

MEMORANDUM



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to: Dr. James H. Billington
The Librarian of Congress

date: September 9, 1998

from: Marybeth Peters
Register of Copyrights

via: David O. Carson *OC*
General Counsel

subject: Summary of the Register's Review of the CARP's Determination Setting Rates for the Noncommercial Educational Broadcasting Compulsory License

Attached for your consideration and approval is a Federal Register document containing my recommendation and a proposed final order setting royalty fees for the noncommercial educational broadcasting compulsory license for the years 1998-2002. This compulsory license, found at section 118 of the Copyright Act, allows public television and radio broadcasters to perform copyrighted music upon payment of the royalty fees established in the order.

The following is a brief description of the Copyright Arbitration Royalty Panel's (CARP) report, setting the annual royalty fees to be paid by the Public Broadcasting Service and National Public Radio (collectively, the "Public Broadcasters") for the use of music in the catalogues of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). ASCAP and BMI are performing rights societies that represent thousands of songwriters and music publishers whose copyrighted works are performed by Public Broadcasters. The summary includes the major objections raised by the parties to the report, and my recommendations as to the resolution of those objections. I am pleased to recommend that the Panel's report be adopted in full without any changes.

Decision of the CARP

As noted above, the CARP was charged with determining the annual royalty fees to be paid by Public Broadcasters to ASCAP and BMI, individually, for the copyrighted musical works in their catalogues for the years 1998 to 2002. The Copyright Act does not offer the CARP much in the way of guidance to determine what the royalty fees should be, except to say that they should be "reasonable." The CARP determined, based on its review of the legislative history and a prior decision of the Copyright Royalty Tribunal, that "reasonable" fees means "fair market value" fees. A "fair market value" fee is the price a willing seller and a willing

buyer would negotiate in the open marketplace for the exchange of goods or services. You may recall that this "fair market value" standard is the same one that applied to last year's adjustment of the satellite compulsory license royalty rates.

To determine "fair market value" royalty fees, the CARP examined the evidence offered by the parties. Each party presented the CARP with its own methodology for calculating "fair market value" royalty fees. ASCAP and BMI recommended that the CARP should use as a benchmark the royalty fees paid by commercial television and radio broadcasters for music and then make adjustments to account for the differences in commercial and public broadcasting. Using that benchmark, ASCAP sought an annual fee of \$7,982,000 and BMI sought an annual fee of \$6,895,000. Public Broadcasters recommended that the CARP should look to the license agreements that Public Broadcasters negotiated in 1992 with ASCAP and BMI, and adjust those fees to the present by accounting for changed circumstances in public broadcasting since 1992. Using that approach, Public Broadcasters sought a combined annual fee of \$4,040,000 for both ASCAP and BMI music.

The CARP rejected the approaches of the parties in favor of its own methodology. The Panel took the \$1.25 million fee that the Copyright Royalty Tribunal awarded ASCAP under the section 118 license in 1978 (the only previous rate-setting proceeding), and trended it forward to 1996 (the most recent year for which data was available) using Public Broadcasters' increase in revenues as the adjusting factor. The Panel then adjusted the royalty fees produced by this formula to account for changes in the relative shares of ASCAP and BMI music used by Public Broadcasters since 1978.

The CARP's methodology yielded an annual fee of \$3,320,000 for ASCAP music, and \$2,123,000 for BMI music. The Panel apportioned the costs of the proceeding (i.e. the arbitrators' monthly fees) one-third each to ASCAP, BMI, and Public Broadcasters.

The Register's Review of the Parties' Objections to the Panel's Report

Because the CARP rejected each of the parties' royalty calculation methods, it is not surprising that ASCAP, BMI and Public Broadcasters all objected to the Panel's determination. Below are the highlights of those objections, along with my recommendations as to their resolution.

- **The CARP applied the wrong fair market value standard.** (Pp. 37-38³⁸). Public Broadcasters argue that the Panel should have examined the price that a willing buyer and seller would negotiate for music in the context of the section 118 license, not in the open marketplace.

Recommendation -- The Copyright Act makes no such distinction, and the Panel applied the correct "fair market value" standard.

- **The Panel's rejection of the previously negotiated agreements between ASCAP/PBS and BMI/PBS was erroneous.** (pp. 39-40). One reason the Panel rejected using these agreements as benchmarks for setting the new rates was that the negotiated rates represented a subsidy to the Public Broadcasters instead of an actual marketplace rate. Public Broadcasters disagree, arguing that neither the inclusion of nondisclosure and no-precedent clauses in these agreements nor the discrepancy between these rates and the rates paid by commercial broadcasters support a conclusion that ASCAP and BMI had been voluntarily subsidizing the Public Broadcasters.

Recommendation — The Panel was not arbitrary in concluding that the nondisclosure and no-precedent clauses were a means by which ASCAP and BMI could prevent use of below market rates as a benchmark for setting future rates, especially in light of the fact that Public Broadcasters were unable to cite any factual bases to explain the huge disparity between what commercial broadcasters pay for music use and what Public Broadcasters have paid for the same music under prior voluntary agreements.

- **The 1978 fee adopted by the Copyright Royalty Tribunal was not a fair market value fee.** (Pp. 20-22). BMI submits that it was erroneous for the CARP to use the 1978 fee adopted by the Copyright Royalty Tribunal (CRT) as the starting point of its methodology because evidence was presented suggesting that the 1978 fee was not representative of fair market value.

Recommendation -- In its 1978 decision, the Tribunal adopted a fee that reflected fair value for the use of ASCAP music by the Public Broadcasters. BMI's anecdotal and after-the-fact evidence to the contrary is insufficient to justify concluding that the CRT's 1978 CRT royalty fee did not establish the fair market value of ASCAP music for the 1978-19821 licensing period.

- **The CARP did not provide for any annual increases in their proposed fees for each year after 1998.** (Pp. 25-26). ASCAP argues that it was arbitrary for the Panel not to provide for interim adjustments, such as inflation adjustments or adjustments for increases in Public Broadcasters' revenues during the 1998-2002 period that the fees are in effect.

Recommendation -- The CARP was not required to make such adjustments. The Panel was not arbitrary in

concluding that the rate it established "reasonably approximates a fair market rate for the entire statutory period."

- **The Panel incorrectly used Public Broadcasters' 1978 revenue figures rather than its 1976 figures.** (pp. 22-25). BMI and ASCAP argue that the CARP should not have used the 1978 revenue figures in its calculations because the CRT did not consider these figures when it set the 1978 royalty fee.

Recommendation — The \$1.25 million royalty fee awarded to ASCAP represents the fair market value of the license as of 1978. Therefore, it is reasonable for the CARP to use Public Broadcasters' 1978 revenue figures to begin its trending analysis.

- **The CARP arbitrarily excluded Public Broadcasters' ancillary revenues from their royalty formula.** (Pp. 26-27). Ancillary revenues are the revenues received from non-broadcasting activities, such as merchandising of toys and books and rents collected for studio space. ASCAP argues that these monies should have been included in Public Broadcasters' revenues.

Recommendation -- The Panel's decision was not arbitrary. Ancillary revenues are not monies received from the broadcasting of music on radio and television, and it was not demonstrated that ancillary revenues are so closely tied to Public Broadcasters' broadcasting activities that they must be included in total revenues.

- **The CARP arbitrarily concluded that overall music use has remained static since 1978.** (Pp. 27-29). ASCAP and BMI argue that Public Broadcasters use more ASCAP and BMI music now than they did in 1978, and the Panel should have increased their royalty award to account for the added use.

Recommendation -- It was not arbitrary for the Panel to presume that music use has remained relatively static since 1978. None of the parties possessed accurate music use data prior to 1992, and post-1992 data shows music use to be relatively flat. Further, even ASCAP asserted at trial that there was no evidence that Public Broadcasters' use of music has changed significantly since 1978.

- **The Panel's dependence on music share is irrelevant and unsupported by section 118.** (Pp. 29-30). ASCAP argues that the section 118 license provides for compensation for the use of music by Public Broadcasters, and that music share does not act as a proxy for music use.

Recommendation — An adjustment for music share reflects the noted decrease in the use of ASCAP music relative to the use of BMI music by the Public Broadcasters between 1978 and now. Use of music share in this manner is totally consistent with the Panel's adopted methodology and therefore not arbitrary.

- **There was insufficient evidence to support the CARP's inferential findings regarding ASCAP's and BMI's relative music shares in 1978.** (Pp. 30-32). ASCAP and BMI argue that lack of data demonstrating how much ASCAP and BMI music was used by Public Broadcasters in 1978 prevented the CARP from inferring their respective music shares. The Panel's adjustments for changes in music share are therefore erroneous.

Recommendation -- It was not error for the Panel to assign music shares given the lack of concrete data from that time period. The conclusion was reasonable and was backed by sufficient circumstantial evidence, such as the consistent division of fees between BMI and ASCAP as reflected in the negotiated agreements since 1981.

- **The Panel's methodology does not account for the increased commercialization of public broadcasting.** (Pp. 33-34). BMI requests use of Public Broadcasters' private revenue figures since 1978 as a way to adjust for the increased commercialization.

Recommendation — The Panel's conclusion that significant differences still exist between public and commercial broadcasting led it to reject use of commercial fees as a benchmark in setting the current rates. Instead, it adopted a trending methodology which adjusts for changes in Public Broadcasters' revenue stream. Use of total revenues instead of private revenues to make this adjustment is reasonable under the Panel's methodology.

- **It was error for the CARP to assess their costs at one-third each to the parties.** (Pp. 35-37). ASCAP argues that the CARP should have allocated payments of the arbitrators' costs one-half to Public Broadcasters, and one-half to ASCAP and BMI combined.

Recommendation -- The Copyright Act gives the Librarian authority to review the rate adjustments and royalty distribution decisions of CARPs, but not their decisions how to split their costs among the participating parties. Even if the Librarian had such authority, there is no cause to disturb the Panel's allocation.

Conclusion

In sum, I recommend that you adopt the CARP's report and set the annual royalty payment by Public Broadcasters to ASCAP at \$3,320,000, and \$2,123,000 to BMI. The parties have agreed among themselves as to the terms of payment, and I recommend that you also accept those terms *in toto*. These terms provide details on the administrative components of the license, such as, when and how payments are to be made.

If you approve of the attached document, please sign it on the last page of the original and four copies. Please return the signed original and three copies to me. The fourth is for your records.

Attachment: Federal Register Document