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HEARING

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In the Matter of:

Adjustment of the Rates for  
Noncommercial Educational  
Broadcasting Compulsory  
License

Docket No. 96-6  
CARP NCBA

ORIGINAL

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

Monday,  
March 9, 1998

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson  
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.:

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

and

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

On Behalf of ASCAP:

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

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

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 WASHINGTON, D.C. 20005-3701

APPEARANCES (continued):On Behalf of ASCAP:

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

On Behalf of the Public Broadcasters:

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

and

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

and

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 WASHINGTON, D.C. 20005-3701

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

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

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

ALSO PRESENT:

GINA GIUFFREDA  
TAMALA T. BOYD, Legal Assistant,  
White and Case

## I-N-D-E-X

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

(10:02 a.m.)

CHAIRPERSON GRIFFITH: All right, Madam Court Reporter, do you want to raise your right hand?

(Whereupon, the Court Reporter was sworn.)

CHAIRPERSON GRIFFITH: Ladies and gentlemen, good morning. The ranks have thinned; is that a good sign?

(LAUGHTER)

CHAIRPERSON GRIFFITH: I want you to be aware that I have given each of my fellow arbitrators a brand new calendar in view of our recent order which said that the Boyle matter would be argued on Thursday, March 9. It is of course, this coming Thursday and not Monday, March 9.

MR. SCHAEFFER: Your Honor, I have an application in respect to that.

CHAIRPERSON GRIFFITH: All right.

MR. SCHAEFFER: After conferring with my brethren, it is my suggestion that because it would interrupt the flow of a number of expert witnesses, would it be possible for us to take, in effect, a

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1 motion in limine on the late afternoon of Friday,  
2 March 13. Then the flow of witnesses would be  
3 undisturbed and I don't want to interfere with BMI's  
4 case or PBS's case.

5 If that would be satisfactory to the  
6 arbitrators, I think it would be satisfactory to the  
7 parties.

8 MR. RICH: We are agreeable, with the  
9 understanding that since we will be bringing one  
10 witness for the evidentiary hearing who is only  
11 available through the end of this week, we would like  
12 that hearing concluded not later than Friday  
13 afternoon.

14 For example, Phil, if there were slippage  
15 in one or more of your witnesses, which may or may not  
16 happen.

17 MR. SCHAEFFER: Certainly, if we have  
18 you, we could be sure that he would be completed on  
19 that afternoon.

20 There is no reason that we shouldn't be  
21 finished by Friday afternoon. But at the very least,  
22 Farr's testimony should be completed by Friday

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1 afternoon. The arbitrators are obviously not going to  
2 decide it on the spot.

3 JUDGE GULIN: Can you tell us how many  
4 witnesses you each intend to call?

5 MR. SCHAEFFER: We intend to call two.

6 MR. RICH: We intend to call one.

7 f Friday afternoon, at two o'clock?

8 MR. SCHAEFFER: What I would suggest is  
9 why don't we start it right after we have concluded  
10 the ASCAP testimony?

11 CHAIRPERSON GRIFFITH: That's fine.

12 MR. RICH: Well, again, just bearing in  
13 mind that there are ten witnesses, I believe,  
14 scheduled for Thursday.

15 MR. SCHAEFFER: Well, I think you and  
16 I can talk about that. I think we are going to find  
17 today, for example, we will have a better feeling for  
18 the pace of the case, and I am sure that Mr. Rich and  
19 I can sit down and see if we can ease some of that.

20 Certainly, some of the people are ASCAP  
21 whom we have more control over; they can be called out  
22 of turn, later in the week.

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1 CHAIRPERSON GRIFFITH: That's agreeable.

2 I would like the record to reflect that in  
3 the Boyle matter, a motion will be heard on Friday  
4 afternoon by agreement of the parties, at the  
5 conclusion of ASCAP's presentation of their testimony  
6 and witness, but in no event, later than two o'clock  
7 Friday afternoon. All right?

8 Mr. Schaeffer, do you have any preliminary  
9 matters other than that?

10 MR. SCHAEFFER: I have none.

11 CHAIRPERSON GRIFFITH: Mr. Rich?

12 MR. RICH: No, Your Honor.

13 CHAIRPERSON GRIFFITH: The only other  
14 thing that we wanted to inquire about and we are going  
15 to ask you right after lunch at two o'clock today, to  
16 report to us what progress you have made in discussing  
17 resolving the Boyle issue among the parties.

18 So, we will look forward to receiving that  
19 from you at two o'clock today.

20 Any other preliminary matters?

21 All right.

22 Mr. Schaeffer, if you would like to

1 proceed.

2 MR. SCHAEFFER: Yes, our first witness  
3 is Mr. Reimer.

4 THE WITNESS: Good morning.

5 CHAIRPERSON GRIFFITH: Good morning, sir.  
6 Whereupon,

7 RICHARD REIMER  
8 was called as a witness, and having been first duly  
9 sworn, assumed the witness stand, was examined and  
10 testified as follows:

11 DIRECT EXAMINATION

12 BY: MR. SCHAEFFER

13 Q Mr. Reimer, would you state your  
14 educational background and occupation?

15 A My name is Richard Reimer. I am currently  
16 ASCAP's vice president for legal services.

17 Mr. Schaeffer, I hold two degrees from the  
18 New York University; a Bachelor of Arts in 1968 and a  
19 Juris Doctor that i received in 1971.

20 Q How long have you been at ASCAP?

21 A I started with ASCAP on my graduation from  
22 NYU law school in 1971.

1 Q What are your present duties at ASCAP?

2 A My duties include, at the moment,  
3 responsibility for virtually all of ASCAP's litigation  
4 in terms of an in-house role. The only areas that I  
5 am not involved in specifically involve rather routine  
6 matters involving the membership and litigation  
7 involving the cable industry.

8 Q What is it that ASCAP licenses to its  
9 licensees?

10 A Well, to respond to that question, it is  
11 probably best approached by first explaining what we  
12 obtain from our members.

13 What ASCAP obtains from its members is a  
14 non-exclusive right to license only the performance  
15 right available to the members, as copyright owners,  
16 under the United States copyright law.

17 The right itself is limited to non  
18 dramatic performances.

19 As a result, ASCAP, on behalf of its  
20 members, searches out those who perform music publicly  
21 and in a non-dramatic manner, and attempts to license  
22 those performances.

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1 Q What is a non-dramatic manner?

2 A Well, this is an area that is often  
3 described as one of the gray areas of copyright law.

4 Essentially, ASCAP's members write, create  
5 musical works. A work can be performed dramatically  
6 if it is presented, for example, as part of a Broadway  
7 show, musical play.

8 The example I like to use, is that if for  
9 example the show is the *Sound of Music*, the song,  
10 Climb Every Mountain, presented as part of the  
11 presentation of that show is a dramatic, musical work.  
12 Presented on the stage, typically with costumes and  
13 part of dialogue, and the music advances the show,  
14 carries forward the flow of the show.

15 On the other hand, if a singer in a night  
16 club or on the concert stage simply sings Climb Every  
17 Mountain, perhaps as a medley of songs, perhaps from  
18 *South Pacific*, perhaps from other Rogers and  
19 Hammerstein shows, then it is a non-dramatic  
20 performance.

21 The members of ASCAP reserve to themselves  
22 the right to license directly dramatic performances of

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1 their musical works.

2 So, as a result, when we issue licenses,  
3 they are licenses for only the non-dramatic  
4 performance.

5 Q You have said that the license is non-  
6 exclusive, that is you get the right to non-  
7 exclusively to license non-dramatic performances of  
8 the members' music. What do you mean by non-  
9 exclusive?

10 A What I mean by that, Mr. Schaeffer, by  
11 virtue of the membership agreement between ASCAP and  
12 each of its members, the member retains the right to  
13 license those same performances.

14 By regulation with ASCAP, members must  
15 advise ASCAP when they issue licenses so of course  
16 they will not be paid royalties from ASCAP for  
17 performances which they have already licensed.

18 JUDGE GULIN: I am just making an inquiry.  
19 We don't seem to have done a voir dire for this  
20 witness.

21 I am not sure how you handled the first  
22 witness.

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1 MR. SCHAEFFER: Well, I think he is the  
2 director of litigation for ASCAP.

3 JUDGE GULIN: I understand, but does PBS  
4 have any questions?

5 MR. WEISS: We have no voir dire.

6 JUDGE GULIN: Okay.

7 Q Would you give us an idea, if you know,  
8 the size of the ASCAP repertoire in music?

9 A The most recent estimate of the scope of  
10 the repertory is that it encompasses perhaps four  
11 million compositions.

12 But when one thinks of the ASCAP  
13 repertory, I think one must think of it as a vast  
14 collection of works in all musical genres that is  
15 anything but static. By that, I mean that it changes  
16 daily as new works are written.

17 Under the federal copyright law, copyright  
18 protection exists as of the moment of creation of the  
19 work, when it is fixed in tangible form.

20 Although ASCAP has extensive records in  
21 the works in the repertory, as I have indicated new  
22 works are written every day, members may not advise

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1 ASCAP for days, weeks or months of new works that are  
2 written. Yet the scope of the repertory is such that  
3 it includes all of those works.

4 Q Does ASCAP represent any foreign composers  
5 or foreign societies?

6 A Yes, it does.

7 Q Who does it represent?

8 A We have arrangements with, I think,  
9 currently 58 foreign performing rights licensing  
10 organizations around the world.

11 On behalf of those organizations, ASCAP  
12 licenses for performances in this country the works of  
13 the members of those foreign societies.

14 Q Who is it that ASCAP licenses?

15 A Again, we begin with the federal copyright  
16 statute which defines the public performance of any  
17 given work. As a result, ASCAP attempts to license  
18 all those who perform music publicly in the United  
19 States.

20 These may include television networks,  
21 television and radio stations, cable services, cable  
22 systems, bars, restaurants, nightclubs, hotels,

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1 bowling alleys, skating rinks, literally anyplace  
2 where a member of the public might observe music being  
3 performed.

4 Q Would you explain to the panel what an  
5 ASCAP blanket license is and how it works?

6 A The vehicle by which ASCAP licenses its  
7 repertory is commonly described as the blanket  
8 license. In this sense, blanket means total access to  
9 the entire repertory.

10 That is the licensing vehicle for  
11 performing rights in use throughout the world. It  
12 assures the user of instantaneous access to all of the  
13 musical works in the repertory and carries with it a  
14 number of advantages.

15 First, access, as I have indicated.

16 Second, it's access to a growing repertory  
17 of music, as I have stated earlier. It is not simply  
18 a license to use the repertory as it exists today.  
19 The blanket license assures the use of all of the  
20 music created, not only today, but throughout the term  
21 of the license agreement.

22 It also assures minimal expense to both

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1 sides in terms of record keeping. The user need not  
2 account to ASCAP for every single performance of ASCAP  
3 music.

4 Essentially, when a user obtains a license  
5 from ASCAP, the user also obtains an indemnification  
6 against claims for copyright infringement.

7 Particularly with broadcaster licensees,  
8 ASCAP has always indemnified the broadcaster against  
9 claims of unauthorized performances of works in the  
10 ASCAP repertory.

11 Q Now, ASCAP's activities are governed by an  
12 anti-trust consent decree, are they not?

13 A They are.

14 Q And for the benefit of the panel, ASCAP  
15 exhibit 21, which is in your packets, is a copy of  
16 that decree.

17 How long has ASCAP labored under an anti-  
18 trust decree and what is the history of the anti-trust  
19 decree?

20 A The first consent decree with the  
21 Department of Justice was entered in 1941 as a result  
22 of an investigation conducted by the Justice

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1 Department and a civil complaint filed under the  
2 Sherman Antitrust Act.

3 The 1941 decree was amended in 1950. Its  
4 precise terminology is it is the amended final  
5 judgement entered in United States v ASCAP.

6 Q In what court was that decree entered?

7 A The decree was entered int he United  
8 States District Court for the Seventh District of New  
9 York.

10 Q What particular activities of ASCAP does  
11 it regulate?

12 A Well, I think in broadest terms, the  
13 decree regulates virtually all of ASCAP's business  
14 activities.

15 When one thinks of ASCAP, one must  
16 understand that essentially, it is a clearing house  
17 operation.

18 On the one hand, members grant rights to,  
19 as we indicate, millions of compositions.

20 On the other hand, ASCAP licenses well  
21 over 100,000 establishments, businesses that use music  
22 throughout the United States. Those businesses pay

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1 ASCAP license fees.

2 In turn, ASCAP distributes the money that  
3 it receives from its licensees to its members in the  
4 form of royalties.

5 The consent decree is broad in scope and  
6 covers all the various elements that I have just  
7 described; relations between ASCAP and its members,  
8 the manner in which license fees as royalties are  
9 distributed to its members and in particular, the  
10 manner in which ASCAP deals with licensees and  
11 potential licensees on the license itself.

12 Q To what extent is non-exclusivity of  
13 licensing by the ASCAP membership dictated by the  
14 decree?

15 A Here again, both the 1941 and the 1950  
16 decrees make it clear that ASCAP obtain from its  
17 members only non-exclusive rights, reserving to the  
18 member the right to license directly either the users  
19 of music or those who prepare programs and then convey  
20 to the users the right to perform those programs,  
21 including the music in those programs.

22 Q To what extent, if any, does the decree

1 regulate the rates or license fees that can be charged  
2 by ASCAP for its members' music?

3 A The 1950 decree has a number of provisions  
4 that directly affect license fees and the  
5 determination of license fees for particular users of  
6 ASCAP music.

7 First, there is a provision that prohibits  
8 ASCAP from discriminating among its licensees in the  
9 terms and fees that it charges. Simply stated, this  
10 means that for example, every radio station, every  
11 commercial radio station would be offered the same  
12 forms of license agreement.

13 The same thing for television stations,  
14 bars, restaurants, hotels and motels, any particular  
15 category of user is offered the same forms of  
16 agreement.

17 In addition, the 1950 decree contains a  
18 provision that affords the user of music the right to  
19 have the fee determined by the federal court in New  
20 York, if ASCAP and the user or the group of users  
21 cannot agree on a reasonable fee. This is section 9  
22 of the ASCAP consent decree.

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1           It is interesting in this respect, that  
2 the provision is triggered by anyone asking ASCAP for  
3 license. It says that if someone applies in writing  
4 for license from ASCAP, they are automatically  
5 licensed to perform works in the ASCAP repertory.

6           The consideration of that license is  
7 payment of license fees and the same provision also  
8 provides both for payment of interim license fees and  
9 for payment of final license fees for the given term  
10 of the license, to be determined either by  
11 negotiations between ASCAP and the user or user group,  
12 or determined by the federal court for the Southern  
13 District of New York.

14           Since the late 1970's, Judge William  
15 Conner as administered the ASCAP consent decree.

16           Q       Now, is there something in the consent  
17 decree described as a program license?

18                   JUDGE DREYFUS:       Excuse me for  
19 interrupting.

20                   MR. SCHAEFFER:       Sure.

21                   JUDGE DREYFUS:       Going back to your  
22 previous answer, is that in the nature of a compulsory

1 license?

2 THE WITNESS: Yes.

3 JUDGE DREYFUS: If all applicants are  
4 automatically licensed unless and until the fee issue  
5 is settled, and then they look back, then it is in the  
6 nature of a compulsory license, is it not?

7 THE WITNESS: Yes, that is correct. But  
8 more than that, what it represents is an agreement by  
9 ASCAP and particularly the ASCAP membership, that they  
10 will give up the other right that they have as a  
11 copyright owner, to tell people they can't use our  
12 music.

13 That is an important point to me, in terms  
14 of the copyright law. The copyright law says to  
15 copyright owners you can certainly say to someone  
16 don't use my property.

17 Assuming the user is not able to defend a  
18 claim of infringement on the basis of fair use, for  
19 example, of some specific exemption in the statute,  
20 the copyright owner can say don't use the property, in  
21 this case the music.

22 By becoming a member of ASCAP, our members

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1 have given up that right. They agree, as Your Honor  
2 has pointed out, that anyone can use the ASCAP  
3 repertory.

4 JUDGE DREYFUS: Thank you.

5 Q Would you explain what a program license  
6 is and what the provisions are in the decree  
7 concerning that?

8 A Yes. The 1941 decree and the 1950 consent  
9 decree as well, contains some specific provisions  
10 relating to use of ASCAP music by the broadcaster  
11 industry.

12 What the decrees provide is that there  
13 will be two forms of license agreement.

14 One is denominated the blanket license.  
15 In this context, apart from referring as I did  
16 earlier, to blanket access to the entire repertory,  
17 blanket license for broadcasters connotes a license,  
18 the fee for which, is a per centage of all revenue for  
19 the broadcast.

20 The distinction between the blanket  
21 license and the program license for broadcasters is  
22 that the program license provides for a fee which is

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1 determined based on the revenue, principally, of  
2 programs that contain ASCAP music.

3 It is an alternative form of music  
4 available to broadcasters, who after all, are in the  
5 position to control the use of music in particular  
6 programs.

7 Q With respect to the program license, is  
8 there any system of valuing certain hours over other  
9 hours when the music is played?

10 A Well, it really depends on the elements of  
11 the particular license. By that I mean separate forms  
12 of program licenses have been offered in the past and  
13 have been determined to be appropriate for radio and  
14 television stations.

15 Mechanisms have been developed to deal  
16 with the value of particular programs to the  
17 broadcaster. Not necessarily the value of the music  
18 to the program, but the value of the program measured  
19 by the revenue derived by the broadcaster.

20 Q And with respect to the radio industry,  
21 can you tell us roughly what the proportion of  
22 stations that use program licenses as opposed to

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1 blanket licenses?

2 A In the radio industry, and I am talking on  
3 the commercial side, we have approximately 11,000  
4 commercial radio stations in this country licensed by  
5 ASCAP. Of that number, about 1,000, perhaps 1,200  
6 employ program licenses.

7 It really is a function of the nature of  
8 the program on a particular station.

9 Q With respect to television, do you have  
10 any judgement to the approximate proportions?

11 A In television, here again we are talking  
12 about commercial television stations, there are  
13 approximately 1,000 stations licensed. My  
14 understanding is that currently the number of stations  
15 that employ program licenses is approximately 250.

16 Let me also point out, apart from  
17 commercial television stations, ASCAP also licenses  
18 commercial television networks, specifically, ABC,  
19 CBS, and NBC, and each of those has always held a  
20 blanket license.

21 Q We are now addressing the radio industry,  
22 what has the history been of how the licenses have

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1       been negotiated as to terms and rates?

2               A       Do we have five minutes or five hours?

3               Q       Five minutes.

4               A       I think one could paint with a fairly  
5       broad brush by describing the history of ASCAP's  
6       licensing of the commercial radio industry in the  
7       United States as one of negotiation against a back  
8       ground of litigation and legislation.

9                       By that I mean, from the time that ASCAP  
10       first licensed radio stations in the 1920's, the  
11       stations felt they were paying too much for the  
12       licenses that they were obtaining.

13                      There was a period on the late 1930's and  
14       early 1940's when the major radio stations and  
15       networks on the air literally removed ASCAP music as  
16       a form of boycott to drive down the price of music.

17                      The result of that was both the 1941  
18       consent decree that I referred to earlier, and a  
19       license that ran for an 18-year term through 1958.

20                      In 1959, the radio industry and ASCAP  
21       commenced negotiations, but within the framework of  
22       the section of the consent decree that I referred to

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1 earlier by which the court would be available to  
2 determine the license fees.

3 Since that time, on roughly a five year  
4 cycle, we have had negotiated license agreements with  
5 the radio industry, the product of which that ASCAP  
6 offered two forms of licenses to radio broadcasters;  
7 a blanket license and a program license.

8 That was the history pretty much through  
9 the early 1990's when, in addition to these negotiated  
10 licenses which were worked out with a committee  
11 representing the entire radio broadcast industry, we  
12 were involved in a separate proceeding involving a  
13 smaller group of stations, led principally by the  
14 National Religious Broadcasters.

15 That organization created a committee of  
16 stations to negotiate with ASCAP and to carry forward  
17 litigation at the same time under the ASCAP consent  
18 decree and that resulted in a decision by Judge  
19 Conner, last year, determining for this small group of  
20 stations alternative forms of blanket and program  
21 licenses.

22 In fact, the blanket license for this

1 smaller group was determined to be the same blanket  
2 license that was affective for the remainder of the  
3 entire industry.

4 The program license was altered slightly  
5 so that currently, for periods through 1996, ASCAP has  
6 made available, by negotiation with the radio music  
7 license committee, the group that is represented as  
8 speaking for the bulk of the industry, a negotiate and  
9 program license. And for this smaller group of  
10 religious broadcasters, an alternative form of program  
11 license.

12 Q When, for the first time, did television  
13 broadcasters become added to the anti-trust consent  
14 decree mix?

15 A The 1950 amended consent decree brought  
16 within its scope the television industry, some of us  
17 may remember that television was essentially an  
18 experimental medium in the 1940's. It became  
19 commercially viable toward the end of the 1940's.

20 As a result, shortly after agreement with  
21 the government on the 1950 consent decree, the first  
22 proceeding to determine ASCAP license fees in the New

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1 York court was instigated by a group of television  
2 broadcasters seeking a form of program license.

3 Q Would you give us briefly, the history of  
4 licensing of the television industry by ASCAP, since  
5 that time?

6 Again, in five minutes.

7 A I was just going to say it will take  
8 another five minutes.

9 The proceeding that I just referred to,  
10 which was commenced in the early 1950's, was known as  
11 the Voice of Alabama proceeding. These proceedings  
12 tend have the name of the lead applicant, the owner of  
13 the station, that is the lead applicant in the group  
14 of stations applying to the court.

15 The court did not determine fees in the  
16 Voice of Alabama proceeding. Rather there was a  
17 negotiated settlement. There followed, I believe,  
18 three successive four-year license terms where fees  
19 were negotiated between ASCAP and the local television  
20 industry.

21 Then in the early 1960's, a litigated  
22 proceeding under the consent decree was commenced;

1 that is known as the Shenandoah Proceeding. That  
2 period of litigation and negotiation culminated in  
3 license agreements being offered on an industry-wide  
4 basis to all commercial television stations in 1969.

5 That was an agreement that was for a term  
6 ending, I believe, in 1972, but by agreement of the  
7 parties, extended through 1977.

8 At the end of 1977, the local television  
9 stations and ASCAP engaged in negotiations that  
10 carried through November, 1978, at which time the  
11 stations commenced an anti-trust action, a plenary  
12 suit, in the Southern District of New York. That case  
13 is captioned Buffalo Broadcasting Co. versus ASCAP and  
14 BMI.

15 ASCAP and BMI were jointly sued as  
16 defendants. The principal allegation in that case was  
17 that the blanket license was a per se violation of the  
18 anti-trust laws.

19 The anti-trust litigation carried us  
20 through I believe it was 1985.

21 Just very briefly, the stations won at the  
22 district court level, but the decision was reversed by

1 the Second Circuit Court of Appeals and was denied by  
2 the Supreme Court.

3 Then the same group of stations applied to  
4 ASCAP for licenses under the consent decree and  
5 applied as well, to the Court for determination of  
6 license fees.

7 That proceeding lasted until 1995,  
8 resulting in two or three decisions on a number of  
9 issues, but ultimately on forms of blanket and program  
10 licenses offered to the entire industry, the licenses  
11 I described earlier.

12 Q What are, as you can recall, what are the  
13 different license fees that are being charged in the  
14 television industry at the present time, network,  
15 local, cable, if you can recall?

16 A Well, I believe that the agreements are a  
17 part of the record in this case. But essentially, the  
18 blanket license fee for each station is determined on  
19 the basis of an industry-wide fee that was agreed upon  
20 in the wake of one of the decisions that I referred  
21 to, in this case a decision by Magistrate Judge  
22 Michael Dolinger of the Southern District of New York

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1 who was sitting as an Article 3 judge.

2 What Magistrate Judge Dolinger did was to  
3 look at the fees last agreed upon by ASCAP and the  
4 local television stations, which in his judgement was  
5 for the year 1972, I believe.

6 He said that those fees should be adjusted  
7 to take into account two factors; CPI, consumer price  
8 index to take into account inflation, and the growth  
9 in the number of stations licensed by ASCAP.

10 The latter factor was fixed at one half of  
11 the number of stations applied to the other two  
12 factors, the 1972 base and the CPI adjustment, on a  
13 yearly basis.

14 The net effect was to create an industry-  
15 wide fee, in a gross dollar amount. In the period  
16 ending March 31, 1998, that current gross dollar  
17 amount for the entire local television industry is  
18 \$96.4 million.

19 In addition to determining this blanket  
20 license fee for the industry, Judge Dolinger  
21 determined that there ought to be a program license,  
22 and the fee for that is determined by stations having

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1 the ability to exclude the revenue from programs that  
2 do not contain ASCAP music.

3 But essentially, we are talking about  
4 blanket license, as I understand in this proceeding,  
5 so the gross dollar amount of the local television  
6 industry was \$96.4 million.

7 With the stations on the program license  
8 I referred to of approximately 250 stations, that has  
9 reduced the total amount paid for local television  
10 stations to something in the order of \$70 million, I  
11 believe.

12 Q Are network stations treated differently?

13 A To be precise, we are talking about, on  
14 the commercial side, television networks and  
15 television stations.

16 Historically, again, there has been both  
17 negotiation and litigation with the three networks,  
18 ABC, CBS and NBC.

19 The principal event in terms of litigation  
20 was an anti-trust suit brought by CBS against ASCAP  
21 and BMI in 1969. That was a case that resulted  
22 ultimately, in two decisions by the Second Circuit

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1 Court of Appeals and one by the United States Supreme  
2 Court.

3 As a result, the networks have paid ASCAP  
4 on blanket basis, they have always held blanket  
5 licenses, and with a couple of exceptions for the last  
6 nearly thirty years they have paid flat dollar amounts  
7 on an annual basis.

8 Currently, at least for the year ending  
9 1996, the last year for which we have had agreements  
10 in place with all three networks, the total amount  
11 paid for the three networks was \$32.45 million.

12 JUDGE GULIN: I am curious.

13 THE WITNESS: Yes?

14 JUDGE GULIN: The Fox Television Network  
15 does not have an ASCAP license?

16 THE WITNESS: No, and again, for a reason  
17 relating to litigation.

18 We believed that the Fox Network should be  
19 licensed and asked Judge Conner, under the consent  
20 decree to so order.

21 There was a proceeding and a decision by  
22 Judge Conner in which he held that for the period

1 covered by the application of the local television  
2 stations, including of course, Fox-owned stations and  
3 Fox-affiliated stations, the fees that were being paid  
4 by the Fox stations were, essentially to cover what  
5 the Fox network should have paid.

6 We disagreed. We thought that Fox  
7 Television Network was taking in enough revenue on its  
8 own, apart from anything the stations were realizing,  
9 so that they should pay, independently, a fee just as  
10 the other three networks.

11 The net effect was that for the period  
12 covered by the Buffalo Broadcasting local television  
13 proceeding and the license that was produced as a  
14 result of that proceeding, there would be no additional  
15 sums paid to ASCAP.

16 However, Judge Conner did say in his  
17 decision that the period thereafter, presumably  
18 commencing April 1, 1998, ASCAP could seek to license  
19 the Fox Network and the Fox stations could make  
20 whatever argument they thought was appropriate as to  
21 potentially a reduction in the fees that they pay as  
22 local stations.

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1                   So, I consider that to be an open issue at  
2 this time.

3                   JUDGE GULIN: As things stand right now,  
4 Fox Network-produced programming can use ASCAP music?

5                   THE WITNESS: Oh, yes, because the  
6 stations carry the programs and the stations are  
7 licensed under the ASCAP local television license  
8 arrangements.

9                   JUDGE GULIN: Well, generally, we were  
10 talking when you license the affiliates, the  
11 independent stations, you are talking about the music  
12 that appears on their programming aren't you?

13                   THE WITNESS: First of all, if I may, one  
14 has to think of local television stations as  
15 affiliated stations or independent stations.

16                   The ASCAP license to the local station,  
17 leaving Fox aside for the moment, encompasses all  
18 programming in the use of ASCAP music and all  
19 programming aired by the station.

20                   The license to the network, ABC, CBS or  
21 NBC covers the network programming that the stations  
22 telecasts.

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1           What you have, looking back in historical  
2 terms, is an understanding amongst the three  
3 components of the industry, ASCAP, the networks and  
4 the affiliated stations, that the fees paid by the  
5 networks and the stations will take into account all  
6 of the revenue that is generated and a fee will be  
7 paid appropriately.

8           Interestingly, in the 1950's, when we  
9 licensed the television networks and we licensed the  
10 stations, they were on a per centage of revenue basis.  
11 So, for example, the stations paid 2.05 per cent at  
12 one period of time but the networks were paying at a  
13 higher rate, 2.50 per cent.

14           Of course, what the networks did, was  
15 charged the affiliates some portion of the fees that  
16 they were paying because they controlled the  
17 programming.

18           So, the historical perspective is that  
19 everyone should have been paying some amount for the  
20 music in the programs.

21           Q       Now, with respect to what you described as  
22 the network licensees, what is the most recent formula

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1 that was adopted by the Rate Court in calculating that  
2 number?

3 A In 1992 and 1993, I believe it was, we had  
4 a proceeding before Judge Conner, in which two of the  
5 three networks, ABC and CBS asked the Court to  
6 determine a reasonable fee. We had settled with NBC  
7 early in 1993, I think it was.

8 Judge Conner said that one looks to the  
9 existing agreements, but one also takes into account  
10 changes.

11 Judge Conner saw two elements as critical.  
12 The change in the network's revenues over time and the  
13 change in the use of ASCAP music.

14 So, it was those two components, to Judge  
15 Conner, that ought to guide the determination of  
16 reasonable fees in the case of ABC and CBS television  
17 networks.

18 Q Ultimately, approximately how much was  
19 paid by the radio industry in 1996-1997 in terms of  
20 license fees?

21 Do you know that number? It is in your  
22 testimony. If I am taxing you --

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1 Let me ask you another way.

2 There has been submitted to the panel a  
3 statement signed by you and dated September, 26, 1997  
4 with I believe one amendment, page 9.

5 Do you reaffirm that testimony?

6 A I do. I know that in my testimony I set  
7 out the rate of radio independently. I believe the  
8 number approaches \$125 million per year.

9 MR. SCHAEFFER: I have no further  
10 questions for this witness.

11 CHAIRPERSON GRIFFITH: All right.

12 MR. WEISS: Can we have a few minutes,  
13 Your Honor, before we begin cross examination?

14 CHAIRPERSON GRIFFITH: Mr. Kleinberg, how  
15 do you want to operate? Do you want to cross-examine  
16 the witness, sir?

17 MR. KLEINBERG: I have no questions for  
18 this witness.

19 CHAIRPERSON GRIFFITH: Okay. Do you want  
20 a two minute break?

21 MR. WEISS: A two minute break, if you  
22 would, Your Honor.

1 CHAIRPERSON GRIFFITH: All right, we will  
2 take four and half. How's that?

3 (Whereupon, the proceedings recessed from  
4 10:43 a.m. until 10:51 a.m.)

5 JUDGE GRIFFITH: Judge Gulin.

6 JUDGE GULIN: Before we go to cross  
7 examination, I just wanted to follow up so that I  
8 understand -- as you indicated, the local affiliates  
9 and independent stations, their license covers all of  
10 their broadcasts, whatever's in their signal, correct?

11 THE WITNESS: Yes.

12 JUDGE GULIN: Then, that begs the  
13 question, why does the network require a license? Is  
14 it because their feed is a performance to the  
15 networks?

16 THE WITNESS: Yes, that's part of it.

17 But also because the networks, early on in  
18 the 1940's, said to us that they want the license so  
19 they in turn can deliver the programs to their  
20 affiliates with the music license taken care of.

21 JUDGE GULIN: Well, if that's the case,  
22 then the local stations are really only paying for

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1 their programming?

2 THE WITNESS: Except that the copyright  
3 law defines the public performance as the separate  
4 performance that occurs when the network airs a signal  
5 and when the affiliated station carries it as well.

6 So there is embodied in the copyright law  
7 the notion of separate performances occurring at the  
8 same time. Then I think the point I was trying to  
9 make earlier was that this had to be dealt with as an  
10 accounting matter, and these license arrangements that  
11 have persisted now for nearly five decades take that  
12 into account.

13 JUDGE GRIFFITH: I suspect counsel may  
14 have a few questions about that.

15 MR. KLEINBERG: I actually do have a  
16 question about it, --

17 JUDGE GRIFFITH: All right.

18 MR. KLEINBERG: -- if I may.

19 DIRECT EXAMINATION

20 BY MR. KLEINBERG:

21 Q Mr. Reimer, do I understand you to say  
22 that the local television license agreements for TV

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1 include the network programming?

2 A No.

3 Q In fact, the network programming that is  
4 shown on the local television stations is covered by  
5 the network license?

6 A That's correct.

7 Q And the non-network programming, whether  
8 it be on an independent station which has no network  
9 programming or an affiliated station, is covered by  
10 the local television license?

11 A That's correct, in terms of the scope of  
12 the licenses issued by the performing rights society,  
13 ASCAP in this case. It's a much -- to me, it's a  
14 different issue when one considers the copyright law  
15 in its essential form.

16 Q No further -- thank you for clarifying  
17 that.

18 JUDGE GRIFFITH: All right.

19 MR. WEISS: If I may just follow up on  
20 that.

21 CROSS EXAMINATION

22 BY MR. WEISS:

1           Q       But as a factual matter, under the local  
2 station licenses with ASCAP, the local station  
3 licenses cover the local station performances only;  
4 the network licenses cover the performances of network  
5 programming on what's called a "through to the viewer  
6 basis" so the performance by the network through the  
7 station and by the station ultimately to the viewer  
8 programming, is that right?

9           A       That's correct.

10          Q       And indeed, that was the subject of  
11 litigation in the cable industry in the late 1980's,  
12 wasn't it, Mr. Reimer?

13          A       Sure.

14          Q       ASCAP had taken the position that, based  
15 on a technical reading of its consent decree, it was  
16 not required to offer such a through to the viewer  
17 license to the cable industry, is that right?

18          A       That's correct.

19          Q       And indeed, Magistrate Judge Dolinger  
20 issued an opinion indicating that in fact ASCAP was  
21 obligated to offer such a through to the viewer  
22 license in the cable industry as well, correct?

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1 A Correct.

2 Q And that case was affirmed pro curiam by  
3 the 2nd Circuit?

4 A Yes, it was.

5 MR. WEISS: Okay, I'd like to -- before I  
6 begin some additional questions, Your Honors, I have  
7 a few exhibits I'd like to show the witness and mark  
8 as Public Broadcaster exhibits as well. These are  
9 essentially a handful of the cases and rate  
10 proceedings that Mr. Reimer has talked about and that  
11 we may talk about during his cross examination.

12 I don't believe that Counsel should have  
13 any objection to these. They're probably a matter of  
14 public record as well.

15 MR. SCHAEFFER: We have no objection.

16 JUDGE GRIFFITH: For the purposes of the  
17 record then, these will be marked as PB -- you've  
18 already marked them?

19 MR. WEISS: Why don't I just say for the  
20 record PB Exhibit 20 is a decision in American Society  
21 of Composers, Authors and Publishers against Showtime  
22 and The Movie Channel, Inc. And that's a 2nd Circuit

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1 Court of Appeals decision in the so-called Showtime  
2 rate proceeding.

3 And I'd note for the record that the  
4 District Court decision is actually attached as an  
5 attachment to the 2nd Circuit decision. So if Your  
6 Honors are interested in seeing what the District  
7 Court said, it's attached at page nine, I believe it  
8 is, of PB 20.

9 JUDGE GULIN: If I might suggest, perhaps  
10 we -- well, actually this being a hearing exhibit, why  
11 don't we call this PBS Hearing Exhibit Number 1.

12 MR. WEISS: That's fine.

13 JUDGE GULIN: We've already -- we don't  
14 want to add to your written exhibits. That should be  
15 kept separate.

16 MR. WEISS: That's fine.

17 JUDGE GULIN: Would that be agreeable?

18 MR. WEISS: That's fine with us, Your  
19 Honor.

20 JUDGE GRIFFITH: Okay. It will be PBS  
21 Hearing Exhibit 1.

22 MR. WEISS: And we have it PB, Public

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1 Broadcasters, because obviously PBS --

2 JUDGE GRIFFITH: I'm sorry, PB Exhibit 1.

3 (Whereupon, the above-mentioned  
4 document was marked as PB  
5 Exhibit 1X for identification.)

6 MR. WEISS: PB Hearing Exhibit 2 is the  
7 decision of the District Court in the cable proceeding  
8 that Mr. Reimer and I were just referring to  
9 regarding, among other things, the through to the  
10 viewer question and the interpretation of ASCAP's  
11 consent decree.

12 And that case is entitled *United States v.*  
13 *ASCAP*, Application of Turner Broadcasting System, et.  
14 al. PB Exhibit -- Hearing Exhibit Number 3 is the  
15 Buffalo Broadcasting Rate Court decision referred to  
16 earlier by Mr. Reimer in his testimony.

17 And that's not the Buffalo Broadcasting  
18 that's been marked as ASCAP Exhibit 24. This is a  
19 separate opinion entitled *United States v. ASCAP*,  
20 Application of Buffalo Broadcasting Company, et. al.

21 And PB Hearing Exhibit Number 4 is another  
22 opinion in that same proceeding on behalf of a smaller

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1 group of stations that was an unusual procedure where  
2 part of the case was appealed on behalf of certain  
3 applicants directly to the 2nd Circuit and part was  
4 appealed to the District Court judge, Judge Conner,  
5 and this is Judge Conner's decision in that case.

6 And that would be PB Hearing Exhibit  
7 Number 4. And while I don't have a copy with me, Your  
8 Honors, I would propose offering after today, when we  
9 can get a copy as PB Hearing Exhibit Number 5, a copy  
10 of the Fox decision that Mr. Reimer referred to during  
11 his direct testimony as well.

12 JUDGE GRIFFITH: Are there any objections  
13 to these --

14 MR. SCHAEFFER: No.

15 MR. KLEINBERG: No.

16 JUDGE GRIFFITH: These will be admitted as  
17 hearing exhibits as opposed to cross examination  
18 exhibits.

19 (Whereupon, the above-mentioned  
20 documents were marked as PB  
21 Exhibits 2X, 3X, 4X and 5X for  
22 identification.)

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1 MR. WEISS: Thank you, Your Honor.

2 BY MR. WEISS:

3 Q Mr. Reimer, on page four of your  
4 testimony, paragraph seven, you indicated that  
5 beginning in the 1930's, ASCAP and its licensing  
6 activities "engendered anti-trust concerns on the part  
7 of music users in the Department of Justice."

8 Those concerns in the 1930's took the form  
9 of the commencement of criminal anti-trust actions  
10 against ASCAP, didn't they?

11 A Yes, it was a proceeding that was never  
12 carried forward by the Justice Department.

13 Q Well, ultimately, the Justice Department  
14 and ASCAP engaged in discussions and negotiations over  
15 the period of several years culminating in 1941 in the  
16 commencement of a civil anti-trust action by the  
17 Department of Justice against ASCAP, is that correct?

18 A I presume so. I wasn't there.

19 Q You testified that there was a civil anti-  
20 trust action that led to the consent decree, and you  
21 know for a fact that that was -- the consent decree  
22 was entered as the result of the Government's having

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1 filed a civil anti-trust action against ASCAP,  
2 correct?

3 A I presume so.

4 Q And in fact, that consent decree settled  
5 that civil anti-trust action by the Department of  
6 Justice against ASCAP, didn't it?

7 A A fair conclusion, yes.

8 Q Okay. And even after the entry of this  
9 consent decree in 1940, however, ASCAP continued to  
10 find itself on the defense against additional anti-  
11 trust concerns, as you talk about them, raised by the  
12 Department of Justice and music users, isn't that  
13 right?

14 A I don't know of any particular concerns  
15 raised by the Justice Department in the 1940's up  
16 until the decision I presume you're referring to, the  
17 *Alten-Rochelle* case.

18 Q Well, the *Alten-Rochelle* case -- why don't  
19 you tell us what the *Alten-Rochelle* case was?

20 A In the mid 1940's, the exhibitors of  
21 motion pictures commenced an anti-trust action against  
22 ASCAP. The case was *Alten-Rochelle*. It's A-l-t-e-n

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1 (hyphen) R-o-c-h-e-l-l-e versus ASCAP.

2 The decision was rendered by Judge Leibell  
3 -- I believe was L-e-i-b-e-l-l.

4 Q Sounds right.

5 A In -- I think it was 1948, held that ASCAP  
6 had violated the anti-trust laws not only in terms of  
7 its efforts to license the motion picture exhibitors,  
8 but also in terms of its internal structure.

9 It was that decision that precipitated, as  
10 I understand it, additional negotiations with the  
11 Justice Department ultimately resulting in entry of  
12 the 1950 amended file judgement. On the same day that  
13 the 1950 decree was entered, Judge Leibell vacated his  
14 decision in the *Alten-Rochelle* case.

15 Q And he vacated it in part because the  
16 provisions provided for in his order were encompassed  
17 within ASCAP's consent decree, were they not?

18 A Yes.

19 Q You said you're not sure that the  
20 Department of Justice had anti-trust concerns; but in  
21 fact, we just -- you just said that the complaints and  
22 the *Alten-Rochelle* decision caused the Department of

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1 Justice to reopen the consent decree and add  
2 additional restrictions and provisions, isn't that  
3 right?

4 A That certainly was the result.

5 Q And one of the anti-trust concerns  
6 addressed by the 1953 -- or one way the anti-trust  
7 concerns was addressed was, as we talked about, the  
8 creation of an automatic licensing mechanism, right?

9 A That's your characterization, yes.

10 Q Well, I believe Judge Dreyfus referred to  
11 it as a compulsory license. In essence, it's a  
12 license -- somebody who uses ASCAP music can  
13 automatically protect themselves from anti-trust  
14 infringement merely by writing -- excuse me, copyright  
15 infringement merely by writing for a license, is that  
16 right?

17 A Yes, with one exception.

18 Q With one exception?

19 A Yes, it's ASCAP's view, and it's been held  
20 -- so held by courts, that one cannot simply obtain a  
21 license from ASCAP, stop paying license fees with the  
22 result that we would terminate for default and then

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1 apply again under the decree, that would effectively  
2 eviscerate the ability of ASCAP's members to collect  
3 license fees.

4 So with that exception, I accept your  
5 remarks.

6 Q Well, assuming a user is prepared to pay  
7 license fees either negotiated with ASCAP or litigated  
8 in front of the Rate Court, ASCAP cannot withhold the  
9 license from a user, is that correct?

10 A Except in the circumstance I described.

11 Q Yes, that's what I said; assuming they've  
12 paid the fees --

13 A That's correct.

14 Q -- or they're willing to pay fees, that  
15 shouldn't be a problem?

16 A That's correct.

17 Q And indeed, one of the reasons for that  
18 provision was ASCAP had created a series of rules in  
19 the 1940's with its memberships that was enabling  
20 ASCAP to prevent that licensing situation from  
21 happening or from withholding licenses from certain  
22 users, isn't that right?

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1           A       I wouldn't agree with that.

2                    There were instances in the 1940's in  
3       which members of ASCAP, acting quite on their own and  
4       apart from ASCAP, did seek to prevent people from  
5       obtaining licenses.

6                    I think that they have that right under  
7       the copyright law apart, of course, from having agreed  
8       as members of ASCAP that they would not do so.

9           Q       But they don't have that right under  
10       ASCAP's rules or under the consent decree, correct?

11           A       So long as they're members of ASCAP,  
12       that's correct.

13           Q       So that if they're willing to collect fees  
14       collectively through ASCAP, they waive their right to  
15       withhold a license from people who perform their  
16       works?

17           A       Yes, and quite on the understanding that  
18       they will ultimately be fairly compensated for the use  
19       of the music through ASCAP.

20           Q       Well, that's obviously the subject of  
21       other discussions we can get to later.

22                    Now another provision we mentioned was the

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1 existence of a Rate Court in 1950 that hadn't existed  
2 in the 1941 decree, correct?

3 A That is correct.

4 Q And that again was designed to ensure that  
5 if ASCAP sought fees higher than a user felt was  
6 reasonable, the user could go to a court and ask an  
7 impartial third party to set the fees, correct?

8 A I think I so testified, yes.

9 Q You also mentioned that there were  
10 strengthened per program license provisions in the  
11 1950 decree, correct?

12 A I mentioned that there were additional per  
13 program terms and specifically terms that apply to  
14 television broadcasters.

15 Q Well, there were additional strengthenings  
16 of the per program license provisions as existed even  
17 as to radio operators, correct?

18 A There were additional terms. It's your  
19 characterization, the strengthening term.

20 Q Well, the 1950 decree required that ASCAP  
21 offer the per program license as a genuine choice to  
22 broadcasters through the blanket license. That

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1 provision wasn't in the 1941 decree, was it?

2 A That's correct.

3 Q And again, the provisions of the per  
4 program license were to ensure alternatives to ASCAP's  
5 blanket license which had been ASCAP's preferred  
6 method of licensing up until that point as well,  
7 correct?

8 A I think it was not only ASCAP's preferred  
9 method, but also much of the industry.

10 Q Well, in fact, it was essentially the  
11 exclusive method of licensing for ASCAP up until then,  
12 isn't that correct?

13 A I believe you'll see that in the 1941  
14 decree there was a provision for a kind of per use  
15 licensing as well, or per piece licensing I think it  
16 was called in those days.

17 Q And nobody ever was able to take advantage  
18 of that though, am I correct?

19 A I believe that is correct, but of course  
20 I wasn't there in the 40's.

21 Q We talked a little bit about the history  
22 in local television, and we sort of fast forwarded to

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1 the end of the 1960's. In the early 1960's, the local  
2 television stations engaged in litigation known as the  
3 Shenandoah proceeding.

4 You recall that, don't you?

5 A I so testified, yes.

6 Q Right. And that originally in the  
7 Shenandoah proceeding, is it correct that the local  
8 television stations sought different forms of license  
9 than were being offered by the ASCAP consent decree?

10 A That is correct, they sought a limited  
11 form of blanket license.

12 Q Indeed, they sought the same relief that  
13 the motion theater picture exhibitors had received as  
14 to their syndicated program product. In other words,  
15 programs that they did not themselves create, they  
16 sought the -- a mandatory source license, a mandatory  
17 license through sources other than ASCAP, is that  
18 correct?

19 A Well, I think, Mr. Weiss, you're painting  
20 here with what I would consider a very, very broad  
21 brush --

22 Q Well, --

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1           A       -- introducing a number of concepts that  
2 I haven't addressed.

3                   I'll agree with you for the moment, but I  
4 do think that if one is going to discuss source  
5 licensing and its antecedents, particularly with  
6 regard to the motion picture industry and how that  
7 impacts on television and other industries, that a  
8 good bit more detail ought to be fleshed out.

9           Q       Well, I think it's a factual matter though  
10 -- it is correct, is it not, that the local television  
11 stations sought mandatory source licensing through the  
12 Shenandoah proceeding in the early 1960's as to their  
13 syndicated television programs, correct?

14           A       That was one of a number of specific  
15 alterations in the form of blanket license that they  
16 were seeking.

17           Q       That was an alteration in the form of  
18 blanket license?

19           A       Well, I have in mind, of course, that  
20 different stations sought different kinds of licenses.  
21 For example, I believe it was the Metro Media Group as  
22 it was known in those days sought a license that would

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1 have excluded news programs and revenue derived from  
2 news programs.

3 But essentially the notion was that the  
4 blanket license ought to be altered in a fashion that  
5 would have allowed stations to carve out, if you will,  
6 certain of the revenue derived from some of their  
7 programming.

8 ASCAP's response to that was that no, the  
9 blanket license -- again, we're talking now about the  
10 specific blanket license for broadcasters, radio or  
11 television broadcasters, ought to encompass all of the  
12 revenue from all of the programs. That, after all, is  
13 what is provided for in the consent decree.

14 And the result was, as I'm sure you know  
15 and perhaps you're going in this direction, was a  
16 decision by the 2nd Circuit Court of Appeals that  
17 ASCAP was under no obligation to alter this essential  
18 element of the blanket license.

19 Q Where in the consent decree, by the way,  
20 does it say ASCAP is entitled to a blanket license as  
21 a percentage of revenues?

22 A Well, I'm interpreting the decree in terms

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1 of the way in which the license was being offered at  
2 that time.

3 Q Well, in fact, nowhere in the decree does  
4 it say ASCAP's entitled to a license on that basis,  
5 does it?

6 A That's correct.

7 Q Indeed, in the Buffalo Broadcasting rate  
8 proceeding that you're referring to, ASCAP's position  
9 was that the local stations should be required to pay  
10 a percentage of revenues to ASCAP, isn't that right?

11 A We sought to have the blanket license fee  
12 determined on the basis of the prior agreements which  
13 did provide for percentage of revenue, right.

14 Q And in fact, Magistrate Judge Dolinger  
15 said that that was not an appropriate way to place a  
16 license for the local television industry, is that  
17 correct?

18 A That was his decision, yes.

19 Q And as we said, the networks, the  
20 broadcast television networks that are licensed by  
21 ASCAP have, for the most part, since the 1960's been  
22 operating under flat fee arrangements with ASCAP, not

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1 percentage of revenue arrangements, correct?

2 A Again, that was my testimony, yes.

3 Q Now the provisions in the 1950 consent  
4 decree continued to control ASCAP's operations,  
5 correct?

6 A Again, I so testified, yes.

7 Q So is it fair to say that whatever anti-  
8 trust concerns the Department of Justice had in the  
9 1950's continue today to some extent?

10 A I would suggest you ask that --

11 Q Well, you're aware, are you not, that the  
12 Department of Justice is actively --

13 MR. SCHAEFFER: I don't know why -- we're  
14 now getting into a somewhat sensitive area and I don't  
15 really understand what the relevance of that is to  
16 this proceeding, what's going on.

17 JUDGE GRIFFITH: Mr. Weiss.

18 MR. WEISS: Well, first off, I think that  
19 by talking about the nature of this marketplace and  
20 the reactions of the Department of Justice, the anti-  
21 trust concerns, Mr. Reimer's opened up the door.  
22 Moreover, certainly ASCAP has placed a large element

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1 of its case on the experience in the commercial  
2 television and radio industry.

3 And to the extent -- and suggests,  
4 frankly, that that is operating as essentially a free  
5 market. To the extent that there is evidence to  
6 suggest that that's not in fact the case, I think it's  
7 perfectly appropriate for me to question Mr. Reimer on  
8 that subject.

9 MR. SCHAEFFER: All right, I think that --  
10 two things.

11 First of all, the only purpose of  
12 discussing the anti-trust was so that you could  
13 understand the very decisions that now have been  
14 physically called to your attention of how the Rate  
15 Court values it.

16 What's going on in the Department of  
17 Justice at the present time with those anti-trust  
18 considerations are irrelevant because the statute  
19 specifically provides that anti-trust considerations  
20 are not part of this proceeding.

21 It's a compulsory proceeding. As Mr.  
22 Dreyfus pointed out, the Rate Court has a kind of

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1 compulsory license, and therefore there are certain  
2 analogies between the Rate Court and what we have  
3 here.

4 But we're certainly not going to now try,  
5 I would hope, the anti-trust -- an anti-trust case  
6 against ASCAP, although it's starting to sound like  
7 that's the direction you're going in. ASCAP is not a  
8 miscreant.

9 There is indeed -- in the Salem Media case  
10 itself which was cited before, Judge Conner got quite  
11 exercised about people trying to say that. We operate  
12 under this consent decree. It's impossible to  
13 understand the rates without understanding the consent  
14 decrees.

15 And we've done that. But now to go into  
16 the anti-trust considerations at the present time  
17 really seem to me to be bootless, inconsistent with  
18 the purpose of the compulsory license statute and  
19 inappropriate cross examination.

20 JUDGE GRIFFITH: Mr. Kleinberg.

21 MR. KLEINBERG: I would join in Mr.  
22 Schaeffer's comments --

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1 JUDGE GRIFFITH: All right.

2 MR. KLEINBERG: -- in particular with  
3 respect to the fact that the statute specifically  
4 eliminates anti-trust concerns imposed in compulsory  
5 license with due regard for all anti-trust issues.

6 MR. SCHAEFFER: I would also remind I  
7 would want to have the hearing closed if we're going  
8 to get into this kind of thing.

9 JUDGE GRIFFITH: All right. The objection  
10 is overruled. If you wish to close the hearing at any  
11 time, let us know.

12 MR. SCHAEFFER: I would wish to close the  
13 hearing if there's anybody here who is not bound by  
14 the stipulation.

15 JUDGE GRIFFITH: Is there anyone here who  
16 is not bound by -- sorry.

17 (Whereupon, the hearing went into  
18 Executive Session.)

19

20

21

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1 CROSS EXAMINATION (continued)

2 BY MR. WEISS:

3 Q Now you had talked, Mr. Reimer, about the  
4 fact that the Shenandoah license previously agreed to  
5 by the television industry was a percentage of revenue  
6 license, correct?

7 A That is correct.

8 Q If ASCAP had been awarded its --

9 A Excuse me, Mr. Weiss.

10 As I remember my testimony, I may not have  
11 made that point. But you are correct, it was a  
12 percentage of revenue license.

13 Q And had that license continued in effect,  
14 is it true that ASCAP would have earned, on an annual  
15 basis, tens of millions of dollars more than they were  
16 ultimately awarded by Magistrate Judge Dolinger in the  
17 Buffalo Broadcasting proceeding?

18 A ASCAP certainly would have realized more  
19 in the license fees from local television had that  
20 formula been carried forward.

21 Q I said tens of millions of dollars more.

22 A I don't know what the number would be.

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1 Q But certainly in the millions, isn't that  
2 correct?

3 A Yes.

4 Q And over the course of time, you would  
5 certainly agree that it would result in the aggregate  
6 in tens of millions of dollars?

7 A I'm just simply not going to accept tens  
8 of millions. It is millions. I don't have a number  
9 for it.

10 Q And do you recall that, in or about 1989,  
11 ASCAP projected that the Shenandoah license fees would  
12 have yielded approximately \$90 million dollars per  
13 year to ASCAP?

14 A I don't recall that.

15 Q That was the subject of testimony though  
16 at the Buffalo Broadcasting trial, correct?

17 A It may well have been. And if it was,  
18 then certainly the number you've got is correct. But  
19 I just don't recall.

20 Q In fact, ASCAP didn't earn \$90 million  
21 dollars a year in 1989 under Magistrate Judge  
22 Dolinger's decision, did they?

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1           A        I don't recall; although, as I'm sure you  
2 know, there were periods when additional amounts were  
3 being paid for retroactive periods. I just don't know  
4 what the year was.

5           Q        Well, you mentioned, by the way, that the  
6 length of the proceeding continues through the end of  
7 March of this year. That's not entirely accurate, is  
8 it?

9           A        I didn't mean to imply that the proceeding  
10 itself continued. What I meant to say, if I didn't  
11 say it clearly, was that the agreements produced as a  
12 result of that proceeding carried through March 31,  
13 1998.

14          Q        Right. So that in fact what happened was,  
15 while appeal was pending in the 2nd Circuit Court of  
16 Appeals, ASCAP and the local television industry  
17 reached agreement on the current TV blanket and per  
18 program licenses, correct?

19          A        That is correct.

20          Q        And those licenses took essentially the  
21 form, with minor modifications, to -- that Magistrate  
22 Judge Dolinger had outlined in his decisions, correct?

1           A       With modifications. I don't accept the  
2           characterization of minor modifications.

3           Q       Okay. Now we talked a little bit about  
4           the per program license. ASCAP's position in the  
5           Buffalo Broadcasting case was that the per program  
6           license should be placed roughly four times the cost  
7           of the blanket license, correct?

8           A       That was correct, yes.

9           Q       Again, ASCAP was relying upon its past  
10          licensing history and what it said in the Shenandoah  
11          license agreement, correct?

12          A       Correct.

13          Q       The court rejected that proposal, did it  
14          not?

15          A       Magistrate Judge Dolinger determined that  
16          the ratio would be in the order of 1½:1.

17          Q       And indeed, when that decision was  
18          appealed as to a handful of stations to Judge Conner,  
19          he agreed with that ratio as well, correct?

20          A       Yes.

21          Q       In fact, the court, in reaching that  
22          conclusion, felt that the historical fee levels that

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1 ASCAP had charged local stations rendered that license  
2 technically available but practically illusory to  
3 virtually all stations.

4 Do you recall that?

5 A I don't recall those precise words; but if  
6 that's quote from the decision, I'm sure that the  
7 quote is accurate.

8 Q Indeed, prior to the Buffalo Broadcasting  
9 rate proceeding, virtually no TV station had ever  
10 taken a per program license, correct?

11 A That's correct.

12 Q Now you talked before a little bit about  
13 the -- well, let me strike that. I think you've  
14 clarified in terms of the net license fee. I  
15 apologize.

16 In your written testimony, you mention  
17 that there are a certain number of TV stations that  
18 are operating under the local television station per  
19 program license, correct?

20 A That's correct.

21 Q Do you know, of the \$96.4 million dollars  
22 that is designated as an industry-wide blanket license

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1 fee, what percentage of that \$96.4 million dollars is  
2 not being paid to ASCAP as blanket license fees  
3 because the stations are instead operating under per  
4 program licenses?

5 A I'm not sure I understand the question.

6 Q Well, --

7 A If you could rephrase it.

8 Q -- stations that are operating under a per  
9 program license are not paying blanket license fees,  
10 are they?

11 A Well, under the per program license for  
12 local television stations currently in place, a  
13 station that operates under that license on a monthly  
14 basis starts the calculation of its fee with its  
15 blanket license and deducts from that, at least from  
16 the revenue base, the revenue from programs that do  
17 not contain ASCAP music.

18 So yes, they will pay less in most  
19 instances, perhaps in virtually all instances.  
20 Although it isn't impossible that a station may, from  
21 month to month, wind up paying more than it would pay  
22 under a blanket license.

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1 I think that that's relatively rare  
2 occurrence, if indeed it has occurred at all.

3 Q What percentage of that \$96.4 million  
4 dollars is subject to the deduction for the per  
5 program licenses we've talked about?

6 A I don't know the percentage.

7 Q Is it close to half?

8 A I really don't know.

9 Q The stations that you've identified are  
10 principally large market affiliated stations, correct?

11 A Yes, and I believe on average a station  
12 saves somewhere in the range of 50% by employing the  
13 per program license.

14 Q By the way, you characterized those  
15 stations as having relatively little programming  
16 during the day which contains either ASCAP music,  
17 music not otherwise -- it says received. I'm not sure  
18 what that contains -- or indeed any music.

19 First, can you -- if you'd look at page  
20 eight, footnote three, tell me what you meant by  
21 "received." I think it's probably a typo.

22 A Where are you reading?

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1 Q In the footnote at the bottom of page  
2 eight, the last couple of lines.

3 A I think the word received probably should  
4 be licensed.

5 Q So then, in other words, when you say "not  
6 otherwise licensed," these stations may go out and  
7 seek source or direct licenses covering the  
8 performances of their music through transactions with  
9 individual composers or publishers of music, correct?

10 A That's correct.

11 Q Okay, you said "indeed, any music." It's  
12 not in fact true that these stations don't use any  
13 music. Is that accurate?

14 A I would say most stations use music in  
15 some form or another.

16 Q In virtually all of their programs, right?

17 A That's correct.

18 Q So that to suggest that they may not use  
19 any music is probably an overstatement?

20 A It's a possibility. That was all that was  
21 intended.

22 Q It wasn't intended to suggest that that's

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1 in fact what happens in the vast majority of cases?

2 A I don't think it says that.

3 Q Okay. You mentioned in your testimony  
4 also that ASCAP has taken four rate proceedings to  
5 trial and conclusion, correct?

6 A I believe that that is the number that is  
7 used.

8 Q Now the first such proceeding was on  
9 behalf of Showtime and The Movie Channel, is that  
10 right?

11 A Yes.

12 Q And that was the first rate proceeding to  
13 ever go to decision?

14 A Yes, that was a proceeding to determine  
15 the reasonable fees for the Showtime, Movie Channel,  
16 cable program service.

17 Q And that proceeding was for the period  
18 ending December 31, 1988, correct?

19 A I don't recall at this moment; but if you  
20 tell me that that's the term, then I agree with it.

21 Q Sounds roughly like the right time period?

22 A Yes.

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1 Q And since January 1, 1989, ASCAP has  
2 operated under interim license arrangements with the  
3 cable television industry, correct?

4 A That's correct.

5 Q And indeed, ASCAP has never had final  
6 license agreements with any basic cable television  
7 networks in its history, has it?

8 A I believe that's correct, although, as I  
9 stated very early on this morning, I have not been  
10 involved directly in ASCAP's cable litigations. I  
11 hesitate to simply recall -- rely on my memory as to  
12 what has transpired with regard to particular elements  
13 of that industry.

14 Q Well, as we talked about earlier, one of  
15 the early activities in the cable interim rate  
16 proceeding involved a summary judgement motion by  
17 ASCAP seeking a determination of ASCAP's obligations  
18 under its consent decree, correct?

19 A You're referring to the Turner decision?

20 Q The Turner decision which we've marked as  
21 PB Hearing Exhibit Number 2.

22 And that decision involved a fairly

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1 lengthy discussion by Magistrate Judge Dolinger of the  
2 history and the rationales underlying ASCAP's consent  
3 decree, is that right?

4 A I frankly have not looked at the decision  
5 in years and I'm not going to agree or disagree with  
6 your characterization. I'm sure the decision speaks  
7 for itself.

8 Q Okay. Is it accurate, Mr. Reimer, that in  
9 that Showtime proceeding, ASCAP sought fees based upon  
10 prior arms length agreements with HBO and Cinemax of  
11 roughly 25 cents per subscriber; but that in fact, the  
12 court awarded fees to ASCAP of 15 cents per  
13 subscriber?

14 A If by the question you're asking me to  
15 agree that that accurately reflects ASCAP's position  
16 and the ultimate decision, I assume that that's  
17 correct. But again, as I've stated, I haven't read  
18 the decision in quite a while.

19 And while I agree generally with your  
20 characterization, I wouldn't adopt it fully.

21 Q You do recall that ASCAP's position was  
22 based upon that prior license agreement with HBO?

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1           A       Well, I think in part, but I'm sure that  
2 there were other reasons advanced by ASCAP as to what  
3 the appropriate fee was.

4                   And again, I'm sure it's in the decision  
5 because, generally, in these decisions, what the court  
6 does is to recite not only the general framework of  
7 the ASCAP consent decree and the proceeding, but also  
8 to carefully set out the views of each side as to what  
9 the appropriate fees would be.

10                   So essentially, when you read the  
11 decision, you know what each side was arguing for.

12           Q       And you also mentioned that ASCAP had a  
13 rate proceeding against ABC and CBS television  
14 network, correct?

15           A       Not against, with.

16           Q       When you say "not against," what does that  
17 mean?

18           A       Both sides are asking the court to  
19 determine reasonable fees.

20           Q       But they were taking opposite positions in  
21 an adversary proceeding?

22           A       Absolutely.

1 Q Okay. And ASCAP's position, you recall in  
2 that case, was premised upon arms length agreements  
3 negotiated between ASCAP and NBC prior to that  
4 proceeding, is that correct?

5 A That again was one of the principal  
6 components of the process we were suggesting the court  
7 use to determine the reasonable fee, yes.

8 Q And that -- those fees resulted in  
9 payments to ASCAP annually of roughly \$11.3 million  
10 dollars a year. Does that sound right to you?

11 A I think ultimately it was \$11.3. The fees  
12 varied over the terms of the license agreements.

13 Q And in particular, that fee was --

14 JUDGE DREYFUS: I'm sorry, Counsel, I'm  
15 losing track of which case you're -- are you talking  
16 about the NBC license?

17 MR. WEISS: The CBS and ABC proceeding.  
18 NBC was not a party to that proceeding.

19 JUDGE DREYFUS: Right, but when you're  
20 talking about these amounts, are you talking about the  
21 amount paid by NBC?

22 MR. WEISS: Paid by NBC, yes.

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1 JUDGE DREYFUS: Okay.

2 MR. WEISS: Yes. I apologize for that.

3 BY MR. WEISS:

4 Q And the \$11.3 million dollars paid by NBC  
5 was determined as through the negotiation with NBC of  
6 a percentage of revenue license, correct?

7 A It was a mixed license fee at that time.  
8 As I recall, there was one year when it was .44% of  
9 NBC's gross revenue. There was another year when it  
10 was an average of a couple of years' fees. So it was  
11 a mix.

12 But ultimately, yes, it did wind up at  
13 .44% of NBC's gross revenue. And gross revenue was  
14 defined in the license agreement as excluding, at  
15 least for one year as I recall, revenues derived from  
16 the Olympics because NBC argued that the year in which  
17 they carried the Olympics, they also had  
18 extraordinarily high programming costs associated with  
19 the Olympics.

20 Q Am I correct though that ASCAP sought a  
21 comparable percentage of revenue formula in  
22 determining blanket license fees for ABC and CBS as

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1 part of the ABC-CBS proceeding?

2 A That's correct, yes.

3 Q And the court rejected that approach,  
4 correct?

5 A The court did reject it. And I think if  
6 one reads the decision, one sees that the fee  
7 ultimately determined by the court was roughly in the  
8 same range as the .44%.

9 Q But as a factual matter though, the fee  
10 was not determined by multiplying their revenues by a  
11 defined percentage, was it?

12 A That is correct.

13 Q And the fees that ABC and CBS ultimately  
14 paid for the periods at issue in those proceedings  
15 were less than the \$11.3 million dollars paid by NBC,  
16 correct?

17 A That is correct.

18 Q Indeed, CBS's fees were in the  
19 neighborhood of less than \$10 million dollars,  
20 correct?

21 A I think it was \$9.75 million.

22 Q \$9.75 million a year, so almost a million

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1 and a half less than NBC had paid through their  
2 negotiation with ASCAP, correct?

3 A Yes.

4 Q And ABC's fees were \$10.45 million, if I  
5 recall correctly?

6 A It was in that range, yes.

7 Q So close to a million dollars a year less  
8 than NBC had agreed to pay in an arms length  
9 negotiation?

10 A In the years when, as I recall, NBC was  
11 the leading network in terms of ratings and in  
12 competent dollars.

13 MR. WEISS: I have no further questions.

14 MR. SCHAEFFER: I'm going to have some,  
15 but I'd like to talk to my associates for a few  
16 minutes.

17 JUDGE GRIFFITH: Okay. Usually we would  
18 take a morning recess at 11:30 and then a lunch at  
19 1:00 if that's agreeable with you. So why don't we  
20 take about a ten minute recess at this time then.

21 (Whereupon, the foregoing matter went off  
22 the record at 11:31 a.m. and went back on

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1 the record at 11:44 a.m.)

2 JUDGE GRIFFITH: Mr. Schaeffer.

3 REDIRECT EXAMINATION

4 BY MR. SCHAEFFER:

5 Q Very briefly, let's just review something.

6 At the present time -- or since the Capital Cities  
7 case, how have the free networks been paying ASCAP for  
8 music use?

9 A Mr. Schaeffer, when you refer to the  
10 Capital Cities case, I assume you're referring to the  
11 proceeding before Judge Conner to determine fees for  
12 the ABC and CBS television networks, correct?

13 Q That is correct.

14 A Okay. The conclusion of that case -- in  
15 fact, ABC and ASCAP very quickly reached an agreement  
16 that encompassed not only the television network, but  
17 other ABC entities with respect to license fees.

18 And thereafter, we had negotiated  
19 agreements with all three networks for the period '94,  
20 '95 and '96, as a result of which the networks paid  
21 ultimately the dollars that I set forth in my written  
22 testimony.

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1 Q And since that time, have there been other  
2 negotiations with the networks for more current years  
3 -- that is following 1997?

4 A There have. And indeed, we're currently  
5 engaged in negotiations with both ABC and CBS. And I  
6 think last fall, we reached an agreement with NBC on  
7 license terms for the next three years or for the  
8 years '97, '98 and '99.

9 Q And what happened -- what was the  
10 agreement that was reached with NBC relative to what  
11 had been paid before by NBC? Was it increased,  
12 decreased -- what happened?

13 MR. WEISS: If I may interject an  
14 objection. We happen to represent NBC in various  
15 negotiations, including with ASCAP's competitor, BMI.  
16 The amounts and the nature of the payments made by NBC  
17 to ASCAP are something that BMI has not been given  
18 access to in the context of those negotiations and is  
19 not entitled to.

20 And on behalf of -- I guess wearing my NBC  
21 hat, I would object to this question being answered  
22 certainly with any of the BMI representatives in the

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1 room.

2 MR. SCHAEFFER: Well, I've only asked if  
3 it was increased or decreased. I didn't ask the  
4 actual amount.

5 MR. WEISS: Right, if it's rough -- I  
6 mean, at the broad level of whether it has increased  
7 or decreased, I have no problem. But beyond that, --

8 JUDGE GRIFFITH: That was the question.

9 THE WITNESS: The answer is that there was  
10 a modest increase.

11 BY MR. SCHAEFFER:

12 Q Now with respect to CBS and ABC,  
13 negotiations are still going on?

14 A That's correct.

15 Q Incidentally, what was the role of the  
16 Weil, Gotshal firm with respect to these three network  
17 negotiations? Are they attorneys for any of the  
18 networks?

19 A They have not participated in  
20 negotiations. Although, of course, as you know, Weil,  
21 Gotshal represented ABC and CBS in the proceeding  
22 before Judge Conner.

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1 Q Now with respect to cable television at  
2 the present time, I take it from your testimony there  
3 has never been an actual, final agreement between the  
4 cable television stations and ASCAP as to what the  
5 music use fee should be; is that correct?

6 A In the broadest of terms, that's correct.

7 Q Have there been interim fee agreements?

8 A There are interim fee arrangements, and my  
9 understanding is that those are pursuant to interim  
10 fee orders entered by Judge Dolinger.

11 Q Do you know if any of those are revenue-  
12 based?

13 A I have some understanding that, at least  
14 as to some of the cable services, there are revenue-  
15 based interim fees.

16 Q Now who is representing the cable  
17 operators?

18 A There are a number of law firms  
19 representing different cable services -- cable  
20 programming services, one of which, of course, is the  
21 Weil, Gotshal firm.

22 Q Now with respect to local television, I

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1 take it that agreement will be up in 1998?

2 A It will be up at the end of this month.

3 Q And I take it there has been no agreement  
4 at the present time between ASCAP and any of the local  
5 TV operators as to what the final fee should be?

6 A That's correct.

7 Q Incidentally -- now let's turn finally to  
8 the radio industry. The radio industry's -- would you  
9 tell us what the radio industry's blanket license fee  
10 is?

11 A Currently, for virtually all of the  
12 stations in the industry, the blanket license fee is  
13 a percentage of a station's revenue less specified  
14 deductions. The percentage fee is 1.615%.

15 Q Of what?

16 A Of gross revenue less deductions set out  
17 in the license agreement.

18 Q Now the radio stations are determined on  
19 a station by station gross revenue, are they not?

20 A That's correct.

21 Q Whereas the networks are based upon the  
22 totality of the network's income, is that correct?

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1           A       Well, certainly when we had the percentage  
2 of revenue agreement with NBC, it was based on the  
3 total of the network's revenue.

4           Q       Incidentally, what law firm represented  
5 the radio industry in the negotiation you just  
6 described, the negotiated agreement?

7           A       The negotiated agreements were worked out  
8 with a committee of radio broadcasters, and the Weil,  
9 Gotshal firm was counsel to that committee.

10          Q       Now there's been some discussion of per  
11 program license. Although, as I understand it, the  
12 per program license is not itself an issue because, as  
13 I understand it, nobody's requested a per program  
14 license in this proceeding.

15                   If they have, I think it would be put  
16 forward. But as far as we know, we're only asking the  
17 blanket licenses on both sides. Is that correct?

18           MR. RICH: If I can make a comment, Mr.  
19 Schaeffer, you proffered it in your direct testimony.

20           MR. SCHAEFFER: No, that's not -- but I  
21 want to just clarify we are dealing with a blanket  
22 license for NPR stations and for PBS, is that correct?

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1 MR. RICH: Correct.

2 BY MR. SCHAEFFER:

3 Q Now with respect to the per program  
4 license for radio, was there ever a contest in the  
5 last two years that the per program license for radio  
6 stations was too high or the proposed charge was too  
7 high vis-à-vis the blanket license in radio?

8 A Well, the negotiated agreements with the  
9 radio music license committee which, as I have  
10 described it, represents the bulk of the stations in  
11 the radio industry, resulted in blanket license, as  
12 I've already described, 1.615%.

13 And the per program license has a license  
14 fee that's comprised of two elements. One what is  
15 called the base fee, and there it's .24% of the  
16 station's gross revenue for most stations. And a  
17 second element or a second component of the fee that  
18 applies to programs that contain feature use of ASCAP  
19 music, and the fee there is 4.22% of the revenue  
20 derived from those programs.

21 Q Now with respect to the ratio between per  
22 program licenses and blanket licenses being paid, was

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1 there an attack on that by the Salem Media Group?

2 A Yes, the other group of stations, the much  
3 smaller group, represented principally by the National  
4 Religious Broadcasters organization and its committee  
5 did seek a reduced per program fee in the proceeding  
6 that you referred to, the Salem Media proceeding.

7 Essentially Judge Conner left in place the  
8 4.22% feature use fee. He did modify slightly the  
9 incidental use fee, but in dollar terms it's not a  
10 significant percentage.

11 Q Indeed, the argument in the Salem Media  
12 case, I take it, was that the per program license fee  
13 should be closer to the 1½:1 that Judge Dolinger had  
14 found in the local TV cases, is that correct?

15 A That's correct.

16 Q And that was rejected by Judge Conner?

17 A That is correct.

18 Q And is it also true that Judge Conner  
19 agreed that the blanket fee being paid by the radio  
20 stations -- commercial radio stations non-religious  
21 broadcasters was okay for the religious stations as  
22 well?

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1           A       That is correct.

2           MR. SCHAEFFER:     I have no further  
3 questions.

4           JUDGE GRIFFITH:   Okay, Mr. Kleinberg.

5           MR. KLEINBERG:   I have a few if I might.

6           JUDGE GRIFFITH:   All right, please.

7                       REDIRECT EXAMINATION

8           BY MR. KLEINBERG:

9           Q       Mr. Reimer, you were asked some questions  
10 by Mr. Weiss about the Buffalo Broadcasting Rate Court  
11 proceeding. Do you recall those questions?

12          A       Yes, I do.

13          Q       Is it your understanding that, in that  
14 proceeding, the court was seeking to establish a  
15 reasonable fee for the local television stations?

16          A       That's correct.

17          Q       And that entailed an examination of what  
18 the rate or range of rates that would be set in a  
19 competitive market?

20          A       That was what the court said it was  
21 attempting to do.

22          Q       And in fact, the court did set a rate

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1 which you testified about as a competitive rate at the  
2 conclusion of that case, correct?

3 A The court did set a rate.

4 Q And the court received a station's  
5 arguments and claims about ASCAP's market powers as  
6 part of that rate setting proceeding?

7 A As I indicated earlier, Mr. Kleinberg,  
8 when one reads the decision, one sees that as one of  
9 the directions in which the court was going, yes.

10 Q And you also testified about the network  
11 rate setting that was done in the ASCAP Rate Court as  
12 well in a different case?

13 A I certainly testified about the ABC-CBS  
14 network case, yes.

15 Q And that ABC-CBS network case also  
16 involved the court determining as part of the  
17 reasonable fee what the competitive fee would be in a  
18 competitive market?

19 A Again, as I recall the language of the  
20 opinion, that was certainly the stated goal.

21 Q And finally, Mr. Reimer, you made some  
22 mention earlier in your testimony about negotiating --

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1 ASCAP negotiating with a committee. I'm talking about  
2 the local television stations and radio stations.

3 What did you mean by a committee?

4 A Well, I think I testified that when  
5 licenses expire generally on an industry-wide basis,  
6 ASCAP has initially sat down at the bargaining table  
7 with a group of station owners who have constituted  
8 themselves a committee.

9 And indeed, the name of the organization  
10 or the bargaining entity in radio was the All Industry  
11 Radio Music License Committee. The first such  
12 committee involved in television negotiations was the  
13 Television Station Per Program Music License  
14 Committee, as I recall.

15 And so that, over the years -- in fact,  
16 over the decades, these committees have formed,  
17 constituted themselves and reconstituted themselves  
18 for the express purpose of sitting down and  
19 negotiating license agreements with ASCAP, and I  
20 presume with BMI as well.

21 And if an agreement could not be reached  
22 via negotiations, then these entities undertake to

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1 hire counsel and proceed in the court before Judge  
2 Conner. That's the best way I can describe it.

3 Q And in fact, at the negotiating table,  
4 ASCAP is negotiating with the entire local television  
5 industry, for example, when it deals with a committee?

6 A Well, that certainly has been the case  
7 from the time of the Shenandoah proceeding to date.

8 Q And you're aware from your involvement in  
9 the ASCAP Rate Courts that Magistrate Judge Dolinger  
10 has commented on the fact that, with respect to local  
11 television stations, they have had the bargaining  
12 advantage of negotiating jointly through their own  
13 industry committee?

14 A I presume you're citing language in one or  
15 another of Judge Dolinger's opinions, and that  
16 certainly is accurate, I presume.

17 MR. KLEINBERG: No further questions.

18 JUDGE GRIFFITH: All right.

19 Anything further of this witness?

20 MR. WEISS: One additional question or  
21 two.

22

RE CROSS EXAMINATION

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1 BY MR. WEISS:

2 Q You referred to the interim fees being  
3 paid in the cable industry. Do you recall that, Mr.  
4 Reimer?

5 A Yes.

6 Q By interim, does that mean that the fees  
7 paid and the method of calculating those fees are  
8 subject to adjustment at some later date once the  
9 parties have either reached an agreement or the court  
10 has reached a decision?

11 A That is correct, and as contemplated by  
12 Section 9(b) of the ASCAP consent decree.

13 Q So that the interim percentage of revenue  
14 fees you mentioned being paid by the cable industry is  
15 subject again to adjustment both as to the amount and  
16 as to the form in which they were calculated once that  
17 case comes to conclusion?

18 A That is correct.

19 But of course, as I'm sure you're well  
20 aware, that historically, interim license fees,  
21 particularly for major industries and for lengthy  
22 periods of time, tend to be the final fees as well.

1 MR. WEISS: No further questions.

2 JUDGE GRIFFITH: All right, may this  
3 witness be excused?

4 MR. SCHAEFFER: As far as I'm concerned.

5 JUDGE GRIFFITH: All right, sir, you may  
6 step down. Thank you very much.

7 THE WITNESS: Thank you.

8 (The witness was excused.)

9 JUDGE GRIFFITH: Yes.

10 MR. SCHAEFFER: Next call Mr. Bennett  
11 Lincoff.

12 JUDGE GRIFFITH: Mr. Lincoff, if you'll  
13 raise your right hand, please.

14 Whereupon,

15 BENNETT LINCOFF

16 was called as a witness and, after having been first  
17 duly sworn, assumed the witness stand, was examined  
18 and testified as follows:

19 JUDGE GRIFFITH: All right, just have a  
20 seat, please.

21 MR. WEISS: Your Honors, just a  
22 housekeeping note before we begin with this witness.

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1 JUDGE GRIFFITH: Yes.

2 MR. WEISS: I'm not sure where  
3 logistically we are supposed to place the exhibits  
4 that were used with Mr. Reimer. Just give them to the  
5 reporter?

6 JUDGE GRIFFITH: With the reporter,  
7 please.

8 It was my understanding there were no  
9 objections to those exhibits?

10 MR. SCHAEFFER: There are no objections.

11 JUDGE GRIFFITH: They are received.

12 (Whereupon, the above-mentioned  
13 documents, previously  
14 identified as PB Exhibits 1X,  
15 2X, 3X, 4X and 5X for  
16 identification, were received  
17 in evidence.)

18 DIRECT EXAMINATION

19 BY MR. SCHAEFFER:

20 Q Mr. Lincoff, what is your occupation?

21 A I am an attorney.

22 Q And how long have you been in practice in

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1 New York?

2 A Since 1978, I believe.

3 Q And are you employed by ASCAP?

4 A Yes, sir.

5 Q How long have you been employed?

6 A Since June 2, 1986.

7 Q And what's your present position and  
8 duties with ASCAP?

9 A I am presently director of legal affairs  
10 for New Media at ASCAP. And in that capacity, I am  
11 responsible for seeking to license public performances  
12 of music in the ASCAP repertory when transmitted in  
13 Internet transmissions.

14 Q Now when did you get that job?

15 A The New Media department was created in  
16 1994, and I've been working as its Director of Legal  
17 Affairs since its inception.

18 Q Prior to that, what were your  
19 responsibilities at ASCAP?

20 A I had a number of responsibilities in  
21 different areas of ASCAP's endeavors. I worked on  
22 negotiating license agreements for performances of

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1 ASCAP music with a variety of industry groups.

2 I also supervised outside counsel in the  
3 conduct of copyright infringement litigation against  
4 unlicensed users of ASCAP music. And I might add that  
5 when I was doing that, Mr. Reimer was essentially my  
6 supervisor in that effort.

7 And I also represented ASCAP in  
8 proceedings before the Copyright Royalty Tribunal for  
9 the -- in rate adjustment and distribution proceedings  
10 under I believe every one of the compulsory license  
11 regimes that have existed.

12 Q Would you tell us in your own words the  
13 history of ASCAP's license fee arrangements from 1978  
14 to the present?

15 MR. RICH: I'd like to conduct a voir dire  
16 if I may before Mr. Schaeffer proceeds to substance.

17 JUDGE GRIFFITH: All right, thank you.

18 VOIR DIRE

19 BY MR. RICH:

20 Q Mr. Lincoff, what has been your  
21 involvement specifically in the licensing of  
22 commercial broadcasters in your tenure at ASCAP?

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1           A       I have had no direct involvement in the  
2           licensing of commercial broadcast entities.

3           Q       Would that encompass either radio or  
4           television?

5           A       Yes.

6           Q       Would that encompass both local television  
7           and network television?

8           A       Yes.

9           Q       What has been your involvement in the  
10          licensing of the Public Broadcasters in your tenure at  
11          ASCAP?

12          A       I participated in the last two rounds of  
13          negotiations with the public broadcasting entities  
14          under the compulsory license.

15          Q       Would you define what you have in mind by  
16          the last two rounds, please, time-wise?

17          A       The 1990 -- the negotiations that resulted  
18          in the five year agreement spanning the term January  
19          1, 1993 through December 31, 1997 and the license  
20          agreement that spanned the five year term immediately  
21          preceding that one.

22          Q       And when you say you had involvement, what

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1 was the nature of that involvement?

2 A My involvement was -- well, it was  
3 different in the two --

4 MR. SCHAEFFER: I'm going to -- I'm sorry.

5 I'm going to object. This is, by and  
6 large, a fact witness. I don't know what the voir  
7 dire is. I'm not presenting him as an expert. I'm  
8 representing him to explain as best he can what he  
9 understands ASCAP and PBS did, not what -- he's not  
10 rendering any expert opinions.

11 MR. RICH: Pursuant to the direct  
12 testimony, this witness is about to make sweeping  
13 generalizations about the free marketplace that  
14 characterizes commercial broadcasting. And he now  
15 testified he's had no involvement.

16 MR. SCHAEFFER: That's not in his -- I'd  
17 love to be enlightened where this appears.

18 MR. RICH: I'd be happy to enlighten you,  
19 Mr. Schaeffer. Page two of this witness' testimony,  
20 paragraph five. I believe it's written testimony of  
21 Bennett Lincoff.

22 MR. SCHAEFFER: Page two of --

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1 MR. RICH: Quote, "As my colleague Richard  
2 Reimer is testifying, since the advent of commercial  
3 broadcasting more than seven decades ago, ASCAP has  
4 conducted license negotiations with commercial  
5 broadcasters (dash) including television networks,  
6 local television stations and radio stations (dash) in  
7 the free marketplace against the backdrop of  
8 regulation imposed by the anti-trust consent decrees  
9 which have governed ASCAP's operations."

10 And then beginning paragraph six, "The  
11 licensing of non-commercial broadcasting has been  
12 different."

13 I think I'm entitled to explore the basis  
14 for his knowledge in deriving these conclusions.

15 MR. SCHAEFFER: It seems to me that those  
16 are factual -- those are factual representations. The  
17 first is really a truism, as we know already from --  
18 and he knows it from being in ASCAP.

19 The second is what we're going to be  
20 talking about, is his experience with respect to the  
21 negotiation. I don't see that this is expert  
22 testimony such that it requires an elaborate voir

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1 dire.

2 MR. RICH: With all respect, I really  
3 think this witness -- Your Honor, I'll pause. You're  
4 about to say something.

5 JUDGE GRIFFITH: Oh, that's all right.  
6 I'm just going to ask Mr. Kleinberg if he had any  
7 comments on behalf of BMI.

8 MR. KLEINBERG: I do not.

9 JUDGE GRIFFITH: Thank you.  
10 The objection is overruled.

11 MR. RICH: Thank you, Your Honor.

12 BY MR. RICH:

13 Q Now Mr. Lincoff, you were beginning to say  
14 that your involvement was different in the two periods  
15 of time in which you've had involvement with the  
16 Public Broadcasters.

17 Could you describe -- let's take the 1987  
18 negotiations covering the 1988 to 1992 period. I  
19 believe you said you had involvement?

20 A Yes, sir.

21 Q Did you participate in any face to face  
22 negotiations with the Public Broadcasters in those

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1 negotiations?

2 A I believe I did not.

3 Q So what was the nature of your  
4 involvement?

5 A I was assisting Mr. Koenigsberg and Mr.  
6 Korman who were, at that time, respectively the  
7 Assistant General Counsel and General Counsel of ASCAP  
8 in gathering supporting material for the negotiations  
9 that they were conducting.

10 Q And what was the nature of what materials  
11 you gathered for that process?

12 A I don't recall specifically the individual  
13 documents or other materials that I gathered.

14 Q And what was the nature of your  
15 involvement in the next round of negotiations, which  
16 I take it would have occurred in 1992?

17 A My involvement there was somewhat greater  
18 because Mr. Koenigsberg had, by that time, already  
19 left ASCAP, as I recall; and I was working with Mr.  
20 Korman and Ms. Messinger who was then ASCAP's managing  
21 director.

22 My role, however, was still minor and I

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1 suppose I would characterize it as ministerial.

2 Q And so, if you would turn to paragraph  
3 three of your testimony -- written testimony, please,  
4 where you indicate that during your 11 years at ASCAP,  
5 you've been involved in "negotiating various license  
6 agreements with representatives of users of music from  
7 ASCAP's repertory."

8 Do you see that?

9 A Yes, sir.

10 Q I take it that that did not include any  
11 negotiations with commercial broadcasters, as you've  
12 established, correct?

13 A I did not conduct any negotiations with  
14 commercial broadcasters under this compulsory license,  
15 that's correct.

16 Q And I take it equally that you have not  
17 negotiated license agreements with representatives of  
18 either PBS or NPR. Is that also correct?

19 A Under the compulsory license, that's  
20 correct.

21 Q That's correct, that's the 118 proceedings  
22 we're here about, correct?

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1 A Yes, sir.

2 Q Okay. Now given that you joined ASCAP  
3 when, in 1986?

4 A Yes.

5 Q I take it that you were also not involved  
6 in the 1978 CRT proceeding between the Public  
7 Broadcasters and ASCAP, correct?

8 A That's correct.

9 MR. RICH: Your Honors, based on this, I  
10 can't imagine what meaningful testimony this witness  
11 can give beyond what's in the face of license  
12 agreements that anyone in this room could read and  
13 provide testimony concerning.

14 Certainly any effort by this witness to  
15 characterize the tenor of negotiations that some were  
16 in a free marketplace, others were not, as is implicit  
17 in his testimony, seems -- he seems utterly  
18 incompetent to offer such testimony.

19 MR. SCHAEFFER: In arbitration, the usual  
20 rules of evidence are not applicable. This witness  
21 will testify as to what his source for the information  
22 is that he disclosed to the arbitrators. Then it is

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1 for the arbitrators to decide if that is a source of  
2 information on which they wish to rely.

3 The purpose in an arbitration in part of  
4 having a witness such as Mr. Lincoff is to set forth  
5 our position and to set forth a basis for that  
6 position. We have heard a great deal of hearsay in  
7 this case already, and I'm sure we'll hear much more.

8 We'll hear a lot of material that isn't  
9 the usual kind of thing that you hear in court. All  
10 this man is going to do is tell us what ASCAP's  
11 position is and he'll tell us what the source of that  
12 information is.

13 It is true that the two leading  
14 negotiators, Mr. Korman and Ms. Messinger, are no  
15 longer at ASCAP and we don't have the power to  
16 subpoena in this proceeding. So as a consequence,  
17 we're limited in the kind of evidence that we can put  
18 forward.

19 But in each case, Mr. Lincoff will state  
20 what the basis for his testimony is, and you can then,  
21 as arbitrators of experience, will then evaluate  
22 whether or not there's a basis for believing that

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1 testimony.

2 I think in each case it will be  
3 uncontroversial, and I think in each case it will be  
4 based upon sources which are unimpeachable. And I  
5 think this method of marshalling evidence is  
6 commonplace in an arbitration and particularly true  
7 where we haven't had discovery and we can't subpoena.

8 JUDGE GRIFFITH: Okay.

9 The objection is overruled. The Panel  
10 will hear the testimony and give the testimony such  
11 weight as we deem appropriate.

12 MR. RICH: Thank you.

13 DIRECT EXAMINATION (continued)

14 BY MR. SCHAEFFER:

15 Q Mr. Lincoff, let's address the period 1978  
16 to 1982. In your statement at paragraph eight, I  
17 believe you -- paragraph eight at page three, you had  
18 set forth certain facts. What's your source for those  
19 facts?

20 A My experience at ASCAP, discussions when  
21 he was there with Mr. Korman and with Mr. Koenigsberg  
22 and Ms. Messinger, reading of the article written by

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1 Mr. Korman and Mr. Koenigsberg concerning the first of  
2 the proceedings before the Copyright Royalty Tribunal  
3 which was the 1978 proceeding between public  
4 broadcasting and ASCAP.

5 Q That's the document which is attached I  
6 think as exhibit -- ASCAP Exhibit 19, although there's  
7 some -- I think there was some confusion about what  
8 document -- excuse me? It's a corrected exhibit. I  
9 think the rule on the article was sent with the  
10 original set of papers.

11 MR. RICH: We'll be objecting to the  
12 admission of that -- the document in evidence. It's  
13 hearsay written by a present and former employee of  
14 ASCAP who are not here testifying as to its contents.

15 JUDGE GULIN: This is the exhibit that was  
16 already submitted we're talking about?

17 MR. RICH: No.

18 MR. SCHAEFFER: No, this is an article  
19 that appeared by Mr. Koenigsberg and Mr. Korman  
20 narrating what happened in 1978 to '82. If they have  
21 any objection to what -- anything that's said in  
22 particular there, I have no doubt that they have

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1 witnesses that they can put on who will testify to  
2 that or they'll use their own documents.

3 We're in arbitration, not court.

4 MR. RICH: If I may, Your Honors, it's bad  
5 enough that we have an individual here purporting to  
6 give the history who has really no firsthand knowledge  
7 of the history now that's being supplemented by, with  
8 respect, self serving lawyer view articles written by  
9 present and former ASCAP employees.

10 I don't think that will lead to a fact  
11 record that is worthy.

12 MR. SCHAEFFER: Let me make a final point.  
13 Under the Ancient Documents Rule, as a 20 year old  
14 document, it probably would be admissible. But  
15 whether or not the article makes sense would be  
16 evaluated by the arbitrators in light of the opinion  
17 that was rendered and all the rest of it.

18 The credibility is for you gentleman, not  
19 for any abstract rules of evidence.

20 JUDGE DREYFUS: There's no objection  
21 pending now, I take it.

22 MR. RICH: The document is formally being

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1 sponsored, I believe, by Mr. Baumgarten, but this is,  
2 I guess, a preview of my formal objection at that time  
3 since Mr. Schaeffer is --

4 JUDGE DREYFUS: So everyone will be  
5 prepared at that time.

6 MR. RICH: Thank you.

7 JUDGE GRIFFITH: I think that we'll wait.

8 BY MR. SCHAEFFER:

9 Q Mr. Lincoff, would you tell us as best you  
10 understand it what happened in the 1978 negotiation?

11 A As best I understand it, there were  
12 negotiations between ASCAP and representatives of  
13 public broadcasting which did not result in a  
14 voluntary agreement; that subsequently a proceeding --  
15 a rate setting proceeding was conducted before the  
16 Copyright Royalty Tribunal which issued a decision and  
17 set a rate and -- and set a rate, sorry.

18 Q Do you recall what the rate was?

19 A The opinion itself reflects, I believe,  
20 that the rate is -- was \$1.25 million dollars in the  
21 first year with inflation adjustments to follow during  
22 each of the succeeding five years interim term.

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1 Q And do you know if the form of license  
2 which was issued was a blanket license?

3 A Yes, the opinion so held.

4 Q And the \$1.25 million dollars, I take it,  
5 covered both the radio stations represented by NPR and  
6 the television stations represented by PBS, is that  
7 correct?

8 A Yes.

9 Q Do you have any understanding as to what  
10 amounts were being demanded by ASCAP prior to the  
11 initiation of that proceeding or in that proceeding  
12 that would compare to the \$1.25 million?

13 A No, I do not.

14 Q What happened in subsequent -- in the  
15 subsequent five year intervals? How many times were  
16 agreements reached?

17 A Three separate times.

18 Q And what is -- that was 1993 to '87, '88  
19 to '92, and '93 to '97?

20 A You said '93 to '87, but '83 to '87 --  
21 yes, otherwise that was a correct statement.

22 Q Now what's your source of information as

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1 to that?

2 A ASCAP's files and also more particularly  
3 the agreements which are in those files and the  
4 decisions of the Copyright Royalty Tribunal proving  
5 and accepting those agreements.

6 Q Now, did you have any role with respect to  
7 the drafting of the PBS/NPR license in any of those  
8 years?

9 A Yes.

10 Q What was your role?

11 A My role was limited essentially to  
12 compiling rather than creating the language of the  
13 license agreements because, as I said, I did not  
14 directly participate in the negotiations.

15 Q Now in the last session, I had referred to  
16 page four. I think this is the ASCAP Exhibit 32. Let  
17 me just double check that. Yes, it's Exhibit 32.

18 I had been referring to paragraph 3(b)  
19 where it said "licensees agree that said license will  
20 have no precedential value in any future negotiation  
21 or proceeding."

22 And the question had been asked by one of

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1 the arbitrators as to the second -- starting of the  
2 second sentence, that which reads, "This agreement  
3 contains no provision comparable to that found in  
4 paragraph 3(a) of the license agreement between  
5 Society, PBS and NPR dated October 28, 1992. The  
6 presence or absence of any such provision in the  
7 agreement shall have no precedential value in any  
8 negotiation," etc.

9 And I think that Mr. Dreyfus asked me what  
10 was that relating to. Exhibit 11 of -- and I believe  
11 it's -- yes, Exhibit 11 of the Public Broadcasters,  
12 which I've also blown up, I think gives us the answer  
13 to that. And I'd like to just point this out at the  
14 present time.

15 Old paragraph three provided, in  
16 consideration of the license hearing granted PBS and  
17 NPR, agreed to pay Society a license fee in the amount  
18 of \$11.5 million, and then it states the installments.

19 But what was added was, "Should the  
20 corporation for public broadcasting receive \$200  
21 million dollars or more in congressional  
22 appropriations from the Federal Government in any

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1 fiscal year during the term of this agreement, then  
2 the installment due in the calendar year with the same  
3 name shall be the greater of the installment due in  
4 same year as set forth above adjusted to reflect any  
5 change in the CPI."

6 And I think that's what that referred to.

7 MR. RICH: Your Honor, is Mr. Schaeffer  
8 testifying or is this witness testifying?

9 MR. SCHAEFFER: It is not, of course,  
10 uncommon even in trial, Mr. Rich, for, in the course  
11 of the cross examination where you have documents that  
12 are already in evidence, for me to call attention to  
13 the trier of fact, whether it be jury or judge, a  
14 point I wish to make.

15 I think that's a common -- certainly in  
16 the 30 years I've been practicing, that has been a  
17 common part. And I wish to point that out to answer  
18 the arbitrator's question.

19 JUDGE DREYFUS: Well, we thank you,  
20 Counsel. And I know my name is connected with this  
21 presentation part of it. When we do have a witness on  
22 the stand, we can stay with the witness and these are

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1 matters for -- I mean, if and when the document is  
2 introduced as an exhibit, --

3 MR. SCHAEFFER: Well it already is.

4 JUDGE DREYFUS: It's already an exhibit?

5 MR. SCHAEFFER: That's why -- otherwise I  
6 would be --

7 JUDGE DREYFUS: -- being referred to by  
8 another witness, sir, or in final summation, that  
9 would be fine.

10 BY MR. SCHAEFFER:

11 Q Were you involved in the 1997 -- year 2002  
12 negotiations?

13 A I participated in one meeting with  
14 representatives of public broadcasting.

15 Q Now I'm not talking about the latest one.  
16 I'm talking now about the latest one since 1997. Were  
17 you involved in that? In the negotiations for the  
18 current license period that we're here today about.

19 A Yes, I attended one --

20 Q Okay. And do you remember when that was?

21 A It was last year, but I don't remember the  
22 specific --

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1 Q And do you know what happened in those  
2 negotiations?

3 A While I was there or do you mean --

4 Q Just generally. I just want to move this  
5 on.

6 A I believe that those negotiations did not  
7 result in any voluntary agreement, and that is why we  
8 are here today.

9 MR. SCHAEFFER: I have no further  
10 questions for this witness.

11 JUDGE GRIFFITH: Cross examine?

12 Oh, I'm sorry, Mr. Kleinberg, do you have  
13 any --

14 MR. KLEINBERG: No questions at this time.

15 JUDGE GRIFFITH: Thank you.

16 Mr. Rich.

17 MR. RICH: Thank you.

18 CROSS EXAMINATION

19 BY MR. RICH:

20 Q I'd like to bring you back, Mr. Lincoff,  
21 to paragraphs five and six of your written testimony.  
22 Do you have that handy?

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1           A       Yes, I do.

2           Q       Now you appear in those paragraphs to  
3 contrast the "free marketplace" which is characterized  
4 commercial broadcasting's negotiations with ASCAP with  
5 the "different" circumstances attending the licensing  
6 of public broadcasting.

7                   Am I correct in so interpreting paragraphs  
8 five and six?

9           A       Yes.

10          Q       I'd like to explore that a bit further  
11 with you, if I may.

12                   In paragraph seven immediately following,  
13 you state that public broadcasting and ASCAP are  
14 encouraged to conduct good faith negotiations in the  
15 first instance under the provisions of Section 118, is  
16 that correct?

17          A       Yes, that paragraph says so.

18          Q       Now that process, I take it, is not  
19 antithetical to a free market, is it; that is the  
20 process of voluntary negotiations between Public  
21 Broadcasters and ASCAP?

22          A       In the context of a compulsory license,

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1 it's, in my view, not a free market negotiation. But  
2 that doesn't -- I'm sorry.

3 Q Go ahead. Please finish your answer.

4 A That doesn't preclude the exercise of good  
5 faith on both parties' behalf.

6 Q And indeed, to your knowledge, based on  
7 your research as you've described it, has ASCAP  
8 conducted negotiations with the Public Broadcasters  
9 over the past 20 years in good faith?

10 A Yes.

11 Q And based on your research, is it your  
12 understanding that the Public Broadcasters have  
13 similarly negotiated with ASCAP in good faith over the  
14 last 20 years?

15 A I don't think it would be fair for me to  
16 characterize their approach to negotiations.

17 Q Do you have any knowledge that the Public  
18 Broadcasters have approached these negotiations at any  
19 time in other than good faith?

20 A No.

21 Q Now you go on to say in your testimony  
22 that if the parties are unable to agree under the

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1 structure of Section 118, a CARP such as the instant  
2 one determines the rates and terms for licenses over  
3 a five year period.

4 Is that correct?

5 A Yes.

6 Q That's your understanding of how 118  
7 operates, correct?

8 A Yes.

9 Q And indeed, these rates and terms are  
10 binding both on ASCAP and the Public Broadcasters,  
11 correct, the outcome of this proceeding?

12 A Yes.

13 Q Now do I understand you to be suggesting  
14 by this written testimony that these facts, namely  
15 that there is first a period of voluntary negotiation  
16 which has been conducted in good faith and which, if  
17 it fails, results in a proceeding of the type we are  
18 here engaged in whose outcome is binding on both ASCAP  
19 and the Public Broadcasters is very different or  
20 significantly different from the dynamics which have  
21 characterized commercial broadcasting's own  
22 relationships with ASCAP?

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1           A       As I understand the provisions of the  
2       ASCAP's consent decree relating to Rate Court  
3       proceedings, the -- a decision by the Rate Court is  
4       not binding on the user community except for those who  
5       directly participated in the proceeding.

6           Q       Let me ask -- let me take this in bite-  
7       size chunks, okay?     Let's take a hypothetical  
8       negotiation between the ABC television network and  
9       ASCAP, okay?   Okay?

10          A       All right.

11          Q       Now I realize you've not been involved in  
12       any such negotiations between commercial broadcasting  
13       and ASCAP; but for the purpose of my questions, let's  
14       see if we can reach some agreement on some basic  
15       points.

16                   Typically is it your understanding that  
17       what happens initially is that there is a period of  
18       negotiation between ABC and ASCAP?

19          A       Well, specifically with regard to ABC, I  
20       don't know that.

21          Q       Are you familiar -- were you here for Mr.  
22       Reimer's testimony about the ABC-CBS Rate Court

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1 proceeding?

2 A Yes, I was.

3 Q As part of your general knowledge as a  
4 member of ASCAP's legal department, I take it you're  
5 are that there was covering the 1991 to '93 period a  
6 Rate Court proceeding involving the ABC and CBS  
7 television networks, correct?

8 A I'm aware that ASCAP has been involved in  
9 Rate Court proceedings with the networks, yes.

10 Q Okay. And is it your understanding that  
11 those Rate Court proceedings resulted from failed  
12 negotiations?

13 A Yes, that's my understanding because had  
14 the negotiations not failed, there would have been a  
15 voluntary agreement.

16 Q So we can agree, can we not, that step one  
17 typically in a Rate Court scenario is a period of  
18 negotiation; and step two is, if those negotiations  
19 fail, the user and ASCAP most frequently have in  
20 recent years resorted to a Rate Court mechanism in the  
21 Southern District of New York to resolve their  
22 differences, correct?

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1           A       Yes.

2           Q       And versus a three panel group here, you  
3       have a Federal District Court judge, whether Judge  
4       Conner or in recent years Magistrate Judge Dolinger,  
5       reaching a determination as to reasonable fees,  
6       correct?

7           A       Well, I believe that the determination  
8       here is not specifically limited by the notion of  
9       reasonable fee, whereas it is in the Rate Court  
10      proceeding.

11          Q       What is your understanding of what governs  
12      the outcome of this proceeding?

13          A       That they -- well, that they will set a  
14      fee that is appropriate under all of the  
15      circumstances, but I think that in the -- that the  
16      term reasonable in the Rate Court -- in the ASCAP Rate  
17      Court context has developed a special meaning --  
18      specialized meaning.

19          Q       What is your --

20          A       But I haven't -- sorry, but I haven't been  
21      involved in those directly and so my understanding of  
22      it is, admittedly, rather limited.

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1 Q And you have not been involved directly in  
2 118 proceedings involving Public Broadcasters either,  
3 is that correct?

4 A Well, the one that had -- the one trial of  
5 that that has occurred prior to this one was before my  
6 time at ASCAP, yes.

7 Q Yes. So you do agree, do you not, that in  
8 the event negotiations between commercial broadcasters  
9 and ASCAP fail, the commercial broadcasters, by  
10 resorting to the Rate Court, in effect have available  
11 to them, if I may borrow from Judge Dreyfus'  
12 suggestion, a form of compulsory license, is that  
13 correct?

14 A But the commercial broadcasters rely on  
15 Section 118, not on the Rate Court.

16 Q You may have misspoken. You said the  
17 commercial broadcasters rely on 118.

18 A Oh, I'm sorry. Could you -- I guess I  
19 missed you.

20 Q Focusing still on my hypothetical example  
21 of a commercial broadcaster --

22 A Yes.

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1           Q       -- who has a failed negotiation with  
2       ASCAP, am I not correct that there is a close analogy  
3       in terms of the rights and abilities of that  
4       broadcaster to continue to utilize the ASCAP  
5       repertory, the equivalent of a compulsory license, at  
6       a fee determined by a third party tribunal, correct?

7           A       Yes, determined by the Rate Court, yes.

8           Q       And so in those respects, you would agree  
9       the process is quite similar to what we are here  
10      developing, correct, under 118?

11          A       The steps seem similar, yes.

12          Q       What you are pausing on, I take it, is  
13      that you have not, at least in your own mind, reached  
14      the determination that the function of this tribunal  
15      as opposed to the Rate Court is to arrive at a  
16      reasonable fee?

17          A       I think that the -- I think that the  
18      structure of the two different kinds of proceedings is  
19      different and that the -- and that when we -- when  
20      ASCAP negotiates with any user, but it a broadcaster -  
21      - and outside the context of a compulsory license such  
22      as this one, that that is done initially in a free

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1 market and that the provisions of the ASCAP consent  
2 decree and the Rate Court structure loom more or less  
3 in the background of that which can guide the parties  
4 accordingly.

5 I think that that is, at least in my view,  
6 different than a compulsory license proceeding.

7 Q Let me ask you this. Take a look at  
8 paragraph eight of your direct testimony, if you  
9 would, please. You there recite the outcome as you  
10 did in response to questioning from your counsel of  
11 the 1978 CRT proceeding. Namely a first year fee of  
12 \$1.25 million. Is that correct? Subject to annual  
13 inflation adjustments.

14 A Yes.

15 Q That was the rate outcome of the 1978 CRT  
16 proceeding, correct?

17 A That was the fee set by the Tribunal, yes.

18 Q Yes. Now what did your research into the  
19 history of that proceeding disclose as to the fee  
20 which ASCAP requested in that proceeding?

21 A I believe I testified in response to a  
22 question on direct that I do not know what ASCAP

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1 requested in that proceeding.

2 Q So in whatever materials you reviewed and  
3 in whatever conversations you had, you have not come  
4 across, I take it, what ASCAP's own position was and  
5 arguments were in that proceeding. Is that your  
6 testimony?

7 A Well I don't doubt that that is set out in  
8 the Koenigsberg Korman article, or that it is  
9 contained in files that when I was more directly  
10 involved in these sorts of proceedings that I would  
11 have read, but I do not recollect and so therefore do  
12 not know as I sit here what that request was.

13 Q Let me ask you if you do recall or  
14 recollect that ASCAP asserted that since public  
15 broadcasting was then in direct competition with  
16 commercial broadcasting for viewership, public  
17 broadcasting should then pay the same percentage of  
18 its revenues as commercial broadcasting is then paying  
19 ASCAP. Does that ring a bell with you?

20 A If you say that was the position that  
21 ASCAP had taken, I would have no reason to disbelieve  
22 you.

1 Q And does it also refresh your recollection  
2 that in computing that comparison, Mr. Korman, then  
3 ASCAP's General Counsel, asserted that the proper fee  
4 payable to ASCAP as of 1978 was the sum of \$3.6  
5 million per annum?

6 A I would accept your representation that  
7 that was so. But I do not know it to be true on my  
8 own.

9 Q So that would be a fee nearly three times  
10 what the Tribunal eventually agreed was appropriate,  
11 is that correct?

12 MR. SCHAEFFER: I object, unless we know  
13 what Mr. Rich is reading from. On cross examination  
14 we are entitled to this. He is not entitled to take  
15 it out of thin air.

16 MR. RICH: I am probing this witness's  
17 recollection and knowledge, your Honor.

18 MR. SCHAEFFER: He already said he doesn't  
19 have the --

20 CHAIRPERSON GRIFFITH: He says he doesn't  
21 personally recollect. On the other hand, he is saying  
22 that if you represent to him that that was -- that he

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1 will accept that.

2 MR. RICH: I'm representing both to the  
3 witness and to your Honors and we will have  
4 appropriate --

5 CHAIRPERSON GRIFFITH: Mr. Schaeffer  
6 objected asking you to identify the source of the  
7 information that you are taking it from.

8 MR. RICH: In due course we will be happy  
9 to sponsor ASCAP's submissions that reflect this  
10 information.

11 CHAIRPERSON GRIFFITH: I see.

12 MR. RICH: I'm really at this point  
13 probing the witness's knowledge and facts of the '78  
14 proceedings.

15 MR. SCHAEFFER: I think I'm entitled to a  
16 better answer. But I'll accept --

17 CHAIRPERSON GRIFFITH: If you could  
18 identify the document that you are referring to and  
19 show him the document, then I think it's perfectly  
20 appropriate for you to go ahead. But without doing  
21 so, I don't think it would be appropriate.

22 MR. RICH: All right, your Honor. If you

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1 will give us a few minutes, we will see what we have  
2 available in the courtroom today.

3 CHAIRPERSON GRIFFITH: All right.

4 BY MR. RICH:

5 Q Let me move on. Mr. Lincoff, in  
6 connection with your research on the history of public  
7 broadcasting relationships with ASCAP, do you know  
8 whether ASCAP ever expressed the view that had the  
9 issue before the 1978 Tribunal been tried in the New  
10 York Rate Court instead of before the CRT, that the  
11 outcome might have been different?

12 MR. SCHAEFFER: I object. I don't know  
13 what he means by ASCAP is an association of a lot of  
14 people. Is he talking about an individual in ASCAP or  
15 corporate -- I don't understand what that question  
16 means.

17 CHAIRPERSON GRIFFITH: Can you rephrase  
18 the question please?

19 MR. RICH: Sure. Are you -- have you ever  
20 come across a submission to any, before the Copyright  
21 Royalty Tribunal by ASCAP in which ASCAP commented or  
22 provided its view as to the degree to which the 1978

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1 CRT Tribunal outcome might have been similar or  
2 different had the matter been tried in the New York  
3 Rate Court? Have you ever come across that in your  
4 research?

5 THE WITNESS: I don't recall.

6 BY MR. RICH:

7 Q Let me show you, if I may with the Panel's  
8 consent, I'd like to show the witness a document --  
9 I'll give you two additional ones which we will also  
10 be offering -- [discussion off mike].

11 CHAIRPERSON GRIFFITH: Hold on. We've got  
12 to figure out how we are going to mark these. [More  
13 discussion off mike.] We are trying to get organized  
14 here. [More discussion off mike.]

15 All right, just for your information.  
16 What we are trying to do is start off right so that we  
17 won't have difficulty identifying the nature of the  
18 exhibits in the future.

19 What we are going to do, the exhibits  
20 which has previously been marked as PB1, 2, 3, and 4  
21 are going -- we are asking the reporter at this time  
22 to mark them as PB Exhibit 1X, 2X, 3X, 4X. That

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1 denotes to us that they -- and they are admitted, the  
2 came up by way of cross examination.

3 This then will be Exhibit No. PB Exhibit  
4 5X.

5 MR. WEISS: Your Honor, if I may just have  
6 a chance to refer to the Rules. If I recall the rules  
7 correctly, there is a distinction as to the nature of  
8 the document marked as a cross examination document as  
9 compared to those accepted as hearing documents. I  
10 think that that distinction would prevent the Court  
11 from relying on the documents in the same fashion as  
12 if they had been marked as hearing exhibits.

13 JUDGE GULIN: That's correct.

14 MR. WEISS: I think that at least as to  
15 exhibits that we've marked with Mr. Reimer, I don't  
16 think there is any objection to having them marked --

17 JUDGE GULIN: I said they are admitted.  
18 They are admitted so they can be cited to in any  
19 manner you want, as substantive evidence. As long as  
20 they are admitted. As long as we can take official  
21 notice.

22 MR. SCHAEFFER: Yeah, I don't have any

1 problems.

2 MS. MCGIVERN: It was the Practice Volume  
3 set out in the rate adjustment proceeding -- no one  
4 had any problem with it as first material. And you  
5 know and at the end the parties stipulated to what  
6 comprised the exhibits in the end.

7 MR. SCHAEFFER: I have an objection, by  
8 the way, some of these documents if they are going to  
9 be proffered. That's why I don't want -- the marking  
10 of them should not -- they should be for ID. At least  
11 two of them are objectionable in my view.

12 JUDGE GULIN: Let me just address that  
13 last comment. With respect to deciding what would be  
14 admitted at the end of the proceeding, we hope we are  
15 not going to be dealing with that type of a situation  
16 again.

17 If you have a cross examination document  
18 that you feel can be put in evidence at the time it's  
19 presented because you feel the witness either has  
20 agreed with it so it can be sponsored, or for whatever  
21 reason, let's get it into the record then. Not wait  
22 until the end and be left with a lot of documents that

1 there are some arguments about as to whether they were  
2 actually substantive evidence or not.

3 But I think it's appropriate to proceed in  
4 this matter to have documents marked as cross  
5 examination documents. But if they are admitted, they  
6 can certainly be used as substantive evidence.

7 MR. WEISS: I would simply note, your  
8 Honors, that while we didn't have a copy of that Fox  
9 opinion that was referred to during Mr. Reimer's  
10 testimony, I've indicated that we would provide a copy  
11 and that we would designate that as cross examination  
12 PB Exhibit 5. Is that all right?

13 MR. SCHAEFFER: Fine, then we have no  
14 objection to that, ASCAP --

15 MR. WEISS: So that I believe that would  
16 make this Exhibit 6.

17 CHAIRPERSON GRIFFITH: That will be  
18 admitted and this will be PB Exhibit 6X.

19 JUDGE GULIN: Six a, b, and c or what is  
20 it --

21 MR. SCHAEFFER: Well, I have an objection  
22 to those documents.

1 MR. RICH: The next two documents I  
2 simply, to avoid recirculating paper, will be offered  
3 by me shortly.

4 JUDGE GULIN: Oh, okay.

5 MR. RICH: But at the moment --

6 MR. SCHAEFFER: But I suppose I'd like to  
7 be heard.

8 JUDGE GULIN: Well they haven't been  
9 offered into evidence, we are just talking about  
10 identifying them at this point.

11 MR. RICH: In a moment I wanted to inquire  
12 as to what we have marked, I guess, as 6X. Is that  
13 right? Which is comments of ASCAP?

14 J U D G E G U L I N : C o r r e c t .  
15 (Whereupon, the above-referred  
16 to document was marked as PB 6X  
17 for identification.)

18 BY MR. RICH:

19 Q Mr. Lincoff, I place before you a document  
20 entitled "Comments of the American Society of  
21 Composers, Authors and Publishers" which is dated  
22 December 17, 1979. A document which appears to have

1 been submitted to the CRT. Do you have that in front  
2 of you?

3 A Yes, I do.

4 Q Is that a document you've had occasion to  
5 review before?

6 A I don't specifically recall if I have  
7 reviewed this document.

8 Q You may have, you just don't recall?

9 A That's correct.

10 Q Would you turn to page four of this  
11 document, please? You will see in the second full  
12 paragraph, ASCAP states "without the compulsory  
13 license --

14 A Yes.

15 Q -- "a federal judge would have fixed a  
16 reasonable fee under the amended final judgement in US  
17 v. ASCAP. There is no reason to suppose that the  
18 Court's decision would have been very different from  
19 the CRT's." Do you see that?

20 A Yes, that's part of the paragraph.

21 Q Yes, and in looking back as you did over  
22 the history of the CRT's dealings with public

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1 broadcasting, did you ever see or hear reference to  
2 this?

3 A I'm afraid I don't really understand your  
4 question.

5 Q I'm simply asking whether looking at it  
6 now, this is the first time you've seen a reference to  
7 this statement on the part of ASCAP as of December of  
8 1979?

9 A Well I just said a moment ago that I don't  
10 specifically recall reading this document before. So  
11 that if this is where that has only ever been stated  
12 --

13 MR. SCHAEFFER: I'll stipulate that this  
14 is a statement by ASCAP and this is an official  
15 position that was taken by ASCAP at that time.

16 MR. RICH: That's fine and we would offer  
17 the document at this time --

18 MR. SCHAEFFER: I have no objection to a  
19 document on that ground. Unfortunately, this wasn't  
20 made available to me before. I think the document  
21 itself is going to be admissible under any  
22 circumstance, because it's an admission.

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1 MR. RICH: Sure is.

2 MR. SCHAEFFER: That's perfectly clear.  
3 But I would like the opportunity to be able to read it  
4 because I only got it two minutes ago. I mean I found  
5 two other documents that I've been given. I think I'm  
6 being sandbagged.

7 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

8 MR. KLEINBERG: I just want to make it  
9 clear that as I understand it this is being offered  
10 with respect to ASCAP since it is like an ASCAP  
11 document, not BMI. I don't think that I have to make  
12 that statement repeatedly, but I want to be understood  
13 that's my understanding as to how that is coming into  
14 evidence.

15 JUDGE GULIN: Well, maybe we should ask  
16 how you see -- what is the distinction?

17 MR. KLEINBERG: Well, it's being offered,  
18 I think, as an admission of ASCAP. It certainly  
19 couldn't be an admission of BMI. It's not a BMI  
20 document and there is no support --

21 CHAIRPERSON GRIFFITH: As to what their  
22 position was at the time --

1 MR. KLEINBERG: Yes, right.

2 CHAIRPERSON GRIFFITH: -- of these  
3 proceedings.

4 MR. SCHAEFFER: And I'll stipulate that  
5 was their position.

6 CHAIRPERSON GRIFFITH: Right, and you have  
7 no objection to the document?

8 MR. SCHAEFFER: No. I want to look at the  
9 record -- I haven't -- I just got the document so I  
10 want to make sure it's authentic. If it isn't, I'll  
11 get back to everybody at that time.

12 JUDGE GULIN: Well maybe we should make  
13 clear. I think simply because the document  
14 constitutes an admission, I don't know that  
15 necessarily means it's going to be admitted in these  
16 proceedings.

17 In these proceedings, all documents have  
18 to be sponsored.

19 MR. SCHAEFFER: Yeah, it happens this  
20 document --

21 JUDGE GULIN: You have no objection to  
22 this document?

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1 MR. SCHAEFFER: I have no objection to  
2 this document. Just subject to my checking that it's  
3 authentic.

4 CHAIRPERSON GRIFFITH: All right. At this  
5 time, the record will reflect that PB Exhibit 6X is  
6 stipulated to by counsel for ASCAP and admitted  
7 without objection.

8 (Whereupon, the above-reference  
9 document was admitted as PB  
10 Exhibit 6X.)

11 BY MR. RICH:

12 Q Thank you. Now, Mr. Lincoff, in paragraph  
13 nine of your written testimony, you indicate that for  
14 every subsequent period, that is subsequent to the CRT  
15 1978 ruling. That is from 1982 until the present, a  
16 PBS and NPR have reached voluntary agreements with  
17 ASCAP. Is that correct?

18 A Yes.

19 Q And you so testified in your direct  
20 examination, yes?

21 A Yes.

22 Q And these were the product of good faith,

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1 arms-length negotiations, correct?

2 A Yes.

3 Q And now other than as you referred to in  
4 paragraph nine, avoiding the time and expense  
5 associated with compulsory license fee rate adjustment  
6 proceedings -- that's I believe your testimony in  
7 paragraph nine? Other than avoiding such time and  
8 expense, to your knowledge, were there any other  
9 constraints operating on ASCAP in telling or  
10 compelling it to reach terms with PBS and NPR all  
11 those many years?

12 A Well there is certainly the risk of  
13 litigation itself.

14 Q And I take it that risk exists as well in  
15 the rate court setting, correct?

16 A Risk exists in all litigation.

17 Q Is there anything in your understanding of  
18 the operation of 118 that creates a higher risk  
19 calculus for ASCAP or makes such a proceeding more  
20 costly relatively speaking than engaging in a rate  
21 court proceeding?

22 A No.

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1           Q       How many lawsuits on average has ASCAP  
2 commenced a year? I believe -- let me back up. You  
3 said you are in charge of copyright infringement or  
4 involved in copyright infringement end of the legal  
5 operations of ASCAP?

6           A       I have been involved in it. I was never  
7 in charge of it.

8           Q       Okay.

9           A       Mr. Reimer was Director of Infringement  
10 Litigation for all the time that I was involved in  
11 infringement litigation.

12          Q       But you accordingly have first hand  
13 knowledge of the scope of that enterprise, correct?

14          A       Yes, well I had -- I had specifically I  
15 had responsibility for supervising local counsel in  
16 the conduct of infringement litigation in particular  
17 jurisdictions. Those jurisdictions changed over time,  
18 but that was what my responsibilities were.

19          Q       Approximately how many lawsuits does ASCAP  
20 commence a year?

21          A       I don't know.

22          Q       Ball park. How many -- in the hundreds?

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1 A I really don't know.

2 Q Did you ever know?

3 A I don't believe so.

4 Q What is ASCAP's legal budget for --

5 MR. SCHAEFFER: I object.

6 MR. RICH: -- litigation in a given year?

7 CHAIRPERSON GRIFFITH: What's the basis of  
8 your objection?

9 MR. SCHAEFFER: This is well beyond the  
10 scope of all cross what our expenses are.

11 CHAIRPERSON GRIFFITH: Objection  
12 sustained.

13 BY MR. RICH:

14 Q At any given time when you were involved  
15 in copyright infringement litigation, how many cases  
16 did you have sitting at your desk, Mr. Lincoff?

17 A I tried never to allow cases to sit on my  
18 desk.

19 Q There was no disparagement meant. I was  
20 merely trying to get a sense for how many cases you  
21 were supervising local counsel on at any one time?

22 A I believe that at it's greatest, I may

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1 have had a pending case load of in the range of 125  
2 cases.

3 Q And how many other attorneys in ASCAP's  
4 Legal Department had responsibility for supervising  
5 local counsel in other infringement matters?

6 A Well that too has varied over time.

7 Q What's been the range of the numbers of  
8 people involved?

9 A During my years in the Legal Department,  
10 hang on, let me think about it just for a moment. I'm  
11 counting heads in my mind, if you will.

12 CHAIRPERSON GRIFFITH: You may use your  
13 fingers.

14 THE WITNESS: Use my fingers to answer.  
15 I believe that in terms of junior attorneys who were  
16 directly handling the litigation, that during my time  
17 there the most might have been seven. And then there  
18 were supervisors as well.

19 I might add that it wasn't necessarily so  
20 that each of us handled infringement litigation to the  
21 exclusion of every other function. I believe most of  
22 us did something else in addition.

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1 BY MR. RICH:

2 Q Now, in paragraph 16 of your written  
3 testimony, you cite to the "administrative savings" to  
4 public broadcasting entities of having a single,  
5 centralized license. That is having a license  
6 negotiated with NPR and PBS as opposed, I take it,  
7 with individual -- many individual stations, correct?

8 A Yes.

9 Q And my question to you, sir, is it not  
10 correct that ASCAP likewise realizes significant  
11 savings by not having to administer and collect  
12 license fees under hundreds of different radio and  
13 television licenses in the public broadcasting sector?

14 A I assume that that results in an  
15 administrative savings of some measure to ASCAP, yes.

16 Q Now, to your knowledge, Mr. Lincoff, what  
17 was the first ASCAP license to contain the no  
18 precedential effect language which Mr. Schaeffer  
19 earlier averted to?

20 A Do you mean in the context of --

21 Q Context of --

22 A -- our relations with PBS?

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1 Q Yes.

2 A I'm sorry. I believe it was the license  
3 agreement for the term January 1, 1983 to December  
4 31st, 1987.

5 Q And that was prior to your arriving at  
6 ASCAP, correct?

7 A The commencement date of that was, yes.

8 Q And the drafting of that document, by  
9 definition, occurred before you arrived at ASCAP,  
10 correct?

11 A Oh yes.

12 Q And so you have no knowledge, do you, of  
13 the genesis of that provision, do you? In terms of  
14 what in the negotiations precipitated that language in  
15 that license agreement? That first license agreement?

16 A I wasn't there when it happened, but my  
17 understanding of it arose subsequent -- subsequently.

18 Q You were not present by definition at any  
19 of the negotiations underlying that license agreement,  
20 correct?

21 A That's right.

22 Q Now, to your knowledge, has the language

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1 changed or changed materially in any of the subsequent  
2 license agreements? That no precedent language  
3 between ASCAP and the public broadcasters?

4 A To my knowledge it has not.

5 Q Do you know --

6 A Uh --

7 Q Pardon me, please finish.

8 A I'm sorry.

9 Q The entire paragraph, in paragraph 3(a) of  
10 the 1982 agreement, there are two references to non-  
11 precedential nature of the agreement. One of them  
12 relates to the fee itself, and the other relates to an  
13 adjustment to the fee if PBS were to be given greater  
14 than \$200 million in Congressional appropriations.  
15 Which of those are you talking about?

16 A For purposes of my questioning, let's  
17 focus on the former. That is the language relating to  
18 the fee provision itself, okay?

19 MR. SCHAEFFER: I've been just waiting for  
20 an opportunity, because I don't want to interrupt  
21 anybody, but it seems to me we have a kind of a parole  
22 evidence rule issue here. Now, usually I wouldn't

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1 object on an evidentiary basis, but this is a rude,  
2 substantive look.

3 A contract is perfectly clear on its face.  
4 It says it should have no precedential value. To  
5 allow in the course of a proceeding somebody to go  
6 into the motives and the intent defeats the whole  
7 purpose of having a clear linguistic statement that  
8 it's to be no precedent.

9 And I -- on that ground, it's not an  
10 evidentiary basis I object, but the rules -- the  
11 parole evidence rule which is enshrined in this  
12 district, in the federal court and certainly in New  
13 York.

14 CHAIRPERSON GRIFFITH: Mr. Rich?

15 MR. RICH: We wouldn't -- your Honor, Mr.  
16 Shaeffer when convenient says we have relaxed or no  
17 rules of evidence here. And when convenient for the  
18 other way says we should enforce these rules strictly.

19 This is going to be for ASCAP, I suppose,  
20 a central facet of its defense and we briefed this  
21 before the Copyright Office once and prevailed. That  
22 is against a motion to strike any testimony or

1 references to the impact of this proceeding on this  
2 matter. And, your Honor, I'd be prepared to do it  
3 again.

4 This is too substantive a matter, it seems  
5 to me, for us to, I think, casually foreclose lines of  
6 testimony as to the genesis of this provision and what  
7 it means. We certainly don't agree it's clear on its  
8 face for its implications in this proceeding at all.

9 MR. SCHAEFFER: Let me just -- I do want  
10 to respond to one thing. The motion to object, the  
11 motion that you are referring to is not a motion in  
12 that context. We will again renew our objection to  
13 the testimony of their expert who used the document,  
14 the very rates that were supposed to be agreed to be  
15 non-precedential as a basis for his report. That's a  
16 different issue than the one we are raising here now.

17 That's true with respect to his testimony  
18 and I will renew that objection. Certainly it has not  
19 been favorably upon by the Copyright Office, that's a  
20 gross exaggeration.

21 And I'm not making it evidentiary  
22 objection. And also I am really making a substantive

1 objection, one of substantive law.

2 Now, I will consistently throughout this  
3 proceeding take the position, and I won't have to, I  
4 assume, object if you overrule this objection that  
5 it's a matter of substantive law when parties have  
6 reduced their writing to clear terms. And I believe  
7 that's clear. That's for you to decide. But none of  
8 the preparation of the mind is relevant. And that's  
9 really my major point.

10 It's not a rule of evidence, it's a rule  
11 of substance.

12 CHAIRPERSON GRIFFITH: The objection is  
13 overruled.

14 BY MR. RICH:

15 Q Mr. Lincoff, do you know at whose instance  
16 the language that appears in paragraph 3(b) of the  
17 license was first agreed to?

18 A I believe it was at ASCAP's instance.

19 Q That's not based on personal knowledge  
20 though, is it?

21 A I was not there at the time the language  
22 was formulated initially, that is correct.

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1 Q And do you know whether its inclusion in  
2 the 1988 to 1992 license was a deal point in those  
3 negotiations?

4 MR. SCHAEFFER: Objection.

5 JUDGE DREYFUS: I'm sorry, I missed that.

6 MR. RICH: Was a deal point.

7 JUDGE DREYFUS: Deal, deal.

8 MR. RICH: Let me rephrase it, if I may.

9 JUDGE DREYFUS: Deal breaker?

10 MR. RICH: Was an active -- let me try  
11 again. Do you know whether the inclusion in the 1988  
12 to 1992 license of that language was a point of  
13 negotiation?

14 THE WITNESS: I know that it was a point  
15 of substantive importance to ASCAP.

16 MR. RICH: Could you answer my question?

17 MR. SCHAEFFER: I think that does answer  
18 the question.

19 BY MR. RICH:

20 Q I don't believe so. My question is  
21 whether you know first hand, you attested to some  
22 familiarity with those negotiations, whether that

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1 provision was the subject of negotiation for the  
2 license covering the 1988 to 1992 license period?

3 A I wasn't present if such discussions took  
4 place between ASCAP and representatives of public  
5 broadcasting.

6 Q Then I'll ask you the same question with  
7 respect to its inclusion in the 1993 to 1997 license.  
8 To your personal knowledge, was that clause a subject  
9 of negotiation in connection with that license?

10 A Once again, the discussions that Mr.  
11 Korman and his messenger had with representatives of  
12 public broadcasting were by and large not conducted in  
13 my presence.

14 Q You were present, I take it, when Mr.  
15 Reimer testified that one of the regulating provisions  
16 in the ASCAP Consent Decree deals with ASCAP's  
17 obligation not to discriminate between similarly  
18 situated users. Do you recall his testimony along  
19 those lines?

20 MR. SCHAEFFER: This is beyond the scope  
21 of direct.

22 JUDGE DREYFUS: How does it tie in?

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1 MR. RICH: Well again --

2 JUDGE DREYFUS: It is direct.

3 MR. RICH: Again your Honor, in paragraphs  
4 five and six, this witness is attempting to draw  
5 contrasts in the history and license negotiation  
6 experiments with commercial and non-commercial  
7 broadcasters. I really only have one question  
8 following on this.

9 CHAIRPERSON GRIFFITH: Well, wait just a  
10 minute. One question.

11 BY MR. RICH:

12 Q Thank you. My question, Mr. Lincoff is,  
13 have you ever considered in reviewing the history of  
14 non-commercial broadcasting's relationships with ASCAP  
15 and commercial broadcasting's relationship, whether  
16 those entities are similarly situated within the 1950  
17 ASCAP agreement?

18 A No, I had not considered that.

19 Q You would not today argue they are.

20 MR. SCHAEFFER: That was the one question.

21 CHAIRPERSON GRIFFITH: Objection  
22 sustained.

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1 BY MR. RICH:

2 Q My final, will and promptly, turn to page  
3 three, note one of your testimony. You make reference  
4 to several other agreements reached with other non-  
5 commercial entities. Is that correct? Reached by  
6 ASCAP in the recent past?

7 A Yes, with -- yes, with a few others, yes.

8 Q And can you identify them, please?

9 A They are with representatives of non-  
10 commercial educational radio stations which are  
11 licensed to colleges and universities, and non-  
12 commercial educational radio stations that are not  
13 licensed to colleges and universities and that are not  
14 represented by National Public Radio.

15 Q And I anticipate an objection from my  
16 colleague to the right, but what I've done is placed  
17 before the Panel and the witness what are filed as  
18 joint proposals of ASCAP and these entities resolving  
19 licenses for a period and was going to ask the witness  
20 to identify those documents and then I was going to  
21 offer those as evidence.

22 MR. SCHAEFFER: I would object. Each one

1 of the documents contains the following --

2 CHAIRPERSON GRIFFITH: The following what  
3 -- I'm sorry.

4 MR. SCHAEFFER: These are proposals from  
5 ASCAP and each one contains the following. If I may  
6 read it and then I'd like a ruling.

7 I'm reading now from the one that's dated  
8 9 -- I think I have the same one. Well, I'm reading  
9 from -- I don't know which is which. I'm reading from  
10 the joint proposal of the American Society of  
11 Composers, Authors and Publishers, the National  
12 Federation of Community Broadcasters and National  
13 Religious Broadcast Music License Committee at page  
14 six. It says:

15 "Once again, as in 1987 and  
16 1992, this proposal is being  
17 made on a non-prejudicial and  
18 non-precedential basis to  
19 resolve this matter without  
20 the necessity for any CARP  
21 hearings or other action.  
22 The annual compulsory license

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1 fees we are proposing are  
2 arbitrary and do not reflect  
3 any assessment by any party  
4 at the outset relative value  
5 of the right of performance  
6 of music in the ASCAP  
7 repertory by community radio  
8 stations."

9 These are community radio stations.

10 Then again in the other document, the  
11 joint proposal of the American Society of Composers  
12 and Authors and Publishers and the American Council of  
13 Education, once again, this is at page six, as of 1987  
14 and 1992 this proposal is being made on a non-  
15 prejudicial and non-precedential basis to resolve the  
16 matter without the necessity for any CARP hearings or  
17 other action. And it goes on to say the same thing  
18 the previous document did.

19 These were obviously without prejudice,  
20 done with respect to the community stations. And I  
21 think it inappropriate for them to be used in any  
22 fashion here to bind ASCAP. They were done expressly

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1 for the purposes stated.

2 And I think frankly I think it's shocking  
3 that this document was given to me. I expect there  
4 was some expectation I wouldn't read it before it was  
5 admitted in evidence because page six clearly  
6 indicates that it shouldn't be considered by this  
7 CARP. It's non-precedential. It also reconfirms  
8 this, but that's another issue.

9 MR. RICH: Our position, if I may, your  
10 Honors, is very simple. That all should go to weight.  
11 Section 118 explicitly invites this CARP to consider,  
12 not to give binding weight to or if you choose not to  
13 give any weight to, but explicitly invites you to  
14 consider 118(b)(2) "License agreements voluntarily  
15 negotiated at any time between one or more copyright  
16 owners and one or more public broadcasting entities."  
17 And that's explicitly in the provisions.

18 And the fact that there may be language of  
19 the type that Mr. Schaeffer cites, I suppose, can be  
20 taken for the weight that you may want to give it.  
21 But to exclude the only other extant agreements  
22 dealing with music performance licensing involving

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1 non-commercial educational broadcasting, just seems to  
2 us contrary to the entire purpose of the --

3 CHAIRPERSON GRIFFITH: Well, Mr. Rich,  
4 this is a proposal as opposed to the licensing  
5 agreement itself, is it not?

6 MR. SCHAEFFER: Well, let me, if I may be  
7 heard. First of all, I think these already been  
8 passed.

9 CHAIRPERSON GRIFFITH: They are signed?

10 MR. SCHAEFFER: Yes, they have been  
11 signed. But the benefit of our bargain in making this  
12 proposal was that it wasn't going to be precedential  
13 and it wasn't going to be any kind of evidence.

14 Now if it turns out that contrary to the  
15 understandings between parties that these kinds of  
16 things which are expressly held to be non-  
17 precedential, and to the benefit of the other party of  
18 the contract as well as ASCAP or the agreement, then  
19 it seems to me we will never be able to do this sort  
20 of thing and we can never reach these kinds of  
21 agreements.

22 When parties reach a bargain, the bargain

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1 is set. Just as -- I understand that PBS and NPR,  
2 much to my shock, think that even though they made an  
3 agreement they can disaffirm it. But this is  
4 perfectly clear what it says here, that it is non-  
5 prejudicial, non-precedential. Just as that was.

6 And it seems to me now to allow third  
7 party documents which are put in as non-precedential  
8 and non-prejudice as any kind of evidence means that  
9 in the future we will never be able to enter into such  
10 agreements, because we will always have to anticipate  
11 that a CARP will give it some weight. That's the  
12 whole purpose of putting in this language.

13 And I don't -- the public broadcasters are  
14 like anybody else, they make contracts like anybody  
15 else. When they sign an agreement, the other party is  
16 entitled to the benefit of his or her bargain.

17 But now it's even more shocking. Not only  
18 are they disaffirming their bargain, but they are  
19 disaffirming the bargain that's made between these  
20 other parties who specifically in a federal filing  
21 said it was non-precedential and non-prejudicial. I  
22 think it would be outrageous if it's admitted into

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1 evidence. And I object.

2 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

3 MR. KLEINBERG: I just would amplify  
4 because I assume that this is going to come up again  
5 with respect to BMI, I would point out that the  
6 document distinguishes between a voluntary agreement  
7 and this non-waiver proposal at Section 118(b)(2)  
8 deals specifically with voluntary agreements. If you  
9 look at this, it's very clear, it says as in 1987 and  
10 1992, ASCAP and ACE are making this joint proposal for  
11 the librarian rather than entering into a voluntary  
12 agreement.

13 And that has a significance, substantively  
14 even if one is going to look under the statute. So,  
15 for that additional reason, I would object to the nth  
16 degree of the receipt of these documents as somehow  
17 having something to do with 118(b)(2).

18 JUDGE GULIN: Mr. Lincoff, are you  
19 familiar with these documents?

20 THE WITNESS: I haven't seen them. Mr.  
21 Rich --

22 JUDGE GULIN: I'm sorry. The first

1 question Mr. Rich is, do you intend to put these into  
2 evidence now?

3 MR. RICH: I had intended to ask the  
4 witness whether he was familiar with them. He averted  
5 to them in a footnote to his written testimony.

6 CHAIRPERSON GRIFFITH: So you haven't  
7 moved them as being brought into evidence?

8 MR. RICH: I anticipated this colloquy  
9 with counsel first, your Honor. I was going to move  
10 them --

11 MR. SCHAEFFER: -- documents in the  
12 footnote, Mr. Rich, be straight.

13 CHAIRPERSON GRIFFITH: Well, that's --

14 MR. RICH: Let's avoid personal  
15 perjoratives.

16 CHAIRPERSON GRIFFITH: Hold on a minute.  
17 For the purposes of our record keeping, the Joint  
18 Proposal of the American Society of Composers, Authors  
19 and Publishers and the National Federation of  
20 Community Broadcasters and the National Religious  
21 Broadcast Music License Committee will be marked for  
22 identification at this time as PB Exhibit 7X.

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1 (Whereupon, the above-  
2 referenced document was marked  
3 as Exhibit PB 7X for  
4 identification.)

5 The document which is entitled Joint  
6 Proposal of the American Society of Composers, Authors  
7 and Publishers and the American Council of Education  
8 will be marked for identification at this time as PB  
9 Exhibit 8X.

10 (Whereupon, the above-  
11 referenced document was marked  
12 as PB Exhibit 8X for  
13 identification.)

14 Now, how much longer is this going to  
15 take?

16 MR. RICH: I'm done. This was going to be  
17 my very last question.

18 CHAIRPERSON GRIFFITH: Go ahead. What's  
19 your question then?

20 MR. RICH: My question of Mr. Lincoff was  
21 whether he was familiar with these documents as  
22 reflecting the joint proposals of ASCAP and these

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1       respective entities. That's the question.

2               THE WITNESS: These particular documents  
3 I have not seen before you just handed them to me. I  
4 did not work on these particular proceedings.

5               MR. RICH: Well, either at this point or  
6 an appropriate time, your Honors, I think there is no  
7 question but that these are documents which ought to  
8 be in the record of this hearing for the reasons I  
9 indicated. We would move into evidence -- we would  
10 offer them into evidence.

11              MR. SCHAEFFER: I have one or two short  
12 questions if you want to do it.

13              CHAIRPERSON GRIFFITH: Well, let me just  
14 ask so I understand what Mr. Rich just said. You said  
15 at an appropriate time, I presume that is not now.  
16 You are not offering them. They have been marked for  
17 identification, but you are not offering them --

18              MR. RICH: I'm not anticipating that ASCAP  
19 will offer a sponsoring witness for these documents  
20 and Mr. Lincoff says he doesn't know it. But I think  
21 they are again, they are documents crafted by ASCAP.  
22 They are what they are. They are genuine, authentic

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1 documents.

2 And I think again, Mr. Schaeffer's  
3 arguments to go the weight to be accorded those  
4 agreements. I think they ought to be part of the  
5 record.

6 JUDGE GULIN: These are official filings?  
7 There is no --

8 MR. RICH: They are official filings.

9 CHAIRPERSON GRIFFITH: All right --

10 MR. RICH: I dare say you could take  
11 judicial notice of these, probably.

12 CHAIRPERSON GRIFFITH: All right, let me  
13 come up with a very excellent solution to this. We  
14 will defer ruling on these exhibits until after the  
15 lunch break in an effort to try to get this witness  
16 off before we go to lunch. All right?

17 REDIRECT TESTIMONY

18 BY MR. SCHAEFFER:

19 Q During the period 1992-97, you were the  
20 draftsman, were you not, of the license between  
21 PBS/NPR and ASCAP. Is that correct?

22 A Yes, under Mr. Cormin's direction and

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1 supervision.

2 Q Did you have any discussions with anyone  
3 about the importance of the non-precedent, non-  
4 prejudicial language? And if so, who and what was  
5 said?

6 A I do not specifically recall separate  
7 discussions regarding that language in particular.  
8 But Mr. Cormin and Ms. Messinger, in their work on  
9 that fee structure, I believe, and this I conclude  
10 from working with them, agreed to a fee structure,  
11 this particular fee structure, only in light of the  
12 language relating to the non-precedential nature of  
13 it. It was part of the entire bargain.

14 And I believe that if we were not going to  
15 have protected ourselves with that kind of language,  
16 the negotiation would not have concluded at the level  
17 that they did.

18 Q No further questions.

19 CHAIRPERSON GRIFFITH: Well I have a  
20 question. How do you know that?

21 THE WITNESS: From being Mr. Cormin and  
22 Ms. Messenger's assistant and aide in these

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1 discussions. And working directly with them, even if  
2 not working directly with the people from public  
3 broadcasting.

4 CHAIRPERSON GRIFFITH: Thank you, Judge  
5 Dreyfus has one question.

6 JUDGE DREYFUS: Yes. If this technique or  
7 approach becomes pervasive in all the agreements  
8 entered into by ASCAP, then eventually there will be  
9 no precedent at all for Panels such as this to  
10 consider in the future, would there not?

11 THE WITNESS: Well there certainly would  
12 be the precedent of your opinion in this case.

13 JUDGE DREYFUS: That's not my question.  
14 My point is that if this type of clause goes into  
15 every ASCAP agreement, then that's taking your  
16 position that Panel could not consider any of these  
17 exhibits as precedent to an arms-length negotiated  
18 deal. Is that correct? I'm asking the witness.

19 THE WITNESS: The inclusion of that  
20 language is intended to preclude that subsequent use,  
21 yes.

22 JUDGE GULIN: I've got one question.

1 CHAIRPERSON GRIFFITH: Judge Gulin?

2 JUDGE GULIN: Yes, you were asked a number  
3 of questions exploring the differences or similarities  
4 between Section 118, compulsory license scheme and the  
5 rate court scheme. And one possible difference comes  
6 to my mind, maybe you can help me with it.

7 Under Section 118, compulsory license, the  
8 copyright owner cannot refuse to have his work used as  
9 long as the compulsory license is paid. Is that  
10 correct?

11 THE WITNESS: That's correct.

12 JUDGE GULIN: Now under the rate court  
13 scheme, one could by simply not joining a performing  
14 arts society. And therefore, never become part of a  
15 rate court proceeding and one would have control and  
16 one would be able to prevent one's work from being  
17 used by any entity. Is that true?

18 THE WITNESS: I believe Mr. Reimer  
19 discussed that in his testimony, and yes, I believe  
20 that is so.

21 MR. RICH: May I follow with one question  
22 on that line, Judge Gulin?

1 MR. SCHAEFFER: Well, I just want to  
2 respond to Judge Dreyfus because I know you are going  
3 to be making a decision. This protects both ends from  
4 the point of view of the licensee and the licensor.  
5 They have done this. So that the license --

6 CHAIRPERSON GRIFFITH: Mr. Schaeffer, is  
7 this a question to the witness?

8 MR. SCHAEFFER: No, I'm sorry. I thought  
9 this was -- I'm concerned about --

10 BY MR. RICH:

11 Q I have a couple of questions for the  
12 witness. To your knowledge, Mr. Lincoff, what percent  
13 of U.S. composers whose works are performed on  
14 broadcast television, commercial or noncommercial are  
15 members or affiliates of ASCAP and BMI?

16 A I don't know the precise percentage, but  
17 I believe it to be an overwhelming majority.

18 Q Ninety plus percent?

19 A I think my colleagues from SESAC would  
20 probably dissent from that particular number, but it's  
21 very high.

22 Q Thank you. Is Mr. Korman living to your

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1 knowledge?

2 A I certainly hope so.

3 Q And Ms. Messenger?

4 A I believe so.

5 Q And Mr. Koenigsberg?

6 A Yes.

7 Q What is Mr. Koenigsberg's current capacity  
8 in relation to ASCAP?

9 A Mr. Koenigsberg is a partner at the firm  
10 of White & Case and he is counsel, or special counsel  
11 to ASCAP's Board of Directors.

12 Q I have no further questions.

13 MR. SCHAEFFER: If I could just point --  
14 I guess this is really argument because it's a  
15 question of Mr. Dreyfus raised.

16 CHAIRPERSON GRIFFITH: Well I think we  
17 better save argument for the appropriate time. All  
18 right?

19 MR. SCHAEFFER: Well, because in case  
20 there is a ruling I do think there is an answer to  
21 your question.

22 CHAIRPERSON GRIFFITH: When we come back

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1 at 2:00 sir, and we rule you may have an opportunity  
2 to respond to the ruling if it's adverse to your  
3 interest. Not at 2:00, 2:15 please.

4 MR. SCHAEFFER: Thank you.

5 CHAIRPERSON GRIFFITH: Thank you.

6 (Whereupon, the foregoing matter went off  
7 the record at 1:16 p.m.)

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

2 (2:17 p.m.)

3 CHAIRPERSON GRIFFITH: Ladies and  
4 gentlemen, if it seems like we're spending an unduly  
5 amount of time today trying to get things together and  
6 all of this organized, it's better to do it now than  
7 halfway down the road.

8 One housekeeping matter literally. The  
9 Library has asked that we pick up all of our papers,  
10 cups, and things like that before we leave each  
11 evening. So if you will be kind enough to do that,  
12 they will appreciate that.

13 MR. SCHAEFFER: We'll take care of this  
14 side.

15 CHAIRPERSON GRIFFITH: All right. Mr.  
16 Schaeffer, you're in charge of that side.

17 MR. SCHAEFFER: That's one thing I'm  
18 eminently qualified for.

19 CHAIRPERSON GRIFFITH: All right. The  
20 second thing is tell me in minutes how long you have  
21 spent discussing the Boyle issue with each other in an  
22 attempt to resolve it.

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1                   MR. RICH: Not many since Friday's ruling,  
2 in part because of the timing in which it was  
3 received, no criticism intended.

4                   CHAIRPERSON GRIFFITH: Please let's  
5 continue to do so.

6                   MR. RICH: We will. And we have chatted  
7 a bit. If you'd like, I can give you a brief update  
8 if you think it useful now or we can --

9                   MR. SCHAEFFER: Well, it seems to me we  
10 should keep in trying.

11                   CHAIRPERSON GRIFFITH: I think keep on  
12 trying. And let us know when you've made some real  
13 progress. And if you want us to intervene, to mediate  
14 with the possibility of resolving, I think we might  
15 be, one or more of us, amenable to do that.

16                   MR. RICH: Appreciate it.

17                   MR. SCHAEFFER: Well, maybe we could  
18 schedule a telephone conference in the next couple of  
19 days.

20                   CHAIRPERSON GRIFFITH: All right. But  
21 keep that in mind.

22                   MR. RICH: Thank you.

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1 CHAIRPERSON GRIFFITH: Judge Gulin has one  
2 thing he wants to bring up.

3 JUDGE GULIN: Yes. Thank you.

4 There's the matter of the effective date  
5 of the decision that we render. The statute provides  
6 for, I think it is, January 1, '97. I'm told by Bill  
7 Roberts that -- oh, it's '98. According to the  
8 statute it's '98, January?

9 MR. SCHAEFFER: I think it's January 1st,  
10 '98, yes.

11 JUDGE GULIN: I'm sorry. '98. Right.

12 Bill Roberts tells me that you've worked  
13 out an agreement among yourselves as to when the date  
14 would be because in order for us to render a decision  
15 making the date effective January 1, that would be  
16 tantamount to retroactive rulemaking, which is  
17 prohibited by the ABA.

18 So unless you want us to establish a date  
19 that's not retroactive, we're going to need a  
20 stipulation. So if you're going to --

21 MR. SCHAEFFER: I think that's something  
22 that we should -- the mechanics of it, it seems to me,

1 are just a question of bunching the numbers. In other  
2 words, what we could do is we could have a catchup on  
3 the first period, on the first installment. I think  
4 that's been done before.

5 JUDGE GULIN: That's fine if you want to  
6 do that.

7 MR. SCHAEFFER: Yes.

8 JUDGE GULIN: What I'm saying is --

9 MR. SCHAEFFER: I mean, I would be  
10 willing. And that would take the pressure off  
11 everybody, it seems to me. What we'll simply do is  
12 we'll agree on some mechanism, which we'll reduce to  
13 writing.

14 JUDGE GULIN: All right. Discuss that and  
15 let us know at the next session what you intend to do,  
16 but we will need a signed stipulation.

17 CHAIRPERSON GRIFFITH: We have one more  
18 thing.

19 Judge Dreyfus?

20 JUDGE DREYFUS: Yes. Thank you.

21 If you recall, we had originally scheduled  
22 the 3rd of April as a hearing date. And that was

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1 later withdrawn. Is there an interest in rescheduling  
2 that date?

3 MR. SCHAEFFER: I think we ought to hold  
4 it if we can. You see, what I'm concerned about is if  
5 we go ahead with the hearing that would affect the  
6 motion in limine, we may be bunched up. And we may  
7 have to reschedule. So I think we should hold it if  
8 we could.

9 JUDGE DREYFUS: Hold?

10 MR. SCHAEFFER: The date.

11 JUDGE DREYFUS: Hold it for?

12 MR. RICH: There's a problem, I take it,  
13 with that date?

14 JUDGE DREYFUS: Yes.

15 MR. SCHAEFFER: Oh, you want to drop it?

16 JUDGE DREYFUS: It's already dropped.  
17 It's been dropped. What we're talking about is  
18 rescheduling it on a new date.

19 JUDGE GULIN: I don't think it's going to

20 --

21 JUDGE DREYFUS: No, we didn't do it by  
22 order. No, because I looked.

1 MR. SCHAEFFER: Verbally, yes.

2 JUDGE GULIN: Yes. But if it's possible  
3 to reschedule it, that would be good. Otherwise, we  
4 could perhaps proceed with two arbitrators --

5 JUDGE DREYFUS: That's possible.

6 JUDGE GULIN: -- if that's agreeable. But  
7 let's try --

8 JUDGE DREYFUS: That would be the last day  
9 of someone's case, I take it?

10 MR. KLEINBERG: It's the last day of all  
11 of the cases on the direct, and then we have rebuttal  
12 scheduled. I think we're all hopeful that maybe we  
13 won't need it for a substitute. But if we do, it  
14 seems to me, we'll have to come up with a substitute  
15 that coincides with everybody's schedule.

16 JUDGE DREYFUS: Yes. You don't want to  
17 try to schedule it now?

18 MR. SCHAEFFER: I would think why don't we  
19 see if we can live without it?

20 MR. KLEINBERG: That would be my --

21 MR. SCHAEFFER: I mean, I'm available the  
22 whole month of April. I don't think I have a court

1 engagement that weekend.

2 JUDGE DREYFUS: All right. We can do  
3 that, live without that. However, there are two other  
4 dates. Two of the rebuttal dates are not good either.  
5 That's the 27th and the 30th.

6 The 28th and 29th are good of April, yes.  
7 If we can push that into the week of the 4th of May,  
8 push those, push the 27th and 30th, into the week of  
9 May 4th somewhere back to back, that would work.

10 Perhaps Thursday we'll fix a date. If you  
11 could check your calendars?

12 MR. SCHAEFFER: How about Friday, Friday,  
13 the 1st?

14 JUDGE DREYFUS: The 1st? No, no. You  
15 know, my preference is like the 6th and 7th, May 6th  
16 and 7th. And, by the way, those rebuttal dates, if  
17 you recall, were tentative. You didn't know if you  
18 needed them or not.

19 MR. KLEINBERG: Correct.

20 MR. SCHAEFFER: All of those dates are  
21 okay with me.

22 JUDGE GULIN: My only concern about the

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1 6th and 7th is we're pushing the time up towards when  
2 facts and conclusions of law are to.

3 CHAIRPERSON GRIFFITH: Well, on Thursday,  
4 why don't you check the calendars and come back to us  
5 with a suggestion for those two dates, please, if  
6 that's agreeable?

7 MR. SCHAEFFER: That's fine by me.

8 CHAIRPERSON GRIFFITH: Now, the last thing  
9 I think is the motion, which we deferred ruling on.  
10 We'd like to hear some additional argument on that.

11 MR. SCHAEFFER: I wondered since there's  
12 no sponsoring witness for it anyway and the issue is  
13 of some importance to both sides if we shouldn't have  
14 an opportunity maybe even to reflect on it and have an  
15 oral argument or, if you prefer, actually have briefs  
16 because it's an issue of some importance. Obviously  
17 it's up to you, but I'm --

18 JUDGE DREYFUS: The question came up at  
19 lunch: the nature of those documents. Are those  
20 documents, Exhibit Numbers --

21 MR. SCHAEFFER: 7X and 8X.

22 JUDGE DREYFUS: 7X and 8X? Are each of

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1 those actually agreements?

2 MR. SCHAEFFER: They are joint proposals  
3 that were ultimately accepted by the Librarian of  
4 Congress and published as such. So they constitute,  
5 in effect -- I don't know if they legally come to the  
6 -- I don't think they can be agreements. What they  
7 are are proposals that everybody signed off on.

8 I think that, literally speaking, as Mr.  
9 Kleinberg very eloquently stated before, they don't  
10 fit the statute. And the Congress must have had  
11 something in mind when it distinguished between  
12 agreements and voluntary agreements, intending the  
13 parties to be able to opt out of that proposal.

14 And I'm sensitive to what you've  
15 suggested, that it is conceivable that all the PROs  
16 and all of these people could conceivably follow with  
17 agreements that could be the basis for a CARP  
18 proceeding, but --

19 JUDGE DREYFUS: No. On the basis of CARP  
20 duration.

21 MR. SCHAEFFER: Yes. But that's what  
22 Congress must have intended because they said only

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1 voluntary agreements can be considered. It can't be  
2 all agreements considered or they would have said all  
3 agreements considered.

4 JUDGE DREYFUS: Right. That's the  
5 argument. I'm still trying to focus on the nature of  
6 this.

7 MR. SCHAEFFER: They're both proposals.

8 JUDGE DREYFUS: Is it the agreement that  
9 the parties went forward and paid the license fees  
10 under and so forth or is there some kind of an  
11 agreement somewhere else?

12 MR. SCHAEFFER: There is no agreement.  
13 What it is is there are -- and I don't mind anybody  
14 looking at it just to see what I'm talking about.  
15 Both of them are proposals for fees that we're then  
16 accepting.

17 And then the Librarian of Congress reviews  
18 them. Other people have an opportunity, including  
19 PBS, NPR, anybody else, BMI presumably in the ASCAP  
20 case, or SESAC, to object or anybody in the world.  
21 Nobody objected to it. And so they were promulgated.

22 But they are not literally agreements.

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1 They're joint proposals. Implicitly there's a  
2 consent, and there's an agreement.

3 JUDGE DREYFUS: Well, the question is: I  
4 mean, if it takes an agreement for one corporation to  
5 pay money to another, is this the agreement that is  
6 the --

7 MR. SCHAEFFER: No, no. They pay  
8 according to a ruling by the Librarian of Congress.  
9 And this is the basis for the ruling. It is not an  
10 agreement. They don't pay pursuant to this. They pay  
11 it pursuant to the published Federal Register ruling.

12 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

13 MR. KLEINBERG: Just to amplify, Section  
14 37 CFR or I guess Sections 253.5 and 253.6 reflect the  
15 Librarian of Congress decision with respect to the  
16 rates for these particular users. They happen to have  
17 emanated from these joint proposals. But they  
18 definitely are not voluntary agreements within  
19 118(b)(2).

20 If you look at the CFR sections where they  
21 appear, Sections 253.5 and 253.6 have as Subsection  
22 (b)'s voluntary license agreements. And they indicate

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1 that they are different.

2 In fact, they say if there are voluntary  
3 license agreements that are entered into between  
4 parties, they supersede what appears in these  
5 Librarian rules.

6 They do not represent an agreement between  
7 the parties as to this as to what the fees are. They  
8 are proposals which were then accepted and, after  
9 comment or lack thereof, were adopted by the Librarian  
10 of Congress. And, of course, the proposals,  
11 themselves have the provisions that they are entry and  
12 don't reflect whatever they are.

13 Not, not to be terribly literal here, but,  
14 in fact, I think it's important. They do not qualify  
15 under 118(b) (2) because the only way under 118(b) (3)  
16 that you get to look at voluntary agreements if they  
17 are voluntary agreements under 118(b) (2). And these  
18 aren't those.

19 JUDGE GULIN: Just one moment, sir.  
20 There's no sponsoring witness at this point. So  
21 you're offering them into evidence under the doctrine  
22 of official notice. Is that correct?

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1 MR. RICH: I'm offering them under the  
2 Section 251.48(c), documents filed with a Copyright  
3 Arbitration Royalty Panel or a Copyright Office, which  
4 says, as I read it, if the matter offered in evidence  
5 is contained in documents already on file with a  
6 Copyright Arbitration Royalty Panel or the Copyright  
7 Office, which Mr. Kleinberg and Mr. Schaeffer appear  
8 to say is the case, the documents themselves need not  
9 be produced but may, instead, be referred to according  
10 to how they've been filed. And that's under this  
11 section called "Rules of Evidence." So I think it's  
12 in evidence.

13 JUDGE GULIN: What section is that in?

14 MR. RICH: 251.48(c). They can't have it  
15 both ways.

16 MR. SCHAEFFER: Well, it's not in evidence  
17 unless the Panel says it's in evidence.

18 JUDGE GULIN: That's right.

19 MR. SCHAEFFER: You've got to take notice  
20 or choose not to.

21 JUDGE GULIN: Now, what's your legal  
22 theory, Mr. Schaeffer? Why shouldn't they be put out?

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1 MR. SCHAEFFER: My legal theory is that  
2 the parties to this agreed that this would not be  
3 precedential. And it, in effect, would have no  
4 binding effect no either of them.

5 As such, the parties to -- and this was  
6 then no objection was made by anybody during the  
7 period of comment as provided for in the regulation  
8 and statute.

9 These rates were then promulgated on that  
10 basis, but the rates were promulgated on the basis of  
11 both the licensee and the licensor that it wouldn't be  
12 precedential for either of them.

13 Under those circumstances, it's no  
14 different than when you have a settlement agreement in  
15 federal court or state court and somebody comes along  
16 and says, "Oh, here's a settlement agreement" and the  
17 court says, "No. I don't accept settlement agreements  
18 because it's against public policy because what it  
19 does is it discourages people from making these  
20 settlements" and the --

21 JUDGE GULIN: Isn't there a doctrine,  
22 however, which prohibits the admission into evidence

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1 of settlement negotiations and settlement documents  
2 that you can specifically rely upon?

3 CHAIRPERSON GRIFFITH: Well, under the  
4 standard rules of evidence, negotiations with respect  
5 to --

6 MR. SCHAEFFER: Why is this any different?  
7 I mean, the question is one of policy for the  
8 arbitrators, the fact that you can make any rules you  
9 want to.

10 But what I'm pointing out to you and I  
11 think is clear, once you've made the ruling that in a  
12 CARP this kind of material can be used, then there  
13 will never be any of these kinds of settlements at all  
14 because everybody will say, "Well, I'm going to run  
15 the risk that it's going to be used in a collateral  
16 proceeding and adversely affect the rates that I want  
17 and something that's more important. And that's the  
18 origin of the rule as to settlements.

19 I have no doubt if we were in a court this  
20 would be excluded. I have no doubt about that at all,  
21 any civil court, at least with which I'm familiar,  
22 because it says it's without prejudice and it say

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1 specifically it isn't intended to be an omission by  
2 anybody. And it's just like a consent decree where  
3 you say, "I don't make admissions" and all the unusual  
4 folderol that goes with a consent decree. That's why  
5 you do this.

6 But if you are now going to allow this  
7 kind of material to go in, it means that nobody ever  
8 again will make these agreements without recognizing  
9 it's at their peril.

10 JUDGE GULIN: Consent decrees are not  
11 admissible?

12 MR. SCHAEFFER: No, they are not. They  
13 are not admissible as admission. That's exactly  
14 right. They're not. You can say that "I have a  
15 consent decree." That's another issue. But as to the  
16 substance of the consent decree as an admission or  
17 declaration, no, they're not.

18 That's why I said maybe we ought to brief  
19 this. This has very, very long-range effects.

20 JUDGE DREYFUS: Excuse me. No one on the  
21 Panel suggested that if we allow it in, we would take  
22 it as an admission against interests. Nobody has said

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1 that.

2 MR. SCHAEFFER: Well, it's not just a  
3 question of admission against interests. If you are  
4 going to use it as probative evidence of what the  
5 rates should be, it defeats the whole purpose of these  
6 arrangements that are made between -- frankly, these  
7 are teeny users. They're community radio stations,  
8 television stations. And when the time comes, we'll  
9 show they have nothing to do with the price of tea in  
10 China.

11 But what happens from now on is, rather  
12 than take the risk that the information will be used  
13 in a CARP, nobody, neither ASCAP, BMI, nor SESAC, will  
14 ever enter into these agreements because the stakes  
15 against PBS and NPR are big. The stakes against these  
16 poor folks are very, very small. So what you're now  
17 saying is: All right. Then come into the proceeding.

18 And so you're expanding the CARP. And  
19 that's not good policy. And as arbitrators, you have  
20 complete control over evidence and policy and facts.  
21 That's why it is an arbitration.

22 What I'm suggesting to you is it's going

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1 to create a tremendous problem in the future. There  
2 are not that many CARPs. But what will now happen,  
3 this will now be regraded as a rule of evidence.  
4 Everybody is going to cite it and all the rest of it.  
5 And it's going to come back and bite us all. That's  
6 my point.

7 CHAIRPERSON GRIFFITH: How about Mr. Rich?

8 MR. RICH: I'm puzzled. I mean, Mr.  
9 Schaeffer has offered the very documents in evidence  
10 with the same language he claims prohibits offering  
11 them in evidence here, namely ASCAP's own license  
12 agreements with public broadcasters.

13 Now, he would put them in for, quote, "his  
14 purposes." I don't think you can say, "They're in  
15 evidence but only for the purpose I want them in. And  
16 if Mr. Rich offers documents which happen to have  
17 similar language, you shouldn't even let them in the  
18 front door for such evaluation as you might give  
19 them."

20 JUDGE GULIN: What's the purpose for which  
21 you want them in?

22 MR. RICH: For the fact that I don't agree

1 as to the Section 118 interpretation. I believe it is  
2 something that the Panel is able to consider and give  
3 such weight as you will to the clauses in those  
4 agreements, which we may want to argue is nothing but  
5 common boilerplate that was put in by ASCAP or by both  
6 parties or by whomever without any meaningful economic  
7 meaning to it; that, secondly, I believe these are the  
8 only other documents which have been agreed to between  
9 noncommercial educational broadcasters and ASCAP  
10 contemporaneously with these proceedings.

11 And I think that, again, they deserve to  
12 be admitted into evidence and given whatever weight  
13 reflecting the language and whatever supporting  
14 testimony there might be about the meaning of that  
15 language as one or more parties chooses to give it.

16 But I didn't see Mr. Schaeffer saying,  
17 "Don't let the ASCAP agreements into evidence." He's  
18 moved them in as part of his direct case. They have  
19 the same language.

20 MR. SCHAEFFER: On the contrary. The 1982  
21 agreement was put in by your side. We didn't put it  
22 in. The last agreement obviously had to be put in,

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1 and we put it in with the disclaimers that we have  
2 made that it's not precedential. But that's as  
3 between us, and that's perfectly understandable.

4 We're talking about third party  
5 agreements, where the third parties had no intention  
6 of this being done. And we bargained with them for it  
7 not to be done.

8 And, as I say, what will happen is in  
9 future CARPs, that means these kinds of agreements  
10 will never be reached again because there's no  
11 percentage in it for the performing rights  
12 organization. They might just as well bring everybody  
13 into the proceeding, rather than run the risk. It's  
14 bad policy.

15 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

16 MR. KLEINBERG: I'm concerned more about  
17 this proceeding, quite frankly, and what this  
18 envisioned. And this gets to something that the Panel  
19 has raised, which is rebuttal.

20 These are not part of anyone's direct  
21 testimony; that is, how the fees were arrived at or  
22 proposals were arrived at and what they constitute or

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1 anything else.

2 If now we are admitting into evidence  
3 these fee rulings from the Librarian, then it seems to  
4 me the next step is to have a whole proceeding about  
5 what those were, how they came about because I don't  
6 hear the other side saying they want them in because  
7 of the language having to do with the non-prejudice  
8 language, but, rather, substantively they want to  
9 compare those fees in some fashion to the fees that  
10 are being sought or ought to be awarded in this part.  
11 And I tell you that is not the subject matter of  
12 anyone's direct testimony.

13 If they're in evidence, meaning people can  
14 refer to them and argue from them as having some  
15 relevance, we will definitely have rebuttal testimony  
16 that has to explain how and why these proposals were  
17 made and how they got to the point where they became  
18 rules.

19 So I don't disagree with Mr. Schaeffer as  
20 to the public policy aspects for the future, but I  
21 want the Panel to understand what we're dealing with  
22 with respect to the present.

1 CHAIRPERSON GRIFFITH: All right. Thank  
2 you. We'll have a little conference now.

3 (Whereupon, the Panel conferred off the  
4 record.)

5 CHAIRPERSON GRIFFITH: I probably  
6 shouldn't do this on the record, but I will. We have  
7 a vote to admit it, a vote to exclude it, and a vote  
8 to have it briefed.

9 (Laughter.)

10 CHAIRPERSON GRIFFITH: Out of concern for  
11 the fact that we are in a sense setting some type of  
12 policy with respect to this issue, we need time. Now,  
13 if you think it would be helpful to brief it, we are  
14 perfectly amenable to receive that type of information  
15 from you.

16 On the other hand, if you think that that  
17 would be an exercise in futility, we'll go ahead and  
18 make the decision. But we just need some additional  
19 time to do so.

20 MR. SCHAEFFER: We would like an  
21 opportunity to write a short letter or memorandum to  
22 set forth the details, especially since, frankly, Ms.

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1 Willett is not with us today and she is really an  
2 expert, more expert than I.

3 CHAIRPERSON GRIFFITH: All right.

4 MR. RICH: In that case, I suspect we will  
5 also put something on.

6 CHAIRPERSON GRIFFITH: How long do you  
7 need?

8 MR. RICH: A week?

9 MR. SCHAEFFER: A week.

10 CHAIRPERSON GRIFFITH: Okay. Then counsel  
11 will submit to the Panel a brief brief --

12 MR. SCHAEFFER: Probably by letter, Judge.

13 CHAIRPERSON GRIFFITH: -- or letter  
14 concerning this particular issue within one week from  
15 today, at which time the Panel will be in a position  
16 to rule on the matter.

17 JUDGE GULIN: Close of business the 16th?

18 CHAIRPERSON GRIFFITH: Close of business  
19 March 16th.

20 MR. SCHAEFFER: We won't ask how it split.

21 CHAIRPERSON GRIFFITH: Now, any other  
22 matters before we get to the next witness?

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1 (No response.)

2 CHAIRPERSON GRIFFITH: All right. Sir, if  
3 you'll raise your right hand, please?

4 Whereupon,

5 JON BAUMGARTEN

6 was called as a witness by counsel for ASCAP and,  
7 having been first duly sworn, assumed the witness  
8 stand, was examined, and testified as follows:

9 CHAIRPERSON GRIFFITH: All right. Thank  
10 you.

11 MR. SCHAEFFER: I would propose to start  
12 on Mr. Baumgarten with voir dire.

13 CHAIRPERSON GRIFFITH: All right.

14 VOIR DIRE

15 BY MR. SCHAEFFER:

16 Q Mr. Baumgarten, would you state what law  
17 school you graduated and the year?

18 A New York University School of Law in 1967.

19 Q And what jurisdiction were you admitted to  
20 practice in?

21 A State of New York, District of Columbia,  
22 Second Circuit, Fourth Circuit, United States Supreme

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1 Court.

2 Q Would you tell very briefly your  
3 professional history in terms of what law firms you  
4 have been an associate and partner with and the years?

5 A The first two years out of law school, I  
6 was as a young associate with a New York firm, whose  
7 name escapes me.

8 Q Linden and Deutsch?

9 A No, no. That came later. After those two  
10 years -- Parker, Chapin, Flattau, and Kimball. After  
11 those two years, I then became associated with the law  
12 firm of Linden and Deutsch. And that is really when  
13 I began to devote the preponderant portion of my time  
14 to copyright matters.

15 Among the clients of that firm was the  
16 American Guild of Authors and Composers, now known as  
17 the Songwriters' Guild. And, among other matters, in  
18 representation of AGAC and certain other clients of  
19 the firm, I did have considerable involvement in  
20 discussions, negotiations, and legislative activities  
21 with respect to what ultimately became Section 118 of  
22 the Copyright Act.

1           In 1976, I left Linden and Deutsch and was  
2 appointed General Counsel of the United States  
3 Copyright Office, where I stayed until mid to late  
4 1979.

5           During that period, I was the principal  
6 legal officer of the Copyright Office. Together with  
7 the Register of Copyrights and legislative staff of  
8 principally the House Committee, I was thoroughly  
9 involved with the final steps and revision of the  
10 Copyright Act.

11          After the revision, I had principal  
12 responsibility for the promulgation of new forms, new  
13 regulations, and everything else that had to be done  
14 to bring the Copyright Office and the administrative  
15 part of the Copyright Office into conformity with the  
16 100 percent overhaul of all of the law represented by  
17 the '76 Act. I also represented the office in courts  
18 and in international tribunals.

19          After leaving the Copyright Office, I  
20 opened the Washington office for a New York law firm,  
21 whose name escapes me.

22           Q       Paskus.

1           A       Paskus, Gordon and Mandell. Thanks, Mr.  
2       Schaeffer.

3                   And then when that firm decided that they  
4       no longer wanted to maintain the Washington office, I  
5       joined the Proskauer, Rose firm, which is where I am  
6       today.

7           Q       What is your principal practice today?

8           A       It is virtually entirely copyright law and  
9       related issues; in other words, technology law  
10      involving copyright questions, licensing, domestic and  
11      international matters. I don't do as much trademark  
12      as I did before I came to Washington. It's all  
13      heavily focused on, related to, or revolving around  
14      copyright law.

15          Q       Do you give lectures? Did you write  
16      articles?

17          A       Yes, I did.

18          Q       Why don't you give us some idea of the  
19      articles you've written?

20          A       Many of them in recent years have been in  
21      course handbooks for PLI and mock seminars, but in the  
22      past I wrote a book on U.S.-Soviet copyright

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1 relations. I wrote an article on copyright law in the  
2 People's Republic of China. I've written papers on a  
3 variety of international topics.

4 And, as I said, there have been quite a  
5 number of proceedings published as part of the PLI in  
6 law and business and other course handbooks.

7 Q Without getting into any opinion, what was  
8 your role, if any, in the drafting and development of  
9 Section 118 of 17 USC?

10 A As I mentioned yesterday, my role was  
11 twofold. While I was practicing in New York  
12 representing AGAC and two large American book  
13 publishers who were not members of the principal trade  
14 association of book publishers at that time, my role  
15 was essentially that of being involved in discussions  
16 with representatives of the public broadcasting  
17 industry, discussions within the copyright owner  
18 community.

19 During that period, the focus -- this was  
20 until '75. The focus really was on trying to maintain  
21 the elimination of the for-profit exemption from the  
22 Copyright Act and forestalling the imposition of a

1 compulsory license.

2           When I came to Washington in the beginning  
3 of '76, the Senate had approved a compulsory license,  
4 a variation of the so-called Mathias amendment. At  
5 that time obviously representing the public interest  
6 and not McMillan or Harcourt or AGAC, I was heavily  
7 involved in the change from the Senate version of what  
8 had been the Mathias amendment to the House version,  
9 which was subsequently adopted by the Conference  
10 Committee and became law.

11           Q       What, if anything, were you asked to do  
12 for ASCAP in this proceeding other than providing  
13 expert testimony as set forth in your direct written  
14 testimony?

15           A       Other than providing expert testimony?  
16 Nothing.

17           Q       In other words, you did nothing else for  
18 ASCAP. Did you do anything for White and Case other  
19 than provide the direct testimony?

20           A       No.

21           Q       Did you provide any information to ASCAP  
22 or White and Case other than what is set forth in your

1 direct testimony?

2 A I did not.

3 Q When for the first time did you become  
4 aware that your law firm represented NPR at the same  
5 time you were performing this task for ASCAP and White  
6 and Case?

7 A On one of my regular trips to Los Angeles,  
8 I received a -- I checked my telephone messages. I  
9 don't recall whether it was a result of a check or  
10 whether my secretary alerted me, but I checked in to  
11 my voice mail.

12 Denise Leary had left a message. This was  
13 on the evening of November 10th. Denise Leary had  
14 left a message that she wanted to speak to me about my  
15 declaration in this matter.

16 She wanted to know if I was aware that we  
17 did pension-planning work in the New York office for  
18 NPR. She indicated that they had gone back and forth  
19 on whether to raise this issue but had decided that  
20 they did want to speak to me about it and asked me to  
21 call her.

22 Q Did you call her?

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1           A       Well, first I called New York to confirm  
2           that we did work for NPR.

3           Q       And what did you find out?

4           A       I found out that we did indeed do that  
5           work. I contacted Michael Sirkin, the partner who  
6           does the work, to let him know what had happened. I  
7           contacted Stephen Krane, the partner who was in charge  
8           of conflict matters at the firm, to let him know what  
9           had happened.

10                   And the next evening, given the time  
11           difference and my commitments in Los Angeles, the next  
12           evening, November 11th, I called Denise Leary.

13           Q       Now, before you get to your conversation  
14           with Ms. Leary, did Mr. Sirkin indicate what kind of  
15           information the firm had access to with respect to the  
16           pension?

17           A       No, no.

18           Q       Now you spoke to Ms. Leary?

19           A       I said I was surprised but had confirmed  
20           that it was true. I adopted the phrase she used in  
21           voice mail and said that it did appear to have gone  
22           through the cracks. I said I regretted that.

1 I said that I had considered the work I  
2 did with Denise for America One and had concluded  
3 that, in light of the apparent conclusion of the  
4 matter, the different client, and the total lack of  
5 any relation to anything I was being asked to do, that  
6 I had concluded that that was a problem and had, in  
7 fact, confirmed that with Stephen Krane before  
8 anything arose but that the NPR matter was a surprise  
9 to me and I must have let it fall through the cracks.

10 Ms. Leary said that they would like me to  
11 withdraw, but she also indicated that with respect to  
12 America One, she had reached the same conclusion, that  
13 it was not an issue.

14 She did say that -- I believe she said,  
15 thinking back on that conversation, I believe Denise  
16 indicated that she would have preferred that I had  
17 called her first, but she had concluded that the  
18 America One issue, for the reasons I indicated, was  
19 not a problem but that they did consider the NPR  
20 issue, which was a concurrent representation of the  
21 same client, to be a matter of ethics. At that point,  
22 I said that I would undertake a talk to my New York

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1 office and get back to her.

2 I then convened a teleconference among  
3 myself -- I believe Michael Sirkin was on the call;  
4 Stephen Krane, our ethics expert; and Robert Kafin,  
5 our managing partner, discussed the issue.

6 At that point, Stephen took the position  
7 that since I was engaged as an expert, that withdrawal  
8 was not necessary and that it would be inappropriate  
9 to withdraw from an affidavit that had already been  
10 submitted and relied on by one of the parties.

11 The next day, which was the 12th, I called  
12 Denise Leary. I communicated that to her. And I  
13 mentioned that Stephen had said there was a published  
14 ethics opinion which supported the view that this was  
15 not a conflict and suggested that she talk to him and  
16 that I'm sure he would be pleased to give her the  
17 copy, provide her the copy of the opinion.

18 I understand that Denise and Stephen then  
19 did talk, a copy of the opinion was provided. But I  
20 had no more discussions with Denise about the matter.

21 Q Is there any relationship between the  
22 information about which you testified or the material

1 which you put in the direct case and your prior  
2 representation of America One?

3 A Absolutely none.

4 Q As far as you know, is there any  
5 relationship between the information you have  
6 disclosed and the testimony you have given in your  
7 written statement and the pension work that's being  
8 done for NPR by your law firm?

9 A I have no idea what pension work is being  
10 done, but I have no reason to believe that any pension  
11 work would have any relationship whatsoever with the  
12 subject matter in my testimony.

13 MR. SCHAEFFER: I think that concludes my  
14 voir dire.

15 CHAIRPERSON GRIFFITH: All right. Mr.  
16 Rich?

17 VOIR DIRE

18 BY MR. RICH:

19 Q Just to go over some ground, Mr.  
20 Baumgarten, you're a member presently of the firm of  
21 Proskauer, Rose, LLP; correct?

22 A Yes, I am.

1 Q And I take it you testified you're  
2 admitted to practice in New York and D.C. Is that  
3 correct?

4 A Yes, I am.

5 Q And I take it that your firm, Proskauer,  
6 it's now been established has been providing legal  
7 representation to NPR in various matters for more than  
8 two years. Is that correct?

9 A I wouldn't use the word "various matters."  
10 I know they've been providing what was described to me  
11 as pension-planning advice over the past two years.

12 Q What is the extent of your understanding  
13 of the breadth or nature of those matters?

14 A I have none other than what I understand  
15 to be planning for the financial breeding and care of  
16 employees and others.

17 Q So that the record is clear, NPR is a  
18 present client of the law firm of which you're a  
19 member. Is that correct?

20 A That is correct.

21 Q And you have also personally performed  
22 work for NPR in the recent past. Is that correct?

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1 A That is incorrect.

2 Q You take your work on behalf of America  
3 One as not entailing work for NPR?

4 A That is correct.

5 Q What is your understanding of the  
6 composite interested parties in the America One  
7 venture?

8 A I understand that America One is an  
9 endeavor comprised -- I don't know its technical  
10 capacity -- comprised of NPR, Public Radio  
11 International, and perhaps CPB.

12 Q Who was your client --

13 A Corporation for Public Broadcasting. I'm  
14 sorry.

15 Q And who is your principal client  
16 relationship when you engage in counseling matters on  
17 behalf of America One?

18 A Denise Leary.

19 Q That's this lady right here. Is that  
20 correct?

21 A Yes.

22 Q And do you know what Denise Leary's

1 position was at the time that you engaged in  
2 counseling with her on behalf of America One?

3 A I was aware she was also counsel to NPR,  
4 which is why I disclosed it as an exception in my  
5 affidavit.

6 Q Now, when you performed work, I take it  
7 this is your recollection that this work occurred  
8 substantially, if not entirely, during 1976; that is,  
9 the work on behalf of America One by your office?

10 A You mean '96.

11 Q Nineteen ninety-six. Is that correct?

12 A That is correct.

13 Q And, in fact, that work entailed provided  
14 music license advice in relation to the America One  
15 venture, did it not?

16 A That work entailed providing advice to Ms.  
17 Leary on the exploitation of their properties outside  
18 of the United States, including licensing outside of  
19 the United States.

20 Q Including? I'm sorry?

21 A Licensing for exploitation outside of the  
22 United States and Canada.

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1 Q And that advice included significantly,  
2 did it not, music licensing advice in relation to  
3 exploitation of rights outside the United States;  
4 correct?

5 A It did. That's correct.

6 Q And that included matters relating to  
7 music performing rights licensing advice, did it not?

8 A Outside of the United States. That is  
9 correct.

10 Q And that advice occurred over a  
11 more-than-eight-month period. Is that correct?

12 A I think that's incorrect. I believe the  
13 time sheets would show my first contact with Denise to  
14 be in April and the last to be -- the firm contact and  
15 the last to be in September, which sounds like eight  
16 months.

17 My contact with Denise during that period  
18 does not reflect the expenditure of eight months of  
19 time. I believe one associate may have had  
20 intervening contact with Denise.

21 So it was not a continuous -- just to  
22 clarify the question, it was not a continuous

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1 eight-month, in-and-out, regular consultation with Ms.  
2 Leary. From the time when Denise first came to the  
3 time when it appeared to have been concluded, that was  
4 until it was something like eight months.

5 Q And you have been retained by ASCAP in  
6 this proceeding to provide testimony which is adverse  
7 to NPR's interests. Is that correct?

8 A Yes, it is correct.

9 Q And I take it from your prior disclosures  
10 that you did not run a conflicts check prior to  
11 undertaking the ASCAP assignment; correct?

12 A No. That is an impression that's been  
13 created. That is not entirely correct. When I  
14 apparently said that Denise had -- the conflict check  
15 fell through the cracks, if that's what I said, at the  
16 time I probably believed that.

17 What indeed we found out did happen was  
18 that I had put in the business intake side of the  
19 system. I had filled out a document indicating a  
20 potential retention by ASCAP and White and Case with  
21 the adverse party listed as NPR.

22 It appears that the kick-out form, the

1 form that would have come back to me saying -- listing  
2 NPR, Michael Sirkin, pension-planning work was issued.

3 I don't recall it ever coming back to me.  
4 I don't recall ever seeing it. So I guess, in  
5 retrospect, what went through the cracks was either it  
6 never came back or it did come back and fell through  
7 the cracks with my seeing it or being attentive to it.  
8 The input form was put in.

9 Q When did this latest information about the  
10 input form going in come to your attention?

11 A I think on November 11th, when Bob Kafin  
12 said to me, you know: You screwed up. The form was  
13 -- there was a form released or something like that.  
14 I think it would have been around November 11th.

15 Q Can you identify again who Stephen Krane,  
16 K-R-A-N-E, of your law firm is?

17 A Stephen is a partner with the intra-firm  
18 responsibility of passing on matters of potential  
19 conflicts of interest. I believe his CV has been made  
20 available to the Panel. I don't recall it in detail.  
21 But I believe he is a highly regarded ethics expert,  
22 both in New York and nationwide.

1 Q Did you have occasion to review his  
2 certifications submitted in this proceeding dated on  
3 or about November 24 of 1997?

4 A After it was not. I did not see it  
5 before.

6 Q Did you see any errors which you brought  
7 to his attention?

8 A No, I did not.

9 Q May I quote you from Paragraph 8 of that  
10 document? And if you'd like to see it after I read  
11 it, --

12 A No.

13 Q -- I'd be happy to show it to you.

14 A Did I see any errors when?

15 Q At any time.

16 A Oh. Yes.

17 Q What errors did you find?

18 A I think that includes the notion that I  
19 didn't complete the intake part. That impression, to  
20 which I contributed because I guess I was feeling  
21 guilty, is something I just never paid attention to.

22 The fact is that there was a mess-up and

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1 I was responsible for it, but I didn't put the  
2 document in or whether I didn't see the document that  
3 spit out.

4 Q I take it that neither you nor any member  
5 of your firm saw NPR's consent prior to your agreeing  
6 to testify as an expert for ASCAP in this proceeding?

7 A That is correct.

8 Q Now, are you being paid by ASCAP for your  
9 testimony?

10 A I am.

11 Q On what basis? Is it your normal hourly  
12 rates?

13 A My normal hourly rate.

14 Q And what is your normal hourly rate?

15 A I think -- it's recently gone up, but I  
16 think it was 360 an hour at the time. It may have  
17 been up to 375.

18 Q Now, let's come back to the America One  
19 counseling work which you and one of your colleagues  
20 did. In the course of that representation, you met  
21 face to face on one or more occasions with Ms. Leary,  
22 did you not?

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1 A I did.

2 Q Do you recall how many meetings?

3 A I believe there were two face to face and  
4 one lengthy call. We had another party on that  
5 telephone call who was not a member of the firm. It  
6 was on that side.

7 Q Am I correct that the associate of your  
8 law firm who worked on this matter was a woman named  
9 Laura Oberbroeckling?

10 A That is correct.

11 Q I ' l l s p e l l i t . I t ' s  
12 O-B-E-R-B-R-O-E-C-K-L-I-N-G?

13 A Yes.

14 Q And is it correct that during these  
15 face-to-face meetings and one or more telephone  
16 conversations, Ms. Leary disclosed to you, among other  
17 things, information regarding the confidential  
18 business plans of America One?

19 A She did disclose to me some material which  
20 could have been confidential, yes.

21 Q Did you treat it as such when you learned  
22 of it?

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1 A I never repeated it to anyone.

2 Q Did you treat it as if it were  
3 confidential?

4 A I never repeated it to anyone. I'm not  
5 sure what else the question is.

6 Q Did you regard it as confidential and  
7 treat it as such?

8 A I don't recall any information  
9 specifically at this time. I did not disclose  
10 anything Ms. Leary discussed with me to anyone,  
11 including Web site listings or television programs or  
12 contracts that were not filled in.

13 Q Contracts that were not?

14 A Yeah. There were contracts that were not  
15 filled in in the file. I treated the whole file as  
16 something that I would have handled confidentially.

17 Q Did Ms. Leary also provide you details of  
18 ongoing rights negotiations with a particular European  
19 satellite cable system?

20 A I don't know about the word "details," but  
21 yes, there was discussion. There were rights  
22 negotiations with a foreign cable or satellite or both

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1 organizations.

2 Q And is it not correct that she supplied  
3 you with one or more drafts of the license agreement  
4 between America One and this entity?

5 A I believe that's correct.

6 Q And, among other things, she asked you to  
7 opine on the music performing rights obligations that  
8 would be assumed between the parties to that license  
9 agreement?

10 A I do not recall that specific question.

11 Q Is it your best recollection that that was  
12 not part of what you were asked to look at or you  
13 simply don't remember?

14 A My answer to that at that moment was that  
15 I do not remember. My recollection of the task that  
16 I was involved in during that period was how they  
17 could best exploit the properties outside the United  
18 States given the various regimes of law applicable  
19 throughout.

20 If Ms. Leary claimed that she asked me  
21 questions about a particular agreement, I won't deny  
22 it. It's quite possible she did. I don't recall.

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1           Q       If you recall, Ms. Leary identified for  
2 you in correspondence the fact that specifically  
3 regarding music performing rights licensing with this  
4 European entity, there had been a change of position  
5 by the other party which required your advice as to  
6 how to handle it?

7           A       Yes. There was a -- if we're talking  
8 about the same one -- can I ask -- I'm in a little bit  
9 of a bind now. I'm being told there's confidential  
10 information which I am being asked to discuss in a  
11 public room. So I'm not sure what to do.

12           MR. SCHAEFFER: I assume there's an  
13 implicit waiver by NPR.

14           MR. RICH: Well, I have not identified the  
15 entity deliberately. And I'll take my cue from my  
16 client on this one.

17           MR. SCHAEFFER: I mean, the one thing that  
18 is clear is it's not ASCAP or BMI.

19           MR. RICH: Your Honors, at the level that  
20 I'm examining, I don't know that we're disclosing any  
21 confidences in terms of I'm not asking for the  
22 substance of any legal advice that was provided. I'm

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1 trying to understand and elicit the scope of the legal  
2 advice and what subject matters were involved. And  
3 that's the only level I intend to take this.

4 JUDGE DREYFUS: It's hard to tell the  
5 scope of your question until the answer comes out.  
6 And then if it's not there, you would probe further.  
7 If you want to clear the room of those --

8 CHAIRPERSON GRIFFITH: I think he's  
9 entitled to an answer to his question.

10 JUDGE DREYFUS: Oh, sure.

11 THE WITNESS: I'm perfectly happy to  
12 answer. I don't want to be accused of something else  
13 I haven't done in the course of doing this.

14 MR. RICH: I've forgotten what my question  
15 was at this point, I confess. Yes.

16 THE WITNESS: There was I think late in  
17 the day an organization that --

18 CHAIRPERSON GRIFFITH: Mr. Baumgarten?

19 THE WITNESS: Yes?

20 CHAIRPERSON GRIFFITH: Let me interrupt  
21 you.

22 THE WITNESS: Yes.

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1 CHAIRPERSON GRIFFITH: I'm sorry to  
2 confuse everybody. What did we decide on this issue?

3 MR. RICH: I'm not sure what the question  
4 is to me at this point.

5 CHAIRPERSON GRIFFITH: I mean, are you  
6 waiving --

7 MR. RICH: We are not waiving --

8 CHAIRPERSON GRIFFITH: -- the confidential  
9 relationship --

10 MR. RICH: Not as to the details of the  
11 advice, but I think we could properly conduct this  
12 examination. At least I would hope so.

13 CHAIRPERSON GRIFFITH: We need to know the  
14 answer.

15 MR. SCHAEFFER: I would object to that  
16 procedure on behalf of my witness. You can't be half  
17 pregnant.

18 MR. RICH: Well, are prepared, then, to  
19 ask any -- well, let me consult again because I don't  
20 know who has to leave.

21 MR. SCHAEFFER: I think in these  
22 proceedings, it's implicit that when you ask the

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1 question, you get the answer, you're representing the  
2 party, you've waived the privilege.

3 MR. RICH: Again, Your Honors, we would  
4 much prefer limiting this to exploring the subject  
5 matters of the advice, as opposed to substance. I  
6 don't knowingly intend to ask Mr. Baumgarten for  
7 substance.

8 If you all feel that we have to take it or  
9 might have to take it the next step, then I would ask  
10 that perhaps, with the exception of Mr. Schaeffer  
11 here, who must be here as Mr. Baumgarten's counsel, I  
12 think we would ask that the courtroom otherwise be  
13 cleared.

14 MR. SCHAEFFER: I'm not Mr. Baumgarten's  
15 counsel, in the first place. Mr. Baumgarten is here  
16 as an independent expert, Mr. Rich. And I don't think  
17 anybody should be cleared. If you want to get into  
18 this, just like you do in court, you can ask the  
19 question. If the question elicits a full answer, it  
20 elicits a full answer. You can't have it both ways.

21 CHAIRPERSON GRIFFITH: Mr. Baumgarten, let  
22 me inquire. Do you think that you can respond to the

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1 questions that he's asking you without revealing the  
2 --

3 THE WITNESS: I think I can on this  
4 question, yes.

5 CHAIRPERSON GRIFFITH: On this question?

6 MR. RICH: Let's try and see how we do.

7 THE WITNESS: If the reporter could read  
8 it back for both Mr. Rich and myself?

9 (Whereupon, the foregoing matter went off  
10 the record briefly at 3:10 p.m., during  
11 which time the pending question was not  
12 played back by the Reporter, as  
13 requested,)

14 BY MR. RICH:

15 Q Mr. Baumgarten, do you recall that among  
16 the advice Ms. Leary sought from you was advice as to  
17 some changes in certain license terms implicating the  
18 respective obligations of the parties; that is,  
19 America One and the prospective other side to the  
20 deal, concerning clearing music performing rights  
21 overseas?

22 A If we're thinking about the same thing,

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1 yes, but I don't recall it being a change in the  
2 license terms as much as a change, I believe a change  
3 in the country from which that organization was going  
4 to do its emissions.

5 Q But the subject matter, in part, then,  
6 that you were asked to counsel and your law firm was  
7 asked to counsel dealt with how to protect America One  
8 in respect of any needed music performing rights in  
9 various countries overseas; correct?

10 A That is correct.

11 Q Okay. And do you recall Ms. Leary sharing  
12 with you as well the terms of an NPR agreement for the  
13 leasing of international satellite transponder space?

14 A I believe we had that in the file. I  
15 honestly do not recall ever looking at that. But I  
16 think the subject was mentioned, and I believe there  
17 is a letter in the file, a copy in the file.

18 Q But you regarded any number of these  
19 communications and these documents, some of which were  
20 in draft form, as non-public in nature. Is that  
21 correct?

22 A I did, which is why -- with the exception

1 of the declaration, yes.

2 Q And you treated them, as you testified, as  
3 confidential in nature; correct?

4 A Yes.

5 Q Now, when you make reference in your  
6 certification to this panel of several weeks back that  
7 it was your, quote, "understanding that the fact that  
8 America One is publicly known, as was its purpose,"  
9 unquote, I take it that was not meant to denigrate the  
10 confidential nature of your discussions with Ms. Leary  
11 --

12 A No.

13 Q -- concerning America One; correct?

14 A Yes. The reason I put the exception in  
15 was because material was provided to me by -- and I  
16 was very adamant about the exception there, even  
17 though America One had been told -- I had been told  
18 there was not a problem by Ms. Leary and it was  
19 already mentioned earlier.

20 I put it in because the court's order  
21 referred to being provided certain information by A,  
22 B, and C and B was NPR's attorney. I'm aware of the

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1 fact that Ms. Leary is NPR's attorney. I, therefore,  
2 decided I needed an exception to the assertion that I  
3 did not have available to me any confidential  
4 information.

5 I made this affidavit in Los Angeles, did  
6 not have the file with me. I accepted the fact that  
7 there was probably confidential information in the  
8 file.

9 Q Is it also not true, Mr. Baumgarten, that  
10 Ms. Leary showed you and/or your associate relevant  
11 excerpts from NPR's license agreements with ASCAP,  
12 BMI, SESAC, and the Harry Fox Agency?

13 A I don't recall seeing those. I cannot  
14 speak to whether they were shown to Ms.  
15 Oberbroeckling.

16 What I remember was an almost offhand  
17 discussion at the beginning of the matter that, of  
18 course, any arrangement of the Section 118 of the  
19 Copyright Act could not give them rights outside the  
20 United States. And if they got rights directly from  
21 the copyright owners, those might or might not extend  
22 outside the United States.

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1 I do not recall any more specific  
2 discussion of an agreement and terms between NPR or  
3 America One and the copyright proprietors you  
4 mentioned in that.

5 Q Sitting here today, you're not testifying  
6 that you did not receive excerpts of these agreements?

7 A That's correct. I'm not testifying I did  
8 not.

9 Q And I take it from your prior answer that,  
10 at least in a general sense, the grants of rights  
11 provisions in these agreements, reflecting, as they  
12 do, Section 118 considerations, had a bearing on the  
13 legal advice which you were asked to render and, in  
14 fact, rendered; correct?

15 A I don't know what that question means. I  
16 don't know what "bearing," "118" --

17 Q In providing advice as to America One's  
18 potential rights and obligations respecting music  
19 performing rights being secured overseas, I take it  
20 the state of license grants in the United States was  
21 at least a relevant piece of information to you, was  
22 it not?

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1           A       The state of license -- I don't want to be  
2       cute.   The state of license grants in the United  
3       States was totally irrelevant to me.   The language of  
4       the grant if it encompassed rights outside of the  
5       United States would have been relevant to me.

6           Q       And, conversely, the fact that the license  
7       agreements did not grant rights outside of the United  
8       States led you to have to engage in other legal advice  
9       for securing those rights outside the United States;  
10      correct?

11          A       That sounds like the discussions were  
12      simultaneous.   I do remember saying that Section 118  
13      doesn't give you any rights outside the United States.  
14      So we have to discuss something other than the Section  
15      118 compulsory license.

16                   I think the discussion went something like  
17      if the terms of your grants from copyright owners  
18      owning rights outside the United States give you  
19      rights outside the United States, then you can rely on  
20      them.   If they did not, then you don't have anything  
21      to rely on and you have to deal with the mishmash  
22      situation here.

1 I don't recall opining and I don't believe  
2 I did opine as to whether any particular grant did or  
3 did not convey rights outside the United States.

4 Q Now, did not the practice of U.S. music  
5 rights holders and of the collective societies  
6 representing them in respect of granting or not  
7 granting worldwide synchronization and music  
8 performing rights have a bearing on the legal advice  
9 you were asked to render and, in fact, rendered?

10 A I certainly didn't think of one or don't  
11 see one reflected in my testimony.

12 Q I'm not asking reflected in your  
13 testimony. I'm asking in the advice which you  
14 rendered to America One.

15 A Oh, for America One?

16 Q Yes, whether or not the practice of U.S.  
17 rights holders respecting granting or not granting  
18 worldwide synchronization in music performing rights.  
19 Did not those factors have a bearing on the legal  
20 advice you formulated --

21 A Yes.

22 Q -- and gave to America One?

1           A       Yes.

2           Q       And did not the state of competition  
3 existing in both the U.S. and international music  
4 performing rights marketplace have a bearing on the  
5 legal advice you were asked to render and, in fact,  
6 rendered?

7           A       I'm not certain about the state of  
8 competition. I think there was a discussion of the  
9 fact that there are three performing rights societies  
10 in the U.S. in many jurisdictions with broad arrows,  
11 only one.

12          Q       And did not the degree to which individual  
13 U.S. composers and music publishers might be willing  
14 to break ranks with ASCAP, BMI, or SESAC and source or  
15 direct license their music internationally have a  
16 bearing on the advice you were asked to render and did  
17 render?

18          A       It did.

19          Q       Now, you mentioned in response to Mr.  
20 Schaeffer that you spent a period of time in practice  
21 I believe with a law firm called Paskus, Gordon and  
22 Mandell?

1 A Yes.

2 Q What time period was that, please?

3 A It was 1979, late 1979 or early 1980,  
4 until I joined Proskauer, five, six, seven years. I  
5 don't recall the date. I actually meant to look at  
6 that this morning. I don't know.

7 Q Does 1985 sound about right?

8 A Something like that.

9 Q Is it possible that the firm was then  
10 known as Paskus, Gordon and Heyman?

11 A I think when I joined it, it was Paskus,  
12 Gordon and Heyman. It changed to Paskus, Gordon and  
13 Mandell.

14 Q Now, you did not identify your partnership  
15 in that firm in your written testimony or in your  
16 curriculum vitae. Is there any particular reason that  
17 that was omitted?

18 A No.

19 Q Now, you were a partner in the D.C. office  
20 of Paskus-Gordon?

21 A Yes.

22 Q The founding partner of that office?

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1 A Founding partner.

2 Q And did you have any other partners in the  
3 D.C. office of Paskus-Gordon at any point in time?

4 A I don't think there were two partners.  
5 The two attorneys I had with me I think were special  
6 counsel or something to that effect.

7 Q Was one of these individuals a man named  
8 Eric Smith?

9 A Yes, it was.

10 Q I would represent to you that  
11 Martindale-Hubbell from 1983 through 1985 lists Mr.  
12 Smith as a resident partner of the Washington office  
13 of Paskus-Gordon.

14 A I'm not done. If Eric wasn't a partner,  
15 it should have so stated that.

16 Q Now, did he precede you or follow you to  
17 the firm, to the D.C. office?

18 A I hired him.

19 Q You hired him. And where did he come  
20 from?

21 A I think it was PBS. Eric and I had known  
22 each other for many years, largely through the Section

1 118 wars.

2 Q What was his position at PBS at the time  
3 you hired him?

4 A I don't recall his title. He was a  
5 lawyer.

6 Q If I represent to you that he was senior  
7 vice president and general counsel, does that refresh  
8 you recollection?

9 A I have no reason to quarrel with it.

10 Q For how long did you and Mr. Smith  
11 practice together as Paskus-Gordon?

12 A I don't remember when Eric was hired. We  
13 could find out those dates. I don't have that. That  
14 was a matter of years.

15 Q Period of years?

16 A Yes.

17 Q And you were the two sole partners sharing  
18 D.C. office responsibility?

19 A There was another attorney but not a  
20 partner.

21 Q Can you identify the other attorney?

22 A William Patry.

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1 Q Who also came with Copyright Office  
2 experience --

3 A No.

4 Q -- somewhere along the line?

5 A Copyright experience, not Copyright Office  
6 experience.

7 Q I stand corrected.

8 A Copyright-writing experience.

9 Q Mr. Patry was associated with the firm --

10 A Yes.

11 Q -- at some point?

12 A Yes, he was.

13 Q Now, isn't it the case that Mr. Smith  
14 following joining Paskus-Gordon provided music  
15 copyright advice to PBS?

16 A I believe he did.

17 Q And you were aware that he was providing  
18 such advice, were you not, as his resident partner?

19 A Yes.

20 Q And you consulted periodically with him  
21 concerning such advice, did you not?

22 A I don't recall any. That was many years

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1 ago. I might have. It was a small office. There  
2 were two of us. We talked a lot.

3 Q Were you next to each other physically in  
4 the office?

5 A We were in a basement office. It sort of  
6 had to be that.

7 Q Did you share secretaries and all of that?

8 A No. I think we each had our own  
9 secretary, but we shared photocopy machines. I mean,  
10 we were in close proximity and complaining about the  
11 New York office to each other most of the time.

12 Q But isn't it also the case that Mr. Smith  
13 specifically provided advice to PBS relating to  
14 Section 118 of the Copyright Office during the time  
15 that you and he were partners?

16 A I don't know. I don't recall.

17 Q Do you also recall that Mr. Patry after  
18 joining Paskus-Gordon provided music copyright advice  
19 to PBS?

20 A I don't know.

21 Q When did ASCAP first retain you in this  
22 proceeding?

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1           A       I think Mr. Schaeffer first called me in  
2 late August or early September last year.

3           Q       Did Mr. Schaeffer explain to you what the  
4 case was about?

5           A       He explained to me that there was a public  
6 broadcasting proceeding before CARP, before the CARP,  
7 for the adjustment of rates and asked if I would be  
8 willing to testify about the history of Section 118  
9 and its role in relation to copyright; essentially  
10 sponsor legislative history.

11          Q       And in those early conversations, did Mr.  
12 Schaeffer or any other member of his legal team  
13 indicate more specifically how they hoped your  
14 testimony on that history would fit in with, square  
15 with ASCAP's theory of this case?

16          A       They hoped that I would opine -- first,  
17 they hoped that I would put in the legislative  
18 history. And then they hoped that my recollection and  
19 description would support their positions.

20          Q       And I take it before committing to engage  
21 you, they obtained some assurances from you in some  
22 form that that would be the case?

1 A Yes.

2 Q Did they also in these early discussions  
3 outline for you PBS' and NPR's likely positions in  
4 this matter?

5 A No, not comprehensively. There was  
6 probably in the course of the discussions a statement  
7 that "Well, they'll say this" or "They will say this,"  
8 but there was no comprehensive outline of positions.

9 I still have not seen your case. It would  
10 be nice to see your case.

11 Q Did you and they have one or more either  
12 face-to-face or telephonic communications where you,  
13 at least tentatively, scoped out the direction which  
14 your testimony would to, either with regard or without  
15 regard to the likely position that NPR and PBS would  
16 be taking?

17 A No. They described to me what positions  
18 they would be taking in the area relating to the  
19 history of Section 118. And they asked if I could  
20 opine supportively. And for most of them, I said yes.

21 Q Did that process occur strictly orally?

22 A No. There was a written communication to

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1 me.

2 Q To you from White and Case?

3 A From White and Case.

4 Q And that laid out what their expectation  
5 was as to testimony here to see the degree to which  
6 you would comfortably be able to align with that?

7 A Not their case, only the portion of their  
8 case dealing with Section 118.

9 Q Dealing with the legislative history of  
10 the Act?

11 A Yes.

12 Q And did you, in fact, react to it, either  
13 orally or in writing?

14 A I reacted to it orally.

15 Q Telephone call?

16 A Yes.

17 Q Face-to-face meeting?

18 A No.

19 Q And do you recall who was on the other end  
20 of that phone call?

21 A There were two people. There was Charles  
22 Simms from my office and I believe Joan McGivern.

1 Q And the reason Mr. Simms was on the call?

2 A When I first accepted the possibility of  
3 performing, I told Mr. Schaeffer I was greatly  
4 concerned about time. I had gone through a difficult  
5 personal situation.

6 I was overwhelmed with work, trying to  
7 recover from that situation. I had a trip to Japan  
8 about the time the CARP proceeding was going. I was  
9 pretty much overwhelmed.

10 I needed to do this task. I needed help  
11 with the first drafts pulling the material together.  
12 I felt that Mr. Simms was a wonderful writer and knew  
13 the way I think, and he had a basic understanding of  
14 the copyright law.

15 Rather than ask an associate, I told Mr.  
16 Schaeffer and Ms. McGivern that I'd like to use a  
17 partner to help me with the first draft.

18 Q Did that, in fact, occur?

19 A Yes, it did.

20 Q Is a substantial part of the work product  
21 that represents your written testimony that of Mr.  
22 Simms?

1           A       Every letter has been adopted by me, read  
2 by me, changed by me, but yes. I mean, since he did  
3 the first draft, since he's an excellent writer,  
4 understands the copyright law but was not there, parts  
5 of it do reflect a lot of original writing by him.

6           Q       Did you sign a retention agreement with  
7 ASCAP for your expert retention here?

8           A       I did.

9           Q       Did Mr. Simms?

10          A       I don't believe Mr. Simms signed it. The  
11 letter referred to my engaging other personnel or  
12 referred to an associate, which is I believe why I  
13 mentioned to Joan of Phil that I would like to involve  
14 a partner.

15          Q       Now, were various drafts of your testimony  
16 shared prior to its finalization with attorneys either  
17 at ASCAP or at White and Case?

18          A       Yes. I don't know about ASCAP. I know  
19 about White and Case.

20          Q       Were comments supplied to you,  
21 suggestions, comments?

22          A       I don't remember any or many. I know

1 there were comments that I supplied when we first  
2 looked at the draft that Chuck had provided. I don't  
3 think there was much feedback to me at all.

4 Q So I'm clear, did Mr. Simms' draft  
5 simultaneously or roughly simultaneously go to White  
6 and Case and to you for comments?

7 A Yes. I don't know the exact chronology.

8 Q And so inputs came both from you and from  
9 White and Case on Mr. Simms' draft?

10 A No because when Chuck did his draft, that  
11 was essentially the end of it. He gave it to me, and  
12 I think he might have given it to White and Case  
13 simultaneously.

14 We had a conference call. I think I asked  
15 Chuck to fix things. There were things I wanted to  
16 add. But, subject to that, your description is  
17 accurate.

18 Q Did White and Case participate in the  
19 conference call you described?

20 A I think I probably had one conference call  
21 with Chuck at which White and Case was not present.

22 Q And were there one or more conversations

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1 either with Mr. Simms or without him on which White  
2 and Case gave advice on one or more drafts of your --

3 A I honestly don't believe, do not recall  
4 really getting much input from White and Case at all  
5 once the draft was done. At one point -- if I look at  
6 the work product, I might be able to remember  
7 something.

8 I know at one point, I asked for input  
9 from White and Case, from ASCAP because I referred to  
10 an article written by Korman and Koenigsberg and I  
11 wanted to know if there were any readily available  
12 materials that I cite to, rather than the article.  
13 And I was told that they were not readily available.  
14 I decided the point for which I was citing and the  
15 source I was citing, being a public source, that was  
16 sufficient.

17 Also, there was some discussion early in  
18 the process about describing the difference between a  
19 grand right and a small right. And I asked to speak  
20 to Fred Koenigsberg because I chose not to get  
21 involved in that and wanted Fred to know I was not  
22 going to get involved in it and whether he had any

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1 problem with that.

2 But other than those two, I -- that's my  
3 affidavit. That's not White and Case's affidavit  
4 being polished by me.

5 Q So, then, if I understand your testimony,  
6 whatever suggestions came from ASCAP's counsel, they  
7 came generally prior to the drafting process. Is that  
8 correct?

9 A That's my best recollection.

10 MR. RICH: That's the conclusion of my  
11 voir dire.

12 CHAIRPERSON GRIFFITH: All right.

13 MR. SCHAEFFER: I have a couple of very  
14 short questions.

15 CHAIRPERSON GRIFFITH: All right.

16 DIRECT EXAMINATION

17 BY MR. SCHAEFFER:

18 Q First of all, you spoke to Ms. Leary first  
19 on what time? What date? November 10th, did you say?

20 A In connection with America One --

21 Q Yes.

22 A -- or NPR?

1 Q In connection with the first time you  
2 heard that there was an objection to your services.

3 A November 10th.

4 Q Are you aware that the file, your file --

5 A I'm sorry. No. Her voice mail message  
6 was November 10. My response was November 11th.

7 Q Are you aware that the document, your  
8 direct testimony, was filed on September 29th?

9 A Yes. I dated it.

10 Q Did Ms. Leary explain why it had taken so  
11 long for her to get to you and inform you of the  
12 objection that NPR had to your services?

13 A In her voice mail message on the 10th and  
14 I believe in discussion on the 11th, she said that  
15 they had gone back and forth on it.

16 Q Are you aware that September 29th was the  
17 last day for filing direct case in this proceeding?

18 A I was because that's why I was concerned  
19 at that time, yes.

20 Q And, indeed, one of the reasons you didn't  
21 withdraw, among others, I assume is because it would  
22 have prejudiced ASCAP?

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1 A Yes.

2 Q When for the first time did you disclose  
3 to ASCAP or, as far as you know, did anybody disclose  
4 to ASCAP the fact that since September 29th, Ms. Leary  
5 had been entertaining the possibility of making an  
6 objection?

7 A I think I disclosed it to you or Ms.  
8 McGivern when I learned it on the 10th or the 11th.

9 Q Did Ms. Leary ever indicate to you in her  
10 conversation with you that ASCAP would be prejudiced  
11 by the belated objection?

12 A I think that was my assertion to her.

13 Q What did she say in response to that,  
14 "Tough"?

15 A I don't recall the specific response.

16 Q Now, there's been some reference to  
17 America One. When for the first time did you find out  
18 that there was any objection to your service on the  
19 basis of America One?

20 A I don't think to this point I've seen an  
21 objection. I've seen a reference to it in one  
22 affidavit and an outrageous suggestion that I was less

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1 than truthful in another affidavit, but I haven't seen  
2 an objection.

3 Q That accusation of your lack of candor or  
4 truthfulness took place within the last month or so,  
5 didn't it?

6 A In the last week or so, I think.

7 Q Has Ms. Leary ever explained to you why it  
8 took so long for her to suddenly decide that America  
9 One was a problem after she had said it wasn't a  
10 problem in your initial conversation?

11 A I've had no discussions with Denise Leary  
12 since the 12th.

13 Q Let's go to a different subject, also  
14 involving some degree of time. In the 1980s, you were  
15 a partner at Paskus, Gordon and Heyman?

16 A Yes.

17 Q And Paskus, Gordon and Mandell?

18 A Yes.

19 Q Was I a partner in that law firm?

20 A You were.

21 Q And were you aware that Eric Smith was a  
22 contract partner?

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1 A Not that you've told me.

2 Q Can you sitting here today tell me that  
3 anything 13 years ago that you learned in the course  
4 of your partnership at Paskus, Gordon and  
5 Heyman/Paskus, Gordon and Mandell had any bearing on  
6 the direct testimony you're offering here?

7 A I don't see any bearing at all. In fact,  
8 Eric know that I was generally on the other side, the  
9 public broadcasting questions, and he was on the other  
10 side.

11 I assume he got some kind of clearance to  
12 even work in my office.

13 Q Indeed, today is the first time that you  
14 ever heard that there was perhaps some problem with  
15 your expert testimony because of your 13-year-old  
16 partnership relationship 13 years ago at Paskus,  
17 Gordon and Heyman. Isn't that correct?

18 A That's correct. I hadn't.

19 MR. SCHAEFFER: And, remarkably, Mr. Rich  
20 hasn't objected to my service here. I guess that  
21 comes next.

22 I have no further questions.

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1 CHAIRPERSON GRIFFITH: All right.

2 JUDGE DREYFUS: At the time that you gave  
3 counsel for America One, did you know the relative  
4 holdings of the NPR share or holding equity position  
5 of America One?

6 THE WITNESS: No. I think the word "joint  
7 venture" was mentioned, but beyond that, no.

8 JUDGE DREYFUS: So you knew they were a  
9 principal of --

10 THE WITNESS: Yes, I did.

11 JUDGE DREYFUS: -- America One?

12 THE WITNESS: Yes, I did.

13 JUDGE DREYFUS: I have no further  
14 questions.

15 CHAIRPERSON GRIFFITH: Do you think so or  
16 not? How about five minutes each of argument? Then  
17 we'll decide the issue.

18 MR. RICH: Since I'm the proponent of the  
19 motion, I suppose I should go first.

20 CHAIRPERSON GRIFFITH: All right. Mr.  
21 Baumgarten, if you'd be more comfortable, sir, you can  
22 step down or --

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1 THE WITNESS: This is fine.

2 CHAIRPERSON GRIFFITH: -- we're delighted  
3 to have you sit there.

4 THE WITNESS: Thank you.

5 MR. RICH: First of all, I'd like to say  
6 that I've known Mr. Baumgarten for 20-plus years. And  
7 this is not one of the more pleasant assignments I've  
8 been given. This is not a reflection of my personal  
9 respect for Mr. Baumgarten. I do want to say that for  
10 the record.

11 Notwithstanding that, I think we have  
12 three serious areas here of ethical lapse or breach,  
13 which require in the circumstances that Mr.  
14 Baumgarten's testimony not be adduced adverse to  
15 either PBS or NPR.

16 First is the fact that there is a current  
17 representation from Proskauer of a client in whose  
18 behalf Mr. Baumgarten, concededly, is giving testimony  
19 adverse here.

20 One can parse the fine hairs of the ABA  
21 opinion, which has been briefed thoroughly by both  
22 sides, but at the end of the day, I believe, even if

1 one argues that that opinion has bearing and it is,  
2 without doubt, addressed to a factually different  
3 situation than is presented here, at the bottom, even  
4 that opinion makes plain that the proper approach here  
5 and the correct approach ethically would have been for  
6 Mr. Baumgarten and/or his law firm to seek NPR's  
7 consent before taking on the testimonial role here.

8           Secondly, I think it's clear from the voir  
9 dire that Mr. Baumgarten did not simply in a pristine  
10 state give testimony here. He was provided with  
11 written materials from ASCAP's counsel outlining to  
12 some measure -- we have not seen it, of course --  
13 their legal thinking and strategy, inquiring the  
14 degree to which Mr. Baumgarten's testimony would fit.

15           And we have further testimony that it was  
16 an iterative process. This was not "Here is my  
17 testimony. I'll see you in the CARP proceeding." It  
18 was, instead, that at some point in the process, it  
19 was certainly back and forth in terms of shaping and  
20 so forth, although ultimately I completely accept the  
21 fact that Mr. Baumgarten put his own stamp and brand  
22 on his testimony.

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1                   So I think Rule 1.7(b) of the D.C. rules  
2 limiting the ability of one to represent another  
3 client in a matter which is adverse to the interests  
4 of a current client without consent -- that's 1.7(c);  
5 you've got to get consent -- itself should be  
6 dispositive.

7                   Secondly, the America One story, it seems  
8 to us, indicates that Mr. Baumgarten was privy to  
9 confidential information -- that's Rule 1.6(a)(2) --  
10 relating to matters substantially related, I would  
11 argue, to what's involved in this proceeding.

12                   Mr. Baumgarten's memory in places -- and  
13 I believe it is spotty in terms of the precision of  
14 the advice, but he answered yes to a series of  
15 questions, indicating that implicit in the advice was  
16 an understanding of the state of the U.S. music right  
17 license marketplace, including the music performing  
18 rights marketplace, his advice to the venture  
19 concerning the disposition or predisposition of U.S.  
20 copyright holders who are actually members of ASCAP  
21 and BMI to license or not internationally and,  
22 therefore, strategically what was appropriate to do in

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1 the music rights field, among others, in relation to  
2 implementing the venture.

3 The confidential information strictures of  
4 Rule 1.6(a)(2) survive the termination of a  
5 relationship. They're lifelong bonds. They cannot be  
6 unilaterally breached without consent of America One.  
7 That consent was not provided.

8 Third and finally, Rules 1.9 and 1.10 of  
9 the D.C. rules involve something we just learned about  
10 this week reviewing files in preparation for this  
11 hearing, namely the fact that Mr. Baumgarten while as  
12 Paskus-Gordon recruited the then general counsel of  
13 our other client, PBS, to serve as his partner, that  
14 Mr. Smith brought with him music counseling work to  
15 the firm of which he and Mr. Baumgarten were the sole  
16 D.C. office partners.

17 Mr. Baumgarten doesn't recall but doesn't  
18 dispute that he would counsel with Mr. Smith, said  
19 they were long-time colleagues. It would be unnatural  
20 to assume in a two-lawyer shop that they would not  
21 counsel on music copyright advice, including the fact,  
22 as Mr. Baumgarten allows, that Mr. Smith was giving

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1 advice on the very section we're concerned with here,  
2 Section 118 advice.

3 And Rules 1.9 and 1.10 make clear that to  
4 the extent Mr. Baumgarten had knowledge of  
5 confidential information and confidential counseling  
6 which directly go to the very provision that is at  
7 issue in this proceeding, it's quite clear that he's  
8 barred thereafter from appearing adverse in such a  
9 matter, goes with him, carries with him, and stays  
10 with him, again, without consent of NPR.

11 And, for those three different reasons, we  
12 submit, the proffer of testimony should be stricken.

13 CHAIRPERSON GRIFFITH: Thank you.

14 MR. SCHAEFFER: As a threshold matter, --  
15 I noticed that it hasn't been addressed by Mr. Rich --  
16 the ability to object to service, even if Mr.  
17 Baumgarten was acting as a counsel, which I'll get to  
18 in a minute, -- he is clearly not -- can be waived by  
19 the client.

20 Surely, the inaction, which must be  
21 assumed to be calculated, on the part of NPR of  
22 waiting until the last possible moment to inform ASCAP

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1 and Mr. Baumgarten, for that matter, of the objection  
2 not only is deplorable but constitutes a waiver.

3 We have had it unrebutted that there was  
4 a waiver directly by the General Counsel of NPR of the  
5 America One issue because it was said so, and it isn't  
6 argued. And nobody would dispute Mr. Baumgarten's  
7 integrity in saying that was said to him, and I assume  
8 it was.

9 Insofar as the PBS representation in 1985,  
10 that's so far-fetched, and I used a good example. I  
11 was as much a partner with Mr. Smith as was Mr.  
12 Baumgarten. And, surely, nobody's going to suggest  
13 that on the basis of what happened 13, 14, and 15  
14 years ago I shouldn't be able to represent ASCAP in  
15 this proceeding.

16 Certainly the fact that Mr. Baumgarten was  
17 a partner at Paskus-Gordon is a matter of public  
18 record. It's in Martindale. And I have to say  
19 there's a lot of -- and I'll get to the merit of the  
20 objection.

21 Where I come from in New York, -- and I  
22 suspect it's true in the District also; I know it's

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1 true in New Jersey -- there has been a lot of comment  
2 by the judges about how deplorable these kinds of  
3 motions are, particularly when they're used entirely  
4 for tactical reasons.

5 This arbitration, the arbitrators should  
6 recognize that this is just a tactic. If they were  
7 serious about any kind of an objection, they would  
8 have as soon as they saw the September 29th document  
9 risen up and said, "Baumgarten shouldn't be serving."  
10 They certainly wouldn't have waited until the last  
11 possible moment to do this. It's completely  
12 unthinkable.

13 Similarly, with America One having  
14 consented, now they come back and say: Oh, no. We  
15 didn't consent. Ms. Leary's recollection presumably  
16 was as good before as it is now. So the whole tactic  
17 is deplorable and smells.

18 Now, whether or not an expert is  
19 disqualified or not when he is a counsel -- and the  
20 ABA opinion is perfectly relevant on that -- depends  
21 on the nature of the opinion he has given.

22 All Mr. Baumgarten has done in his direct

1 testimony, not dealing with anything particularly  
2 confidential, if he had written a treatise on the  
3 subject of copyright and on Section 118, it would be  
4 no different than what he is going to testify to here.

5 Nothing he's testified to here about  
6 communications back and forth between NPR, ASCAP, or  
7 anybody else; indeed, the America One matter that  
8 we're talking about, had nothing to do with ASCAP at  
9 all.

10 The mere fact that in the course of giving  
11 the testimony today he gives some generic testimony  
12 about the nature of Section 118 and at various times  
13 has counseled various clients all over the country on  
14 Section 118 and copyright doesn't disqualify him from  
15 giving public lectures or even private lectures on the  
16 subject of Section 118. If that were true, we'd  
17 assume as a lawyer who had given any kind of advice to  
18 a client on any discrete subject, his mouth thereafter  
19 would always be silenced when speaking out in public.

20 Mr. Baumgarten is not here as an advocate.  
21 He is not here as an attorney. He has not  
22 quarterbacked this case. And there is nothing in the

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1 voir dire that established he did.

2 All he's coming in here to do is enlighten  
3 us, just as a fact witness would, as to the history of  
4 Section 118, of which he was a party, to tell us the  
5 facts. There's no advocacy. There's no argument to  
6 the extent that he says that he may say things on  
7 cross-examination that are inconsistent with ASCAP's  
8 position.

9 But the issue here is not one of his being  
10 an advocate. He's not an advocate. He's an expert.  
11 And that's precisely the distinction that the ABA rule  
12 points to.

13 I think this is an absolutely frivolous  
14 and really malicious motion. And I'm shocked with it  
15 being made, particularly under the circumstances. I  
16 find I'm addressing a moving target.

17 We started out. They were talking about  
18 the pension and profit-sharing, which obviously has  
19 nothing to do with the subject matter of this  
20 litigation. Then suddenly we found out at the last  
21 minute that America One, which had been waived before  
22 and nobody had ever mentioned before, suddenly becomes

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1 an issue. And today for the first time, I find out  
2 that because 13 years ago Baumgarten was a partner at  
3 Paskus-Gordon, at which Smith was a contract partner,  
4 now they've got another issue.

5 I think this motion should be denied. We  
6 should finish with the testimony today.

7 CHAIRPERSON GRIFFITH: All right. Mr.  
8 Kleinberg, do you have any comments on this issue,  
9 sir?

10 MR. KLEINBERG: No, I don't.

11 CHAIRPERSON GRIFFITH: Thank you.

12 All right. Why don't we take the  
13 afternoon -- oh, I'm sorry. Do you have a question?

14 JUDGE DREYFUS: I'd like to ask counsel to  
15 comment on the waiver, please?

16 MR. RICH: Yes. I'd be pleased to. I  
17 have two points that I think need to be made. The  
18 first is that Mr. Schaeffer would apparently tax NPR  
19 for giving deliberate thought through the highest  
20 levels of its legal operation to what is a  
21 consequential step in relation to a lawyer with whom  
22 NPR had a relationship and would tax them for taking

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1 a requisite time to make that deliberative decision,  
2 which is, in fact, how the process occurred. I think  
3 that as a matter of policy is simply barking up the  
4 wrong tree.

5 But, more dispositively, the Copyright  
6 Office rules made plain that each and every motion  
7 directed to the admissibility of testimony was to come  
8 in on a date certain.

9 For example, I could turn Mr. Schaeffer's  
10 argument right around on his head. Mr. Schaeffer,  
11 among abrasive motions served upon my client on the  
12 very same day we served Mr. Baumgarten's motion,  
13 sought to strike our very fee proposal. He sought to  
14 strike as impermissible the, quote, "collective fee  
15 proposal."

16 Now, I could have argued: Why did White  
17 and Case wait, lo, 45 days to file a brief going to  
18 the heart of our case when if that was their position,  
19 they could have let us know sooner and let us amend?

20 The answer was he was entitled to file on  
21 the deadline any motion directed against any aspect of  
22 our direct case. And he did so. And he did so

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1 vigorously.

2 We did exactly the same thing. We were  
3 not delinquent. There is no rule or policy or  
4 anything else in a CARP proceeding saying the very  
5 moment you become aware of the conflict, you must in  
6 advance of filing any other motion, however substance,  
7 file it. There is no such rule.

8 We filed it timely. And, as you know, the  
9 Copyright Office deferred decision to this Panel.

10 CHAIRPERSON GRIFFITH: Okay. We're going  
11 to take an afternoon recess. We'll decide the motion  
12 and come back with a ruling, 4:00 o'clock. Fifteen  
13 minutes.

14 (Whereupon, the foregoing matter went off  
15 the record at 3:47 p.m. and went back on  
16 the record at 4:01 p.m.)

17 CHAIRPERSON GRIFFITH: All right, ladies  
18 and gentlemen, I'm sure as counsel is aware, this is  
19 not the first time we have considered this motion. We  
20 appreciate the opportunity to have the witness  
21 examined and the argument of counsel. The motion to  
22 strike the testimony of Mr. Baumgarten is denied. An

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1 order will follow.

2 MR. SCHAEFFER: Before I do the direct  
3 testimony, Your Honors, there are a couple of  
4 typographical errors in the direct testimony that I  
5 just wanted everybody to be alerted to. I apologize,  
6 that it's been done in a rush.

7 On page 16, the sixth line from the top  
8 has the word "rules", R-U-L-E-S, and again the seventh  
9 line from the top has the word "rules." In both cases  
10 that should be "rates", R-A-T-E-S.

11 On page 21, the twelfth line from the top  
12 should read -- now I've lost it. Instead of  
13 "repealed" it should be "repeated", "repeated use."

14 I apologize again for that. I'm sure  
15 there are other typos, but we were trying to put this  
16 out in time.

17 BY MR. SCHAEFFER:

18 Q Mr. Baumgarten, would you describe to the  
19 Panel what you believe to be the rights of the  
20 composer or lyricist of music under the 1976 Copyright  
21 Act with respect to the performance of his or her  
22 music, subject to that copyright?

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1 CHAIRPERSON GRIFFITH: Before he does  
2 that, I have left my pad on the desk in here where I  
3 keep my hearing notes. Excuse me one second.

4 (Pause.)

5 CHAIRPERSON GRIFFITH: All right.

6 MR. SCHAEFFER: Your Honor, should I  
7 repeat the question?

8 CHAIRPERSON GRIFFITH: No.

9 BY MR. SCHAEFFER:

10 Q Could you give us that answer, Mr.  
11 Baumgarten?

12 A Yes, the composer or lyricist like all  
13 copyright authors under the Act, is accorded a series  
14 of rights, sometimes called a bundle of rights by  
15 Section 106 of the Act. These are the rights to  
16 reproduce a work, to adapt a work, to perform a work,  
17 to display a work and to distribute a copy of the  
18 work.

19 In this country, the broadcast of a work  
20 is generally considered and defined as a party has the  
21 right to publicly perform a work. A composer or a  
22 lyricist or its successor, any other copyright owner,

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1 would have both the exclusive right to do that act to  
2 authorize others to do it or to forbid others from  
3 doing it. The only exception are situations where the  
4 Act may inherently impose a limitation, an exception  
5 or a compulsory license on the particular right in  
6 question.

7 Q Is that right for a lifetime? What is the  
8 duration of that copyright right excluded?

9 A It is for a finite time. However, the  
10 duration, because of the revisions of our copyright  
11 laws, the how long it lasts is not an easy question to  
12 answer. If it's a work created after January 1, 1978,  
13 it would generally be for the life of the author, 50  
14 years after the author's death.

15 If it were created before, it would  
16 generally be for 75 years from publication or 100  
17 years from creation.

18 In either case, it's not a perpetual  
19 right.

20 Q Now when you attested or testified or gave  
21 an opinion that a copyright owner has the use to  
22 control or use to restrict their own rights, can it be

1 for any reason whatever?

2 A Subject to potential application of the  
3 anti-trust laws in any particular case, you have the  
4 right to say yes or no and to give or not give  
5 reasons, be whimsical or serious.

6 Q Now is there a particular section of the  
7 Copyright Act which affords the kinds of rights you've  
8 just described?

9 A Section 106.

10 Q Is it your understanding in copyright law  
11 that a broadcast on television or radio is a public  
12 performance?

13 A That is correct. I mentioned that  
14 earlier.

15 Q Now, would you state very briefly and the  
16 time is a little bit late, and I think most of the --  
17 your preliminary material is already in your writing,  
18 will you state for the arbitrators the origins of  
19 Section 118.b of 17 U.S.C. by describing the issues  
20 which gave rise to its enactment?

21 A Under the law in effect before January 1,  
22 1978, the right to publicly perform was described as

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1 a right to publicly perform for profit. That was a  
2 general limitation on all performing rights.

3 Acting under that language, noncommercial  
4 broadcasters, as well as others, had for quite some  
5 time contended that they were not engaging in a public  
6 performance for profit and therefore had no license,  
7 royalty or other obligations to copyright owners.

8 Some copyright owners, however, including  
9 those in the literary and music field, believed that  
10 certain practices of noncommercial broadcasting, at  
11 least noneducational institutional, noncommercial  
12 broadcasting involving large corporate grants, for  
13 example, would have met the concept of "for profit"  
14 under the application of certain case law.

15 Since much of this dispute arose during  
16 the period from roughly 1958, 1959, 1960, following  
17 where copyright law revision was being considered in  
18 Congress, nobody sued. Nobody wanted to upset the  
19 legislative apple cart at the time and instead people  
20 worked with Congress on this issue.

21 In the late 1960s, in the first bill, the  
22 first or second bill that was introduced in Congress,

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1 the copyright revision program was a very lengthy  
2 series of studies followed by reports and bills.  
3 Early in the late 1960s, the bill was introduced or  
4 seemed to -- which did set the tack for the future.  
5 It eliminated the "for profit" limitation as a general  
6 limitation on performance rights. It accorded the  
7 right to publicly perform and did not follow up with  
8 the words "for profit."

9 Various committee reports described this  
10 as a very purposeful change. Some of those  
11 legislative explanations are included in my statement.  
12 I'll quote just one. "Congress explained that the  
13 arguments that the line between commercial and  
14 nonprofit organizations is increasingly difficult to  
15 draw. Many nonprofit organizations are highly  
16 subsidized and capable of paying royalties. The  
17 widespread exploitation of copyrighted works by  
18 educational broadcasters and other noncommercial  
19 organizations is likely to grow." For those  
20 considerations and others mentioned in this quotation  
21 and others, Congress decided to handle the not for  
22 profit system in a completely different way than it

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1 had earlier. It gave an absolute right to publicly  
2 perform and then carved out limited exceptions in  
3 certain areas of not for profit exploitation,  
4 instructional broadcasting being one.

5 It did not give any special concession  
6 during this time to noneducational, noncommercial  
7 broadcasting, broadcasting as we know it or have come  
8 to know it. The conclusion at that time was public  
9 broadcasting would find a way to pay its way under the  
10 normal system. That conclusion is really reflected in  
11 -- that was pretty much the legislative view from 1967  
12 to 1974 as quoted in this material.

13 Q Now what was the -- having confronted the  
14 requirement that there be payment for the copyright  
15 licenses, what was the evolved position immediately  
16 prior to the enactment of Section 118(b) of the Public  
17 Broadcasters.

18 A Well, the Public Broadcasters were not  
19 happy with the decision that they would have to deal  
20 in the same marketplace as, for example, commercial  
21 broadcasters. They believed that they had special  
22 attributes, special concerns, that they were cloaked

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1 with a particular public interest, that their  
2 operating funds were limited to largesse by the  
3 government and corporate donors and that putting them  
4 in a position where they had to negotiate for rates,  
5 seek clearances, pay the going rate was threatening to  
6 them. They might be faced with cumulatively  
7 burdensome budget needs, excessive fees requests and  
8 the like. They --

9 MR. RICH: May I simply figuratively rise  
10 to object to the hearsay characterizations of what the  
11 Public Broadcasters said or didn't say back in the  
12 hearing process.

13 THE WITNESS: I'd be glad to refer to the  
14 page --

15 CHAIRPERSON GRIFFITH: Just a moment.

16 THE WITNESS: Sorry.

17 MR. SCHAEFFER: It's already in the direct  
18 testimony, but I think it is a common place of expert  
19 witnesses as Mr. Baumgarten clearly has been  
20 established to be, to testify on the basis of hearsay  
21 and of the general situation. It's perfectly  
22 appropriate evidentiary proffer on our part.

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1 MR. RICH: Not for the truth of the  
2 statement, however.

3 MR. SCHAEFFER: On the contrary. You need  
4 only look at any of the standard evidence text.

5 CHAIRPERSON GRIFFITH: The objection is  
6 overruled.

7 BY MR. SCHAEFFER:

8 Q Mr. Baumgarten, do you know where you left  
9 off?

10 A Yes, I think so. And those concerns are  
11 also documented in the legislative history we referred  
12 to in our statement.

13 The Public Broadcasters sought a  
14 compulsory license and prevailed upon Senator Matt  
15 Mathias of Maryland to introduced in mid-1975, I think  
16 it was, but became widely known as the Mathias  
17 Amendment which would have created a compulsory  
18 license in many respects similar to the compulsory  
19 licenses existing elsewhere in the statute. The  
20 Senate initially did not adopt the Mathias Amendment.  
21 The Senate later did adopt a variation of the Senate  
22 amendment and that occurred in late 1975.

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1           In January 1976, the House heard testimony  
2           from the public broadcasting community and from the  
3           copyright proprietors. The copyright proprietors were  
4           not happy with the Mathias Amendment. They did not  
5           like the idea of compulsory licensing. The Copyright  
6           Office was not particularly attracted to the Mathias  
7           Amendment.

8           Ultimately, the House accepted the notion  
9           of compulsory licensing, but substantially revised the  
10          Mathias Amendment to become what in large part is  
11          Section 118 today. There have been some changes of  
12          118 since the time I'm speaking of in 1998, but I  
13          don't think they're material.

14          Q       I need to interrupt you here at this  
15          point. What was the Senate version? You said it was  
16          different than what was eventually adopted by the  
17          House and then ultimately Congress. What was the  
18          Senate version?

19          A       The Senate version was very much modeled  
20          on the compulsory licenses that were already existing  
21          for jukebox performances and cable. The expectation  
22          was that a sum of money, apparently a universal sum of

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1 money applicable to all copyright owners and the  
2 legislation referred to a per use basis or a per  
3 program basis or an annual basis or a prorated basis,  
4 but there would be a set sum, sum of money that would  
5 be deposited, would be calculated by public  
6 broadcasting organizations pursuant to their use and  
7 then deposited together with a statement of account  
8 with what was then the Copyright Royalty Tribunal who  
9 would then redistribute the money to copyright owners  
10 who claimed that their works were used. And that was  
11 very much the model of the cable statute, cable  
12 compulsory license and the jukebox compulsory license.

13           There was a significant difference,  
14 however, Senator Mathias and the Senate did not set  
15 the rate. They would have had the rate determined by  
16 the Copyright Royalty Tribunal, but it still would be  
17 a rate, apparently, for all copyright owners, which  
18 everybody would then figure out their portion of it.  
19 If it were compositions, you would figure out how many  
20 compositions you used and periodically deposited it in  
21 the Copyright Office and the Copyright Office would  
22 allocate it among claimants. That was the Mathias

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1 Amendment or the Senate bill reflecting the Mathias  
2 Amendment.

3 Q What was actually recommended by the House  
4 and ultimately adopted by Congress?

5 A The House felt that the notion of a single  
6 universal rate paid by discrete copyright owners into  
7 a government agency for redistribution was an  
8 unnecessary intervention of government machinery.  
9 They accepted the notion of a copyright license or  
10 sometimes called a legal license, but they felt it was  
11 simply preferable to set up a procedural mechanism to  
12 encourage the parties to negotiate together, to reach  
13 voluntary agreements. If they did not reach voluntary  
14 agreements to allow the CRT, the predecessor of this  
15 organization, to set fees, but the money would still  
16 change hands on a one to one basis. It would not be  
17 deposited with a Government agency. It would be more  
18 like the mechanical compulsory license where it's a  
19 transactional, strictly transactional, but the user  
20 pays the owner and the Government is not involved,  
21 except for adjustments of the fee. That was the House  
22 version. The Conference Report adopted in all

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1 respects the House version and that became Section 118  
2 as we know it.

3 Q What was the role of the performing rights  
4 organizations such as ASCAP, BMI and SESAC to be as  
5 contemplated by Congress under Section 118?

6 A In the -- before the effective date of the  
7 law, the performing rights organizations were, in the  
8 music field, the principal spokespersons in the  
9 copyright community, objecting to a compulsory license  
10 or seeking a modification of the compulsory license,  
11 as political circumstances dictated that one was  
12 likely.

13 After the effective date of the bill, the  
14 PROs in the music licensing area became the primary  
15 players with respect to performing rights, in some  
16 cases negotiating with the public broadcasting  
17 entities as encouraged by 118 or in other cases such  
18 as with respect to ASCAP, putting their members'  
19 proposals forward and participating in the proceedings  
20 of the predecessor of this Tribunal to reach the  
21 determined rate.

22 Q Would it be fair to say that one of the

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1 themes of Section 118 as enacted by Congress was to  
2 encourage as much as possible negotiations between the  
3 performing rights organizations and the users of the  
4 copyrights without interference by Government agencies  
5 or ultimately the CRT?

6 A Yes, I think that that was sort of the  
7 hallmark, very much the hallmark of the change from  
8 the Senate bill to the House bill. It's an effort  
9 that I was closely involved with. That was when I  
10 came to Washington.

11 In fact, the version of 118 that passed  
12 and I think this provision has been deleted since  
13 simply because of housekeeping, but the version of 118  
14 that passed actually charges the parties to cooperate.  
15 It was an unenforceable bit of business, but at the  
16 beginning, copyright owners and public broadcasting  
17 shall negotiate in good faith and cooperate fully with  
18 the Tribunal. That set the tone and I think expressed  
19 well what the notion of 118 was. Get the parties  
20 talking together and then if they can't, then the  
21 Tribunal would step in and set a fee subject to  
22 criteria that were established in the report and the

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1 legislation.

2 Q Would it be fair to say that impediments  
3 to negotiated agreements were not to be encouraged, as  
4 you understand the purpose of Section 118?

5 A Yes. I mean the negotiated agreements  
6 were much the preferred model, the hoped for model,  
7 the desired model.

8 Q Was there any consideration given by  
9 Congress, as far as you can recall when Section 118  
10 was enacted or by the Copyright Office of the  
11 subsidization by the copyright owners of the  
12 noncommercial broadcasters?

13 A Yes, that was a term that was widely  
14 averted to and strongly rejected in at least three  
15 instances and perhaps more by the Congress. I cite in  
16 the testimony three occasions, first in 1974, when the  
17 Senate rejected the idea of a compulsory license and  
18 said that it was not going to be for copyright owners  
19 to subsidy public broadcasting. Second, when the  
20 Senate finally did act with a version of the revised  
21 amendment, but stated that it was acceptable because  
22 it would not subsidize broadcasting at the expense of

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1 the copyright owners. And third, when the House  
2 adopted changed version of compulsory licensing, it  
3 again repeated that this was not to be treated as a  
4 subsidy, a copyright owner subsidy to public  
5 broadcasting.

6 Q Now what was the role of the Copyright  
7 Royalty Tribunal as of 1976?

8 A In instances where there were not  
9 negotiated rates, the Tribunal was to set a rate, a  
10 reasonable rate.

11 Q Was there a substantive standard to be  
12 used in setting rates provided in the legislative  
13 history and under the statute?

14 A I think the combination of fairness and a  
15 nonsubsidy rate would seem to be the two hallmarks.

16 Q Well, the quote you use in your report at  
17 page 11 is "fair value". Do you have an understanding  
18 as to what was meant by "fair value"?

19 A I think it meant the value that would be  
20 fair to the copyright owner taking into account the  
21 realities of the marketplace, not ignoring that it was  
22 public broadcasting, but not desiring to make the

1 copyright owners pay or receive less or an increment  
2 less, and tribute to public broadcasting or to  
3 subsidize it, a fair marketplace value.

4 Q I think I'm going to stop here and ask you  
5 another question because you said it pretty much in  
6 your direct testimony. Do you have any corrections or  
7 do you affirm the testimony that you signed on  
8 September 29th?

9 A Subject to the typos, yes.

10 MR. SCHAEFFER: I have no further  
11 questions for the witness.

12 CHAIRPERSON GRIFFITH: All right. No  
13 questions?

14 MR. KLEINBERG: No questions.

15 CHAIRPERSON GRIFFITH: All right. Mr  
16 Rich?

17 CROSS EXAMINATION

18 BY MR. RICH:

19 Q One moment, if I could get my -- with the  
20 Panel's and counsels' consent, I collected several  
21 pieces of testimony from a 1975 House hearing record  
22 with which this witness will be familiar and I don't

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1 believe it's part, as yet, of the record of exhibits  
2 which ASCAP has put in on the legislative history.

3 CHAIRPERSON GRIFFITH: Mr. Rich, is it all  
4 right to have this marked for identification at this  
5 point?

6 MR. RICH: Yes, if we could. I believe  
7 we're up to 9.

8 CHAIRPERSON GRIFFITH: 9X. Thank you.  
9 It's marked for identification as Public Broadcast  
10 Exhibit 9X.

11 (The document referred to was  
12 marked for identification as  
13 Public Broadcast Exhibit No.  
14 9X.)

15 BY MR. RICH:

16 Q Mr. Baumgarten, I believe you testified  
17 that while in private practice in the 1970 through  
18 1975 period, you engaged in certain lobbying  
19 activities in relation to the proposed enactment of  
20 Section 118, is that correct?

21 A I didn't use the word lobbying and I  
22 didn't do much of lobbying. I was involved in a lot

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1 of the behind the scenes, I was a witness in that  
2 proceeding. But I was heavily involved in background  
3 negotiations, especially among the copyright owner  
4 groups and I was at readings with representatives of  
5 public broadcasting.

6 Q Yes, and this was in an effort on behalf  
7 of various clients who you were then representing to  
8 shape the ultimate form and substance of Section 118,  
9 correct?

10 A Correct.

11 Q And I believe you testified that one of  
12 the trade associations, one of the clients you  
13 represented was a trade association of songwriters  
14 known as the American Guild of Authors and Composers?

15 A Yes.

16 Q Is that called AGAC or AGAC for short?

17 A In those days it was AGAC.

18 Q I believe you've testified it has a new  
19 name today?

20 A Yes.

21 Q Remind me?

22 A Songwriters Guild.

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1 Q Thank you. Did you help AGAC formulate  
2 its position before Congress respecting Section 118?

3 A Yes. I was involved. I'll restate that.  
4 I was in meetings among members of the music community  
5 at which the music copyright owners' position was  
6 discussed. I participated in some of those meetings  
7 as a representative or a co-representative of AGAC.

8 Q Am I correct that AGAC opposed a  
9 compulsory license of copyrighted music in favor of  
10 public broadcasters?

11 A I believe that was the position of AGAC.

12 Q And if you care to look at page 922 of  
13 what's been marked as 9X, am I correct that this is  
14 testimony -- if you look at page 920, this is jointly  
15 sponsored testimony of the National Music Publishers  
16 Association and the American Guild of Authors and  
17 Composers. I take it the latter was the client we've  
18 been referring to?

19 A Yes.

20 Q If you flip a few pages to 922 in the  
21 sentence just under Roman B, pardon me, B, "compulsory  
22 licensing is unfair and unworkable", it was their

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1 view, I take it, as reflected in this testimony that  
2 the proposed compulsory license was "anathema to the  
3 creative talent of this country." Is that correct?

4 A Yes.

5 Q And if you flip back a page to page 921,  
6 the concluding sentence just in advance of Roman I was  
7 it also the case that AGAC's opposition included the  
8 view that "discrimination against the creators of  
9 American music cannot logically be written into a  
10 copyright law that is constitutionally intended to  
11 protect them merely out of consideration for such  
12 large corporate sponsors of public broadcasting as  
13 Mobil and Exxon who contribute tax deductible dollars  
14 to advertise their generosity"?

15 A That is the sentence.

16 Q And AGAC urged, did it not, that the  
17 parties in lieu of a compulsory license scheme be  
18 allowed to work out license arrangements privately,  
19 correct? In other words, just deal with one another  
20 to work out what the market would bear?

21 A AGAC as part of the music community --

22 Q Yes?

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1           A       Yes. I just would -- yes, I'd just like  
2 to make clear that this was a political process.  
3 There were times when it became apparent that  
4 something was going to pass when you then stop  
5 opposing and then you work to policy. At particular  
6 points in time, a person's political objectives may  
7 have changed.

8           Q       But at least as of the time of these  
9 hearings in 1975, this was an accurate reflection of  
10 --

11          A       I think the testimony speaks for itself.

12          Q       Yes. And finally, if you flip back to 922  
13 for a moment, the final sentence ahead of Section B,  
14 is it accurate that it was AGAC's position at the time  
15 that "no Tribunal, however wise and impartial, can  
16 establish a rate for each work of music as fairly and  
17 economically as untrammelled negotiations between the  
18 two parties directly involved"? Do you see that?

19          A       That is the sentence. I'm just double  
20 checking to make sure we're still talking about AGAC.  
21 Why don't I take your word for it.

22          Q       I believe I'm right. It's certainly my

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1 intention.

2 A It starts with my name and McMillan  
3 Harcourt.

4 Q It begins at page 920.

5 A Okay. That's NMPA and AGAC, correct, yes.

6 Q And so if I'm correct then in 1975 the  
7 client who you represented was of the view that the  
8 optimal interest of the copyright law in relation to  
9 public broadcasting's licensing of copyright music,  
10 copyrighted music, would be attained by encouraging  
11 the interested parties, the copyright owners on one  
12 side and the Public Broadcasters on the other, to work  
13 things out at the bargaining table, correct?

14 A By providing an environment where they  
15 could, yes. Removing the "for profit" limitation in  
16 that sense and dealing with the compulsory licensing.

17 Q Yes, correct?

18 A Yes.

19 Q Now you also represented in the  
20 formulation of Section 118 two book publishing  
21 concerns, is that correct?

22 A Correct.

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1 Q One was Harcourt Brace Jovanovich and the  
2 other one was McMillan?

3 A Yes.

4 Q And they too opposed enactment of a  
5 compulsory license with respect to literary works, did  
6 they not?

7 A That's correct.

8 Q And if you turn to page 911 of this  
9 testimony, first on 910 you might see that this is --  
10 what I'm referring to is labeled a joint statement on  
11 behalf of a number of groups, including Harcourt Brace  
12 and McMillan, do you see that?

13 A Yes, I see it.

14 Q And were you also involved in either the  
15 preparation of this testimony or at least the  
16 formulation of legal thinking that lay behind it?

17 A I was and I was present at the delivery of  
18 the testimony.

19 Q Okay, and if you turn to page 911, please,  
20 under paragraph 3, in the third paragraph, was it an  
21 accurate reflection of the views of Harcourt Brace and  
22 McMillan, among the other sponsors of this statement,

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1 that "there is no reason to inflict the regressive  
2 effects of compulsory licensing on authors of books,  
3 poetry, articles and short stories or their  
4 publishers"?

5 A That's a correct statement.

6 Q Is it also correct that you distinguished  
7 or this group distinguished the plight of literary  
8 authors from composers in arguing that turning to page  
9 914, second full paragraph, that "their economic  
10 situation is drastically different from that involved  
11 in licensing the performance of music"? Do you see  
12 that?

13 A No, I don't.

14 Q I'm under No. 8 on page 914, second  
15 paragraph, second sentence.

16 A "The economic situation."

17 Q Yes, "the economic situation" referring to  
18 these literary authors is reported to be "drastically  
19 different", yes, from that involved in licensing the  
20 performance of music?

21 A Yes. Yes, it says "the economic situation  
22 is drastically different from that involved in

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1 licensing the performance of music."

2 Q And does one interpret that sentiment, at  
3 that time, by two of the clients you represented as  
4 their implicit or explicit support for the notion of  
5 compulsory licensing as to the public performance of  
6 music?

7 A I don't think so. I would have to read  
8 the statement as a whole. I don't believe that they  
9 were, in any way, supporting the notion that the  
10 Mathias Amendment was good for music and bad for them.  
11 What they were saying was it was bad for them and then  
12 the arguments that could be made with respect to music  
13 don't apply to them. Given the fact, for example, that  
14 McMillan at the time owned G. Sherman and there were,  
15 of course, other ownerships and myriad other factors,  
16 I don't believe the literary copyright owners were  
17 saying okay, do it for music, but don't do it for us.  
18 I think they were saying don't do it for us and leave  
19 the music to be argued by the proponents of, the  
20 advocates for the music copyright owners.

21 Q Now you thereafter, that is, thereafter  
22 meaning some time after 1975, the following year, as

1 I recall, went on to service at the Copyright Office,  
2 is that correct?

3 A Yes, I did.

4 Q Where you served as General Counsel?

5 A Correct.

6 Q And who was the Register of Copyright at  
7 that time?

8 A Barbara Ringer.

9 Q Was she your boss, effectively?

10 A She was.

11 Q What was Ms. Ringer's view of the proposed  
12 compulsory license provisions of Section 118?

13 A She didn't like them.

14 Q In fact, she opposed, if you'd turn to  
15 page 976 of this compendium, please?

16 (Pause.)

17 I take it, if you look at the last full  
18 paragraph on page 976, three lines down, that she  
19 opposed a broad compulsory license as "not justified  
20 or necessary." Is that correct?

21 A I can't find it here, but that rings a  
22 bell, yes.

1 Q And it was her view, was it not, that in  
2 testimony you'll find slightly up the page, "the  
3 copyright system can fulfill its objective of  
4 promoting the progress of science and the useful arts  
5 only if the exclusive rights of authors to control use  
6 of their works and receive payment on a negotiated  
7 basis are respected", correct?

8 A That's what she says.

9 Q That's consistent with your recollection  
10 of her views, is it not?

11 A Yes, it is.

12 Q And you functioned as her General Counsel,  
13 is that correct?

14 A That's correct.

15 Q Now since resuming private practice, Mr.  
16 Baumgarten, as your testimony reports, you've  
17 represented various trade associations interested in  
18 copyright matters, correct?

19 A Correct.

20 Q And that's included the Association of  
21 American Publishers?

22 A That is correct.

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1 Q And that's an organization which  
2 represents the interests of United States based book  
3 publishing companies, correct?

4 A That is correct.

5 Q And they are major owners of copyrighted  
6 materials, are they not?

7 A That is correct.

8 Q And another of your clients is the Motion  
9 Picture Association of America. That's the major  
10 motion picture studio, among others, correct?

11 A That is correct.

12 Q And they too are major owners of  
13 copyrighted materials, is that true?

14 A Yes.

15 Q And you also list the International  
16 Intellectual Property Alliance, correct?

17 A That is correct.

18 Q Am I correct that the IIPA is a coalition  
19 of industries that create, produce and distribute  
20 copyrighted materials and includes among its  
21 membership the Association of American Publishers, the  
22 National Music Publishers Association, the Recording

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1 Industry Association of America and several software  
2 associations?

3 A That is correct.

4 Q And finally you list something called the  
5 International Publishers Copyright Council. Can you  
6 tell me what that is?

7 A That is essentially the copyright policy  
8 arm of something called the International Publishers  
9 Association which is a group comprised of the various  
10 national book publishers associations, it's like the  
11 AAP in the United States. And another organization  
12 called the National Group of STM Publishers which are  
13 the various publishers of scientific, technical and  
14 medical journals. International Publishers Copyright  
15 Council is sort of a joint copyright policy entity for  
16 that --

17 Q And would it be fair to suggest that a  
18 fundamental purpose of that organization is to  
19 preserve and protect the copyright interests of the  
20 constituent members of the organization?

21 A Yes.

22 MR. RICH: At this time I'd like to offer

1 what's been marked as 9X into evidence. It's part of  
2 the legislative history of the Act.

3 MR. SCHAEFFER: I have no objection.

4 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

5 MR. KLEINBERG: I have no objection.

6 CHAIRPERSON GRIFFITH: All right, PB  
7 Exhibit 9X is admitted without objection.

8 (The document referred to,  
9 having been previously marked  
10 for identification as Public  
11 Broadcast Exhibit 9X was  
12 received in evidence.)

13 BY MR. RICH:

14 Q Mr. Baumgarten, reaching back a few years,  
15 do you recall your firm and mine collaborating on a  
16 brief to the United States Supreme Court involving the  
17 fair use of unpublished materials?

18 A I recall you and I collaborated on that.

19 Q Yes, indeed. It was a case styled Henry  
20 Holt & Company against New Europe Publications  
21 International, yes?

22 A Yes.

1 Q I'd like to just read you three paragraphs  
2 from the brief that our firms jointly crafted and ask  
3 you whether the sentiments reflected there fairly  
4 reflect your view of the balance struck, sought to be  
5 struck by the Copyright Office.

6 MR. SCHAEFFER: I only object to -- if  
7 you're asking what his personal view is as an expert  
8 or whether or not it's what he was arguing on behalf  
9 of the client. There may be a difference and I don't  
10 want the witness to be misled.

11 MR. RICH: I would accept that and ask  
12 whether Mr. Baumgarten appears here as an expert  
13 believing that what I'm about to read is a fair  
14 depiction of what the copyright law balancing process  
15 entails. And if you want to read along or otherwise  
16 I have it and then see it, I'll be happy to show it to  
17 you.

18 "Our nation's scheme of copyright  
19 protection deriving from Article 1, Section 8 of the  
20 United States Constitution and from a succession of  
21 copyright law enactments, most recently the 1976  
22 Copyright Act, is designed to encourage creativity by

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1 offering limited protection to literary and artistic  
2 expression, thereby assuring contributors to the store  
3 of knowledge a fair return for their labors." Citing  
4 Harper & Rowe Publishers v. Nation Enterprises and  
5 20th Century Music v. Aiken.

6 "At the same time, however, as this Court"  
7 -- meaning the Supreme Court -- "has observed, the  
8 privileges granted by copyright are neither unlimited  
9 nor primarily designed to provide a special private  
10 benefit." Citing Sony v. Universal Studios.

11 "Rather, the public interest in access to  
12 information and knowledge must be properly  
13 accommodated. A delicate balance must therefore be  
14 struck between protecting the works of copyright  
15 owners and permitting later artists and authors to  
16 build upon these works. Both interests are  
17 fundamental to the purpose of copyright." End of  
18 statement.

19 Do you agree with those sentiments of  
20 ASCAP's testifying witness here?

21 THE WITNESS: I'd like to see it.

22 MR. SCHAEFFER: Can I see a copy?

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1 MR. RICH: Sure. Or I can look at John's.

2 (Pause.)

3 MR. SCHAEFFER: This is just the page.  
4 I'd like to look at the -- this tells me everything I  
5 need to know, that's fine.

6 THE WITNESS: First, when I referred  
7 before to briefs you and I had written together, I was  
8 referring to several we'd done over the years. My  
9 name is not on this one for some reason or another, so  
10 perhaps it's one I didn't work on -- but I'm sure I  
11 had something to do with it.

12 And the context of this statement as well  
13 was an attempt to reach common understanding between  
14 the Copyright Committee of the AAP and the --  
15 Committee of the AAP, there was a common statement in  
16 the Supreme Court, so there was one balancing, some  
17 measure of advocacy serving the purpose.

18 But looking at me as an individual expert  
19 and apart from the context of the case, I think this  
20 is an accurate statement of the Copyright Act. I  
21 quibble sometimes over the use of the word "primary  
22 purpose of copyrighters to encourage creation" because

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1 of the tendency occasionally to take that and to make  
2 some kind of primary purpose test to try to figure out  
3 how much is needed to incense somebody and once you go  
4 beyond that point of incensing somebody, you don't  
5 have to provide the reward any more. I think what  
6 Congress did and what Congress intended and what the  
7 framers intended was the whole system of incensing is  
8 the answer. But the general statements here that  
9 there has to be a balance in the Copyright Act, that  
10 the purpose of copyright is to insure the creation of  
11 additional works, including the first work, I would  
12 stand by that.

13 BY MR. RICH:

14 Q Thank you. Now I take it, Mr. Baumgarten,  
15 that you do not understand this proceeding to involve  
16 the issue of whether Section 118 should be repealed,  
17 correct?

18 A I don't know whether that's subject to the  
19 proceeding. I do know it's not the subject of my  
20 testimony.

21 Q Do you have any sense whatsoever that  
22 among the tasks before this Panel and/or the

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1 jurisdiction of this Panel is included the charge to  
2 consider whether 118 should be repealed?

3 A I'm not aware of that.

4 Q In light of this, I'm wondering the  
5 relevance of your testimony at pages 7 to 9 of your  
6 written testimony, if you wouldn't mind looking at it,  
7 to the effect that "a fundamental aspect of American  
8 copyright law" entails the right of a copyright owner  
9 "to deny permission" to use its works and referencing  
10 the supposed aversion of U.S. copyright law as well as  
11 "copyright law throughout the world" to compulsory  
12 licensing.

13 Can you tell me --

14 A What page? It's not page 7 to 9 of mine.

15 Q It may have been paragraph 7 to 9. I  
16 misspoke.

17 (Pause.)

18 A It's paragraph 9.

19 Q I beg your pardon. It's really the gist  
20 of paragraph 7 through 9.

21 A Yes.

22 Q My question is what do you believe the

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1 relevance of those paragraphs to this proceeding to  
2 be?

3 A I believe that said in context, as is said  
4 in the caption, everything that happened later. That  
5 there was only one compulsory license. It was  
6 extended among controversy among the parties. I  
7 believe it's an accurate reflection of the place of  
8 compulsory licensing in the Copyright Act, and as I  
9 believe the statement says in paragraph 1, I was asked  
10 to opine as to background information concerning the  
11 Copyright Act of 1976, its history and its application  
12 to the issues, Section 118, its relation to the  
13 copyright law in general, and other compulsory license  
14 provisions that Congress intended. It was my purpose  
15 in stating paragraph 7 to let the Judges know what I  
16 thought was pertinent to them and that was part of a  
17 small way the copyright operates and not the general  
18 one in the system.

19 Q And perhaps that answer presages my next  
20 question which is you certainly don't understand 118  
21 to incorporate the premises of paragraphs 7 through 9  
22 insofar as those paragraphs deal with the right of the

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1 copyright owner to deny permission to use his or her  
2 works. Is that correct?

3 MR. SCHAEFFER: The paper is hitting the  
4 microphone.

5 THE WITNESS: Sorry. The existence of  
6 Section 118 is an exception to the statement in  
7 paragraph 7.

8 BY MR. RICH:

9 Q Yes.

10 A As it is an exception to paragraph 8 which  
11 is precisely what the paragraph states, "unless  
12 authorized by the owner, excused by some particular  
13 exemption or license pursuant to other provisions of  
14 the copyright law."

15 Q So you would agree that Congress was  
16 entitled and indeed did, to make a contrary  
17 determination as to what you term a "fundamental  
18 aspect" of copyright law in relation to public  
19 broadcasting's use of certain copyrighted material?

20 A Where is that found in my testimony?

21 Q Paragraph 8 of your testimony, page 4.

22 A That is correct. As I stated in paragraph

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1 6 there are exceptions to it.

2 Q And Section 118 is an exception, correct?

3 A 118 is an exception.

4 CHAIRPERSON GRIFFITH: Before you go any  
5 further, Mr. Rich, since you did quote extensively in  
6 this excerpt perhaps we should mark it?

7 MR. RICH: I'm happy to.

8 CHAIRPERSON GRIFFITH: Would you give a  
9 copy to --

10 MR. RICH: Sure.

11 MR. SCHAEFFER: I'd like the whole brief  
12 to be marked. I think you'll see the context in which  
13 the statement is made. I'll get to this on --

14 MR. RICH: Sure. With Panel's consent,  
15 we'll supply copies tomorrow, physical copies of the  
16 entire brief?

17 CHAIRPERSON GRIFFITH: That will be fine.  
18 This will be PB Exhibit 10X.

19 (The document referred to was  
20 marked for identification as  
21 Public Broadcast Exhibit 10X.)

22 THE WITNESS: Did we win?

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1 (Laughter.)

2 MR. RICH: No comment.

3 BY MR. RICH:

4 Q Now if you take a look at paragraph 11 of  
5 your testimony, please.

6 A Yes.

7 Q You there describe the rationale for the  
8 development of ASCAP, namely the inability of  
9 copyright owners to "learn of and license all  
10 performances on their own." Is that correct?

11 A Yes, I stand by paragraph 11.

12 Q When was ASCAP organized approximately, if  
13 you know?

14 A I believe it was 1946.

15 Q And what were the primary users and uses  
16 which the ASCAP blanket license was designed to secure  
17 license arrangements for?

18 A I believe it was saloons --

19 Q Bars, taverns, saloons, yes. What study,  
20 if any in connection with your expert testimony here  
21 have you made of the need today for blanket licenses  
22 to deal with the clearances of music on the kinds of

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1 prerecorded television programming features on PBS?

2 A I've made none.

3 Q None?

4 A None.

5 Q Now in paragraph 12 of your testimony, you  
6 talk about the fact that ASCAP and BMI and the  
7 composers and music publishers they represent have  
8 given up the right to refuse to license, correct?

9 A They voluntarily have given up.

10 Q Voluntarily. And I take it you agree that  
11 that came about independently of Section 118, correct?

12 A Yes.

13 Q Now in your experience as a copyright  
14 lawyer, how usual or unusual is it that an entire  
15 industry or virtually an entire industry of copyright  
16 owners would be subject to such a license constraint  
17 as you are there referring to?

18 A A constraint being not to refuse a license  
19 and submit it to a rate court?

20 Q Correct.

21 A This is the only one I'm familiar with.

22 Q Script writers don't have any such

1 mechanism, do they?

2 A I don't believe so.

3 Q Choreographers?

4 A No sir.

5 Q Anybody else who has a performing right  
6 under the Act?

7 A No.

8 Q What is your understanding of why music  
9 composers and publishers have been so singled out?

10 A I was only referring here to the existence  
11 of that. The Justice Department felt it was  
12 appropriate. I did not conduct an investigation of  
13 why it was felt to be appropriate.

14 Q Now you do agree that the rate court  
15 mechanism that we've been referring to and will  
16 continue to refer to operate as a form of compulsory  
17 license, do they not?

18 A A combination of the obligation to license  
19 any one of them and recourse to the rate court, if  
20 there's a dispute as to fairness, ends up suspending  
21 the right to say no and if that's the way you define  
22 compulsory license, yes, it's similar to that.

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1 Q And anyone who chooses to license his or  
2 her works through ASCAP or BMI suspends, as you would  
3 term it, that right to say, is that correct?

4 A That's correct. I think there are under  
5 the ASCAP license, I'm not sure whether under the BMI  
6 there are certain reservations where even areas  
7 otherwise licensed within the scope of small rights.  
8 I just seem to recall this historically. There were  
9 some small exemptions where you can put the  
10 composition on the list of something. It can be  
11 withdrawn, but apart from that to answer your  
12 question.

13 Q You're making reference to the right to  
14 limit access to certain works in the repertoire under  
15 certain unusual conditions, some -- we might agree,  
16 arcane provision that dates back many years?

17 A There was some provision of copyright  
18 law, L-O-R-E, tells me that exists, but subject to  
19 that, it is -- has the appearance of operating as a  
20 compulsory license. It's different because in a true  
21 compulsory license from Day 1, the copyright owner,  
22 the creator, doesn't have the right to say no. In

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1 this situation from Day 1, the creator, composer,  
2 lyricist had the right to say no and voluntarily gave  
3 that up. It's only after voluntarily giving that up  
4 that this degree of lack of choice took over. I think  
5 that's a significant difference, at least in  
6 principle.

7 Q Is it a realistic difference from the  
8 standpoint of any composer who stands to earn money  
9 from the exploitation of his or her copyrights?

10 A I think there were composers affiliated  
11 with SESAC and with the Italian Book Company and  
12 others who are nonaffiliated that hadn't made that  
13 choice.

14 Q A fraction of one percent, correct?

15 A I don't know the figures.

16 Q Now in paragraph 15 of your testimony, you  
17 cite two precedents, Buffalo Broadcasting v. ASCAP and  
18 CBS v. ASCAP which are claimed to bear on "the manner  
19 that commercial broadcasters and others" pay for music  
20 performing arts. Do you see that?

21 A Yes.

22 Q Can you tell me how those decisions bear

1 on the manner that commercial broadcasters and others  
2 pay for music performing arts?

3 A I use those citations, you may be parsing  
4 it tighter than I intended. If I led you to do that,  
5 I apologize it. I use those citations only as general  
6 descriptions to -- inexpert audience as to what  
7 happens in the commercial broadcasting field with  
8 respect to public broadcasting. The best of my  
9 recollection I did not mean anything more than that.

10 Q Did it occur to you and if so, did you  
11 consciously determine not to list the more recent Rate  
12 Court authority which has explicitly had a bearing on  
13 the manner in which commercial broadcasters have been  
14 licensed by ASCAP?

15 A I didn't consider it. At that point, I  
16 don't believe I was reading "the manner that" as  
17 tightly or as sensitively as you are. I wanted  
18 something that would give somebody without experience  
19 in licensing, performing rights and the commercial  
20 royalty a handy place to look for it. And these two  
21 cases give pretty extensive descriptions.

22 Q These two cases happen to be anti-trust

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1 jurisprudence, correct?

2 A Yes, they are.

3 Q Not Rate Court jurisprudence?

4 A That's true.

5 Q Now in paragraph 17 of your testimony --

6 MR. RICH: Let me pause a moment to  
7 indicate that I don't think I will make 5, if  
8 everybody could stay a bit, I probably could push to  
9 finish not too much later than that?

10 MR. SCHAEFFER: Fine with me. I have a  
11 little Redirect anyway.

12 MR. RICH: But Panel's option. I have a  
13 ways to go.

14 BY MR. RICH:

15 Q Paragraph 17 of your testimony, Mr.  
16 Baumgarten.

17 A Yes.

18 Q You state that during negotiations over  
19 Section 118, the Public Broadcasters "sought to retain  
20 as much of their revenue as possible." Do you see  
21 that?

22 A Yes, I do.

1 Q Is there anything wrong with that?

2 A No, there's not.

3 Q You later cite "the recognition" that  
4 Public Broadcasters use music "far more" than do  
5 commercial broadcasters. Do you also see that?

6 A I do.

7 Q On what data is that statement based?

8 A I believe the statements in this paragraph  
9 are I drew from sitting down and reading the 1975  
10 hearings, jotting down notes. They all appear either  
11 literally or necessarily implied from the 1975  
12 hearings.

13 Q Do you recall specifically from that  
14 hearing record whether any data were proffered by  
15 anybody demonstrating the degree of intensity of usage  
16 of copyrighted music by Public Broadcasters?

17 A I believe there may have been some  
18 idiosyncratic examples, rather than co-tabular  
19 collections. I don't recall anything.

20 Q Have you examined any current music use  
21 data that bears on this topic?

22 A I have not.

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1 Q Now you conclude paragraph 17 with the  
2 assertion that Public Broadcasters "in effect" "argued  
3 for subsidization of their operations through the  
4 copyright law."

5 A Yes.

6 Q Now I've reviewed the Public Broadcasters'  
7 testimony from that period, Mr. Baumgarten, and I  
8 don't see statements to that effect. Is this your own  
9 interpretation, I take it?

10 A It's mine and I believe that of at least  
11 three House and Senate Committees, I believe, the  
12 conclusion that they drew and the one that I drew was  
13 similar that the argument was for subsidization in the  
14 sense that public broadcasting use of music should  
15 either bear no payment in which case it which it would  
16 subsidized in kind by the copyright owners of the  
17 music rights themselves, or a partial subsidy in the  
18 sense that something less than fair value would be  
19 contributed. That was my reading. I believe that  
20 reading was shared by the Members of Congress and  
21 Members of the Senate who acted in this.

22 Q Do you believe that the Public

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1 Broadcasters believe and articulated a position that  
2 they should pay something other than "fair value" as  
3 they understand that concept for the music they would  
4 use?

5 A I believe their definition of fair value  
6 would have included a notion of subsidization and if  
7 you accept that expanded definition that's what I  
8 believe.

9 Q Now you agree that first and foremost  
10 Section 118 expresses a preference for voluntary  
11 negotiations, is that correct? I believe that was the  
12 gist of your testimony?

13 A Yes.

14 Q The rates that the parties themselves may  
15 agree upon are far preferable to those a Tribunal  
16 might establish, correct?

17 A Yes.

18 Q And so one of your clients testified in  
19 1975 as we recounted earlier, yes?

20 A Yes.

21 Q And such voluntary agreements in your  
22 terms "supersede" CRT or CARP determined rates. Is

1 that right? That's paragraph 24 of your written  
2 testimony?

3 A Yes.

4 Q And that's because they're far more market  
5 approximating, is that why?

6 A No. Not necessarily.

7 Q Why?

8 A Because they were reached between the  
9 parties. Period. I'm not sure what market  
10 approximating means. They prefer it because it's not  
11 an imposition at any government hand. It's what the  
12 parties want. It's sort of American. The parties  
13 agree to it, that's better than having somebody else  
14 dictate.

15 Q And sitting here today, do you know of any  
16 better say to determine the fair value of intellectual  
17 property rights between parties than the result of an  
18 arm's length negotiation between the parties  
19 themselves?

20 A No, in the general sense. Obviously if  
21 it's fair value as used in the tax code, you want an  
22 accountant or something like that, but fair value in

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1 the sense of we're speaking of, I think arm's length  
2 negotiations is the best way.

3 Q And 118 embraced that concept, generally,  
4 did it not?

5 A 118 encouraged that concept to permit it  
6 to occur.

7 Q And encouraged the parties between them to  
8 arrive at reasonable fees without the incumbrance or  
9 the burden of invoking this kind of proceeding,  
10 correct?

11 A That is correct.

12 Q And indeed, the preference for voluntary  
13 license agreements is further reflected in 118's  
14 invitation to the CRT originally and that of the CARP  
15 to consider voluntary agreements reached between  
16 Public Broadcasters and copyright owners in making its  
17 own determinations, correct?

18 A That is correct.

19 Q So that in this proceeding, am I correct,  
20 sir, that the CARP has been expressly invited by the  
21 Congress to consider prior voluntary agreements  
22 reached between public broadcasting and ASCAP and BMI

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1 in making its judgment here?

2 MR. KLEINBERG: Objection. It misstates  
3 118(b).

4 CHAIRPERSON GRIFFITH: I didn't hear you.

5 MR. KLEINBERG: It misstates 118(b) as  
6 he's reading from the statute. He's not reading it  
7 correctly.

8 MR. RICH: The witness is free to correct  
9 me, if he thinks I'm wrong. I don't agree that I am  
10 misreading from the statute.

11 CHAIRPERSON GRIFFITH: Well, wait just a  
12 minute. Tell me how he's misreading it.

13 MR. KLEINBERG: 118(b)(3) says "in  
14 establishing such rates and terms the Librarian of  
15 Congress may consider the rates for comparable  
16 circumstances under voluntary license agreements  
17 negotiated as provided in paragraph 2." That is not  
18 what Mr. Rich said. He referred to license agreements  
19 between Public Broadcasters and some specified party.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. KLEINBERG: He used the word "prior"  
22 as well and it doesn't appear there.

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1 MR. RICH: If I may, I think this is  
2 entirely permissible cross and I think this is verging  
3 on inappropriate coaching of the witness. I think  
4 this witness who knows as much, allegedly, about the  
5 history and provisions as anybody is more than capable  
6 of answering the question that I posed.

7 CHAIRPERSON GRIFFITH: Well, he is an  
8 expert witness, but I think if you're going to quote  
9 from the statute, Mr. Rich, you should do it  
10 accurately.

11 MR. RICH: I didn't -- with respect, sir,  
12 I didn't quote. I characterized and asked him if he  
13 agreed with my characterization.

14 JUDGE DREYFUS: I think we just ought to  
15 pick it up where we left off.

16 MR. RICH: Thank you.

17 JUDGE DREYFUS: Say it again. Is that all  
18 right?

19 CHAIRPERSON GRIFFITH: Ask it again.

20 BY MR. RICH:

21 Q Am I correct, Mr. Baumgarten, that reading  
22 118(b)(3) in conjunction with its reference back to

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1 subparagraph 2, that this CARP has been expressly  
2 invited by the Congress to consider prior voluntary  
3 agreements reached between Public Broadcasters and  
4 ASCAP and BMI?

5 A I'm a little -- I can't ignore the fact  
6 that the point has been made. Whatever 2 refers to,  
7 3 permits consideration of. I'm not sure about the  
8 time element. When I agreed with you earlier, I  
9 viewed it as a paraphrase of the statute that you  
10 spoke very quickly, it sounded pretty much like what  
11 I thought it was. If you're telling me precisely what  
12 the statute says, it says consider the rates for  
13 comparable circumstances of the voluntary agreements  
14 negotiated as provided in paragraph 2. Paragraph 2  
15 says license agreements voluntarily negotiated at any  
16 time shall be given effect.

17 Q Do you have an understanding that "at any  
18 time" excludes the past?

19 A Colloquially, no, within this provision  
20 I've not considered it at all.

21 Q So you have no opinion?

22 A I have no opinion.

1 Q Now if you'd look at paragraph 43 of your  
2 testimony, please --

3 JUDGE GULIN: I'm sorry, you don't have an  
4 opinion as to whether that language implies that  
5 Panels look at past agreements between parties?

6 THE WITNESS: Not without thinking about  
7 it.

8 (Pause.)

9 It certainly seems broad. And as I said,  
10 the colloquial meaning of it any time is any time. If  
11 there is an issue with respect to agreements  
12 voluntarily negotiated in 1978 and the proceeding  
13 occurred seven years later, if there's an argument  
14 that this is segmented to one of those, if there's  
15 support to that in the legislative history which I  
16 haven't examined, I can't out rule it. I just haven't  
17 focused on the question as a legal matter. As a  
18 colloquial matter "at any time" means, I would think  
19 at any time.

20 BY MR. RICH:

21 Q Mr. Baumgarten, when you assisted in the,  
22 I assume, the final drafting of the Copyright Act, was

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1 it your style to put a lot of colloquial language in  
2 the Act?

3 A I'm trying to answer that. It was not my  
4 style. I was not the only draftsman. Many cases  
5 under the Copyright Act, if you look at Section 111,  
6 you'll see a typical example. The parties' political  
7 deals were such that we in Washington didn't want to  
8 touch them. In other cases, we scrubbed them pretty  
9 good. I can't react specifically to -- I think  
10 without being elitist, I do try to be less colloquial  
11 and more precise in drafting.

12 Q And you were the General Counsel of the  
13 Copyright Act at the time this Act became enacted, is  
14 that correct?

15 A I was.

16 Q Now if you look at paragraph 43 of your  
17 testimony, please, I'm curious about your choice of  
18 language. At the bottom of page 21 over to page 22,  
19 you say "the CARPs are to consider if no agreement is  
20 reached by the parties, 'rates for comparable  
21 circumstances under voluntary license agreements  
22 negotiated' ". Now why did you close the quote and not

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1 complete in context what 118(b)(2) says which is  
2 "voluntarily negotiated at any time between one or  
3 more copyright owners and one or more public  
4 broadcasting entities"?

5 A It seemed to me to irrelevant to the point  
6 I was making. I wasn't making the point that focused  
7 on time. I was trying to make it short. I did not  
8 have a particular reason for excluding that.

9 Q So your reason was not to suggest  
10 improperly, I take it, if that were the suggestion,  
11 that 118(b)(3) invites this Panel to examine, for  
12 example, ABC Television Network's prior license  
13 agreements with ASCAP. Correct, that wasn't your  
14 intention?

15 A My intention was just to say that no  
16 agreement was reached, rates were comparable  
17 circumstances under voluntary license agreements  
18 negotiated would be referred to. I was not thinking  
19 in terms of time. I didn't realize it was an issue  
20 until I walked in this room today.

21 Q But forgetting for a moment what your  
22 interpretation of the words "at any time" is, I take

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1 it there is no ambiguity in your mind under 118(b) (2)  
2 that the voluntary agreements referred to are those  
3 between one or more copyright owners and one or more  
4 public, as opposed to commercial, broadcasting  
5 entities, correct?

6 A Can I go back to the statute?

7 Q Please.

8 (Pause.)

9 A 118, what is it?

10 Q (b) (2).

11 A The sentence I was paraphrasing here reads  
12 in full, "negotiated at any time between one or more  
13 copyright owners and one or more public broadcasting  
14 entities."

15 Q Correct, and so your testimony was not  
16 meant to suggest, I take it, in paragraph 43, that the  
17 statute at least, explicitly invites the CARP to  
18 consider voluntary license agreements other than those  
19 entered into between public broadcasters and one or  
20 more copyright owners, correct?

21 A It would be more accurate to say that  
22 sentence which I shortened, does not specifically

1 invite.

2 Q I'm asking you though your interpretation  
3 as a copyright law expert who was General Counsel to  
4 the Copyright Act at the time this was enacted,  
5 whether you read Section 118(b)(2) explicitly to  
6 invite a CARP --

7 A I do not, did not then, do not read now,  
8 118(b)(2) to -- that sentence to invite consideration  
9 of anything other than the agreements it refers to.  
10 That does not mean that -- because I think I refer  
11 elsewhere in this agreement, consideration of why the  
12 class of agreements. This sentence says what it says.  
13 I know I was not intending to change it.

14 Q Your voice is trailing.

15 A I was not intending to change the meaning  
16 of the sentence to which I was paraphrasing.

17 Q Is there any place in Section 118 in its  
18 language that expressly invites this Panel to look to  
19 ASCAP's or BMI's prior voluntary agreements with  
20 commercial, as opposed to noncommercial broadcasters?

21 A I think the answer is -- explicitly refers  
22 to commercial broadcasters?

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1 Q That's my question.

2 A The answer to that is no. Permits  
3 references to those. I think the answer is yes.

4 Q Where do you derive that from?

5 A Give me a minute.

6 (Pause.)

7 I'm looking at the old 1976 version. "The  
8 CRT shall proceed on the basis of the proposal  
9 submitted to it, as well as any other relevant  
10 information. The CRT shall permit any interested  
11 party to submit relevant information to such  
12 proceedings."

13 Q Anything else that you would cite for that  
14 proposition?

15 A Other -- other than -- not in -- as  
16 opposed to case law or final -- the final rules. I  
17 think in case law that was -- there may be some  
18 legislative history which gives broad encouragement to  
19 consider other agreements as well, but I'm not looking  
20 at that now.

21 Q In paragraph 44 of your testimony, you  
22 indicate that, "Nothing in either the text or history

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1 of the Copyright Royalty Tribunal Reform Act of 1993  
2 changed in any fashion the previous key legislative  
3 decisions" -- second bullet -- "to provide for the  
4 consideration of voluntary license agreements  
5 negotiated pursuant to 118 and others, in any setting  
6 of rates and terms."

7 Now, focusing on the "and others," is the  
8 basis for that assertion the several passages you  
9 cited me to?

10 A Yes.

11 Q Nothing else, correct?

12 A Nothing else in the statute. I don't  
13 recall whether I had referred to anything else in  
14 legislative history, or whether I had in mind here the  
15 first -- the final ruling in '78 as exemplifying or  
16 interpreting the key legislative decisions. I do not  
17 recall at this time.

18 I believe the "and others" phrase here was  
19 a reflection of the other relevant information that  
20 was --

21 JUDGE DREYFUS: I'm sorry. I can't hear  
22 you.

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1 THE WITNESS: The reflection of the so-  
2 called -- of the "other relevant information"  
3 provisions of the statute.

4 MR. RICH: Let me just pause again to  
5 advise the Panel that I've got about, well, 15 or 20  
6 minutes at least. I don't know whether --

7 MR. SCHAEFFER: Whatever you say. We  
8 don't hear anybody complaining.

9 MR. RICH: Okay.

10 JUDGE DREYFUS: I don't mind.

11 MR. SCHAEFFER: Unless somebody wants to  
12 take a break. I know Mr. Baumgarten has been on the  
13 stand a while and --

14 MR. RICH: Jon, do you want to take a  
15 break?

16 THE WITNESS: No.

17 CHAIRPERSON GRIFFITH: Do you want to take  
18 a break? Okay.

19 MR. RICH: Press ahead?

20 BY MR. RICH:

21 Q Mr. Baumgarten, does anything in  
22 Section 118 prevent or discourage the parties from

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1 bargaining hard with one another?

2 A No.

3 Q Does anything in Section 118 prevent ASCAP  
4 or BMI from seeking to obtain the fair market value of  
5 their members' works in their negotiations with public  
6 broadcasters?

7 A It doesn't stop anyone from negotiating  
8 towards that. The imposition of an organization,  
9 whether it's a CRT or the CARP, poses the danger that  
10 if it proceeds in a fashion that is other than what  
11 Congress intended, there would be an impediment to  
12 fair value.

13 Q I'm not sure I understand that last  
14 answer. Can you say it in a maybe slightly different  
15 way?

16 A I'm not sure I can, but to help you I will  
17 try. The danger that many copyright owners feel of a  
18 traditional compulsory license -- that is, the market  
19 -- the value is set by Congress. One of the reasons  
20 that has always scared the copyright owners is as a  
21 result of the political process, the rate never comes  
22 out of Congress of anything reasonably resembling a

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1 fair market rate.

2 When you don't set the rate, that danger  
3 is eliminated. But as long as you give somebody other  
4 than the players the ability to set the rate -- and  
5 this is not a personal aspersion on you gentlemen --  
6 and you may be hopefully immunized from political  
7 pressures, you are subject to both -- then to  
8 arguments of counsel on both sides.

9 And if your interpretation of your  
10 statutory charge is incorrect, there is a danger to  
11 the copyright owner acquiring a fair value for its  
12 composition. But that's what I --

13 Q I take it you would have similar concerns  
14 about imposition of a third party mechanism such as a  
15 rate court as well having possible distorting effects  
16 on negotiations, true?

17 A It depends. Well, yes, any third party  
18 could distort something. I'm not aware of it and  
19 haven't participated in proceedings before the rate  
20 court, arguing over what their criteria or  
21 consideration should be. I have only been asked to  
22 address it with respect to this proceeding.

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1           Q       How many times since enactment of  
2 Section 118 has the compulsory license mechanism been  
3 invoked as the ASCAP, BMI, or SESAC fee setter? How  
4 many times has the mechanism been formally invoked?

5           A       As ASCAP, BMI, or SESAC -- I may be -- I  
6 think it's two, because I think the third one was  
7 nonaffiliated stations.

8           Q       I'm aware of one in 1978 as to ASCAP.  
9 What was the second -- I assume that's one that you  
10 have in mind?

11          A       Yes, and this one.

12          Q       And now this one.

13          A       Yes.

14          Q       So my question should have been prior to  
15 the instant one, there has been once before?

16          A       Well, there was an intervening one, and  
17 I'm not sure of the complete breadth of it. But there  
18 was an intervening proceeding.

19          Q       Did you conclude from the fact that at  
20 least from 1978 until the instant proceeding there has  
21 not been any other such proceedings that market was  
22 working at least reasonably well, as the copyright law

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1 intended it to?

2 A I think there were --

3 MR. SCHAEFFER: I don't know what basis he  
4 would have -- I mean, he can do it, but it has nothing  
5 to do with his expertise on what he has testified to.

6 CHAIRPERSON GRIFFITH: Mr. Rich?

7 MR. RICH: I think this is well within the  
8 scope of his proffered testimony.

9 CHAIRPERSON GRIFFITH: Can you answer the  
10 question?

11 THE WITNESS: I could try.

12 CHAIRPERSON GRIFFITH: Go ahead.

13 THE WITNESS: I think there are a lot of  
14 reasons things don't happen. I had mentioned earlier  
15 that although the copyright owners believed they had  
16 a strong case for proceeding against Public  
17 Broadcasting before 1978, the suit -- the suit was not  
18 filed because of the fear of political repercussions.  
19 That's not the only time that has happened.

20 The book publishers didn't want to sue  
21 photocopying because of that until Williams & Wilkins  
22 went off and did what -- what it felt like doing. I

1 think in this sentence, I'm not saying it is the case.  
2 It is conceivably the case that concern with  
3 allocation of fees, priorities during the year,  
4 upsetting the Congress, getting a wrong result --  
5 there could be a lot of reasons why nothing happened  
6 other than in these two cases, or it could be they  
7 were satisfied. I just don't have any basis for  
8 guessing.

9 BY MR. RICH:

10 Q You have no opinion, looking back at that  
11 history?

12 A No. But you asked me the question, so --

13 Q I did indeed.

14 Now, in paragraph 21 of your testimony,  
15 you quote from the 1976 House Subcommittee Report to  
16 the effect that, "The committee does not intend that  
17 owners of copyrighted material be required to  
18 subsidize public broadcasting."

19 A Yes.

20 Q Do you see that?

21 A Yes.

22 Q Is there a reason that you omitted the

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1 very next sentence in the report, which is the  
2 observation that the CRT and now, by extrapolation,  
3 the CARP is expected to "assure a fair return to  
4 copyright owners without unfairly burdening Public  
5 Broadcasters." Wouldn't that be a fairer contextual  
6 way to analyze the language you cite?

7 A I don't think it was relative to the  
8 point, but if it -- if you're suggesting anything  
9 other than the fact that I was using the one sentence  
10 to highlight the point I made, I'd suggest you look at  
11 footnote 4, where I acknowledged, "Such stations may  
12 deserve greater financial assistance, but they should  
13 not be subsidized by this greater" -- I think there's  
14 another quote.

15 If you'll look at the quote at the top of  
16 page 12, "The Tribunal is expected to consider the  
17 public interest in encouraging the growth and  
18 development of public broadcasting." I think what I  
19 was trying to make -- and I used the relevant point  
20 when I was trying to get the full context, because it  
21 should be given. I gave the full context.

22 Q Paragraphs 25 to 30 of your testimony, I

1 take it, states the view that this Panel, at the end  
2 of the day, is required to determine reasonable  
3 royalties payable separately to each of ASCAP and BMI,  
4 is that a fair encapsulation of those portions of your  
5 testimony?

6 A Please repeat that.

7 Q Paragraphs 25 to 30, I take it, are  
8 designed to indicate that the function of this Panel  
9 at the end of the day is to determine separate fees  
10 payable to ASCAP and BMI?

11 A I think, frankly, that the Tribunal could.  
12 I mean, I'm not sure I was saying that it was an  
13 absolute requirement.

14 Q That's what I was getting at. I take it  
15 the methodology by which the Panel gets there is not  
16 anywhere specified in Section 118 or its legislative  
17 history, correct?

18 A I think the general expectation was -- and  
19 a major reason for changing from the Senate version of  
20 118 to the House version -- was to open this up and  
21 let the parties in and let the parties play. It was  
22 absolutely, in my experience -- and I was there -- and

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1 I can't refer to specific discussions, but there is  
2 absolutely no doubt that the policymakers in this area  
3 at the Copyright Office, in the staffs, on the Hill,  
4 were aware of the fact that there were three  
5 performing rights societies that did not always do  
6 things the same way.

7 And it is my firm belief that that  
8 language was entitled to allow individualized rates if  
9 -- if individualized rates were what were called for.

10 Q You see nothing in 118 that would  
11 prohibit, for example, if this Panel decided it to be  
12 appropriate, first a decision made that the overall  
13 value of the ASCAP and BMI repertory to our clients is  
14 X million dollars, and then deciding what proportion  
15 of that amount is payable respectively to ASCAP or BMI  
16 -- if this Panel should methodologically determine to  
17 go that route, you see nothing in Section 118  
18 prohibiting that, do you?

19 A I don't see expressly in 118 prohibiting  
20 it. I think it would -- I think there should be at  
21 the very least a presumption against that, because  
22 that seems to me to step on the difference why the

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1 House made the change.

2 What you have just described is sort of  
3 the functional equivalent of the universal rule for  
4 all copyright owners that was the hallmark of the  
5 Mathias amendment and its successor. As I said  
6 before, I don't see anything in the statute that says  
7 you shall not do that.

8 I think the legislative history and my  
9 opinion is such that that is what -- not what was  
10 intended. It was intended to let the parties do what  
11 they do, and it was done with a full expectation and  
12 a full understanding that there is more than one  
13 performing rights society in this country, and that  
14 they do not always act the same way.

15 Q And if at the end of the day ASCAP were to  
16 get 56 percent and BMI 44 percent of some number, how  
17 would that result -- these are purely hypothetical --  
18 how would this result adversely affect your view of  
19 what 118 was intended to accomplish, which was to  
20 establish an individual rate for individual copyright  
21 owners?

22 MR. SCHAEFFER: This has been asked and

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1 answered, and he really has given the answer that --

2 THE WITNESS: I believe it has.

3 CHAIRPERSON GRIFFITH: The objection is  
4 overruled.

5 THE WITNESS: I think it's the process by  
6 which you get there. The process that I believe was  
7 intended was to let individual parties come do their  
8 thing, negotiate. And if ASCAP and Public  
9 Broadcasting entities came out with this approach, and  
10 BMI came out with this approach, SESAC with another,  
11 and Italian Book Company, I believe the intent was to  
12 tolerate that disparity.

13 And I believe shortcutting -- you could  
14 come out, I guess, mathematically and strictly  
15 mathematically to some of the results by doing it the  
16 other way. But then the next time around that won't  
17 be the process. I think the process was important.  
18 The process was what drove Barbara Ringer, Bob  
19 Kastermeier, myself, and others to change the Mathias  
20 amendment.

21 BY MR. RICH:

22 Q So that if the Panel were to pursue the

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1 hypothetical approach, I suggest that you believe it  
2 would be an abuse of process under Section 118?

3 A I believe it was not what was intended by  
4 the Act.

5 Q Are you aware that the Copyright Office in  
6 this proceeding, at an earlier phase, has expressed --  
7 the current regime of the Copyright Office has  
8 expressed its opinion about the correctness of civil  
9 proceedings?

10 A I am not aware of that.

11 Q Turning to the 1978 CRT proceeding, in  
12 paragraph 32 of your testimony you make much of the  
13 fact that in 1978 the CRT issued "a distinct ASCAP  
14 fee." Is that correct, you do state that?

15 A Paragraph --

16 Q 32.

17 A Yes. You used an adjective there that --

18 Q I'm not --

19 A -- I didn't understand, but I think there  
20 are longer paragraphs than this elsewhere in the  
21 testimony.

22 Q And how many performing rights

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1 organizations fees were before the CRT for  
2 determination, to your knowledge?

3 A I know ASCAP's was. I -- I don't know  
4 what functional definition the performing rights  
5 organization in that situation was. I don't know  
6 whether you would be arguing that some of the smaller  
7 entities were claimed to be performing rights  
8 organizations, or -- but if you count the performing  
9 rights organizations as BMI, SESAC, and ASCAP, it was  
10 wrong.

11 Q Isn't it true that nothing in the CRT 1978  
12 ruling itself indicates that individualized rate  
13 setting was congressionally mandated or generally  
14 preferred, much less "an absolute necessity"?

15 A What are you quoting from?

16 Q I was just asking myself the same  
17 question. Let me withdraw the question since I can't  
18 answer it.

19 Let me ask you this. Do you recall the  
20 CRT, in its 1978 ruling, indicating "that it" --  
21 pardon me, that it "has wide discretion in determining  
22 the structure of the rate schedule and providing for

1 different treatment of copyright owners or public  
2 broadcasting entities on the basis of reasonable  
3 distinctions rooted in relevant considerations"?

4 A End quote.

5 Q End quote.

6 A Will tell you me what your quote is?

7 Q Pardon me? The CRT ruling. Do you recall  
8 that language?

9 A Do I recall? I recall the sense of the  
10 language.

11 Q And do you recall in a similar vein that  
12 the Tribunal indicated that it had "authority, which  
13 it chooses to exercise, to establish separate rates  
14 for the repertory of certain performing rights  
15 licensing associations"?

16 A Yes.

17 Q Now, in paragraph 35 of your testimony,  
18 Mr. Baumgarten, you suggest that the CRT reached a fee  
19 of \$1.25 million that "closely approximated" what a  
20 revenue formula proposed by two of the five  
21 commissioners would have yielded, is that correct?

22 A That's correct.

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1 Q Do you know how the revenue percentages  
2 considered, although not adopted, by the CRT compared  
3 to those then being paid by commercial broadcasters?

4 A I don't know anything that's not stated in  
5 this paragraph with respect to the question you have  
6 just asked.

7 Q Do you know for a fact that those  
8 percentages which were considered was a fraction of  
9 the revenue percentages then being paid by commercial  
10 broadcasters?

11 A I -- I have no knowledge.

12 Q You suggest that the CRT ruling "expressly  
13 disclaimed" any intent to be precedential as to the  
14 rate adopted or the approach used. That's paragraph  
15 38 of your testimony?

16 A 38?

17 Q Pardon me?

18 A 37?

19 Q There's two. There's a typo. There are  
20 two 38s. There's a carryover 38 at the bottom of 18.

21 A Oh. That's the one I'm referring to.

22 MR. SCHAEFFER: 18-19.

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1 THE WITNESS: So it's talking about the  
2 first 38 here.

3 MR. RICH: Yes.

4 THE WITNESS: The bottom 38.

5 MR. RICH: Yes.

6 THE WITNESS: Yes, that's what I stated.

7 BY MR. RICH:

8 Q Now, do you rely for this assertion on any  
9 aspect of the CRT's ruling other than the language you  
10 cite at the top of page 19 of your testimony?

11 A At this point now, I'd like to reexamine  
12 and see if I just selected one or several quotations.

13 Q Would you like a chance to --

14 A Sure.

15 Q -- review these?

16 MR. RICH: I'm nearing the end.

17 CHAIRPERSON GRIFFITH: Okay.

18 THE WITNESS: I mean, I'm literally going  
19 to sit here -- this is the only way I know how to do  
20 it -- and read these pages. So I apologize.

21 MR. RICH: I don't want to foreclose you  
22 from supplementing your testimony if you wish.

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1 THE WITNESS: Would that be --

2 MR. RICH: I'm saying as of now --

3 MR. SCHAEFFER: I think it would be okay  
4 if he writes a letter or --

5 MR. RICH: No, I didn't mean it that way.  
6 I think sitting now, if you want to supplement your  
7 testimony, I'm prepared to wait for you to review it  
8 and see if there is anything else on which you rely  
9 for that proposition.

10 THE WITNESS: There is certainly nothing  
11 else that I quoted.

12 MR. SCHAEFFER: Mr. Rich, if we find  
13 something else, we'll send you it.

14 MR. RICH: I'm simply asking what this  
15 witness relied on, not what you in your research might  
16 find.

17 MR. SCHAEFFER: No, no, no. Come on, Mr.  
18 Rich.

19 BY MR. RICH:

20 Q Mr. Baumgarten, are you familiar with the  
21 fact that one of the fee models which ASCAP --

22 A Could you please wait until I finish

1 reading?

2 Q I'm sorry. I thought you had said you  
3 found nothing at all.

4 A No. I was reading from the back to the  
5 front.

6 Q Please go ahead.

7 CHAIRPERSON GRIFFITH: Go ahead.

8 THE WITNESS: There is a statement,  
9 although it appears to be in connection with the  
10 visual arts -- and I do not recall whether I relied  
11 upon it -- page 25070, left-hand column, three, six,  
12 about six lines, three -- five lines down.  
13 "Consequently, the payment schedule adopted should not  
14 be regarded as a guide to future rate determinations."

15 That seems to be -- other than the context  
16 of PGS works -- I'm sorry, pictorial graphic and  
17 sculptural works, whether it reflected a -- I didn't  
18 -- I'd have to say I don't think I relied on that. I  
19 relied on what was -- what was --

20 MR. RICH: Thank you.

21 THE WITNESS: And again, there may be  
22 others. Should I just read? I mean, the way you

1 phrased the question doesn't give me much information.

2 I don't think -- my eyes are deceived  
3 there. I don't think there was anything else that I  
4 relied on in this. I believe that it's possible that  
5 in a subsequent proceeding, a document -- the Tribunal  
6 reiterated this, and so that would require looking at  
7 the 1982 record and the final report from the CRT as  
8 well. So I don't know if you want me to do that.

9 BY MR. RICH:

10 Q But I take it that the paragraph beginning  
11 at the bottom of 18 and top of 19, first numbered 38,  
12 purports to describe the outcome specifically of the  
13 1978 proceeding, correct? That's the section heading  
14 beginning at the bottom of page --

15 A Yeah, that's true. All I'm raising is the  
16 possibility that maybe two of the Tribunal might have  
17 said, "As we said in '78, we were" --

18 Q Well, we'll agree anything is possible.

19 Let me ask you, are you familiar with the  
20 fact that one of the fee models ASCAP here proposes is  
21 expressly built upon the CRT's 1978 ruling?

22 A I am not familiar with ASCAP's proposals

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1 in that case at all.

2 Q Well, so representing to you, in your  
3 expert judgment, should no consideration be given to  
4 ASCAP's model on the ground that the CRT's ruling was  
5 "expressly non-precedential"?

6 A It was non-precedential except as -- where  
7 it said that it was precedential, and so I'd have to  
8 look at those provisions and see if any of the  
9 provisions which were discussed were intended -- I'm  
10 not trying to be cute. You're just asking me  
11 extremely broad questions, and I don't carry that  
12 document around in my mind.

13 MR. SCHAEFFER: I mean, I would object to  
14 the basic premise.

15 THE WITNESS: Because, you know, I give  
16 examples at the end of page 23 where there were what  
17 I considered to be precedential aspects of the  
18 opinion.

19 Now, I -- so I think I have no choice.  
20 But if it is purely an alternative approach, and it  
21 has nothing to do with anything else that the Tribunal  
22 said, and it would fit within this quotation, then I

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1 would say it's not --

2 MR. RICH: Thank you.

3 BY MR. RICH:

4 Q At paragraphs 40 to 42 of your testimony,  
5 you advert to the CRT's 1980 recommendation that the  
6 compulsory license be abolished. Yes?

7 A Yes, that's correct.

8 Q Was their recommendation adopted by the  
9 Congress?

10 A It was not.

11 Q In fact, did not the final paragraph of  
12 that report correctly indicate, "It is for the  
13 Congress, not the Tribunal, to determine public  
14 policy. The Public Broadcasting compulsory license  
15 may present policy considerations in areas beyond the  
16 special competence of the Tribunal"?

17 A That is correct.

18 Q You agree with that sentiment, don't you?

19 A Yes, I do.

20 Q Now, you are not here testifying as to the  
21 reasonableness or not of any of the rates sought by  
22 ASCAP or BMI in this proceeding, is that correct?

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1           A       That is correct.

2                   MR. RICH: All right. I have no further  
3 questions of the witness, but would like to restate my  
4 objection to the admissibility of Exhibit 19 for which  
5 Mr. Baumgarten is the sponsor, and that is the Law  
6 Review article co-authored by ASCAP's former general  
7 counsel and its present special counsel to the board.  
8 Since they are not available to be cross examined on  
9 it, it is ranked hearsay and it is written by validly  
10 self-interested parties.

11                   MR. SCHAEFFER: I don't know if you want  
12 to hear from me or --

13                   CHAIRPERSON GRIFFITH: Let me ask. This  
14 19, it was substituted -- yes. that was substituted,  
15 wasn't it, 19?

16                   MR. SCHAEFFER: Yes, that's right.

17                   CHAIRPERSON GRIFFITH: Yes.

18                   MR. SCHAEFFER: And there is the question,  
19 are we surprised that in an arbitration collateral  
20 information is often used. They have a chance at  
21 rebuttal. If there is anything in there that they  
22 don't like, then presumably the system allows them to

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1 rebut that. I don't know what else I can say.

2 There is endless amounts of hearsay, quite  
3 appropriately, that both parties have put in. Hearsay  
4 is not an objection in this proceeding.

5 MR. RICH: With respect, we have  
6 strenuously avoided burdening the record with hearsay.

7 MR. SCHAEFFER: If you want a list, I'll  
8 give it to you.

9 CHAIRPERSON GRIFFITH: All right. The  
10 objection is overruled. The witness has testified as  
11 an expert, indicating that he read and relied on the  
12 -- we presume that he relied on the article.

13 MR. SCHAEFFER: I have several questions  
14 on --

15 CHAIRPERSON GRIFFITH: He has the right  
16 to --

17 MR. SCHAEFFER: I'm sorry.

18 CHAIRPERSON GRIFFITH: He does have the  
19 right, as an expert witness, to rely on hearsay  
20 testimony or evidence.

21 MR. RICH: Your Honor, I have no problem.  
22 Could I get a clarification, though, that the document

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1 is not coming in for the underlying truth of the  
2 statements made in the document, as opposed to what  
3 inferences or opinions he might derive from it?  
4 That's the standard understanding what --

5 MR. SCHAEFFER: The document --

6 MR. RICH: -- expert reliance on  
7 documents, if I may finish, Mr. Schaeffer.

8 MR. SCHAEFFER: Yes.

9 MR. RICH: Thank you.

10 MR. SCHAEFFER: That's a judicial  
11 standard. We're in an arbitration. It's not  
12 uncommon, for example, to have affidavits come in,  
13 documents come in, for whatever they're worth. If  
14 there is some objection or some statement that  
15 anything in there is untrue, they have ample  
16 opportunity to rebut it.

17 We are in arbitration, not under the  
18 Federal Rules of Evidence, and this is just another  
19 hearsay document -- one of many that is already before  
20 the Arbitrator.

21 CHAIRPERSON GRIFFITH: Excuse me just --  
22 excuse us just a moment here.

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1 MR. SCHAEFFER: Yeah. I would cite, with  
2 most respect, 251.48, which says, "In any public  
3 hearing before a CARP, evidence that is not unduly  
4 repetitious or cumulative and is relevant and material  
5 shall be admissible." The --

6 CHAIRPERSON GRIFFITH: Well, we have  
7 already ruled that it's admissible. The question he  
8 is asking at this point I think is the manner in which  
9 we're going to consider it. Is that right?

10 MR. SCHAEFFER: But there is no  
11 qualification --

12 MR. RICH: That's correct.

13 MR. SCHAEFFER: -- for limitation on any  
14 hearsay. And, indeed, as time will go on, we will  
15 point out numerous items of PBSs and NPRs that is also  
16 hearsay. There is no discovery in this proceeding, so  
17 that -- in any arbitration proceeding, and that's why  
18 hearsay is admissible. They can present any witnesses  
19 they want to. We don't have a right to subpoena even,  
20 so it makes it even more complicated.

21 CHAIRPERSON GRIFFITH: The objection  
22 remains overruled, and we will simply receive it at

1 this time. And we, as a Panel, feel that we are  
2 capable of granting it the weight and extent to which  
3 it is properly entitled.

4 MR. RICH: Thank you.

5 MR. SCHAEFFER: I have a few minutes of  
6 direct. I don't know if you want to take a break now.

7 CHAIRPERSON GRIFFITH: How long? How  
8 long?

9 MR. SCHAEFFER: I would say 10 minutes at  
10 most, but I don't know how Mr. Baumgarten is faring,  
11 and I don't know how everybody else is faring.

12 CHAIRPERSON GRIFFITH: Well, do you want  
13 to take a five-minute break?

14 MR. SCHAEFFER: Why don't we do that.

15 CHAIRPERSON GRIFFITH: We'll finish by  
16 6:00. Promise me we'll finish by 6:00.

17 (Whereupon, the proceedings in the  
18 foregoing matter went off the record at  
19 5:43 p.m. and went back on the record at  
20 5:48 p.m.)

21 CHAIRPERSON GRIFFITH: Ladies and  
22 gentlemen, our Reporter has simply asked me to inform

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1 you that the transcript of today's hearing really will  
2 not be available until Wednesday. If you do need the  
3 -- anything tomorrow, they can give you the morning  
4 session but not the afternoon.

5 SEVERAL PARTICIPANTS: Thank you.

6 CHAIRPERSON GRIFFITH: Thank you.

7 MR. SCHAEFFER: I just have a few  
8 questions, Mr. Baumgarten.

9 REDIRECT EXAMINATION

10 BY MR. SCHAEFFER:

11 Q I'm going to address your attention to the  
12 actual licenses between ASCAP and PBS and NPR. I take  
13 it, by the way, part of your business as a copyright  
14 lawyer has been involved in negotiation and drafting  
15 of licenses.

16 A That's correct.

17 MR. RICH: I would object to this line of  
18 testimony as totally outside of the witness' realm --

19 MR. SCHAEFFER: Oh, no.

20 MR. RICH: -- and cross examination, as he  
21 said nothing -- he didn't say word one about knowledge  
22 about any of the prior ASCAP agreements or the

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1 negotiations of them, and has no opinion on any of  
2 that.

3 MR. SCHAEFFER: He --

4 MR. RICH: This is absolutely a sandbag.

5 MR. SCHAEFFER: Mr. Rich asked and opened  
6 the door as to the free negotiation of licenses --  
7 what would be the best way of setting rates -- wasn't  
8 the best way of setting rates past license agreements,  
9 past license agreements between the parties?

10 I would like to get the witness'  
11 reaction to --

12 JUDGE GULIN: That was under Section --  
13 under the statute portion of --

14 MR. SCHAEFFER: Yes.

15 JUDGE GULIN: -- Section 118.

16 MR. SCHAEFFER: I'm going to ask the  
17 question --

18 JUDGE GULIN: Why are you getting into the  
19 specific agreements?

20 MR. SCHAEFFER: Yes. Because I am going  
21 to ask -- I'll make a proffer. The question I'm going  
22 to ask: would he expect, under Section 118 --

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1 CHAIRPERSON GRIFFITH: Let me interrupt  
2 you just a minute. Why don't you ask the question --

3 MR. SCHAEFFER: Okay.

4 CHAIRPERSON GRIFFITH: -- right now.

5 MR. SCHAEFFER: Let me go directly --

6 CHAIRPERSON GRIFFITH: Your objection is  
7 notes.

8 Please do not answer until we determine.

9 Okay?

10 Now let's hear the question.

11 BY MR. SCHAEFFER:

12 Q I don't know if you can -- Jon, I don't  
13 know if you can see this from where you are sitting.  
14 But the license between ASCAP and NPR and PBS for the  
15 last -- for the 15 years since 1982 has read as  
16 follows, "Society (ASCAP) and licensees (NPR and PBS)  
17 agreed that said license fee will have no precedential  
18 value in any future negotiation proceeding before the  
19 Copyright Royalty Tribunal, court proceeding, or other  
20 proceeding between the parties."

21 In your opinion, would a license rate that  
22 is subject to such a section in the license be

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1 appropriate for consideration under Section 118?

2 CHAIRPERSON GRIFFITH: We note your  
3 objection.

4 MR. RICH: Your Honors, paragraph 1, the  
5 witness indicates the scope of his testimony. Provide  
6 the Panel with background information concerning the  
7 Copyright Act of 1976, its history, its application to  
8 the issues herein.

9 I have also been asked to address 118 of  
10 the Act, its relationship to copyright law in general,  
11 and to the handful of other compulsory license  
12 provisions Congress has enacted. He is a historic  
13 witness. To come in as now an expert interpreting a  
14 document he had no knowledge of is absurd.

15 MR. SCHAEFFER: But on cross examination,  
16 he went beyond the scope, because what he went into  
17 was the issue of whether or not negotiated licenses  
18 weren't the best evidence for the CARP to consider.  
19 He went over that repeatedly all different ways from  
20 Sunday. I don't have the transcript in front of me.

21 But it's perfectly appropriate, then, on  
22 redirect for me to ask the question whether having

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1 elicited that statement, and made that argument trying  
2 to get you to agree that the prior rates negotiated  
3 between NPR, PBS, and ASCAP should be precedential  
4 here, it is perfectly appropriate now for me to say is  
5 this -- does this clause make a difference?

6 CHAIRPERSON GRIFFITH: All right. Just a  
7 minute.

8 JUDGE GULIN: Mr. Rich, do you contest  
9 that, that you went into and asked questions as to  
10 whether prior agreements constitute the best evidence?

11 MR. RICH: As a general proposition, of  
12 course that was -- that was part of the fabric of this  
13 -- of the original direct, which was privately  
14 negotiated agreements are preferred. And I obviously  
15 pursued it at that level, but that's different than  
16 proffering this witness, after a conference in the  
17 hallway after my cross is finished, to set him up to  
18 say this document, which he has never laid eyes on  
19 before, is properly construed as doing this, that, or  
20 the other thing. I mean, it is totally alien to his  
21 testimony here.

22 CHAIRPERSON GRIFFITH: Let me ask one more

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1 question.

2 MR. SCHAEFFER: Sure.

3 CHAIRPERSON GRIFFITH: Sorry. All right.

4 The objection is sustained.

5 On the other hand, counsel is entitled, if  
6 you lay the proper foundation, for the witness to  
7 testify as to what industry practices might be as  
8 opposed to this individual agreement or contract.

9 MR. SCHAEFFER: All right. Well, I'll try  
10 -- I don't know the answer, so I'll try it.

11 BY MR. SCHAEFFER:

12 Q From time to time, have you -- is it your  
13 understanding -- is there an industry practice as to  
14 the enforcement of all provisions of a copyright  
15 license?

16 A Few people don't like it. Promisees don't  
17 like it, or promissors don't live up to their  
18 promises. And people get sued, and --

19 Q Let me ask it in a slightly different  
20 fashion. I understand what you're saying. Isn't it  
21 a fact when a license agreement is entered into, both  
22 the licensor and the licensee expect that both parties

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1 will live up to the letter of the license?

2 A I think that is a common understanding of  
3 the parties to a license.

4 Q And wouldn't it also be a common  
5 expectation in the industry -- that is, in the  
6 intellectual property industry -- that if a licensee  
7 does not act in accordance with the license, it  
8 discourages the licensor from ever licensing that  
9 licensee again at another time when the license  
10 expires?

11 A If it's material, yes.

12 Q You've testified here an expert under  
13 oath. Did you in any way tailor your testimony by  
14 virtue of your representation of any other clients or  
15 of ASCAP?

16 A No.

17 Q Would you do that?

18 A I would not.

19 Q And now, there was some -- some  
20 questioning was made of you -- information was  
21 elicited as to the possibility of this CARP setting a  
22 single unitary price or rate for all of the performing

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1 rights organizations, and then leaving it to them to  
2 fight it out among themselves. Do you recall that?

3 A Yes.

4 Q If that were the scheme, or if that were  
5 an appropriate thing to do in a proceeding under  
6 Section 118(b), to what extent would that encourage or  
7 discourage settlement with an individual performing  
8 rights organization? Do you have an opinion as to  
9 that?

10 A I'm not certain. If it were known that  
11 the Tribunal was going to do this?

12 Q No. Maybe I've been confusing in my  
13 question. If one of the performing rights  
14 organizations -- let's say, BMI or ASCAP -- settled  
15 prior to the convening of the CARP, that would be  
16 inconsistent with setting a unitary rate, wouldn't it?  
17 How would you set a unitary rate if one party opted  
18 out? Would you have a credit?

19 A You couldn't set a unitary rate with the  
20 universe of the three performing rights societies. It  
21 would have to be the universe of the two performing  
22 rights societies which would sort of be self-

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1 contradictory. It wouldn't be a universal rate.

2 Q To the extent that you established a  
3 principle of having unitary rates for those two or  
4 three performing rights organizations, wouldn't that  
5 inhibit the settlement of these matters by negotiated  
6 agreements, or don't you have an opinion?

7 A Well, I -- I think it could, because I  
8 think there would be a -- I'm not sure it would. I  
9 think it could, because -- I think a lot, frankly,  
10 would depend upon what the first rate was, the first  
11 time it was set.

12 Q So the first one would be -- okay. Thank  
13 you.

14 MR. SCHAEFFER: I can use that in brief.  
15 No further questions.

16 CHAIRPERSON GRIFFITH: All right.  
17 Anything further?

18 MR. RICH: Nothing further.

19 CHAIRPERSON GRIFFITH: All right. Sir,  
20 you may step down. You are free to go. Oh, I'm  
21 sorry.

22 JUDGE DREYFUS: One moment.

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1 THE WITNESS: It's nice to feel wanted.

2 (Laughter.)

3 JUDGE DREYFUS: I would like to explore  
4 the -- your views on the meaning of subsidized in the  
5 legislative history. What do you think Congress meant  
6 by that -- by that sentence --

7 THE WITNESS: I think it --

8 JUDGE DREYFUS: -- that you quoted in your  
9 direct testimony?

10 THE WITNESS: Yes. I think -- I think at  
11 different times in history it probably had two  
12 meanings. I think it originally meant that there  
13 should be no absolute -- there should be no  
14 reinstatement of the for-profit exemption, which would  
15 mean the -- I think "exception" here really means  
16 contribute the value of the copyright towards the  
17 success of public broadcasting.

18 So I think the subsidy, at the time when  
19 people were arguing that there should be a restoration  
20 of the for-profit exemption, at least for public  
21 broadcasting, "no subsidy" meant no, that's a bad  
22 idea, because that would mean the copyright owners are

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1 subsidizing public broadcasting to 100 percent of the  
2 value of those copyrights.

3 I think later, when it became a question  
4 of Congress saying, "Okay. There is going to be a  
5 rate-setting body," but it would not be subsidization,  
6 I think it meant that that body would be expected to  
7 set a fee, which would not contribute part of the fair  
8 value of those copyrights to the success of public  
9 broadcasting, and there should be no deduction to  
10 serve the purpose of subsidization. It should be  
11 whatever fair value was.

12 Does that help? It's sort of a subsidy of  
13 kind, rather than a cash subsidy.

14 JUDGE DREYFUS: I'm sorry. Go ahead.

15 THE WITNESS: I think it was a subsidy in  
16 kind, rather than a cash subsidy. Being forced to  
17 contribute the value of -- of the copyright.

18 JUDGE DREYFUS: Or a partial value?

19 THE WITNESS: Or less, an increment less  
20 than the -- deducted from the fair value.

21 JUDGE DREYFUS: So assuming that -- for a  
22 moment that commercial broadcasters were arms length

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1 negotiating fair values, does that mean that  
2 subsidization, as used in a legislative history, meant  
3 anything less --

4 THE WITNESS: No. I think that --

5 JUDGE DREYFUS: -- than in market value?

6 THE WITNESS: Well, I think it --

7 JUDGE DREYFUS: Commercial market value.

8 THE WITNESS: No, I don't think that  
9 automatically follows. I think -- it might follow or  
10 it might not, depending upon what you believe are  
11 relevant similarities or differences between non-  
12 commercial and commercial broadcasting, other than an  
13 objective of letting them pay less. And I just think  
14 that's a bigger factual issue than I'm comfortable  
15 with dealing with.

16 If you thought there were relevant  
17 differences that didn't have --

18 JUDGE DREYFUS: In the organization, do  
19 you mean?

20 THE WITNESS: Well, between the commercial  
21 broadcasters and non-commercial broadcasters -- that  
22 didn't have anything to do with -- simply they're

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1 different because one can't afford it as much as the  
2 other can. If there were other kinds of relevant  
3 differences, then I -- I don't think you would be  
4 forced automatically and irretrievably to equate the  
5 two.

6 You still -- they still might be very  
7 close, depending upon what these factors were, but I  
8 think the real factor is what factors, other than what  
9 I consider to be an impermissible desire to make it  
10 cheaper for them, do you believe there are and are  
11 within your cognizance as a rate-setting body?

12 JUDGE DREYFUS: So, then, with your  
13 experience in the legislative history of this, and  
14 closeness to it, are you suggesting that when a team  
15 permits the Panel to consider fair value for public  
16 broadcasters something less than commercial rates --

17 THE WITNESS: I think that is not an  
18 impermissible result. I don't think you are commanded  
19 to do that. I don't think it is forbidden to you. I  
20 think the whole question is: are there anything -- is  
21 there any relevant circumstances that you are -- you  
22 are permitted to take into account that differ between

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1 commercial and non-commercial broadcasting? But the  
2 one I think is forbidden to you, and that is non-  
3 commercial broadcasting has less money than commercial  
4 broadcasting.

5 JUDGE GULIN: Is what you're really saying  
6 is that fair value is fair market value? Are you  
7 familiar with that term fair market value?

8 THE WITNESS: Yeah. I think -- you know,  
9 if you're asking me accounting terms, in my sense --

10 JUDGE GULIN: Well, it's an accounting  
11 term, but it is also a legal term. It's a term that  
12 has probably been defined -- I know it has been  
13 defined -- by the Supreme Court. I mean --

14 THE WITNESS: Yeah, but I think it also  
15 could be defined in different contexts, and I think  
16 there may be theoretical cases where fair market value  
17 is less than fair value. I don't know. I -- I think  
18 recognition of the marketplace, and what is a fair  
19 return, and what is fair to the copyright owner in  
20 terms of maintaining the system of inducement, that  
21 requires recognition of marketplace forces. So I --  
22 I'm inclined to say there is no difference between

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1 fair value and fair market value, but I'd need a  
2 better definition.

3 JUDGE GULIN: Well, fair market value  
4 is --

5 THE WITNESS: What a willing buyer could  
6 get for --

7 JUDGE GULIN: What a willing buyer would  
8 pay a willing seller in arms length, free  
9 negotiations.

10 THE WITNESS: If that is --

11 JUDGE GULIN: And in this context, the  
12 willing buyer and the willing seller would be PBS and  
13 ASCAP.

14 THE WITNESS: Yeah. If that's the sense  
15 of it, yes. But really, I -- I did cite some  
16 legislative history where -- where the -- and Mr. Rich  
17 accused me of leaving out anything that was favorable,  
18 but I pointed out that I didn't leave it out -- where  
19 it talked about paying attention to the public purpose  
20 behind public broadcasting.

21 And I think if you look at -- for example,  
22 the Tribunal, in '78, said, "This will not put public

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1 broadcasting out of business." So I think, you know,  
2 that is much more palatable to me than saying they  
3 can't afford it, and, therefore, they pay less. So I  
4 think there may be factors -- I can't think of all of  
5 them now -- that would enable you to distinguish  
6 between commercial and non-commercial broadcasting.  
7 But there may not be.

8 The one I think is absolutely forbidden is  
9 they've got less so they can pay less, so their return  
10 should be less. I think that's what no subsidization  
11 means.

12 CHAIRPERSON GRIFFITH: All right.

13 THE WITNESS: I hope that's helpful.

14 CHAIRPERSON GRIFFITH: Is that all?

15 All right, sir. You may step down. Thank  
16 you very much. You are free to go.

17 (Whereupon, the witness is excused.)

18 CHAIRPERSON GRIFFITH: Mr. Schaeffer, what  
19 awaits us Thursday morning now?

20 MR. SCHAEFFER: We have, I think, on  
21 Thursday Mr. Ledbetter, Seth Salzman, and Dr.  
22 Bergstein. And if I can load somebody else in, I

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1 will.

2 CHAIRPERSON GRIFFITH: All right.

3 MR. SCHAEFFER: Well, let's talk a little  
4 bit about -- let's -- some of the witnesses may be --

5 JUDGE DREYFUS: There's a letter that we  
6 received some time back with the order --

7 MR. SCHAEFFER: Yes.

8 JUDGE DREYFUS: -- of your witnesses.

9 MR. SCHAEFFER: I've been trying to follow  
10 that. Yes.

11 JUDGE DREYFUS: You have. And if you're  
12 going to change from that, we'd like to know that.

13 MR. SCHAEFFER: Yes. So far, I think --  
14 yes. Also, I'd like to get a list from PBS which --  
15 BMI has given us a list.

16 JUDGE DREYFUS: You have a list.

17 MR. SCHAEFFER: We do?

18 JUDGE DREYFUS: Yes.

19 CHAIRPERSON GRIFFITH: Okay.

20 MR. SCHAEFFER: I'm not -- maybe I'll get  
21 it. We don't have it. And it may be inadvertent, but  
22 I think we -- I think that it's following the same

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1 order.

2 CHAIRPERSON GRIFFITH: All right.

3 MR. SCHAEFFER: And that's my expectation.  
4 Because of the problem with the Boyle hearing, I may  
5 try and load somebody on, but the major witnesses on  
6 Thursday will certainly be Ledbetter, Bergstein, and  
7 Salzman. Salzman will have a brief demonstration.

8 CHAIRPERSON GRIFFITH: All right. I'll  
9 entertain a motion to adjourn until 10:00 Thursday  
10 morning.

11 SEVERAL PARTICIPANTS: So moved.

12 CHAIRPERSON GRIFFITH: Ordered. Thank  
13 you.

14 (Whereupon, at 6:09 p.m., the proceedings  
15 in the foregoing matter were adjourned, to reconvene  
16 at 10:00 a.m., on Thursday, March 12, 1998.)

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CERTIFICATE

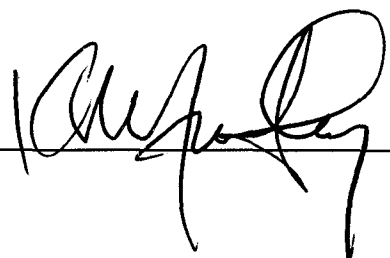
This is to certify that the foregoing transcript in  
the matter of:           Hearing: Adjustment of the Rates for  
                                  Noncommercial Educational  
                                  Broadcasting Compulsory License,  
                                  Docket No. 96-6 CARP NCBRA

Before:                   Library of Congress  
                                  Copyright Arbitration Royalty Panel

Date:                     March 9, 1998

Place:                    Washington, DC

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
typewriting.



A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be 'K. M. ...'.