22 approach that problem in the context of cable television?

23 A It seems to me it is the question before this
24 Tribunal is the relative value of each of the components or
25 each of the claimants that are before them. Absent a world of

1 compulsory licensing of those values, those economic values
2 would be determined by the transactions between the claimants
3 that are before you and the cable systems or the organizations
4 of cable systems.

5 We don't have that here. We have a compulsory li-
6 cense and the job that you have. It seems to me that it may
7 be helpful to you and we are suggesting that you look at the
8 economic values that are determined in the local TV market-
9 place. The prices that are paid in that marketplace for
10 music.

11 The prices that are paid for syndicated programs.
12 The prices that are paid for sports. These are hard facts.
13 These hard facts and the relationship among these facts may
14 be helpful to you in determining the relative value in the
15 claimants for cable.

16 Q Dr. Fagan, with respect to the hard facts as to the
17 broadcasters claim or rather as to the value of the locally
18 produced programs, ASCAP and SESAC have said that value is
19 nil. Would you care to comment on why we say that for the
20 Tribunal's benefit?

21 A It seems to me to be obvious that the cable systems
22 would not pay absent or in a world where you do not have com-
23 pulsory license and they had the freedom not to tape locally
24 produced programs, programs produced for another local market.
25 The news in Dubuque is of little interest to Washington.

1 If the Washington operator, cable operator, could
2 have the option of buying it or not buying it, I think it is
3 obvious that it would not buy it.

4 Q Just common sense?

5 A Just common sense.

6 Q You don't have to get to the question of the sound-
7 ness of methodology, do you?

8 A We have not made a study on this. I think others
9 have before this Tribunal, but we have not.

10 Q Dr. Fagan, we came up with 13.5 percent. We did it
11 in steps. I call your attention to the first part of our
12 suggestion which is to look at what happens in local televi-
13 sion. Why did we pick local television?

14 A We picked local television for two reasons. One is
15 the programs that we are talking about. They are broadcasted
16 by local stations. It is the same film on a local station
17 that is picked up and shown on a cable system or the same
18 sporting events which are shown locally and also shown on the
19 cable system.

20 Another factor and an important factor is that we
21 have very specific hard facts, as I call them. We have the
22 FCC collecting the information as to what the financial values
23 are in the transactions that took place between the syndica-
24 tors and the station.

25 They publish it. They aggregate it and publish it

1 once a year. So, we have some numbers to look at to see what
2 the results were at the marketplace and local television.

3 Q To be clear, Dr. Fagan, we don't have those numbers
4 do we for the specific television stations which are carried
5 as distant signals. The FCC publishes only a summary?

6 A That is correct. The individual replies are confi-
7 dential, but the summaries are published.

8 Q Do you have any reason to think that the data in
9 summary form we analyzed would be different if we had it
10 station by station and looked only at those stations which
11 were carried?

12 A Sure. There would be differences. We don't know.
13 We have not been privied to the statements of the individual
14 stations which are carried on cable. We don't know.

15 Q Do you think there is any reason to believe dramatic
16 variances?

17 A I do not think so.

18 Q I call your attention to the table on page 4. Would
19 you run us through that and tell us what it teaches?

20 A The table on page 4 sets forth the amounts in
21 millions of dollars as reported by the FCC for the year 1978
22 in their publication TV Broadcast Financial Data 1978. There
23 is an amount for independent stations for music license fees
24 of \$8.9 million.

25 There is an amount for independent stations for

1 rental and ammortization of film and tape \$118.6 million.
2 There is an amount for other program and performing rights
3 \$18.6 million. We have added those numbers up.

4 Incidentally, in that table they are broken down. We
5 combined them. We percentage them out to see of these amounts
6 what percent was spent for music and what percent was spent
7 for rental and amortization of film and tape and what percent-
8 age was spent for program and other performing rights.

9 We did the same thing for affiliated stations.
10 Basically, we did make an adjustment for the music license fee
11 for network affiliated stations. If we add the various compon-
12 ents in that schedule, we have for the amounts paid for music
13 license fees some \$58.9 million.

14 We subtracted out however \$12 million from that num-
15 ber to reflect the fact that the network affiliates pay
16 approximately, it is our understanding they pay 50 percent of
17 the amount of music license fees which the networks pay to the
18 music performing rights organizations.

19 So, the network affiliates are reported to have paid
20 58.9. We subtracted out 12 as their portion to the network to
21 come out with \$46.9 million. There is no adjustment necessary
22 for the rental and amortization of film and tape and the other
23 program and performing rights costs.

24 We in this table for percentage out, the total for
25 these elements. We find for music 16.1. For rental and

1 amortization of film and tape, 75.7 and other program and per-
2 forming rights is 8.2.

3 I might say at this time that when they say rental
4 and amortization of film and tape it is my understanding and
5 belief that that represents the amortization for the syndicat-
6 ed material whether that be feature movies or cartoons or off
7 network series or a series produced especially for local tele-
8 television.

9 It is further my understanding that the last category
10 other program and performing rights is basically for broadcast
11 rights to important sporting events.

12 Q Can you take us through the next step, Dr. Fagan?
13 You refer at the bottom of page 4 to a sample. You are trying
14 here to use the knowledge we had of the relative values of
15 music and other copyrighted materials in television to get the
16 answers to what those values were in the cable.

17 What did we do next?

18 A If you don't mind, let me go back a step. From this
19 table 4, we would not have any need to take a sample if all of
20 the channels carried by all the distant channels carried by
21 cable systems were of one type or another.

22 If they were all independent stations or all network
23 affiliates. All independent stations. We have said the music
24 share at this point is 6.1. If they were all affiliated, we
25 would say the music shares would be 16.1. We know that they

1 are not all one or the other.

2 So, we took the survey to try to get the division of
3 the channels carried by cable as between network affiliates
4 and independent stations and also public broadcasting stations.
5 In analyzing a sample of systems, actually it is the 12
6 largest systems.

7 We were advised by the copyright office they were
8 the 12 largest systems. We analyzed those systems to see what
9 channels were carried and applied the weights to the different
10 kind of channels. One for an independent station. A quarter
11 for an affiliated station and so on.

12 We arrived at a conclusion based on that sample that
13 the independent stations accounted for a weighted average of
14 85.1 percent of the channels carried by these 12 systems. Net-
15 work affiliates 13.2 percent and the remainder was for public
16 broadcasting stations.

17 We then combined these two results. That is the
18 music share for independent stations times the important
19 answer of important stations in cable carriage, distant signal
20 for cable carriage weighted by the value of independent sta-
21 tions as compared to these stations.

22 Likewise with network affiliates when we came to a
23 public broadcasting station, we had somewhat of a problem in
24 that we did not have the comparable numbers for public broad-
25 casting stations from the FCC that we had from the affiliates

1 in the independents.

2 We did not know for public broadcasting what their
3 relationship was between music license fees and the amount
4 paid for syndicated programming for sports programming. We
5 made an estimate. The maximum if 100 percent music would be
6 1.7. We thought it was nothing like that.

7 We thought it was more like .1 percent. It may be
8 and I think it is true that in these proceedings so far there
9 have been some surveys which would show that the relationship
10 between independent networks and public broadcasters are some-
11 what different than our sample showed.

12 We roughed out what the effect of that would be on
13 music share. It would be something more actually for a music
14 share. We are not wedded to these particular divisions of the
15 importance of these three kinds of stations.

16 Q How was the radio share interpreted?

17 A We did not have a specific analysis for radio. We
18 think radio is a relatively small part. We are suggesting
19 five percent. We are not basing that on any particular study.

20 Q If you will look at the schedule on page 6, Dr.
21 Fagan, we used FM only. The reason given at the bottom of
22 page 5 and top of page 6 cable systems showed 98 percent of
23 all radio systems carried are FM stations. Can you run us
24 through those numbers?

25 A Yes. The numbers for the amounts paid by FM radio

1 broadcasters for music license fees comes from the same FCC
2 report. Not the same, but a comparable FCC report. It is the
3 FCC report for radio whereas the former was a report for
4 television for 1978.

5 In that report, there is a breakdown between AM and
6 the FM stations. We believe that the stations carried, the
7 distant radio stations carried by radio systems are overwhelm-
8 ingly FM stations. We used those sets of numbers to make our
9 computations.

10 Incidentally, the FCC item film in rental and amorti-
11 zation of film and tape, they are carrying forward the same
12 designation in cable television. They are not talking about
13 film. They are tapes.

14 Q So, we come to page 8. We have been unable to
15 quantify the value of the radio transmission right on the
16 basis of any formula. We suggest 5 percent as a reasonable
17 approximation. We get down to the computation. It brings
18 music shares to 10.8.

19 MR. SCHEINER: Mr. Korman, would you excuse me,
20 please. I would at this point interpose an objection to any
21 testimony which starts on page 8 under IV, under the caption
22 music's share should be increased because potential claimants
23 failed to file claims.

24 I submit that any testimony on this score is ruled
25 out by the Tribunal at our session on February 14 when the

1 Tribunal determined that it would not as I read the transcript
2 entertain such evidence or testimony. It is based on obvious-
3 ly the premise that less than all of the claimants within a
4 group are before this Tribunal.

5 Some adjustment should be made in the share given to
6 the group. On February 14, the Tribunal said it would not
7 entertain any evidence or testimony with respect to individual
8 claims and the numbers of them as it related to phase one of
9 this proceeding.

10 For that reason, I submit this line of testimony
11 should not be permitted at this stage of the proceeding. I
12 would object to some of the assumptions that are contained in
13 the pursuit of this testimony. However, I don't think it is
14 appropriate to raise it now.

15 In my view, the testimony should not be permitted
16 in the first instance at this stage.

17 MR. FITZPATRICK: May I speak to that?

18 CHAIRWOMAN BURG: Mr. Fitzpatrick.

19 MR. FITZPATRICK: I am representing the Sports. We
20 are not unfamiliar with the Tribunal's ruling on February 14.
21 However, I believe the Tribunal's ruling was to reject at that
22 time our proposal as a matter of affirmative case each person
23 bringing forth data demonstrating the specifics of each pro-
24 gram claimed for.

25 I don't believe that there was anything in terms of

1 the Tribunal's rulings denying each party here the opportunity
2 in presenting his case to comment on the failure of our parties
3 to file claims and indeed represent the full measure of the
4 programming under the various categories.

5 I think the Tribunal should reject Mr. Scheiner's
6 claim. I think clearly those of us who adhere to Mr. Korman's
7 point were not denied the opportunity to present our case on
8 those facts.

9 CHAIRWOMAN BURG: Mr. King.

10 MR. KING: I would join in Mr. Scheiner's motion for
11 another reason. It would seem to me that this simply is not
12 the subject for the testimony of Dr. Fagan. This is really a
13 discussion of legal issues. I don't think it is a proper
14 subject of his testimony.

15 COMMISSIONER BRENNAN: Isn't it relevant for Dr.
16 Fagan to testify on what should be the total share of music
17 to come out of this proceeding?

18 MR. KING: If it is based on value, yes. But what
19 he is now doing is making an assumption, a legal assumption
20 that any unclaimed royalties, the method which they should be
21 allocated. I think that is a legal judgment as to what should
22 be done with that and not a subject of expert testimony.

23 MR. KORMAN: I might comment ASCAP, the performing
24 rights, are the only people in this room who deal regularly
25 with this problem. ASCAP runs into a situation quite

1 frequently where there is no member share.

2 We have older works. You would have a composer or
3 estate of a composer as a member, but the author has dis-
4 appeared. He is nowhere to be found. His descendants are not
5 known, and the work is performed. The composer does not get
6 the lyric writer's share earned by those performances nor the
7 publisher.

8 That goes into a pot and is shared by all members.
9 It is a precedent in this country for how the problem is
10 handled. I think it is relevant. It may be there is a legal
11 issue involved as well.

12 Let me digress. Are these statements without being
13 moved for admission into evidence as part of the record here
14 automatically made a part of the record?

15 COMMISSIONER JAMES: What?

16 MR. KORMAN: Are these statements filed automatically
17 a part of the record in these proceedings?

18 CHAIRWOMAN BURG: All submissions that have been
19 received will be incorporated as part of the record.

20 MR. KORMAN: In effect, we have in the record what
21 Dr. Fagan would have said. He is subject to examination on
22 it. This Tribunal will accord it whatever weight the Tribunal
23 thinks appropriate.

24 CHAIRWOMAN BURG: The objection is overruled.

25 MR. KORMAN: Mr. Scheiner is always a step ahead of

1 me. I had not come to point four, yet. I was trying to com-
2 plete Dr. Fagan to get us to 10.8.

3 BY MR. KORMAN:

4 Q Dr. Fagan, can you do that?

5 A We had said that the, and computed that the music
6 share of television as evidenced by what happened in the local
7 TV market in the order of 7.4 percent. We made the computa-
8 tion for radio and said 76.7 percent.

9 We find those percentages to the respective impor-
10 tance of TV and radio and 95 and five. We cannot come to the
11 number which add up to 10.8. This analysis says that if
12 there were all the claimants here, we would be claiming 10.8
13 percent of the pool.

14 MR. KORMAN: Madaam Chairman, that completes the
15 questions I have on direct for Dr. Fagan. However before
16 cross-examination begins, I would like to make two brief
17 comments that perhaps should have been made at the beginning.

18 First, I assume that the numbers that have been
19 bruted about as settlement figures are not of any concern to
20 the Tribunal, and the Tribunal will pay no attention to them.
21 Settlement figures are compromises that normally don't come
22 to the Tribunal's attention.

23 That is not the way it worked in the public broad-
24 casting method. I am aware figures were published in the press
25 last week about some settlement discussions. I want the

1 Tribunal to notice ASCAP, BMI and SESAC were not parties to
2 those discussions. We have not agreed to the numbers the
3 other assigned for music.

4 So, we would have been here had the other agreed and
5 not budged from those numbers. Secondly, the statisticians and
6 the Tribunal does encourage cooperation among the parties, we
7 and SESAC cooperated. BMI chose to go off on its own. I
8 shall not comment on the motives as to why they might have
9 done that.

10 I want the record to show that SESAC and ASCAP do not
11 subscribe to BMI's theory in this proceeding. Thank you.

12 CHAIRWOMAN BURG: Mr. James.

13 COMMISSIONER JAMES: The figure you just gave us,
14 does that represent just ASCAP and SESAC statements of percent-
15 age?

16 MR. KORMAN: Yes. That is our view of what music
17 should receive including BMI.

18 CHAIRWOMAN BURG: Broadcasters.

19 MR. ELDRIDGE: I am Carlton Eldridge member of the
20 law firm of Coudert Brothers along with Mr. King and Miss
21 Gottschalk represent the Broadcasters. May I proceed from the
22 table as Mr. Korman did?

23 CHAIRWOMAN BURG: Yes, as long as you make yourself
24 heard throughout the room.

25 MR. KORMAN: Clarification. Is he representing the

1 public as well as the commercial broadcasting interest?

2 MR. ELDRIDGE: Just the commercial interest.

3 CROSS-EXAMINATION

4 BY MR. ELDRIDGE:

5 Q I will address my questions to Dr. Fagan.

6 CHAIRWOMAN BURG: Excuse me. Dr. Fagan, would you
7 come up front so he does not have to turn around.

8 THE WITNESS: Sure.

9 BY MR. ELDRIDGE:

10 Q Dr. Fagan, as I understood your presentation basical-
11 ly, you are looking at the FCC program cost for local stations
12 in the independent ONO and affiliate columns talking of TV
13 first. You have extracted music's license cost as a number
14 originally; is that right?

15 A Yes. One of the numbers.

16 Q Would you be kind enough to tell us what it is that
17 is included in music license fees in terms of a local station
18 broadcaster expense?

19 A Well, each station has a license. Most stations
20 have a license. Virtually all stations. ASCAP, BMI and
21 SESAC. They report to the FCC the amount for music licenses.
22 We know what we receive in the aggregate.

23 Looking at the total reported by the FCC, the numbers
24 seem reasonable that that is in fact the amount paid by the
25 television stations for ASCAP, BMI and SESAC.

1 Q You do not. That is ASCAP. No other performing
2 rights society licenses music to be used in a dramatic way, do
3 they?

4 A No, they do not.

5 MR. KORMAN: Excuse me. One disadvantage of not be-
6 ing able to put my hand on Dr. Fagan's shoulder is that he
7 would answer an improper question. The fact is SESAC does
8 grant dramatic licenses.

9 COMMISSIONER BRENNAN: Mr. Korman, I would have to
10 object somewhat.

11 MR. KORMAN: I ask Madaam Chairman to ask the wit-
12 ness to look at me before he answers.

13 COMMISSIONER BRENNAN: I have no objection.

14 MR. ELDRIDGE: What will you do when he looks at
15 you?

16 MR. KORMAN: I will signal.

17 MR. ELDRIDGE: I will have to object to that.

18 MR. KORMAN: Only as to whether the question is
19 objectionable. Dr. Fagan is so fast and honest a witness, he
20 will describe anything that you ask.

21 BY MR. ELDRIDGE:

22 Q Despite or regardless of Mr. Korman's statement,
23 ASCAP does not license, grant dramatic rights in music, do
24 they?

25 A That is right. ASCAP does not.

1 Q Neither does BMI?

2 A That is my belief.

3 Q When a broadcaster pays a music license fee to some-
4 one for the use of a dramatic use of music, they therefore do
5 not pay it to a performing rights society; is that correct?

6 A That is correct.

7 Q They would pay to the copyright owner?

8 A Right.

9 Q When a broadcaster pays for the use of rights in
10 music and he reports a music license fee, where on the FCC
11 schedule does he report it?

12 A I think it is on the same line as music performing
13 rights. If you don't mind ---

14 Q That is the question I put to you. That is where
15 he would normally report it is it not?

16 A I believe so.

17 Q Are there other music license fees that a broadcast-
18 er has to pay other than grant rights and small rights, your
19 rights?

20 A That would be reported on that line?

21 Q Yes.

22 A I cannot think of any that would be minor items.

23 Q You have heard of a synchronization license?

24 A Yes.

25 Q That would be a music license would it not?

1 A Yes.

2 Q Where would you expect the broadcaster to report
3 that license fee when paid?

4 A I really don't know. What I said before was that we
5 do know the amount of money we collect from television sta-
6 tions in the aggregate. We know at what rate we collect from
7 television stations. We know at what rate BMI collects.

8 So, we can tell whether the numbers are consistent
9 with that knowledge or not. There may be other items, but
10 they are in the aggregate very small.

11 Q But they were not taken into consideration when you
12 use music license fees as being merely license expense of a
13 local broadcaster were they?

14 A They were not.

15 Q When a distant CATV operator picks up a local signal,
16 he picks up the signal for the entire program, does he not?

17 A Yes, he does.

18 Q He does not pick up a signal merely for the copy-
19 rightable program elements, does he?

20 A No, he does not.

21 MR. KORMAN: I object to the question. You may
22 answer if you know. I think that is a legal question, a
23 question calling for a legal conclusion not a factual question.
24 Would you identify copyrightable elements?

25 MR. ELDRIDGE: You identified it by using three of

1 of the nine elements of program expense from the FCC report.
2 You only used three of them, and you labeled them as copyright
3 program expenses.

4 CHAIRWOMAN BURG: Would you rephrase the question.

5 BY MR. ELDRIDGE:

6 Q In the FCC report on television, I am sure you are
7 familiar with it, the one you used in the study?

8 A Yes.

9 Q How many different program element expenses are
10 listed thereupon?

11 A I don't recall.

12 MR. ELDRIDGE: Maybe if you can give your witness a
13 copy, he can recall.

14 MR. KORMAN: Would the reporter read that question
15 back.

16 (The question was read by the reporter.)

17 BY MR. ELDRIDGE:

18 Q It appears in the little column.

19 A I missed it.

20 Q From the nine elements of program expesne that are
21 involved in the production of the program that a distant sig-
22 nal CATV operator takes from the local station, you elected to
23 use only three of the items; is that correct?

24 A That is correct.

25 MR. KORMAN: I don't know what you are talking about

1 because I don't have a copy. Could we have the nine elements
2 of what you are talking about so maybe the Tribunal knows what
3 you are talking about?

4 MR. ELDRIDGE: I know you are familiar with them,
5 but I assumed that the document had been filed with the
6 Commission. If it has not, I am laboring under a misapprehen-
7 sion, the TV report that ASCAP referred to in their
8 presentation and the radio report.

9 CHAIRWOMAN BURG: We don't have it in front of us.

10 MR. ELDRIDGE: Perhaps I can make a statement that
11 might be helpful. In the document that is used by ASCAP in
12 the course of their formulas of what they call the true market
13 value of music, at the table which is table 5.

14 BY MR. ELDRIDGE:

15 Q That is the correct one is it not, Doctor?

16 A That is the one we used. Yes.

17 Q In that document, it lists the various program
18 expenses that are involved in terms of it talking about net-
19 works, but we are not using that nor did you, Doctor. You did
20 not use that column, did you?

21 A I did not.

22 Q You used the columns that relate to the owned and
23 operated stations?

24 A That is correct.

25 Q When you made your computation, you took three of

1 the elements into consideration to reach a hundred percent on
2 your table that appears in your presentation; is that right?

3 A That is correct.

4 Q There are nine elements, and if I may I will read
5 the program expenses that are on the FCC report. They are as
6 follows, merely the categories of expense that enable the
7 broadcaster to have a program that could be transmitted.

8 They are payroll for employee considered talent.
9 Payroll for all other program employees. No, 3, Dr. Fagan,
10 he did use that which is called rental and amortization of
11 film and tape. The next which he did not use is records and
12 transcriptions.

13 The next is cost of outside news services. Not
14 used. The next not used is payments to talent. The next
15 item he used is music license fees. The item following that
16 he used also, other program and performance rights, and the
17 last item he did not use all other program expenses.

18 Now, the document also carries a total of those
19 program expenses for the owned and operated for the affiliate
20 and for the independent in terms of VHF and UHF. You used
21 those figures did you not in three categories, Doctor?

22 A We used the figures for the three categories music
23 license fees, rental and amortization of film and tape and
24 other program and performing rights. The way you stated the
25 question that we used the total ---

1 Q No. You used three of the nine elements from the
2 columns I referenced, right?

3 A That is correct?

4 Q What do you understand to be a program expense,
5 Doctor?

6 A Well, it is something the station has considered as
7 an expense and going into the programs for the station puts
8 out.

9 Q In order to produce their programs, they incur cer-
10 tain expenses?

11 A Yes.

12 Q They have listed nine categories of expenses?

13 A They have not. The FCC has.

14 Q The FCC has asked them to split down those expenses
15 nine ways, right?

16 A Yes.

17 Q So, a hundred percent of the program expenses is
18 not the figure that appears in your survey; is that right?

19 A That is correct.

20 Q Did you make a calculation as to what your share in
21 music would be if you used all of the program expenses?

22 MR. KORMAN: I object to the question.

23 MR. ELDRIDGE: Why?

24 MR. KORMAN: He did not make that computation, Mr.
25 Eldridge, and he also did not compute what fees would be

1 if measured as automobiles across the George Washington Bridge
2 each hour. He did not do anything that would have been totally
3 irrelevant to these proceedings.

4 When you list talent payroll for employees considered
5 talent. I ask a question whether we included that in a
6 schedule headed amounts paid for television broadcasters for
7 copyrighted materials in 1978. You lose me.

8 MR. ELDRIDGE: May I be heard on that?

9 CHAIRWOMAN BURG: I am going to overrule the
10 objection.

11 BY MR. ELDRIDGE:

12 Q The question was did you make a calculation if you
13 used 100 percent of program expenses of local stations to
14 determine what music share would be?

15 A I did not.

16 Q Are you able to do that?

17 A Of course.

18 Q Could you do it for me?

19 A I guess we all can do it if we have the numbers
20 here.

21 Q Well, the totals are all in a column up at the top,
22 as you know.

23 MR. KORMAN: I object to the line of questioning.
24 It is obvious it is obvious you are going to get a much lower
25 percentage if you throw in terms that are not relevant. May

1 I suggest that the Tribunal has before them copies of the
2 elements before them.

3 MR. ELDRIDGE: They just said they did not have it.
4 You did not file it.

5 MR. KORMAN: They are public documents. There is
6 no question as to their accuracy.

7 CHAIRWOMAN BURG: I said we did not have it before
8 us.

9 MR. ELDRIDGE: I recognize that. That is why I said
10 it is more difficult to follow in Mr. Korman's presentation.
11 That is why I read the material in hopes that it might be
12 better understood.

13 My point and why to me it is completely relevant is
14 when you take a program and it is being carried on a distant
15 signal and you use the formula that is advanced by ASCAP by
16 taking three of the items of program expense and treat it as
17 if it were 100 percent of the expense, you are not being fair
18 because 100 percent of the program expense would include all
19 nine elements.

20 You don't have much of a program without talent.

21 CHAIRWOMAN BURG: I will take this opportunity to
22 declare a noon recess. We will return here at 1:30.

23 (Whereupon, a recess was taken at 12:30 p.m. to
24 1:30 p.m. the same day.)

25

1 CHAIRWOMAN BURG: Back on the record.

2 Before we resume with Mr. Eldridge, I was going to
3 mention this morning that on Friday Gene Bechtel of Public
4 Broadcasting had asked me about rebuttal in this proceeding.
5 I replied to him that we will allow rebuttal. It will be
6 allowed of course only in terms of subject matter already
7 introduced.

8 I will allow surrebuttal, also. It will be sometime
9 in May. At this time, we don't know when. PBS and NPR are
10 scheduled for May 1. At some point after that with sufficient
11 notification, we will have rebuttal. Thank you very much.

12 Mr. Eldridge, please continue.

13 Whereupon,

14 PAUL FAGAN

15 the witness on the stand at time of recess, resumed the stand,
16 and was examined and testified further as follows:

17 CONTINUED CROSS-EXAMINATION

18 BY MR. ELDRIDGE:

19 MR. ELDRIDGE: My understanding is that the commis-
20 sioners now have before them the page that Dr. Fagan and I
21 have before us which is table 5 on television.

22 BY MR. ELDRIDGE:

23 Q At the time we broke, Dr. Fagan, I had asked if my
24 recollection is good if you would do a computation for us us-
25 ing all of the program expenses as opposed to merely using

1 three of the nine program expenses in order to arrive at the
2 comparable figure to which you obtained by using three of the
3 expenses.

4 That is programming expenses as listed on the chart
5 you elected to use.

6 MR. KORMAN: Could or would?

7 MR. ELDRIDGE: Would he.

8 MR. KORMAN: I object. There is no point in wasting
9 time making that kind of computation. You can make it as well
10 as anybody else. It will show a different number.

11 MR. ELDRIDGE: He agreed that it would show much
12 more interest in music that program would have. I submit the
13 Commission should be interested in knowing what the realistic
14 number in terms of the total program costs to permit a distant
15 signal station to tape the local program is, not just three
16 elements of the expense.

17 MR. KORMAN: May I be heard?

18 CHAIRWOMAN BURG: Mr. Korman.

19 MR. KORMAN: It would seem we are talking about
20 copyright items here. You can drag in all kinds of costs in-
21 cluding transmitter expense. Without the transmitter, it
22 certainly could not be retransmitted. It is prejudicial and
23 unnecessary to add items which clearly do not belong.

24 Payroll for employees clearly considered talent.
25 What they pay their announcers for their local news shows that

1 no one in their market wants to see does not belong here I
2 submit. It would be prejudicial to have that computation made.

3 It is a waste of time to have that computation made.
4 Which items belong in here. Dr. Fagan put in those on the
5 advice of counsel. Those are the items counsel considers
6 appropriate for this proceeding and none other. We can brief
7 that point legally.

8 Mr. Eldridge is an old friend of 30 years. I hate
9 to think I am in disagreement with him.. If he thinks they
10 are irrelevant, I would like to argue that out with him in a
11 brief. I don't think Dr. Fagan lightening quick though he may
12 be should make a lot of foolish calculations.

13 MR. ELDRIDGE: What Dr. Fagan said before we recessed
14 obviously the denominator would be substantially increased.
15 The share of music would be substantially less.

16 THE WITNESS: I don't recall what I said. Maybe
17 we could read it back.

18 BY MR. ELDRIDGE:

19 Q It is obvious is it not that if you increase the
20 denominator and continue with the same music license dollar
21 figure that your percentage interest that music has in stage
22 one would be less?

23 A That computation would result in a smaller number.
24 Yes.

25 MR. ELDRIDGE: That is what I thought you said.

1 before lunch. Now, we have it after lunch. The point being
2 is that my good friend, Burnie, is suggesting in order that
3 you have a program that is transmittible to be received by dis-
4 tant CATV, the only elements one considers are what he believes
5 are the copyright expenses.

6 That goes without saying that there is no program
7 submittable without the other expenses involved in putting it
8 together. It is hard to invision a program that would be
9 carried that would not have talent costs which is the major
10 cost production of a program.

11 All of these items are the costs that I submit that
12 should be used in fairly determining on their theory what
13 should be music's interest. To merely go and say I choose, as
14 Burnie said on his advice to his witness, I suggest you only
15 use three of the program costs.

16 I submit that is incorrect, and the Tribunal should
17 know what music's real interest is if you are going to proceed
18 on the basis they elect which is by taking the cost if you
19 will of the local program whose program is being transmitted.

20 That is why I asked since he is a lightening calcu-
21 lator as counsel says that it would be interesting to have
22 those numbers. I have had them done. I am perfectly happy
23 to have them state what they come out. I thought since he is
24 a witness it might better come from his lips since he knows
25 how to do it.

1 MR. KORMAN: I will submit the answering brief in
2 writing. I suppose that is legal argument rather than
3 testimony.

4 MR. ELDRIDGE: I would like to proceed with testi-
5 mony from the witness. I don't know whether he did it over
6 lunch time pursuant to my request.

7 MR. KORMAN: He did not pursuant to my advice.

8 MR. ELDRIDGE: Pursuant to your advice? You
9 overruled me?

10 MR. KORMAN: I assume so.

11 CHAIRWOMAN BURG: The Chair will overrule your
12 objection.

13 BY MR. ELDRIDGE:

14 Q In terms of lightening speed that you are known for,
15 how much time would you need to come up with it?

16 MR. KORMAN: He needs his computer.

17 MR. ELDRIDGE: It should not be hard because the
18 total cost is one line above the nine, as you know.

19 BY MR. ELDRIDGE:

20 Q Maybe you could tell us the numbers that you feed
21 them, into the calculator that you are using into the column
22 to get the number denominator.

23 A It is the fourth line down. Program expense total.
24 The last column 1 billion 145 million point eight.

25 Q That includes everything as well as network. I

1 don't want you to include network. I want you to include the
2 same things you included to get your denominator when you
3 used three items.

4 A I am sorry. I don't think you are correct. Your
5 first column for the networks is 1 billion 145 million total.
6 At the top, it says 708 TV stations.

7 Q If you just announced because you used three columns
8 according to your cross this morning. You used the O and O,
9 three items, affiliates column and the independent stations
10 column?

11 A Yes. We included all of the stations broken down
12 between independents and affiliates.

13 Q You did not use the network column?

14 A Right. The last column is entitled total 708
15 stations. You said that included networks. Your first column
16 says three national networks 2 billion 278 million. The total
17 for the 708 stations is 1 billion 145 million.

18 Q That would be your new denominator?

19 A That would be the total for the stations.

20 Q As opposed to the denominator that you used for your
21 calculation with three of the columns which was what?

22 A I made the computation separately for independent
23 stations and affiliated stations, and the total was 146.1
24 million. The independent stations 292.1 million for the
25 network.

1 Q Would you proceed with your calculation?

2 A My understanding is you want the network and the
3 independents in the computation?

4 Q Do it the same way for nine items of program ex-
5 penses as you did it for three items of program expense.

6 A I did not understand your question then.

7 Q Do you understand it now?

8 A I think so.

9 Q Okay.

10 MR. KORMAN: May I make this suggestion. Mr.
11 Eldridge says he has already make these computations. Let him
12 submit the results of these computations. We will accept them
13 subject to check rather than waiting for Dr. Fagan to make the
14 computations.

15 CHAIRWOMAN BURG: It is agreeable to me.

16 MR. ELDRIDGE: I did not personally make them.

17 CHAIRWOMAN BURG: Did you say that you have them?

18 MR. ELDRIDGE: Yes. I received them on the phone
19 this morning. I did not do it.

20 CHAIRWOMAN BURG: Would you like to enter those?

21 MR. ELDRIDGE: It should take him a relatively short
22 period of time.

23 MR. KORMAN: Although I said Dr. Fagan proceeded at
24 lightening speed, that was a term that is not true obviously.
25 I must add I do not wish to be bound by calculations he is

1 THE WITNESS: Mr. Eldridge, I will try to help you.
2 Did you make the same adjustment I made for the music license
3 fees? That is this schedule would total music license fees
4 58.9 million. We have indicated in our footnote that we re-
5 duce that by 12 million. Had you done that?

6 BY MR. ELDRIDGE:

7 Q That may account for the 1 percent difference be-
8 tween your calculation and mine. But again, I did not use the
9 calculator.

10 A Neither did I.

11 Q I got 5.1 percent. Is that right for the affiliates?

12 A That is correct.

13 Q You say 4 percent, or do you agree it is 3.9?

14 A It is a little less.

15 Q We will call it 3.9.

16 A That is all right.

17 Q For the independents?

18 A Yes.

19 Q In order to complete your methodology, I gather you
20 would take 5.1 percent and multiply it by 13.2?

21 A No. I would not.

22 Q How do you do that?

23 A I would not do that because in our view there are
24 other items of expense that are not appropriate to include.

25 Q No, no. I say if you carried through your

1 methodology as you did it for us this morning, what is the
2 next thing you do once you have the percentage numbers?

3 A Assuming that those were the appropriate numbers?

4 Q Yes. Assume that for the sake of this discussion.
5 What do you do next? Do you take the 5.1 and multiply by
6 13.2?

7 A That is correct.

8 Q What do you get there?

9 A It looks like .67.

10 Q All right. Then with respect to the independents,
11 you would take the 3.9 and multiply by 85.1?

12 A Right.

13 Q Tell me what you get there.

14 A It is 3.3.

15 Q It is 3.30?

16 A It is 3.32.

17 Q Then, you would add those two numbers together; is
18 that correct?

19 A For the commercial aspect of this, yes.

20 Q You would get 3.9 percent?

21 A Right.

22 Q As opposed to the 10.8 percent under your original
23 thesis?

24 A No. That is for 89.3 percent on the television side
25 and nothing on the radio side.

1 Q I am sorry. This is television. What did you get
2 for television?

3 A Seventy-four.

4 Q You get 3.99 in lieu of 74?

5 A Using those computations, that is correct.

6 Q If you did the same thing for radio, using the nine
7 items of program expense on the charts you utilized as opposed
8 to three of them, what would you come up with for radio in
9 lieu of the number you submitted for radio?

10 A I don't have ---

11 MR. KORMAN: Continuing objection, Madaam Chairman.
12 I suggest this ought to be cut off at some point. You will
13 see the drift of the argument. If the argument is sound, it
14 is computable by everybody.

15 BY.MR. ELDRIDGE: . . .

16 Q The radio numbers are on another schedule; is that
17 correct, Doctor?

18 A Yes, in another schedule and another report.

19 MR. ELDRIDGE: With the permission of the Chairman,
20 we have that. That could be zeroxed and made available. I
21 would not persist in going through the math. It is obvious
22 that the result will substantially reduce.

23 CHAIRWOMAN BURG: I think the members of the Tribunal
24 get your point. I don't think it would be necessary to take
25 this routine through the radio section.

1 MR. ELDRIDGE: No. That is what I was going to
2 suggest. It became part of a mathematical formula. You keep
3 the same numeration for license fees, and you increase the
4 denominator by the total extension of the programs which are
5 nine items as opposed to using three.

6 You come out with a music claim that is not anywhere
7 near that suggested on the direct presentation.

8 MR. KORMAN: Mr. Eldridge, I cannot hear your testi-
9 mony. Would you speak into the microphone.

10 MR. ELDRIDGE: I would merely suggest that I would
11 concur with your thinking that we not go through the mathemati-
12 cal matter of radio because it is merely the same mathematics
13 that is done here by the good Doctor.

14 You will come up with a substantially reduced claim
15 for radio and television as opposed to that produced or prof-
16 fered for the direct case of music, and we would submit that
17 in the event that the proffered basis for ---

18 CHAIRWOMAN BURG: Help me out, sir, if you will.
19 Are you cross examining the witness at this point?

20 MR. ELDRIDGE: No, no. I was trying to merely ex-
21 plain why I would not continue to cross examine him on the
22 radio as to where you come out. I think you indicated you
23 understand the cross would be the same.

24 I was merely saying that the number that would fit
25 in and lock into an accurate presentation were all program

1 expenses are used from the very chart they used, is reduced by
2 I would guess not having all of those figures in front of me by
3 some 50 percent. Perhaps a little more.

4 That is the purpose of the cross-examination. I
5 will defer to the Chair and not go through the radio because
6 you all can have copies of the radio statement just as you now
7 have received copies of the TV statements. Is that agreeable?

8 CHAIRWOMAN BURG: That is agreeable.

9 BY MR. ELDRIDGE:

10 Q Doctor, are you familiar with the method under which
11 ASCAP licenses music to local television stations?

12 MR. KORMAN: Objection. What relevance does that
13 have?

14 CHAIRWOMAN BURG: What is the relevancy of that?

15 MR. ELDRIDGE: What I was going to show assuming
16 some knowledge on the part of the Doctor which I don't know as
17 a result of the question being unanswered is the methodology
18 used in licensing the local television stations which are the
19 very numbers they are using is a method I have to know the
20 numbers in terms of radio and television.

21 For example, WCBS-TV which the Doctor might know as
22 to the percentage of the revenues derived from broadcasting
23 by that station what percentage they turn over to ASCAP.
24 I submit to you that those numbers would come out very similar
25 to the reduced numbers that I am suggesting is the real number

1 when you add all program expenses to the cost of producing a
2 program which I submit is obviously necessary.

3 MR. KORMAN: Maybe we can stipulate and get rid of
4 this quickly. Are you suggesting that the rate paid by local
5 television stations which is a combined rate works out to
6 1.5 percent of revenues from advertisers?

7 MR. ELDRIDGE: With certain allowed deductions.

8 MR. KORMAN: Let's say the effective rate 1 percent.
9 As a matter of fact, there is evidence before the Tribunal it
10 is lower than that. Point eight. Are you suggesting that the
11 appropriate comparison is the same .8 percent of revenues from
12 cable television subscribers?

13 MR. ELDRIDGE: I am merely showing from commercial
14 stations themselves your rates are not inflated in percentage
15 terms as they are in terms of CATV.

16 MR. KORMAN: I don't understand the comment, but
17 ASCAP licenses local television stations. We can stipulate on
18 the basis of a relationship between the fee and the revenues
19 of the station. That licensing is producing certain dollars
20 which we have put in the record to show how those dollars
21 compare with what local television ---

22 CHAIRWOMAN BURG: I am going to overrule that
23 objection. Continue, please.

24 BY MR. ELDRIDGE:

25 Q You heard Mr. Korman testify as to how to compute

1 the rates to local television stations. Are you familiar with
2 the methodology used there?

3 A You mean in the license agreement phase?

4 Q You are familiar with the methodology used to pay
5 local television stations like WCPS television in New York?

6 A If you mean formula, yes.

7 Q Could you explain that?

8 A Yes. At the present time, the television stations
9 are on an interim fee basis. The license agreement with the
10 television agreement with the television expired December 31,
11 1977. The interim fee arrangement is to continue the terms of
12 the prior license agreement.

13 The license agreement expiring in December of '77 is
14 based on a percentage of the gross amounts paid by sponsors to
15 the station or to third parties on behalf of the station or by
16 third parties on behalf of the sponsor, with certain specified
17 deductions.

18 To that figure is applied a percentage which varies
19 each year depending upon the gross amounts reported and paid
20 by stations in the aggregate who are in the base. The base is
21 a group of stations that meet certain qualifications.

22 The fee is broken down into two parts. Base fee is
23 two percent of the industry revenue for base stations. The
24 average is 64 to 65.

25 Q That is television you are discussing?

1 A Yes, I am. On the incremental rate of 1 percent.
2 Those two items coupled with the revenues after these deduc-
3 tions, these specified deductions, a product of those two is
4 the commercial fee.

5 In addition to that, there is a sustaining fee which
6 is computed as a percentage of the commercial fee.

7 Q What percentage is that?

8 A It varies station to station. It is the same per-
9 centage that existed between the sustaining fee as of 1968 and
10 the commercial fee for 1968.

11 Q What would it be if you could estimate? You gave
12 2 percent for the base fee, 1 percent for the sustaining fee.
13 Are you able to tell us what is the total percent of the fees
14 that are applied against the revenues less deductions?

15 A The average on a commercial, on the commercial fee
16 would be able, 20 percent of the revenue is on a base and 80
17 percent on the increment which would make the average ratio
18 about 1.2, 1.2 to 1.3 percent.

19 Q 1.2 to 1.3.

20 A 1.2 to 1.25. To that you add a sustaining fee. I
21 would say varies station to station.

22 Q That is about 1 percent?

23 A I would say about 10 percent of the commercial fee.

24 Q Reduced down to about 1 percent?

25 A No. You would add them, not subtract them. One to

1 three to five.

2 Q You would add the previous one?

3 A Yes.

4 Q By the way, do you license, does ASCAP license CATV
5 originations, program originations by them with respect to
6 their use of music?

7 A No. We do not have a license in effect at the
8 moment.

9 Q You let them use music for nothing?

10 MR. KORMAN: I object to the form of the question.

11 BY MR. ELDRIDGE:

12 Q Do you collect any revenues for a CATV program
13 origination which has music in it?

14 MR. KORMAN: Pay or what?

15 MR. ELDRIDGE: Any CATV.

16 MR. KORMAN: If you know.

17 THE WITNESS: Pay cable, we do collect. On non-paid
18 cable, I don't think we do.

19 MR. KORMAN: Which is not to say that the uses are
20 free.

21 MR. ELDRIDGE: I presume you are busy in litigation
22 with them.

23 MR. KORMAN: I do indeed with some infringers.

24 MR. ELDRIDGE: I would like to make one comment
25 while the witness is on the stand. That relates to Mr.

1 Korman's comment and Mr. Scheiner's comment this morning in
2 terms of what the Tribunal would do with monies that were
3 "non-claimed" because there are not 100 percent claimants in
4 all industries.

5 I would like to submit on behalf of NAB that it
6 should be the Commission's position I think that they would
7 find out on the industry to industry basis the percentage
8 attributable to those claimants as a group.

9 If Mr. Korman has 100 percent of his people present
10 and someone else has less than 100 percent, for example motion
11 picture share should not go to Mr. Korman's group or the motion
12 picture share should not go to the broadcast group.

13 I submit that the unclaimed share should be prorated
14 and paid out to the industry groups that you after finding out
15 and determining what percentage should go to each claiming
16 group. I say that in response to Mr. Korman's statement which
17 he says is a part of the record. I believe you agreed.
18 It is a part of his written submission.

19 MR. KORMAN: Is the question whether Dr. Fagan
20 agrees with you or with me?

21 COMMISSIONER BRENNAN: Dr. Fagan, perhaps I can fill
22 a gap by asking you a question.

23 The Congress in its wisdom has provided a cable com-
24 pulsory license. It is the responsibility of this body to
25 live with what the Congress has wrought. How would you

1 copyrighted programs of the local station broadcasters had a
2 value of nothing in terms of its claims to royalties in the
3 Tribunal?

4 A That is correct.

5 Q Do you reach that conclusion I gather by saying or
6 you said by common sense? Is that it?

7 A That is correct.

8 Q Would you tell me what you did in the course of
9 exercising your common sense to reach the value of zero?

10 A Well, it seems to me first of all I did not make any
11 particular study to back up this conclusion. I think I stated
12 that before.

13 Q You did not make any study of any kind?

14 A That is correct.

15 Q Nor did you read any studies of any kind?

16 A I cannot say that. It is not uncommon. I have
17 read things in the literature and trade journals on this
18 particular point. I cannot cite any.

19 Q None the less, that did not form a part or judgment
20 or opinion of zero; is that right?

21 A To me, it is common sense. It is a question. The
22 question in my view before the Tribunal is what is the rela-
23 tive value of the various claimants to the cable systems?
24 What is the value of a locally produced program and news pro-
25 gram from another town in a cable system in a different town.

1 A If you are referring to religious services. I have
2 seen religious services particularly at Christmas time and
3 Easter, not on a regular basis.

4 Q Entertainment programs produced by local stations,
5 have you seen any of those?

6 MR. KORMAN: Can you give us a couple of examples?
7 I don't think I have.

8 MR. ELDRIDGE: I think this exercise is supposed to
9 be between me and the witness. If we need a third party, we
10 can call Mr. Korman a little later. I find it objectionable
11 to have him testify.

12 THE WITNESS: The question was have I seen, reviewed
13 locally produced entertainment programs? Is that the question?

14 BY MR. ELDRIDGE:

15 Q Yes.

16 A I cannot think of any. I suppose I have from time
17 to time. If you asked me to name them, I could not name them.

18 Q My point being in the questioning I thought that you
19 were relegating your zero value opinion to the fact that the
20 only thing that cable system at the distant signal carried
21 was news?

22 A No. That is not what I said.

23 Q That would not have value felt in a distant
24 community?

25 A I don't believe that is what I said. If I did, I

1 will correct it now. What I said was what we should look to
2 or what I suggest the Commission to look to is the kind of
3 values of various programs have, various economic values,
4 various categories of programs have to the cable system.

5 I think I said the locally produced programs would
6 have a minimal value and that we in our computations placed
7 a value of zero on those programs.

8 Q Do you happen to know the number of hours of locally
9 produced programs that are carried on distant signals of
10 CATV's?

11 A No.

12 Q You would agree with me that locally produced pro-
13 grams are in fact carried on distant signals?

14 A I will agree with you.

15 Q MR. ELDRIDGE: I have no further questions of the
16 witness.

17 CHAIRWOMAN BURG: Thank you, Mr. Eldridge.

18 Mr. Scheiner.

19 MR. SCHEINER: Madaam Chairman, to assist in my
20 limited examination of the witness, I would like to offer him
21 and members of the Tribunal an exhibit. I will also furnish a
22 copy to the reporter.

23 Madaam Chairman, for purposes of identification,
24 would it be appropriate to call this Program Producers and
25 Syndicators Exhibit 1 and mark it XX for cross-examination?

1 Q Yes, sir.

2 A Yes.

3 MR. SCHEINER: Very well, I offer this exhibit in
4 evidence.

5 CHAIRWOMAN BURG: Any objection?

6 MR. BECHTEL: I ask the Tribunal to withhold the
7 consideration of the exhibit until some of us who have just
8 seen it have an opportunity to look at it further.

9 CHAIRWOMAN BURG: We are going to accept it.

10 (The document heretofore mark-
11 ed as XX Exhibit No. 1 for
12 identification was received
13 in evidence.)

14 Proceed, Mr. Scheiner.

15 BY MR. SCHEINER:

16 Q I now ask you to refer, sir, to your analysis for
17 radio. Your bottom line there is 3.8 percent on the basis
18 that you have indicated? Is that right, sir?

19 A Yes.

20 Q Is it correct that that is for, it is correct is it
21 not that that is for FM radio only?

22 A Let me just find it, will you please.

23 MR. KORMAN: The discussion is between pages 6 and
24 8 of the ASCAP statement for your benefit.

25 THE WITNESS: Three point eight is correct. It is

1 CHAIRWOMAN BURG: XX Exhibit 1.

2 (The document referred to was
3 marked XX Exhibit No. 1 for
4 identification.)

5 CROSS-EXAMINATION

6 BY MR. SCHEINER:

7 Q Dr. Fagan, you previously testified that the item of
8 rental and amortization of film and tape consist of syndicated
9 programs; is that correct, sir?

10 A That is correct.

11 Q You also testified and it appears at page 5 of your
12 written testimony first paragraph that you used a multiple or
13 independent network affiliated stations based on the fees
14 generated by cable carriage of those stations; is that
15 correct, sir?

16 A That is right.

17 Q I refer you, sir, to Exhibit 1 in cross-examination.
18 I ask you to review it. What I have attempted to do as the
19 caption indicates is to apply the ASCAP analysis precisely as
20 you have done it to the program producers and syndicators.

21 For this purpose I, too, have estimated, made an
22 estimate rather, for PBS stations of 1 percent. I ask you to
23 accept that estimate. Have I correctly applied your method-
24 ology to the program producers and syndicators?

25 A Insofar as it relates to television?

1 for FM stations. It is based on FM because we found that it
2 was the FM stations that were the distant signals carriers.

3 BY MR. SCHEINER:

4 Q Sir, is it also correct that that estimate is based
5 on FM signals local and distant.

6 A What we did was suggest that that was our word
7 suggesting 5 percent for radio. We are really saying whatever
8 the percentage applicable to radio we would further suggest
9 that a share of that percentage for music would be computed
10 in the way indicated, 76.7 percent of that percent.

11 Q I understand, sir, that it is a suggestion, and it
12 does not purport to be a scientific analysis or based upon any
13 data before us. Is that true? Restate it if you will to make
14 it true.

15 A It is not based on a particular study. We think it
16 is low. We don't know exactly what the number is. We suggest-
17 ed that the Commission consider 5 percent.

18 Q For this purpose, sir, am I not correct that you did
19 not distinguish between local and distant FM signals?

20 MR. KORMAN: As to whether the radio shares should
21 be 5 percent? Is that the question?

22 MR. SCHEINER: I will accept that.

23 THE WITNESS: It would be for all of radio.

24 BY MR. SCHEINER:

25 Q In part, you are relying on the carriage of distant

1 making now on the spot. I reserve the right to check them
2 later when we have some time.

3 MR. ELDRIDGE: Another exaggeration.

4 THE WITNESS: I now have for the denominator for
5 affiliates 915.9 million, independents 229.9 million.

6 BY MR. ELDRIDGE:

7 Q Your next step would be to what? Take the music
8 license fee in dollars as a numerator?

9 A That is correct.

10 Q Would you do that?

11 A It is about 4 percent for an independent station or
12 stations.

13 Q Don't you come up with some more exact than about?

14 A If you will allow me to take the time, I will.

15 Q I have 3.87?

16 A What is the next number? Do you want to help me out
17 on the next one?

18 Q Go ahead.

19 A It looks like 5.1 percent, about.

20 Q That is 5.1?

21 A What did you get?

22 Q I got higher than that.

23 A Maybe I am wrong.

24 MR. KORMAN: I said he was lightening fast. I did
25 not say he was very accurate.

1 I think it is common sense that that is very small.
2 In our calculations, we computed it as zero.

3 Q Are you going on the assumption that the only local
4 station programming carried on distant signals is news?

5 A No. I know the other category. You might have
6 locally produced documentaries that would have particular
7 interest to the community in which the station is serving.

8 Q Haven't you seen programs locally in your community
9 that were not, that were produced by the local station that
10 were not peculiar to the locality of the city in which the
11 station was located?

12 MR. KORMAN: Only cable?

13 MR. ELDRIDGE: Done by a local station.

14 THE WITNESS: I cannot think of any right now. I
15 am sure I have, but I cannot think of any right now. If you
16 give me an example, I can tell you.

17 BY MR. ELDRIDGE:

18 Q Every Sunday, do you have a number of religious
19 programs on the air that you would think would transcend local
20 industry?

21 A I think many of those religious programs are
22 syndicated programs.

23 Q And many are produced by local stations?

24 MR. KORMAN: If you know, Dr. Fagan. Don't concede
25 that too quickly.

1 compare the damage caused to performing rights societies by
2 the cable compulsory license with the damage caused to other
3 categories of claimants; namely, Program Syndicators and
4 Sports?

5 THE WITNESS: One of the unique things about the
6 music side is that they are required to license everybody at
7 the present time. They cannot say to a station no you cannot
8 have a license. The station is entitled to a license. If
9 they are not satisfied with the terms quoted to them, they
10 can go to a court and have those fees determined.

11 Now, the transmission of distant signals into a mar-
12 ket is of course going to have some disruptive impact on many
13 parties. You have heard this morning on the or in the papers
14 about this affecting adversely Sports, Syndicators.

15 Certainly, the local broadcasters in the market of
16 the cable system feel that their potential audience is frag-
17 mented and it adversely affects them. To the extent first of
18 all ASCAP music cannot withhold the right.

19 Secondly, to the extent that their fees are related
20 to the business generated by the local stations to the extent
21 the local stations are adversely affected, so are music per-
22 forming organizations. It is not an easy one for me to
23 answer.

24 BY MR. ELDRIDGE:

25 Q Doctor, you said that you thought that the

1 signals?

2 A Yes.

3 Q Do you have any information on cables' carriage of
4 distant radio signals?

5 A Look at the top to see what the distant FM ---
6 Excuse me. Distant radio signals there were. We found that
7 most of those signals were FM. That is why we used FM. I
8 think we said 98 percent or an overwhelming percentage of
9 them were FM. We did look to those.

10 Q Looked to FM?

11 A Yes.

12 Q But my question, sir, is did you make any determina-
13 tion as to the frequency, if any, of cables' carriage of dis-
14 tant FM signals?

15 A No.

16 Q Sir, is it then fair to say that you have no know-
17 ledge, you have no data as to whether or not and if so, the
18 frequency of cables' carriage of distant FM signals?

19 A I have knowledge that there are such things. There
20 are distant radio signals that are carried by cable.

21 Q Could you tell me whether it is more than 1 percent?

22 A I don't know.

23 MR. SCHEINER: At this point, I would respectfully
24 request that the Tribunal take official notice of a report
25 and order issued by the Federal Communications Commission in

1 docket 19418. The docket is January 25, 1978, and released
2 September 7, 1978. I am merely asking that official notice be
3 taken.

4 I will not give it any exhibit number. The purpose
5 of the official notice is to furnish the Tribunal with an
6 analysis done by the Federal Communications Commission which
7 as I read it generally holds to the proposition that the amount
8 of carriage by cable systems of distant FM signals is virtual-
9 ly negligible.

10 If memory serves me, you will find it well towards
11 the end of my conclusions I think paragraph 59, and the end
12 result is something of an impact in the order of one half of
13 1 percent. But the Commission's report will speak for itself
14 on this score.

15 BY MR. SCHEINER:

16 Q Sir, so much for cable's carriage of distant FM
17 signals.

18 Is it your position, is it your testimony that you
19 are making a claim for cable's carriage of local FM signals?

20 A What we are saying is that on radio we are saying
21 whatever the percentage is that the Commission arrives at, we
22 think their share should be 76 percent of that. The number I
23 said before, No. 5, was not a number arrived at from an analy-
24 sis. It was a suggestion.

25 Q I understand that, Doctor. I trust we won't spend

1 too much time with it. For the purpose of this question, I
2 want to set aside distant signals. I want to talk about local
3 only.

4 Is it your testimony that the music interest should
5 be afforded any share based upon local FM signals?

6 MR. KORMAN: I am going to object to that. That
7 calls for a legal conclusion. Dr. Fagan has testified ASCAP's
8 position as SESAC's is that the music should get 76 percent or
9 whatever it is of whatever the share the Tribunal decides is
10 appropriate for radio.

11 As to whether we are entitled to claim a share for
12 local transmissions, that question ought not to be put to Dr.
13 Fagan. I don't think we are making a claim on that. It is a
14 legal conclusion. We may argue that at some later point.

15 MR. SCHEINER: I respectfully disagree. The only
16 reason to put the question to Dr. Fagan is that it appears
17 before the written testimony in the Tribunal. I refer you to
18 the bottom of page 7, the last paragraph on that page. I will
19 not encumber you be reading that.

20 MR. KORMAN: That is an ASCAP statement, not Dr.
21 Fagan's.

22 MR. SCHEINER: I move that that be stricken from
23 Dr. Fagan's testimony. Mr. Korman can argue that in his brief
24 if he cares to. I would like to meet him on the brief. If it
25 is to remain in there, I must persue it.

1 CHAIRWOMAN BURG: Are you talking about the last
2 paragraph on page 7?

3 MR. KORMAN: That account of radio signals is a
4 agreeable.

5 MR. SCHEINER: Madaam, if you take a look at Dr.
6 Fagan's testimony starting at the very bottom of page 6.

7 MR. KORMAN: That is not Dr. Fagan's testimony.
8 That is ASCAP's statement. It is a joint statement of ASCAP
9 and SESAC.

10 MR. FITZPATRICK: This statement is not Dr. Fagan's
11 testimony? It is a brief. I am puzzled. I earlier thought
12 it was Dr. Fagan's testimony.

13 MR. KORMAN: I did move it, and Dr. Fagan testified
14 to the substance. It is a statement respectfully submitted by
15 ASCAP and by SESAC, by me and by Mr. Ciancimino. I don't know
16 how you can characterize it as the witness' testimony.

17 MR. SCHEINER: I thought we were in an evidentiary
18 proceeding and materials, statements, and exhibits were to be
19 submitted by a sponsoring witness who was to be made available
20 for cross-examination. I was genuinely under the impression
21 that the Doctor was the sponsoring witness for this purpose.

22 I will confess to you right now that I had addition-
23 al questions which I now learn are more appropriately put by
24 way of an answering brief. If indeed this is a brief of
25 counsel and the other signatories to this paper, I ask that

1 it be removed from evidence in this evidentiary proceeding. I
2 would be delighted to meet Mr. Korman on the merits of whatever
3 legal questions he is asserting.

4 If Mr. Korman is right, it is inappropriate and un-
5 fair indeed to put it to Dr. Fagan.

6 CHAIRWOMAN BURG: I agree with you, Mr. Scheiner.
7 We will have a very short recess.

8 (A short recess was taken.)

9 CHAIRWOMAN BURG: We will proceed. Let me say obvi-
10 ously this has been reconciled, but I would hope that other
11 parties who are scheduled down the line will take note of what
12 is happening here. Thank you.

13 Proceed, Mr. Scheiner.

14 MR. KORMAN: Let the record show Dr. Fagan has kind-
15 ly agreed to adopt the ASCAP statement as if it were written
16 word for word by Dr. Fagan. He is available for cross-exami-
17 nation on that basis.

18 BY MR. SCHEINER:

19 Q We were at the point of addressing your position on
20 the share of ASCAP for cable's carriage of local FM signals.

21 A Right.

22 MR. SCHEINER: Just so the record may be clear on
23 this, once again, I request official notice be taken of a
24 document which bears on this question. For this purpose, I am
25 circulating a paper entitled, "94 Congress Second Session

1 House of Representatives Report No. 49-1476," a report for a
2 company S-22.

3 My question for official notice is limited to page
4 90 with particular reference to the third full paragraph on
5 page 90 which is rather supportive of Dr. Fagan's disclaimer
6 of any claim for local FM signals.

7 BY MR. SCHEINER:

8 Q Dr. Fagan, please refer to page 8 of your testimony.
9 With particular reference to the second footnote, the double
10 asterik at the bottom of the page. Quite clearly from the
11 statement, the source of the representative that only 50 of
12 500 eligible motion picture producers and snydicators file
13 claims is a statement made by the sports interest?

14 A It is.

15 Q Do you have an independent knowledge of that?

16 A No.

17 Q You don't know whether it is true or false?

18 A I am not sure. I assume that it is correct.

19 Q You generally don't know?

20 A Not by my independent information.

21 Q I again refer you to a footnote on page 9 again with
22 the double asteriks. That footnote in turn refers to a speci-
23 fic share for music of 15 percent.

24 Sir, do you know where that 15 percent first
25 appeared?

1 A I do not.

2 Q Do you know that rate scale that was contained in
3 the bill in which that 15 percent figure appeared?

4 A No. I don't remember it.

5 Q You do understand my question?

6 A Yes. You are talking about the rates charged cable
7 system.

8 Q Let me refresh your recollection. The reference is
9 to S-543 and subject to check. My notes indicate that in
10 increments starting up to the first \$40,000 and then in
11 \$40,000 increments thereafter, the rate graduated from one to
12 two to three to four to five percent.

13 Does that refresh your recollection?

14 A I do have some recollection of it.

15 Q Do you have any recollection as to the subsequent
16 rate schedule that appeared in S-1361? Let me refresh your
17 recollection, sir, as modified that rate schedule cut the one
18 we just referred to in half.

19 The steps would be one to one and a half to two to
20 two and a half. Does this refresh your recollection?

21 A I know there were different numbers talked about,
22 proposed at different times.

23 Q Please accept it subject to later check.

24 Going back to that statement that the draftsman
25 inserted a specific share for music of 15 percent, do you have

1 any idea how that 15 percent number came about?

2 A I have no direct knowledge of that. I know it was
3 in and it came out.

4 Q Again, perhaps I can refresh your recollection. Is
5 it not the case that that 15 percent set aside was inserted in
6 1979 pursuant to an agreement arrived at between the music
7 interest and cable interest and before the syndicators and
8 others were on the scene to negotiate with the cable people?

9 A I really can't answer that. I don't have the
10 specific knowledge. This was a very complex piece of legisla-
11 tion and went through many bills. I am sure you know much
12 better than I. I am just not the witness to handle that.

13 Q A final question in this regard. Back to that same
14 footnote 15 percent. It says that provision was deleted at
15 the request of Jack Valenti. Do you know that to be so?

16 A That is what I heard.

17 Q But do you know it to be so?

18 A I have been told that by Herman Finkelstein and by
19 Mr. Korman.

20 Q Who is Herman Finkelstein?

21 A Previous counsel of ASCAP.

22 Q In the proceedings before the Senate on S-1361, do
23 you know what Mr. Herman Finkelstein's position was with
24 respect to that 15 percent provision?

25 A Well, ---

1 MR. KORMAN: If you know, Dr. Fagan. This is a
2 matter of printed record.

3 MR. SCHEINER: I would ask the Tribunal to take
4 official notice. The document is much too voluminous to repro-
5 duce for this purpose. But I am referring to hearings before
6 the subcommittee on patents, trademarks and copyrights of the
7 committee of the judiciary, United States Senate 93 Congress
8 on S-1361, July 31 and August 1, 1973.

9 More particularly to the testimony of Mr. Herman
10 Finkelstein who has been referred to a moment ago who argued
11 very strongly that there are no statutory scales, but the
12 matter should be determined by, the matter of Music's rights --

13 MR. KORMAN: I object to that characterization. The
14 testimony was quite different. The testimony was there was no
15 need for including music in the provision at all.

16 MR. SCHEINER: I withdraw the characterization. If
17 I misstated it, I did not intend to do so. The purpose is
18 simply that the Tribunal take official notice of Mr.
19 Finkelstein's testimony, and that speaks for itself.

20 I would expand that request for official notice to
21 include as well the testimony of Mr. Jack Valenti which
22 appears in the same document. I have no further examination.

23 CHAIRWOMAN BURG: Thank you, Mr. Scheiner.

24 Mr. Bechtel.
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CROSS-EXAMINATION

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BY MR. BECHTEL:

Q Gene Bechtel for PBS. I would ask the witness and suggest that otherwise place before them a copy of page 4 of your testimony and a document received Program Producers and Syndicators Exhibit 1.

Dr. Fagan, do you have that exhibit?

A Yes, I do.

Q On Program Producers and Syndicators' Exhibit 1 for independent stations, there is a figure of 118.6 million and percentage of 81.2 percent. If I go over to page 4 of your testimony, I see the same figures under independent stations 118.6 million, 81.2 percent.

It is true is it not that the 81.2 percent is the percentage of the total at the bottom 148.1 million which is the total of three categories of expense items concerning which you have testified?

A That is correct.

Q This morning in answer to questioning if you went to the pertinent FCC table and totaled up the expenses for all nine categories, you would have 229 million total programming expenses for the independent stations; is that correct?

A That is this afternoon, I think. Yes.

Q It is true is it not that 118.6 million rental and amortization of film and tape is approximately 55.8 percent of

1 the expanded total of 229 million program expensing.

2 MR. KORMAN: I would like an objection noted on this
3 line of questioning to previously stated ground that the inclu-
4 sion of salary and so forth is entirely improper.

5 MR. BECHTEL: If it please the Tribunal, I have just
6 two or three questions along this line and I think it is
7 appropriate follow-up on the distribution of this exhibit this
8 afternoon by the counsel for the Syndicators.

9 CHAIRWOMAN BURG: Proceed.

10 MR. BECHTEL: I have computed the percentage, and
11 I will put them on the record subject to check.

12 BY MR. BECHTEL:

13 Q Are we close?

14 A I have not made the computation. If you put them
15 in, I will check.

16 Q Turning to network affiliates percentage first on
17 the Program Producers and Syndicators Exhibit 1, you have
18 rental and amortization 221 million which is 75.7 percent of
19 going to your page 4 292 million total of three categories of
20 programming expenses; is that correct, sir?

21 A Yes.

22 Q I offer for the record subject to check that if we
23 take the total of 915 million program expenses concerning
24 which you have testified earlier today, the percentage would
25 be 24 percent rather than 75 percent?

1 A That looks about right.

2 Q Then, let us go to the bottom of the Program.

3 Producers and Syndicators Exhibit 1. First, independent sta-
4 tions. If you insert 55.8 in lieu of 81.2 percent and multi-
5 ply times 85.1 percent, you arrive at approximately 44 percent,
6 subject to check.

7 Fifty-one point 8 percent times 85.1 percent equals
8 approximately 44 percent?

9 A Fine. It looks about right, sir.

10 Q Network affiliates. Let's substitute 24 percent
11 for the 75.7 percent, 4 percent times 13.2 percent. It is
12 approximately 3 percent. Is that correct, sir?

13 A Yes.

14 Q If you add 44 percent and 3 percent to the 1 percent
15 estimated for Public Broadcasting Service, you arrive at a
16 total for Program Producers and Syndicators of approximately
17 48 percent; is that correct?

18 A Using those figures, yes.

19 MR. BECHTEL: Thank you. I have no further
20 questions.

21 CHAIRWOMAN BURG: Mr. Lannay.

22 MR. KORMAN: For the record, I object to Mr. Lannay's
23 participating at this point for cross-examination of the wit-
24 ness. There was a motion made some time ago concerning the
25 Cartoon Characters right to participate. I take it that motion

1 has not been finally decided? I am not clear on what the
2 status of it is.

3 This point can be briefed, and I continue to think
4 it has been. Cartoon Characters does not belong here, though
5 I love them. It is an obvious reason to me the way they
6 license, Cartoon Characters license their people is quite
7 different from music. We are dealing with a performing rights,
8 and these people don't have that right.

9 When you let it in and let someone representing the
10 Cartoon Characters and unduly lengthen the proceeding, en-
11 counterering my friend Carl Eldridge, if the Cartoons should be
12 considered, so too should the disc jockey.

13 MR. DANNAY: May I speak briefly to that?

14 CHAIRWOMAN BURG: No. I will. We have decided that
15 the Cartoon Characters can participate. We allowed Mr. Dannay
16 to question Dr. Link this morning. I will allow it and hope
17 you will be brief, Mr. Dannay.

18 MR. DANNAY: I have five or six questions. For
19 the record, I am representing Cartoon Characters.

20 CROSS-EXAMINATION

21 BY MR. DANNAY:

22 Q I would clarify for the record your analysis this
23 morning and in your written statement and some of the factors
24 that went into it and some of the factors that did not go into
25 your analysis.

1 I understand your analysis is based on amounts that
2 were paid to music for music by TV and radio broadcasters and
3 that you are assuming that in a free market without a com-
4 pulsory license that cable systems would pay the same amounts
5 or the same percentage amounts? Is that correct?

6 A What I think I said this morning or this afternoon
7 was that what we are talking about here is relative economic
8 value. I think relative economic value to the cable systems
9 for these items. We don't have a market here to determine,
10 to examine that directly.

11 That is one of the jobs of this Commission. What I
12 said was if we look in the local TV market for these items,
13 this is the way it looks. We were suggesting that this is a
14 way to approach this problem.

15 Q But am I correct in assuming that your analysis de-
16 pends on an assumption made that the relative economic values
17 as you term it would be just the same in the cable market as
18 it was reflected in the TV broadcast market; is that correct?

19 A I would not say that.

20 Q Percentages.

21 A What we are saying is that this is how these items
22 are bought and sold in another market which would maybe help.
23 We think it is helpful to the Commission in getting a judgment
24 as to the relative values that are involved.

25 Q But still Dr. Fagan, I want to clarify your analysis.

1 Once you arrive at certain figures that are relevant in the
2 television market, you are offering those figures to base the
3 relative economic values in the cable market; is that correct?

4 A That is correct.

5 Q I want to clarify something further on that point.
6 Do you have any previous or have you put into the record any
7 proof in the form of surveys or studies or any other material
8 which shows what cable systems would do in fact or would pay
9 in fact? Is any such material put in?

10 A Not by us.

11 Q I think it is clear from Mr. Korman's preliminary
12 statement and your own analysis and oral today that your
13 analysis does not take into account any share whatsoever of
14 the total cable carriage time; is that correct?

15 That is, the time that is devoted to music in the
16 cable systems?

17 A That is correct.

18 Q It is similarly true that your analyses do not take
19 into account the share of total cable audience relative to
20 music?

21 A It does. We did say that we did not believe that
22 the locally produced shows ---

23 Q I am just talking about music. I am asking you
24 whether your analysis for music took into account any factor
25 for a share of total cable audience viewing?

1 A We have not made any survey on that.

2 Q Does your original analysis take into account any
3 proof at all as to what cable or TV audiences watch or listen
4 to and the popularity of music with cable subscribers or
5 cable systems?

6 A We have not.

7 Q We have not put in any such evidence?

8 A We have not.

9 Q Is it possible that TV broadcasters though they pay
10 for music, is it possible that subscribers or cable systems
11 may simply be indifferent to the presence or absence of music
12 in the programs which they carried or watched?

13 A ASCAP is really always taking the position that
14 cable systems did not need this Commission as far as music was
15 concerned. They could deal directly with them in value not
16 only for music but ASCAP, BMI and SESAC. That would be deter-
17 mined by negotiations between the parties.

18 Q If there were a free market without a compulsory
19 license. I am trying to clarify your analysis which you put
20 into the record. These factors as to what audience and cable
21 systems want to see were not included in your study in
22 record?

23 A We did not make that type of study.

24 Q My last question relates to the terms used by Dr.
25 Link linked with feature usage and background usage. I want

1 to clarify. I think I know the answer.

2 Your analysis that you offered does not take into
3 account any breakdown based on these so-called factors of
4 feature usage or background usage?

5 A It does not.

6 MR. DANNAY: Thank you. No further questions.

7 CHAIRWOMAN BURG: Would you come up here Ms. Hill.

8 MS. HILL: I am Janice Hill with National Public
9 Radio.

10 CROSS-EXAMINATION

11 BY MS. HILL:

12 Q Dr. Fagan, I want a clarification on page 4 of your
13 or whoever's testimony. It says we have no comparable FCC or
14 other figures for public broadcasting. That is under the
15 table for television broadcasters.

16 On page 6 dealing with radio, you don't make a com-
17 parable statement, but I believe that is true. Your table for
18 radio is strickly commercial and does not include any non-
19 commercial radio data?

20 A That is correct.

21 Q Your documentation and analysis is only dealing
22 with commercial radio?

23 A That is correct.

24 MS. HILL: I have no further questions.

25 CHAIRWOMAN BURG: Mr. Chapin.

1 MR. CHAPIN: I am Edward Chapin from BMI. I want to
2 point out two things. No. 1, all that you have heard this
3 afternoon is just one approach from one part of the music seg-
4 ment. As you have heard this morning, we have an entirely
5 different approach.

6 I would not want to close the proceedings without
7 reminding you that we do have a different approach and that we
8 don't subscribe to the ASCAP approach. BMI has its own state-
9 ment. The other thing I would like to say is as we get into
10 the other segments, the nonmusic segments, to bear in mind that
11 music is running throughout all of those.

12 So, we feel we will have statements on all of the
13 future parts of this proceeding. Thank you.

14 CHAIRWOMAN BURG: Thank you.

15 Mr. Korman.

16 MR. KORMAN: Just a few questions on redirect, if I
17 may.

18 COMMISSIONER BRENNAN: I think there is a lady in
19 the back with some questions.

20 MS. SEMO: I am Judith Jurin Semo, Sanders and
21 Dempsey, National Collegiate Athletic Association. Mr. Dannay
22 covered one of my questions concerning any evidence concerning
23 the value of the cable operators. I have one further
24 question.

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CROSS-EXAMINATION

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BY MS. SEMO:

Q On page 8 of the statement with respect to the failure of potential claimants to file claims. You say a conservative estimate is one-fifth of the total claimants have not filed.

On the next page, you say therefore usage share should be increased by 25 percent. I am wondering if that should be 20 percent?

A No. I don't think so. Why don't we go through the mathematics if we will. If claimants add up to 80 percent and we were to add 20 percent of that. We add 16 and we would get 96 percent and not have the total.

However, if the claimants add up to 80 and we add a quarter to that, we would add 20, and we get the entire find.

Q I am not sure I follow that conclusion.

A Would you like me to repeat it?

Q Yes.

A Maybe if we take some numbers, it might be easier. Let's say that the cable pot is \$12 million. Okay. Let's say that all the claimants that came in were able to prove that 80 percent of that \$12 million. That would be \$9 million 600.

Are you with me so far?

Q Yes.

A That would leave \$2 million 400,000 left over. Now,

1 the 2,400,000 is 20 percent of the \$12 million, but it is 25
2 percent of the 9 million six which is what the claimants
3 would add up to.

4 MS. SEMO: I follow. I have no further questions.

5 CHAIRWOMAN BURG: Mr. Korman. Let me remind you
6 that this is just redirect. We are not entertaining rebuttal
7 or surrebuttal.

8 MR. KORMAN: Yes. I will address myself to questions
9 raised by Mr. Brennan and by Mr. Eldridge.

10 REDIRECT EXAMINATION

11 BY MR. KORMAN:

12 Q Dr. Fagan, Commissioner Brennan asked what injury to
13 performing rights licensing organizations as a result of the
14 compulsory license would be, and you gave him an answer.

15 Let's consider. If there were no compulsory license,
16 what would ASCAP do with respect to cable?

17 A ASCAP would do with respect to cable what it would
18 do with any other group licensees. Namely, it would discuss
19 with them the terms of a license and sit down with a group
20 representing them and negotiate a license.

21 Q So, the real injury is it not is the loss of a very
22 important customer of the cable television industry. I suggest
23 that that loss is considerably greater than the loss measured
24 by the injury to our local radio or television licensee
25 through their loss of revenue. Won't you agree with that?

1 A Yes.

2 MR. ELDRIDGE: I object to the form of the question.

3 BY MR. KORMAN:

4 Q Just a couple of more questions of Dr. Fagan. You
5 have been involved have you not in a great many audit disputes
6 that ASCAP has had with broadcasters?

7 A Yes.

8 Q And in the resolution of those disputes?

9 A Yes.

10 Q You are familiar are you not with the information
11 ASCAP obtains regularly in the course of the examination of
12 the books and records of local radio and television stations?

13 A I am.

14 Q Do you know whether local television stations pay
15 amounts of money for dramatic rights to music or synchroniza-
16 tion rights that Mr. Eldridge if he were to place the sum in
17 his eyes would know he had put something there, if my question
18 is clear?

19 MR. ELDRIDGE: I would object to the form of that
20 question. That does not incorporate the thesis of truth of
21 testimony earlier in the day.

22 CHAIRWOMAN BURG: Would you restate that.

23 BY MR. KORMAN:

24 Q Dr. Fagan, who pays for dramatic and synchronization
25 rights as far as you know normally for a television program?

1 A Normally, it is the program producer.

2 Q It is not the television station at all is it?

3 A Not generally.

4 Q If you were to watch Eleven Alive on Channel 11 in
5 New York where they may have a station promo, and I think
6 that station is the kind of station careful about getting the
7 necessary licenses, they might for that music use if it were
8 not especially written and improperly was obtaining a special-
9 ization right?

10 A They would.

11 Q Normally local TV stations do not require rights to
12 dramatic music or synchronization rights?

13 A That is correct.

14 Q You know that on the basis of your information con-
15 cerning your audit results of ASCAP?

16 A I know it in two ways. This morning I alluded to
17 the fact that we know what our ASCAP collections are from
18 local stations. We know that the agreement with BMI calls for
19 58 percent. The amount reported to ASCAP. We can take those
20 two.

21 Figuring the amount for SESAC, we know there is not
22 that much left over for synchronization rights.

23 Q So when we talk about music license fees, Mr.
24 Eldridge suggests that we somehow were being tricky by not
25 deducting something for synchronization and dramatic. In

1 fact, the amount if it could be deducted would be very, very
2 small?

3 A That is correct.

4 Q I am speaking of commercial.

5 A I am answering in terms of commercial.

6 Q These data we are talking about are FCC data that
7 deal only with commercial stations.

8 We went through a lot of time today, Dr. Fagan, mak-
9 ing computations suggesting being ASCAP somehow exaggerated,
10 and SESAC, the percentage it could properly claim. As a re-
11 sult of having failed to include certain items. Items of
12 program expense.

13 First, there is a very large item for four other
14 program expenses. The very last item on table 5 considering
15 which items have been mentioned, that is to say, payroll for
16 talent, payroll for all other programs and employees, R&A
17 records, transcription costs of outside news services, payments
18 to talent and music license fees, other performance and pro-
19 gram rights.

20 Then, you get down to all other program expenses.
21 That seems to be one of the very largest items there. What
22 might be included, do you think, for a television station's
23 program department? Executive salaries, rent allocations, ---

24 MR. ELDRIDGE: Let me object. This is his witness.
25 It seems to me he is doing most of the testifying. I think

1 expenses. In my judgment, that is a good question.

2 MR. ELDRIDGE: But not on a guess basis or might
3 basis. That is my point.

4 BY MR. KORMAN:

5 Q Dr. Fagan, if you don't know, say you don't know.

6 A I do know something about this. The reason I know
7 something about this is that ASCAP has an auditing department
8 that audits stations. That department reports to me. In the
9 process of the audit, from time to time information is, the
10 audit really is the examination of the deductions made by the
11 stations under the ASCAP license. It is not uncommon that a
12 station would take as a deduction the total amount of program
13 expense.

14 In the audit, we would then examine what is in the
15 program expense and determine those items deductible under
16 the license to those items which are not. So, I have from
17 time to time looked at the records of stations with respect to
18 these kinds of items and know on the basis of that.

19 When you get down to the category other program
20 expense, you have a miscellaneous category that can include
21 many, many things. It can include petty cash. It can include
22 an allocation of the expense of a transmitter. It is allocat-
23 ed to the program department.

24 It can include an allocation of executive salaries
25 to the program department. It can include many, many things

1 and it varies from station to station. I think the designation
2 all other program expense is really another way of saying mis-
3 cellaneous can be almost anything. That is my experience.

4 MR. KORMAN: I have no further questions.

5 RE-CROSS-EXAMINATION

6 BY MR. ELDRIDGE:

7 Q Your experiences with respect to what is a proper
8 deduction with respect to the ASCAP contract; isn't that
9 correct? When you are saying whether they are proper or im-
10 proper deductions?

11 A The reason why we examine the records are because of
12 the audit provision of the license and the audit is an exami-
13 nation to test whether the deductions taken are proper.

14 Q Under the terms of the ASCAP license, sir?

15 A That is the reason why the records are examined.
16 The auditor takes on the one hand the amounts which are de-
17 ducted and then examines the amounts that are deductible. The
18 only reason he gets into this is because they were deducted in
19 the first place.

20 That is the only reason why he knows what is in
21 these accounts. Such as an account for all other program
22 expense.

23 Q For example, you said petty cash might not be
24 deductible under the ASCAP list of approved deductions. None
25 the less, it is a correct business deduction is it not in

1 relating to programming?

2 A I thought the question was what is in those accounts.
3 I said there is a petty cash item, allocation of transmitter
4 expense and a variety of other things. It says all other
5 program expenses. It is a miscellaneous account.

6 MR. ELDRIDGE: I don't have anything further on that.

7 MR. KORMAN: I have a follow-up.

8 CHAIRWOMAN BURG: All right.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. KORMAN:

11 Q If the program manager in a large station were allow-
12 ed a limousine for whatever purpose, might not it be applicable
13 under ---

14 MR. ELDRIDGE: I object.

15 CHAIRWOMAN BURG: It is sustained.

16 Mr. Ciancimino, do you have anything to add or
17 question?

18 MR. CIANCIMINO: No, no. No, I do not.

19 CHAIRWOMAN BURG: Do the commissioners have any
20 questions?

21 COMMISSIONER COULTER: Dr. Fagan, the theorem pro-
22 posed by ASCAP is like that proposed by Sports. Mr. Korman
23 said earlier and is significantly different from that proposed
24 by the Broadcasters, BMI, in attempts to find a value through
25 a comparison with the marketplace. That is the attempt here

1 in one form or another.

2 THE WITNESS: It is a marketplace approach. Yes.
3 The nearest marketplace that we know of.

4 COMMISSIONER COULTER: In other program and perform-
5 ing rights, I think I heard you or Mr. Korman say that is
6 sports, the bulk of that is sports. Is that correct?

7 THE WITNESS: That is correct. Just in a broad

8 COMMISSIONER COULTER: Just in a broad sense, I have
9 tried to apply your theory. I did a little bit what Mr.
10 Scheiner did. I came out with sports around 11 percent.
11 Please, I do not claim any accuracy or even speed at all in
12 this.

13 CHAIRWOMAN BURG: No one else did, either.

14 COMMISSIONER COULTER: Obviously just to pursue my
15 reasoning if you added what you claim and the 80 percent that
16 Mr. Scheiner came up with and say 11 or 10 percent for sports,
17 you would exceed the hundred percent.

18 THE WITNESS: It should be about 100 percent.
19 Television is a part of it.

20 COMMISSIONER COULTER: I see what you are saying.
21 The only problem is we are dealing with 100 percent. Is it
22 the excess over 100 percent? Following your theory, it comes
23 partly from radio, but also from another calculation you have
24 made.

25 In other words, not all claimants have filed.

1 Following through, the base of your theory unfortunately does
2 not come up with a comprehensive theory. We are left dangling
3 at the end.

4 So much for syndicators. So much for sports. So
5 much for you, and that is due for some additional reasoning on
6 the end of your theory. How would you deal with that program
7 in a comprehensive way?

8 THE WITNESS: In the computations that we have set
9 forth, we started off with the premise that the locally pro-
10 duced programs were worth very little. We valued them at zero.

11 COMMISSIONER COULTER: I understand that.

12 THE WITNESS: Then, we add the three component parts.
13 That is the music, the syndicated programs, the sports. We
14 worked out a formula for television. Then, we worked in radio.
15 In those, working out those numbers, that was on the assump-
16 tion that all of the potential claimants were in.

17 We had a number for the amounts paid by local sta-
18 tions to syndicators and to music and to broadcast writers.
19 Those were for everybody.

20 COMMISSIONER COULTER: Theoretically you would de-
21 duct a percentage from the program syndicators?

22 THE WITNESS: If they were not, all the potential
23 claimants were not in.

24 COMMISSIONER COULTER: You cannot in the case of
25 broadcasters?

1 THE WITNESS: Because it was computed as zero, that
2 is correct. But it was meant to be a comprehensive approach
3 that you can use generally. It was not directed only for
4 music. That is, the approach was not applicable only to music.

5 COMMISSIONER COULTER: The next question is the only
6 other formula that is somewhat similar to yours or following
7 the same premise is that presented by Sports. I don't know if
8 you have seen it. I don't have a distribution. They come up
9 with percentages.

10 Unfortunately, they excluded music. They have 27
11 percent for sports, 66 for movies, five for syndicated TV
12 shows, zero and 2 percent for local news and public affairs.

13 Assuming that there has to be a basis in the market-
14 place, following the marketplace theory is an appropriate
15 basis. They come up with these percentages. Where would you
16 assume that music would have to come out of in this?

17 THE WITNESS: I did see their submission along with
18 many of the others. Frankly, I am not that fast a reader to
19 read all of the submissions that came up that last week. But
20 I did read their summary which I thought was excellent laying
21 out exactly what they were doing.

22 I think they were incorrect on a couple of items.
23 I think they were incorrect in assuming that sports programs
24 don't contain music. Many sports programs contain quite a bit
25 of music. When you think about a college football game, music

1 very frequently is an important component in the atmosphere of
2 that program.

3 But it is not only college football. There are
4 other sporting events as well where music is a factor. Assuming
5 that, and I think my recollection is there was no music, they
6 are not correct.

7 COMMISSIONER COULTER: I thought the national
8 anthem was public domain?

9 THE WITNESS: This is not only the national anthem.
10 You have much, much music in sporting events programs. But in
11 terms of the overall approach that they have, I think it is
12 very similar to the approach we use. Namely, you try to come
13 to a judgment as to what the relative values would be in this
14 cable market for the various claimants.

15 COMMISSIONER COULTER: Would you say to carve a
16 music share out of this you would take a percentage out of
17 every category?

18 THE WITNESS: No. We are saying sports are in the
19 local TV market as are syndicated programs. There are rela-
20 tive values in that market which we are suggesting it is some-
21 thing for you to look to to get a motion as to what the rela-
22 tive values are in the cable market.

23 COMMISSIONER COULTER: No, no. That was not my
24 question. My question is if you don't dispute the concept of
25 the Sports theory as it currently stands, it excludes you from

1 participating unless you take it out of somebody else. Who
2 would you take it out of?

3 THE WITNESS: It seems to me that music has a hand
4 in these various categories of programming. It would come out
5 of each.

6 COMMISSIONER COULTER: You would take a percentage
7 out of each. Would you venture to say where the bulk of it
8 would come?

9 THE WITNESS: I would think our approach would be to
10 take off for music first. You have in your local market.
11 You have the FCC numbers, the amount spent.

12 COMMISSIONER COULTER: No, no. I mean out of the
13 percentage the Sports have given.

14 THE WITNESS: I am saying I would not do it that
15 way. I would say look to the local markets and log and base
16 the shares on that examination.

17 COMMISSIONER COULTER: That does not quite answer my
18 question. If your contention is music is involved in all of
19 these programs in one form or another and therefore a percent-
20 age for music would have to come out of them given these per-
21 centages of 27, 66, 5 and 2, which ones would you take it
22 out of most?

23 THE WITNESS: The total you added up to is 100. To
24 put anything in for music at all, we are suggesting that you
25 take out a portion 13 and a half percent for music and divide

1 this up in whatever fashion you think is appropriate. If you
2 went along with the Sports people, you would divide it up in
3 these ratios.

4 CHAIRWOMAN BURG: This whole process strikes me as
5 being very similar to the dialog going on up on the Hill with
6 respect to cutting the budget. Everyone agrees in principle
7 that it ought to be balanced, but nobody wants their own
8 appropriations cut.

9 I suppose it is fair to say even before we heard
10 the arguments today on the part of the music claimants that
11 we were sufficiently aware of the fact that when all of these
12 schedules are finished in the first phase of this evidentiary
13 hearing, the sum of the parts was going to exceed the whole.

14 I think it might be useful given Commissioner
15 Coulter's questioning, the fact is we don't have the luxury
16 of dealing in a vacuum. We have to deal with the entire 100
17 percent of the cable royalties. We are trying to deliberate
18 and ascertain the fair division of those cable royalties.

19 I would like therefore because we have to deal in
20 the entire picture and cannot just listen to the particular
21 parties who present only justification for their share, I
22 would like the groups of claimants on the conclusion of these
23 dates which would be right after May 1 when Public Broadcasting
24 and NPR are scheduled to submit to the Tribunal a division of
25 royalties based on all claimants shares as it pertains to

1 other claims as well in the four or five categories, as it
2 pertains to all of the others as well as your own.

3 I think that might be practical. It would be respon-
4 sible in my judgment, and it would certainly be helpful to
5 this Tribunal. I will put you on notice we will expect that
6 from each of you following May 1.

7 Let me ask one additional question I have. It does
8 not really go to your testimony, Dr. Fagan, but to the fact I
9 am fascinated with numbers. But I am not very good at numbers.
10 Somebody once said if you are fast you can probably take
11 numbers and statistics and have them tell any story you want
12 them to tell.

13 Given this proceeding, there is no benchmark. There
14 is no framework. It has never been done before. How do you
15 start out? You adopt a certain premise and follow that
16 premise and come out wherever it may lead you? Is that a fair
17 question? Can you answer that before I go on?

18 THE WITNESS: Madaam Chairman, my prediction to Mr.
19 Korman this morning was that when you came in here and you saw
20 the assembled group, your first announcement would be that
21 all the commissioners had resigned.

22 When you read all the statements, I am sure you
23 knew this long before you saw the statements that you have a
24 very complex job. Music, ASCAP in particular, has the kind of
25 job you have. They have it every quarter. They have

1 theoretically in the abstract the same kind of operation. You
2 have no member that has ever said he gets paid too much. The
3 user, he gets too little.

4 ASCAP is always in the middle of taking a finite
5 number of dollars and distributing those dollars to a group of
6 claimants each of which thinks he gets paid too little.

7 CHAIRWOMAN BURG: Could you start this process, this
8 method at which you arrive at any percentage? Could you
9 start the process by surmising or making an assumption that a
10 given figure is what you ought to get and then go back and
11 find the figures or statistics or methodology to support that?

12 Yes or no, if you can.

13 THE WITNESS: I suppose that is possible. That is
14 not what we did.

15 CHAIRWOMAN BURG: But it is possible?

16 THE WITNESS: Yes.

17 CHAIRWOMAN BURG: If there are no other questions,
18 we will adjourn with the proviso at some future point Mr.
19 King will have an opportunity to question Dr. Link.

20 As I said, we will notify you in terms of the dates
21 for rebuttal. Thank you very much.

22 (Whereupon, at 3:45 p.m. the hearing adjourned.)
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25