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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

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

Thursday, February 26, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

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

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WASHINGTON, D.C. 20005-3701

APPEARANCES:On Behalf of Broadcast Music, Inc.:

NORMAN C. KLEINBERG, Esquire; and
MICHAEL E. SALZMAN, Esquire
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6680/6833

JOSEPH J. DiMONA, Esquire
Assistant Vice President
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

PHILIP H. SCHAEFFER, Esquire; and
SAMUEL MOSENKIS, Esquire
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740/8424

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

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

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APPEARANCES (Continued):On Behalf of the Public Broadcasters:

R. BRUCE RICH, Esquire;
JONATHAN T. WEISS, Esquire;
MARK J. STEIN, Esquire; and
ELIZABETH FORMINARD
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170/8007

KATHLEEN COX, Esquire
General Counsel
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9701

ANN W. ZEDD, Esquire
Assistant General Counsel
PBS
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5170

DENISE LEARY, Esquire
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2049

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

2 (10:00 a.m.)

3 CHAIRMAN GRIFFITH: Ms. Court reporter, do
4 you want to raise your right hand to be sworn, please?

5 (Whereupon, the court reporter was duly
6 sworn.)

7 CHAIRMAN GRIFFITH: Ladies and gentlemen,
8 good morning. Once again, my name is Lewis Griffith,
9 I am the Chairperson, or the panel Chairman of this
10 group. Judge Gulin to my left, and Judge Dreyfus to
11 my right.

12 Pursuant to Rule 25146 of the Copyright
13 Arbitration Royalty Panel Rules and Procedures, I am
14 to announce the subject matter under consideration.
15 This is CARP NCBRA docket number 96-6, the Non-
16 Commercial Educational Broadcasting Compulsory
17 License.

18 There are two matters which the Panel has
19 considered, one which has been formally addressed,
20 that is the Baumgarten issue with respect to the
21 motion to strike his testimony, which we issued an
22 order on that, and I trust that all of you have

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1 received it. And the pending motion concerning
2 striking certain testimony of Dr. Peter Boyle.

3 Before we begin with the opening statement
4 of the parties, let me just enquire, are there any
5 other preliminary matters that Counsel wish to raise
6 at this particular time?

7 MR. SCHAEFFER: Mr. Chairman, we have a
8 set of responding papers that we are about to file
9 today.

10 CHAIRMAN GRIFFITH: They are due by the
11 close of business today, we understand, in the Boyle
12 matter, yes.

13 Any other preliminary matters?

14 (No response.)

15 CHAIRMAN GRIFFITH: All right, we are
16 prepared to entertain your opening statements, then.
17 Mr. Rich?

18 MR. RICH: Thank you. I have a few visual
19 aides which I will be putting on a chart, but I think
20 it might be easier to have you follow along.

21 CHAIRMAN GRIFFITH: Thank you.

22 MR. RICH: If it is not inconvenient, I

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1 will just stand over by here.

2 CHAIRMAN GRIFFITH: Fine.

3 MR. RICH: Your Honor, the Public
4 Broadcasters believe that the issues presented in this
5 proceeding can be resolved in relatively
6 straightforward fashion. The tools of analysis come
7 from the language of Section 118, itself, from the
8 only decision which has been rendered under that
9 provision, namely the 1978 CRT decision involving the
10 Public Broadcasters and ASCAP, and critically the
11 parties' own course of conduct over a 20 year period.

12 I begin with the premise that there can be
13 little quarrel over the proposition that the function
14 of this Court is to set license fees for the 1992
15 through 2002 period that are "reasonable".

16 Now, you don't find, literally, the word
17 "reasonable" in the text of 118, presently. As I
18 recall, its predecessor version, pre-1993, did in fact
19 contain the word. But I'm comfortable in suggesting
20 that as you course through the legislative history,
21 which effectively transformed this process from one
22 before the CRT, to one before Your Honors, as a CARP,

1 the legislative history speaks in terms, solely, of
2 technical amendments that the intended substantive
3 content of Section 118 was not to be changed.

4 I will refer Your Honors to the Conference
5 Committee Report underlying the original 118 at pages
6 77 and 78, where repeatedly reference is made to the
7 task of the predecessor Tribunal. And I would argue,
8 by extrapolation, this Tribunal, to be to determine
9 reasonable license fees.

10 The 1978 CRT decision, itself, posits
11 "both the Copyright Act and Equity require that music
12 copyright owners receive reasonable compensation for
13 the use of their works by Public Broadcasting."

14 We clearly believe that is the touchstone
15 of the analysis here. The determination involves
16 finding reasonable compensation for the use of ASCAP's
17 and BMI's members works by Public Broadcasting.

18 Now, it also seems, to us, that there is
19 little doubt in the context of such a proceeding, what
20 the meaning of the term "reasonable" must have
21 ascribed to it. And, in our view, "reasonable" must
22 mean an approximation of the license fees that a

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1 freely competitive market would produce for their
2 transactions, enabling us, in a free market, to
3 determine the value of performances of music occurring
4 on non-commercial broadcasting, be it television
5 and/or radio.

6 That happens to be precisely the standard
7 which has governed the analogous ASCAP Rate Court
8 Proceedings in the New York Federal Court Systems,
9 pertaining to commercial broadcast networks, to
10 commercial local television stations, to commercial
11 cable program services, all as affirmed by the Second
12 Circuit; that is as to that standard.

13 I would cite you, just by illustration,
14 the U.S. v Ascap, the application of Showtime and the
15 Movie Channel, Inc., which was the first such
16 proceeding tried to completion, and then appealed and
17 affirmed by a Panel in an opinion written by, then,
18 Chief Judge Newman, an opinion appearing and reported
19 at 912F576.

20 Notably, and I'd like to come back to this
21 in a few moments, the recently concluded Satellite
22 Carrier proceeding, compulsory license proceeding,

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1 entailed precisely the same inquiry. They are under
2 section 119, prescription was that the Panel ascertain
3 "The fair market value of the rights involved." And
4 we submit that this Proceeding entails exactly the
5 same inquiry.

6 So the central issue, then, distills down
7 to what benchmarks one ideally looks to in best
8 approximating the value which a freely competitive
9 market would place on the music performances made by
10 non-commercial educational broadcasters.

11 And again, we have more than ample
12 guidance from prior practice, and prior reported
13 decisions, as to what guideposts this Panel should
14 look to.

15 I submit that one must begin with the
16 recognition that we are not dealing in a freely
17 competitive market for the acquisition of music
18 performing rights.

19 From the outset of ASCAP's and BMI's
20 existence, these organizations have been viewed as
21 fraught with antitrust risks, owing to the great
22 concentration of market power they enjoy by

1 aggregating, under one licensing roof, the licensing
2 authority of tens of thousands of otherwise
3 competitive composers and music publishers, and
4 licensing in combination literally millions of
5 copyright works.

6 That is why these organizations, for more
7 than 50 years, have been the subject, first, of
8 Government antitrust lawsuits, criminal and civil, and
9 outgrowths of those being Federal Government antitrust
10 consent decrees governing substantial aspects of their
11 operations, and notably putting constraints on the
12 manner in which they can license, and creating,
13 outside of the Section 118 context, Rate Court
14 mechanisms to govern the fees which users are paid in
15 the event of disagreement.

16 Those decrees were not created for the
17 benefit of ASCAP and BMI in their relationship with
18 users, they were created in relevant part, to protect
19 the interests of the users dealing with those
20 organizations.

21 As Chief Judge Newman said, in the
22 Showtime opinion, in the Second Circuit, the music

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1 performing rights marketplace is not freely
2 competitive, ASCAP -- which was the only party before
3 the Court -- enjoyed significant market power. And we
4 submit to the Panel the essential facts as to BMI are
5 no different.

6 And that there is an absence of
7 competition between songs, on price, of the type one
8 would expect to find in a freely competitive market
9 place. That is the Second Circuit viewing the
10 marketplace in which music performing rights are
11 licensed.

12 How then, taking account of that
13 foregoing, do you go about the assigned task of
14 approximating the rates which a freely competitive
15 market would yield?

16 Here, again, I submit we don't have to
17 enter into uncharted waters. In searching for the
18 answer, the New York Federal Rate Courts, as to ASCAP,
19 there has been no Federal Rate Court experience, yet,
20 as to BMI; because, as you may be aware, BMI was
21 subjected to its own Rate Court only as of 1994,
22 relatively recently. There is no jurisprudence there.

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1 There is quite a bit of jurisprudence
2 beginning in the mid to late 1980s, and forward,
3 dealing with broadcast and cable television, as to
4 ASCAP.

5 And in that developed jurisprudence, as to
6 ASCAP, the Federal Rate Courts have indicated that in
7 the absence of significant evidence of actual
8 marketplace transactions between individual composers
9 and users, the thing that Judge Newman said was
10 lacking, fundamentally, in this marketplace; that the
11 next best starting point for analysis is the prior
12 agreements reached between the parties themselves.
13 Prior agreements reached between the parties
14 themselves, not a wild concept.

15 This approach, namely, that that is a
16 starting point, logically, will come as no surprise to
17 ASCAP, which has been its leading proponent in these
18 Rate Court cases.

19 Here is what ASCAP said in its post-trial
20 brief, in the ABC/CBS Rate Court case in 1992: "There
21 is no better measure of a reasonable fee for a license
22 to broadcast ASCAP music in network television --"

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1 that is what was there involved, commercial broadcast
2 network television "-- than the fees that the networks
3 themselves have agreed to pay in voluntary arm's
4 length agreements with ASCAP."

5 In the same year, in a proceeding
6 involving the so-called background music industries
7 fee payments to ASCAP, an industry which, not unlike
8 our clients, have had a long history of voluntary
9 agreements, this is what Judge Conner, who is the
10 decree supervising Judge had to say, in characterizing
11 ASCAP's Court position: "ASCAP stresses the
12 historical basis for the previous license agreements,
13 intending that for both firms "-- meaning both prior
14 license terms, each of them being five years "--
15 ASCAP's fees for the music service industry were the
16 product of good-faith negotiations, conducted at arm's
17 length by sophisticated business people."

18 "ASCAP further asserts that the fees to
19 which the parties agreed for a decade, cannot suddenly
20 become unreasonable, and accordingly, ASCAP urges this
21 Court to apply the presumption in favor of the
22 reasonableness of their prior agreement."

1 Now the similar effect, the Panel that
2 decided the Satellite Carrier proceeding observed that
3 fair market value is best approximated by the rate
4 that would be negotiated in a free market "between a
5 willing buyer and a willing seller". Page 17 of the
6 Slope opinion of the Satellite Carrier Proceeding.

7 Only in the absence, in that proceeding,
8 of just such a benchmark, the lack there of a
9 negotiating history between the broadcasting parties
10 and the Satellite Carriers, since there had been a
11 prior statutory rate, which was then subject to the
12 proceeding, there had never been face-to-face
13 negotiations, only in the absence of such a negotiated
14 benchmark between the parties, did the Panel find it
15 necessary to reach out to next-best analogies, namely
16 cable suppliers relationships, and to economic
17 modeling.

18 Clearly, as I read what the Panel was
19 doing, a clear less-favorable second choice, had there
20 been market data, had there been prior negotiated
21 agreements between the parties, it seems evident, as
22 I read the Panel's decision, that those were the prima

1 facie, been the starting point, and an important
2 starting point for the analysis.

3 And it is finally noteworthy, looking at
4 the section we are involved with, in this proceeding,
5 Section 118 itself, that that section explicitly sets
6 forth one and only one benchmark that is expressly
7 indicated as a guide to this Panel.

8 And that is, look to prior voluntary
9 agreements reached between non-commercial educational
10 broadcasters, and as relevant here, the Performing
11 Rights Societies. It is the one explicit suggested
12 guidepost for this Panel, in the express language of
13 118 itself.

14 Now, I need to make one important caveat
15 at this juncture, before moving on. If there is a
16 distortion, if there is a distortion in looking at
17 prior voluntary agreements, that distortion, the
18 developed law tells us, is one which actually favors
19 the Performing Rights Organizations.

20 As the Second Circuit, in the Showtime
21 proceeding concluded, the significant power these
22 societies enjoy can result in a user actually

1 overpaying in a voluntary arm's length transaction,
2 given the limited and costly options that user would
3 face in resisting the fees demanded.

4 And that, in fact, was found factually, in
5 the record in the Showtime proceeding.

6 I would submit, looking at this very
7 proceeding, it is relatively easy to envisage why
8 National Public Radio, and Public Broadcasting
9 Service, might agree to an arm's length negotiated
10 result, in prior dealings, to avoid the cost of
11 engaging in the kind of proceeding we are here
12 engaged, having to cross examine 21 witnesses, no
13 fewer than six experts from the other side, over a
14 several month period.

15 Now, to be sure, a proper analysis entails
16 more than looking simply at prior agreements that were
17 reached. Again, the Rate Court experience informs the
18 analysis, and indicates, quite properly, that it is
19 necessary to look at changed circumstances.

20 What circumstances, if any, warrant upward
21 or downward adjustment of previously negotiated arm's
22 length fees?

1 Fundamentally, we would submit, this Panel
2 must examine whether the economic and music use
3 circumstances present at the time of the most recent
4 license agreements, those that ran from 1993 through
5 1997, have changed so as to warrant judicial
6 adjustment of the parties' own prior views of optimal
7 fees.

8 What has changed, what is different from
9 the last time the parties, taking account of all
10 relevant economic and music use circumstances, reached
11 terms with one another?

12 PBS and NPR's case adopts precisely this
13 framework for analysis. ASCAP and BMI run from that
14 framework of analysis. The most salient fact that
15 will be presented to this panel, is that in 20 years
16 of operation, under Section 118, since 1978, the
17 effective date of the Copyright Act of 1976, until
18 now, there has been but one CARP type proceeding.

19 That was, in fact, the CRT proceeding in
20 1978 involving ASCAP, BMI, or SESAC licenses. That
21 one was in 1978, involving solely ASCAP.

22 Over that 20 year period there have been

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1 four successive five year agreements reached with BMI,
2 four successive five year agreements reached with
3 SESAC, and since that sole 1978 CRT experience with
4 ASCAP, there have been three successive five year
5 agreements reached with ASCAP.

6 It is terribly important to understand
7 that no compulsion attended those many years of
8 agreements. In each case, ASCAP, BMI, SESAC, or the
9 Public Broadcasters, for that matter, could have
10 resorted to the Panel's predecessor, to the CRT, had
11 the terms reached at the bargaining table not been
12 acceptable.

13 Instead the parties did what parties do.
14 They staked out their positions, they bargained hard,
15 and they reached agreement. These are half a billion
16 dollar licensing organizations who appear before you,
17 with enormous resources, bringing hundreds, hundreds
18 of litigations per year. That is no exaggeration,
19 when it suits them. Entering into numerous Rate Court
20 challenges when they feel it appropriate; bringing to
21 bear enormous resources in this very proceeding.

22 There can really be no serious question

1 that ASCAP and BMI took a dive in these negotiations,
2 that they voluntarily agreed to preposterously
3 unreasonable fees, so as to avoid the cost for what is
4 for them, frankly, a cost of doing business.
5 Litigation is part and parcel of the licensing premise
6 of these organizations.

7 Without litigation, in their view, they
8 die. Without litigation, in their view, proper
9 enforcement of the Copyright Laws is unavailing. They
10 know how to find the courts, they know how to find
11 arbitration tribunals, they've been before other CRTs,
12 and other CARPS, they knew where to find the CRT in
13 this industry, they decided, properly, that the deals
14 that they were willing to strike over the last twenty
15 years were sufficiently "reasonable" to enter into
16 them.

17 Let's look at the result of this 20 year
18 experience. These are combined license fees, combined
19 ASCAP and BMI license fees. The 1978 to 1993 number
20 incorporates the fee award of the Copyright Royalty
21 Tribunal Proceeding, adverse to ASCAP.

22 So this is a combined fee reflecting CRT

1 ruling itself, and the voluntarily arrived at BMI
2 agreement with our clients. All the ensuing five year
3 agreements -- the ensuing five year agreements were
4 the product of separately negotiated license
5 agreements with both parties, 14.375, from 1983 to
6 1987, 16.375 million for 1988 through 1992, and the
7 just expired negotiated agreements of 18.875 million
8 dollars for 1993 through 1997.

9 I should note that while these agreements
10 were, in fact, separately negotiated, there is an
11 extraordinary symmetry reflected in these negotiated
12 fees, as follows.

13 If you were to examine the relative fees
14 paid to ASCAP and BMI during the last license term, as
15 against what the parties discussed at the bargaining
16 table, and understood to be their respective "market
17 shares", that is, what share of the total ASCAP/BMI
18 pie was being used by our clients.

19 And if you then divided 18.875 by 100, and
20 assigned, therefore, 188,000 dollars per point of
21 music used, per percentage point of music used, and
22 you extrapolated it out to the approximately 21

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1 percent market share, which BMI had, and the
2 approximately 79 percent market share ASCAP had, by
3 gosh, you come within a tiny fraction of the reality
4 of the actual fees agreed to.

5 They aligned each other almost precisely
6 in relation to the then best data, certainly held by
7 our client, and communicated at the bargaining
8 sessions, as to the respective market shares of the
9 parties.

10 What better evidence, we would submit,
11 that the marketplace was working, than within a hair's
12 breadth, a hair's width, the 18.875 million dollars
13 disaggregated, to look at the fees paid to each of the
14 societies over this five year term, aligned virtually
15 perfectly in relation to their respective market use
16 shares.

17 So we begin with the premise, from our
18 view of the case, that these -- and particularly this
19 last five-year agreement, is the correct starting
20 point for analysis. We don't run from our history, we
21 say the history, by definition, reflects the parties'
22 best sense of the value of the services and the rights

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1 offered. We say we go from there.

2 And we begin with that analysis, and we
3 then ask what we think is the next relevant question,
4 what has changed?

5 Now, it is obviously relevant to look at
6 music use, in considering what has changed. And we
7 did look at that, and you will see in Dr. Jaffe's
8 written testimony, and when he appears before Your
9 Honors, he will testify further, what we found by way
10 of answer to that question.

11 You will hear some, in this case, some
12 concepts that perhaps are new to you. One is the
13 concept of a cue. What is a cue? A cue, effectively,
14 is just a measurement of a needle drop, or more, of
15 music. It does not measure duration, it measures the
16 event of a usage. It can be a second, it can be five
17 minutes, that is what a music cue is.

18 And you will hear testimony as to cues,
19 and you will hear testimony as to minutes, and there
20 may or may not be some debate about which is the
21 better form of measurement, but everybody talks about
22 cues, and everybody talks about minutes, so we looked

1 at the phenomenon of both.

2 And what did we find looking at the feed
3 of PBS programming, the feed of PBS programming out to
4 its affiliates, what we found was, measuring ASCAP and
5 BMI cues combined, over the period 1992 through 1996,
6 and this green line is a trend line derived by our
7 economists, you see basically a flat to slightly
8 declining number of cues. That is the numbers of
9 musical compositions performed on PBS feed of ASCAP
10 and BMI music, combined, shows certainly no
11 discernible increase over that period of time, and
12 arguably a slight decrease.

13 Looking at that same feed, in terms of
14 minutes, so literally holding a stop-watch,
15 figuratively speaking, to the amount and duration of
16 the music fed, what do we find? We find a slight
17 difference.

18 As Dr. Jaffe reports, there is a slight
19 increase, and you see the trend line slightly moves up
20 between 1992 and 1996, in terms of combined minutes of
21 ASCAP and BMI music over the five year period. It is
22 about 6.6 percent, if you were to compare 1996 to

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1 1992, there is a 6.6 percent increase between those
2 two years.

3 But, as Dr. Jaffe also examines, if you
4 dig one level deeper, to try to understand the basis
5 for that change, and what is driving that change in
6 minutes, what you find is we broke out three
7 categories of commonly examined music, so-called
8 background music, feature/concert music, and theme
9 music, the three primary categories which are tracked
10 by one or both of ASCAP and BMI.

11 And what we find is that most or all of
12 the increase is driven by increase in so-called
13 background music. That is the line that is forcing
14 upward a little bit. And notably what you find is
15 almost a 20 percent decrease in feature music
16 performances.

17 Now, as you will learn later on in the
18 testimony, our friends at ASCAP give significantly
19 greater weight, when they distribute music license
20 income, to feature performances of music, than they do
21 to either background or theme.

22 And as Dr. Jaffe will testify, it seems to

1 us relevant to take into account, when you try to
2 discern what is happening with music use, and the
3 value of music use, take account of these components
4 in attempting to asses whether over this past five
5 year period there really have or have not been
6 significant changes.

7 And Dr. Jaffe's conclusion is, when you
8 look both at the music cues, which is relatively flat,
9 and you look at music minutes, albeit with a slight
10 increase, but then understand that there are
11 offsetting trends, feature music, the most important,
12 is down significantly; background up significantly.

13 It is Dr. Jaffe's conclusion that over the
14 past five years there simply isn't significant change,
15 significant change, up or down, in the music use of
16 our clients, in respect to ASCAP and BMI.

17 Now, as to radio, it is a little harder.
18 Much harder to track radio music use, and you are not
19 going to find significantly would submit data on radio
20 use from any of the parties in terms of actual
21 measurement of music use.

22 We used what we believe is the best next

1 proxy. We looked at programming formats. And Dr.
2 Jaffe's testimony, as you will see, examines what
3 happened in the various radio program formats that
4 predominate in public radio.

5 And his conclusion was that when you look
6 at so-called -- the so-called music base of public
7 radio, programs whose format involves a predominant
8 use of music, that the trend is slightly down between
9 1992 and 1996, in terms of the percentage of broadcast
10 hours, percentage of broadcast hours accounted for by
11 so-called music based programming formats.

12 I should point out that fully half of what
13 we term the music base, consists of program formats
14 that feature predominantly classical music. And if
15 you've had a chance to read BMI's papers, and that of
16 certain of its experts you will see that -- and
17 certain of ASCAP's experts, you will see that
18 classical music is predominantly music in the public
19 domain, it is not music subject to license by either
20 of these societies.

21 And so one shouldn't over-emphasize the
22 fact that even as of 1996, 65 percent, approximately,

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1 of our program hours, broadcast hours, are of a format
2 of music based programming.

3 The corollary to this chart, we didn't put
4 it in chart form, is the fact that there has been a
5 slight increase, over the same period of time, in news
6 and information format radio programming, news and
7 information format radio programming.

8 But it is Dr. Jaffe's conclusion that,
9 again, the trends and tendencies are so slight,
10 overall, as to radio, that no reasonable conclusion of
11 increase or decrease is properly drawn.

12 And so, overall, Dr. Jaffe and we
13 conclude, with respect to changes in music use over
14 the past five years, not very much of note has
15 happened one way or the other.

16 We certainly think there is a slight
17 overall tendency of decline in the music data.
18 Certainly not any overall tendency of increase in the
19 data.

20 And for that reason, in terms of looking
21 at that factor, for purposes of adjusting the 18.875,
22 it is a non-factor.

1 Now, I need to point out here that ASCAP's
2 case presents no data, zero data, showing either
3 overall use of ASCAP/BMI music combined, or changes,
4 over any period of time, let alone the last five
5 years.

6 All that ASCAP shows is changes,
7 purportedly, in its own music use, ASCAP credits, its
8 own music. It makes no effort, as we did, and as BMI
9 does, to look at the whole pie of change.

10 And that is critically important, we would
11 submit to you.

12 BMI's data is similarly limited to
13 television, BMI's music data. Neither they nor we
14 purported to examine literally needle drops of music,
15 it is simply too hard on radio to do it accurately.

16 They, too, used in essence, television as
17 a proxy, which we think is right. And interestingly,
18 BMI's data, overall, is fundamentally, fundamentally
19 in line with our own. They, too, show an increase,
20 although a slightly higher increase on their analysis,
21 in total ASCAP/BMI combined minutes of music use by
22 our clients.

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1 And we will, on cross examination, perhaps
2 see whose data holds up better. But they show, in
3 minutes, a slight increase, and a slightly higher
4 increase than a 6.6 percent that we found. But their
5 analysis, we submit, is much more monochromatic than
6 ours.

7 They don't look at cues, at all, they
8 don't look at numbers of uses, as we do, cues; they
9 don't examine that. And, importantly, they don't
10 examine the basis for the increase in minutes. There
11 is no comparable analysis, from BMI, of the
12 subcomponents in background theme and feature uses
13 that, again, gives more texture and feeling for, and
14 meaning to, what is driving that increase.

15 Now, we didn't stop looking at what has
16 changed in terms of music use, and determining what
17 should move from 18.875; although that clearly is a
18 critical, if not the most critical component.

19 Dr. Jaffe also examined the changes that
20 have occurred in total system programming, and
21 production costs, for public radio and television, for
22 the period 1992 through 1996. Why examine that data?

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1 The reason is because music rights are
2 only one of a plethora of costs of doing business for
3 public radio and television. And while it is
4 certainly reasonable that ASCAP's and BMI's members
5 and affiliates, respectively, not lose ground over
6 time in relation to the compensation being received by
7 other contributors to programming, neither we submit,
8 is it appropriate, absent to showing that music's
9 overall contribution to the programming has increased,
10 that they should be over-compensated.

11 They should stay roughly in relation to
12 where they are. If the music use has not dramatically
13 changed, and the data from everyone, we submit,
14 suggests it hasn't; then unless lots of things are
15 happening to the good, with other creative inputs for
16 programming, why should music, relatively, be over-
17 compensated, beyond where these prior agreements
18 placed the societies lo these 20 years.

19 And what Dr. Jaffe's analysis discloses is
20 that when you look at system-wide, that is radio and
21 television, every broadcast hour, not just PBS fee,
22 not just NPR fee, system-wide, what every local

1 television and local radio station has spent on
2 programming expenditures between 1992 and 1996, you
3 see what is depicted in this next chart, namely a
4 growth of just 4.5 percent over that period of time,
5 from combined 801 million dollars in 1992, to 837
6 million dollars in 1996.

7 So in an environment in which, A, music
8 use stayed essentially constant; and B, overall
9 programming expenditures grew by simply 4.5 percent,
10 Dr. Jaffe concludes that overall music license fees
11 should be increased to the societies, at most, at
12 most, by an equivalent amount, bumping the 18.875
13 million dollars for 1993 to 1997, at most, to 19.8
14 million dollars, which is the combined fee proposal
15 that PBS and NPR for 1998 through 2002. Our case is
16 as simple as that.

17 I want to talk a little bit about ASCAP
18 and BMI case. Astonishingly, ASCAP and BMI, on these
19 facts, seek nearly a 300 percent increase, to a
20 combined 74.78 million dollars, over the same five
21 year period.

22 Neither organization is shy. ASCAP, which

1 received 14.95 million dollars over the 1992 to '96
2 period, seeks 40.305 million dollars here. That is
3 based, by the way, on the proposed amended Boyle
4 submission, 170 percent increase, 170 percent increase
5 from the prior period.

6 BMI, which received 3.925 million dollars
7 over the same period, seeks 34.75 million dollars
8 here, a 778 percent increase.

9 Thus, in an environment in which music use
10 has remained generally constant, in which programming
11 expenditures to all of the creative inputs for our
12 clients have grown by a meager 4 and a half percent,
13 rather than adjusting fees in relation to those
14 benchmarks, as we proposed, ASCAP and BMI shoot for
15 the moon.

16 And in our last chart we simply, on an
17 indexing of one, to measure radiants of growth for
18 each of the elements here that I've coursed through,
19 we simply plot to show, I think quite dramatically,
20 the directions of growth, and suggested growth, based
21 on music use, based on program expenditures, the
22 dotted black line reflects the effects of the PBS and

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1 PR fee proposal, and they are virtually increase up
2 here, the dotted red line, is the impact of the ASCAP
3 and BMI fee proposal.

4 ASCAP and BMI do everything they can to
5 ignore the implications of the prior fee experience.
6 ASCAP, which in every other form, involving every
7 other broadcaster, has argued that history is the best
8 guide, and here conclusively says, no it isn't, but
9 they don't provide any reason for that view, none.

10 BMI, in turn, blames ASCAP. They say, we
11 only agreed to low fees because they did. A half a
12 billion dollar licensing organization coming here,
13 seriously, and arguing, we only agreed to it because
14 they did.

15 Now, in fairness, BMI does make one
16 additional argument that may have merit. BMI claims
17 that its share of the overall pie has markedly
18 increased since the last license term.

19 Now, maybe so, but there has to be a flip
20 side to this fact, if it is so. By definition, if
21 BMI's share of a constant pie has grown, ASCAP's
22 share, correspondingly, has to have decreased.

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1 We don't know the facts on that score;
2 that is, as between ASCAP and BMI, who has what share,
3 and how much it has changed. Because from our
4 standpoint, this is the relevant number, system-wide,
5 to us. We want to look at what has changed, overall,
6 in our patterns of music use.

7 We will continue to urge this Panel that
8 analytically the proper and optimal way to view the
9 issues is to determine what has changed in our overall
10 use, leaving an important, to the societies, but less
11 important to us, subsidiary issue of, once you
12 determine by how much, if at all, the pie should grow,
13 how they should divide it up between themselves.

14 Now, both ASCAP and BMI focus extensively
15 on a comparison to commercial radio and television.
16 To draw their analogy, I submit, they grotesquely
17 distort the nature and mission of public radio and
18 television, as well as their very different economics.

19 We will address those issues in much
20 greater detail, through both our affirmative case
21 witnesses, as well as during our cross examinations of
22 the other sides' witnesses.

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1 I do want to make, simply, three or four
2 points, however.

3 First, as you listen to and read the
4 testimony submitted by ASCAP and BMI, witnesses such
5 as Mr. Day and Mr. Ledbetter, they cite to what they
6 call sea changes in public television, in its
7 inexorable move to become a mirror of, a clone of,
8 allegedly, commercial broadcasting.

9 Examine carefully those submissions,
10 because even if one were to accept some of them at
11 face value, and we will urge that you shouldn't, for
12 most, the changes discussed are changes which have
13 been occurring all the way back to and preceding 1978.

14 In other words, to the extent the market
15 reflects the phenomena which ASCAP and BMI suggests,
16 those phenomena were well in evidence, were at the
17 bargaining table, were implicitly part of the
18 understandings and dealings of the parties, lo these
19 many prior license agreements.

20 None of these phenomena, I would suggest,
21 sprung to life in the last five years, let alone
22 warranting respective 170, and 770 percent rate

1 increases.

2 Second, that we are no different than
3 commercial broadcaster's premise, ignores the very
4 statutory provision that brings us here. Section 118,
5 itself, is eloquent testimony to the difference
6 between commercial and non-commercial broadcasters.

7 ASCAP and BMI strenuously opposed
8 enactment of Section 118, making substantially the
9 same arguments to the Congress that they made here.

10 Congress, nevertheless, singled out non-
11 commercial broadcasters for special treatment. In
12 recognition that, in the words of the House report,
13 "Encouragement and support of non-commercial
14 broadcasting is in the public interest."

15 The ASCAP BMI argument here is very
16 reminiscent of an argument which ASCAP made in 1990,
17 in the Second Circuit, in one of the Rate Court cases,
18 in the ASCAP case.

19 They argued that because ASCAP had not
20 been formally condemned under the antitrust laws,
21 merely subjected to Rate Court control, that the Court
22 there should give complete deference to ASCAP's

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1 marketplace decisions about what levels of license
2 fees were appropriate.

3 There the issue was, what was the
4 appropriate level of license fee to a commercial cable
5 program service, Showtime and the Movie Channel.

6 The Second Circuit would have none of it.
7 The Second Circuit said "The disinfectant --" meaning
8 the Rate Court "-- need not be a placebo."

9 So, too, this CARP, implementing the
10 intent of Section 118, should not effectively be
11 nullified by the sudden ASCAP BMI realization that, oh
12 my God, we've been grossly disadvantaged all these
13 years, by receiving fees that reflect the realities of
14 this, as opposed to the commercial marketplace.

15 Third point. The 1978 CRT opinion
16 rejected, rejected the very premise that drives the
17 ASCAP BMI positions here. ASCAP there made the very
18 same arguments as to why commercial parity was
19 appropriate. That is back here, in 1978. They made
20 it, and it was rejected.

21 The CRT ruling, instead, reflects the
22 profound differences between commercial and non-

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1 commercial broadcasting. And it is most telling, we
2 submit, that whether or not ASCAP agreed with those
3 rulings back then, for 15 years thereafter, they sat
4 at the bargaining table, took the levels of increases
5 that they and PBS and NPR agreed to, and until now,
6 happily took them without resort to this kind of
7 Tribunal.

8 The fact is that non-commercial education
9 broadcast stations in the United States operate in a
10 manner that is dramatically different from commercial
11 broadcasters, as is logically suggested by the very
12 fact that they are non-commercial in nature.

13 The differences, the evidence will show,
14 are legion. One, revenues. Non-commercial
15 broadcasting revenue sources are indisputably
16 different from the commercial sector. Our diverse
17 revenue sources include the federal government, state
18 and local government, colleges and universities,
19 voluntary contributions from the public at large,
20 auctions, foundations, and businesses.

21 And while you are hearing an extraordinary
22 amount about businesses, the fact is that business

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1 sponsors account only for about 15 percent of the
2 total income stream of public broadcasting.

3 In contrast, commercial broadcasters
4 generate virtually all of their revenue from the sale
5 of advertising to commercial sponsors.

6 Now, there are at least two concepts
7 interweaved with the revenue thought that I would urge
8 the Panel to keep in mind. The first concept is that
9 the very suggestion that there is or should be an
10 inexorable link between the "revenues earned" by a
11 broadcasting entity, and the music license fees it
12 pays, is at best a tenuous and dubious one.

13 That very premise has already been
14 explicitly rejected in the New York Federal Rate
15 Courts. In the Buffalo Broadcasting case, decided by
16 Magistrate Judge Dolliner in 1993, he said there is no
17 inexorable link in the television sphere between
18 revenues earned and the value of music performing
19 rights.

20 Sure, there may be some correlation, but
21 it is surely not a direct correlation.

22 And again, the CRT, itself, declined to

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1 adopt a revenue based formula to determine license
2 fees, as to ASCAP, over ASCAP's objection, in 1978.

3 Secondly, the dubiousness of this exercise
4 of doing a revenue comparison is only heightened when
5 the effort is made, as here, to make an apples to
6 apples comparison between an advertising dollar paid
7 to a for-profit radio or television broadcasting
8 entity, and say a tax dollar from the State of
9 Nebraska, or a dollar from a young contributor to PBS'
10 piggy bank, made to these guys.

11 To say that dollar for dollar they carry
12 equal weight in the music performing rights licensing
13 equation, we submit, is simply incorrect, for the
14 reasons that Dr. Jaffe will describe in great detail.

15 Bear in mind one very salient fact. When
16 CBS pays enormous sums of money to carry the Olympic
17 games, it is doing so in the broad expectation, that
18 it will be able to recoup, and then some, those costs
19 through the very significant 30 second stop rates that
20 it will charge advertisers.

21 When it incurs those costs, it certainly,
22 as a for-profit enterprise, expects to do so, not as

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1 a loss-leader, hopefully for CBS, but to make money
2 from it. There is, at least, a realistic expectation
3 that producers will -- that advertisers will pay
4 hugely significant sums of money allowing CBS to
5 recoup all, or significant amount to all of its
6 investment.

7 There is no similar funding mechanism that
8 our clients have. If ASCAP were awarded 170 percent
9 increase, if BMI were awarded a 770 percent increase,
10 I don't think that the appropriation for the
11 Corporation for Public Broadcasting is likely to
12 increase by a commensurate amount, and certainly not
13 automatically, to account for that fact.

14 I don't think voluntary contributions can
15 be guaranteed to be increased to account for that
16 fact. Nor going down the line, state or local funding
17 or anything else. It is a non-profit enterprise. The
18 very economics of this business are truly different.

19 And an incremental dollar of expense
20 incurred by our clients, as you will hear in great,
21 great detail from our witnesses, is a dollar which
22 tightens the belt, and which causes them to scrounge

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1 around and look for ways to operate in an ever more
2 difficult environment.

3 Public broadcasters operate under
4 extraordinarily tight fiscal constraints. And they do
5 so in a political fishbowl. In any given year the
6 amount of federal support is in doubt. Unlike
7 commercial TV, as I've indicated, they can't count on
8 passing on new higher operating expenses.

9 As ASCAP's own expert witness put it
10 "Public television leads a hand to mouth to screen
11 existence", is exactly right.

12 The same non-commercial broadcasters are
13 subject to FCC regulations, unlike the commercial
14 sector. And most notable, perhaps, for our purposes,
15 are the constraints on commercial messages. You are
16 going to hear an enormous amount, I suspect, mostly
17 from the other side, on that subject.

18 But the fact is, that the limitations on
19 the nature, content, placement, substance, duration,
20 everything, is so totally and fundamentally different
21 in the commercial sector, that to suggest otherwise is
22 simply, simply absurd.

1 Ownership. Non-commercial broadcast
2 stations differ dramatically in their terms of
3 ownership. They are licensed to state governments,
4 municipalities, colleges and universities, and
5 communities. 211 of 356 public television stations
6 are operated by Universities, or state education
7 agencies.

8 Finally, our programming fare. No
9 commercial educational broadcast -- pardon, non-
10 commercial educational broadcasting programming is
11 fundamentally different from that of its commercial
12 counterparts, due to its educational and non-violent
13 focus.

14 It is absolutely a caricature to suggest
15 that the emphasis of PBS, NPR, and their member
16 stations mirrors that of the commercial sector.

17 Tell the 29 million students, and 70,000
18 schools served by public television, that public
19 broadcasting is only a clone of commercial television.
20 That the seven hours, on average, per day, of
21 educational offerings of our clients, are simply
22 available on the commercial counterparts.

1 Tell those millions of parents whose pre-
2 school children have been introduced to reading and
3 education by Sesame Street, Mr. Roger's Neighborhood,
4 and similar programming, that public broadcasting is
5 no different from commercial television.

6 Tell the american public that in-depth
7 national news coverage presented by the News Hour with
8 Jim Lehrer, local and regional news coverage, such as
9 WNET, the New Jersey Network News, or Maryland Public
10 Television's News Night Maryland, that searing
11 historical documentaries, like Ken Burns' Civil War
12 Series, that public affairs and interview programs,
13 such as Washington Week in Review, and Charlie Rose,
14 that documentary programs like Front Line, that how-to
15 programs such as This Old House and Home Time are just
16 clones of commercial offerings.

17 Tell the public that thrives on public
18 television's science, nature, and exploration
19 programming, such as Nova, that public broadcasting
20 simply mirrors its commercial counterparts.

21 And as on the radio side, tell the people
22 listening in their cars, in their offices, in their

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1 homes, to News Magazines, such as Morning Edition, and
2 All Things Considered, to dramatic readings of
3 contemporary and classic short stories, and other
4 literary works featured in Selected Shorts and NPR
5 Play House, to the zany and fresh Car Talk, to
6 Garrison Kiellor's Prairie Home Companion, to hours of
7 uninterrupted classical music; tell all of those folks
8 that they simply have to flip over to the commercial
9 dial and replicate it, it is simply not true.

10 In closing, I apologize for taking so
11 long; I cannot help but note a delicious irony in the
12 ASCAP and BMI cases. ASCAP and BMI embrace, embrace
13 warmly, the agreements reached with the commercial
14 broadcasting counterparts, as arm's length, hard
15 fought, market approximating, and seek to engraft
16 their economic indicators on this medium.

17 Yet those very arguments for reliance on
18 previously negotiated agreements cry out, not for
19 reaching into a vastly different medium, whose
20 economics, whose mission, whose programming, whose
21 governmental oversight, whose copyright law treatment,
22 and everything else are so different, for precedent;

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1 but instead for looking no further than home, right
2 here, for the precedents that should guide us.

3 Thank you very much.

4 CHAIRMAN GRIFFITH: Thank you.

5 MR. SCHAEFFER: I wonder if we could take
6 a short break. And also I have a second question.
7 Would the Arbitrators allow me to be seated while I
8 address them? It is easier, for me, I have trouble
9 seeing my notes.

10 CHAIRMAN GRIFFITH: Indeed so, yes. Your
11 motion in both instances is granted.

12 MR. SCHAEFFER: I hope that augurs success
13 for me.

14 (Whereupon, the above-entitled matter went
15 off the record at 10:55 a.m. and went back on the
16 record at 11:09 p.m.)

17 CHAIRMAN GRIFFITH: We received a
18 stipulation at closed portions of the Hearing, which
19 I think were faxed in last night to the Copyright
20 Office, here.

21 We are certainly willing to close the
22 Hearings if and when you request us to do so. For the

1 purposes of entering this, however, I'm going to ask
2 that -- I have what appears to be an original. We
3 have the others which are signed by Mr. Rich and Mr.
4 Salzman. But if Counsel would sign the original, we
5 can go ahead and just enter it.

6 (Counsel complies.)

7 CHAIRMAN GRIFFITH: Thank you, very much.
8 Ready, Mr. Schaeffer?

9 MR. SCHAEFFER: Yes, thank you.

10 My name is Philip Schaeffer, I'm from
11 White and Case, I'm one of the lawyers for ASCAP, and
12 I will do ASCAP's opening with the permission of the
13 arbitrators.

14 My opening, really, will be in two parts.
15 The first part I will try and set forth, as best I
16 can, ASCAP's position in this arbitration. In setting
17 forth that position I do not purport that everything
18 I say on behalf of ASCAP is going to be conceded by
19 anyone else, whether PBS, NPR, or BMI.

20 However, I believe, that very much, very
21 very much do I believe, that in this proceeding there
22 are relatively few disputed issues of fact. That the

1 only real disputes between the parties is how we
2 should look at the facts. And I will address that a
3 little bit as we go along. But I think that will be
4 one of the common threads of ASCAP's position in this
5 case.

6 The second portion of my opening will
7 address what is more conventional for me in addressing
8 courts, I will attempt, very briefly, to tell you what
9 proof we have submitted to the Arbitrators, and what
10 proof we will submit in buttressing those positions
11 which I will here set forth.

12 In a real sense I believe that the proof
13 that is already before you is such that in a more
14 conventional proceeding, a Motion for Summary Judgment
15 could be made on all sides, and the Arbitrators would
16 have an enormous burden of wading through the
17 undisputed material.

18 But with the assistance of memoranda and
19 briefs, which I hope we will do at the conclusion of
20 this case, anyway, we could chart the paths we see as
21 leading to the proper result.

22 I don't think that there are any serious

1 issues of credibility in this case. There is nobody
2 here who, at least I can see, would be under any
3 circumstances committing a conscious lie, or
4 falsehood. There is nothing like that, this isn't
5 that kind of case, at all. The dispute is essentially
6 one of viewpoint.

7 The Proceedings are also perhaps unique in
8 that all four parties are all laudatory. Nobody here
9 is a bad guy. National Public Radio is the Agency for
10 some 700 radio stations and performs a valuable public
11 service, so does PBS, which is the representative here
12 for another 300 and some television stations. We have
13 no quarrel with their purpose.

14 And in pointing out how that purpose has
15 changed over the years, we do not mean to criticize,
16 that is not our place. We merely mean to point out
17 the real and salient facts of the situation.

18 Similarly, the two licensing organization,
19 BMI and ASCAP, ASCAP being the one I represent, are
20 also not bad people, they are not anything wicked or
21 evil, and I will address that in a second, as to what
22 the purpose, at least, of ASCAP is.

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1 ASCAP was organized in 1914. Its purpose
2 in being organized was to assure that those
3 individuals who create the music which our society
4 enjoys, would be compensated as they were supposed to
5 be for their use.

6 Section 106 of the Copyright Act, and its
7 predecessors, allows all creators to do one very
8 fundamental thing with respect to their creations.
9 They can say no to its performance. And they can say
10 no for a silly reason, or they can say no for an
11 intelligent reason.

12 They can say no because the performance is
13 going to be, in their opinion, very poor, and will
14 reflect badly on them, or more typically, for the vast
15 number of ASCAP members, the 67,000 who are not
16 millionaires or rich people, they are ordinary
17 songwriters, and guys who are hustling to make a buck,
18 for them, they want to get paid for their effort.

19 It is hard to make money on being a
20 songwriter, it is like being an inventor, too, and it
21 is like anything that involves intellectual property,
22 writers and all those people, they are entitled to be

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1 paid.

2 That is not an unreasonable thing to want
3 in our society. Years ago, before the 1914
4 organization of ASCAP, it was an open -- it was an
5 open scandal, that songs would be played, and music
6 would be performed, and the individual songwriter or
7 publisher had no recourse, he didn't have the
8 resources to run around the country and find out when
9 they were using the product that he had produced.

10 And so the ASCAP people -- I mean, he got
11 paid for some things, but certainly not all of the
12 things that that songwriter should have been paid.
13 And how could he be; what was he going to do, run
14 around to every bar and grill in the United States,
15 every small nightclub, every -- in those days there
16 was no television or radio, but there were plenty of
17 small theaters that were carrying on the creator's
18 music, and he wasn't getting paid for it, as he was
19 supposed to be, under the Copyright Act.

20 So there was nothing terrible in what
21 happened. The ASCAP people like to talk about Victor
22 Herbert, and the history, and all that kind of thing.

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1 But essentially what happened was a kind
2 of trade union, in a way, or kind of collective
3 organization, that got together and tried to figure
4 out a way that the songwriters could be paid, and
5 there could be a tracking down.

6 Now, ASCAP was organized on a very, very
7 clever, very cleverly, by a very brilliant copyright
8 lawyer, who I think those of us who have done any
9 copyright work, give obeisances to Mr. Burkin.

10 In any event, the notion was that ASCAP is
11 an organization, it is an association, it is not a
12 corporation, it is not a partnership, it is an
13 association, an unusual form nowadays, but one of
14 distinguished lineage in New York. It would become
15 the non-exclusive licensee of all writers and
16 publishers of copyrightable music with respect to the
17 non-dramatic performance of that music.

18 Now, those are all -- I'm not a copyright
19 lawyer by trade, I'm a litigator, but I gather all of
20 those things are words of aircraft, and maybe Mr.
21 Kleinberg and Mr. Rich could talk about at some
22 length.

1 But, essentially, as I understand that,
2 non-dramatic performance of music means music which is
3 not used to further the exposition of a play, or a
4 musical, or something along those lines.

5 To conventional people like me, and I
6 probably -- to conventional people like me, that means
7 when somebody sings a song on radio or television, or
8 in a nightclub, and it isn't part of a story, or it
9 isn't part of an opera, or it isn't part of a musical,
10 that is a non-dramatic performance.

11 It is kind of a funny way to frame it, but
12 that is how it is, it is sometimes called the small
13 rights.

14 Non-exclusive, the reason that the
15 licenses were eventually made non-exclusive, was
16 essentially the writer had his choice, or the
17 publisher had his choice. He could use ASCAP
18 essentially as a collection agency, to monitor the
19 performance of the writer's or the publisher's work,
20 and presumably get the money, and figure out a way to
21 get it back to the writer.

22 Or he, himself, if he was able to do it,

1 could go directly to somebody who wanted to perform
2 the rights, and make his own deal. And, indeed, there
3 are undoubtedly, to this day, many ASCAP members,
4 publishers and writers, who have the position, they
5 are such famous writers, they have the connections,
6 that they can do that.

7 Well, ASCAP doesn't have anything to do
8 with that. That is perfectly legitimate, they do it
9 by themselves. ASCAP is the non-exclusive licensee.
10 And I think that is a fairly important point to make.

11 One of the corollaries to that is, this
12 idea that ASCAP is this greedy monster that is
13 grasping all of this money, of course it is not true.
14 What it is, it is a device by which the ordinary guy
15 who used to work on Tin Pan Alley, and now more likely
16 works where I live in the Greenwich Village, or in
17 some other places in the United States, gets a couple
18 of bucks, so that he can at least live.

19 And for many ASCAP members, this is the
20 difference between welfare, probably, and non-welfare;
21 for some ASCAP members it produces a fairly
22 substantial amount of money, but we will undoubtedly

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1 get to that later.

2 There are now 67,000 writers and
3 publishers. ASCAP is affiliated with 58 foreign
4 societies, for whom it does the same kind of work. It
5 also acts as the non-exclusive licensor. Some of the
6 more distinguished writers, some of the great
7 composers of all time, in Europe, we collect the
8 royalties for those folks, also.

9 Obviously ASCAP serves a very, very useful
10 purpose, and so does BMI, which is a competitive
11 organization. It is a good purpose, it does what is
12 right, it realizes, as best it can, the royalties that
13 are due these people under the Copyright Law, and
14 figures out how to distribute the money.

15 ASCAP does other things as well, and it is
16 my client, so if you will give me, indulge me just a
17 minute, it also tries to act on behalf of its writers.
18 It has an insurance program, there is a foundation, it
19 does all kinds of things as a service organization of
20 that kind can, and I suspect BMI does something like
21 that, also.

22 The membership ranges from the most

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1 illustrious. We have -- we are pleased to be the
2 exclusive licensees of the BArtok estate, of Leonard
3 Bernstein's music, of Steven Sondheim, Bruce
4 Springstreen. And we also license all kinds of very,
5 very much minor writers, but writers who are entitled
6 to a reward for their services.

7 Now, we are going to see, or somewhere in
8 the list we gave, exhibit 35, which is this big thick
9 -- which I don't expect anybody is going to read, this
10 big thick membership of ASCAP. And it gives you an
11 idea, that we are ordinary people trying to make a
12 living.

13 Let me move on. In addition to BMI, it is
14 important to mention SESAC, which is the third
15 licensing organization, and which has settled with PBS
16 and NPR, on behalf of their respective stations, and
17 they are not here today for that reason, a situation
18 just BMI and ASCAP who are in dispute. And all we are
19 in dispute about is the amount that the royalties
20 should be.

21 Now, I think, to understand the issues in
22 the proceeding, which involve compulsory licensing of

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1 ASCAP's music repertoire, I think it is essential to
2 explain how we obtain royalties, or license fees,
3 which is what they are properly called, for the 67,000
4 members, and how we distribute it.

5 Payments to ASCAP are made on the basis of
6 licenses to use the music that is already in ASCAP's
7 repertoire. So far, the license fees which have
8 evolved over the last 80-some years, have almost
9 invariably been linked, in major ways, in major
10 degrees, to every revenue earned by the users of the
11 music, that is the common place it is done.

12 It will usually be adjusted, also, for
13 music use, in some cases. Usually the license fee
14 itself is a formula. And in most cases, in most
15 cases, and we will talk a little bit about this for a
16 minute, the fee is for a blanket license.

17 The blanket license gives the licensee the
18 right to use or not use any of the vast amount of
19 music that is in the ASCAP repertoire, the millions of
20 compositions.

21 So that when you sign up, and the Supreme
22 Court of the United States, and the Second Circuit,

1 and the District Court, the Rate Court, which we will
2 talk about in a minute, has said this repeatedly; a
3 blanket has a lot of features to it, it is not just
4 that you do the one song, is that you have the right
5 to pick from this vast group.

6 Secondly you have the convenience that
7 ASCAP has already, for you, provided this vast amount
8 from which you can pick. And so there is a certain
9 administrative convenience that is extremely
10 important, particularly for radio stations and
11 television stations, and the courts have said this
12 repeatedly in justifying the ASCAP blanket fee.

13 And finally it is an insurance policy,
14 because what happens, is you know if you are an ASCAP
15 licensee, and use ASCAP songs, and so many songs are
16 ASCAP, and if you use BMI, if you are a BMI licensee,
17 frankly, and a SESAC licensee too, you are never going
18 to get in copyright trouble.

19 And, as I think everybody on the Panel is
20 well aware, the penalties for copyright infringement
21 are draconian, and they are intended to be so, so this
22 is kind of an insurance policy. So the blanket

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1 license, if properly understood, and the Supreme Court
2 has talked about it, and the Second Circuit has talked
3 about it, is essentially a device by which you get the
4 use of the ASCAP repertoire, and all of these good
5 things about it.

6 Obviously the use of music is an important
7 and critical part of the equation. By and large,
8 though, how are license fees and licenses arranged?
9 They are negotiated. Now, ASCAP doesn't negotiate
10 with every potential user in the United States, of
11 music, that would be impossible, even for an
12 organization that is a collective of 67,000 writers
13 and publishers.

14 What they do is by and large they
15 negotiate with trade groups. And I think BMI does the
16 same thing. There is a radio trade group, there is a
17 local television trade group, there is a cable
18 television trade group, there is a radio trade group.

19 They sit down and they negotiate it, and
20 eventually they come up with a common license. Now,
21 it is not just ASCAP who is acting as a group in these
22 cases, and I don't think it is intended -- I'm sure

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1 Mr. Rich, of all people, doesn't intend to think that
2 ASCAP is going individually to television stations
3 saying, bam, you've got to take our license, it is
4 nothing like that.

5 It is groups, the groups that ASCAP
6 negotiated have a lot more money than ASCAP. For
7 example, when ASCAP sits down with the television
8 networks, when ASCAP sits down with the entire local
9 television industry, I can assure you the entire local
10 television industry dwarfs ASCAP by multiples. So,
11 too, does the radio industry. There are 10,000 radio
12 stations.

13 So, I mean, it is not as if ASCAP is
14 walking around beating up on people.

15 No matter how -- anyway, so what they do,
16 they negotiate, if everything works out they negotiate
17 a license with the industry, and I'll talk in a few
18 minutes about the mechanism that is now used, whereby
19 the license becomes available.

20 No matter how laudatory the motive of an
21 organization like ASCAP, which is essentially an
22 organization that involves collective economic rights,

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1 it is obvious that antitrust laws are implicated, it
2 has to be, because our antitrust laws have made it
3 this way since the early 19th century.

4 Since 1941, ASCAP has operated under a
5 Consent Decree. And I don't think the fact that ASCAP
6 operated -- consented to a Consent Decree in 1941,
7 makes ASCAP some sort of malefactor, or great wealth,
8 or anything like that, for the last 50-odd years, this
9 is the way the music system has worked, and to be
10 honest, there is a lot of virtue for ASCAP in being
11 able to use what I'm going to talk about in a minute
12 is the Rate Court.

13 That decree, a copy of which is in the
14 papers, and we will probably talk a little bit about
15 later in the course of the proceeding, has been
16 amended on numerous occasions, and is constantly
17 supervised by the Department of Justice and constantly
18 looked into; ASCAP itself is constantly regulated by
19 the Department of Justice, as well as a Court in the
20 United States -- the United States District Court for
21 the Southern District of New York in Manhattan, called
22 the Rate Court.

1 And what happened was, when the Consent
2 Decree was entered, back in 1941, a single judge was
3 assigned to administer that Consent Decree, and it has
4 always been the case with antitrust consent decrees,
5 that a single judge in whatever district it is
6 entered, administers it.

7 ASCAP has been blessed by having some of
8 the most distinguished judges in the United States
9 supervising its affairs. It started, one of them was
10 Chief Judge Dryan, for people as old as me in New
11 York, will remember him as one of the finest Judges in
12 the history of New York. Another Judge was Harold
13 Tyler, who is a very well known Federal Judge, who is
14 a former Deputy Attorney General, and who is a
15 practicing lawyer.

16 At the present time it is supervised by
17 Judge William Conner, which is another distinguished
18 Judge, and a former Chief Judge of the United States
19 District Court for the Southern District.

20 This Rate Court works in a very ingenious
21 way. What happens, when there is any applicant for a
22 license, whether it is part of these groups that are

1 negotiated, or the group itself, whenever they
2 disagree with ASCAP, as to what the royalties should
3 be for the next five years, and I should add, I should
4 have said this before, license fees are, generally
5 speaking, negotiated in five year trenches, just as it
6 was here, the negotiations we talked about.

7 In any event, when the application, or the
8 group, or whoever it is says, I don't like it, you are
9 overcharging, this is no good, the decree provides,
10 immediately, for the application or whoever it is, to
11 file a document in the Rate Court, which I think it is
12 usually two or three pages, and then he, or she, or
13 it, is immediately licensed temporarily until Judge
14 Conner works out what the rate should be, or the
15 parties settle the case, which is far more frequent.

16 So there is regular procedure. What you
17 have is ASCAP is in a very unusual position for this
18 terrible monopolist that it is supposed to be. It has
19 no control over its prices. What happens is, it goes
20 to the -- if anybody says I disagree, they go to the
21 Court, and the Court decides, with the usual results.

22 And since most of the people ASCAP is

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1 negotiating in, is not an individual tavern owner, or
2 something along those lines, usually it is the
3 Association of Tavern Owners, or the Old Music Radio
4 Committee, or the Local Television Committee, we are
5 not talking about people who can't afford to litigate,
6 and I'm going to get to that in a minute.

7 The function of the Rate Court is not
8 dissimilar from this CARP, and the standard that is
9 used in this part, I certainly agree with Mr. Rich,
10 the standard is what is the fair value, or the fair
11 market value of ASCAP's licenses to the applicants.

12 It is the fair market value. Those words
13 are used over, and over again in the Rate Court
14 proceedings, and I'm going to quote some of Judge
15 Conner's comments about that, because it is a problem.
16 And, of course, in Section 118, which we will get to
17 in a minute.

18 Anyway, one other feature of ASCAP's money
19 gathering for its membership has to be mentioned.
20 This is also regulated by the antitrust decree. This
21 is also regulated by the antitrust decree.

22 ASCAP conducts, I think anybody would say,

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1 the most elaborate survey of music use in the United
2 States, of anybody. They do it by a variety of
3 getting information from the individual users, that is
4 part of the license arrangement. I'm going to show
5 you a license, and we can take a look at it later, and
6 you can see some of this with respect to PBS and NPR.

7 But the licensees have to give
8 information, and I'm sure most of them voluntarily do
9 it, in these days of computers it is not such a
10 burden. ASCAP monitors by tape recordings, 10s and
11 1000s of hours of radio and television programs. And,
12 in short, ASCAP does this huge survey.

13 Now, ASCAP does the survey, not just in
14 order to figure out what the license rates fee should
15 be, but they have to figure out a way of distributing
16 the dollars to the members. After all, the purpose of
17 ASCAP is to distribute dollars to these individual
18 67,000 members.

19 And they have worked out, over the years,
20 the ASCAP board is all composed equally of songwriters
21 and publishers, they've worked out an arrangement
22 whereby the survey is conducted, it is a scientific

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1 survey, they've been using firms that Mr. Rich knows
2 quite well, the Nathan Firm, and Dr. Peter Boyle, who
3 is the chief economist of ASCAP, and there was another
4 one.

5 This is a very so-called scientific survey
6 which I don't understand, but I hope you guys will.
7 It is a scientific survey intended like the Gallup
8 Poll, but much greater, to come up with a -- what
9 music is played, does it have defects? I guess it
10 must, because I can't imagine a survey doesn't, and
11 unfortunately I've questioned a lot of expert
12 witnesses over my life, and often things people tell
13 you are exactly so, aren't. But in substance it has
14 to be right, it is monitored.

15 Then what the ASCAP board does is,
16 obviously the use of music, there are different values
17 in the use of music. We are going to talk a little
18 bit about music evaluation when I get to it in a
19 second or two. But certain kinds of music use,
20 presumably, are more valuable than others.

21 If you have a jingle on a television
22 commercial, and you have a Bartok's third piano

1 concerto, which is a long piece, it is obviously
2 different in value, and to some extent, the value for
3 purposes of users in radio and television, is the
4 duration, how they make use of it, and so the ASCAP
5 board, under the supervision of Judge Conner, and two
6 monitors, one of who is ex-Judge Tyler has, for years,
7 attributed certain credits to what they call theme
8 music, feature music, incidental music, and they have
9 a whole formula for this.

10 That formula, incidentally, was -- passed
11 muster with the Department of Justice, and is part of
12 one of the amendments of the Consent Decree. I mean,
13 none of this is done -- ASCAP is kind of a quasi-
14 public institution.

15 Anyway, the distribution is worked out on
16 that basis. And there is a sort of sideline of the
17 ASCAP distribution survey, which comes with all of
18 this -- a tremendous amount of ASCAP's time is devoted
19 to that survey, and a fairly substantial amount of the
20 court time, probably more court time is devoted to
21 monitoring the survey, than there is to the rate
22 cases.

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1 The survey being so detailed, and I will
2 be the first to admit, and so will Dr. Boyle, that
3 there will be blemishes here and blemishes there, has
4 been repeatedly used in the Rate Court by the
5 licensees, or the applicants, as well as ASCAP.

6 That is because there is nothing really as
7 good. It may not be perfect, but there is nothing as
8 comprehensive or good. And if Dr. Boyle is permitted
9 to testify, we will get into that a little later on.

10 Anyway, now you know how ASCAP operates to
11 get its money, and how it distributes its money, at
12 least I've told you what it is.

13 Let's talk about Section -- now, let's get
14 more specific. Now, let's get into Section 118,
15 itself. As I understand it, because remember I wasn't
16 there, and I'm not a copyright lawyer.

17 Apparently in 1976, as part of the great
18 copyright revision, which I do remember, there was a
19 dispute between the then so-called public
20 broadcasters, they called themselves non-commercial
21 broadcasters, on the one hand, and what is called the
22 Performing Rights Organizations, ASCAP, BMI and SESAC

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1 on the other.

2 The non-commercials took the position that
3 they didn't have to pay anything, nothing at all.
4 That they should be able to use anybody's music,
5 regardless. Obviously, the PROs, the Performing
6 Rights Organizations thought that was unfair to them,
7 and there was a battle royal, a lot of battle royals
8 in the 1976 Copyright Act, but this was one of the
9 bigger ones.

10 And Congress, unanimously, both the Senate
11 and the House, rejected the position that the
12 songwriters and publishers shouldn't be compensated
13 for their intellectual property, like anybody else.

14 So what they did was, on the other hand,
15 and I think the legislative record bears this out, but
16 we will have testimony, I hope, on this; what actually
17 happened was they tried to work out some sort of
18 compromise. The PRO said, look you know, they could
19 just as well go to the Rate Court like everybody else.

20 And, as I understand it, the non-
21 commercial broadcasters said, the Rate Court is
22 expensive, we don't have a lot of money, this is 1978,

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1 this is twenty years ago, and as we will present
2 evidence, television and radio, public television and
3 public radio were a lot different animal in those days
4 than it is now.

5 And so Congress said, I'll tell you what
6 we will do, we will give a compulsory license. There
7 has been a few compulsory licenses in the Copyright
8 Law, there were a number given that year, and I know
9 two of you sat on another form of compulsory license
10 in the proceeding before that, and probably know much
11 more about it than I do.

12 What they said was, we will use the same
13 standard the rate court does, for valuing ASCAP's
14 music, we will use the same technique of having the
15 parties try to agree, but okay, instead of going to
16 the Rate Court and traveling to New York, you guys are
17 Washington-based, all the rest of it, we will have the
18 Copyright Royalty Tribunal, which was already being
19 enacted in connection with xeroxing regs, and all
20 kinds of other great ideas that didn't work out in the
21 1976 Act.

22 So originally the United States Senate

1 proposed, the Senate report, which you have in front
2 of you, and I don't think there is any dispute about
3 that, that it be structured like the Satellite
4 Proceedings, I understand the Satellite Proceedings,
5 a sum would be created, a fund, and then the people
6 who owned the copyrights would squabble over that.

7 And that was rejected by the House of
8 Representatives, very clearly, and said so. And the
9 House of Representatives proposed what we have here
10 today, this exact proceeding, except not being in
11 front of a CARP, it was before this Copyright Royalty
12 Tribunal Board.

13 And the concept was, clearly, that ASCAP
14 would either negotiate a settlement, or have its fight
15 with the Public Broadcasters, BMI and SEASAC would do
16 likely. And, in fact, it has to be that way, because
17 just as in this proceeding, SEASAC has settled, you
18 can't get one fund for the three organizations, now
19 that one has settled. BMI and ASCAP haven't settled.

20 And in the original 1978 proceeding, which
21 we will talk about next, BMI and SEASAC settled, it
22 was only between ASCAP and BMI. So obviously what

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1 this is preceding, a joint proceeding, in which we
2 have our case against them, they have their case
3 against us, Mr. Kleinberg has his case against them.
4 It is not one common pool, there is not one unitary
5 amount.

6 And what is interesting about what has
7 happened here is the proposed -- and we are going to
8 get this, I'm sure, because there are going to be oral
9 motions, if not written motions of discussions and
10 objections, in the course. PBS and NPR, they've just
11 given us a sum and said, hey, you guys, you fight
12 about it.

13 Well, that is not provided for in the
14 statute. The contemplation of the statute was, they
15 were supposed to tell us how much they were going to
16 pay us, and we would tell them how much we want to be
17 paid by them, and same thing for BMI.

18 And this pooled item is something
19 different, it wasn't what was contemplated on the
20 statute. But we will talk about that later, and I'm
21 sure Mr. Rich disagrees with me.

22 One thing that was said over, and over

1 again, in the legislative history, by the House and
2 the Senate, was that the writers and publishers should
3 not subsidize the public broadcasters. It is said,
4 clearly, loud, and clear, there can't be any dispute
5 about that.

6 They said, there are statements here and
7 there about, and justifiably, about how nice it is
8 that we have a growing and embryonic public television
9 and public radio system. But no matter how nice that
10 is, it isn't for the people who own the intellectual
11 property to subsidize that.

12 It is no more appropriate, if you think
13 about it, for a musician or a songwriter, to subsidize
14 public broadcasting, than a writer. If I have a
15 script, and I want that script, I'm entitled to my
16 full money. Why isn't a composer, why isn't a
17 publisher?

18 And really that comes through loud and
19 clear, repeatedly, both in the literature, and in the
20 Senate and House reports, and that has to be evaluated
21 in the background of the comments, over and over
22 again, by public broadcasting, that they were

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1 something special, that they didn't have to pay for
2 that which they were eating.

3 Nor was there any -- it was kind of
4 alluded to by Mr. Rich, and I don't exactly understand
5 the position. There is a suggestion that the
6 limitation of what the license fees should be is what
7 the Corporation for Public Broadcasting has to
8 contribute in its licensing fee budget. I don't know
9 where that comes from, but it sure doesn't come from
10 any statute I've ever seen, or been pointed out to me,
11 or any regulation.

12 We are entitled to our fees, we are not
13 entitled to excessive fees, we are entitled, I agree,
14 to reasonable fees. And we are entitled to the fair
15 market value of our fees, something we are going to
16 really discuss.

17 Anyway, at the outset, in 1978, not
18 surprisingly, although two of the Performing Rights
19 Organizations, SEASAC and BMI made a deal with Public
20 Television and Public Radio, ASCAP didn't, and there
21 was a very, kind of an amiable, as I understand it,
22 because one of my partners handled it, an amiable

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1 hearing before the Copyright Tribunal.

2 A lot of different theories were floated,
3 and that appears in the opinion. I don't have to
4 recount that. They wanted -- I shouldn't say that.
5 The Public Broadcasters wanted licenses where the only
6 thing ASCAP would be paid for was each performance,
7 and all kinds of other stuff like that. ASCAP said it
8 should be a blanket license, as I've described before.

9 There were a lot of fights about what the
10 rates should be, and it came out, as I understand it,
11 and I believe this is in the opinion, pretty close in
12 dollar value to what ASCAP was asking for, it is about
13 1.2 million dollars a year. And I think I'm right in
14 saying that; if I'm not, I apologize, and I'm sure I
15 will be corrected, but it is pretty close.

16 And what the Tribunal said, since this is
17 one of their earliest cases was, we want you to know
18 that the rate that we -- and the terms are without
19 prejudice. They are not intended to be precedental.

20 That is in the opinion. That we expect,
21 said they, that you are going to come back in a year
22 or two, or three, or four, or five, and they were

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1 writing a report as to whether or not compulsory
2 licenses should be continued, which was eventually
3 published, and interestingly enough, the CRT was
4 against it.

5 But, in any event, they said, you are
6 going to be coming back here, and we don't want to be
7 met with the argument that the rate we have set, the
8 terms we have established, or the means by which we
9 have done it, which we won't tell you, because they
10 don't tell them, is precedential.

11 It was intended to be tentative. And it
12 is perfectly understandable, under the circumstances.

13 Anyway, as lawyers always do, both sides
14 claimed they won; they went back to their clients and
15 said, this is great, terrific, and then for the next
16 period of time, there was a series of perfunctory
17 negotiations, and you will hear a little bit about
18 that. And the settlements were reached.

19 What was characteristic, though, what was
20 interesting about the settlements, and explains a lot
21 of stuff, what they did each time is they met, they
22 agreed that they would hype up the amount of the 1978

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1 rate by the COLA, by the cost of living.

2 They forgot about it, they walked away,
3 and that is what they did each time.

4 Now, when Mr. Rich, I understand, says
5 about the unique similarity, or symmetry of the
6 increases between BMI and ASCAP, I think he has a
7 little bit of his tongue in cheek, because the reason
8 they are uniquely similar, is when these guys were
9 negotiating, rather than spend a lot of time
10 negotiating, they just used the COLA, and that is why
11 it is so similar, and that is why the increases are so
12 similar.

13 It was true, ASCAP got lots more money
14 than BMI at the start, and that continued.

15 Everybody agreed, during that twenty year
16 period, that the blanket license was more appropriate
17 for public broadcasting. Remember that blanket
18 license I talked about before?

19 And I assume, in this case, we are
20 continuing to assume that the blanket license is the
21 appropriate license for PBS' stations and NPR's
22 stations. At least I've heard nothing to the

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1 contrary, so I'm going to assume that.

2 Incidentally, the blanket licenses, as Mr.
3 Rich above all people knows, is one that is always
4 wanted by the largest users of music. It is only if
5 you use a lot of music, that you don't want to have to
6 account for it, because there is another license that
7 we will talk about, a per program license, that
8 encourages, or gives -- that gives a better deal to
9 people who use less music, and talk radio shows use
10 that all the time, and Mr. Rich is eminently
11 acquainted with that.

12 And, also, I assume one of the reasons
13 they want to do that is, because it is so convenient
14 for them. They can use the entire ASCAP repertoire.

15 The -- what was very interesting -- well,
16 let's turn to something that might be of more
17 interesting to you. We've talked about the ASCAP
18 license. Let's take a look at the most recent
19 license. This is a blow-up, and this is in the
20 record.

21 This is a blow-up of what has been
22 described as successfully negotiated hard-fought

1 license between PBS and NPR that was done at the time.
2 And it is simple enough, and I assume everybody can
3 see it.

4 On the first page there is the usual
5 grant, it must have taken somebody two minutes to
6 write, with all deference to my colleagues at ASCAP.
7 And the second page goes along in the same way, you
8 know, what they can do, what they can't do. They are
9 going to provide certain schedules of information, and
10 we've asked for this, similarly, in the license we
11 propose.

12 And then we get to the third page, and
13 here we have, again, not surprisingly, more schedules,
14 more limitations on licenses, and more boilerplates.
15 But then we get to the fourth page, and there is
16 something Mr. Rich didn't mention to you.

17 This was present on all of the licenses
18 that were negotiated. And I'm going to write a red
19 line, this is 3B on page 4. What it says, right here,
20 where I'm underlining, "Society --" that is ASCAP "--
21 and licensees agree that the said license fee will
22 have no precedential value in any future negotiation

1 preceding before the Copyright Royalty Tribunal, Court
2 Proceeding, or Proceeding between the parties."

3 Well, when they said that, they must have
4 meant something by it. I read that to mean, when it
5 says, "no precedential value", not merely to mean that
6 the agreement is without prejudice, because that would
7 have been easy to say. It means what it says. We
8 made a deal with you, and we are not going to be bound
9 in future proceedings by that.

10 Now, I can't tell you what was going on in
11 the minds of the people who negotiated that. And I
12 don't think it is a legitimate inquiry to even ask
13 that. But I do think that a reasonable person reading
14 this would say, it is an integral part of the license.

15 And I have to assume that one of ASCAP's
16 bargained for points, in giving such a rate, was that
17 it wouldn't be precedential. I can without delving
18 into the minds of somebody, figure, you know, in 1978
19 maybe, maybe ASCAP said, you know, public television
20 is in disarray, it is an infant industry, so is public
21 radio, it is pretty small, let's see what happens,
22 let's see how it develops over the years.

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1 And therefore, I'll give them this rate,
2 this was the rate formed in '78, I'll hype it up by
3 the COLA, and I'll go on with that. I'm protected,
4 says ASCAP, because I provided that it wouldn't be a
5 precedent. Now, I am startled that somebody would
6 come in and say, I disaffirm that part of the
7 contract. I'll take the good, but not the bad.

8 I don't think that is fair play. And I
9 don't think there is any ambiguity in that, and it has
10 not been suggested, in the record that is before Your
11 Honors, that there is any ambiguity in that. And it
12 has simply been ignored.

13 So I have to note, in fairness, ASCAP did
14 that, BMI did not. Which is another interesting point
15 that just came to me, which shows you that sometimes
16 when you talk you think. It couldn't have been
17 boilerplate, because I suspect when we compare this to
18 the BMI license, it is virtually identical in every
19 way, licenses are licenses.

20 But they don't have that clause in there.
21 So it was something that was bargained for, negotiated
22 for. And I respectfully submit that it is binding.

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1 And I respectfully submit that the public television
2 stations, and the radio stations are bound by their
3 own agreements, just like any other citizen in the
4 United States.

5 JUDGE DREYFUS: Excuse me for interrupting
6 one moment. Can you tell us the significance of the
7 following two sentences of that paragraph? And also,
8 is the '92 license agreement also of record?

9 MR. SCHAEFFER: Yes. And the presence or
10 absence of such provision in this agreement shall have
11 no precedent. Which one -- this agreement contains no
12 provision --

13 JUDGE DREYFUS: Right.

14 MR. SCHAEFFER: -- comparable to that
15 found in 3A of the license?

16 JUDGE DREYFUS: Right.

17 MR. SCHAEFFER: I don't know what it
18 means, but we can get out 3A. I don't think it
19 changes any of that. But you remind me, Judge, I'm
20 really getting blind. This is pretty relevant, too.
21 The presence or absence of any such provision in this
22 agreement shall have no precedential value, either.

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1 And we will take a look and see what it
2 looks -- I think it was intended to be part of that.
3 I don't know whose benefit that would be for.

4 Now, in '97, it is now obviously bringing
5 us up to date, we couldn't agree. We all took an oath
6 of silence as to why we couldn't agree, so let's just
7 leave that, and I think we have to. But we couldn't
8 agree, we reached an impasse, and we came here.

9 Now, what has happened to ASCAP since
10 1978, up until 1997? I think that is relevant to your
11 consideration. And I know I'm being long-winded about
12 all this stuff, but I think the active points I'm
13 coming to, now that we've established background, I
14 can handle fairly quickly.

15 For the first time in history, really,
16 there was a tremendous amount of litigation in the so-
17 called Rate Court. As I've said to you before, ASCAP
18 negotiates licenses with groups in five year
19 intervals.

20 In cable TV, local TV, TV networks, and
21 certain segments of radio, not all radio, there were
22 a lot of disputes in Judge Conner, and thereafter

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1 Magistrate Dollinger, who is the Judge that some of
2 this material was referred to, had lots and lots of
3 cases.

4 The issues that were litigated in front of
5 the Rate Court involved all kinds of things; what the
6 rates should be, whether blanket licenses were to be
7 in certain forms or not, whether they should be of
8 different kinds of licenses, etcetera, etcetera.

9 And ASCAP took its lumps in a lot of those
10 cases, and to some extent so did the licensees. It
11 was a mixed record before Judge Conner and Dollinger.

12 Now, it is of significance that the Rate
13 Court, and the Second Circuit to whom it looked for
14 review, have held that the mission of the Rate Court
15 was to ascertain "the fair market value" of ASCAP's
16 blanket and program licenses, and we are not
17 interested in the program.

18 Judge Conner, who certainly is an
19 experienced jurist, and has been the Judge of the Rate
20 Court for many years, commented: "An appraisal of
21 fair market value is an appraisal based essentially on
22 estimation of the price that a willing buyer, and a

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1 willing seller would agree to in an arm's length
2 transaction."

3 And that is in a case that is in the
4 record, and we can cite it a little later.

5 That is the same task that the CARP has,
6 fixing fair market value with respect to our blanket
7 license. However, Judge Conner, went on, in that same
8 opinion, which is a relatively recent one, to state
9 that assigning a fair market value to ASCAP's blanket
10 license presented for him a conundrum. "To postulate
11 what prices would prevail, where such a market for
12 music blanket licenses competitive, is perplexing in
13 theory, impractical in practice, and dubious in
14 outcome. Any rate setting standard that calls in the
15 abstract for a theoretic construct of a competitive
16 market in blanket licensing, must confront the reality
17 that there exists minimal evidence as to what the
18 market would look like, much less the prices it would
19 yield."

20 Now, where does that leave Judge Conner
21 and us? Judge Conner, who is a pretty experienced
22 fellow in this stuff, says you can't figure out what

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1 the competitive price is, how could you do it, there
2 is no market.

3 He figured out a smart way to do it. He
4 did what ASCAP suggested, and I don't know that there
5 was so much dispute about that, and it was
6 particularly for ASCAP to suggest that, he looked at
7 negotiated agreements over the years. He gathered up
8 past negotiated agreements between ASCAP and the
9 licensees, and then he made a critical determination.

10 He decided if they were representative,
11 those agreements, or otherwise appropriate precedents,
12 then if he found that to be so, he then adjusted them
13 by music use, and by change in revenue of the
14 stations, he increased it by the change in revenue of
15 the stations, the upward movement, and then he made
16 what he thought was an appropriate adjustment.

17 It is obviously not dissimilar for cutting
18 open a duck and pulling out the entrails and throwing
19 it up and see where it finds at, but it is maybe a
20 little more rationale.

21 But we have a different problem here.
22 Unlike Judge Conner, who kind of slid off it, we've

1 been in contracting for 20 years, that the good terms
2 we've been giving them didn't count. And you can't
3 come in now and say, they do count.

4 And, in fact, in the very case we are
5 talking about, which Mr. Rich I think argued, the
6 network said, these contracts, certain contracts can't
7 count, because they are not representative, there is
8 this reason or that reason, and the Judge did that, he
9 picked and chose.

10 But in our case it certainly would be
11 inappropriate to do what Mr. Rich asks, after we
12 bargained that it wasn't going to be precedence, that
13 it be held against us. And there will be more
14 reasons. I will leave that to BMI because, I'm going
15 to get to it in a minute, there is a sea change in
16 public television, which is exactly why, we were
17 giving them, in effect, interim fees.

18 This CARP has a similar function, as I've
19 said. We have a suggestion as to the only practical
20 way that you can fix fair market value. And that is
21 to look to the experience of commercial television and
22 radio. There is no other way.

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1 I will add, I'm a little ahead of myself,
2 but just to make it clear, the proposal of ASCAP does
3 not consider governmental revenues in making our --
4 what we've done is we've tried to distinguish between
5 those revenues which are arrived from underwriting and
6 membership sales, and for a reason, because that is
7 what people are paying for what is on the programs.

8 The Government, we are agreeing, at least
9 for the moment, we are not entitled to any of that.
10 Nor have we made any claim for the very substantial,
11 and it is going to come out, one way or the other,
12 ancillary income that PBS and NPR stations are
13 earning.

14 We have provided you, and we will talk
15 about that, an enormous amount of data, too much
16 probably, that we got from strange -- because we
17 couldn't believe what we found about what these
18 stations are doing in realizing income.

19 But we are not claiming the sales they
20 make, or the tremendous amount, the telecommunications
21 they engage in, the marketing they do of all kinds of
22 commercial things, that is really not -- we are not

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1 making any claim on that. Maybe indirectly we are
2 having some effect, but we tried to slice that off.

3 All we are claiming is a piece of what we
4 call their private revenues, which is, and not much of
5 one either, which we will get to in a second, which is
6 what they get from their sponsors, the people they
7 call sponsors, for the underwritings, which they call
8 commercials, for memberships, which they say are
9 brought in by what programs they put on.

10 I called somebody who I was kidding around
11 with the other day, discussed the question of fair
12 market. I do a lot of real estate litigation, and I
13 do real estate appraisal work, and sometimes people
14 kid around and they talk about finding out what fair
15 market value would be, as the hunt for the quark. The
16 quark being, I guess, that basic element in physics
17 that is the basic element of everything, which people
18 find or don't find.

19 Fair market value is a hunt for a quark.
20 And anybody who decides what the fair market value is
21 of the ASCAP blanket license, in this context, has to
22 be ingenious. Judge Conner used a very clever method,

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1 one I don't think is available to you, because we've
2 opted out of it, and also one which wouldn't be just,
3 because the circumstances have changed.

4 We believe, looking at the commercial
5 industry, overall, is an appropriate place to look,
6 and would overcome the problem.

7 Now, what has happened to PBS and NPR
8 stations since 1978? We all know that starting with
9 the Reagan administration there was a change of view,
10 in Washington, that there should be no longer, or at
11 least reduce subsidies for NPR and PBS stations.

12 Whether that is right or wrong, it is not
13 ASCAP's business. That is a question for each citizen
14 to decide for himself.

15 In any event, that view has certainly won
16 over the Congress. And NPR stations, and PBS stations
17 have done an admirable job adjusting to that new
18 environment, an environment that is only, I think, a
19 small piece of what is going on in the country,
20 generally.

21 They have, using their ingenuity, created
22 a sea change for themselves. They've done it cleverly

1 and intelligently, and legitimately. They have, in
2 effect, gone out to their membership and said, we give
3 you a lot of value, please pay us for it.

4 One can't turn on a PBS affiliated station
5 without some time during the month, hearing these
6 solicitations. They have gone out to the major
7 corporations of the United States, and some of the
8 real small ones, we will see, and said: why advertise
9 on commercial television? You will get less time, but
10 what a bang for a buck when you are on PBS and on
11 Masterpiece Theater, or concerts from Lincoln Center,
12 or something like that.

13 And they have created manuals where they
14 go out and say that. We should have this kind of
15 programming, because we get that many more membership.
16 And one of the things that takes up so much space in
17 the material we've given you, and we will eventually
18 walk you guys through it, I hope. Probably don't need
19 to, I think it is just interesting reading, is how
20 they have created manuals to do this, and how the
21 individual stations are doing it.

22 So what they are doing is, they are taking

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1 their program content, and in effect selling it. They
2 are not selling it to Mighty Fine Pudding, or
3 whatever, they are selling it to individuals like me,
4 and they say to me, you are watching Pavarotti, and
5 the Three Tenors, regularly. Hey, don't you think you
6 should pay for that? And I go back and I write a
7 check.

8 They go to Dupont and they say, hey, what
9 an image, you know? You can do that on WNBC, you can
10 do that on this station, but it is very -- you know,
11 this is a biggie, you are going to do this theater or
12 that theater.

13 What is their biggest, one of their great
14 theatrical successes? The Mobil Theater. To this day
15 now I don't think Mobil advertises the Masterpiece
16 Theater. But I bet you, if you ask most people, they
17 say it is the Mobil Theater.

18 And they've also done it, they are clever,
19 and they should do it. They looked at their marketing
20 and they say, hey, PBS and NPR, generally, they don't
21 appeal to the people who don't spend money, they
22 appeal to the people who do spend money. And they

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1 tell that to the potential advertisers.

2 And we've got the manuals. There is
3 nothing wrong with that. What is right with that is,
4 that NPR being built up to a half a billion dollars
5 gross, and three quarters of a billion just on private
6 revenue -- what we call private revenue to PBS,
7 they've used the content of the shows to get the
8 money.

9 Well, aren't the music writers whose
10 intellectual property is being sold in that way
11 entitled to a fair share? That is the claim.

12 In all respects, in all respects PBS and
13 NPR stations are competitive. The fact that a lot of
14 stations are owned by states really doesn't cut the
15 mustard on this age.

16 I went to the University of Wisconsin.
17 The University of Wisconsin, which is a great
18 institution, sells more stuff than probably the
19 department stores. If you are getting -- if you are
20 selling somebody's intellectual property, if you are
21 yielding a profit on it, you should pay for it.

22 Now, NPR, unlike PBS -- I mean, PBS

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1 advertises, Concerts from Lincoln Center, we are going
2 to see all of that. For NPR it is incredible, because
3 NPR is owned -- it sells only two things, talk and
4 music. That is what sells NPR.

5 NPR points out that they use various
6 formats, jazz, folk, classical, traditional standards.
7 I have no doubt that the NPR stations use more ASCAP
8 music than the ordinary commercial stations.

9 And that is why we've -- we've tried to
10 put that into our proposal. They talk about classical
11 music, it is all out of date. Well, I don't know,
12 when I listen to the radio, I like to listen to
13 Stravinsky, I didn't know he was out of copyright. I
14 didn't know Mr. Bartok's estate isn't supposed to get
15 anything. I didn't know that Leonard Bernstein had
16 died so many years ago. I didn't think William Shuman
17 was unknown.

18 This idea that all classical music is
19 stuff that was baroque is nonsense. If you turn on
20 any classical music, you will hear a lot of modern
21 composers. And the chances are nine out of ten that
22 those modern composers are ASCAP members, or members

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1 of affiliated societies in foreign countries, and they
2 should get paid.

3 One of the most interesting uses of music,
4 but ignored by all of this, is something called
5 pledges. Now, all of us listen to pledge week. I
6 don't know how many people haven't said, they are at
7 it again. That is the bad part. The best part is,
8 they save their best stuff for pledge week, because
9 that is what brings in the money.

10 And we will show you what pledge week is
11 for these stations, it is all music, or at least
12 mostly music, for the television as well as the radio.
13 The radio has no choice, because the radio is so
14 heavily in music, anyway; but certainly for PBS.

15 We have done a survey, it is not as good
16 a survey as what you do for the ASCAP distribution
17 system, but we did a survey of music preferences, and
18 it is before you, and we will have testimony on that.
19 And two-thirds or almost 60 percent, two-thirds of the
20 people, one of the reasons they like to listen to PBS
21 is they like the musical performances. That doesn't
22 bespeak of dying music.

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1 Their own documents are contrary. I'm
2 going to show you a whole bunch of stuff that their
3 studies show that say music is a big seller on PBS.
4 Repeatedly, in the press releases they do, they talk
5 about the value of music.

6 I'm about finished. The task before you
7 fellows is estimable. I think the PBS proposal is not
8 really almost worth considering, at least in so far as
9 we are concerned. It doesn't distinguish between
10 ASCAP and BMI, that is not what it is supposed to do,
11 for all of the reasons I've previously said.

12 Without justification it ignores the
13 bargain we made that they weren't supposed to be --
14 these terms were interim terms, and weren't supposed
15 to be binding on us, when push came to shove. And it
16 really ignores the change in the world of
17 broadcasting.

18 They've -- it seems to me their proposal
19 is really of no value, except for one good idea. They
20 are kind of taking the position that we will make a
21 proposal, and if we, PBS and NPR make a proposal and
22 it is reasonable, it should be accepted by you

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1 fellows.

2 Well, actually, it is the other way
3 around. When somebody is selling something, whether
4 under an antitrust decree, or whatever, or a
5 government compulsory license, it should be the seller
6 who fixes the price in the first instance, and it is
7 only if that price is unreasonable, that it should be
8 rejected.

9 That is what the system should be. And
10 the next question should be, I agree with Mr. Rich, is
11 the price reasonable? There is no one just price.

12 As Judge Conner, also I'm going to quote
13 said, and then he was quoting an ASCAP lawyer, "The
14 Tribunal is not required, or requested 'to create a
15 platonic ideal of a marketplace'". You can only do
16 the best you can. What better way to see if the price
17 we are proposing is reasonable, and then if it is
18 okay, there shouldn't be a problem.

19 Now, I've told you what ASCAP's proposal
20 is, that we were going to go to the marketplace and
21 give you the best value, use that as a basis. There
22 is another virtue besides it being something relevant

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1 to fixing the fair market value. It is also fair.

2 Notwithstanding the special mission of
3 public television and public broadcasting, they are
4 competing with commercial television and commercial
5 radio.

6 And there is no reason why they should get
7 a leg up on commercial television and commercial
8 radio. There is such a thing that we all know is
9 institutional advertising. There is institutional
10 advertising in all the commercial programs. They
11 compete with that.

12 There is all kinds, you are going to find
13 little shops all over the United States, who take ads
14 out on PBS affiliated stations. Why should PBS get
15 the advantage of that, over a commercial station?

16 So that is a secondary, although one I'm
17 not as much interested in, for obvious reasons, why
18 our proposal is good.

19 We have done the following, and Dr. Boyle
20 will testify to it. We've compared music uses we
21 understand that in revenue, on the public
22 broadcasters, excluding government appropriations, and

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1 ancillary income, to music use and revenue as applied
2 commercially.

3 We've used the survey in order to
4 determine the music use, we recognize that it is for
5 a different purpose, but it is really the only game in
6 town that is as thorough as it is.

7 We also recognize that the distribution,
8 the measuring of music is somewhat, in a major part,
9 governed by our classifications, the Board of
10 Directors of ASCAP, which has been used over the
11 years, with the approval of the Justice Department and
12 the Court, that more credit goes to features, less
13 credit goes to jingles, and that sort of thing.

14 I think that in principal no disagreement
15 about that. We believe that that is a sensible and
16 intelligent way to do it. We have made a new
17 proposal, because we have made some adjustments for
18 errors we found in our original proposal.

19 We are asking that NPR, which is pretty
20 much the same, pay us 4.4 -- let me see if I've got it
21 right. We've asked that the NPR stations pay us
22 3,580,000 dollars a year for five years. And I will

1 get to the incidence per station of that in a minute.

2 And we had originally proposed 5,201,000
3 dollars, for the PBS affiliated stations, we are now
4 proposing 4,481,000 dollars. Our amendment hasn't
5 been accepted yet, so I figured out, and what I'm
6 going to give you both ways.

7 Now, that money, which is made to sound
8 like a lot is, I think you will see in a second, a
9 pittance. I've already passed this around to my
10 colleagues.

11 This all comes from the record, and it is
12 my bright idea. The first page of this is very
13 simple. We took -- I really think you probably should
14 look at the second page, the first page I'm just
15 doing, because we haven't -- our amendment hasn't been
16 accepted yet.

17 If you look at the second page, this is
18 ASCAP's PBS proposal, 4,481,000 dollars for 300
19 television stations in the PBS system. There is some
20 variation between -- in their own papers, and in our
21 papers, about how many stations there are. I assume
22 at some point we will iron that out, but I don't think

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1 it is significant, it is in the order of three, or
2 four or five.

3 So this is a big 12,803 dollars per
4 station, to get access to the entire ASCAP music
5 repertoire. It is hard for me to imagine that any
6 television station in the United States, affiliated
7 with PBS, is going to find that a hardship, but if
8 they are going to claim that, we have plenty of
9 evidence as to why it isn't a hardship. It doesn't
10 even cost the price of a third of a secretary.

11 If we look at the radio licensing fee, on
12 the other side, for the 700 questions which are
13 unquestionably music intensive, we are talking about
14 5,000 dollars a station, straight line. 5,000 dollars
15 to play, the right to play the millions of
16 compositions in the ASCAP repertoire. That does not
17 seem, to me, to be excessive.

18 Then we did a second thing. We thought we
19 would try it a different way. We went and said, what
20 would happen if instead of doing it just station by
21 station we did it in accordance with the revenue of
22 the top stations in PBS land?

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1 Now, we couldn't segregate what we call
2 private and public revenue, on a per station basis.
3 As you know, discovery in this proceeding is not
4 exactly as it is in Court, so we had to rely,
5 ourselves, on information that we generated. And I
6 have to say, thank God for the Internet.

7 On the left, if you look at the top, total
8 public revenue, 1,000,486,000 dollars is what the PBS
9 affiliated television stations earned, I think, from
10 everywhere. 5 million, again, is our proposal. The
11 rate -- let's skip this one, let's go to the second
12 page. I'm sorry, let's go to the second page.

13 JUDGE DREYFUS: Counsel, you have to help
14 us. These figures do not include the Government?

15 MR. SCHAEFFER: These -- the total public
16 revenue, I believe, does. We couldn't break down, I
17 don't have the detail, I'd love to have it, as between
18 government contributions per station.

19 But I think in order of magnitude, it is
20 not going to make any difference, at least to the
21 point I'm making. Maybe when this proceeding is over,
22 and I have a chance to do some cross examining, I will

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1 find out more. So this is without discovery, and I
2 apologize, but I have to do what I can do.

3 1,000,486,000 dollars is the revenue, as
4 we understand it, the total revenues in '96 of the PBS
5 affiliated stations. It is not just PBS, it is the
6 350 stations.

7 Our proposal is 4,481,000 dollars, or 0.3
8 percent of revenue per station, which is pretty cheap
9 when you think of music having any importance in the
10 PBS stations.

11 And then we thought it would be
12 interesting to break out, for the top ten stations,
13 and that is their gross, under station revenue fiscal
14 year '96, what the percentage that is of public
15 television gross, and then what these people would be
16 paying on that .30 percent.

17 And so you can see, for example, take the
18 biggest example, WGBH in Boston, has a gross of 143
19 million dollars a year. They would be paying 115,000
20 dollars a year for our music.

21 The smallest of the top stations, is what
22 -- KTCA, which I may be -- I'm not sure where that is.

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1 MR. RICH: Excuse me, maybe you misspoke
2 on WGBH, 432,000?

3 MR. SCHAEFFER: Yes, isn't that right?

4 MR. RICH: You said 115.

5 MR. SCHAEFFER: I'm sorry, 432,000, I'm
6 sorry. If you look at KTCA, it is 19 million dollars
7 in gross, and they are going to pay around 58,000
8 dollars for our music.

9 Now, we did the same thing for NPR on the
10 next page. It is two pages, okay. There is an ASCAP
11 -- we should be on the sheet reading ASCAP's proposed
12 radio licensing fee, as a percentage of the total
13 revenue of the top 14 NPR represented stations or
14 groups.

15 And there you see a similar analysis, a
16 station that is in Westin New York, that is yielding
17 11 million dollars, almost 12 million dollars a year,
18 is paying 90,000 dollars a year for all of ASCAP's
19 music. And I can tell you, they are using a fair
20 amount of ASCAP music. They may be doing some talk,
21 too, I don't know. But they are going to be doing
22 lots of music.

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1 And you look down. I mean, a station that
2 is -- WSKG, right? it is 4 million dollars, and they
3 are going to pay 31,000 dollars. You have a station
4 that makes 535,000, that is the smallest, I think, of
5 the group; they are going to be paying 4,000 dollars.
6 Hardly an exorbitant amount for the cost of your --
7 you know, when you go into business, and you sell
8 something, you have a cost of goods sold. This is
9 kind of raw material.

10 Then the last thing we thought we would
11 do, or the last two things was, we thought it would be
12 interesting -- we believe that Public Broadcasting is
13 asking your writers and our publishers to subsidize
14 them; that we don't have to get what we're getting
15 from the commercials.

16 Well, it wouldn't be such a shocking thing
17 if the sibling stations said, we'll step up to the
18 plate and we'll cover all of the expenses of music
19 licensing and the small guys, our brethren, we'll take
20 care of -- after all, we're kind of a great
21 cooperative.

22 And so we figured out if the top 10

1 stations in television assumed all of the burden of
2 the licensing fee we proposed, it would come to 0.64
3 percent of their respective revenue -- gross revenues.
4 Similarly, for radio that would come to 1.24 percent.

5 So whether you agree with the numbers,
6 don't agree with the numbers, whether it's all -- the
7 important point is, we're not asking to bankrupt any
8 of these stations. It's hard to imagine that any of
9 the stations we've been talking about can't afford the
10 license fee.

11 And I think this is an arbitration. An
12 arbitration isn't an administrative review obviously.
13 You're not governed by the rules of substantial
14 evidence; you don't have to justify yourselves to a
15 court.

16 And when the Congress adopted an
17 arbitration as the method of resolving these royalties
18 after it's unhappy experience with the CRT, it had in
19 mind I think, not so much law necessarily -- although
20 that's certainly part of it -- but equity and common
21 sense would apply.

22 Now, what are we arguing about here?

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1 We're arguing about, insofar as PDS and NPR and their
2 stations, pennies. Pennies. It's nothing to them.
3 It's the price of less than a secretary, less than a
4 quarter of a clerk per station. Yet for the
5 songwriters this is a significant amount of money.

6 I ask you to consider that in making your
7 decision. Now, I'm going to just finish and I'll
8 promise now I'll be done.

9 How are we going to prove our case?
10 First, we're going to put on three witnesses who will
11 tell you the history, as we see it, and legal
12 background that I have been arguing for.

13 One of them is Mr. Baumgarten. You will
14 rule whether he can testify about 118 or not; that's
15 yet to be seen. The other are two ASCAP lawyers. One
16 of them, Richard Reimer and one of them, Bennett
17 Linkoff. They'll testify early-on as to all of the
18 things I've said about the statute and the attendant
19 negotiation.

20 Mary Rodgers is here today who's on the
21 Board of ASCAP, to confirm all of the things I've said
22 about ASCAP. We will also put on very briefly

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1 somebody from ASCAP who will identify very briefly,
2 the materials we've given you which explains what
3 ASCAP is all about.

4 We have had to use experts because we
5 don't have discovery in this. And so we have used
6 three experts who we will bring before you -- Mr. Day,
7 Mr. Ledbetter, and Mr. Unmacht -- who will testify.

8 Mr. Day who is an old pioneer of public
9 television I think we all will agree, and a
10 distinguished professor and author, will testify to
11 changes in the public television sector since 1978.

12 Mr. Ledbetter, who's a much younger man
13 and a recent author and a journalist and a reporter
14 for the Village Voice, will testify both as to
15 television and NPR.

16 And Mr. Unmacht, who is a very well-known
17 figure in the radio field, will testify about the NPR
18 stations. We may have some very brief testimony from
19 Mr. Anderson about wages in the business.

20 I don't intend to put Ms. Girajeda on very
21 long. She's an employee of White & Case. She will
22 link up all of that Web site material which we regard

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1 is very important to our case.

2 There will be two -- Mr. Saltzman will
3 anecdotally testify -- he's from ASCAP -- as to use of
4 music in connection with pledges and he will have a
5 presentation that I think will be interesting; at
6 least better than hearing my voice.

7 And we will bring on Mr. Bergstein who did
8 the survey that I've previously referred to. And
9 finally, we'll put on Dr. Boyle who will testify as to
10 the ASCAP proposal and the survey, if allowed to do
11 so, depending on the Motion.

12 I really have overstayed my time I think,
13 and I apologize for that, but thank you for your
14 attention.

15 CHAIRMAN GRIFFITH: Mr. Kleinberg, what's
16 your pleasure?

17 MR. KLEINBERG: Two minutes. I will
18 complete before we break for lunch, assuming we're
19 staying until one o'clock.

20 CHAIRMAN GRIFFITH: All right. Is that
21 agreeable?

22 MR. KLEINBERG: I will undertake to do

1 that but I would like to just take a 2-minute break.

2 CHAIRMAN GRIFFITH: We'll take a 2-minute
3 break.

4 (Whereupon, the foregoing matter went off
5 the record at 12:22 p.m. and went back on
6 back on the record at 12:27 p.m.)

7 CHAIRMAN GRIFFITH: Mr. Kleinberg, do I
8 understand sir, that you believe you can finish by one
9 o'clock?

10 MR. KLEINBERG: I will commit to do that.

11 CHAIRMAN GRIFFITH: It appears to me that
12 Mr. Schaeffer is the only one who suggested that we
13 put a time limit on opening statements and then --

14 MR. KLEINBERG: Thank you. May I proceed?

15 CHAIRMAN GRIFFITH: Please do.

16 MR. KLEINBERG: Normal Kleinberg on behalf
17 of Broadcast Music, Inc., or BMI. I will finish by
18 one o'clock, not that I wouldn't like the opportunity
19 to speak longer, but I will endeavor to avoid
20 repeating any of the material and argument that Mr.
21 Schaeffer has dealt with, except to the extent that it
22 is absolutely necessary.

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1 We start out on behalf of BMI, with the
2 proposition that we are entitled to a big raise. We
3 say that unabashedly; whether it's 700 percent or 750
4 percent increase, the numbers are what they are.

5 Why do we say we're entitled to that
6 increase? We say we're entitled to that increase
7 because our songwriters and composers who are
8 affiliated with BMI -- which by the way, is a separate
9 organization; it is apart from ASCAP and I'll get to
10 that in a moment -- our songwriters and publishers
11 deserve to be paid market rates for the use of their
12 works on Public Broadcasting television and radio.

13 It is I think, going to be, and probably
14 already is, undisputed that BMI's share of music used
15 on television, public television, has increased
16 substantially since the last license agreement was
17 entered into in 1992.

18 In fact, it has grown dramatically by over
19 83 percent from even the level that PBS and Public
20 Broadcasting acknowledge may have been in effect in
21 1992, of approximately 20 percent.

22 That substantial increase in the use of

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1 BMI music reflects in fact, the addition to the
2 quality, to the performance of Public Broadcasting.
3 And I think Mr. Rich effectively acknowledged the sea
4 change, if you will, insofar as BMI is concerned, over
5 the period from 1992 and certainly, even if one goes
6 back further in time.

7 During the same period -- and really there
8 has been a trend which we would determine is a sea
9 change -- in the nature of Public Broadcasting. Mr.
10 Schaeffer has alluded to the comparisons with the
11 commercial television and radio broadcasters.

12 We agree with that. That trend has
13 continued and has become significant, both in economic
14 terms, but in the realities of the marketplace. And
15 it is absolutely clear that today, and starting years
16 ago, public broadcasters compete with the commercial
17 broadcasters for talent, they compete for audience,
18 and they compete for corporate support.

19 Euphemistically referred to in Public
20 Broadcasting circles as corporate underwriting;
21 referred to in commercial circles as advertising. And
22 we will have displayed for the panel throughout the

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1 proceedings, what we are talking about when we use the
2 term "corporate underwriting" and how that appears and
3 how that is used in the Public Broadcasting arena.

4 The public broadcasters themselves I
5 think, have acknowledged that they operate, in effect
6 compete with, the commercial broadcasters. When they
7 seek to get compensated for other's use of their
8 intellectual property -- for example, in the Satellite
9 Carrier case or otherwise -- they do not come in and
10 say others should pay less for their intellectual
11 property because they are public broadcasters.

12 Indeed, they've made the argument that
13 perhaps they should get more than commercial because
14 of the sort of improved and enhanced quality and the
15 laudatory things that Public Broadcasting
16 unquestionably does.

17 Our songwriters, our composers, contribute
18 to those laudatory qualities of Public Broadcasting
19 and they deserve to be paid accordingly. And if that
20 allows Public Broadcasting to compete with commercial
21 broadcasting television and radio, there ought to be
22 no distinction in terms of how that affects the

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1 composers and the writers of music.

2 There is no rational or economic basis for
3 them to be subsidizing, in effect, Public
4 Broadcasting, when their works are used on Public
5 Broadcasting to compete with commercial broadcasting.

6 Now, I want to digress for just a moment
7 to the question of what the standard is that the panel
8 must apply. I don't disagree -- in fact, I agree --
9 your job is to determine what the market value, the
10 fair market value of the BMI repertory is.

11 And that is a function of an individual
12 determination separate from ASCAP, because that's what
13 the statute requires; that you determine the fee,
14 reasonable fee, for each of the organizations
15 separately.

16 Mr. Rich alluded to the fact that his
17 reading of Section 118 suggests that Congress
18 specifically alluded to prior agreements between the
19 parties as an appropriate thing to look at. I've
20 taken a look at 118 myself in that regard, and
21 actually, I'm not sure that that's what 118 says
22 because the word "prior" isn't in there.

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1 And if you look at 118, Section B.3, it
2 says, "In establishing such rates and terms the
3 Librarian of Congress may" -- of course that is
4 permissive, not mandatory -- "consider the rates for
5 comparable circumstances under voluntary license
6 agreements negotiated as provided in paragraph 2".

7 That clearly provides for consideration
8 of, for example, the rates that SESAC has voluntarily
9 agreed to and which have been submitted under Section
10 2.

11 That is in fact, what the 1978 CRT
12 Tribunal did when, in considering ASCAP's license fee
13 under Section 118, the parties looked to what the BMI
14 voluntary agreement was, and the SESAC agreement.

15 So I think that there is a legitimate
16 question as to whether there is any direction from
17 Congress that prior license agreements are those that
18 are referred to in the rates for comparable
19 circumstances under voluntary license agreements.

20 We don't say -- make no mistake about this
21 -- that you cannot look at the prior license
22 agreement. What we do say is, it is not determinative

1 of what the license fee should be for this proceeding
2 and for the years that you are going to decide the
3 rate for.

4 You have to consider, under the
5 circumstances, what that rate should be. We are going
6 to adduce expert economic testimony, and our own
7 testimony of our business people, about what that rate
8 should be, and we say the rate should be arrived at
9 looking at the comparable circumstances of the
10 commercial broadcasters.

11 We do not agree that other factors which
12 were taken into account because they were required to
13 in the Satellite Carrier case, apply here. Section
14 119 -- and I've left my copyright book here -- Section
15 119 which deals with the Satellite carrier case, which
16 I believe two of Your Honors were involved in,
17 specifies mandatorily.

18 It says, "The panel shall consider various
19 things, including the fee established under any
20 voluntary agreement filed with the Copyright Office in
21 accordance with paragraph 2, and the last fee proposed
22 by the parties before proceedings under this

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1 paragraph".

2 It also goes on to say, "The fee shall
3 also be calculated to achieve the following
4 objectives". And then four objectives are listed,
5 including number 4: "to minimize any disruptive
6 impact on the structure of the industries involved,
7 and on generally prevailing industry practices".

8 I would submit to you that the dichotomy
9 between the mandatory consideration and for example,
10 a 119 proceeding, as opposed to the permissive single
11 criterion in a 118 proceeding, is something that the
12 panel cannot ignore.

13 And it is simply a little too quick to say
14 that what may have been the criteria that were applied
15 in the Satellite Carrier case or some other proceeding
16 other than 118, should apply ipso facto in this
17 proceeding. One needs to use the statute and the
18 statutory criteria.

19 I thought I heard a suggestion made by Mr.
20 Rich that somehow the Satellite Carrier case under 119
21 carried over into this case because of the criteria
22 that are applied, or should be applied. And I think

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1 the statute does not bear that out.

2 Now, it is of course true that BMI as well
3 as ASCAP, and various of its users of music, have been
4 embroiled in litigation, anti-trust litigation since
5 the beginning of time. One of the great things in
6 being here is that I'm able to be with Mr. Rich again,
7 and we started doing this in 1977, he and I. We have
8 been doing this for over 20 years.

9 And I think I know pretty well what he's
10 going to say; I'm sure he knows what I'm going to say.
11 Because we have had the fortune, or misfortune, of
12 litigating some of those anti-trust cases, including
13 the local television anti-trust case called Buffalo
14 Broadcasting, and the NCTA case here in Washington,
15 just in 1991 I believe.

16 And I've had the fortune to also work on
17 the network TV case involving BMI, since and ASCAP --
18 that went all the way to the Supreme Court of the
19 United States.

20 Why does that have any significance? The
21 only significance is, all of those anti-trust charges,
22 in every single one of those cases, has been rejected

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1 by the courts -- including up to the United States
2 Supreme Court.

3 And interestingly, as a sidelight, the
4 Supreme Court of the United States in the BMI-CBS
5 case, explicitly and specifically referred to
6 Congress' decision to impose a mandatory license and
7 blanket license in public broadcasting, as an example
8 of the benefits, if you will, of collective licensing
9 by BMI and ASCAP and the blanket license.

10 So what relevance all that has to your
11 determination I'm not sure, but there is relevance to
12 what the existence of the litigation has meant to
13 those who negotiate. And one question that has been
14 raised is, why has BMI for 20 years, continued to
15 enter into license agreements with Public Broadcasting
16 and NPR, and not go unto CRT or to the CARP?

17 You will hear the testimony from the BMI
18 businesspeople who negotiating those licenses, who are
19 knowledgeable about them, and they will explain that
20 since 1978 until 1997 litigation was in effect,
21 affecting the television broadcasting market --
22 particularly the local television market.

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1 The rates that were then being paid by BMI
2 were interim and affected by that litigation for
3 virtually that entire 20-year period. Just as they
4 claim they have priorities in terms of when they have
5 litigation or when they negotiate, so do we.

6 We were embroiled in more litigation than
7 you could shake a stick at over the past 20 years, and
8 whether one should commit resources to starting a CARP
9 proceeding or a CRT proceeding in the old days -- when
10 by the way, BMI's marketshare was considerably lower
11 than it was, were questions from management to
12 consider and decide upon.

13 But the existence of the litigation and
14 the fact that there was an overhang to the negotiation
15 process, is indeed a fact that we believe is
16 significant in terms of the evaluating whether what
17 was done from 1992 or before, to where we are today.

18 We believe that there is perfectly
19 legitimate business reasons as to why deals were made
20 in the past they way they were.

21 See, one of the interesting things I noted
22 when Mr. Schaeffer was talking about the disclaimer or

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1 the no prejudice or no precedential value thing in the
2 ASCAP license, it is true. It is not in the BMI
3 licenses with Public Broadcasting.

4 But interestingly, if you go back in time
5 to the beginning of the licensing relationship, BMI's
6 arrangements were always sort of on the coattails of
7 ASCAP at that time.

8 When Mr. Schaeffer alluded to the decision
9 in the 1978 ASCAP CARP proceeding, I took a look at
10 that as he was speaking and in fact, he is quite
11 accurate that the CRT at that point in time, when they
12 adopted the schedule for ASCAP said, this is basically
13 something for us to look at in terms of methodology
14 and in terms of the correctness of it for the future.

15 They also pointed out that the reason why
16 they did not look at the BMI license agreement which
17 was voluntary in 1978, was because it was keyed into
18 in effect, ASCAP, and would have been a circular
19 exercise. It's that it would be the equivalent of
20 traveling in a circle for the CRT to now utilize the
21 BMI agreement as the basis for establishing a
22 reasonable royalty schedule for the use of ASCAP

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1 music.

2 Well, the person who was trying to use it
3 wasn't ASCAP, I can assure you; it was Public
4 Broadcasting. So the history of the licensing
5 relationships are not one between BMI and Public
6 Broadcasting that bespeak some agreement that whatever
7 has been arrived at is fixed in stone and can never be
8 revisited again.

9 If that were the appropriate legal view to
10 these proceedings, and that is that an agreement, once
11 entered into, becomes in effect, that's it for the
12 future absent some monumental change, I would imagine
13 there would be far less voluntary agreements and more
14 litigation, which I don't think any of the users and
15 the societies that license the music, want.

16 Now, I mentioned before that BMI wants to
17 be treated individually and separately; indeed, it is
18 required to be individually treated in this case. BMI
19 is the largest music and performing rights society.
20 It has 185,000 affiliates.

21 We are a corporation that operates on a
22 non-profit basis; we're not a membership society. We

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1 have a Board of Directors; indeed, BMI was founded by
2 the broadcasters -- the radio broadcasters and
3 television broadcasters, many of whom still sit on the
4 Board of BMI.

5 BMI wanted to compete with ASCAP and we
6 have a vigorous competitive relationship in terms of
7 our business dealings with ASCAP. Our writers and
8 publishers deserve to be compensated for the work that
9 they do that's used by others. The Copyright Law
10 mandates it, Congress mandates it -- with respect to
11 Public Broadcasting.

12 There is no dispute I would agree, on most
13 of the factual issues: what the revenues of Public
14 Broadcasting are; what the programming expenditures
15 are; what the audience size is. We dispute what the
16 significance of those things is to the determination
17 that is going to be done by the panel.

18 There is also no dispute that music is
19 used intensely on Public Broadcasting; absolutely can
20 be no dispute. And it is our proof that, with respect
21 to television and radio, the music is used more
22 intensely on Public Television than on commercial;

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1 that's with respect to Public Television.

2 And it's undisputed, taking their numbers,
3 that 19 to 20 minutes of every hour is music -- wall-
4 to-wall music. If you took each hour and you took out
5 19 minutes of it, it would be music. According to
6 their figures. We say it's as high as 25 percent --
7 25 minutes, excuse me, 25 minutes. But that's in
8 duration. So there is no question that there is
9 intense music use being done on Public Television;
10 absolutely none.

11 With respect to radio there is in fact,
12 less -- as everyone has acknowledged -- less music use
13 statistics; just because of the difficulties Mr. Rich
14 alluded to and Mr. Schaeffer. But that does not
15 suggest that music isn't important.

16 Indeed, one of the more anecdotally
17 amusing -- to us, anyway -- items and it's one of them
18 before you, is an ad taken from TIME magazine the week
19 of February 2nd, 1998, page 78, which is an NPR ad --
20 which as you can see, directs the reader's attention
21 to rhythmic drumming, stomping feet, tribal chanting,
22 raindrops -- and then in the tag line which is

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1 promoting the NPR morning edition, they talk about
2 among other things, music: stay tuned to NPR and
3 discover news that intrigues, music that enchants, and
4 talk that challenges.

5 It is interesting to us, one, that they
6 are in fact, promoting music -- which of course we've
7 known; that they are promoting it in a national
8 publication like TIME magazine which charges upwards
9 of \$100,000 for such an ad. It's also I think,
10 relevant to determining how much should be paid to the
11 music licensing societies.

12 We have asked for the following fees:
13 \$5,500,000 per year for the PBS and Public
14 Broadcasting television stations for the years 1998
15 through 2002; \$1,395,000 for Public Radio for each of
16 those years; and finally, we have asked that in any
17 event, BMI should be given 38 percent of whatever the
18 total amount is established for BMI, ASCAP, and SESAC
19 for this license period.

20 That percentage corresponds to what our
21 proof will be as to the BMI share of copyrighted music
22 on Public Television. Obviously, we know that non-

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1 copyrighted music is also used so that figure will
2 actually be greater.

3 We rely on that -- the theory of our
4 request is really, will be explained by Dr. Bruce Owen
5 who is a former chief economist of the anti-trust
6 division of the Justice Department and someone I think
7 the panel may know from the Satellite Carrier case.

8 Dr. Owen briefly -- he has examined in
9 fact, three different factors -- revenue, programming
10 expenditures, and audience size -- in terms of both
11 commercial television on the one hand, and Public
12 television on the other.

13 And as this chart indicates, the Public
14 television has for example, based on two years: 4.6
15 to 4.8 of the size of revenues of commercial; 6.7
16 percent of programming expenditures; and 4.4 to 5.5
17 percent of the audience size.

18 He has concluded and will testify that on
19 balance, that relationship should result in a fee
20 between \$4- and \$7 million; BMI has selected the
21 midpoint between \$4- and \$7 million to arrive at the
22 \$5.5 million figure, which is roughly 5.2 percent of

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1 what the commercial television industry pays for their
2 BMI music license fees in the current world.

3 And that's what this chart shows, is that
4 BMI expects to receive \$106 million in commercial
5 television license fees for 1997; 5.5 is the requested
6 fee for public television and that would be I think,
7 if my math is correct, 5.2 percent.

8 For public radio, again Dr. Owen has
9 analyzed available information with respect to two
10 categories; those being revenue for commercial and
11 public radio, and audience size.

12 There was no comparably available or
13 satisfactorily available music use data, although he
14 did take that into account in terms of taking
15 discounts with respect to differences in the use of
16 music on Public radio as opposed to commercial radio.

17 The bottom line of which is, we are
18 proposing that BMI receive \$1.395 million which is
19 equal to about 1.2 percent of the fees that will be
20 paid by commercial radio to BMI; and that's \$115
21 million.

22 We believe that Dr. Owen's analysis is

1 consistent with the appropriate search that should be
2 undertaken here which is to look at the comparably
3 situated industry of commercial TV. You've heard a
4 lot about that and given the time constraints I am not
5 going to go into all of the indicia of that.

6 But I will tell you that when you focus on
7 the audience, you focus on the programming
8 expenditures, you focus on the revenues and how the
9 commercial and the Public Broadcasting stations
10 operate, we feel that they are a very good proxy for
11 determining market value today in terms of what the
12 value of the BMI reparatory is.

13 In addition to Dr. Owen whom you will
14 hear, you will hear from two BMI employees. Allison
15 Smith who is in the Performing Rights Department; she
16 will talk about the BMI business and its repertoire
17 and its affiliates.

18 You'll hear from Fred Willms who's BMI's
19 chief financial officer who will talk about the
20 historical licensing arrangements that BMI has had
21 with Public Broadcasting, as well as with the
22 commercial television industry.

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1 In addition, we will have for you Michael
2 Bacon who is a composer who specializes in composing
3 for Public Broadcasting television. He also does work
4 that appears on commercial television, and indeed,
5 what he will tell you will illustrate the unfairness
6 that exists today between work that's composed for use
7 on Public Broadcasting in terms of compensation, and
8 what he will get for the same type of work on
9 commercial broadcasting.

10 Finally, we will have Janet McFadden who
11 is a television producer who worked for 20 years in
12 the Public television industry and then worked for
13 National Geographic producing programming.

14 She will explain how composers are used in
15 the production of programming for both Public and
16 commercial television, and the fact that there is not
17 any difference in terms of how the hiring and the
18 usage of music and composers is done; indeed, the
19 importance of the music to those programs.

20 Our last witness is going to be Roy
21 Epstein who is another economist, and he's here just
22 to deal with a music use study that was done several

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1 years ago in connection with the local television
2 industry.

3 Now I started, I think I said, we agreed
4 with one premise that the Public Broadcasters have
5 stated and that is, we're trying to determine market
6 value; what's the value?

7 We disagree with the premise that the
8 starting and ending point is the prior fee that either
9 BMI or ASCAP has. We believe that the commercial
10 stations do offer the appropriate place to look.

11 And lastly, let me leave you with this
12 thought and that is, we believe that the evidence that
13 we will adduce before you in the coming month will
14 establish the propriety and reasonableness of the fees
15 that we have articulated; even though they in fact,
16 involved a big increase over what has been the prior
17 fee.

18 I think there is no disagreement, however,
19 that there is a floor to which we are entitled, that
20 there is no dispute and that is, if you take the
21 analysis from the Public Broadcasting side they say,
22 take the old fee, increase it five percent for

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1 programming expenditure increases and any change in
2 music use.

3 Well, the BMI music use has undeniably
4 changed to the tune of 83 percent. So we approach
5 this proceeding that even if everything else were
6 rejected from our presentation, we are entitled to
7 basically double of the fee that previously was in
8 effect. And I think there can be no dispute.

9 For the Public Broadcasters to say that
10 they don't care what we get and that's something
11 between us and ASCAP, I think is a little unfair.
12 They do care what we get. They cared what we got in
13 1992 when they said we got down to the penny
14 practically, what our music use showed -- 20 percent.

15 Mr. Rich correctly says, if you do 20
16 percent of the license fee you come out to within a
17 hair's width of that. So I think they do care, and
18 they ought to care. But from our perspective that is
19 a floor and we are entitled to much more than that
20 floor.

21 I think I've come in underneath and with
22 that I'll say, that's all I have.

1 CHAIRMAN GRIFFITH: All right. Thank you,
2 very much. Mr. Schaeffer, do I understand sir, that
3 ASCAP is going to present their testimony first and
4 you have several witnesses?

5 MR. SCHAEFFER: No, we have one witness
6 today only, as agreed between the parties --

7 CHAIRMAN GRIFFITH: All right. How long--

8 MR. SCHAEFFER: -- and a short witness, at
9 that.

10 CHAIRMAN GRIFFITH: How long is that
11 witness going to take?

12 MR. SCHAEFFER: I shouldn't think the
13 direct would be more than 15 or 20 minutes.

14 MR. WEISS: We expect the cross
15 examination wouldn't be any longer than that, either,
16 Your Honors.

17 CHAIRMAN GRIFFITH: I'm trying to make it
18 as convenient for you all. Let's take our lunch and
19 recess and we'll come back at 2 o'clock and we'll take
20 care of that witness.

21 (Whereupon, a brief luncheon recess was
22 taken at 12:56 p.m.)

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

2 (2:01 p.m.)

3 CHAIRMAN GRIFFITH: Ladies and gentlemen,
4 before we begin our afternoon session, let me simply
5 advise you -- Judge Gulin is not feeling well. He's
6 gone back to his hotel room. If you have no objection
7 we will proceed and he will read the transcript of the
8 testimony of this witness. If that's agreeable with
9 all parties?

10 MR. SCHAEFFER: It's agreeable to ASCAP.

11 CHAIRMAN GRIFFITH: All right. Let the
12 record reflect that all parties have agreed to proceed
13 in this matter.

14 All right, do you want me to swear the
15 witness?

16 MR. SCHAEFFER: Would you please swear the
17 witness? We call Mary Rodgers, Your Honor.

18 CHAIRMAN GRIFFITH: All right, Ms.
19 Rodgers. Do you solemnly swear any testimony and
20 evidence presented by you in this cause will be the
21 truth under penalty of law?

22 MS. RODGERS: I do.

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1 CHAIRMAN GRIFFITH: Thank you.

2 DIRECT EXAMINATION

3 BY MR. SCHAEFFER:

4 Q Ms. Rodgers, would you state in your own
5 words, what your occupation is and what your
6 relationship is to ASCAP?

7 A I'm a composer, a lyric writer, and a
8 screen writer. I'm a writer member of ASCAP and have
9 been since 1954, and I've been a writer member of the
10 Board since 1995.

11 Q Would you just tell us briefly, your
12 family has been involved both with ASCAP and with
13 music, have they not, over the years?

14 A Yes, always. My father was Richard
15 Rodgers of Rodgers and Hart and Rodgers and
16 Hammerstein, and later on actually Rodgers and Rodgers
17 when he wrote his own lyrics. He was actually on the
18 Board of ASCAP. I've grown up with music. I've sat
19 around the living room actually listening to my father
20 writing all that stuff because he didn't have an
21 office -- which was a great, great pleasure.

22 And I've written music myself, and we have

1 a son who's now doing wonderfully as a young composer
2 himself and is also a member of ASCAP; as is my nephew
3 who also writes music. Sometimes I feel that my
4 sister and I are sort of gene conduits for creativity.
5 We just sit in the middle and pass it along.

6 Q Are there any shows that you have written
7 the music for that we would be aware of?

8 A Well, you may know about "Once Upon a
9 Mattress" which starred Carol Burnett. That's the
10 best known one. I also did a big flop called Hot Spot
11 with Judy Holiday.

12 I was one of the founding editors and
13 contributors to Marlo Thomas', "Free To Be You And
14 Me", which is about to celebrate its 25th Anniversary.
15 I've written a lot of children's things, and I guess
16 that's it.

17 Q Do you serve on any Boards of Directors
18 other than ASCAP?

19 A I'm Chairman of the Board of the Julliard
20 School -- which I guess you probably all know what
21 that is. It's, in my opinion anyway, the finest
22 conservatory in the world -- not just for music but

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1 also drama and dance -- and I'm very proud being
2 there.

3 I'm on the Dramatist Guild Council. I'm
4 on the Board of Lincoln Center, and -- on the
5 Executive Board of Lincoln Center. Let's see, what
6 else do I do here? I guess that's the primary stuff.
7 I'm also a director of the Rodgers and Hammerstein
8 organization.

9 Q Would you describe ASCAP and what it is,
10 to the Board, briefly? To the Board of Arbitrators,
11 briefly?

12 A ASCAP is basically a service organization.
13 It's for the collection of monies written by, you
14 know, writers, and published by ASCAP publishers, and
15 for the protection of their copyrights.

16 We have something like 67,000 -- there are
17 67,000 of us and millions of copyright -- copywritten
18 compositions and things. We also are affiliated with
19 58 foreign performing rights societies, and we protect
20 their authors and present them and they similarly do
21 the same for us.

22 Basically we're a licensing agency because

1 it's impossible for individual people to do this for
2 themselves. If you take 67,000 people you don't
3 expect every one of them and the stations of cable or
4 whoever wants to play that particular song, to call up
5 and individually negotiate. It's just unwieldy and
6 impossible. So it's really just -- there's no way I
7 think, for writers to collect money unless there is an
8 organization such as ASCAP or BMI.

9 Q That anticipates a couple of my questions.
10 Can you tell us what you know about the ASCAP
11 repertoire?

12 A We have some pretty snappy people. We
13 have among us: my father, and Lawrence Hart, and
14 Oscar Hammerstein, and Cole Porter, and Irving Berlin,
15 and Pearl Jam, and Wynton Marsalis. And you know, the
16 list goes on really, forever.

17 Q To what extent does -- let's just see,
18 maybe I'll move this along. What kinds of genres are
19 there in the ASCAP repertoire?

20 A Everything you can think of: pop, rock,
21 hip-hop, classical music -- symphonic and concert
22 music, standards -- theater standards as well as

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1 regular standards, gospel. You name it and we've got
2 it.

3 Q Are there any classical composers in
4 copyright that ASCAP represents?

5 A Yes, there are. If you consider Leonard
6 Bernstein one, certainly, and I guess Perkofiev is
7 probably still considered within that point. I need
8 --

9 Q I can give you names but there's no need
10 to --

11 A You need to give me names. Bartok.

12 Q Would you tell us very briefly what you
13 know about ASCAP's membership and organizational
14 structure?

15 A We are composed of -- there are six writer
16 Board -- 12 writer Board members and 12 publisher
17 members. The current president is Marilyn Bergman
18 who's the well-known songwriter -- lyric writer, with
19 her husband Alan Bergman.

20 Before that Morton Gould was our president
21 and before that Hal David who wrote "Raindrops Keep
22 Falling On My Head", and all of that. What else do I

1 need to tell about that?

2 Q If you can't remember don't worry about
3 it.

4 A We have -- well, we also license a lot of
5 -- we do the licensing for foreign writers as well,
6 like Maurice Jarre, Andrew Lloyd Weber. Perkofiev, I
7 was right about that. Pierre Boulez, Tim Rice, Arthur
8 Honnegger. Those are people whose copyrights are
9 still involved with what we're doing.

10 It's a completely membership owned and run
11 organization. It's non-affiliated, non-profit, and we
12 grant non-exclusive rights, which means that if you
13 choose to be dumb enough to try to negotiate for
14 yourself, you actually could.

15 We will license anything for anybody that
16 is non-dramatic. In other words, ASCAP will not
17 license "Oklahoma" or Mechanicals Records, but they
18 will license everything else.

19 Q Would you describe very briefly as best
20 you know, the distribution of royalties for license
21 fees -- how that works?

22 A There's a -- we have a survey system and

1 what basically happens is that songs are logged --
2 which is basically I suppose, more a computer function
3 than anything else, now -- and we have listeners,
4 people who simply listen to see what's been played and
5 how often it's been played.

6 And based on those performances we
7 distribute all the money except for about 16 percent
8 which goes to maintain the offices, of which there are
9 several -- one in New York, one in L.A., one in
10 Nashville. And we're in pretty good computer touch
11 with everybody else.

12 Q Are you familiar with the expression
13 "follow the dollar"?

14 A Yes, I am. That's our -- "follow the
15 dollar" is basically the slogan; it's what we do.
16 Depending on how much, how often something is played,
17 that money accrues to the people responsible for
18 having it appear on the air or whatever, in the first
19 place.

20 The outside experts -- not we, of course -
21 - are the people who determine exactly how that gets
22 done, through special court appointed advisors at this

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1 point. The Honorable Harold Tyler who's a former
2 Federal Judge -- I'm sure you know all this -- and
3 Seth Huffstedler, who oversee to make sure that these
4 things are being done correctly and fairly.

5 If there are any changes that need to be
6 made in what we call the weighting formula or, you
7 know, how people get paid and who gets paid what,
8 first it's discussed pretty thoroughly with the ASCAP
9 Board and then it's submitted to the Department of
10 Justice, and sometimes by a U.S. Federal Court.

11 And there are no arbitrary rate changes
12 allowed at all. We can't -- ASCAP can't just suddenly
13 say, this person should get more and this group should
14 get less. It's highly regularized.

15 Q And pentultimately, would you tell us very
16 briefly about what special services and awards ASCAP
17 provides to its publisher/writer members?

18 A We really do a lot; I'm very proud of
19 that. First of all, I'm on the ASCAP Foundation which
20 is sort of last on my list to mention, but it's the
21 one that comes to mind first because it provides all
22 kinds of services in terms of nurturing the careers of

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1 young writers and providing entertainment for old
2 people and for kids.

3 We're expanding that Board now so that
4 it's really become a large and very lively enterprise.
5 We give cash awards -- this is not the Foundation but
6 the organization itself -- we give cash awards to
7 people who don't make enough money in the regular way.

8 In other words, if you wrote an absolutely
9 beautiful little musical that didn't have any pop hits
10 on it and didn't seem to want to be performed on
11 television, but the worth of the creativity is
12 evident, we whenever we can, reward those people.

13 We have songwriter workshops on both
14 coasts run by people like Stephen Schwartz on the West
15 Coast who wrote "Pippin" and "Godspell" and who give
16 a great deal of his time to helping young people
17 develop new works.

18 The other person -- I have taken part in
19 some of these workshops -- and Charlie Strauss who
20 wrote "Bye Bye Birdie" and "Annie", is another one of
21 those people. We have a pretty good sense of
22 volunteerism in terms of helping people up from below,

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1 which is what we all should do, especially when we're
2 at the age that I am, which is older.

3 We have, I think, an extremely good
4 insurance policy for medical stuff, dental stuff, life
5 insurance, and instrument insurance -- which is the
6 kind of thing for instance, that my son Adam needs and
7 would benefit from if his studio burned up. I mean,
8 it's a very handy thing to have in your pocket.

9 We collect the royalties from the
10 cassettes -- Dart -- the blank cassettes for people if
11 they like. And then we have a very exciting World
12 Wide Web system by which people can -- through which
13 people can find out what's going on, they can be
14 informed, they can talk about what they're doing and
15 communicate with each other.

16 And all in all, I think we're a pretty
17 public spirited group. Ironically, I've found at
18 least one friend over here at PBS -- I'm a huge
19 admirer of PBS. My cousin is one of the major writers
20 for PBS. And I listen to almost nothing but NPR,
21 myself.

22 So I love what they do, but I think the

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1 way that things are working now -- as you've heard in
2 much more expert testimony -- I don't think the
3 writers are being fairly compensated.

4 And they are after all, most of them, not
5 lucky enough to be me. My father did very well by me,
6 but there are people all over this country who are
7 sending their kids through, you know, one or two
8 copyrights.

9 I happen to know the guy for instance, who
10 wrote the theme song for "The American Experience".
11 He hasn't got a lot of dough. He really needs that
12 money. And it's really a small -- from what I can
13 tell by the figures and I'm not much of a figure
14 person -- but from what I can tell, what we're asking
15 for is a very small, undamaging part of the monies
16 that PBS and NPR realize.

17 Q You signed a document --

18 MR. WEISS: Excuse me, I'd like to just
19 interject for one moment, Your Honors. I know in
20 prior CARP proceedings there's been much ado about the
21 issue of witnesses whose testimony departs somewhat
22 from their written testimony.

1 I'd just like to state for the record that
2 we have no objection to the nature of the testimony
3 that this witness has given. I don't suspect that all
4 parties are agreeable.

5 I think we're perfectly prepared to allow
6 departures within the general scope and context of the
7 written testimony, and I'd just like to have an
8 understanding that that's what the other parties
9 expect and will allow us to do as well.

10 MR. SCHAEFFER: Well, I suppose it would
11 depend on the departure. I mean, if somebody comes in
12 with a new opinion I'm obviously going to object.
13 It's --

14 THE WITNESS: Am I departing peculiarly?

15 MR. SCHAEFFER: I have no idea what you
16 have in mind.

17 MR. WEISS: With respect to the witness I
18 appreciate that she has opinions about the value of
19 music on Public Television and NPR and how much ASCAP
20 should be paid for the performances, but that's
21 certainly not part of her written testimony --

22 THE WITNESS: No.

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1 MR. WEISS: -- and it does depart from --

2 CHAIRMAN GRIFFITH: Do you object to that
3 portion of her testimony?

4 MR. WEISS: I'm not objecting to that
5 portion. I guess, since the beginning of testimony
6 there seems to be a relatively significant issue. I
7 guess I'd just like to have an understanding that to
8 the extent that we are within the -- not the technical
9 letter but within the realm of testimony, that none of
10 the other parties are going to object if PBS or NPR
11 witnesses likewise depart slightly from the specific
12 scope of their written testimony.

13 MR. SCHAEFFER: I expect to be in all
14 respects, reasonable in every respect. And if
15 somebody's going to say -- I find this a very
16 cumbersome sort of way of proceeding anyway -- I've
17 never done it before. I can't imagine that I'm going
18 to object if people don't follow the jot and tiddle of
19 their written testimony, obviously.

20 If somebody comes in out of nowhere with
21 a completely different opinion I'm sure everybody
22 reserves their right. Sure, let's be reasonable and

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1 I think we should be reasonable in every respect of
2 this proceeding.

3 MR. KLEINBERG: For whatever it's worth,
4 my view is that reason should prevail, but I also
5 don't want to be surprised by something that's new and
6 that's not within the reasonable scope of what was in
7 the directive.

8 CHAIRMAN GRIFFITH: I think simply the
9 best way to handle it is, I think we all recognize
10 that witnesses are generally bound to the nature and
11 extent and scope of their direct, written testimony.
12 If you raise an objection to the testimony we'll
13 consider it at that time and rule on it as it arises.

14 BY MR. SCHAEFFER:

15 Q Ms. Rodgers, you signed a statement on
16 September 28th, 1997, which has been submitted to the
17 arbitrators as your direct testimony. Do you reaffirm
18 that testimony?

19 A I absolutely do. I would -- if you'd like
20 I will read you this final paragraph. And I apologize
21 for sort of wandering off the subject but I'm not a
22 lawyer; just a person.

1 Thank you for giving me --

2 (Laughter.)

3 CHAIRMAN GRIFFITH: Does that imply a
4 distinction?

5 (Laughter.)

6 -- and I apologize for that. "Thank you
7 for giving me the opportunity to provide you with a
8 brief overview of the critically important work ASCAP
9 does for its members, music users, and the general
10 public. My colleagues and I are fiercely proud of
11 ASCAP and continually strive to improve our
12 organization, but we cannot do so unless our members
13 are fairly compensated for the use of their property.

14 "I hope you'll bear in mind the special
15 and valuable role music plays in the programming aired
16 by Public Broadcasting, when determining the fair
17 value to be paid by them for the use of ASCAP's
18 member's music.

19 "I declare under penalty of perjury that
20 the foregoing is true and correct to the best of my
21 knowledge and belief."

22 MR. SCHAEFFER: Thank you. I have no

1 further questions.

2 CHAIRMAN GRIFFITH: All right. Cross
3 examine.

4 MR. RICH: With the panel's permission Mr.
5 Weiss will cross examine.

6 CHAIRMAN GRIFFITH: All right, Mr. Weiss.

7 MR. WEISS: Your Honors, I must state at
8 the beginning of my cross examination that when I told
9 my daughter I was going to meet with the woman whose
10 father composed "The King and I" which is one of her
11 favorite shows, she said, Miss Anna? And I said, no.

12 THE WITNESS: She's not entirely -- well,
13 she's close. Mrs. Anna did write the original book.

14 MR. WEISS: Correct.

15 CROSS EXAMINATION

16 BY MR. WEISS:

17 Q I notice that you were reading from some
18 handwritten notes while you were testifying. Did you
19 prepare those notes yourself?

20 A Yes, I did.

21 Q Were you --

22 A They are based on the testimony that I've

1 already submitted but because I don't think you really
2 wanted me to sit here and read all that to you, I
3 wanted to make sure that I could at least hit the
4 major points with some degree of intelligence.

5 Q That's certainly fine. During your
6 testimony you talked about the fact that ASCAP
7 licenses on a non-exclusive basis its whole repertory,
8 and you mentioned that ASCAP's members have the
9 ability to license on their own if they're dumb
10 enough. I think that is the quote. What did you mean
11 by that?

12 A It's just totally impractical. I can't
13 think of any composer, even somebody who's only
14 written ten songs, who would want to call up and
15 negotiate or respond to television stations or cable
16 stations and try to deal with it themselves. They're
17 not equipped to deal with it, they don't have the time
18 to do it; their business is writing, not negotiating
19 for themselves. It would be unhelpful all around.

20 Q If it were, in their own business
21 judgment, likely that if they were to license on their
22 own they could earn substantially more through that

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1 kind of a transaction than licensing through ASCAP,
2 would you think that's still dumb on their part?

3 A Absolutely not, but I just think it's a
4 preposterous notion. I don't think there's any way to
5 do it. You'd spend your life on the telephone and
6 with lawyers. Excuse me, I've done it again.

7 Q In your written testimony you testified
8 that management answers directly to the Board. What
9 did you mean by that? If you need a reference it's
10 at, I think, page 9.

11 A No, I know what you mean. I just -- our
12 management is responsible to us. We are like any
13 other Board, the major policymakers, fiscal guardians,
14 and we wouldn't be a proper Board if we didn't
15 function that way.

16 Q Is it accurate to say that ASCAP's Board
17 is active in licensing and overseeing the licensing
18 conducting by ASCAP's management?

19 A No. I mean, not on a personal, one-on-one
20 basis.

21 Q Let me ask it a little bit differently.
22 I assume the Board doesn't get involved in individual

1 negotiations, particularly user groups.

2 A No, it doesn't.

3 MR. SCHAEFFER: I'm just going to
4 interpose an objection. I don't see what this has to
5 do with the price of tea in China. It's way beyond my
6 direct, it's way beyond the written direct testimony.
7 It seems to me to have more relationship to other
8 cases than it does to this particular case.

9 MR. WEISS: I don't believe it does. I
10 think it simply responds to some of the testimony that
11 she's given and I'm trying to explore a little bit
12 more, which is what I'm entitled to do on cross
13 examination.

14 JUDGE DREYFUS: The question quoted the
15 sentence out of page 9 of the direct testimony. It's
16 got to be relevant.

17 CHAIRMAN GRIFFITH: I think it's relevant.

18 MR. WEISS: Thank you, Your Honors.

19 BY MR. WEISS:

20 Q As we were saying, the ASCAP Board doesn't
21 get involved in face-to-face negotiations with users
22 or user groups, right?

1 A No, to my knowledge we do not.

2 Q But when ASCAP's management enters into a
3 license agreement with a major user group, say the
4 commercial television industry, Public Broadcasting,
5 does the Board have the obligation, does the Board
6 review the license agreement being proposed by
7 management?

8 A We certainly hear about it. As far as I'm
9 concerned we hear about it when it's accomplished.
10 But that may be because I'm not listening.

11 Q Does management have the authority on
12 behalf of the Board, to simply enter into agreements
13 without getting the Board's approval?

14 A I would say no, but I probably need some
15 assistance from Mr. Schaeffer there. Because we're
16 basically responsible.

17 Q As a member of ASCAP's Board, you are
18 actually elected by ASCAP's members, correct?

19 A Correct.

20 Q And as a composer member of ASCAP's Board
21 you're only elected by those composer members of
22 ASCAP?

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1 A That's correct.

2 Q Do all composer members of ASCAP have an
3 equal vote in who's going to appear on the ASCAP
4 Board?

5 A No. The votes are apportioned according
6 to the -- well, let's see, how do we put it? My
7 father would have more votes than I've got because
8 he's played a lot more often than I am.

9 Q So the number of votes that one gets in
10 determining who's selected for the ASCAP Board bears
11 a relation to how much your music has been performed
12 in the past?

13 A Yes.

14 Q And I guess that means it also bears a
15 relation to how much you in the past, have received
16 from ASCAP in royalties?

17 A Yes.

18 Q So that just to be clear, the more a
19 member's work is performed and the more they're paid
20 by ASCAP, the more votes they have in selecting
21 ASCAP's Board, correct?

22 A Out of -- if we have -- I've now forgotten

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1 the figures -- but out of 67,000 members, something
2 like 43,000 are writers, and very few of them have
3 enough votes to make that kind of difference. I mean,
4 if you're going to talk about the Cole Porter's estate
5 and the Gershwin estate and people like that. I don't
6 know why that's significant.

7 Q Well, I guess we could ask the Judges if
8 they think it's significant later on, but --

9 A I don't think that gets you elected.

10 Q You said that doesn't get you elected.
11 I'm not sure I understand what you're saying.

12 A People vote for writer and publisher
13 members of the Board based on their reputations.
14 Steven Paulus for example, is our classical music
15 representative on the Board.

16 Half the people in the world except the
17 serious music people, probably don't even know who
18 that is. I wish they did. But that's not how people
19 get elected. They get elected on the basis of what
20 they've done and that they'll be responsible members
21 of the Board.

22 Q I guess, but as a factual matter though,

1 it is accurate that the more your works have been
2 performed, the greater number of votes you will have
3 in selecting the Board, correct?

4 A I suppose so. I really don't know how to
5 answer. You know -- I can't answer that. I'm no good
6 at numbers.

7 Q Now, there are publishers members of
8 ASCAP's Board as well you mentioned, correct?

9 A Yes.

10 Q And is it accurate that publisher members
11 of the Board can only be elected by publisher members
12 of ASCAP?

13 A That's right.

14 Q And Mr. Schaeffer before, during his
15 opening argument, was talking about ASCAP's members
16 being small, Mom and Pop type, small business
17 organizations. Are all of ASCAP's publisher members
18 Mom and Pop organizations?

19 A No, some of them are quite large. But
20 some of them are Mom and Pop and there are some
21 writer/publishers, especially now these days.

22 Q Among ASCAP's Board I believe there's a

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1 representative from EMI?

2 A That's correct.

3 Q That's a fairly large company.

4 A Yes.

5 Q There's a representative I think, from
6 Famous Music?

7 A Yes.

8 Q And Famous is owned by Paramount which is
9 owned by Viacom, correct?

10 A If you say so.

11 Q Well, there's a representative from
12 Warner music as well.

13 A That's right.

14 Q We've all heard of Time-Warner. That's
15 the parent company of Warner Music, correct?

16 A Yes.

17 Q And the publisher members have a large say
18 in the operations of ASCAP as well, correct?

19 A Equal.

20 Q ASCAP collects royalties from users and
21 then after it takes a certain amount off the top for
22 its administrative expenses it distributes the rest to

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1 its members, is that right?

2 A That's correct.

3 Q And of the amount that's left to
4 distribute, half goes to the publishers and half goes
5 to the composers, correct?

6 A Is that right?

7 Q I'm asking for your testimony. If you
8 don't know you can just say so.

9 A I honestly don't know if that's true
10 because I don't know what publishers get.

11 Q You're not aware that 50 percent of
12 ASCAP's collections go to publishers and 50 percent go
13 to composers?

14 A Well, that's certainly -- that's the way
15 it was when my father was growing up and it's probably
16 the way it is in my case.

17 Q Is it accurate that among the largest
18 recipients of royalties from ASCAP are in fact, the
19 major music publishing companies that are ASCAP
20 affiliates?

21 A I suppose so.

22 Q So that would include the Warner Brothers,

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1 EMIs that we talked about before? Who have
2 representatives on ASCAP's Board?

3 A I suppose that's right.

4 Q I'd like to come back for a second to the
5 whole issue of the Board's involvement in approving
6 license agreements presented by management. Is it
7 your understanding that when management proposes a
8 license agreement to the Board, the Board makes a
9 determination as to whether that agreement is
10 reasonable or not?

11 A Yes, I would say so.

12 Q Since you've been on the Board have you
13 had the opportunity to vote on whether to approve a
14 license agreement proposed by management?

15 A I'm not really aware because that -- the
16 licensing department is not a committee that I'm
17 involved in.

18 Q But there is a Board committee -- a
19 subcommittee of the Board, actually, that deals
20 directly with management on licensing issues. Is that
21 the Law and Licensing Committee I believe it's called?

22 A Yes.

1 Q And the Law and Licensing Committee, after
2 working with management, will make recommendations to
3 the Board as a whole, is my understanding, correct?

4 A Sounds right.

5 Q If the whole Board believes that the
6 proposal is reasonable, the Board will then approve
7 the proposal presented by management, correct?

8 A Sounds right.

9 Q And I assume if the Board or the Law and
10 Licensing Committee of the Board were to believe that
11 the proposal presented by ASCAP management was not
12 reasonable, you'd have an obligation to say, we're not
13 going to approve or accept that license agreement
14 proposal, is that right?

15 A I suppose that would be true, but I can't
16 imagine it happening because we're all -- I mean, the
17 Law and Licensing members of the Board committee are
18 cognizant of what's going on all the time anyhow. I
19 don't think it would be brought up at a Board meeting
20 and discussed were it not something that everybody
21 agreed on.

22 MR. WEISS: I have no further questions,

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1 Your Honors.

2 CHAIRMAN GRIFFITH: All right. Let me
3 just ask -- Mr. Kleinberg, do you wish to cross
4 examine, sir?

5 MR. KLEINBERG: No questions.

6 CHAIRMAN GRIFFITH: All right. Thank you.
7 Any redirect, then?

8 REDIRECT EXAMINATION

9 BY MR. SCHAEFFER:

10 Q Do you know approximately how many
11 publisher members there are in ASCAP?

12 A If you give me a couple of seconds I can
13 look it up.

14 Q If you need to refresh your recollection
15 you may look at page 8.

16 A Thank you. It's 23,000 publishing
17 members, as against 43,000 writer members.

18 Q And are all those 23,000 of the size of
19 Time-Warner?

20 A No, not at all. A lot of them are little,
21 weeny guys.

22 Q Do you know some of the publisher members

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1 of ASCAP?

2 A Well, I know the ones on the Board.

3 Q Do you know any of others besides? Do you
4 know what the range of sizes are that are represented
5 on the Board?

6 A I know very few publishers, but there's an
7 enormous variation in size -- from the big companies
8 to the small, you know. People can publish their own
9 stuff, too.

10 Q And do you have to be any particular size
11 publisher to be a member of ASCAP?

12 A No.

13 Q And now, there's 23,000 publisher members
14 of ASCAP and there's 67,000 members, so that means by
15 my arithmetic there's 44,000 writers. Of those 44,000
16 writers, how many would you estimate -- based on your
17 long experience in the music committee -- are as
18 prominent as Cole Porter was, or your father was, or
19 any of the other people like that?

20 A About ten.

21 Q Now, when you were testifying about the
22 votes for ASCAP Board members, you seemed a little --

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1 you found it difficult to express the role that the
2 people like Cole Porter's estate or the Gershwin
3 estate or your Dad's estate, had. What is the way the
4 votes are attributed to them? Can any one of those
5 guarantee themselves a position on the Board?

6 A Absolutely not.

7 Q Tell us why.

8 A Because you don't get enough votes that
9 way. If you added up all the votes that those ten
10 people I'm alluding to get, it doesn't come close to -
11 - let's say everybody else only gets one vote.
12 There's still -- there's a larger representation from
13 other writers. There's no way that you could vote
14 somebody onto the Board with the number of votes that
15 you personally, have.

16 Q Now, you testified that there are,
17 admittedly, a number of large publishers -- probably
18 all large publishers, probably all publishers in the
19 United States who are members of ASCAP, is that
20 correct? Probably pretty close?

21 A I guess, yes.

22 Q Now, what did the publishers do with the

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1 money? Did they give any of the money they get to the
2 writers? Or don't you know?

3 A I don't know. I should know.

4 Q We'll have another witness answer that.

5 A That's good.

6 MR. SCHAEFFER: I have no further
7 questions.

8 CHAIRMAN GRIFFITH: All right. Anything
9 further?

10 MR. WEISS: Just a couple of questions on
11 recross, Your Honor.

12 RECCROSS EXAMINATION

13 BY MR. WEISS:

14 Q What proportion of ASCAP's distributions
15 to publisher members go to the top 25 ASCAP publisher
16 members?

17 A I have no idea. I think you're going to
18 have to get that other expert witness for that.

19 MR. WEISS: I have no further questions,
20 Your Honors.

21 CHAIRMAN GRIFFITH: All right. Ms.
22 Rodgers, thank you very much, ma'am. You're free to

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1 go.

2 MR. SCHAEFFER: I have no further
3 witnesses at this time.

4 CHAIRMAN GRIFFITH: All right.

5 MR. SCHAEFFER: The next witness will be
6 the next session.

7 CHAIRMAN GRIFFITH: Refresh my
8 recollection. Who --

9 MR. SCHAEFFER: The next session I believe
10 -- if my recollection is correct -- it would be Mr.
11 Baumgarten, subject to your ruling, Mr. Linkoff, and
12 Mr. Reimer. There may be a fourth also, but I'm not
13 sure. I don't --

14 CHAIRMAN GRIFFITH: Pretty much in the
15 order that we have them?

16 MR. SCHAEFFER: Yes.

17 CHAIRMAN GRIFFITH: All right. Does that
18 conclude the presentation then, of testimony and
19 evidence today?

20 MR. SCHAEFFER: Yes.

21 CHAIRMAN GRIFFITH: Are you going to have
22 at least three lined up for --

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1 MR. SCHAEFFER: Yes, I will and we may try
2 and get -- what I'm trying to do -- part of the
3 problem with the candidate is, I don't know how long
4 the cross is going to be, and we have to come down
5 here, so --

6 CHAIRMAN GRIFFITH: I understand.

7 MR. SCHAEFFER: -- I'm going to try and
8 get some other -- I'm getting all the ASCAP people and
9 I've been trying to get a non-ASCAP person, and I have
10 more control over the ASCAP people to be around. I'm
11 very mindful and I'm hopeful that we can shorten the
12 testimony a little bit and kind of do this in a more
13 compact way. It is a little awkward bringing them
14 down from New York.

15 CHAIRMAN GRIFFITH: All right. Having
16 concluded our business for today then, we will adjourn
17 until Monday, the 9th day of March, at 10 o'clock
18 a.m., back in this room.

19 (Whereupon, the Copyright Arbitration
20 Royalty Panel Hearing was adjourned at 2:37 p.m.)
21
22

CERTIFICATE

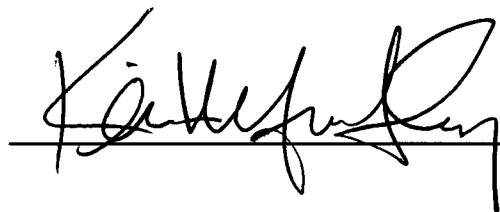
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Date: February 26, 1998

Place: Washington, DC

represents the full and complete proceedings of the
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A handwritten signature in cursive script, appearing to read "Kathleen F. Ryan", is written over a horizontal line.