LIBRARY OF CONGRESS

+ + + + +

COPYRIGHT OFFICE

+ + + + +

COPYRIGHT ARBITRATION ROYALTY PANEL

+ + + + +

In the matter of: Digital Performance Right in Sound Recording and Ephemeral Recording	Docket No. 2000-9 CARP DTRA 1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Friday
September 7, 2001

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

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

ORIGINAL

APPEARANCES:

On Behalf of Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee, and Salem Communications Corporation

KARYN ABLIN, ESQ.
BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
DINEEN PASHOUKOS WASYLIK, ESQ.
of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Loeb & Loeb, LLP
345 Park Avenue
New York, New York 10154-0037
(212) 407-4900

APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.
MARK A. JACOBY, ESQ.
R. BRUCE RICH, ESQ.
FIONA SCHAEFFER, ESQ.
KENNETH L. STEINTHAL, ESQ.
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.
DAVID R. BERZ, ESQ.
of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.
ROBERT ALAN GARRETT, ESQ.
HADRIAN R. KATZ, ESQ.
BRAD R. NEWBERG, ESQ.
RONALD A. SCHECHTER, ESQ.
JULE L. SIGALL, ESQ.
CHRISTOPHER WINTERS, ESQ.
MICHELE J. WOODS, ESQ.
of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
of: Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 513-2049

On Behalf of American Federation of Musicians of the United States and Canada:

PATRICIA POLACH, ESQ.
of: Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

C-O-N-T-E-N-T-S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Kenneth Paul Smith				
By Ms. Leary	8740		8818 8831	
By Ms. Woods		8762		8825
Jane Murdoch				
By Ms. Leary	8846			

EXHIBIT NO.	DESCRIPTION	MARK	RECD
RIAA			
213 DPX	CPB FY1999 Revenue Report	8770	8827
214 DPX	npr.org website printout	8794	8797
215 DPX	netradio.com website	8800	
216 DPX	Kevin Klose statement	8809	
217 DPX	ASCAP Web Site Pages	8908	
218 DPX	NPR Music Rights Survey 2000	8922	8933
219 DPX	Responses to Survey Questions	8933	8947
220 DPX	CARP Report	8951	8955

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

2 (9:04 a.m.)

3 CHAIRMAN VAN LOON: Well, good morning,
4 everyone. We're here on a signal day, the last Friday
5 of the summer, at least, that we'll be spending
6 together. So, we're looking forward to our first
7 witness, who I can attest was the first one here this
8 morning when the room opened. He's ready.
9 Are there any administrative or procedural
10 matters to come before the tribunal first?
11 MR. GARRETT: There's nothing from our
12 side, Mr. Chairman.
13 MS. LEARY: Nothing from our side, Your
14 Honor.
15 CHAIRMAN VAN LOON: Okay. Do we have a
16 time report, by any chance? If it's not immediately
17 handy, let's do it at the break. Sure, that's fine.
18 Okay.
19 And, Ms. Leary, could I ask you to call
20 the first witness?
21 MS. LEARY: Yes. We'd like to call
22 Kenneth Stern, whose NPR's Executive Vice President

1 and Chief Operating Officer. And he will be the
2 primary witness for National Public Radio and the
3 public radio system.
4 ARBITRATOR VON KANN: Good morning, Mr.
5 Stern. Please make yourself comfortable there.
6 There's water. And the all important microphone in
7 front of you to capture your words for posterity.
8 Let me welcome you to the proceeding.
9 Thanks for coming and being here so early.
10 Whereupon,
11 KENNETH PAUL STERN
12 Was recalled as a witness by Counsel National Public
13 Radio, and having been first duly sworn, assumed the
14 witness stand, was examined and testified as follows:
15 DIRECT EXAMINATION
16 BY MS. LEARY:
17 Q Mr. Stern, would you please state your
18 name for the record?
19 A Kenneth Paul Stern.
20 Q And what is your occupation? Your current
21 occupation and title?
22 A I'm Executive Vice President of National

1 Public Radio.

2 Q And how long have you been employed there?

3 A I've employed for almost two years.

4 Q Would you briefly describe your

5 educational background for the panel?

6 A Sure. I'm a graduate from Haverford

7 College in Haverford Pennsylvania and a graduate of

8 the Yale Law School in New Haven, Connecticut.

9 ARBITRATOR VON KANN: Two of us will

10 forgive you for that.

11 THE WITNESS: Is there a third who won't?

12 ARBITRATOR VON KANN: Well, Jeff is

13 neutral on the subject.

14 BY MS. LEARY:

15 Q Would you describe for the panel the kind

16 of work that you do at National Public Radio?

17 A My principle job is overseeing the day-to-

18 day operations of the company and overseeing the

19 strategies and operations of the senior management

20 team.

21 Q Would you describe the nature of National

22 Public Radio and public radio stations generally?

1 A National Public Radio is a 501(c)(3)
2 corporation, incorporated under the law of the
3 District of Columbia. It is an educational company
4 designed to create and distribute educational
5 noncommercial programming to about 300 member station
6 across the United States.
7 Public radio generally is comprised of
8 about 407 qualified stations under the Corporation for
9 Public Broadcasting. Their job -- most of those --
10 let me back off for a second. Most of those are
11 licensees of colleges and universities, and as a
12 consequence their operations are logical extensions of
13 their educational mission. And their mission is to
14 create and broadcast educational noncommercial
15 programming to their audiences.
16 Q Would it be correct to say that
17 approximately two-thirds of those stations are
18 affiliated with universities and colleges?
19 A Two-thirds of the NPR member stations are,
20 that's correct.
21 Q And how about the balance of the stations?
22 A The balance of the stations are licensed

1 either to community broadcasters, to municipalities in
2 some cases and to other similar civic organizations.
3 Q Now, could you describe what your day-to-
4 day position involves with respect to programming and
5 revenues for National Public Radio?
6 A By the nature of my job, it's fairly wide
7 and not always deep in the programming area. I'm
8 involved in the strategies, our programming strategies
9 trying to figure what new programming to create, the
10 ongoing evaluation of existing programming and to see
11 where it fits into our educational mission and
12 philosophies and trying to develop new ways of
13 reaching audiences to extend our mission.
14 On what we would call the business side,
15 my job is focused in the overall economics of the
16 company to make sure that we remain within budget and
17 that the company operates in an efficient way
18 consistent with our mission.
19 Q What is the relationship between National
20 Public Radio and its member stations?
21 A NPR is a membership organization. It is
22 also, I would say, a service organization. As a

1 membership organization our 300 members vote for our
2 board of directors and most of our board members come
3 from the member stations. So we work in partnership
4 with them on the organizational side.
5 When I said service, most of our public
6 service is through our member stations. Our principal
7 business is to create programming and to distribute
8 programming to our member stations. Virtually all of
9 our audience for NPR programming is through the member
10 stations, so they are the critical outlet for
11 virtually all of our content.
12 Q There is another group of public radio
13 stations that National Public Radio is representing in
14 this proceeding, is there not?
15 A There are. We are representing, as I
16 understand it, 407 CPB qualified stations, only 300 or
17 so are NPR member stations. The balance are public
18 radio stations with educational missions who aren't
19 members of NPR. They range from smaller community
20 stations who don't meet the qualifications NPR
21 membership or for others such as Pacifica stations who
22 choose not to be NPR members. But we all share the

1 same general educational mission and the same goal of
2 educating and informing the American public.
3 Now, can you briefly describe the nature
4 of the programming that is available on public radio
5 stations both on their radio broadcast and on their
6 webcast?
7 A Well, they're pretty similar, so let me
8 start with programming on air, which comprises the
9 bulk, I would even say 99 percent of our public
10 service. The public radio stations -- NPR is a
11 creator and distributor of programming. The stations
12 themselves decide almost in their entirety what they
13 program and how they program. So they select what
14 programs they want and create other -- and take
15 programs from other distributors and creators of
16 content, and also create content on the local level.
17 They really fall into three categories.
18 Those who are news and information stations, which
19 comprise the bulk of the NPR audience. Those which
20 are in classical format, and those which are in jazz
21 formats. And there are a variety of mixed format
22 stations in news/classical, news/talk, news/jazz. So

1 most of what you find on air falls into those three
2 categories; news and information programming,
3 entertainment programming and those which are sort of
4 cultural expression; classical music and jazz music.
5 The classical music, I just want to pause
6 for a second and describe to you a little bit about
7 the nature of the music that they offer. You know,
8 the value that PRC sees in cultural expression and
9 cultural programming really is not only in the music,
10 but also in the reporting, the context, the specific
11 added value that we provide to our listeners through
12 our programming.
13 NPR itself creates two different major
14 music streams. One is classical through shows such as
15 "Performance Today," and the real value -- the real
16 added value that NPR brings to that is the context,
17 the interviews, the produced pieces that buffer all
18 the music in the programming.
19 And the same for jazz in which we do shows
20 like "Jazz Profiles," which are really based around
21 profiles and interviews of the jazz artists.
22 Online is very similar to what we do on

1 air. In fact, really it is almost identical to what
2 we do on air. The added value we bring to the
3 Internet space is the ability to build out our content
4 especially in the news and information area, which
5 constitutes the bulk of our audience, but also in
6 providing a deeper content about classical music
7 artists and jazz artists.
8 Q What do you mean by build out content?
9 A If you look at the -- just for an example,
10 at the npr.org site, you'll see that what we spend our
11 resources doing is providing deeper, richer content;
12 additional text that obviously can't be on air,
13 photographs of links to other websites. More context
14 -- more content than you ordinarily fit into the
15 limitations of the broadcast clock.
16 Our programs -- our pieces on air, as you
17 no doubt know, are rather long by radio standards. In
18 fact, some would say too long. But they are short by,
19 you know, by the availability of interests and content
20 on any particular subject. So we use the Internet as
21 an opportunity to deepen and expand the experiences
22 that people have on air.

1 Q Would you say that the programming that
2 most member stations and NPR puts on their web is
3 similar to or different from the programming that's
4 put on the radio broadcast?
5 A I would say it's similar to. I think in
6 every case I'm aware of it is very similar. Everyone,
7 I think, tries to be -- extend themselves -- extend
8 the experience on the air to on line. It's a
9 supplemental medium to what we do on air. It is not
10 something that is intended to be different; it is
11 intended to be an extension, not a different
12 experience
13 Q Could you explain for the panel why
14 National Public Radio and the public radio stations in
15 this proceeding decided to get into Internet
16 programming?
17 A I think there are really sort of a couple
18 of different reasons that stations do online
19 activities. Principally it is an opportunity to
20 introduce their content to different audiences or
21 content to audiences who aren't able to get their
22 content at the right time.

1 Radio is a medium of habit. You turn it
2 on when you're in a car or when you're home at set
3 times during the day. And you get what's on the air,
4 and that may not be what you want or when you want.
5 So there's an opportunity to provide that content at
6 a different time and a different place.
7 Second, is to sort of to inform the public
8 about what is available on air. A lot of stations
9 principally use a website as a program schedule. I
10 would say especially for the smaller stations, that is
11 the bulk of what they do, is they put their schedules
12 up and allow people to find out about program times
13 and places.
14 And finally, it's the opportunity to
15 really expand and deepen the experience, find out more
16 about what you've learned on air in the 8 minutes or
17 7 minutes or 6 minutes of a piece. An opportunity to
18 deepen, enrich that educational experience, to give
19 more resources to the people who are deeply interested
20 in a topic and further expand our educational mission
21 in that way.
22 Have public radio programs both on the web

1 and on air, have they achieved recognition within the
2 industry for their quality or content?
3 A Yes, they have. I think -- I think you're
4 all pretty familiar with public radio by this time, so
5 I won't go through a litany of the awards. I think
6 it's actually appended to my testimony. It's too long
7 and I would say it would be false modesty to go
8 through, but there's really -- I'm willing to go
9 through it because, frankly, I had relatively little
10 to do with the production of most of this and the
11 quality -- the length of awards is just really
12 extraordinary and it actually makes me proud to be
13 part of National Public Radio.
14 Last year we won -- became the first
15 broadcast organization to win the award of the
16 President's Medal of the Art.
17 We've won numerous Peabody Awards, which
18 is the principal journalistic award in our industry.
19 And a number of DuPont awards from
20 Columbia University.
21 The focus of our business, of course, as
22 you know is in the news and information. That's where

1 most of our audience comes from, that's where most of
2 our recognition comes from. So most of the awards
3 you'll see appended to my testimony related to the
4 journalism and to the news and information offering we
5 have through "All Things Considered," "Morning
6 Edition"
7 Q If the largest audiences are garnered for
8 news and information programming, NPR continues and
9 public radio continues to produce music based
10 programming, is that correct?
11 A Yes, it does.
12 Q And what is the reason for that?
13 A I think part of the reasons for the
14 existence of public radio is for broad content that
15 commercial stations will not. And I think that's part
16 of our organic reason for being. And our stations,
17 many of them believe that classical offerings and jazz
18 offerings are still important offering from the
19 noncommercial side because they're not available on
20 the commercial side. And it's specifically not
21 available in the new unique way we do it, which is
22 through providing specifics or text based context and

1 information about the performances and about the
2 people who are involved in the classical industry and
3 the jazz industry.
4 Anyone can do a needle drop service,
5 that's not what public radio is about. It's really to
6 provide that extra information to the public. And
7 that's why we continue to serve our stations in that
8 way.
9 Q Would you briefly describe for the panel
10 the nature of funding both for National Public Radio
11 and public radio stations generally?
12 A I'll try to do it briefly. It's actually
13 somewhat Byzantine.
14 NPR -- public radio stations really get
15 their money from a variety of different sources, and
16 all different from station-to-station.
17 Most revenue for individual stations or
18 member contributions given during mostly -- received
19 during pledge drives, which are the bane of many of
20 our existence.
21 Secondly, they get money from the United
22 States Government through the Corporation for Public

1 Broadcasting. That accounts for about 16 percent of
2 station revenues.
3 Thirdly, they get it through support from,
4 especially those who are college and universities,
5 they get from their licensees.
6 And finally, they get it from foundations
7 and corporate underwriters who contribute money to the
8 organizations.
9 NPR's finances aren't hugely different. We
10 have about half of our revenue comes from our member
11 stations. They get money directly from listeners and
12 they contribute part of it back to us, about half of
13 our revenue comes from that, us giving them programs
14 and us receiving payments from them in return.
15 The second source of revenue for us is
16 corporate underwriting; that accounts for about 30
17 percent of our revenue.
18 And about 15 percent of our revenue comes
19 from foundations who contribute to National Public
20 Radio.
21 And the rest comes from various dribs and
22 drabs. But really those three revenue streams account

1 for virtually all that we do.

2 Q And the nature of the individual pledges,

3 are those voluntary or involuntary?

4 A It really is -- it is an extraordinary --

5 I think we're bulked to the traditional classical

6 economics and free writer theory. There is no reason

7 other than charitable concern that people give to

8 public radio stations. The programs are freely

9 available on air and they give because they think it's

10 a valuable educational tool and they want to support

11 it. No strings attached.

12 CHAIRMAN VAN LOON: Possibly in the spirit

13 of Caesar's wife, I should put on the record that I

14 have succumbed on more than one occasion to the pledge

15 drives.

16 THE WITNESS: Thank you.

17 MR. GARRETT: I haven't, just for the

18 record.

19 ARBITRATOR VON KANN: I join in the

20 Chairman's decision.

21 MR. STEINTHAL: The endowment for Garrett

22 just went down a little bit, I think.

1 MR. GARRETT: It couldn't be down any
2 lower.
3 CHAIRMAN VAN LOON: Please continue.
4 BY MS. LEARY:
5 Q Are the areas of funding in any way to the
6 strength of the national or local economy or political
7 considerations that might influence?
8 A Sure. I mean especially it is heavily
9 influenced. Obviously, people's giving, individuals'
10 givings are influenced by the economic situation. And
11 we've actually found that the economy does effect
12 charitable giving. It also has a deck of cards
13 consequences for foundation gifts.
14 We've recently received a large gift from
15 the Packard Foundation, which for a brief time was the
16 nation's largest foundation. But they're endowment is
17 entirely tied up in Hewlett Packard stock, which is
18 now about a third of what it used to be. So they're
19 charitable inclinations are somewhat restrained. So,
20 the economy does effect charitable giving to us,
21 certainly.
22 Q Would you describe the nature of

1 underwriting funding for public radio briefly?

2 A Underwritings typically come from

3 corporate corporations who want to support public

4 radio, both for the name recognition it brings to them

5 and also for the value of associations, which public

6 radio brings to them. And corporate underwriting has

7 grown as a part of our revenues and our business

8 considerably over the last few years.

9 Q Is public radio required by law to

10 disclose contributions from corporate underwriters and

11 foundations?

12 A Well, the nature of corporate underwriting

13 is that under FCC rules underwriting spots on air,

14 underwriting mentions are -- what they are are

15 disclosures of those who give us money. We are

16 required by law to disclose to the public the

17 supporters of National Public Radio and of the local

18 stations. And when you hear underwriting spots during

19 our programmings, that's what it is, a disclosure of

20 those who have chosen to give charitable contributions

21 to the company and to the stations.

22 Q Are there restrictions about what can be

1 said on air with respect to corporate underwriting?

2 A There are extensive restrictions. There

3 are no calls to actions, which there are -- and we

4 impose a fair amount of restrictions, policy

5 restrictions ourselves in terms of length and content

6 and who we'll accept contributions from. So they are

7 -- they tend to be quite short, limited to

8 identification of the contributor and a brief factual

9 statement about who they are and where you can find

10 out more information about them.

11 Q Now, you understand the nature of the

12 proceeding that this panel is embarked upon is to

13 determine a reasonable value for sound recordings that

14 we and our stations distribute over the Internet?

15 A Yes.

16 Q And have you had occasion to read the

17 expert testimony that has been offered by Dr. Jane

18 Murdoch in this case?

19 A I've had the opportunity to glance through

20 it.

21 Q And you're aware that the suggested rate

22 for the public radio system is $24,000 per annum?

1 A That's correct, as I understand it.

2 Q Do you believe that's an appropriate rate?

3 A I do. I had the opportunity to go through

4 the calculations, understand them. Obviously, I'm not

5 an expert in the subject, but they seem quite

6 reasonable and appropriate. And from my perspective,

7 not being an expert in the field, sustainable from our

8 overall economics. My principle concern as a manager

9 in public radio is ability to serve our audiences and,

10 obviously, too high a rates would limit our ability to

11 do that. And $24,000 seems to be a sustainable and

12 reasonable rate from my perspective.

13 Q Was there any period of time that public

14 radio did not include music in its programming on the

15 Internet?

16 A There was quite a lot of time, a quite

17 extended period of time where we were -- where we

18 stripped all the music from our content before it was

19 put on the air. And that, we thought, we not really

20 in furtherance of our public mission, of our

21 educational mission and limited the value of the

22 service we were allowed to do on the Internet.

1 Q Did that have anything to do with
2 financial considerations?
3 A It had everything to do with financial
4 considerations. An uncertainty about what exposure
5 that would have for NPR and for public radio stations,
6 obviously we had to put in resources simply into
7 stripping the music from our audio on line, but we did
8 that because we were uncertain about the financial
9 implications of putting it online.
10 Q Has NPR and public radio stations
11 generally, have they had to contribute resources to
12 put web programming on the web?
13 A Quite a bit. You know, historically --
14 let me first speak to NPR. For a while we didn't
15 actually put much resources into the web at all. A
16 few years ago we were only putting around $700,000
17 into it. We did that -- we were fairly limited in the
18 resources we were able to put into it, both because of
19 economics and because we know, frankly, that we
20 wouldn't generate any revenue from the activity. And
21 because of that, our activities on the web were fairly
22 limited and didn't reflect the high quality that we

1 expect from -- most people expect from NPR on air.

2 Over the last few years as a function of

3 our overall growth and revenue we've been able to put

4 in substantially more resources, $4 to $5 million this

5 coming year. Again, recognizing that we're not going

6 to generate any revenue at all, but that -- but we

7 need to have the same quality of service online as we

8 do on air. And I think that largely effects the same

9 type of growth curve that public radio stations around

10 the country have seen. Many of the smaller ones still

11 only really have a very static website. Of the 407

12 stations there, I suspect that characterizes, you

13 know, up to close to half of them in terms of what

14 they're able to do online. These are very, very small

15 stations; 5, 4, 3, 2 staffers. So, you know, the

16 webmaster is an hour of the GM's time a week. He's

17 also probably the engineer as well.

18 But the larger stations are beginning to

19 be able to put more resources into it to extend their

20 mission on line as part of their overall educational

21 mission.

22 CHAIRMAN VAN LOON: That $45 million

1 figure you mentioned, is that cumulative or is that
2 annual at this time, or --
3 THE WITNESS: Four to five.
4 CHAIRMAN VAN LOON: Four to five
5 THE WITNESS: Yes. It wouldn't be 45.
6 Yes, that is our annual budget we have.
7 BY MS. LEARY:
8 Q And that is up from, I believe you
9 testified a couple of years ago of $700,000?
10 A That's correct.
11 Q Would you just briefly explain for the
12 panel what you mean by we don't expect to generate
13 revenue on our website? Can you explain what you mean
14 by "generate revenue?"
15 A Well, I think what I mean by that is our
16 online activities bring in listeners. There are
17 traditional ways on air for radio stations, including
18 public radio stations, to monetize that; that is
19 through giving, through corporate underwriting,
20 through foundation grants, through support from their
21 institutions. There are no models that exist right now
22 for them or us to do the same on the line.

1 So, really it is an entirely sort of an
2 added service that we provide that has to be supported
3 from the revenues that we generate from our online --
4 excuse me, our on air activities. Does that answer
5 the question?
6 Q I believe it does. Thank you.
7 MS. LEARY: I have no further questions at
8 this time of the witness.
9 CHAIRMAN VAN LOON: Ms. Woods?
10 MS. WOODS: Yes. I would like to note for
11 the record that the particular figures that the
12 witness had just stated were not included in the
13 written direct testimony. I'm happy to explore them
14 further with him at this time, but there may be a need
15 on our part to request some additional discovery
16 regarding that financial information.
17 CHAIRMAN VAN LOON: So noted.
18 MS. WOODS: Thank you.
19 CROSS EXAMINATION
20 BY MS. WOODS
21 Q Mr. Stern, my name is Michele Woods, and
22 I represent the Recording Industry Association of

1 America here with the law firm of Arnold & Porter.

2 A Good morning.

3 Q Well, it's very nice to meet you here this

4 morning.

5 A Likewise.

6 Q And for the record, I do give pledges to--

7 A Then I'm deeply grateful you're doing the

8 cross rather than Mr. Garrett.

9 MR. GARRETT: For a number of reasons you

10 are.

11 BY MS. WOODS

12 Q Just in case that doesn't -- I don't know

13 how that counts for us, just wanted to get that on the

14 record.

15 MR. GARRETT: I need to pick my associates

16 more carefully.

17 MS. WOODS: Thanks. I think if you

18 started carrying baseball, Mr. Garrett might consider-

19 -

20 THE WITNESS: We'll remember that.

21 BY MS. WOODS

22 Q Let's talk a little bit about the figures

1 you had just mentioned. I'd like to understand them a
2 little more.
3 A Sure.
4 Q When you talked about the $700,000 figure
5 and then there $4 to $5 million, that is NPR's budget
6 and that does not -- is it correct that that does not
7 include the budgets of the member stations?
8 A That's correct.
9 Q And is most of -- well, let me ask, what
10 would be the breakdown in terms of how that money is
11 expended, is that -- well, actually, to back up, NPR
12 does not itself operate radio stations, correct?
13 A That's correct.
14 Q So would I be correct in assuming that
15 most of these funds probably go toward programming?
16 A What most of those funds go to are the
17 people who provide the buildout content on the web.
18 What we -- when we were spending $700,000 a year,
19 basically that was for technology and a few techs to
20 basically put the audio content up on the web and hope
21 it works.
22 What we've been able to do is invest

1 substantially more resources into people, to
2 journalists, to others to really provide the added in
3 depth content that really is the hallmark of NPR
4 programming. So, for instance, if you go to the
5 npr.org site right now, you'll see on the front page
6 of it every day new, sort of in depth content related
7 to some on air piece. So it's usually text and photos,
8 and some other type of -- often -- and now just
9 beginning video that added -- that adds content to
10 what we do on air; extends it, deepens it and really
11 sort of relates for listeners who have a greater
12 interest in the subject, really provides a greater
13 educational experience. So what we've been able to do
14 the last few years invest in really what is the
15 hallmark of NPR, the human resources to make -- to add
16 value on the web.
17 Q Okay. And the npr.org site, the content
18 that's available there, I take it that is not also
19 available on the member station websites?
20 A That is not entirely correct. Some of it
21 is available through member station sites.
22 Q How would it get to member station sites?

1 A That's a technology question which you've
2 gone well beyond my expertise. It is through use of
3 HTML codes which we arrange with member stations,
4 which they're able to pick up certain portions. We
5 make certain portions of our content available
6 everyday through member stations. They use fancy
7 equipment and fancy words that I'm not quite familiar,
8 to pick it up and add it as they choose to their
9 online -- their online sites.
10 And part of the station's identity, of
11 course, is NPR. I mean, obviously, to the extent that
12 what they're trying to do on line is reflect the
13 values and content that they do on air. It's important
14 for us to get NPR content to them so that they're able
15 to do that. We're, frankly, just in the first parts
16 of that process, but we do now make content available
17 on a daily basis for member station sites.
18 Q Okay. And how much of the -- well, and
19 the member stations, I take it, pay a membership fee
20 to NPR, is that correct?
21 A They pay -- that is correct.
22 Q Or dues or something like that? I don't

1 know how you characterize it.

2 A Let me try to be helpful in that. The
3 payments they make to NPR fall into two categories.
4 One is a simple membership fee of relatively small
5 amount entitles them to be members of NPR and to be
6 represented in forums such as -- such as this.

7 The second is payments for specific
8 programming. It's up to each station to decide what
9 NPR programs they want to broadcast, so they are
10 essentially on an a la carte system where they pay us
11 based upon the value of the programming to them.

12 Q And so would they pay for the programming
13 that they would receive that's also on the npr.org
14 website on an a la carte basis?

15 A They actually don't pay for it right now
16 because there's actually no proven economic value to
17 any of it. Frankly, most stations view the web as a
18 tool right now, but it's an economic sinkhole for
19 them. And, frankly, the more -- more traffic they
20 get, the more money they lose. So -- because it
21 require more investment, more band width and more
22 support.

1 So, we actually provide the online content
2 and right now free of charge as a -- as part of
3 overall service to member stations.
4 CHAIRMAN VAN LOON: Can I clarify when
5 they're buying program purchase a la carte, does every
6 station large or small pay the same amount for
7 "Morning Edition," or whatever or --
8 THE WITNESS: No.
9 CHAIRMAN VAN LOON: Do they pay different
10 amounts based on their listenership?
11 THE WITNESS: They pay different amounts
12 based upon the listenership for that program.
13 BY MS. WOODS
14 Q How much of the -- well, say, the $4 to $5
15 million was spent in what year?
16 A Fiscal year '01, which is our current
17 fiscal year we'll be slightly short of $4 million. I
18 believe fiscal year '02 looking forward we will be
19 slightly short of $5.
20 Q Okay. How much of that budget is
21 specifically devoted to the streaming of music?
22 A How much of that specific budget is

1 devoted specifically to the streaming of music? I
2 would say to answer the question, virtually none.
3 And, again, let me explain to you. I can't give you a
4 specific number, but again most of our expenditures on
5 the web are for humans who -- for staff who produce
6 the build out content. So the technology of streaming
7 virtually nothing. Some band width. Minor band width
8 costs.
9 Q And, Mr. Stern, I take it that the
10 stations that you're representing here today are those
11 that are members of CPB, is that correct or that are
12 eligible for CPB funding?
13 A That is correct. They're CPB qualified
14 stations.
15 Q Okay. I'm going to ask you to take a look
16 at RIAA Exhibit 213 DPX, which is being handed out
17 now.
18 (Whereupon, the document was
19 marked as RIAA Exhibit 213 DPX
20 for identification.)
21 BY MS. WOODS
22 Q I'll ask you to take a look at this. I

1 will represent to you that this document was produced
2 to us in discovery in this particular case. And is
3 what we see here an excerpt from a public broadcasting
4 revenue fiscal year 1999 final report from CPB?
5 MS. LEARY: Ms. Woods, may I just request
6 that you point out to the witness that this is
7 produced in response to a request for the Dr. Murdoch
8 and Dr. Woodberry's testimony?
9 THE WITNESS: Okay.
10 CHAIRMAN VAN LOON: So noted.
11 BY MS. WOODS
12 Q I was asking you if you could identify
13 that this is in fact a report from CPB of public
14 broadcasting revenue for fiscal year 1999?
15 A Well, it appears to be. I don't have any
16 personal knowledge of the document. But I'll take
17 your word for it.
18 Q Okay. I would ask you to look at table 2,
19 which is on page 2 of the document. And here we see,
20 I believe, a breakdown of public broadcasting revenue.
21 And if you look down at the legend, is it correct that
22 PR stands for public radio revenue?

1 A It seems -- it seems that's what it says,
2 yes.
3 Q Okay. And if we look for fiscal year 1999
4 and then down in the last row of the chart for total
5 revenue, would I be reading this correctly if I read
6 that the total revenue for public radio for fiscal
7 year 1999 was $536 million?
8 A That is the number here. I actually don't
9 know that would be the total revenue for what I would
10 define as public radio. I don't know, for instance,
11 if that includes NPR -- revenue for NPR or revenue for
12 PRI, or revenue for other producers who are not under
13 the definition CPB qualified stations.
14 I'm not familiar with the document, so you
15 know -- I mean it does say public radio $536 million
16 for fiscal year -- fiscal year two years ago. But I
17 don't know what that includes in the way of non-CPB
18 qualified institutions.
19 Q So in other words the number could be
20 larger than this if one added in none-CPB qualified
21 institutions, is that --
22 A Could be.

1 Q Okay. Well, what is your understanding
2 as, you know, obviously an individual I believe you
3 said in your testimony who oversees finances for NPR
4 of what the revenues were for fiscal year 1999 for the
5 stations that are being represented, the CPB qualified
6 stations that are being represented in this
7 proceeding?
8 A I actually don't think I have any specific
9 knowledge of the total revenue for the 407 stations
10 represented. I can tell you more about NPR's revenues
11 with real specificity. I don't think I can really
12 tell you much based on personal knowledge about the
13 revenue for the 407 stations. Sorry.
14 Q All right. Well, for fiscal year 1999
15 what were NPR's total revenues?
16 A I believe it was -- I wish you had asked
17 me about the year in which I was at NPR, but I believe
18 it was about $85 million.
19 CHAIRMAN VAN LOON: I'm sorry. 85?
20 THE WITNESS: I believe about 85.
21 BY MS. WOODS
22 Q And that's for NPR alone, is that correct?

1 A That is correct.

2 Q And it doesn't include the member

3 stations?

4 A That is correct.

5 Q And what about for fiscal year 2000 when

6 you were there, correct?

7 A 2000?

8 Q Yes.

9 A Yes, I was. It would have been, I believe,

10 should have been about $90 million.

11 Q Okay. And now when does the fiscal year

12 close?

13 A It closed September 30th.

14 Q Okay. So I take you don't have revenue

15 figures yet for fiscal year '01?

16 A No, but I would project. I think we can

17 project about $95 million -- upper 90s.

18 Q Great. Okay.

19 A There is -- let me just say, there's one

20 uncertainty. You know, there are uncertainties about

21 it because we have different activities that are some

22 program related, some are distribution related. We

1 have a chance for revenue related to our job as
2 trustees of the public radio satellite system. And
3 there are -- that is a highly fluctuating revenue
4 cycle because of CPB grants for large project related
5 activities.
6 Q Okay.
7 A There are -- in the last year -- I believe
8 in fiscal year 2000 we replaced the satellite system
9 that was used, and there were some very -- one large
10 one time expenditures, which may make it slightly
11 difficult for me to describe to you those revenues.
12 Q Okay.
13 A But that's -- I've tried to in answering
14 that excise those amounts, because there's not really,
15 I think, what you're driving at. So, that's my best
16 estimate right now.
17 Q Okay. Now, can you help me here? I am
18 trying to clarify exactly --
19 ARBITRATOR VON KANN: She is a
20 contributor.
21 BY MS. WOODS
22 Q Well, trying to clarify, I know you had

1 talked a bit about representing 407 stations in this
2 proceeding?
3 A Yes.
4 Q And approximately 300 of those are members
5 of NPR?
6 A That is correct.
7 Q And when I looked in your testimony I see
8 -- well, I see an attached public radio exhibit with
9 806 call letters of public radio stations.
10 A Right.
11 Q And then I see a reference on page 4 to
12 644 NPR member stations.
13 A That's right.
14 Q And so I guess I'd ask you first to
15 clarify for us is there a way that I can tell from
16 looking at Public Radio Exhibit 1 which of these call
17 sign stations are actually being represented in this
18 proceeding right now?
19 A I believe all of them are. Let me --
20 Q That's 806, correct?
21 A -- try to be helpful. Can I try to
22 clarify?

1 Q Sure. Please.

2 A This is a common confusion, because many

3 what we call member stations have more than one

4 transmitter and more than one call letters. For

5 instance, Wyoming Public Radio is one member station

6 of NPR, but in fact has ten licenses.

7 So, what you -- what you have here is 407

8 members, 407 represented institutions, but 800 --

9 which in the aggregate have 807 or 806 signals. So

10 all the -- when I say 407 institutions, 407 stations,

11 I am referring to 407 licensees which operate 806

12 signals.

13 Q All right.

14 A Did that help?

15 Q Some. Now, if I look at Public Radio

16 Exhibit 1, am I able to tell here which of these

17 signals are members of NPR and which ones are not?

18 A You mean which are the three-quarters that

19 are members of NPR and the quarter that are not?

20 Q Correct.

21 A Not that I know of.

22 Q Okay. Now, in terms of --

1 A But you could go to the npr.org website
2 and find out the list of member stations and cross
3 index against it. I don't recommend that as a fun
4 task.
5 Q Well, I will tell you that I actually --
6 CHAIRMAN VAN LOON: And you could probably
7 turn on music and you could listen while you're doing
8 that.
9 BY MS. WOODS
10 Q I will tell you that I actually started to
11 try to do that and I found it very confusing, which is
12 why I was hoping I could just ask you and get some
13 help with that.
14 So I take it what you're saying is that
15 somehow this list in Public Radio Exhibit 1 would turn
16 out to be 407 institutions?
17 A That's correct.
18 Q Okay. Is there any way for me to tell
19 from this list -- I can see that sometimes it seems
20 fairly self-explanatory, but sometimes it doesn't --
21 which ones are grouped together as a single
22 institution?

1 A I don't think so, not -- I don't think you
2 can do that other than looking and making some
3 educated guesses.
4 For instance, when you get down to page 7
5 -- getting down to 750s and you look at, for instance,
6 Wyoming, you see that there are ten stations or 11
7 stations, 12 stations listed in Wyoming. I happen to
8 know that they're only one public radio licensee,
9 Wyoming Public Radio. So, but that is probably not
10 something you could do without support -- specific
11 knowledge like that.
12 Q So would it be more accurate to say that
13 you are representing 407 public radio licensees here--
14 A That is correct.
15 Q -- in this proceeding rather than stations
16 as it's stated on page 2 of your testimony?
17 MS. LEARY: And I'm going to object to the
18 form of the question. The witness' testimony at page
19 three, footnote 2 describes exactly who is represented
20 in this proceeding.
21 MS. WOODS: Well, with all due respect, I
22 don't believe that's the case. I believe the witness'

1 testimony just now was about licensees. I believe it's
2 a fair question to ask him to clarify who exactly is
3 being represented in this proceeding and what those
4 institutions are.
5 CHAIRMAN VAN LOON: Objection as to the
6 form of the question?
7 MS. LEARY: Yes. I would suggest that
8 perhaps Ms. Woods define what she means by licensee
9 versus public radio station for the witness. These are
10 terms of art.
11 MS. WOODS: I was adopting the witness'
12 own term of licensees. I believe it's a proper
13 question.
14 ARBITRATOR VON KANN: And the question is
15 then what does he mean by that? What does he mean
16 when he refers --
17 MS. WOODS: Well, the question for him was
18 whether it would be accurate to state that in fact he
19 represents here 407 public radio licensees, some of
20 which could have licenses for multiple stations.
21 CHAIRMAN VAN LOON: Overruled.
22 THE WITNESS: I'm a little uncertain, to

1 be perfectly honest, about the precise nomenclature
2 used here. I can tell you sort of the factual -- the
3 underlying facts. I'm not quite sure of the right
4 terminology to be used.
5 There are 407 members, what are called CPB
6 qualified stations. I guess you would call those
7 stations the 806 member are call letters. I think most
8 people would call those stations as well. I'm not
9 sure if that's the technical turn for them as well,
10 but most people would consider, you know, when they
11 hear a different call letter, call those a station as
12 well. There may be some overlapping terminology. I'm
13 not really sure. I can just tell you that there are
14 407 CPB qualified stations and there 806 actual
15 signals going out under the public radio call signs.
16 BY MS. WOODS
17 Q Is the rate request that you are making
18 here on behalf of all 806 of those call signal
19 designated stations?
20 A Yes.
21 Q And can you just --
22 A Well, the answer to that is yes, but they

1 may -- let me just tell you that they may act
2 differently online than they do on air in the sense
3 that, for instance, Wyoming Public Radio which I guess
4 is one of the 407 and 11 of the 806 probably only
5 operated one website.
6 Q Okay. Well, can you tell us how many
7 streaming -- music streaming websites are you here
8 representing today?
9 A No, I can't.
10 Q Could you give us a ball park
11 approximation?
12 A I can -- let me sort of talk it out. I
13 would guess -- do you want me guess? I can guess.
14 Q Well, we'd like informed information,
15 obviously, here.
16 A Well, there -- the 407 is probably likely
17 the number of websites associated with public radio.
18 I would assume that only a fraction of those actually
19 have any music associated with it or stream music.
20 Most of them stream their signals.
21 Of the 407 stations, approximately half
22 are in news/talk formats. So they're probably only

1 streaming news/talk. Now, there are tiny interstitial
2 or what we call buttons of music in there, but that's
3 not music streaming I think of a common definition.
4 So, you're probably only talking a couple
5 of 100 who are even in music formats. And I doubt if
6 all them stream their signal. So I think these are
7 reducing the numbers in that fashion.
8 I couldn't even give you an educated guess
9 as to the number, though.
10 Q The rate request you're making here today,
11 is it on behalf of those that are currently streaming
12 at that time or is it for both? Let me ask you that.
13 Stop there. Is it for those that are currently
14 streaming at this time?
15 A It's for all public radio stations.
16 Q So would I be correct in understanding
17 that if all 407 or 806 decided to have a website and
18 stream music on it, that your rate request would
19 encompass all of that streaming activity?
20 A I suppose that's the case. I understand
21 that the rate request is for a four year period, of
22 which we're in the third year. I would be highly

1 doubtful of any projection that in -- by the end of
2 next calendar year materially more public radio
3 stations would be into streaming radio -- streaming
4 music in any fashion.
5 Q Okay. But if they were to do so, the rate
6 request that you make here you believe would encompass
7 that activity, is that correct?
8 A In theory, I think that is correct.
9 Q Okay. Now, in terms of the licensees or
10 the stations, I guess, that you're representing here,
11 I know you say that NPR represents them. Is that
12 through some kind of agency agreement that they've
13 signed with you?
14 A I don't know.
15 Q So you don't know if there's any signed
16 authorization for NPR to act on behalf of all these
17 stations?
18 A That is correct, I do not know.
19 Q Okay. With respect to the fee request
20 that --
21 A Let me just answer that question, if you
22 don't mind. It is very common for NPR to represent

1 its member stations in proceedings in a broad -- in
2 the FCC. I mean, we're a membership organization, so
3 it's extremely common for us to represent without any
4 specific agency agreement or otherwise it may be in
5 part of our membership charter, for all I know. It is
6 fairly common for us to do so. So that is sort of
7 seen fairly obvious mechanisms for representing those
8 stations.
9 Q And does your membership charter include
10 streaming with respect to Section 112 and 114? It
11 probably does not, does it?
12 A I don't -- I'm not sure if I know what you
13 mean.
14 Q Does your membership charter specifically
15 refer to representing the NRP members with respect to
16 streaming activities undertaken in compliance with --
17 or for rates set -- let me back up. To set rates with
18 respect to streaming activity undertaken under
19 Sections 112 and 114 of the Copyright Act?
20 A No. What I meant by my prior answer,
21 which I guess was a little confusing. It is common for
22 NPR as a membership organization to represent its

1 members in a variety of forums; legislative,
2 regulatory, governmental. I doubt if sort of all the
3 areas in which we represent them are spelled out in
4 any one particular place, but it is a common function
5 of a membership and trade organization, which we are
6 in some respects, to do that type of representation.
7 So I think it flows naturally from the role of NPR as
8 a membership organization.
9 Q Well, what about the approximately one-
10 quarter of the stations you're here representing who
11 are not actually members of NPR, do you have signed
12 authorization on their behalf to represent them here?
13 A I don't actually have any factual
14 knowledge of the mechanisms under which we are
15 representing all the public radio.
16 Q Okay. Has NPR formally been designated as
17 a common agent pursuant to the statutory provisions of
18 Section 114?
19 A I think you've gone beyond the range of my
20 knowledge. I don't know.
21 Q Okay. So you're not familiar with that
22 provision in Section 114, I take it?

1 A You take it correctly.

2 Q Now, with respect to your understanding of

3 how this would work, is it your understanding that if

4 the panel were to accept your rate request and to

5 designate a fee or to set a fee of $24,000 per year

6 for NPR, is it your understanding that that amount

7 would be paid to the --- whatever body is established

8 to collect the fees by NPR?

9 A If I understand your question, you're

10 asking the $24,000 that would be paid by --

11 collectively by public radio, which includes NPR and

12 the 407 stations?

13 Q Well, would the check come from NPR?

14 Would it be, you know, an NPR check?

15 A I don't know.

16 Q Has NPR discussed with its member stations

17 how this particular -- and the stations represented

18 here, how the fee would be allocated?

19 A I'm not familiar with any allocations

20 pursuant to this -- this proceeding. Obviously, we do

21 have allocation systems from other CARPs. I'm not

22 familiar with how they work. Presumably there are some

1 well trod mechanisms for that. I don't have any
2 specific knowledge of that.
3 Q And do you know if those mechanisms in
4 fact apply to Section 114 of the Copyright Act?
5 A No, I do not.
6 Q Okay. Our concern is would we expect for
7 the $24,000 one check or would we, in fact, perhaps be
8 receiving 407 or 806 times 4 checks that would then
9 have to be processed and allocated?
10 A If that's a question for me, I don't know
11 the answer to that. I think it would be hard to
12 imagine that public radio doesn't -- couldn't come up
13 with mechanisms to provide for the administrative
14 confidence of the -- of the record industry. I assume
15 that's a prospect. I don't have any specific
16 knowledge to that question.
17 CHAIRMAN VAN LOON: Do you think NPR could
18 guarantee one check if they got a sufficiently low
19 rate?
20 THE WITNESS: If that's an offer,
21 accepted, Judge.
22 MR. STEINTHAL: Your Honor, we'll accept

1 that on behalf of the broadcasters as well.

2 BY MS. WOODS

3 Q And is it your understanding, for

4 instance, for a particular year when would the check

5 be paid? At the beginning of the year or the end of

6 the year?

7 A I don't have any specific knowledge.

8 Again, I find it hard to believe that there wouldn't

9 be a way to work that out collegially with the record

10 industry in order to make sure that they got payment

11 in a timely fashion.

12 Q And I take it you would understand that

13 artists are represented here as well. On the

14 copyright, owner and performer side I assume you could

15 work with them as well?

16 A Is your question that there are multiple

17 groups and different payments that need to be made and

18 how to coordinate those payments? I'm not sure if I

19 actually follow the question.

20 Q The question was actually just if you

21 understand that -- and you mentioned the record

22 industry, but that in addition artists are involved in

1 this proceeding and actually will receive some portion
2 of the royalties.
3 A Well, you've asked me a number of
4 questions about representation, who NPR and I
5 represent here. I guess I have some understandings
6 about the representations that you have and that the
7 parties and interests in this proceeding is the Record
8 Industry Association of America, and that is the party
9 of interest. I actually don't know the makeup of that
10 association and the mechanisms that it has for
11 distributing payments to artists and others. I guess
12 I would assume that they exist, but that's sort of the
13 limit of my understanding right there.
14 Q Are you aware that the artists unions
15 including AFM, AFTRA and also the independent
16 producers, AFIM are also participating in this
17 proceeding on the Copyright Owner and Performers side?
18 A I'm not familiar with their participation
19 in this proceeding.
20 Q Okay. Are you aware with the provisions
21 of Section 114 that provide that artists get a
22 allocated portion of the royalties that are paid in

1 this proceeding?

2 A I'm not familiar with that section or the

3 mechanisms behind that section.

4 Q All right. Okay. If NPR were to assume

5 responsibility for providing payment in a single check

6 on behalf of all copyright owners who had a claim to

7 the royalties, would NPR also be assuming

8 responsibility for providing the data that would be

9 necessary for allocating those royalties among all of

10 the potential copyright recipients?

11 MS. LEARY: I'm going to object the

12 question. I think the witness has already testified

13 that he is not familiar with the specifics of the

14 statute and the various groups to be paid. And he has

15 testified to the extent of his knowledge.

16 CHAIRMAN VAN LOON: Sustained.

17 BY MS. WOODS

18 Q Does NPR have any provisions in, for

19 instance, it's membership charter that would allow it

20 to act as a representative organization, for instance,

21 for purposes of enforcement actions that might need to

22 be brought with respect to the provisions of Section

1 114?

2 A Not that I'm familiar with.

3 Q Are you aware of any terms that NPR is

4 requesting in this particular proceeding?

5 A Terms -- terms of -- I'm familiar with the

6 dollar terms. I'm familiar with the length of the --

7 length of tenure of those dollar terms. I'm not sure

8 what else you refer to.

9 Q So you're not familiar with other terms

10 that might be related to the operation of the

11 distribution of the funds?

12 A Apparently not. I'm not entirely sure

13 what you mean, but I don't think so.

14 Q Just going back for a second to the

15 concept of repeater stations, do you have any

16 knowledge as to whether any of the repeater stations

17 are actually independently streaming music on

18 websites?

19 A I'm not aware of any repeater stations who

20 do that.

21 Q Are you aware that in fact they do not, or

22 you just don't know?

1 A I'm aware of the general practice that
2 they do not and they operate as a unitary operation
3 for their websites. I can't say that I'm aware that
4 there are no exceptions to that general rule. I'm not
5 aware of any exceptions to that general rule.
6 Q Now, you've mentioned that one of the --
7 I think on page 4 of your testimony, that one of the
8 unique aspects or one of the aspects of public radio
9 is that you could provide programming that might not
10 have mass audience appeal, is that correct?
11 A That is correct.
12 Q And then I think on page 6 you state that
13 public radio's programming doesn't depend on
14 maximizing audiences for any one program. Is that
15 also still correct?
16 A It is correct.
17 Q And you say that funding of public radio
18 has little if anything to do with reaching maximum
19 audiences per se. That's also on page 6. Do you see
20 that? That would be the second paragraph.
21 A Yes, I do see that.
22 Q Okay. And could you tell us what do you

1 mean by that statement?

2 A Well, I think it means that most of the

3 money for public broadcasting comes from a variety of

4 sources. From governmental or institutions of some

5 sort which provide support based upon what they see as

6 overall value of the services. And secondly, from

7 listeners who give money based upon the value of the

8 content to them personally.

9 So, that is -- those are sort of the two

10 over-arching calculations that are made, and that's

11 why I described it that way here.

12 Q So it's not given by, for instance, the

13 traditional concerns about rating that drive the

14 advertising marketplace for commercial over-the-air

15 radio?

16 A That's correct. I mean, obviously, we're

17 an educational institution. We try to be a well run

18 educational institution and set benchmarks for

19 success. And one of our benchmarks as an educational

20 institution is the ability to extend our programming

21 to more and more people. So, yes, we do try to create

22 programming that has educational appeal to wide

1 audiences.

2 On the other hand, we do a variety of

3 niche programming which, in fact, describes from NPR's

4 prospective most of its music based genres that appeal

5 to relatively small audiences. Those programs are not

6 supported by the revenues that they drive, and we do

7 them because of our public service mission, not

8 because of audience numbers or economic targets. And

9 that's, I think, what I was trying to convey in this

10 testimony.

11 Q I'm going to ask you to take a look at

12 RIAA Exhibit 314 DPX, which is a document that we

13 obtained from the npr.org website, and it discusses

14 something that you had talked about in your testimony

15 already, which I believe is the concept of

16 underwriting.

17 (Whereupon, the document was

18 marked as RIAA Exhibit 214 DPX

19 for identification.)

20 THE WITNESS: Yes.

21 BY MS. WOODS

22 Q And, first of all, do you recognize this

1 material from the npr.org website?

2 A Not specifically.

3 Q But are you familiar that NPR does prepare

4 material of this nature to show to potential

5 underwriters?

6 A Yes.

7 Q Okay. And if you look at -- I'm sorry,

8 this doesn't have page numbers. I apologize. But if

9 you look at the second page, it says up at the top "If

10 you want to add might to your marketing, NPR

11 delivers." Correct?

12 A Correct.

13 Q And there's some discussion of the value

14 of the NPR demographic.

15 A Uh-huh.

16 Q Which is highly educated and tends to have

17 fairly high incomes. Is that correct?

18 A That is correct.

19 Q And if we look at the last page --

20 MR. GARRETT: I don't qualify.

21 CHAIRMAN VAN LOON: I didn't say it, also.

22 MR. GARRETT: I knew what you were

1 thinking.

2 BY MS. WOODS

3 Q And if we look at the last page of the

4 document, it actually talks about the on air credits

5 that companies are allowed to have if they, I gather,

6 sort of purchase an underwriting spot. Is that

7 accurate?

8 A I would actually say as indicated in the

9 fourth paragraph, required by federal law. We are

10 required by federal law to disclose -- I think you

11 said allowed to have -- it's actually as a matter of

12 law. I'm more familiar with this part of the law than

13 I am with Section 114. So it's required -- we're

14 required to disclose those contributors.

15 Q You're required to disclose, but isn't it

16 correct that some of the additional description that

17 is permitted would not be technical required by law?

18 A That's correct. Of course, that's right.

19 Q Okay. And if we look at some of the

20 sample on air credits. For instance the first one

21 smartmoney.com, "Financial advice, analytical tools

22 and coverage of the financial world on the web at

1 smartmoney.com."

2 I take it smartmoney.com is able through

3 this actually to direct listeners to places where they

4 might find more information about that company?

5 A Sure.

6 Q And that's correct for most of the sample

7 credits that are available here?

8 A That is correct.

9 Q And would you say that's fairly typical of

10 on air credits that the company -- the underwriter

11 would include information that would provide a

12 reference to places to obtain other information --

13 A Yes.

14 Q -- or direct the listener to some site or

15 service -- well, I guess not service, but site or

16 information source about that particular underwriter?

17 A Uh-huh. Yes.

18 MS. WOODS: At this time I'd like to offer

19 214 DPX into evidence.

20 MS. LEARY: No objection.

21 CHAIRMAN VAN LOON: Admitted.

22 (Whereupon, the document marked

1 as RIAA's Exhibit 214 DPX was
2 received in evidence.)
3 BY MS. WOODS
4 Q Now, you had talked about, I think, just
5 previously about that most of the music programming is
6 in fact, niche oriented, Mr. Stern? NPR's music
7 programming. Is that accurate?
8 A I think it's the word I used, yes.
9 Q Okay. And if I look at page 5 of your
10 testimony, I actually see a list of some of the types
11 of music that is offered by NPR, world music, Celtic
12 music, classic jazz, folk, bluegrass, blues, and other
13 musical genres. Is that correct? In the first full
14 paragraph of page 5 of your testimony? Do you see
15 that listing?
16 A Yes, I do.
17 Q Okay.
18 A Yes.
19 Q And then in the paragraph after that you
20 talk about --
21 A Let me actually correct that.
22 Q Sure.

1 A That refers to NPR and public radio. I
2 think you question may refer only to NPR.
3 Q Okay.
4 A Some of those are genres that are NPR
5 itself do not produce but that our members stations
6 either produce or broadcast.
7 Q Well, let me ask you this, would all those
8 be types of genres that would be found on websites of
9 the stations that you're representing here int his
10 proceeding?
11 A Possibly.
12 Q I'd ask you -- and at the bottom of page
13 5, and I think you referred to it earlier, you also
14 talked about the educational content of NPR's musical
15 programming. And that would extend to the web as
16 well, I take it.
17 A That is correct.
18 Q That you can learn more about the music?
19 A Yes.
20 Q And that's a feature that you think is an
21 important feature of NPR's musical programming?
22 A I would say it's not just an important

1 feature, it's the defining feature of NPR's musical
2 programming.
3 Q Okay. And do you consider that to be
4 unique to NPR?
5 A It's certainly not unique to NPR within
6 public radio, oh.
7 Q Oh, sorry. To public radio, do you
8 consider it be a unique feature of public radio
9 musical programming?
10 A I can't say that I am familiar with all
11 other musical programming in fact outside of public
12 radio. In fact, you might say I'm generally ignorant
13 of music programming outside of public radio.
14 It does strike me as a general matter
15 that, yes, that is a feature that is principally
16 unique to public radio and what it's about, though
17 other services may have it. But, presumably, that's
18 not their mission; it's ours.
19 Q Okay. I'd ask you to take a look at the
20 exhibit that was handed to you, which has been marked
21 and labeled as RIAA 215 DPX.
22 (Whereupon, the document was

1 marked as RIAA Exhibit 215 DPX
2 for identification.)
3 THE WITNESS: Yes.
4 BY MS. WOODS
5 Q And this document is actually -- or this
6 series of documents is printed off the netradio.com
7 website.
8 I'd ask you first, Mr. Stern, are you
9 actually familiar with the netradio.com website?
10 A No, I'm not.
11 Q Are you familiar with the Spinner website?
12 A No, I'm not.
13 Q Are you familiar with the websites of the
14 -- any of the websites that are offered by the
15 webcasters who are participating in this proceeding?
16 A I actually don't know who the webcasters
17 are who are participating in the proceedings. But I
18 think you can take it as a general rule that I am not.
19 Q Okay. Thank you.
20 Now I ask you to go ahead and just take a
21 look at this Exhibit 215 DPX, which comes from the
22 netradio.com website. And --

1 A What page did you point me to?

2 Q The first page first.

3 A Oh, okay. Here I am.

4 Q And do you see that it says "Learn about

5 music."

6 A Yes, I do.

7 Q And then offers a number of genres.

8 A Yes.

9 Q And a number of those, such as blues and

10 classical and jazz and folk, and world would be genres

11 that in fact you had referenced as genres that are

12 offered by stations that NPR is representing in this

13 proceeding, is that correct?

14 A That is -- yes, a number of them are.

15 Q Okay. And then I'd ask you to take a

16 look, for instance, at page 3 of the document and do

17 you see up at the top where it says "Learn about

18 jazz"?

19 A Uh-huh.

20 Q And then there are basically four pages of

21 text about jazz there?

22 A Uh-huh.

1 Q And then if you look at page 4, there's
2 actually a list of styles in this genre and channels
3 in this genre. Do you see those lists?
4 A Yes, I do.
5 Q Okay. And I won't walk through all of
6 these with you, but are you familiar -- I take it you
7 are not familiar with this "learn" section of the
8 netradio.com website?
9 A That is correct, I am not familiar either
10 with netradio or the learn section of their site.
11 Q Okay. And are you -- well I think you had
12 mentioned that you are not familiar with spinner.com.
13 Did you by any chance have an opportunity to watch the
14 opening statements in this proceeding?
15 A No.
16 Q Okay. Then I won't ask you about one of
17 the slides that was shown there.
18 Let me ask you instead about a statement
19 you make on page 5 here. You mentioned that the
20 additional information about programming does not
21 replace listening to CDs, but rather enhances the
22 experience.

1 I'd like to ask you, are you suggesting
2 that what I, for instance, as a listener to one of my
3 CDs would be doing is listening to my CD but then
4 logging on to a public radio website to see if I can
5 find something information about the CD at the same
6 time as I listen to the CD? Is that what you mean
7 there?
8 A I don't think I was suggesting anything
9 about your personal experience or that of any
10 individual. I think what I was trying to suggest there
11 is that mostly what we do is try to teach people about
12 music. And, in fact, encourage them to seek other
13 resources and to learn more about the music in other
14 places.
15 Frankly, it's our experience and our
16 sense, I would say, that learning more about the music
17 often leads people to buy the music or buy books as an
18 anecdotal matter. So I think what I was suggesting
19 there is this is not intended to be a replacement for
20 the experience in whatever fashion that people have
21 for listening to CDs. It's an enhancement to it. In
22 fact, it's really an invitation to it.

1 Q Okay. Do you have any statistics on how
2 many CDs might have been purchased by people who were
3 listening to streamed music on NPR represented music
4 websites?
5 A CDs purchased. Okay. That's a fairly
6 narrow question. The answer is I don't.
7 It is our experience -- let me speak very
8 broadly, because I don't have any information to share
9 with you on that. It's our experience mostly from
10 hearing from Amazon that, you know, when people hear
11 about -- principally books, but we assume records as
12 well and we've heard anecdotally records as well, that
13 they hear about it on NPR, that frequently that drives
14 sales on commercial websites such as Amazon. And that
15 there is, you know -- the stories are legend. They
16 are anecdotal. It's about Cokie Roberts' book, which
17 zoomed from 2 million and 33 to number two after being
18 interviewed on NPR. And you hear that quite
19 frequently.
20 So it's an assumption we make. We --
21 we're not in the business of selling records or
22 selling books, so we don't have any need to track it,

1 but it's our experience that that's what it does.
2 Q But I take it with the exception of
3 perhaps an occasional excerpt that you can't really
4 read a book that you heard about on NPR -- on an NPR
5 website? The text of the book is not available on the
6 website, is it?
7 A Correct.
8 Q Okay. And you don't have any -- I think
9 you said you don't have any statistics as to what sort
10 of purchases of music have been driven by -- and I
11 want to be specific here -- by music programming that
12 is streamed over the Internet?
13 A Oh, I don't -- I think I can assume that
14 the numbers of sales of records or CDs driven by
15 listening to NPR or rated music on the Internet is
16 relatively low simply because as a relative matter the
17 number of people who listen to audio and specifically
18 music on NPR websites is also very low. So I think we
19 can make the assumption that as a relative matter it's
20 a small number.
21 Q And I think you just said that the number
22 of people that listening to music right now is

1 relatively small. Do you have a number you can put on
2 that with respect -- or specifically to the number of
3 people who say in the year 2000 listened to streamed
4 music on NPR websites for which you are making claims
5 in this proceeding?
6 A I don't have a specific number to it. I
7 know in some of the exhibits that we've prepared for
8 this presentation that one percent of our on air
9 listening -- only one percent of our on air listening
10 is reflected in the data for online activities. And,
11 presumably, that reflects mostly because what NPR and
12 public radio mostly does is serve news and
13 information. That the majority of that one percent is
14 news and information and non-music based.
15 So, it would be a fraction of a one
16 percent of our on air audience that would be listening
17 to music online. And I would suspect, but I don't have
18 a number to give you, that it is a very small fraction
19 of one percent.
20 Q Okay. So it's your understanding that
21 that one percent is related to all listeners, not
22 listeners specifically listening to music?

1 A That is correct.

2 Q Okay. And but would I be correct in

3 understanding that NPR actually has a specific

4 corporate goal of increasing its online listening

5 audience? And this question is with respect to all

6 online?

7 A Yes.

8 Q And --

9 A We do.

10 Q -- in fact, there is specific numerical

11 goals that NPR has with regard to the numbers of

12 listeners it would like to have in its online

13 audience, is that correct?

14 A As part of our benchmarking of our overall

15 operations, we try to benchmark subsidiary activities.

16 So, yes, we've set numerical goals, frankly, none of

17 which have been met, I'm sad to say.

18 Q Okay. Who is Kevin Klose?

19 A Kevin Klose is the President and Chief

20 Executive Officer of National Public Radio.

21 Q Okay. I'd ask you to take a look at the

22 document that's just been handed out and marked as

1 RIAA Exhibit 216 DPX.

2 (Whereupon, the document was

3 marked as RIAA Exhibit 216 DPX

4 for identification.)

5 BY MS. WOODS

6 Q And in the first paragraph there there's

7 a quotation from Kevin Close saying that we believe

8 there's an enormous audience out there. Do you

9 disagree with Mr. Klose about that?

10 A No. I think we believe in the long term

11 that there is enormous information -- audience out

12 there on the web that should be served with high

13 quality news, information, cultural programming. Most

14 of that enormous audience we think are presumably

15 interested in non -- I would say two things about it

16 in explanation. One is we think most of it is for our

17 news and information. And two, we know that enormous

18 audience has not come to public radio sites at this

19 point in time.

20 Q Okay. And is it accurate -- I believe

21 there's a quotation from you on page 2 of this

22 document or a reference to a statement that you made

1 that NPR is seeking to increase total audience across
2 all distribution platforms by 10 percent in the next
3 three years. Is that an accurate statement of NPR's
4 goal?
5 A Generally, yes, it was certainly accurate
6 at that time, yes.
7 Q And that time was March 9, 2001, correct?
8 A Yes.
9 Q So the three years encompassed there would
10 presumably be 2001 through 2003, is that correct?
11 A That is correct.
12 Q Okay. And I also see in the final
13 paragraph on page 2 above the index references a
14 reference to NPR's goal of increasing its NPR online
15 audience to 1.2 million by the end of the year, which
16 I understand to be -- correct me if I'm wrong -- 2001?
17 A Yes.
18 Q And to 4.7 million by fiscal year 2004?
19 A Yes.
20 Q Do you understand that to be an accurate
21 statement of NPR's goals with respect to its online
22 audience?

1 A It was the accurate statement at that
2 time. It is no longer an accurate statement.
3 Q That is no longer as of now an accurate
4 statement?
5 A Right. I think --
6 Q Well, what would the accurate numbers now
7 be?
8 A I can't give you -- let me speak to both
9 the statements. You know, the goals we have for
10 online right now, we have gotten -- we are now just
11 getting our first real audience figures from online.
12 Frankly, we had no significant audience figures for
13 the longest time. It is suggested that our audiences
14 are even smaller than we thought. And we've now,
15 instead of having a numerical goal, just focus on a
16 growth goal. Because, frankly, I can't even predict
17 when we would get 1.2 million users a month anytime in
18 the near future.
19 You know, the goal of increasing audiences
20 ten percent across all platforms is actually a radio
21 strategy, because 90 -- well, I think 99 percent of
22 our audience is on radio. So, frankly, if you tripled

1 the online use, it still wouldn't push up our overall
2 numbers other than fractionally.
3 So, you know, the core of our strategy is
4 building radio audiences because that's where our
5 listeners are. We want to build online users as a
6 benchmark of our success in educating people. But,
7 frankly, it's a fractional service now and for the
8 foreseeable future until consumer behavior patterns
9 really change. Some day in the future they may, and
10 we intend to be there with the quality that's a
11 hallmark of NPR. But they're not there now.
12 Q Okay. And with respect to the figures on
13 the 1.2 million and the 4.7, which were previously the
14 goals, those were actually for monthly audience,
15 correct?
16 A That is correct.
17 Q Not annual, monthly.
18 A That is correct, yes.
19 Q Okay.
20 A And --
21 Q Go ahead.
22 A I just want to compare that. Perhaps

1 unfairly given the limited question you asked, but I
2 do want to compare that to 16 million, which is our
3 weekly audience on radio and 64 million monthly on
4 radio. And, frankly, we're nowhere near either the
5 number, even a fraction of that number, both in terms
6 of unique users online or the amount of time they
7 spend with NPR. It's actually -- it may not be --
8 it's always seemed extraordinary to me that people
9 spend on average about 4 hours a week listening to NPR
10 radio. You know, that's about -- that's an extremely
11 high number for radio. The numbers -- the amount of
12 time people spend online listening to NPR is a tiny
13 fraction of that.
14 Q Okay.
15 CHAIRMAN VAN LOON: I want to ask him, is
16 that the average NPR listener listens 4 hours a week?
17 THE WITNESS: Four hours a week. We have
18 16 million listeners a week, 64 million listening
19 hours a week, which is a number that continues floors
20 me when I think about it.
21 ARBITRATOR VON KANN: What was the last
22 number? How many hours?

1 THE WITNESS: 64 million listening hours
2 a week.
3 BY MS. WOODS
4 Q And I think you had mentioned that you
5 were just starting to get information on audience
6 figures. What is the source of that information?
7 A That's a great question.
8 Q For the Internet I mean.
9 A No, I understand. And I apologize, I
10 can't give you the name of the tools we're using. I
11 should, but I can't remember it right now.
12 Q Okay. So I take it that is information
13 that NPR is collecting on an ongoing basis about its
14 audience figures online?
15 A That's correct.
16 Q And you have some kind of arrangement with
17 a service that collects that data from websites?
18 A That is correct.
19 Q Okay. And with respect to that, were you
20 talking -- when you were talking about the person of
21 the audience right now, were you talking about the
22 npr.org website or were you talking about all websites

1 operated by all NPR member stations?

2 A Thank you for making that clarification.

3 I -- you know, quite frequently and inappropriate in

4 this context, lapse into NPR-centric thinking.

5 In that respect, I don't think the experience

6 that our member stations have had is substantially

7 different than from NPR. But the numbers I was

8 precisely giving you were NPR related.

9 Q Okay. So they didn't cover all the member

10 stations?

11 A That is correct.

12 Q And they didn't cover all of the

13 noncommercial stations that might -- that are CPB

14 qualified that you're representing here who are, in

15 fact, aren't NPR members?

16 A That is correct.

17 Q Thank you.

18 MS. WOODS: I'm just checking if I have

19 anything else.

20 BY MS. WOODS:

21 Q We just need a little more clarification

22 on the 64 million listening hour number. I believe

1 you just said that was for NPR only, correct?

2 A That is correct.

3 Q So would that be for NPR programming only?

4 Is that --

5 A Yes.

6 Q -- accurate?

7 A Yes.

8 Q Okay. And do you have any figures on the

9 total listening audience for all programming on all of

10 public radio that's represented here in this

11 proceeding?

12 A NPR's weekly programming numbers are about

13 16 million. Total NPR member stations are about 22

14 million. So NPR typically represents about 70 percent

15 of the programming listening hours.

16 Virtually -- it's a slight exaggeration to

17 say virtually all, but the vast majority of the

18 listening hours for NPR are actually to our news and

19 information programming, specifically All Things

20 Considered and Morning Edition, which has about

21 10 million listeners each week.

22 So I think even though my numbers for NPR

1 -- really, the drivers of the overall public radio
2 audience are really vested in those two news and
3 information shows, and everything in addition to that
4 is really sort of add-ons.
5 Q Okay. I'm sorry. But I'm still having
6 some trouble understanding here. You just mentioned
7 16 million --
8 A Correct.
9 Q -- listening hours, and previously you
10 talked about 60 -- or was that listening hours?
11 A No, those were listeners.
12 Q Listeners.
13 A Who listen on average about four hours a
14 week.
15 Q So if I multiply the 16 times four, I
16 should get the approximately 64 million listening
17 hours?
18 A One would hope, yes.
19 Q Okay. And that would be approximately 70
20 percent of the total listening hours for public radio,
21 is that correct?
22 A That sounds right. I can't testify to

1 that with any great certainty, but that sounds
2 approximately right, it's my understanding.
3 Q Well, if we compare the ratio, the 16 and
4 the 22, and did the math --
5 A Yes. I don't know if it works out
6 entirely that precisely for a variety of reasons, but
7 that seems to be the -- that's the logical leap I was
8 making, so be my guest.
9 Q Okay. The 64 million listening hours was
10 per week, correct?
11 A Correct.
12 MS. WOODS: That's all we have. Thank
13 you.
14 CHAIRMAN VAN LOON: Thank you, Ms. Woods.
15 Ms. Leary, do you have anything on redirect?
16 MS. LEARY: I have a couple of questions
17 on redirect. Would you like me to go ahead or --
18 CHAIRMAN VAN LOON: Yes, please.
19 MS. LEARY: -- take a break?
20 REDIRECT EXAMINATION
21 BY MS. LEARY:
22 Q Earlier in her cross examination Ms. Woods

1 asked you about some of the numbers that show up in
2 what has been marked as RIAA Exhibit 213 DPX, and that
3 was the public broadcasting revenue fiscal report for
4 1999.
5 A Yes.
6 Q Are there, from time to time, certain
7 unusual expenses that are funded through the
8 Corporation for Public Broadcasting that would show up
9 in the revenue table?
10 A There are certainly unusual -- and I think
11 I made reference to the one that I'm most familiar,
12 which is the costs associated with distribution and
13 interconnection. There are project costs of, from
14 time to time, $40- to $50 million. I believe the
15 satellite renewal was actually a $64 million project.
16 How that's reflected in these documents I don't know.
17 Q When you talk about satellite renewal
18 you're talking about replacing a satellite system?
19 A I'm actually referring to replacement of
20 a long-term lease for a satellite system, yes.
21 Q And let me direct your attention to page 3
22 of that table and the accompanying footnote.

1 A Okay.

2 Q I believe you were asked if this included

3 system-wide revenues, including National Public Radio.

4 Can I direct your attention to the footnote --

5 A Yes.

6 Q -- there. Would you read it, please, and

7 explain for the Panel who else might be included in

8 the public broadcasting entities.

9 A This says, "The amounts contained in

10 Tables 1 and 2 include revenue from all federal

11 sources and reportable non-federal revenue for public

12 broadcasting under the Communications Act of 1934,

13 47 U.S.C. 397, as amended, in reference to non-federal

14 financial support and FFS. Tables 1 and 2 do not

15 include revenue from business-related activities,

16 entrepreneurial revenue, which is reported separately.

17 Also excluded is the fair market value of volunteer

18 services in order to keep consistency in historical

19 trends in revenue."

20 I believe, if I interpret that correctly,

21 under the definition of 47 U.S.C. I would hazard the

22 guess that this includes all public broadcasting

1 organizations, stations, national programmers like
2 NPR, NPRI, and others affiliated with public radio.
3 Q But you don't know.
4 A I don't know. That is correct.
5 Q Can you describe for the Panel, this is a
6 report that was prepared by the Corporation for Public
7 Broadcasting in March of 2001?
8 A Yes.
9 Q Can you describe for the Panel the role
10 that is played by the Corporation for Public
11 Broadcasting with respect to financing public
12 broadcasting, radio specifically?
13 A The Corporation for Public Broadcasting is
14 the institution which channels federal appropriations
15 for public broadcasting, public radio, and public
16 television.
17 On the public radio side, they give out --
18 I don't know how much, but they give out the bulk of
19 their revenues through the CGS community service --
20 CSG, community service grant, which is a proportional
21 grants to individual stations. That accounts for most
22 of their giving and appropriations to public radio

1 stations. They also run competitive funds to spur new
2 projects within public radio. That is open to all
3 producers and other participants in the public radio
4 system.
5 Q You're familiar with the royalties paid to
6 the music performing rights societies under
7 Section 118 of the Copyright Act?
8 A For --
9 Q For over-the-air broadcast of music
10 programs.
11 A Only at the most general level.
12 Q Do you know who actually pays those music
13 royalties? Is it NPR directly, or the Corporation for
14 Public Broadcasting?
15 A Those are paid for by the Corporation for
16 Public Broadcasting.
17 Q And are they paid on behalf of all
18 Corporation for Public Broadcasting qualified
19 stations?
20 A Yes, they are.
21 Q And does the Corporation for Public
22 Broadcasting -- sorry, let me strike that question.

1 Let me just direct you -- you were asked
2 about the underwriting, and let me direct your
3 attention to RIAA Exhibit 214 DPX.
4 A Yes.
5 Q And on the last page of that, I believe
6 you were asked some questions by Ms. Woods about the
7 text of the sample on --
8 A Yes.
9 Q And I believe you were asked if the
10 specific language on this page was actually required
11 by statute to be technically disclosed.
12 A Correct. She did ask me that.
13 Q Is this language subject to any kind of
14 regulation by any federal agency?
15 A It is subject to the regulations of the
16 Federal Communications Commission, and all forms
17 comply with the regulations.
18 Q Would I be correct in assuming that any
19 language that appears on this page must comply with
20 FCC regulations?
21 A Yes.
22 Q Are there sanctions for failure to follow

1 FCC regulations?

2 A Yes, there are.

3 Q And what are they?

4 A They are, I believe, a range of options

5 that the FCC may use in an enforcement action, ranging

6 from fines for licensees who have -- who have not

7 complied with the federal -- the regulations of the

8 FCC, up to I think and including revocation of their

9 licenses.

10 I would add that no NPR member station or

11 NPR has ever been fined or otherwise found liable for

12 violating the FCC regulations for any underwriting

13 credits.

14 Q To the best of your knowledge.

15 A To the best of my knowledge.

16 Q You also gave some testimony on cross

17 examination about NPR just gathering -- beginning to

18 gather numbers about web audiences. How recent has

19 that been?

20 A It's been since May, I believe.

21 MS. LEARY: I have no further questions.

22 MS. WOODS: I'm afraid I have a few.

1 RECROSS EXAMINATION

2 BY MS. WOODS:

3 Q If I could ask you to look at Exhibit
4 Number -- what was marked as Exhibit Number 213 DPX
5 again, Mr. Stern. I noted that you read a statement
6 that Tables 1 and 2 do not include revenue from
7 business-related activities, entrepreneurial revenue,
8 which is reported separately.

9 A Yes.

10 Q Do you have any idea of, for fiscal year
11 1999, what that separate business-related
12 entrepreneurial revenue number would be?

13 A No. Though I would hazard the guess it's
14 a relatively small number.

15 Q Okay. Does NPR obtain funds from -- money
16 from business-related activities?

17 A I think we do.

18 Q Would that be things like if I go buy
19 something off the NPR.org website from the shop?

20 A I assume that's what they mean, sale of
21 goods and services like that, yes.

22 Q Okay. And with respect to NPR

1 specifically, at this time are any aspects of NPR's
2 operations operating on a for profit basis?
3 A No.
4 Q No. And that includes the -- for
5 instance, the online sales of goods; that is, not
6 operating on a for profit basis?
7 A Do you mean organized as a for profit
8 company?
9 Q Correct.
10 A Yes. No. No, we're a not-for-profit
11 company, and all of our activities are not for profit.
12 Q Now, I note there had been some talk at
13 one time of perhaps making NPR Online a for-profit
14 company. What's the current status of that proposal?
15 A We have -- as part of our overall thinking
16 about NPR and its future, and ways to generate revenue
17 in order to maximize our public service, I think from
18 time to time we engage in thinking and analysis of
19 different organizational structures. We did go
20 through an exercise of thinking about Online in that
21 regard.
22 At the time last year we concluded it was

1 not either appropriate or likely to be successful.
2 And certainly in the environment we have now the
3 likelihood of success of that is zero or less than
4 zero. And there is no current thinking about making
5 NPR Online or -- I think I can say generally right now
6 -- any other parts of the existing NPR structure for
7 profit.
8 MS. WOODS: Okay. I'd like at this time
9 to offer 213 DPX into evidence.
10 MS. LEARY: I have no objection.
11 CHAIRMAN VAN LOON: Admitted.
12 (Whereupon, the above-referred
13 to document, previously marked
14 as Exhibit No. RIAA 213 DPX for
15 identification, was admitted in
16 evidence.)
17 BY MS. WOODS:
18 Q Now, you discussed with Ms. Leary -- I
19 take it the questions were going toward the
20 possibility that CPB might actually pay the royalties
21 that would be set for the entities you represent in
22 this proceeding. Do you recall that?

1 A I recall the questions she just asked and
2 I answered.
3 Q Okay. Well, assuming for the moment that
4 there's a possibility CPB would take on that role, do
5 you know if CPB in fact has been designated as a
6 common agent pursuant to the provisions of Section 114
7 of the Copyright Act?
8 A I don't know that. To the extent that I
9 derive implications from Ms. Leary's questions, it's
10 simply that in other settings there are mechanisms for
11 doing so, and that presumably mechanisms could be set
12 up here in a similar fashion, if they have not already
13 been done so.
14 Q And would your understanding be that if
15 those mechanisms were set up to make payments to the
16 copyright owners through CPB that CPB would also
17 assume responsibility for providing the necessary
18 information to distribute the money that was paid to
19 the copyright owners?
20 A That seems to be a logical inference. I
21 don't have any specific knowledge on that.
22 Q Okay. And what about with respect to, you

1 know, if there were any issues that the copyright
2 owners had with respect to either the payment amounts
3 or the payment process or additional -- or compliance
4 with the terms of the statute, would you expect that
5 CPB would also take on the responsibility for acting
6 as the agent with regard to those matters?
7 A I'm not sure if I have any specific
8 expectations in that regard. To the extent that I
9 made inquiry, I would guess I would look at the
10 existing mechanisms in place and see if they are
11 sufficient under the -- under other aspects of the
12 copyright laws. But I don't think I have any specific
13 expectations one way or the other with respect to
14 CPB's role here.
15 Q Okay. And with respect generally to
16 issues of compliance with the provisions of
17 Section 114, are you aware of any ongoing efforts by
18 NPR to -- or CPB to ensure that all of the websites
19 being represented here in this proceeding in fact
20 conform to all the provisions of Section 114?
21 A Only in the most general matter, only in
22 the most general way. Part of NPR's role from -- as

1 a trade association and membership organization is to
2 instruct its members about the laws and compliance
3 with it. We don't offer them direct legal advice.
4 They have their own lawyers. But we do provide some
5 general instructions. I don't know if we do it with
6 respect to Section 114 or not, but we might under our
7 general duties as a trade association.
8 Q So you don't know one way or the other
9 whether you provided instructions or recommendations
10 with regard to complying with the performance
11 complement provisions of Section 114?
12 A I --
13 MS. LEARY: I think this is beyond -- I'm
14 going to object to the question. I think this is
15 beyond the scope of the witness' testimony.
16 CHAIRMAN VAN LOON: Overruled.
17 THE WITNESS: I hate to ask that, but
18 would you repeat the question or have it read back?
19 BY MS. WOODS:
20 Q I don't think it's easy to read back. Let
21 me try to repeat the question, which was, has NPR or
22 CPB provided to the stations that are -- actually, my

1 question was NPR, so let me state it that way. Has
2 NPR provided any instructions or recommendations to
3 the stations that are represented here in this
4 proceeding regarding compliance with the performance
5 complement provisions of Section 114?
6 A I'm not aware one way or the other.
7 Q Thank you.
8 MS. LEARY: I have one further question on
9 reredirect.
10 FURTHER REDIRECT EXAMINATION
11 BY MS. LEARY:
12 Q Are you aware of statutory provisions in
13 the Public Broadcasting Act that direct the
14 Corporation for Public Broadcasting to pay certain
15 fees?
16 A I actually am not familiar with those
17 provisions of the Act.
18 Q Do you know if they exist?
19 A I understand they exist. I am not
20 personally familiar with them.
21 MS. LEARY: I have no further questions.
22 ARBITRATOR VON KANN: Mr. Chairman, I have

1 a few, which will probably take us five or 10 minutes.
2 But given the hour, I suggest we break and come back
3 and get them after the break.
4 CHAIRMAN VAN LOON: Let's do that, and
5 come back at 11:00. I anticipate this part will not
6 be lengthy.
7 (Whereupon, the proceedings in the
8 foregoing matter went off the record at
9 10:45 a.m. and went back on the record at
10 11:00 a.m.)
11 CHAIRMAN VAN LOON: Some of the Panel
12 members have a question or two for you that we'd like
13 to pose.
14 THE WITNESS: Okay.
15 ARBITRATOR VON KANN: Good morning. It
16 might be more than one or two. We'll see.
17 THE WITNESS: All right.
18 ARBITRATOR VON KANN: There is a statement
19 in -- have you read the testimony of your expert
20 witnesses in this case?
21 THE WITNESS: I have glanced through it.
22 I have not read it.

1 ARBITRATOR VON KANN: Okay. There is a
2 statement in that testimony which has prompted me to
3 see if you have information on something that might be
4 useful to the -- at least me and possibly other
5 members of the Panel.
6 Look at page 19, if you can, of the direct
7 case.
8 THE WITNESS: Yes.
9 ARBITRATOR VON KANN: And it refers to the
10 1998 public broadcasting CARP, paragraph 61. Do you
11 see that?
12 THE WITNESS: Yes, I do.
13 ARBITRATOR VON KANN: It speaks about
14 meaningful differences between public and commercial
15 broadcasters, and, in paragraph 62, refers to the
16 conclusion of that panel that fair market license fee
17 rates are reasonably expected to be lower for non-
18 commercial broadcasters than for commercial
19 broadcasters, because of the different economic models
20 under which they operate. Do you see that?
21 THE WITNESS: I do.
22 ARBITRATOR VON KANN: Now, I'd like to see

1 if you have any information that might bear on that
2 matter, because I am interested in knowing whether
3 when public radio goes out into the marketplace to
4 license intellectual property for its operations which
5 commercial entities also need the license for their
6 operations, whether public radio has historically been
7 able to secure that intellectual property at
8 significantly lower license fee, and, if so, whether
9 there is any sort of historical pattern about that
10 relationship.
11 Do you typically get it for 50 percent of
12 the commercial rate, 25 percent, 10 percent? That
13 sort of thing.
14 Now, let me focus you on a couple of
15 things. Let's look at a couple of instances of
16 intellectual property. In this particular case, for
17 example, the 1998 public broadcasting CARP involved,
18 as I understand it, the license rates which public
19 broadcasting, both public radio and TV, have to pay
20 ASCAP, BMI, and I'm not sure about SESAC, for the
21 musical works of music broadcast over the air,
22 correct?

1 THE WITNESS: Yes.

2 ARBITRATOR VON KANN: So that's one kind

3 of intellectual property that you need, and commercial

4 radio stations also need them, right?

5 THE WITNESS: Yes.

6 ARBITRATOR VON KANN: The same thing, I

7 guess, applies with respect to internet streaming.

8 You have to pay a certain amount to ASCAP and BMI to

9 stream music over your internet site. So do

10 commercial radio stations, true?

11 THE WITNESS: Yes.

12 ARBITRATOR VON KANN: So there's two kinds

13 of intellectual -- it's the same kind of intellectual

14 property, but two different mediums, I guess.

15 Also, there's been testimony in this case

16 that the commercial webcasters frequently need certain

17 software to operate their internet sites, and that

18 requires frequently paying a license fee to the owner

19 of the intellectual property right in respect to that

20 software.

21 Is that something that public radio

22 stations also do? Do you have licensing agreements

1 with respect to software to operate either your public
2 radio station or your internet site?
3 THE WITNESS: Sure.
4 ARBITRATOR VON KANN: Sure. So those are
5 areas where, yet again, you license something that
6 commercial entities also license, correct?
7 THE WITNESS: Yes.
8 ARBITRATOR VON KANN: And there may be
9 other instances of that that haven't occurred to me.
10 Are there any other areas where you can think of that
11 public radio tends to license intellectual property
12 for its operations that commercial stations also have
13 to license for theirs?
14 THE WITNESS: I think there are probably
15 a large number. Content we get from the Associated
16 Press, for instance; content we license from
17 individuals; individual contributors and commentators.
18 I think there probably is actually a vast range of
19 intellectual property we apply our -- in some --
20 either by purchase or by license.
21 ARBITRATOR VON KANN: Okay. Now, do you
22 know -- and you may well not, and that's fine. I'll

1 probably be asking your experts about it later today,
2 but before you disappear I'll give you -- see what you
3 know. Do you know whether in this area where you have
4 sought to license intellectual property, which
5 commercial entities also license, public radio has
6 historically or traditionally been able to license
7 that at a lower fee than the commercial entities?
8 THE WITNESS: I think it's probably a
9 range, ranging from a variety of situations in which
10 intellectual content is gifted to public radio, and we
11 get it for zero, to probably a long continuum for
12 probably more off-the-shelf products where, you know,
13 frankly, you just buy them at commercial rates because
14 they're -- you go down to your local software store,
15 and you buy them, and it's a straight transaction.
16 I think as a general rule in negotiations
17 regarding separate intellectual rights, there is
18 always an assumption first by nature of who we are,
19 and the purposes for which we exist, that we will pay
20 lower rates, because of the counterparties' frequent
21 desire to support our charitable and educational
22 purposes.

1 And, secondly, we pay because we cannot
2 monetize the intellectual property in the same way
3 that a commercial end user could, you know, because we
4 don't take advertising, and to the extent we have
5 underwriting it is extremely limited by -- in time and
6 scope.
7 So the assumption in all of our
8 negotiations are that the uses we put to them may have
9 greater audience reach than other commercial
10 broadcasters, but our ability to actually derive
11 revenue off of it is relatively low, and that factors
12 heavily into discussions and negotiation.
13 So I would say it is -- it differs from
14 negotiation, but we frequently do, and I believe
15 should, pay discounted rates, substantially discounted
16 rates.
17 ARBITRATOR VON KANN: Now, with respect to
18 something that you say you might just go down to the
19 store and pay the off-the-shelf rate --
20 THE WITNESS: Yes.
21 ARBITRATOR VON KANN: -- I assume these
22 are sort of small ticket items. I mean, it's a

1 relatively inexpensive thing to go to the store and
2 get a -- I don't know, a fairly simple software
3 program, and it's not worth -- for $100, it's not
4 worth spending a great deal of time negotiating a
5 discount.
6 THE WITNESS: Right.
7 ARBITRATOR VON KANN: But that in the
8 larger ticket items where substantial sums are
9 involved, that's where you enter into negotiations,
10 or, if necessary, rate-setting procedures I guess.
11 THE WITNESS: I think that's correct.
12 ARBITRATOR VON KANN: Putting aside, then,
13 the sort of off-the-shelf smaller purchases, but in
14 the areas where you do have a negotiation or a rate-
15 setting, and you indicate that typically there have
16 been substantial discounts for public radio, can you
17 give me any sort of a range in which those discounts
18 have typically lain?
19 I mean, is this range you typically get it
20 for five cents to 15 cents on the dollar compared to
21 the commercial rate? Do you typically get it for 10
22 percent? Or is there any sort of kind of range in

1 which the discounts have normally been granted?

2 THE WITNESS: I don't -- unfortunately, I

3 don't think I can give you any specific information

4 there. I know it goes as low as zero percent, where

5 it's gifted. I would hesitate to give you a sort of

6 normal course of business, because I think it is

7 probably more case-specific than any sort of, you

8 know, general rule of thumb.

9 CHAIRMAN VAN LOON: Could you give an

10 example of the zero percent? You mentioned gifted

11 twice now.

12 THE WITNESS: Intellectual property, we

13 are now -- I mean, I will just tell you right now

14 we're talking with Microsoft about a large gift of

15 software to us. It is not uncommon -- I mean, we get

16 gifts of everything from -- I mean, stations get gifts

17 of everything from furniture to software to people who

18 decline payment for content because they want to

19 support public radio. To the extent they are

20 permitted by union fees, on air sometimes do. So they

21 exist.

22 ARBITRATOR VON KANN: Actually, that's an

1 interesting thought that hadn't occurred to me. In
2 the case of perhaps Microsoft gifting to you some of
3 its software, I presume it may take a tax deduction
4 for that, so that there is some benefit to them.
5 As well as supporting public radio, which
6 is a good thing, they also -- it isn't a total
7 giveaway in the sense that it -- if the commercial
8 value of that software is substantial, I guess -- and
9 this would be their tax lawyers -- they'd have to work
10 on it. But there may be a way for them to actually
11 receive a benefit and for you to get the property
12 without a charge.
13 THE WITNESS: Well, the law, of course,
14 provides charitable deductions to encourage its
15 individual businesses to make those types of
16 contributions. So there is always a variety of, you
17 know, private reasons why people make it -- some is
18 just out of, you know, concerned citizens or concerned
19 corporate citizens. Others make it for very specific
20 reasons, whether they're tax or publicity-related.
21 And when you mentioned corporate
22 underwriting, I mean, we don't spend a lot of time

1 worrying about the reasons why corporate underwriters
2 gives us donations. They are charitable donations.
3 Obviously, they want to do it for the publicity value
4 of it in some instances. So, but where the law
5 permits, and, in fact, encourages those things by the
6 tax laws or the communications codes, we, of course,
7 try to use that appropriately.
8 ARBITRATOR VON KANN: Okay. Thank you.
9 I don't think I have anything more.
10 ARBITRATOR GULIN: Just maybe one
11 question. I think I heard you testify that the use of
12 music, the intensity of music use, really varies quite
13 a bit from one particular webcast to another, from
14 channel to channel.
15 THE WITNESS: Within public radio?
16 ARBITRATOR GULIN: Within public radio.
17 THE WITNESS: I think that is probably --
18 I'm not sure if I did testify to that. I think it's
19 probably an accurate statement.
20 ARBITRATOR GULIN: Okay. Given that, I'm
21 just wondering, if it were possible to devise a metric
22 for paying royalties -- were paid on a performance

1 basis, that is to say on a per song basis or a per
2 stream basis, would that be something that you think
3 would be equitable for public radio rather than simply
4 a flat fee?
5 THE WITNESS: Well, part of my concern,
6 there might be an equity -- equitable aspect to it.
7 Frankly, I am concerned about the incentives built
8 into this. We put music on the web, and we do it as
9 part of an overall architecture of an educational
10 service.
11 And, frankly, I would be reluctant to
12 endorse something that disincentivizes people from
13 expanding that service as much as possible. So to the
14 extent that that would occur to people to strip music,
15 and use less of it, I'm not sure if that's an
16 appropriate thing from a public service benefit.
17 There may be an equity issue between -- among
18 participants, but my first reaction is I'm not sure if
19 that's the incentives we want to build into a rate
20 system.
21 ARBITRATOR GULIN: Okay. Thank you.
22 ARBITRATOR VON KANN: For your own

1 information, it might -- you might be interested to
2 know that as the English language quickly evolves some
3 witness in this case, I've forgotten which, decided
4 that instead of incentivized the word would be
5 incents.
6 (Laughter.)
7 So I-N-C-E-N-T-S. So you could decent
8 people by decentivizing them.
9 THE WITNESS: A remarkably flexible thing,
10 the English language.
11 ARBITRATOR VON KANN: Yes.
12 CHAIRMAN VAN LOON: We're doing our best
13 in this CARP to uphold the --
14 (Laughter.)
15 -- King's English, however.
16 ARBITRATOR VON KANN: We like incentive.
17 I'm not sure I even like that much, but it's better
18 than incents.
19 CHAIRMAN VAN LOON: Have the Panel
20 questions opened any Pandora's Box that would
21 institute any additional direct or cross?
22 MS. LEARY: No, Your Honor.

1 MS. WOODS: No.

2 CHAIRMAN VAN LOON: Then, Mr. Stern, we
3 would like to thank you very much for being with us
4 this morning, and for the information you've shared,
5 and we'll look forward to hearing more from your
6 expert witness colleague.

7 THE WITNESS: Great. Thank you. I hope
8 I've been helpful.

9 CHAIRMAN VAN LOON: Yes, you have. Thank
10 you.

11 (Whereupon, the witness was excused.)

12 CHAIRMAN VAN LOON: Someone observed
13 earlier that whoever has the Altoids and bottled water
14 concession for this proceeding is doing very well.

15 MS. LEARY: I think what we really ought
16 to do to keep ourselves amused is to cover the labels
17 and have water tastings, and then we all get to vote
18 on mints and water.

19 CHAIRMAN VAN LOON: Ms. Leary, are you
20 ready to call the next witness?

21 MS. LEARY: Yes, Your Honor. We would
22 like to call our next witness, Dr. Jane Murdoch, from

1 Charles River Associates. And if the Panel will allow
2 me, we have a couple of visual aids. We have some
3 somewhat dog-eared charts that we've thus far not been
4 able to testify on.
5 CHAIRMAN VAN LOON: We are likely to hurt
6 counsel's feelings, but --
7 (Laughter.)
8 The Creator, you know, he giveth, he
9 taketh away.
10 MS. LEARY: Your Honor, we're ready to
11 proceed.
12 CHAIRMAN VAN LOON: Okay. Well, good
13 morning, Ms. Murdoch. Thank you very much for being
14 with us, and let me ask you also to raise your right
15 hand
16 WHEREUPON,
17 JANE MURDOCH
18 was called as a witness and, having been first duly
19 sworn, assumed the witness stand, was examined and
20 testified as follows:
21 DIRECT EXAMINATION
22 BY MS. LEARY:

1 Q Dr. Murdoch, would you please state your
2 name for the record?
3 A It's Elizabeth Jane Murdoch.
4 Q And what is your occupation and title?
5 A I am an economist and I am vice president
6 at Charles River Associates.
7 Q And how long have you been employed there?
8 A Since 1990.
9 Q Would you describe for the Panel your
10 educational background?
11 A I have a bachelor's in commerce from
12 Queens University in Canada, and a Ph.D. in economics
13 from the University of California in Los Angeles.
14 Q And would you describe for the Panel some
15 of the work that you have done for Charles River
16 Associates since 1990?
17 A Generally, since 1990, at CRA I have
18 worked in the areas of antitrust and economic
19 regulation. That has involved a great deal of merger
20 review and then antitrust litigation in general. And,
21 generally, the regulatory work has been for Federal
22 Communications Commission-related issues and sometimes

1 for state regulators and even for some foreign
2 regulatory matters.
3 In CRA, I'm in the telecommunications
4 practice, so a lot of my work has focused in the area
5 of telecommunications, whether it's television,
6 landline telephone, cellular telephone, satellite
7 delivery of programming.
8 Q Has any of that work that you've done in
9 those areas involved an analysis of market forces or
10 effects of competitive industries?
11 A Yes. Generally, the work that I do is
12 industrial organization, economics, and it focuses
13 very much on how firms compete, how they set prices,
14 what are their incentives to change their prices, how
15 they think about entering into new businesses, what
16 are the costs and return calculations that they may
17 do, what are the competitive responses to respect --
18 to expect in response to certain actions that a firm
19 may take, issues like that.
20 Q And have you had any expertise with
21 respect to intellectual property issues in economics,
22 or, more specifically, with respect to music

1 copyrights?

2 A I have participated in matters concerning
3 music copyrights in particular on two occasions other
4 than the present one. For a long time, I've been
5 involved in the rate court proceeding that is to
6 determine reasonable rates that cable program services
7 will pay to ASCAP for the music that they perform in
8 their programming.

9 And I also participated in the first CARP
10 proceeding to set royalties for the public performance
11 of sound recordings in a digital medium, and that was
12 in a digital audio subscription services CARP. I was
13 not a testifying witness in that, but I supported the
14 testimony of my colleague, John Woodbury.

15 Q So in that other CARP, is that the digital
16 audio subscription service CARP?

17 A Yes, that's how I call it.

18 Q And did your work pertain to valuing the
19 performance of sound recordings by means of digital
20 transmissions in that proceeding?

21 A It pertained to setting what we thought
22 would be a reasonable price to be paid for the right

1 to perform sound recordings in a digital medium.

2 Q Was the Recording Industry Association of

3 America a party to that proceeding?

4 A Yes, they were.

5 Q And if you recall, what were the

6 respective economic decisions of the -- of your

7 clients in that proceeding and the Recording Industry

8 Association on the other hand?

9 A The Recording Industry Association

10 proposed, as a reasonable fee, a fee on the order of

11 40 percent. I think it may have been 41.5 percent.

12 But it was on the order of 40 percent of gross

13 revenues of the services.

14 And I believe the services proposed

15 reasonable fees that ranged maybe from half a percent

16 of their gross revenues to two percent. And the

17 position that John and I took in that matter was that

18 two percent was probably a reasonable upper bound on

19 the fees that would be paid.

20 Q Just for purposes of clarifying the

21 record, when you refer to John, do you mean Dr. John

22 Woodbury, your colleague at Charles River Associates?

1 A Yes, I do. I'm not in the habit of
2 referring to him as Dr. Woodbury. Sorry.
3 Q What was the other --
4 A It doesn't get worse than John.
5 (Witness laughs.)
6 CHAIRMAN VAN LOON: And I neglected at the
7 beginning to welcome you as doctor.
8 THE WITNESS: That's fine. I didn't
9 notice that either.
10 BY MS. LEARY:
11 Q Do you know what the ultimate decision was
12 of the Library and of Congress in that rate
13 proceeding?
14 A Of the Librarian of Congress, the ultimate
15 decision was to set the rate at 6.5 percent of gross
16 revenues.
17 Q I believe, Dr. Murdoch, you have attached
18 to your testimony a -- is it a true and accurate copy
19 of your curriculum vitae?
20 A Yes, it is.
21 Q And it is true and correct as of the time
22 you submitted your direct testimony?

1 A Yes, it is.

2 Q Would you explain for the Panel in general
3 terms the nature of the work that you have done for
4 public radio for this proceeding?

5 A John and I were retained by the
6 Corporation for Public Broadcasting, and the nature of
7 the assignment was to calculate what would be a
8 reasonable fee for public radio entities to pay for
9 the public performance of sound recordings from their
10 websites.

11 Q And would you briefly describe for the
12 Panel the nature of Dr. John Woodbury's work?

13 A He collaborated in this work with me. I
14 wrote the first draft of the report and probably --
15 and have been the primary liaison with the clients.
16 But John has given me feedback and significant
17 comments and has been the sounding bound for
18 discussing my approach on the issues and the data
19 analysis.

20 Q And the opinion that you've rendered in
21 your report pertains to the economic values of certain
22 rights granted by Section 114 of the Copyright Act?

1 A Yes.

2 Q In preparing your expert report, Dr.
3 Murdoch, did you consult with any other expert
4 witnesses who have been retained by other parties in
5 this proceeding?

6 A No, I did not.

7 Q And to the best of your knowledge, did Dr.
8 Woodbury consult with any other expert witnesses
9 retained by any other party in this proceeding?

10 A To my knowledge, he did not.

11 Q And in preparing your report, did you have
12 any assistance from anybody outside Charles River
13 Associates?

14 A Yes. I had assistance with some of the
15 data from someone at National Public Radio.

16 MS. LEARY: Dr. Murdoch is now available
17 for voir dire.

18 MR. GARRETT: I'll defer.

19 CHAIRMAN VAN LOON: Please continue.

20 BY MS. LEARY:

21 Q Dr. Murdoch, I'd like to direct your --
22 I'd like you to begin your oral testimony by directing

1 your attention to page 3 of your report concerning the
2 use of benchmarks in setting blanket license fees.
3 Can you briefly describe for the Panel the use of
4 benchmarks in setting a blanket license fee?
5 A I am sure the Panel is aware that the use
6 of benchmarks in setting license fees is fairly
7 common, and typically economists and CARPs and rate
8 courts look to benchmarks and starting points. And
9 those benchmarks may be market transactions that they
10 can observe, or, in the absence of suitable market
11 transactions, may be past decisions that are set by
12 other CARP panels or rate courts, which may, in turn,
13 rely on past decisions or other market transactions.
14 And generally the way that they use those
15 benchmarks is they start with one that's most -- most
16 closely resembles, I would say, the users of the
17 license in question in the current proceeding, and the
18 uses of the license, and then they make adjustments.
19 And, typically, a lot of those adjustments
20 focus on the music use in the benchmark and how that
21 may differ from the music use in the current licensing
22 matter, and also the scale of activity of the

1 licensees in the benchmark and the differences between
2 those -- between them and the scale of activity of the
3 licensees in the current matter.
4 Q Now, directing your attention to pages 3
5 through 5 of your testimony, your written report, what
6 did you determine would be the best available
7 benchmark for determining reasonable fees in this
8 proceeding?
9 A The best available benchmark that I
10 identified is the fee that public broadcasters pay for
11 the performance of sound -- I'm sorry -- of music
12 compositions in the repertories of ASCAP and BMI.
13 Q And could you explain for the Panel what
14 you mean by a "reasonable fee"?
15 A A reasonable fee -- my understanding in
16 this proceeding is that a reasonable fee has been
17 interpreted as the fee that would be arrived at -- a
18 fee that would be arrived at between willing buyers
19 and willing sellers.
20 As an economist, that is still somewhat of
21 a vague definition for me, because I believe that
22 there's a range of prices between a competitive price

1 and a monopoly price, to which willing buyers and
2 sellers might agree.
3 And when I look at the setting of CARP
4 proceedings, I observe that generally some party has
5 been given the responsibility or the right to
6 negotiate on behalf of multiple parties, and to arrive
7 at a price for all of those parties. And to me that
8 signals that some market power may potentially be
9 created in that process.
10 And while it's possible that such a single
11 entity could perhaps exercise that market power and
12 charge a high price that willing buyers would pay, I
13 don't think that you need CARP proceedings to arrive
14 at that price. And so when I look at it as an
15 economist, I think that the purpose of the CARP
16 proceeding is to arrive at a price that somehow
17 constrains the exercise of that market power and
18 drives the price more toward a competitive level.
19 Q And when you talk about the party that
20 accrues that market power, are you referring
21 specifically to the Recording Industry Association in
22 this proceeding?

1 A That's largely what I have in mind, yes.
2 Q And in preparing your report, Dr. Murdoch,
3 were you aware of any agreements that had been reached
4 between the RIAA and any public educational
5 broadcasting entities?
6 A To my knowledge, there is no fee that has
7 been agreed upon between the RIAA and any public
8 broadcaster.
9 Q In lieu of comparable agreements, what did
10 you determine would be the best available benchmark?
11 I believe you testified it was the 118 proceeding, the
12 rates set in the 118 CARP.
13 A Yes. I don't use the numbers of the
14 proceedings, and I'm not so -- I have to stop and
15 think twice when you use those. But --
16 Q Let me rephrase the question. Would you
17 describe for the Panel, then, what you determined
18 would be the best available benchmark to use in this
19 proceeding?
20 A Right. As I said, there is no market
21 negotiated fee rate for public broadcasters to perform
22 sound recordings that I know of. And so what I looked

1 to was the public record of the fee determined in the
2 last -- in a proceeding, CARP proceeding, that set the
3 fees that public broadcasters would pay to ASCAP and
4 BMI for the performance of music compositions.
5 Q And could you explain to the Panel why you
6 determined that the right pay for the value to perform
7 published musical works would be an appropriate
8 benchmark to be used in this proceeding?
9 A I think that it's important to start with
10 the public broadcasting benchmark, and part of that is
11 informed by my reading of the public broadcasting
12 CARP, where they found that commercial -- I'm sorry --
13 that fees negotiated or set even for commercial
14 broadcasters would not serve as a good benchmark for
15 public broadcasters.
16 And that makes sense to me as an
17 economist, because I understand that public
18 broadcasters have a different economic model, and that
19 their revenues, in large part, depend on voluntary
20 contributions and grants from listeners and from
21 governments and institutions, and that they can't,
22 when their costs rise, automatically pass those costs

1 through to those -- those sources of funding.

2 They do have some underwriting revenues,

3 and perhaps they can adjust those prices somewhat, but

4 they are limited in their ability to absorb higher

5 costs. So it makes sense to me that a performing

6 rights society or someone selling a performance right,

7 shall I say, even if it's the RIAA, would recognize

8 that and agree to sell the right for a lower price

9 based on the lower ability to pay of the public

10 broadcasters.

11 Q And the rights in that proceeding were

12 published musical works, is that correct?

13 A That is -- in the public broadcasting,

14 what I call the public broadcasting CARP, yes, that's

15 correct.

16 Q And the rights at issue in this case are

17 the right to publicly perform sound recordings, is

18 that correct?

19 A That's correct.

20 Q And do you think that the use of published

21 musical works is appropriate for determining the value

22 of sound recordings?

1 A Well, that was the first hurdle that I had
2 to address when I was thinking about how to get to a
3 fee for sound recordings. And -- but I knew that that
4 was an issue that had come up in the CARP proceeding
5 that I had participated in for the digital audio
6 subscription services.
7 And so I looked back to that CARP to see
8 what they had had to say about it. And what they
9 found was that -- and their finding was confirmed by
10 the Librarian of Congress -- was that the fees paid
11 for musical works are an upper bound on the fees that
12 might reasonably be paid for sound recordings. That
13 the fees paid for sound recordings might be less than
14 what are paid for musical works, but they're certainly
15 no greater.
16 Again, I didn't just take what the
17 decisions were by the Panel and Librarian of Congress,
18 but I thought about, as an economist, did that make
19 sense to me. And it's my view, my understanding, from
20 working on the prior CARP, too, that the recording --
21 the owners of the sound recordings probably benefit
22 more financially from the promotional benefits of air

1 play than do the owners of musical works.

2 And, therefore, you might expect the sound

3 recording rights holders to sell the performance right

4 for a lower price. So that was another reason that

5 that made sense to me, and also, based on my past

6 participation in the digital audio subscription

7 services CARP, we had had no opportunity to look at

8 the relative fees paid for the performances of musical

9 works and sound recordings by radio broadcasters in

10 Europe.

11 In the United States, radio broadcasters

12 don't pay both those fees, but in Europe they do pay

13 both those fees. And so we had looked at data that

14 suggest that on average the fees paid for sound

15 recording performances are lower than the fees paid

16 for the performances of musical works.

17 So that, again, confirmed what was found

18 by the digital CARP and confirmed this notion that

19 certainly it would be conservative to expect that the

20 fees for the musical works would be an upper limit on

21 the fees for sound recordings.

22 Q And could you describe for the Panel

1 briefly --

2 MR. GARRETT: Before we go on, I would
3 move to strike the testimony concerning the European
4 rates and what she looked at from the last
5 proceedings. It's not in her testimony, written
6 testimony. We have obviously not been afforded any
7 kind of discovery on that.

8 This was an issue generally that arose
9 prior to the start of this proceeding here where we
10 moved for the Copyright Office to issue a ruling
11 concerning the effect of the musical work ruling in
12 the last proceeding. And we specifically noted that
13 in the -- in Dr. Murdoch's testimony that there was no
14 discussion at all as to why she chose the musical work
15 rate as a benchmark for the sound recording rate,
16 other than the fact that it had been chosen in the
17 last proceeding.

18 And the Copyright Office ruled, as the
19 Panel I think is aware, on this issue. The bottom
20 line, though, is is that there's nothing in her
21 report, her written testimony, about the European
22 fees. And I would ask that that be stricken.

1 CHAIRMAN VAN LOON: I didn't see anything
2 in there about European. Could you respond, please,
3 Ms. Leary?
4 MS. LEARY: I will respond on the
5 European, and if --
6 ARBITRATOR GULIN: Could you just back up
7 one second? While we're on that subject, was there
8 anything in the testimony, the written testimony,
9 about the idea of promotional value? I may have
10 missed it. There is something about promotional value
11 being greater for the sound recording industry? Okay.
12 So you're not contesting that.
13 MR. GARRETT: There is a discussion near
14 the end here about promotion and how that she can't
15 quantify it in any way. It was not offered in the
16 context of why you should have the sound recording --
17 why you should use the musical work fee as a benchmark
18 for sound recording.
19 I'm not going to suggest that. I mean,
20 that's an issue that's been, you know, back and forth,
21 so it doesn't really make any difference here. But,
22 you know, I thought we had already dealt with the

1 European stuff once, and I don't want to have to deal
2 with it again today.
3 MS. LEARY: The motion that counsel refers
4 to that he filed was an attempt to limit and get, in
5 effect, a declaratory ruling from the Copyright Office
6 that the value of musical works, published musical
7 works, could not be used in this particular
8 proceeding, or you were not bound to follow that
9 particular proceeding. As it applied to NPR, it had
10 nothing to do with European works.
11 Counsel lost that ruling, and it is
12 obviously at the basis of our testimony, and the
13 witness is here to answer any questions you may have
14 about any aspect of her testimony. I believe that we
15 have observed some of the Panel's questions about how
16 these two rights might be interrelated.
17 We are in an extremely fast timetable in
18 this particular proceeding, and the witness is here
19 today to testify. So if there are any questions with
20 regard to that, we may reserve those for the Panel.
21 I have no objection to striking the
22 testimony as it pertains to the European CARP at this

1 time.

2 ARBITRATOR GULIN: Did I understand you to

3 say that counsel lost his motion with respect --

4 MS. LEARY: Counsel was seeking to have in

5 effect, as we characterized it, a declaratory ruling

6 that it not be utilized in this particular proceeding.

7 The Copyright Office's determination is simply that

8 the Panel may choose whatever it believes are the

9 appropriate benchmarks, but I certainly don't

10 understand how that is related to the European --

11 ARBITRATOR GULIN: I thought the Library's

12 ruling was that what occurred in the last panel does

13 not mean that, as a matter of law, we have to find

14 that the value of the works were worth as much as the

15 value of the sound recordings.

16 MS. LEARY: That's correct. It does not

17 bind this Panel, but no one had made the argument on

18 our side to that effect. And we saw counsel's ruling

19 in that fashion.

20 MR. GARRETT: The reason for our motion,

21 and why it was specifically directed to NPR, is

22 because the only thing in Dr. Murdoch's testimony

1 about musical work and its appropriateness as a
2 benchmark for sound recordings is that's what the last
3 CARP did. There's no explanation, none of the theory
4 that, you know, she's offering now. And we want to
5 make it clear that that, in and of itself, was
6 insufficient.
7 And just so there's no doubt about it,
8 here is a copy of the order as well as all of the
9 underlying briefs, ours as well as that from the other
10 side here. And I would simply -- well, I would read
11 the entire order.
12 I would highlight at least the portion on
13 page 2 of the order, the first two lines of
14 Conclusion, which says, "The only issue presented by
15 the motion that we filed is whether a prior decision
16 setting rates and terms for subscription services
17 operating under the Section 114 license requires the
18 CARP in this proceeding to use the same musical work
19 fees as the ceiling for setting rates for the non-
20 subscription services." The answer to this question
21 is quite simply no, and then it goes on to explain
22 that.

1 So, I mean, I have no problem in Dr.
2 Murdoch saying that, well, if you use it as a ceiling,
3 this is how her analysis works here. But I think it's
4 inappropriate for her to come in and talk about, well,
5 why one should use it as a ceiling, because that's not
6 an issue that she addressed in her written testimony.
7 CHAIRMAN VAN LOON: Did my ears deceive
8 me, or did I hear you say, Ms. Leary, that on the
9 specific motion here to strike the references to the
10 European background, which is I think clearly not in
11 the direct testimony, that you did not object to that
12 part being stricken?
13 MS. LEARY: We do not object to that, and
14 I would direct the Panel's attention to up above on
15 page 2 where I had discussed the way in which we
16 viewed the motion that had been sought by opposing
17 counsel. And that we believe that the -- we believe
18 that the order that was granted by the Copyright
19 Office is the appropriate one.
20 Counsel had referred to our resolution in
21 that issue in a way that I thought was a
22 mischaracterization. Without going back on the

1 record, I just want the record as clear as possible.
2 But I do agree to strike the testimony -- Dr.
3 Murdoch's testimony as it pertains to the European
4 CARP proceedings.
5 CHAIRMAN VAN LOON: So it would appear
6 that the specific objection has been raised, the
7 motion to strike. There's no objection. I can't
8 imagine that we would not -- we are unanimous in,
9 therefore, granting the motion to strike. It will be
10 stricken, and let's proceed, then, please.
11 ARBITRATOR GULIN: Okay. I guess I just
12 want to be clear on where this leaves us. Dr.
13 Murdoch, then, your testimony for why you used this
14 particular benchmark is, then, in order to justify the
15 idea that the musical works value, performance right
16 value, is worth at least as much as the performance
17 right in a sound recording, is, again, number one
18 because that's what was used, that assumption was made
19 in a prior CARP.
20 And then, the second reason is because you
21 believe that when a song is played on the radio that
22 the promotional value is greater to the record

1 companies than it is to the performing rights
2 organizations. Is that -- did I understand that?
3 THE WITNESS: I wouldn't say it quite that
4 way, if I could just modify slightly --
5 ARBITRATOR GULIN: Sure.
6 THE WITNESS: -- your two points.
7 Generally, yes, but I don't -- I wouldn't characterize
8 the -- I would characterize it as CARP's finding, not
9 an assumption. That they looked at data, and they
10 looked at evidence, and that that's what they found.
11 It's not drawn out of thin air.
12 ARBITRATOR GULIN: Okay. All right.
13 Well, that decision speaks for itself, but --
14 THE WITNESS: And then, as regards the
15 promotional value, yes, but I wouldn't limit it to air
16 play on the radio. I think -- I mean, clearly we were
17 -- in that CARP we were also talking about promotional
18 value of songs being played over the digital audio
19 subscription services, and here it's -- they're being
20 played over websites. But yes.
21 ARBITRATOR GULIN: Yes. The only reason
22 I mentioned radio is because that's the benchmark we

1 were talking about.

2 THE WITNESS: Yes.

3 ARBITRATOR GULIN: Okay. So taking those

4 things into consideration, that there's greater

5 promotional value which you didn't make an adjustment

6 for --

7 THE WITNESS: Right.

8 ARBITRATOR GULIN: -- and I think

9 Professor Jaffe did make an adjustment for, you feel

10 that taking that into consideration you at least have

11 a value which is as much as that of the sound

12 recording --

13 THE WITNESS: Yes.

14 ARBITRATOR GULIN: -- performance right.

15 THE WITNESS: Yes.

16 ARBITRATOR GULIN: Okay.

17 THE WITNESS: And I just -- I'm sorry, but

18 I didn't want to create the impression that I was just

19 blindly accepting past CARP decisions. I was thinking

20 as an economist, do I agree with this? Does it make

21 sense to me?

22 ARBITRATOR GULIN: Okay. Thank you.

1 CHAIRMAN VAN LOON: Please proceed.

2 BY MS. LEARY:

3 Q All right. Dr. Murdoch, could you go

4 through the analysis for the Panel that you did in

5 arriving -- starting with benchmark 118 -- copyright

6 over-the-air broadcast panel, the 118 decision, could

7 you take the Panel through the analysis that you did

8 and the adjustments you made in deriving a reasonable

9 fee for the distribution of sound recordings over the

10 internet.

11 A All right. I don't even know if you can

12 see this. I have behind me -- in any case, it's

13 Table 1 in the report, if you have it attached.

14 MS. LEARY: We have --

15 THE WITNESS: And you may find it easier

16 to look at your own table.

17 MS. LEARY: We have copies of the tables

18 that were produced in Dr. Murdoch's report and that

19 are part of her testimony.

20 THE WITNESS: All right. So as we've

21 talked about, I started with the rate that public

22 broadcasters pay to ASCAP and BMI for performing the

1 public works in those repertories. And that is the
2 first number in Table 1, the $5,443,000. That's an
3 annual fee.
4 It's important to know that that was paid
5 by public television as well as public radio. It was
6 combined for the two of them.
7 The first thing that I wanted to do was to
8 say if I were to try and translate this to a sound
9 recording fee for public broadcasters, what would I
10 do? First of all, I wanted to recognize that there is
11 a little bit of music in a third repertoire, this
12 smaller third repertoire, SESAC, and that the sound
13 recording right would cover that music as well, so
14 that I should make some adjustment upward in the
15 ASCAP/BMI fee for SESAC.
16 I found evidence in I believe it was the
17 Librarian's decision in the digital audio services
18 CARP that said that -- I believe it said that SESAC
19 probably accounted for half a percent of the music, or
20 perhaps that was in the public broadcasting CARP.
21 But in any case, the SESAC accounted for
22 half a percent of the music used by public

1 broadcasters, but I found evidence in the -- or a cite
2 in the Library of Congress' decision that said that in
3 a certain situation when fees were being allocated
4 between the three performing rights societies SESAC
5 was allocated three percent.
6 So I thought I'll take that larger number,
7 and I'll inflate the ASCAP/BMI fee for public
8 broadcasters to one for all the music that's in all
9 the performing rights societies in the United States.
10 And that got me to $5,606,000 here on Table 1.
11 Then, the next thing that I did was to
12 say, all right, now I need to find some means of
13 allocating this total public broadcasting fee to one
14 that would relate just to public radio. So I looked
15 to the measures that typically are relied on for
16 generating fees from benchmarks to music use and the
17 scale of activity to make an adjustment from the
18 public broadcasting fee to a public radio fee.
19 What data did I have? First of all, I
20 wanted to know about relative music use between public
21 television and public radio. And I found that there's
22 very little information on that. But looking back at

1 the public broadcasting CARP, I found discussion that
2 suggested that the parties there treated music use by
3 public broadcasters as if it were the same intensity
4 on their programming for radio as it was for
5 television.
6 And, in particular, ASCAP brought forward
7 some fees from 1978, making only adjustments for scale
8 of activity. So that implicitly they were accepting
9 this equal music use between public radio and public
10 television.
11 That was the only evidence I could find
12 shedding any light on this relative music use issue.
13 So I adopted it. I said music use is the same on
14 public radio and public television, on average. And
15 then the remaining adjustment to make was for the
16 scale of activity.
17 In the thinking that I've done about how
18 you measure scale of activity, I have reached the
19 conclusion that the reasonable measure in matters like
20 this is programming expenses. And that's because
21 music is a programming input, and I would expect the
22 payments for music to more or less track the payments

1 for other programming inputs.

2 So the measure I adopted to adjust -- to
3 allocate this fee on the basis of relative scale of
4 activity, the programming expenses of public radio
5 versus programming expenses of public television. And
6 I found from CPB data that public radio represents 21
7 percent of the programming expenses in all of public
8 broadcasting.

9 So I allocated out the $5,606,000, 21
10 percent, to public radio. And that got me to the
11 $1,177,000 that's on my table.

12 Let me just step back for a minute and
13 note that in the last public broadcasting CARP there
14 was some discussion over what was the relative measure
15 of scale of activity, and the Panel there preferred a
16 measure of revenue.

17 So I also looked at CPB data on the
18 relative revenues of public radio and public
19 television, and if I had used revenues instead,
20 instead of this 21 percent that I have, I would have
21 25 percent. That's a 19 percent increase over 21
22 percent, and that would flow through to the bottom

1 number of fee that I calculate of $24,000 and give a
2 fee of $29,000.
3 There is one -- third source that I'm
4 aware of that one might think about for using -- for
5 allocating fees. And I believe it was something that
6 came up in the last public broadcasting CARP, and that
7 was that the CPB divides its federal funds between
8 public radio and public television, giving 25 percent
9 to public radio and 25 percent to public -- 75 percent
10 to public television. So that's exactly the same
11 number as I would have gotten with the revenue result.
12 All right. So now I have this fee, which
13 is the estimated public radio fee for broadcasting
14 ASCAP, BMI, and SESAC compositions. And then, in the
15 bottom half of the table, I take this number and I
16 adjust it one for one and call it the estimated
17 hypothetical public radio fee for broadcasting sound
18 recordings in the ASCAP, BMI, and SESAC compositions.
19 So that's my -- there is my reliance on
20 the digital audio service -- on the conservative
21 interpretation of the digital audio services CARP that
22 said the sound recording is worth no more, and at most

1 as much as the musical work for the purpose of
2 licensing fees.
3 Now, then I had to deal with one more
4 factor, which is that there is music that would give
5 rise to sound recording rights fees that does not give
6 rise to musical works rights fees. And that's
7 classical music or it's music that's in the public --
8 where the compositions are in the public domain. That
9 tends to be classical music, by and large.
10 And so I had to make an adjustment for the
11 classical music that's on public radio, but that
12 wouldn't be captured by these ASCAP, BMI, and SESAC
13 fees.
14 So, again, I wanted to make adjustments
15 based on relative music use and scale of activity, and
16 I didn't have a whole lot of data on this either
17 because public radio doesn't have music use overall.
18 It certainly doesn't have it by format.
19 But I thought, well, I can make some
20 conservative assumptions here and try and make an
21 allocation. And what I did was I said -- and here's
22 the conservative part of it. I said, "Assume that all

1 of the music performances that give rise to these
2 licensing payments is in the music programming. So
3 ignore any music that comes up in the news and
4 information programming," which may include things
5 like Fresh Air, which has, you know, interviews with
6 artists and snips of music and entire songs even.
7 But anyway, let's assume that all the
8 music is in the music program -- the fees all are
9 generated by the music in the music programming. And
10 then I can probably make some reasonable assumptions
11 about how classical music compares to that non-
12 classical music programming. And what I assumed was
13 that music use is about the same, and that the
14 programming expenses are about the same. Had no basis
15 for assuming anything other than that.
16 Actually, I know that that's not quite
17 true because I know that National Public Radio -- or
18 when stations buy programming from National Public
19 Radio they pay less for classical music programming
20 than they do for other music programming.
21 So, at least for the stations, classical
22 music programming costs less than other music

1 programming when they acquire it from NPR.

2 Nonetheless, I made these assumptions --

3 equal music use, equal programming expenses per hour

4 for classical music as compared with non-classical

5 music programming. And I found that classical music,

6 if I'm recalling my numbers correctly, accounts for 30

7 -- 26 percent of the broadcasting hours in public

8 radio, and other music programming accounts for 38

9 percent.

10 So classical music is about 68 percent as

11 big as the non-classical music programming. So I

12 said, okay, I have to take my fee for the non-

13 classical music programming, add another 68 percent or

14 $800,000, to get a fee for all the music programming

15 that generates sound recordings on public radio.

16 So I added this $800,000, and I came up

17 with this $1,977,000, almost $2 million. That's a

18 hypothetical public radio fee for broadcasting sound

19 recordings.

20 And then, the one remaining thing that I

21 did was to say, okay, if I have a fee for broadcasting

22 sound recordings on public radio, what would a fee

1 look like for webcasting sound recordings on public
2 radio? I assumed that the music use was about the
3 same because mostly they're broadcasting the stream of
4 programming -- or, I'm sorry, they're webcasting the
5 stream of programming that they're broadcasting. And
6 I can come back to that in a little more detail.
7 And I have no -- for scale of activity, I
8 have no program expense or revenue data for the
9 websites, so I used listenership data and just made a
10 comparison of the webcasting audiences to the
11 broadcasting audiences. And I found -- and that's one
12 other table that I think we'll go through in a little
13 more detail, but the only other table I promise you --
14 that the webcasting audience appears to account for
15 maybe 1.2 percent of the broadcasting audience for
16 public radio.
17 So I adjusted this fee. There is almost
18 $2 million for public radio broadcasts by 1.2 percent,
19 and that's how I reached the $24,000 fee for public
20 radio webcasting.
21 BY MS. LEARY:
22 Q And does that fee take into the relative

1 intensity of music use -- at least as it's heard in
2 the broadcast of public radio --
3 A I think it does. I didn't have great data
4 on what the programming was on the websites, but let
5 me tell you what I do know. If you flip to Table 6,
6 all it tells you is 90 percent of the stations that
7 are webcasting indicated that they are -- that they
8 are offering their live broadcast stream from their
9 website.
10 CHAIRMAN VAN LOON: 89 percent of those --
11 THE WITNESS: 80.
12 CHAIRMAN VAN LOON: -- which?
13 THE WITNESS: That offer audio at all
14 offer their broadcast stream. Fifty-nine percent
15 offer archived programming, which may be yesterday's
16 Morning Edition or last week's -- I don't know what --
17 actually what programming is weekly. But, you know,
18 it'll be -- they may keep some library of past
19 programming, so that people can call that up and
20 listen to it.
21 And then, 29 percent of the webcasters
22 that said they were offering audio on their website

1 said that they are offering some web-only programming,
2 which may be programming that they've acquired but
3 haven't aired on their broadcasts.
4 And so the concern was --
5 CHAIRMAN VAN LOON: Let me just -- and
6 that's audio in that case, as opposed to the expanded
7 writeups that we heard about.
8 THE WITNESS: Yes. I'm talking about
9 audio content now, yes.
10 So the concern was if somehow the music
11 intensity is different because of this archived
12 programming and web-only programming, should I be
13 making an adjustment for it? And I guess the easiest
14 way to think about this is to turn to Table 8.
15 And there basically what I've found is
16 that when it comes to archived programming, of the
17 stations that gave me detail on what kind of
18 programming they're archiving 96 percent said they're
19 archiving news and information, and 37 percent said
20 they're archiving music programming.
21 So that led me to conclude that there
22 seems to be more news and information programming

1 being archived than music programming, so that
2 probably was -- that probably when you consider that
3 factor, webcasts are no more music-intensive than the
4 broadcasts.
5 And similarly, for web-only programs, 76
6 percent of the webcasts that gave format detail said
7 that they were doing some non-music formats, and 55
8 percent said that they were doing music formats. So,
9 again, I was comfortable that these other activities
10 on the public radio websites are probably not more
11 music-intensive than the broadcast day is on public
12 radio.
13 ARBITRATOR GULIN: How about in terms of
14 intensity of using classical music? Is that any
15 different?
16 THE WITNESS: I don't believe that I would
17 have had data. I don't believe -- there may have been
18 data by format. I'm not sure if it was broken out by
19 formats of music or not. I didn't look at that. And
20 I'm not sure that would affect my calculations,
21 because at this point I've got sort of overall music.
22 I've converted it to sound recording of all the music

1 in the broadcast day, whether it's classical or non-
2 classical.
3 ARBITRATOR GULIN: Well, I thought I
4 understood that you made an adjustment for classical
5 music content.
6 THE WITNESS: I did.
7 ARBITRATOR GULIN: And you did that, and
8 you made actually an upward adjustment for that.
9 THE WITNESS: Yes.
10 ARBITRATOR GULIN: Because there's still
11 a sound recording royalty due for that, where there
12 would be none -- there would be no performing rights
13 society fee for that.
14 THE WITNESS: That's right.
15 ARBITRATOR GULIN: So --
16 THE WITNESS: But, you see, once -- now I
17 have it -- I've generated a fee for all of the sound
18 recordings that might be performed, and I don't
19 particularly, for my purposes, need to distinguish
20 between classical and other kinds of music. All of
21 the music sound recordings will generate a fee. I
22 made the adjustment back when I was thinking about how

1 the broadcasting day looked.

2 ARBITRATOR GULIN: Okay.

3 THE WITNESS: And so now I've got it --

4 I've got everything captured, and I just treated it --

5 I lumped all of the music together and all of the non-

6 music together. And classical is included in the

7 music -- in the music formats here, but I didn't see

8 any need to look at it separately.

9 ARBITRATOR GULIN: Okay.

10 BY MS. LEARY:

11 Q Dr. Murdoch, in conducting your analysis,

12 you relied on certain survey data?

13 A Yes, I did.

14 Q Would you describe for the Panel the

15 nature of the survey, as best you know?

16 A National Public Radio sponsored a survey

17 of public radio stations, not just the National Public

18 Radio member stations but of all public radio

19 entities, to try to find out more about what they were

20 doing on their websites, with music in particular.

21 Q And were the results of that study made

22 available to you?

1 A Yes, they were.

2 Q And could you just briefly describe for

3 the Panel how you would use the results of that survey

4 evidence?

5 A Sure. Flip to Table 5. Basically, I used

6 the survey data to get a measure of the webcasting

7 audience from public radio entities and to see how

8 that compared to the broadcast audience.

9 So one of the questions -- and let me say

10 that National Public Radio posed a lot of questions in

11 its survey, both things that they would like to know

12 more about, but I think because webcasting is still in

13 its early days the responses were quite incomplete.

14 But one of the pieces of data that we did ask the

15 service -- the stations to provide is how many people

16 are streaming audio from your website on average at a

17 point in time.

18 And those are the data that I worked with

19 in Table 5, and those are the data that I worked with

20 to decide how big is the webcasting audience relative

21 to the broadcasting audience.

22 ARBITRATOR VON KANN: How many people are

1 streaming from your website, or how many listeners are
2 tuning in to the streaming on your website? I thought
3 you just said how many people are streaming.
4 THE WITNESS: Maybe I mean --
5 ARBITRATOR VON KANN: Do you mean from
6 your website or -- it may be a semantic -- you are
7 trying to get --
8 THE WITNESS: I'm getting at, what is
9 their listening audience --
10 ARBITRATOR VON KANN: Okay.
11 THE WITNESS: -- from their website. The
12 second answer -- your second description sounds
13 probably more precise.
14 ARBITRATOR VON KANN: Okay.
15 THE WITNESS: How many people are
16 listening to audio from public radio websites. And
17 you'll probably want to look at the tables on your --
18 in your hands rather than this table here, but I guess
19 I will walk you through how I came up with these
20 numbers, because they're obviously important to
21 generating the fee.
22 The survey was sent to 407 public radio

1 stations or public radio entities that may have
2 answered on behalf of their repeater stations, and so
3 on. There were 205 survey responses. If you look at
4 the top block of numbers, the numbers -- under the
5 number of stations I have 78, 62, and 65. That sums
6 to the 205. Okay?
7 Now, let's just walk across the first
8 line. There's 78 stations. On average, according to
9 the data that these stations provided for us, the
10 average listening audience on their websites is 67
11 listeners. We got from Arbitron data what their
12 average broadcast listening audience is, and that's
13 4,623 listeners.
14 So the website listening audience -- the
15 web listeners as a percentage of the broadcast
16 listeners is 1.45 percent. Okay.
17 Sixty-two other stations, now moving to
18 the second line, told us that they are offering audio
19 content, but they couldn't tell us what their average
20 listening was. We know what their average broadcast
21 audience is from Arbitron data.
22 And what I did here, I didn't have the

1 data, but basically I said, "I'm going to assume that
2 their web audience is in the same proportion as their
3 broadcast audience as for those other survey
4 respondents that gave us data. I'm going to assume
5 that it's 1.45 percent." And where I have the dash
6 underneath the 67, that number would translate to
7 between 39 and 40 listeners per station. Okay?
8 And then, the last line, 65 respondents
9 told us they weren't offering any audio content. So
10 obviously they don't have any web listeners. We know
11 their broadcast audience from Arbitron data. That's
12 the first block of my data, looking at sort of average
13 per station listenership for the survey respondents.
14 The next block, I said, "Okay. What's the
15 aggregate listening, then, for these survey
16 respondents?" And basically, I took the numbers from
17 the first block and multiplied each of them by the
18 number of stations that's also in that first block.
19 So for those offering audio content, the
20 first set of stations told me their average listening,
21 and that was -- their average web listening, and that
22 was 1.45 percent of their broadcast audience. The

1 next block, I assumed they had the same share of
2 broadcast audience on their websites, gave them 1.45
3 percent, and the last block, of course, has no web
4 listeners.
5 So, on average, as a group if you sum up
6 the aggregate web listeners and the aggregate
7 broadcast listeners, the web audience is 1.12 percent
8 of the broadcast audience. So that takes care of the
9 survey respondents.
10 Now, moving down to the next block, I
11 wanted to build this up to numbers for all of public
12 radio. The numbers from the middle block carry
13 directly down to the first line on the -- of the third
14 block. The next line is the 202 public radio entities
15 that didn't respond to the survey, and I know what
16 their average audience is from Arbitron.
17 I know what their broadcast audience is
18 from Arbitron data, on an average quarter-hour basis,
19 623,978,000 listeners. I just assumed that their web
20 audiences were the same in proportion to their
21 broadcast audience as they were for the survey
22 respondents, and that generated me that number of

1 6,989 web listeners for the stations that didn't
2 respond to the survey.
3 That got me total numbers for public radio
4 stations. There's two other entities in this
5 proceeding that are not stations, but that do have
6 websites and that's National Public Radio and
7 Minnesota Public Radio. So I add -- you can see under
8 the broadcast listeners they have no broadcast
9 listeners, because they're not operating stations,
10 they're distributing programming.
11 And then, I got numbers from those two
12 entities for what their web listeners are, and NPR
13 gave me a very conservative estimate of 1,000. That
14 was their capacity at the time, of what their web
15 audience could be, technologically what they could
16 support.
17 And Minnesota Public Radio actually had
18 some data on their average listenership, and they had
19 134 listeners to their website. So I added those two
20 entities into the other public radio stations. I came
21 up with these bottom line figures for web listeners
22 and broadcast listeners. And I found that the web

1 audience is 1.2 percent of the broadcast audience for
2 public radio.
3 BY MS. LEARY:
4 Q Dr. Murdoch, in preparing Table 5, you had
5 to make certain assumptions about the similarity
6 between web listeners on the non-reporting stations
7 and those that were almost -- to those that did report
8 data in the survey. Were you able to undertake any
9 analysis that helped you determine that the averages
10 might apply equally or might not?
11 A Well, I thought about whether or not there
12 would be some bias and that somehow the survey non-
13 respondents would differ from the survey respondents.
14 And I -- in Tables 3 and 4, I looked at the data and
15 said, on average, the broadcast audience for the
16 survey non-respondents is not terribly different from
17 the broadcast audience for the survey respondents.
18 It's a little smaller.
19 And in Table 4, I looked at the profile of
20 their programming day, and those struck me as very
21 similar again.
22 So in terms of audience size and

1 programming day, I couldn't see any obvious
2 differences between the survey respondents and the non
3 -- and the survey non-respondents. So that gave me
4 some comfort in basing estimates for the non-
5 respondents on data from the survey respondents.
6 ARBITRATOR VON KANN: Did you make any
7 inquiry as to what -- whether your determinations
8 about the relative audience size of over-the-air
9 listeners versus web listeners was comparable to that
10 of commercial stations that have websites?
11 THE WITNESS: No, I did not.
12 ARBITRATOR VON KANN: All right.
13 BY MS. LEARY:
14 Q And, Dr. Murdoch, you just testified that,
15 in looking at Table 5 with regard to Minnesota Public
16 Radio, that both NPR and MPR are not broadcasters. Is
17 that true in the case of Minnesota Public Radio?
18 A Well, I guess there's a little bit of a
19 twist in Minnesota Public Radio. I understand it may
20 operate some stations, and those stations -- but the
21 stations don't operate websites. Minnesota Public
22 Radio operates the website.

1 So the stations were captured -- the
2 Minnesota Public Radio stations -- and I don't know
3 that they identify themselves as that -- were captured
4 in the -- the survey data for the stations and were
5 shown as not webcasting, which is true. They are not
6 webcasting. And then the Minnesota Public Radio
7 website was captured down below.
8 I think your point is right that when I
9 said that public -- National Public Radio and
10 Minnesota Public Radio don't broadcast, that's not
11 strictly true for Minnesota Public Radio. But it
12 didn't really affect how I treated the data here.
13 Q And so you arrived at a fee for public
14 radio stations and --
15 CHAIRMAN VAN LOON: I'm sorry. Can I just
16 interrupt on that? Prairie Home Companion is one of
17 -- certainly one of the most listened to. Does what
18 you're saying mean that that goes in as a zero?
19 THE WITNESS: No. It goes in as the
20 one --
21 CHAIRMAN VAN LOON: In Minnesota.
22 THE WITNESS: It goes in the 134 here for

1 Minnesota Public Radio on the web.

2 ARBITRATOR VON KANN: Where is --

3 THE WITNESS: It goes in zero for the

4 stations, because the stations don't have websites.

5 But Minnesota Public Radio has a website, and here's

6 where the listeners to Prairie Home Companion would

7 come in.

8 ARBITRATOR VON KANN: And where would the

9 over-the-air listeners come in?

10 THE WITNESS: They would be up here for

11 the stations, because Minnesota Public Radio, as I

12 think of it, doesn't have stations. But, you know, in

13 its plan -- it's not a station itself, but it does own

14 some stations and they're up here.

15 ARBITRATOR VON KANN: Do you know, as a

16 matter of fact, if there are no companion it's

17 simulcast on its website?

18 THE WITNESS: I don't know. I believe it

19 is, but I'm not absolutely sure.

20 BY MS. LEARY:

21 Q All right. Dr. Murdoch, you then arrived

22 at the $24,000 rate. Did you take into account any

1 other adjustments that you might make in setting a fee
2 for this proceeding? Were there others that you
3 considered? Let me rephrase the question.
4 A Well, there are other factors that the
5 Panel is instructed to consider concerning
6 substitution and promotion of website listening for CD
7 sales, and concerning the relative contributions of
8 the webcasters and the owners of the sound recording
9 rights to the websites. So I did -- I took into
10 consideration those factors, but I didn't quantify
11 them.
12 Q And would you -- can you briefly explain
13 what those factors were and why you didn't quantify
14 them?
15 A Sure. When it comes to promotion and
16 substitution effects of webcasting on the sale of CDs,
17 I didn't have any data. In my report I discuss how I
18 think that the -- for most listeners to webcast the
19 sound quality is inferior, so that would make it a
20 less good substitute for CDs.
21 But on the other hand, it might make it a
22 less good promotion vehicle for the sales of CDs, too,

1 and I just don't know how those two effects would
2 balance. But I did note that the websites -- the
3 public radio websites, because they offer text that
4 isn't available on the radio broadcasts, and links to
5 artists' sites, and just generally more information
6 than is available when you're listening to the music,
7 to just the audio, that there's also this textual
8 accompaniment and links. That that surely must tend
9 to promote the sales of CDs, and so that was a factor
10 that I think might be significant. But as I couldn't
11 quantify it, I made no adjustment.
12 Q Anything else? We're on page 17 of your
13 testimony?
14 A Right. So the other factor is the
15 relative contributions of public radio, and the sound
16 recording owners to the websites. And, again, I did
17 not quantify the expenditures by public radio on their
18 websites.
19 But I -- here in this section of my report
20 I did acknowledge that it is the public radio entities
21 that are developing the text and putting up the
22 websites and maintaining the websites and incurring

1 these costs, and that there's no incremental
2 contribution by the sound recording owners to these
3 websites.
4 So that would tend to favor a lowering of
5 the fees, if an adjustment were made. But, again, I
6 didn't quantify it, and I didn't make an adjustment.
7 Q Were there other benchmarks that you might
8 have considered, Dr. Murdoch, or did consider that
9 were deemed less appropriate? Directing your
10 attention to, say, page 18 of your written report.
11 A There is the benchmark for the digital
12 audio subscription services that are paying a fee
13 actually for sound recordings. But these are
14 commercial music services, and I would emphasize
15 commercial, and I just -- because I agreed with the
16 public broadcasting services CARP that a commercial
17 entity is sufficiently different from a public
18 broadcasting entity that it just complicates matters
19 significantly to try and make any kinds of
20 adjustments.
21 It's not a suitable benchmark. If there's
22 a public broadcasting benchmark out there that I could

1 take, I thought that was the better benchmark to take.
2 Q Dr. Murdoch, in reviewing your testimony
3 for today, did you become aware of any material that
4 you think should be corrected in your testimony?
5 A Yes. When I was reviewing my testimony,
6 I found an error in it, which I would like to correct,
7 and it's in paragraph 16 of the report. And I
8 mischaracterized -- and I should say that Dr. Woodbury
9 pointed this error out to me, and it was purely my
10 oversight that this -- that I didn't go back and fix
11 it.
12 But I mischaracterized the RIAA's reaction
13 to the finding of the Panel that musical works are
14 sort of a ceiling on the value of sound -- on the
15 price that might be charged for sound recordings. The
16 RIAA did not accept this finding, as I say in the
17 second sentence of paragraph 16.
18 And in the following sentence I inserted
19 the word "initial" in square parentheses, and I should
20 not have done that either. And by the same token, the
21 cite that I -- that was the basis of my --
22 ARBITRATOR VON KANN: Are you saying the

1 word "initial" should come out or --

2 THE WITNESS: It should come out.

3 ARBITRATOR VON KANN: -- the brackets

4 should come out?

5 THE WITNESS: Both should come out.

6 ARBITRATOR VON KANN: Both should come

7 out.

8 THE WITNESS: And I can find -- I have

9 found cites for the point that I was trying to make in

10 paragraph 16, but, obviously, it's a different cite

11 than footnote 11.

12 BY MS. LEARY:

13 Q Does that change in any way change your

14 assumptions or the conclusions that you reached in

15 your report?

16 A No, it has no impact on my conclusions.

17 MS. LEARY: We will, at a more appropriate

18 time, file a motion to correct the testimony of the

19 witness, but we did want to point that out.

20 I have no further questions at this point.

21 CHAIRMAN VAN LOON: Since we are so close

22 to what is our normal lunch break, we think that we

1 should -- and if we go into cross examination, the
2 witness will be limited in what she can talk about at
3 lunch, so I think we, out of respect for her, we
4 should go ahead and take our luncheon break now.
5 MR. GARRETT: That's fine. I have no
6 desire to make Dr. Murdoch eat by herself.
7 (Laughter.)
8 CHAIRMAN VAN LOON: Perhaps we should
9 still keep it at an hour and come back at 20 past
10 rather than half past.
11 (Whereupon, at 12:20 p.m., the
12 proceedings in the foregoing matter went
13 off the record for a lunch break.)
14
15
16
17
18
19
20
21
22

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

2 (1:32 p.m.)

3 CHAIRMAN VAN LOON: Let me say

4 preliminarily we were not just idly extending the

5 luncheon hour. We have a further draft order that we

6 would like to hand out to you during the next break

7 having to do with a couple of proposed demonstratives

8 that we think we would like to see at the rebuttal

9 phase if it's not too burdensome and if it would not

10 raise problems for the rest of the proceeding.

11 So that will be refined, and we'll hope to

12 have that for your consideration this afternoon. And

13 then we thought you could take it over the weekend,

14 discuss it with colleagues, and sometime Monday we

15 would get your reaction.

16 So, Mr. Garrett, we welcome the

17 commencement of your cross examination.

18 MR. GARRETT: Thank you.

19 CROSS EXAMINATION

20 BY MR. GARRETT:

21 Q Good afternoon, Dr. Murdoch. I'm Bob

22 Garrett, and I represent the Recording Industry

1 Association of America.

2 A Good afternoon.

3 Q Now, you've determined that a reasonable

4 fee here for the NPR stations would be $24,000 per

5 year, correct?

6 A Yes.

7 Q And that $24,000 would allow as many as

8 407 different stations to stream sound recordings,

9 pursuant to the 114 statutory license, correct?

10 A Four hundred and seven, I'm sorry, what?

11 Q Stations.

12 A Stations?

13 Q Yes.

14 [No response.]

15 Q Well, let me ask you, how many stations --

16 A Public broadcasting entities. I mean we

17 had this discussion this morning about what's a

18 station and there's repeater stations and so on.

19 Q Right.

20 A And I would include them in --

21 Q You refer on page 13 of your testimony to

22 407 stations, and I was just adopting that

1 terminology. But I'm happy to refer to them however
2 you want.
3 A Yes. That's how I tend to think of them.
4 I mean we could talk -- I don't know any other number
5 to attach them. I know there's other numbers that
6 float around. I call them the broadcast entities --
7 the broadcast stations, and I usually think of these
8 407 survey respondents, but I understand that they
9 represent repeater stations and so on as well.
10 Q All right. So there may actually be more
11 than 407 stations that if this $24,000 fee is paid
12 would be able to stream sound recordings, correct?
13 A Yes.
14 Q If we just stuck with the number of 407
15 stations, my math says that works out about $60 a
16 station, correct?
17 A I believe that's about right.
18 Q And if it were -- if you included all of
19 the repeaters and all that, that $60 number would
20 actually be even less, correct?
21 A You're assuming that they would be
22 webcasting and be licensed? Or they would all be

1 eligible to webcast.

2 Q Yes. I mean you've determined that for

3 $24,000 all 407 of these entities here, with however

4 many stations may rebroadcast their signals, can

5 stream sound recordings over the Internet, correct?

6 A Yes.

7 Q And so that works out at about $60 a

8 station, correct?

9 A That's the correct math, yes.

10 Q Okay. Do you realize that for $60 that if

11 I were to contribute to NPR, and I'm not saying I'm

12 going to --

13 (Laughter.)

14 -- but if I were to contribute $60 to NPR,

15 I wouldn't even be able to get one of those NPR tote

16 bags?

17 A Well, that would buy you that in my

18 market.

19 Q Well, if we got $60 from each station,

20 would they expect an RIAA tote bag?

21 (Laughter.)

22 A You can throw that in.

1 CHAIRMAN VAN LOON: I believe that's
2 outside of the scope of direct.
3 (Laughter.)
4 MR. GARRETT: Well, I'll discuss with
5 Counsel separately then afterwards.
6 BY MR. GARRETT:
7 Q Do you think that $60 per station would be
8 enough to cover the costs that RIAA and Sound Exchange
9 would incur in administering the statutory license?
10 A I haven't made a study of the RIAA's and
11 Sound Exchange's costs.
12 Q So you don't know then whether $60 would
13 be enough to actually cover the cost of administering
14 the statutory license for one of those stations.
15 A No. I don't even know what's involved in
16 administering the statutory licenses for those
17 stations.
18 Q Are you aware that once RIAA or Sound
19 Exchange gets the money, it has to then distribute it
20 to the copyright owners of the sound recordings whose
21 recordings were performed on the NPR stations?
22 A That's my understanding.

1 Q Okay. Would you not assume that there
2 would be a cost associated with identifying those
3 copyright owners and determining how much should be
4 paid to them and then getting those payments to them?
5 A I imagine there must be a cost associated
6 with that function. I don't know what the marginal
7 cost of handling the public radio stations would be.
8 Q Okay. But earlier you expressed
9 familiarity with ASCAP, correct?
10 A Yes.
11 Q And, in fact, you're doing work in an
12 ASCAP rate court related matter, correct?
13 A That's correct.
14 Q And who are you doing that work for, by
15 the way?
16 A The cable program services.
17 Q All right. So they're on the other side
18 from ASCAP, correct.
19 A That's correct.
20 Q Now, have you made any study of the cost
21 that ASCAP incurs in administering its statutory
22 license?

1 A No, we have not.

2 MR. GARRETT: Let me have marked a

3 document as 217 DPX.

4 (Whereupon, the above-referred

5 to document was marked as RIAA

6 Exhibit No. 217 DPX for

7 identification.)

8 THE WITNESS: It's truncated on the right.

9 BY MR. GARRETT:

10 Q You're right. Let me represent to you,

11 Dr. Murdoch, that these are -- what we have here in

12 217 DPX are a few pages from the ASCAP web site. And

13 I apologize, but it appears that some of the material

14 beginning on the second and third pages has been

15 truncated.

16 But the thing that I wanted to focus on

17 was on the first page. There's a paragraph there that

18 says, "ASCAP collects significantly more money;" do

19 you see that?

20 A Yes.

21 Q And then there's a statement there that,

22 "Every penny we collect, less operating costs, is

1 distributed to our members. Approximately 84 cents of
2 each dollar we collect goes right back to our members
3 in royalties. That is the highest distribution ratio
4 in the United States." Do you have any understanding
5 of whether or not -- I'm sorry, of what the costs are
6 that ASCAP incurs in administering its statutory
7 licenses?
8 A No.
9 Q If we assume that approximately 16 percent
10 of whatever they collect goes to covering their costs,
11 that would mean that several hundred thousand dollars
12 of that $5 million in Section 118 royalties we talked
13 about each year would actually going to covering their
14 costs, correct?
15 MS. LEARY: I'm going to object to the
16 question. This is not within the scope of the
17 Witness' direct testimony. Counsel has not
18 established any foundation for comparability between
19 these two services, and I think the Witness has
20 testified that she has done no work for ASCAP and has
21 not conducted any survey in conjunction with any other
22 work for costs of administering licenses.

1 MR. GARRETT: All right. Well, let me
2 kind of rephrase the question, how's that?
3 BY MR. GARRETT:
4 Q You stated that you are familiar with
5 ASCAP, correct?
6 A Yes.
7 Q All right. And you're involved in a
8 proceeding right now where the issue is how much the
9 cable industry should be paying ASCAP in royalties,
10 correct?
11 A That's correct.
12 Q And as part of that determination of how
13 much they should be paying, one focus in the rate
14 court will be certainly be on the cost that ASCAP
15 incurs, correct? If you know.
16 A I don't know. I don't -- it's certainly
17 not the focus of -- the focus of our work has not been
18 on that.
19 Q Okay. In figuring out whether or not the
20 fee that your recommending here for the public
21 performance of sound recordings, you have not made any
22 kind of study or inquiry or analysis or whatever of

1 how large the fee would need to be in order to cover
2 the cost of administering the statutory license just
3 with respect to these 407 stations, correct?
4 A That is correct; I have not.
5 Q All right. And you have no knowledge as
6 to exactly what kind of cost ASCAP incurs in
7 administering the statutory license -- I'm sorry, in
8 administering the royalties that it receives pursuant
9 to the Section 118 decision that you cite in your
10 study, correct?
11 A That's correct.
12 Q And you also have not done any kind of
13 analysis or study or investigation into the types of
14 costs that BMI has incurred or will incur in
15 administering the royalties that it receives pursuant
16 to the 118 decision that you have identified in your
17 study, correct?
18 A That's correct. I guess there's a couple
19 of features of that. We're talking about the public
20 broadcasting of CARP when you say Section 118. That's
21 what you're talking about, right?
22 Q Yes.

1 A There's a couple of features about which
2 I know a little bit, which is that CPB pays the fees
3 and that National Public Radio I believe collects
4 information for ASCAP about the music that was played
5 on behalf of all the National Public Radio member
6 stations. And I believe that BMI doesn't collect any
7 information from Public Radio, so I don't think
8 they're incurring too many costs.
9 Q All right. So do you know when ASCAP gets
10 that information and the fees what steps it takes to
11 ensure that it gets into the hands of the appropriate
12 copyright owners?
13 A I don't know what steps ASCAP takes, no.
14 Q All right. And you don't what the costs
15 of those different steps could be, do you?
16 A No, I don't.
17 Q Okay. Now, you are -- well, are you aware
18 that under the Copyright Act there is no requirement
19 that copyright owners of sound recordings designate
20 any particular body to act as its agent in collecting
21 royalties?
22 A I'm not aware of the details that you're

1 speaking about.

2 Q Okay. Well, assume that there is no such

3 requirement then. A copyright owner of sound

4 recordings could choose to be paid directly by NPR

5 here, okay? Assume that.

6 A Yes.

7 Q Do you have -- have you done any kind of

8 study or analysis, investigation to determine what

9 costs NPR or its individual stations would incur in

10 making certain that the appropriate royalty payments

11 were received by each of the different copyright

12 owners of sound recordings?

13 A Did you ask if I've done a study of that?

14 Q Yes.

15 A No, I have not done a study.

16 Q Do you have any information about that?

17 A I don't have any information about that.

18 I think that music used on NPR isn't very intensive.

19 It's probably not very important to the recording

20 artists' acceptance so far as they see it as a great

21 promotional opportunity.

22 Q All right. Just --

1 A Maybe they say, "Fine, you can have it."
2 Q Well, let's assume that copyright owners
3 want to be compensated from these 407 public radio
4 stations. And assume further that they choose not to
5 designate the Sound Exchange or any body to act
6 collectively for them, okay?
7 A Okay.
8 Q Now, under those circumstances, each
9 individual station, in order to fall within the terms
10 of the statutory license, would have to make payment
11 to the appropriate copyright owners, correct?
12 MS. LEARY: I'm going to object to that as
13 to be beyond the scope of Dr. Murdoch's testimony.
14 MR. GARRETT: I don't think it's beyond
15 the scope of her testimony, Mr. Chairman. She has a
16 fee in here. She says that it's a reasonable fee
17 within the meaning of the statute. I think I'm
18 entitled to explore what is meant by reasonable and
19 whether it would cover the costs that would otherwise
20 be incurred by these individual stations in
21 identifying the relevant copyright owners and then
22 ensuring that they got paid in accordance with the

1 statutory license.

2 MS. LEARY: It has to do with terms and

3 conditions for distribution, which I believe the Panel

4 has directed us to address in the rebuttal phase of

5 the case.

6 MR. GARRETT: I don't think it has to do

7 with terms and distribution. We're making assumptions

8 about what those terms of distribution are. And I'm

9 making whether under certain hypotheticals, certain

10 scenarios whether or not this fee would still be

11 considered reasonable.

12 CHAIRMAN VAN LOON: Overruled.

13 THE WITNESS: In this scenario that you

14 are hypothesizing, it seems to me that the stations

15 would need to keep track of the programming that they

16 are creating independently, and they would need

17 information from National Public Radio or Minnesota

18 Public Radio or perhaps other bodies that supply

19 programming to all the stations. But I guess my point

20 is that's one entity that's making the programming and

21 then it's being distributed through large parts of the

22 programming stations. So there is some kind of pool

1 of information that needs to be kept, but it's not
2 every hour of every programming day for every station.
3 And I don't -- and the other thing that's
4 making me pause is I don't think that the stations
5 individually would pay the fee. I'm not sure why it
6 is, but -- maybe I'm speculating, but I'm not sure why
7 it is, but the ASCAP and BMI fees are paid by CPB on
8 behalf of these owners. So there's a lot of
9 collectivity that goes into the organizing of
10 information and the transactions that go on on behalf
11 of the Public Radio entities. So to say that there's
12 407 of them or 800 of them I think is pushing it a bit
13 extremely.
14 Q Well, the royalty that you're proposing
15 here and the one that you say is reasonable is a
16 royalty that will allow all 407 of these stations to
17 stream sound recordings over the Internet, correct?
18 A Yes. But you're trying to tell me that
19 transactions costs per station that then you multiply
20 by this number of stations, and I don't -- I'm not --
21 I don't know completely about all of this, but I'm not
22 willing to concede that.

1 Q All right. Well, actually I was asking
2 you rather than telling you what kinds of transaction
3 costs would you expect that there would be, and do you
4 think that a fee of essentially $60 a station would
5 cover those kind of transaction costs?
6 A And I don't know what the aggregate
7 marginal cost of administering Public Radio licenses
8 would be for the RIAA, so I can't tell you whether $60
9 a station is enough.
10 Q All right. That's fine. Is there a way
11 we can determine from the study that you presented
12 here what an appropriate fee would be on a per station
13 basis; that is, a fee just for stations that are
14 actually streaming sound recordings?
15 A Well, I haven't attempted to make that
16 kind of allocation. My webcasting listenership is a
17 snapshot at the beginning of 2001 or the end of 2000,
18 but I mean it strikes me that there could be some
19 effort made to trace back the listenership to a per
20 station level rather than to the aggregate number that
21 I've calculated. I don't know if that would make
22 sense to do it or not, I haven't thought about that,

1 but it is a per listener model, in some sense.

2 Q Okay. Well, your proposal, as I

3 understand it, is that NPR pays this -- or someone

4 pays this $24,000 on a yearly basis, and in return, as

5 many as 407 entities, stations, whatever you want to

6 call them, will be able to stream sound recordings in

7 accordance with the Section 114 statutory license,

8 correct?

9 A Yes.

10 Q All right. And NPR or whoever will pay

11 this $24,000 regardless of whether the number of

12 stations that happen to be streaming sound recordings

13 is 407 or some lower number or some higher number,

14 correct?

15 A Regardless of whether or not the number

16 was 50 stations in 1999. Like you say, over some of

17 this period it certainly was -- or I can imagine that

18 it may have been lower than it was at the end of 2000,

19 beginning of 2001. And perhaps some more stations

20 will start streaming some audio in what's left of 2001

21 and 2002. You're right.

22 Q All right. But under your proposal --

1 A Under my proposal, the fee would be
2 $24,000 a year for each of those years.
3 Q Regardless of how many Public Radio
4 stations were streaming, correct?
5 A Correct.
6 Q And so it would be fair to say in that
7 sense that the fee you are proposing here is really
8 not tied to the usage of sound recordings.
9 A I wouldn't go so far as to say that. I
10 would say I have a representative picture of what the
11 usage was, better than mid-point through the -- or
12 around mid-point, I guess, through the turn. And I
13 don't -- I didn't see a need to fine-tune it for other
14 years, especially in view of the lack of data.
15 Perhaps after this term, if things were growing
16 rapidly, that would become a more important factor and
17 one would want to look at the stations or their
18 listenership.
19 Q Okay. And if we did want to do this on a
20 per station basis --
21 A Per web site, I guess, really.
22 Q Okay. Let's talk about -- let's do it on

1 a -- if we wanted to have a fee on a per web site
2 basis here, how would we be able to calculate that fee
3 -- strike that. If we wanted to have a per web site
4 royalty fee, do we have sufficient information in the
5 report that you provided us to allow us to calculate
6 that per web site fee?
7 A You might have sufficient information to
8 calculate a per web site fee. I'm not sure if it
9 would be the right one without thinking about it
10 further. But I think, implicitly, in this Table 5,
11 there's some kind of assumption about how many web
12 sites there are, on average.
13 Q Okay. Can you give us any guidance on how
14 we'd go about calculating that per web site fee?
15 A Well, I know how many web sites there are
16 with Audio Service here, and then I would have made
17 some assumption about the same proportion of stations
18 having web sites in the nonsurveyed body -- in survey
19 nonresponse body of stations. I mean that would give
20 you ballpark a number, I think, of how many stations
21 we're imagining have web sites.
22 Q So you would focus just on those web sites

1 that actually offer audio for your calculation?

2 A Yes. This is about sound recording

3 performances.

4 Q Yes.

5 A Yes. I think that makes sense.

6 Q Okay. Now, you mentioned in one of your

7 earlier responses here just a few minutes ago about

8 lack of data. Could you tell me what you meant by

9 that?

10 A Could you tell me which response?

11 Q About five minutes ago.

12 CHAIRMAN VAN LOON: Could you clarify

13 that?

14 THE WITNESS: I don't remember.

15 BY MR. GARRETT:

16 Q Okay.

17 A I think I said that I didn't have data on

18 what the web audiences were for 1999 and 2000.

19 Q Well, maybe that's what -- I was just

20 wondering what you meant by the lack of data.

21 A Yes. I think that's what I said.

22 Q Okay.

1 (Pause.)

2 CHAIRMAN VAN LOON: Do you want to go off

3 the record for a second?

4 (Whereupon, the foregoing matter went off

5 the record at 1:57 p.m. and went back on

6 the record at 1:57 p.m.)

7 CHAIRMAN VAN LOON: We're back on the

8 record.

9 MR. GARRETT: All right. I've handed out

10 a document, Mr. Chairman, that was marked as 067 DRX.

11 We assumed that it was a restricted document, because

12 that's how we'd received it from NPR. Ms. Leary

13 advises that it's not necessary to treat it as

14 restricted, so I will have this document marked

15 instead as 218 DPX.

16 (Whereupon, the above-referred

17 to document was marked as RIAA

18 Exhibit No. 218 DPX for

19 identification.)

20 CHAIRMAN VAN LOON: And this is the NPR

21 music rights survey 2000 in full?

22 MR. GARRETT: Yes.

1 BY MR. GARRETT:

2 Q Dr. Murdoch, are you familiar with

3 document that has been marked as 218 DPX?

4 A Yes, I've seen it before.

5 Q Could you identify it for the record?

6 A This is a music rights survey that

7 National Public Radio circulated to public radio

8 stations, both the National Public Radio member

9 stations and others, around the end of 2000.

10 Q Okay.

11 A Circulated may be a strong word. I think

12 -- well, I think they posted it on their web site for

13 their member stations and circulated it to others.

14 Q And this is the survey that you discuss in

15 your written testimony, correct?

16 A Yes, it is.

17 Q And it's also the same survey that you

18 discussed in oral testimony today?

19 A Yes, it is.

20 Q Okay. And this is the survey that

21 provides certain of the data upon which you relied to

22 calculate your $24,000 royalty, correct?

1 A Yes, that's correct.

2 Q Let me ask you just a couple of

3 preliminary things. Were you involved in the design

4 of this particular survey?

5 A I had some involvement, yes.

6 Q Would you describe that nature of that

7 involvement?

8 A Well, actually, when I was involved I

9 hadn't yet been retained by the Corporation of Public

10 Broadcasting, but we were talking about me potentially

11 doing some work. And National Public Radio said, "We

12 are planning on circulating, if you will, a survey to

13 the public radio stations to find out more about their

14 webcasting activity. And we're putting that together

15 now. Would you like to take a look at it and offer

16 comments and perhaps propose other questions or good

17 feedback on it?" And I said, "Yes." And so I did

18 give some feedback on it.

19 Q All right. So you saw earlier versions of

20 the questionnaire on which you commented?

21 A Yes.

22 Q Do you remember the nature of any changes

1 or suggestions that you made with respect to those
2 earlier versions?
3 A I think -- I don't want to speculate here.
4 One thing I think I asked for was, for instance, the
5 information in question 26 about "Do you how many
6 listeners you have, and do you know the time that they
7 spent listening to these different formats of
8 programming?" And I think that some of the financial
9 data questions. I wouldn't have done the wording
10 explicitly, but I would have said, "Let's see if we
11 can get an idea of what they're spending and what they
12 anticipate to be spending." I think those came from
13 me. I don't have a clear recollection.
14 I know I talked to them about -- I believe
15 they were asking, "What are you going to do five years
16 from now," and I don't know if it was them or me that
17 said, "That's probably too long a planning horizon for
18 webcasting." And we cut it back to two. I remember
19 we discussed that. And was partly in light of the
20 fact, too, that the proceeding was going to set fees
21 to 2002.
22 You know, I may have marked up wording to

1 individual questions and so on, but -- and I don't
2 know -- actually, again, the web audience programming
3 -- or the web programming mix and audience size, these
4 questions 17, 18, and 19, I imagine I had some input
5 to those, but I don't remember, and I certainly
6 wouldn't have been the person to draw up these
7 categories. So I can't tell -- I can't recall what
8 was there and what was mine.
9 Q Okay. Anything further?
10 A No, sorry. It's vague in my mind.
11 Q That's fine. Were you involved at all in
12 the administration of this survey?
13 A No, I was not.
14 Q Do you know who did supervise the
15 administration of the survey?
16 A I think Laurie -- I know Laurie Kaplan
17 worked a lot with the survey data. She was the one
18 who worked, I believe, on the follow up and so on. I
19 think I would designate her as the person responsible.
20 She's at National Public Radio.
21 Q Okay. And who was involved in the
22 formulation of the questions beside yourself?

1 A I believe Denise Leary. I think Neil
2 Jackson may have looked at the survey. I don't know
3 how much he actually was involved with formulating the
4 questions. And I think there may have been some other
5 people at NPR, but they are names that I wouldn't
6 recognize or recall.
7 Q Okay. Do you know whether potential
8 respondents had communications with anyone at NPR
9 concerning this survey itself?
10 A Other than just receiving the survey?
11 Q Yes.
12 A Well, I think there were some follow-up
13 attempts if the survey responses weren't coming in.
14 I think Laurie made one or two waves of sending out
15 reminders to the stations, "Would you please fill out
16 the survey." So that kind of communication. And then
17 sometimes when we were working with the data we would
18 see anomalies, and Laurie would try to resolve those
19 -- inconsistencies in some of their answers. And if
20 it was easier for her to resolve just by looking at
21 their web site, that's what she would do, but I think
22 she may have sometimes called a station -- a web site

1 person and asked for an answer. So there may have
2 been some telephone communication there, but I don't
3 think it was extensive.
4 Q Do you know whether any of the potential
5 or actual respondents to the survey were advised that
6 the survey would be used in connection with this CARP
7 proceeding?
8 A With the CARP proceeding, I don't know.
9 I just notice that the sentence up at the top says,
10 "It's critical to the negotiations to obtain music
11 rights for webcasting." But that's what I'm basing my
12 answer on. I don't know.
13 Q Okay.
14 CHAIRMAN VAN LOON: Can I ask you also,
15 Dr. Murdoch, to please keep your voice up so that
16 everybody in the room can hear and so that the court
17 reporter can get an accurate account of your answers.
18 BY MR. GARRETT:
19 Q Dr. Murdoch, can you tell me which
20 question here was the one in which you elicited the
21 information that was used in your study? I said
22 question but if it's questions --

1 A I believe it would be the answer to
2 question number 15, "What is the average number of
3 people that stream audio at the same time from your
4 web site?"
5 Q Did you use the responses to any of the
6 other questions in your study?
7 A I think I, at some point, looked at, but
8 it's not in my study, but I may have looked at,
9 "What's the maximum number that may stream audio, the
10 capacity?" I used what information I found useful.
11 We used the answer to number 5, "Do any of your web
12 sites currently include audio content?" So that
13 identified people that were streaming for us. We used
14 some of these answers to six, "Do you stream on-air
15 broadcast content;" seven is, "Do you have audio
16 available for programs that aired in the past." That
17 would archived programming. Eight, "Do you provide
18 audio on your web site that's not been broadcast on
19 your station?" That's sort of -- that gets at web-
20 only programming. So we used those.
21 And then in the questions -- they sort of
22 range from 17 to 20, and they're asking, "How many

1 hours per week of certain types of content by format
2 do you provide." And it's broken into newscasts and
3 different kinds of music and so on. Those data, where
4 they were usable, may underlie some of the information
5 that's reflected in those Tables 8 -- in Table 8 and
6 probably in Table 6. I think that's about it.
7 Q Okay. Let me just ask you to turn to
8 Table 5 of your prepared statement. Now, in order to
9 do the calculations that you've done here, you needed
10 to determine the percentage of -- you needed to
11 compare the web audience to the over-the-air audience,
12 correct?
13 A Correct.
14 Q And you determined that the web audience
15 was about 1.2 percent of the over-the-air audience,
16 correct?
17 A Correct.
18 Q And that 1.2 percent number is reflected
19 there in Table 5 in that last -- actually, the last
20 set of numbers there all the way in the right-hand
21 corner, correct?
22 A Yes.

1 Q And that 1.2 percent reflects the number
2 of simultaneous web listeners divided by number of
3 broadcast listeners, correct?
4 A Correct.
5 Q Or another way of saying it is that 15,819
6 number over the 1.3 million number, correct?
7 A Correct.
8 Q Product of those numbers is 1.2 percent,
9 correct?
10 A I'm not sure I'd call that a product, but
11 one divided by the other, yes, yes.
12 Q Okay. In order to get that 15,819 number,
13 you did rely upon answers to the survey that we just
14 discussed, correct?
15 A Correct.
16 Q And in particular, you relied upon the
17 answer to question number 15, correct?
18 A I believe that would be the question, yes.
19 Q And the way we get that 15,819 is, in
20 part, if we go all the way up to the top table there
21 where it says, "Offering audio content," do you see
22 that?

1 A On the top band, yes.

2 Q Yes. You say reporting average

3 simultaneous streaming data --

4 A Yes.

5 Q -- there were 78 respondents to the survey

6 who reported average simultaneous streaming data?

7 A That's correct.

8 Q And those 78 respondents had an average of

9 67 simultaneous web listeners, correct?

10 A Yes.

11 Q Now, you do a number of different

12 calculations but ultimately that 67 number supports

13 the 15,819 number all the way down at the bottom

14 there, correct?

15 A Yes. I would say that the data for the 65

16 stations not offering audio content probably has an

17 impact on the bottom numbers as well.

18 Q Okay.

19 CHAIRMAN VAN LOON: Did you intend to

20 offer 218?

21 MR. GARRETT: Yes. I can offer it now.

22 May I offer it now?

1 MS. LEARY: We have no objection.

2 CHAIRMAN VAN LOON: Admitted.

3 (Whereupon, the above-referred

4 to document, previously marked

5 as RIAA Exhibit No. 218 DPX for

6 identification, was admitted

7 into evidence.)

8 MR. GARRETT: I'm not done with it yet.

9 BY MR. GARRETT:

10 Q Dr. Murdoch, I've handed you what's been

11 marked as 219 DPX.

12 (Whereupon, the above-referred

13 to document was marked as RIAA

14 Exhibit No. 219 DPX for

15 identification.)

16 Q And let me just represent in discovery we

17 were provided with a disk of -- as we understand, it

18 contained the responses to the individual questions in

19 this survey. And what you have before you is a

20 printout of the responses by some of the respondents

21 to certain of the questions, okay? And the particular

22 respondents that are included here in 219 DPX, all of

1 those who answered yes to question 5. Do you have
2 question 5 there in front of you?
3 A Yes, I do.
4 Q This was one of the questions you said
5 that was used -- or the responses that was used.
6 Question 5 says, "Do any of your web sites currently
7 include audio content."
8 A So this is the 78 plus 62 stations?
9 Q Well, this is the actual number that we
10 were able to come up with as answering yes to question
11 5. It was 134, which is a little off from the number
12 that you have.
13 A May I ask, is this is the raw data? I
14 guess this is the raw data, not the cleaned up data.
15 Q Yes.
16 A Okay.
17 Q Okay? And in the third column where it's
18 listed as Q5, they should be all yeses all the way
19 through. Q6 refers to question 6, which was, "Do you
20 stream on-air broadcast content at the same time as
21 such material is broadcast over the air by your
22 station." That was the sixth question in the survey

1 that you referred to earlier?

2 A Yes.

3 Q And question 15 says -- in the survey is,

4 "What is the average number of people that stream

5 audio at the same time from their web site?" That's

6 the question?

7 A That's question 15, yes.

8 Q All right. And you said the responses to

9 question 15 are what support your number of

10 simultaneous web listeners there in Table 5, correct?

11 A I believe that's right.

12 Q And we've simply reproduced the responses

13 to question 15 here in the fifth column going down.

14 Question 16 was, "In the next two years, how many

15 simultaneous audio connections do you anticipate your

16 web site will be capable of handling," correct?

17 A That's correct.

18 Q Let me just stop there for a second. If

19 I go through and -- well, why don't you tell me, did

20 you actually look at the raw data in order to

21 calculate that 67 number?

22 A No, I did not.

1 Q How was that number, 67, actually
2 calculated?
3 A Well, Laura Kaplan calculated it at NPR,
4 and my understanding is that she took a number where
5 it was available. If they gave a range, she took the
6 high end of the range. And if they gave a number, for
7 instance, just on the first page, 200 Real Audio, 400
8 Chaincast, there's technical things that she may know
9 about that that would have led her to say whether that
10 was appropriately 600. I have no idea. But those are
11 the kinds of things that she did to clean up the data,
12 and she took the conservative high end of a range.
13 That's what I know.
14 Q All right. Let's start with the very
15 first one which is Station KTOO; do you see that?
16 A Yes, I do.
17 Q All right. It answers yes to question 5,
18 which means that it offers audio content on its web
19 site, correct?
20 A Correct.
21 Q But it says no to question 6, which means
22 that it's not simulcasting its signal on its web site.

1 A It's not streaming its on-air broadcast
2 programming day all day long. If that's what you mean
3 by simulcasting, yes.
4 Q Yes.
5 A Yes.
6 Q And so this would be an example of a
7 station that on Table 5 would be reported as offering
8 audio content but not reporting ever simultaneous
9 streaming data; is that right?
10 A Yes. The heading -- I hope the heading on
11 Table 5 isn't misleading you, because the reason it
12 would say not reporting average simultaneous streaming
13 data that they said N/A on question 15.
14 Q Okay.
15 A Okay? Now when I look at the wording of
16 this survey I see where -- if you made a connection
17 there, it's not connected to the question that you
18 were just talking about.
19 Q Okay.
20 A It's not getting at whether or not they're
21 streaming their broadcasting; it's getting at whether
22 or not they gave us data for question 15.

1 Q That's fine. The very next one, 59, they
2 answered yes to questions -- which is WNPR, and they
3 answered yes to both questions 5 and 6. Again, with
4 question 15 they just said, "Too knew to know,"
5 correct?
6 A Right. Yes, that's right. I mean I just
7 wouldn't focus too much on six, because six, seven,
8 and eight are just as important to us as six, "Do you
9 have archived programming, do you have web-only
10 programming?" That was just -- that's kind of a
11 detail.
12 Q Okay.
13 A What's the nature of the audio that you're
14 offering.
15 Q All right. But, ultimately, the important
16 number for your calculation is what's there in
17 question 15, correct?
18 A I think that's right.
19 Q All right. Because you base all of your
20 calculations on that $24,000 fee on the responses to
21 question 15, right?
22 A Yes, I think that's right.

1 Q And we see in a number of these cases,
2 even though they may offer audio content, they don't
3 have any data as to exactly how many simultaneous --
4 how many people are listening simultaneously.
5 A Right. That should -- there should be 62
6 of those.
7 Q Right.
8 A Based on this number in Table 5.
9 Q Right. I think we've got a number very
10 close to that, but --
11 A I mean it's possible that in the clean-up
12 Laurie got more information, and so the number may
13 have changed in the clean-up to this raw data.
14 Q Yes. Well, just so that you can rest
15 assured here, I'm not going to ask you to go through
16 all these numbers, add them up, and tell us whether
17 you come to the number 67, okay? Will that make you
18 feel better if I tell you that?
19 A No, that would be an enjoyable way to
20 spend the afternoon probably.
21 Q Okay. But I'm not really focused on that
22 here. I just want to know for question 15 here that's

1 where they were telling you their best -- they were
2 telling you how many average simultaneous listeners
3 they were getting to the web site, correct?
4 A Yes. Sorry, yes.
5 Q All right. And so if I just go down like,
6 for example, 69, KOSU-FM, if I go to the fifth column
7 over, the put the number 60, so there's one that looks
8 like it's pretty close to your average. They were
9 getting 60 people listening simultaneously to the
10 streams, correct?
11 A That looks right, that it is close to the
12 average, yes.
13 Q Okay. And then the one below it was below
14 average at 20, right?
15 A That's correct.
16 Q And then the one below that was -- they
17 were only getting one person listening, correct?
18 A Correct.
19 Q And then we got some "don't knows" and
20 some other numbers. And we go to the next page, KCCU,
21 where you say -- I'm sorry, where it says 15 to 20.
22 Your understanding is that they would take the higher

1 number to figure out what the average is.

2 A That is my understanding, yes.

3 Q Okay. Do you believe that the information

4 that was provided here in question 15 is accurate and

5 reliable?

6 A I believe it's the stations' best estimate

7 of what's happening on their web sites, and it's the

8 only information I have. It's the best available

9 information.

10 Q Okay. You don't have any -- you did not

11 have available to you any information other than --

12 strike that. You did not have available to you any

13 information concerning the average number of

14 simultaneous listeners to public radio sites other

15 than what you had here in response to question 15.

16 A That's correct.

17 Q And did you have any way of determining

18 whether or not that information was or was not

19 reliable?

20 A No, I did not.

21 Q Okay. Let me ask you just to turn to

22 question 24 of the -- question 24 asked the

1 respondent, "Does your station have a reliable way to
2 measure listening to audio on your web site," right?
3 Yes?
4 A Yes.
5 Q Okay. So this is a question in which you
6 asked the respondent, himself or herself, specifically
7 to say, "Do you consider that information to be
8 reliable," correct?
9 A No, I don't think that's the right way to
10 interpret this question. This was leading into a set
11 of questions about how people spend their time
12 listening, what are their listening habits. This is
13 not listeners, it's listening, and I think that's a
14 term of art in radio, and it means are you able to
15 track what your listeners are listening to on the web?
16 That's what question 24 is getting at.
17 Q So if, for example, going back to question
18 -- or respondent number -- go to number 69, KOSU-FM
19 again.
20 A Yes.
21 Q And question -- well, actually, let's go
22 to the one right below that, WGBH-FM 20.

1 A Yes.

2 Q They said they have 20 -- be exact here --

3 20 is the average number of people that streaming

4 audio at the same time from the web site. Right?

5 That's what they're representing there in question 15.

6 A Yes.

7 Q And in response to question 24, they say

8 that, "We do not have a reliable way to measure

9 listening to audio on our web site."

10 A Right. I think that means, "We don't have

11 a reliable way to know what the people are listening

12 to when they're listening to the audio. We don't know

13 if they're picking up our archived programming or our

14 broadcast stream or what they're listening to."

15 Q And you don't think that the people who

16 were responding to this were saying, "We really don't

17 have a reliable way to tell you exactly how many

18 people are listening simultaneously to each stream."

19 You would not read the question that way.

20 A I wouldn't read the question that way, and

21 I can't speak to how they would read it.

22 Q Okay.

1 A My understanding of the question is as I
2 explained it to you, and that was how it was explained
3 to me by NPR. But I mean for question 15 I don't know
4 that all of the people who gave me the number of their
5 streamers have highly scientific data that's keeping
6 track all the time of how many streamers they have in
7 calculating an average either. I'm not saying this
8 is, you know, highly precise data.
9 Q Are you saying that all of the data that
10 was provided to you or was provided in this survey
11 here in response to question 15 is indeed reliable,
12 valid, accurate data?
13 A It's the best I've got. It's as reliable
14 as they could make it, and they said don't know when
15 they absolutely didn't know. I don't know if they're
16 making up numbers sometimes. It's the best data I've
17 got.
18 Q Okay.
19 A It's the only data I've got.
20 Q All right. But you're asking the Panel
21 here to set a royalty fee based upon data. And are
22 you saying to the Panel here that these data here,

1 putting aside the response to question 4, that these
2 data are data that they can feel comfortable in
3 relying upon and structuring a royalty fee here for
4 NPR?
5 A Yes, I am, because I think the audience is
6 so small that if the average is off by a few, it's
7 probably not going to make a big difference.
8 Q Okay. So it's not important to be really
9 precise --
10 A It's important to be as precise as you can
11 be, and of course the Panel wants the best data it can
12 have. This is the best estimate that is out there.
13 Q Now, you were here when Mr. Stern
14 testified this morning, correct?
15 A Yes, I was.
16 Q And Mr. Stern talked about efforts by NPR
17 to -- more recent efforts by NPR to gather data on web
18 site listening, correct?
19 [No response.]
20 Q Do you recall that testimony?
21 A I recall that testimony. It certainly was
22 on web site visiting, and I think it probably was on

1 web site listening too, yes.

2 Q Okay. Do you know what efforts are being

3 made in that regard today and how far they differ from

4 this survey that was put out in March of 2000?

5 A I don't know. I had heard that they were

6 starting to track activity on their web sites, but I

7 think that that's about all I know.

8 Q Okay. And I take it you don't know

9 whether when individual stations were responding to

10 this survey whether they knew this information was or

11 was not to be used in connection with this CARP

12 proceeding.

13 A I don't know.

14 Q I would move the admission of 219 DPX.

15 MS. LEARY: I'm going to object to the

16 admission of 219 DPX. The Witness did not prepare

17 this. The Witness -- we've not had any opportunity to

18 review it. The Witness testified that she received

19 clean data. This is, as I understand it, to be raw

20 data. I'd like to have a few minutes just to look it

21 over. It may not be a problem.

22 MR. GARRETT: I would be happy to have it

1 -- to defer the rulings subject -- well, simply to
2 allow her to go back to her office and recheck the
3 data. If there's any question -- I mean, basically,
4 we just took the disk that they had provided us in
5 discovery, and we said, "Give us the answers to the
6 questions that are identified up here," and this is
7 what came out. And we haven't done anything with the
8 disk other than that.
9 CHAIRMAN VAN LOON: Would it be acceptable
10 to you, Ms. Leary, to admit it subject to the same
11 conditions that we have with some other documents
12 which if upon subsequent review you go back and think
13 that there was a data glitch or whatever, you'll come
14 back and we would reopen it?
15 MS. LEARY: Yes, Your Honor.
16 CHAIRMAN VAN LOON: Okay. So this is
17 admitted on those terms.
18 (Whereupon, the above-referred
19 to document, previously marked
20 as RIAA Exhibit No. 219 DPX for
21 identification, was admitted
22 into evidence.)

1 BY MR. GARRETT:

2 Q Dr. Murdoch, did you make any inquiries as

3 to how many of the -- well, let me go back. You said

4 that you apparently discussed question 24 with the

5 people at NPR, correct?

6 A Right.

7 Q And who did you discuss question 24 with

8 at NPR?

9 A Laurie Kaplan.

10 Q And Laurie Kaplan explained to you what

11 was meant by -- what she meant by question 24,

12 correct?

13 MS. LEARY: I'm going to object to the

14 form of the question. I don't think the Witness has

15 testified to that effect.

16 BY MR. GARRETT:

17 Q Well, let me ask you, did Laurie Kaplan

18 explain to you what was meant by question 24?

19 A Yes, she did.

20 Q Okay. And that's consistent with what you

21 had testified to a few minutes ago.

22 A Yes, it is.

1 Q Did anybody else at NPR discuss with you
2 what was meant by question 24?
3 A Not that I recall.
4 Q And did you discuss with any of the
5 respondents what they understood to be meant by
6 question 24?
7 A I've never had a question with a
8 respondent.
9 Q Okay. Did you make any inquiry as to how
10 many of the respondents had answered no to question
11 24, meaning that they did not have a reliable way to
12 measure listening to audience on their web sites?
13 MS. LEARY: I'm going to object to the
14 form of the question as Counsel read it. He
15 incorrectly read question 24, at least as I heard it.
16 MR. GARRETT: All right. Well, I'll
17 rephrase it.
18 BY MR. GARRETT:
19 Q Question 24 says, "Does your station have
20 a reliable way to measure listening to audio on your
21 web site?" Do you know how many of the respondents to
22 this survey answered no to that?

1 A I certainly don't know how many answered
2 no.
3 Q Do you know how many left that question
4 blank -- left the answer blank?
5 A No, I don't. If it's helpful, I know that
6 in this realm of this set of questions, starting at
7 24, that asked people about their listening habits, my
8 recollection is that the web sites provided very
9 little useful information about people listening's
10 habits. They didn't seem to know.
11 Q If we look at 219 DPX and the response to
12 the question 24 in the far right column there, it
13 would appear, would it not, that a substantial portion
14 of the respondents to this survey who provided
15 responses on their number of simultaneous listeners
16 actually answered no to question 24, correct?
17 A Can I answer that question in a different
18 way? Without looking at whether or not they say yes
19 or no in 15, it looks to me like a substantial number
20 -- well, no, some number said no to question 24. I
21 haven't done a correlation between that and 15, but
22 that's -- a good number said no to 24 is consistent

1 with what I just told you, which is my recollection is
2 that there was very little, if any, information in the
3 responses to questions 24 through 26. And I haven't
4 look at the -- we didn't work with that data, but this
5 is my recollection from when the surveys came back and
6 I was told, "There's nothing useful here."
7 MR. GARRETT: Mr. Chairman, I'm handing
8 out a copy of a document that's marked as 220 DPX. It
9 is a report of the Panel in the Section 118 proceeding
10 that Dr. Murdoch described earlier.
11 (Whereupon, the above-referred
12 to document was marked as RIAA
13 Exhibit No. 220 DPX for
14 identification.)
15 BY MR. GARRETT:
16 Q Dr. Murdoch, do you recognize this
17 document?
18 A Yes, I do.
19 Q And this in fact the CARP report that you
20 reference in your written testimony?
21 A Yes, it is.
22 Q And it's the CARP report that you

1 discussed in your oral testimony earlier?

2 A Yes, it is, one of them.

3 Q Did you review the entire report in

4 preparing your written testimony?

5 A Yes, I did.

6 Q Do you recall what the position of ASCAP

7 was in that proceeding?

8 A Not as I sit here today; no, I don't.

9 Q Let me ask you to turn to page 12. Down

10 at the bottom of that page where it refers to the

11 ASCAP analysis, do you see that?

12 A Yes, I do.

13 Q It says, "The primary ASCAP approach uses

14 music license fees recently paid by commercial

15 television and radio broadcasters to ASCAP as a

16 benchmark for valuing the license fees that public

17 broadcasters should pay to ASCAP under Section 118."

18 Do you see that?

19 A Yes, I see that.

20 Q Does that refresh your recollection in any

21 way as to what ASCAP's position was in the proceeding?

22 A No. I'm relearning it today.

1 Q Okay. Do you recall at all that ASCAP had
2 argued that the royalty fee under Section 118 for
3 public broadcasting should be set using as a benchmark
4 what ASCAP was receiving from commercial radio and
5 television?
6 A I don't recall that.
7 Q Do you recall whether a similar position
8 was articulated by BMI?
9 A No, I don't.
10 Q I mean it puts into context the Panel's
11 discussion about commercial benchmarks -- commercial
12 licensing benchmarks not being relevant, but it's so
13 long since I read this I don't remember. I've
14 completely lost sight of what ASCAP and BMI were
15 asking.
16 Q Right. Well, you do state in your report
17 here, you quote the portion of the report here where
18 the 118 Panel said that the commercial rates were not
19 a good benchmark, correct?
20 A Yes.
21 Q And I just want to ask you a few questions
22 to help us all understand what the difference is

1 between what commercial radio broadcasters were paying
2 and what public radio broadcasters were paying, okay?
3 A Are paying to ASCAP?
4 Q Right. ASCAP and BMI.
5 A Okay. If the numbers are in here, we can
6 read them together.
7 Q All right. But you --
8 A I certainly don't know.
9 Q You don't know.
10 A No.
11 Q Okay. You don't know how the final
12 royalty that was adopted by the 118 CARP compares to
13 what would have been the royalty had the CARP adopted
14 a commercial radio and television benchmark.
15 A I do not know. I recall some discussion
16 about the gap between commercial and public
17 broadcasters' payments, and I have the impression that
18 the CARP Panel narrowed that gap somewhat. That's as
19 much as I know.
20 Q All right. As we sit here now, you don't
21 know what the discount was of commercial benchmark,
22 correct?

1 A No.

2 Q Okay. All right. Well, then it doesn't

3 make much sense to go into this in any depth with you,

4 but I will offer this document as -- I'll move its

5 admission.

6 MS. LEARY: We have no objection.

7 CHAIRMAN VAN LOON: Admitted.

8 (Whereupon, the above-referred

9 to document, previously marked

10 as RIAA Exhibit No. 220 DPX for

11 identification, was admitted

12 into evidence.)

13 BY MR. GARRETT:

14 Q Let me just ask you, again, going back to

15 Table 5, Dr. Murdoch, let's go down again. You call

16 that a band, is that right?

17 A Sure, if you like.

18 Q Okay. The last band there under

19 "Broadcast Listeners Quarter Hour Audience," do you

20 see that?

21 A Yes.

22 Q And the number there is at 1.3 million,

1 right?

2 A Yes.

3 Q And as we said earlier, you compare that

4 number to the one immediately to the left, which is

5 15,819, correct?

6 A Correct.

7 Q And that's how you then determine to make

8 your scaling adjustment of 1.2 percent, correct?

9 A Yes.

10 Q Okay. Now, note in footnote 37 of your

11 testimony, which is on page 13, that concepts of

12 simultaneous web listeners and quarter hour audience

13 are not exactly the same, correct?

14 A That's correct.

15 Q When we're talking about simultaneous

16 listeners and you say 15,819, that means there were

17 15,819 people who are listening at any given moment to

18 the webcast, correct?

19 A Correct.

20 Q But the $1.3 number isn't saying that

21 there are 1.3 million people listening at any given

22 moment to the over-the-air broadcast, is it?

1 A It's not quite saying that, because they
2 have to be at least listening for five minutes,
3 according to the way that Arbitron measures those
4 people.
5 Q Can you -- take these two numbers that we
6 have here, 15,819 and 1.3 million, and make them
7 comparable to each other. Is there any way to do
8 that?
9 A Well, I thought about this issue, and I
10 think there's a few different ways to approach it, and
11 this is a complicated issue. But I think what I say
12 in footnote 37 is I got comfortable that these numbers
13 could probably, reasonably be compared. The problem
14 is -- let me see if I can get this straight -- in the
15 middle of footnote 37 --
16 ARBITRATOR VON KAHN: Beginning with
17 "Specifically?"
18 THE WITNESS: Oh, I'm just seeing if
19 that's the sentence I want. In this paragraph, I'm
20 sort of trying to explain if I were measuring my web
21 listeners in the same way that Arbitron captures them,
22 would my number get smaller because web listeners are

1 on for less than five minutes? Or they would be
2 required to be on for at least five minutes if they
3 were to get counted in Arbitron's measure. That's a
4 better way to say it. If I were to count webcasters
5 the same way that Arbitron counts broadcast listeners,
6 I would need to know that these people were on for at
7 least five minutes to get captured. And furthermore,
8 I decided when I thought about it that if people were
9 on for more than five minutes but less than 15
10 minutes, I may be understating my average quarter-hour
11 listenership on web sites. Because it could come on
12 -- the way that Arbitron would capture them, if people
13 came on for, say, five-minute blocks, each would get
14 captured, and in a 15-minute period there's many five-
15 minute blocks. And I would be undercounting them
16 because I'd be counting all those people each time
17 they just came. I'm counting them at the beginning of
18 the period for you instead. This is complicated and
19 I can draw and diagram.
20 CHAIRMAN VAN LOON: Can I ask you, just to
21 see whether I'm understanding it, it's a 15-block, you
22 have to be on for at least five minutes.

1 THE WITNESS: Five minutes, right.

2 CHAIRMAN VAN LOON: So that in theory, if
3 every listener listened only five minutes to the
4 second and no longer and one-third of them
5 simultaneously clicked it on at 0.0 and the next one
6 at the next --

7 THE WITNESS: Five minutes.

8 CHAIRMAN VAN LOON: -- group at five and
9 then the next group at ten, that I mean in theory the
10 number of simultaneous listeners would be the overall
11 number divided by three.

12 THE WITNESS: Right. I would capture just
13 the first block that clicked on, and I wouldn't
14 capture the next two blocks. So I'd be understating
15 my web audience; that's exactly right. So what I --
16 I knew I couldn't -- there's no other measure they
17 had, and so I had to know whether or not I thought
18 this was a serious concern, and I said, "I'd really
19 like to know how long people are on when they're
20 listening to a webcast."

21 And it turned out that Minnesota Public
22 Radio had some data on this. And they actually have

1 two different streams, and I took the stream that
2 people listen to for shorter blocks of time, but it
3 was still 43 minutes. So someone comes on in the 25-
4 minute period that Arbitron might be measuring for.
5 I'm going to get them whether I'm -- even if I'm only
6 catching them at the first minute of the block.
7 CHAIRMAN VAN LOON: That's because
8 Garrison Kielor's report from Lake Wobegone was on so
9 late.
10 THE WITNESS: It's because it was an hour
11 or two-hour long program, but I mean that's how a lot
12 of National Public Radio programming is. They're not
13 only listening to Prarie Home Companion. And in fact
14 one of those streams has Prarie Home Companion and the
15 other doesn't, I think. I'd have to go back and look.
16 Anyway, so that gave me comfort that I wasn't get this
17 bias, because people were on for five minutes but not
18 15 minutes.
19 BY MR. GARRETT:
20 Q Can we agree that the two concepts are
21 different?
22 A I agree that the two concepts are

1 different.

2 Q And that it's difficult, given the way the

3 data is available, at least at the present time, to

4 make any precise adjustments that make the two exactly

5 comparable.

6 A I'd have to think about it a whole lot

7 more to think if I could make an adjustment to make

8 them exactly comparable. I mean you'd have to make

9 assumptions about how people were arriving and so on,

10 I suppose. I didn't make such an adjustment, but I

11 had some comfort that it probably wasn't a concern.

12 Q All right. The difficulties, whatever

13 they are, that arise here arise, in part, because

14 over-the-air audiences are not reported the same way

15 as webcasting audiences, at least at the current time,

16 correct?

17 A That's correct.

18 Q All right. Over-the-air audiences aren't

19 -- advertisers and stations don't look at how many

20 people are listening at any given moment, they simply

21 -- they're satisfied if they know somebody tuned in

22 for at least five minutes during the quarter hour.

1 MS. LEARY: I'm sorry. I'd like to pose
2 an objection to the form of the question. Is Mr.
3 Garrett asking specifically about Dr. Murdoch's survey
4 research and the research that she performed for
5 National Public Radio or is it applied to the universe
6 of radio broadcasters and advertisers?
7 MR. GARRETT: I was asking a question
8 about broadcasters and advertisers on radio stations
9 and asking her to answer that on the basis of her
10 knowledge and experience. She's talked about how she
11 is an economist but does a great deal of work in this
12 area here. She's used this concept of average quarter
13 hours in her study, and I'm asking for information
14 related to that.
15 MS. LEARY: I just want clarification that
16 it is indeed the universe of radio broadcasters and
17 advertisers that the question is directed to or is it
18 a more narrow group?
19 CHAIRMAN VAN LOON: I think the
20 clarification has narrowed that down.
21 ARBITRATOR VON KAHN: It's not just the
22 station she looked at, I understood you to be saying

1 --

2 MR. GARRETT: That's right.

3 ARBITRATOR VON KAHN: -- but broadcasters

4 and advertisers generally.

5 MR. GARRETT: Yes.

6 ARBITRATOR VON KAHN: Okay.

7 THE WITNESS: Commercial or public,

8 average quarter hour measures of listeners is what has

9 evolved in the industry, and I think that's because

10 commercial broadcasters are using that as a measure

11 when they talk to advertisers.

12 BY MR. GARRETT:

13 Q Okay. What about public broadcasters, do

14 they use that as a measure of the value of their

15 programming?

16 A I don't know.

17 Q Do you know what types of audience data

18 public broadcasters do use as a measure of the value

19 of their programming?

20 A I'm sure they don't measure the value of

21 their programming by their listeners. I'm sure NPR

22 thinks the value is much more complicated than that.

1 And I've heard them talk about their audiences for
2 different programs, as Ken Stern did this morning, but
3 they obviously have this Arbitron data in-house, so it
4 may be something that they look at too.
5 Q It's your view that public radio does not
6 value their programming by the number of listeners
7 that listen to that programming?
8 A Perhaps I was being glib. I don't know
9 how public radio values their programming, but I know
10 that part of their mission is to give programming --
11 to provide programming that isn't otherwise available.
12 And they expect small audiences, but they probably
13 would tell you that that's important programming.
14 Q Okay. So they in fact do get, it appears,
15 small audiences for webcasts, correct?
16 A They do appear to get small audiences for
17 webcasts.
18 Q But those small audiences might still be
19 very important to them, correct?
20 A They may feel that that extends their
21 mission to offer programming content and that they're
22 reaching some people, yes.

1 Q By simulcasting over the Internet may be
2 the only to reach to actually some audiences that
3 would otherwise not had that programming available to
4 them.
5 A It may be a matter of convenience for
6 their listeners. I wouldn't know if that's the only
7 way to reach them.
8 Q Okay. Well, your study here is really
9 based upon the notion that you can look at audiences'
10 listening habits here and then calculate a royalty on
11 that basis, correct?
12 A I have no way to allocate programming
13 expenses or revenues between web sites, as far as the
14 audio content is concerned, between web sites and
15 broadcasts for public radio. The only measure I could
16 find out that seemed to shed some light was
17 listenership, and that's what I used. I wouldn't say
18 it's the best measure necessarily.
19 Q And why would you say it's not the best
20 measure?
21 A I just said I wouldn't say it's the best
22 measure; I didn't say it's not the best measure.

1 Because I think you could spend a lot of money on
2 programming inputs for programming that doesn't reach
3 very many people.
4 Q In the 118 decision that we talked about
5 a few minutes ago, did the -- was the royalty rate set
6 in that case based in any way upon listenership or
7 changes in listenership to public radio, do you know?
8 A My recollection is it was based on
9 revenues as a measure of the changes in the scale of
10 activity.
11 Q Do you know whether listenership played in
12 any role in setting the royalty rate in that decision?
13 A I don't believe it played a role in the
14 determination of the royalty rate, as I recall.
15 Q Let me ask you this: You say that in that
16 118 decision there was a determination made that the
17 fair market value of the ASCAP and BMI programming --
18 I'm sorry, ASCAP and BMI works was about a little over
19 $5 million, correct?
20 A Yes, that's right, I think. Yes.
21 Q And that was the fair market value as of
22 the time that the royalty rate was set in that

1 particular proceeding, correct?

2 A That was the rate that the CARP set when

3 it was trying to approximate a fair market value. I

4 believe the words "fair market value" are in the

5 decision.

6 Q Okay. But it was the fair market value at

7 that point in time, correct?

8 A It's the Panel's view of the best

9 approximation on that, I suppose.

10 Q Okay. But I'm trying to get at --

11 A The point is that these things aren't

12 transacted in market so you would go to a CARP. I

13 don't know if it's the fair market value.

14 ARBITRATOR VON KAHN: Wait a minute.

15 Didn't hear anything in your last sentence. You

16 really need to keep your voice up. Can you say that

17 again a little louder?

18 THE WITNESS: I just -- it wasn't a

19 market-negotiated rate. It's the rate that the Panel

20 set when it was trying to approximate a fair market

21 value.

22 BY MR. GARRETT:

1 Q But it was the --

2 A It was the intent of the Panel to reflect

3 that.

4 Q To reflect the fair market value at the

5 point in time that the decision was rendered, correct?

6 A I'd have to look. They were setting a fee

7 for a five-year period. I'd have to look back and see

8 if that was to change over time or not. I don't

9 recall.

10 Q Okay. Well, let's assume we just fast

11 forward, say, ten or, say, even 15 years from now, and

12 we want to use that decision in that 118 proceeding to

13 determine what the fair market value ought to be, say,

14 ten or 15 years down the road, okay?

15 A Okay.

16 Q Would we be able to look at changes in

17 listenership over that ten- to 15-year period to

18 determine the value of that programming?

19 A It might be something that you would want

20 to look at, but I would suggest that looking at

21 changes in revenues or program expenses, preferably

22 program expenses would be better.

1 Q Gearing it program expenses you think is
2 a better way of going?
3 A I think it's best because it tracks the
4 amounts that are being paid for programming inputs,
5 and music is a programming input, correct.
6 Q Could the Panel in that last 118 decision
7 have looked at -- strike that. Assume the Panel in
8 that last 118 decision started with the royalty that
9 the Copyright Royalty Tribunal had adopted back in the
10 late 1970s, actually 1980, okay?
11 A Yes.
12 Q And wanted to figure out what the
13 appropriate royalty should be for the year 1996 using
14 that '78 fee as an appropriate benchmark, okay?
15 A Are these for the same licensees?
16 Q Yes, okay?
17 A Yes.
18 Q Could the Panel have simply looked at
19 changes in listenership between that period, 1978,
20 1980 and 1996, and adjust the royalty accordingly?
21 A It might be something that they would want
22 to look at, but I would suggest that they'd also want

1 to look at program expenses and maybe revenues as
2 well, because the revenues per listener or the program
3 expenses per listener might really be changing. If
4 all those relationships were fairly stable over time,
5 it wouldn't matter which one you looked at. But I
6 think it's better to look at something like program
7 expenses or revenues before listenership.
8 Q Okay.
9 CHAIRMAN VAN LOON: Can I inquire, Mr.
10 Garrett, we're close to the time when we usually take
11 an afternoon break. If you have -- what's the best
12 estimate of how much additional you might have?
13 MR. GARRETT: I'd say about 45 minutes to
14 an hour.
15 ARBITRATOR VON KAHN: Break.
16 (Laughter.)
17 CHAIRMAN VAN LOON: Why we don't take a
18 break then and come back at quarter past.
19 MR. GARRETT: Okay.
20 (Whereupon, the foregoing matter went off
21 the record at 2:58 p.m. and went back on
22 the record at 3:19 p.m.)

1 CHAIRMAN VAN LOON: We're ready to resume
2 then.
3 BY MR. GARRETT:
4 Q Dr. Murdoch, let me just ask you to turn
5 back to Exhibit, yes, 220 DPX, which was the Panel
6 report in the 118 case. And let me direct your
7 attention to page 7 and footnote 12. There's a
8 reference there to 1,300 non-commercial, religious,
9 and college- or university-owned radio stations
10 unaffiliated with NPR. Do you see that?
11 A I do.
12 Q I am correct that your particular royalty
13 proposal here does not cover any of those 1,300
14 stations are unaffiliated with NPR; is that right?
15 A I'm not sure I can answer that. There's
16 some public radio stations that aren't affiliated with
17 NPR that are in my group, and I don't know if -- I
18 don't think there's any religious, but I wouldn't know
19 if there's college- and university-owned.
20 Q Okay. Let me ask it this way: It is
21 correct, is it not, that there are a number of other
22 non-commercial radio stations other than the 407 that

1 form the basis of your study, correct?

2 A I don't know a lot about it. I've heard

3 of non-commercial, religious stations. That's what I

4 know --

5 Q All right. In any event, your --

6 A -- in the realm of other non-commercial

7 stations.

8 Q In any event, your study was simply

9 focusing on the 407 stations that you've identified or

10 the 407 entities that have several hundred additional

11 signals, correct?

12 A Correct.

13 Q Okay. And I ask you turn to your Table 5

14 then.

15 CHAIRMAN VAN LOON: This is in her

16 testimony?

17 MR. GARRETT: Yes.

18 BY MR. GARRETT:

19 Q Am I correct that -- well, again, on that

20 final band there, there's a column called, "Broadcast

21 Listeners Quarter Hour Audience" that we discussed

22 earlier, correct?

1 A Yes.

2 Q And what you're saying there is that

3 there's approximately 1.3 million that -- people or

4 households, by the way?

5 A I believe those people.

6 Q One point three million people who listen

7 to the -- ages 12 and above, correct?

8 A I don't know about that. It may be the

9 case.

10 Q All right.

11 A I have a definition somewhere in my

12 report, but I'm not even sure it says the age.

13 Q Okay. All right, 1.3 million people

14 listen to public radio stations during the average

15 quarter hour.

16 A For at least five minutes.

17 Q For at least five minutes.

18 A Yes.

19 Q Right. Okay. And if I wanted to find out

20 the number of total listening hours, let's just say

21 weekly listening hours, how would I make that

22 calculation using that 1.3 million figure?

1 A You want to find out total weekly
2 listening hours. I'm not sure. I've never tried to
3 do that. I remember when I was dealing with this
4 instantaneous streaming versus quarter-hour audiences,
5 I thought that maybe I could get the average time
6 spent listening from the Arbitron data, because
7 there's other data, like cumes and so on. But even
8 then I don't remember the formula. I don't know. I
9 haven't thought about how you --
10 Q Okay. That's fine.
11 A I don't know.
12 Q Okay. Where did you obtain the data on
13 average quarter-hour audience?
14 A That's Arbitron data that came from
15 National Public Radio.
16 Q Okay. Did you make any independent
17 verification of that data?
18 A No. I remember talking to National Public
19 Radio, and I think we ended up talking to someone from
20 Arbitron about what was measured and what these
21 definitions meant and so on, but I didn't check the
22 data in any way, no.

1 Q Okay. You were here this morning for Mr.
2 Stern's testimony, correct?
3 A Yes, I was.
4 Q And you heard him talk about the number of
5 weekly hours, listening hours that NPR stations have?
6 A Yes. I remember him talking about 64
7 million hours a week.
8 Q For just NPR, correct?
9 A I don't remember what that was.
10 Q And you don't know how your data would
11 compare to the data that he had provided earlier
12 today, do you?
13 A No, I don't.
14 Q Okay.
15 A That was the first I had heard those
16 numbers.
17 Q Now, let me just ask you to turn to page
18 13 in paragraph 39. In the last sentence in the
19 paragraph, you say, "Using such an adjustment factor,"
20 referring there to the audience numbers, correct?
21 A Let me read the paragraph, please. It's
22 not so obvious.

1 Q Yes, I'm sorry, go ahead.

2 A Yes. Using such an adjustment factor

3 refers to the relative size of webcast and broadcast

4 audiences.

5 Q And you go on to say, "If the programming

6 on a web site is completely indistinguishable from a

7 station's broadcast, the hypothetical license fee for

8 the radio station and the fee for the web site would

9 be the same on a per listener basis," correct?

10 A Correct.

11 Q Okay. Now, what you've shown in your data

12 here is that actually the audiences on the broadcast

13 stations are substantially larger than the audiences

14 on the web sites, correct?

15 A Correct.

16 Q And if we were looking at a fee on a per

17 listener basis, do you think that in a marketplace

18 negotiation that some discount might be given for

19 volume?

20 A So you're asking me would a station with

21 a bigger market pay less on a per listener basis than

22 a station in a smaller market?

1 Q Well, we can -- I could ask that question.
2 I have, actually, a couple of other questions, but go
3 ahead.
4 (Laughter.)
5 I can always take help with my questions.
6 A I think that's possible. I mean I think
7 that prices are higher in bigger markets than in
8 smaller markets, but perhaps on a -- perhaps it's not
9 linear with listenership, perhaps on a per listener
10 basis, but I don't know. It could be more expensive,
11 I don't know.
12 Q Okay. Well, in the 118 decision, for
13 example, that $5 million fee was being spread over a
14 fairly large audience, correct? I mean there was both
15 television and radio, correct?
16 A Yes.
17 Q Okay. And do you think it's reasonable to
18 conclude that in a marketplace setting that parties
19 negotiating might have a higher per listener fee if
20 there are fewer total listeners?
21 MS. LEARY: I'm sorry. May I ask Counsel
22 to clarify if this pertains to a section of public

1 radio broadcasting right or a hypothetical market
2 somewhere?
3 MR. GARRETT: Whatever she said here in
4 paragraph 39. She says that the fees would be the
5 same on a per listener basis here, and I'm asking
6 whether that really is always the case?
7 CHAIRMAN VAN LOON: Paragraph 39 does
8 refer to a hypothetical basis.
9 THE WITNESS: And the fee would be the
10 same on a per listener basis between my webcasts and
11 broadcasters. And what I know is that prices differ
12 for programming sometimes, for instance, in television
13 markets depending on the market size. But whether
14 it's more or less is what I'm having trouble with, I
15 don't know.
16 Q All right. So --
17 A And so, obviously, I just don't know.
18 Q All right. In making this statement here
19 in paragraph 39, you haven't factored into that any
20 notion of volume discounting, correct?
21 A That's correct.
22 Q Okay. Let me ask you just a few questions

1 about your discussion of the subscription services
2 decision. You talk about that on pages 19 and 20.
3 A Subscription --
4 Q Pages 18 and 19.
5 A Yes.
6 Q Okay. And you talked about that earlier
7 this morning as well, correct?
8 A Yes.
9 Q And you had said that you had supported
10 the testimony that was provided in that case by
11 Charles River Associates?
12 A By Dr. Woodbury.
13 Q Okay. There won't be many questions here,
14 because it's always very painful for me to talk about
15 this.
16 (Laughter.)
17 But I do want to ask, and you were there
18 representing or providing -- Dr. Woodbury was there
19 providing testimony for the subscription services in
20 that proceeding, correct?
21 A That's right, yes.
22 Q Okay. And a written report had been

1 submitted in that proceeding on behalf of the
2 subscription by Dr. Woodbury and Charles River,
3 correct?
4 A There was a written report and rebuttal.
5 Q Right. And you had worked on that
6 particular testimony, correct?
7 A Correct.
8 Q And as I recall in that report, you had
9 urged the Panel to use as the benchmark an agreement
10 that one of the subscription services had entered into
11 with three of the major record companies, correct?
12 A That's correct.
13 Q And you had urged them to use that
14 agreement as a benchmark, notwithstanding the fact
15 that the agreement itself had been negotiated at a
16 time when there was no performance right in -- no
17 digital performance right in sound recordings,
18 correct?
19 A Right. And the fact that they negotiated
20 when there was no right, we said indicated that -- and
21 the conditions under which it was negotiated indicated
22 that the recording industry was basically buying an

1 endorsement of that right and setting a high
2 precedential value for it.
3 Q Okay. But the point was is even though
4 there was no right at the time that that factor did
5 not -- you said that factor didn't stop the Panel from
6 relying upon that particular agreement, correct?
7 A Right.
8 Q And that particular agreement concerning
9 a royalty rate was contained in a whole series of
10 agreements between these record companies and the
11 subscription service, correct? There are like 11
12 interdependent agreements, correct?
13 A Even the number 11 sort of a rings a bell
14 with me, and it was called a complex collection of
15 agreements or something. And we argued that the
16 reason it had to be embedded was because the right
17 didn't exist, and the services needed to be getting
18 something for this endorsement.
19 Q Okay. And there was actually a no
20 precedent clause in that agreement too, was there not?
21 A I believe there was.
22 Q And the parties had agreed that once a

1 royalty rate was established, if it were ever
2 established, that they would abide by that particular
3 rate rather than the rate that was in the agreement,
4 correct?
5 A Yes. I believe that's true. I don't know
6 where I remember that from, but I believe that's true.
7 Q All right. But notwithstanding those
8 facts, you said that was the best benchmark for the
9 CARP to rely upon in that particular proceeding,
10 correct?
11 A That's correct.
12 Q You also recall discussing whether the
13 market for sound recordings was competitive.
14 A Yes, I remember some discussion of that.
15 I think it was sort of cast in terms of Department of
16 Justice and merger guidelines.
17 Q That's right. And one way to determine
18 whether or not the sound recording marketplace was
19 competitive was by looking at whether or not the
20 market was concentrated by using the Department of
21 Justice guidelines, correct?
22 A Correct.

1 Q And the particular guideline that you used
2 is the Herfindahl Hirschman Index, correct?
3 A That's correct.
4 Q And it was your conclusion, was it not,
5 that the sound recording marketplace, using that
6 Herfindahl Hirschman Index, was competitive at the
7 time?
8 A I don't remember where the numbers fell,
9 but I think that was our conclusion.
10 Q Okay. Have you done any research since to
11 determine whether or not the marketplace has become
12 uncompetitive using the Department of Justice test?
13 A No, I haven't.
14 Q Okay. Incidentally, under the Department
15 of Justice test, do you know what kind of number you
16 have to come up with before the market is considered
17 to be a monopoly market?
18 A A pure monopoly market?
19 Q Yes.
20 A Pure monopoly would be 10,000.
21 Q Ten thousand. And the -- was it your
22 recollection that the sound recording marketplace was

1 somewhere down near the 1,000 range?

2 A I know 1,800 is highly concentrated and

3 down around 1,200 is -- between 1,200 and 1,800

4 moderately, and I seem to remember -- that's why I was

5 hesitating. I don't remember if -- the recording

6 industry was down at the bottom end of that bound, so

7 if you say 1,000, that might be what the number was.

8 Q Okay. I have no further questions. Thank

9 you very much, Dr. Murdoch.

10 THE WITNESS: Do you want chocolate?

11 MR. GARRETT: That was the deal.

12 (Laughter.)

13 CHAIRMAN VAN LOON: The Chair wants full

14 disclosure on the record of the deal and wants a cut.

15 (Laughter.)

16 Do you have some redirect, Ms. Leary?

17 MS. LEARY: I have some redirect, yes.

18 CHAIRMAN VAN LOON: Please.

19 REDIRECT EXAMINATION

20 BY MS. LEARY:

21 Q Directing your attention back to page 13

22 of your testimony, paragraph 37.

1 A Footnote 37?

2 Q Footnote 37, sorry. And you were asked a

3 series of questions by Mr. Garrett concerning the

4 comparability of AQH, or average quarter hour,

5 listener with simultaneous streamers. Do you recall

6 that question?

7 A I remember the conversation.

8 Q And you were asked as to whether or not

9 the two were comparable, were you not?

10 A Yes.

11 Q And if you made adjustments to make them

12 comparable, is it possible that the numbers could go

13 the other way? Is it the possible that number of

14 broadcast listeners might be undercounted by other

15 adjustments you could make to these measures to make

16 them comparable?

17 A It's possible. I guess the way -- I only

18 talked about half of thinking about how these things

19 might be comparable, and I talked about taking the

20 broadcast listeners and trying to measure them as

21 average quarter hour listeners the way that Arbitron

22 measures radio listeners. But I could take my radio

listeners, say, if I wanted to see how many simultaneous listeners there are, on average, how many would I count? And then it wouldn't matter if a listener had been on for five minutes or not. So that's a bunch of listeners that are not getting counted that I would then count. And then the webcast as a percentage of broadcast would be even smaller than what I've averaged.

Q And would that in any way reduce the percentage that appears on Table 5?

A Yes. It would reduce the percentage that I calculated in Table 5 and then used in Table 1.

Q And the percentage you're speaking of is the 1.2 percent, the webcast audience as a percentage of broadcast audience?

A That's right.

Q That might be further reduced.

A Right. Obviously, these other percentages would be reduced as well.

Q Dr. Murdoch, you were asked whether or not it might be appropriate to tie the fee in this case to a usage model per recording used by Mr. Garrett.

1 MR. GARRETT: I don't remember it either,
2 but --
3 THE WITNESS: I don't remember.
4 BY MS. LEARY:
5 Q I'm sorry. You were asked -- let me
6 rephrase the question -- you were asked a question as
7 to whether or not the fee that you proposed was tied
8 to intensity of music usage or not.
9 A We may have discussed that.
10 Q And is your model for a blanket license or
11 a per use license?
12 A It's for a blanket license.
13 Q And would you describe for the Panel what
14 you mean by a blanket license?
15 A A blanket -- with a blanket license, you
16 pay a flat fee, and your fee doesn't vary with the
17 amount of music that you use.
18 Q And it would cover -- a blanket license
19 would cover everything that's in the repertory of any
20 particular recording label, would it not?
21 A That's my understanding.
22 Q And let me direct your attention to what

1 was introduced by the Recording Industry Association
2 as Exhibit 218 DPX. That was the Corporation for
3 Public Broadcasting/NPR music rights survey 2000. And
4 I'd like to direct your attention to question 21 and
5 the questions that follow.
6 ARBITRATOR VON KAHN: Known by lawyer as
7 et seq.
8 THE WITNESS: Twenty-two and 22 you mean?
9 There's no 23.
10 BY MS. LEARY:
11 Q And you were asked what the question
12 meant, "Does your station have a reliable to measure
13 listening to audio on your web; is that correct?
14 A Right. That's 24.
15 Q And you gave the Panel your understanding
16 of what that question was intended to capture.
17 A Right.
18 Q And do any of the questions that follow in
19 questions 25, 26 have anything to do with measuring
20 listening to audio on the web site?
21 A Yes. Twenty-five is referencing to 24,
22 which is referencing to web sites. And 26 is

1 referencing to web sites.

2 Q And are you aware that this survey was
3 sent for reasons other than the CARP proceeding at
4 issue in this case, that there were additional
5 questions to be answered within the public radio
6 system?

7 A I had an understanding that NPR had
8 broader interests in learning about the webcasting
9 activities of public radio. I don't remember any
10 conversations about particularly what that was or what
11 other uses they might put this to, but I think they
12 were going to these stations asking for information,
13 and they were only going to make one set of requests.
14 So it may have included information that wasn't
15 relevant to us.

16 Q And do you have any reason, Dr. Murdoch,
17 to doubt the overall reliability of the information
18 that you were given by Public Radio for your use in
19 this proceeding?

20 A No.

21 Q Trying to cut questions here. And you
22 used listenership as a measure for determining the fee

1 to be paid the recording industry as a measurement of
2 the fee that is paid to the performing rights
3 societies for radio broadcasts; is that correct?
4 A I'm sorry?
5 Q Did you use listenership, the number of
6 listeners on the web versus the number of listeners to
7 a broadcast as factor in determining the ultimate fee
8 to be used in this proceeding?
9 A Yes, I did.
10 Q And are there other factors that could be
11 used?
12 A Where I used listenership I used it
13 because I didn't have other factors that I might have
14 preferred to measure things by.
15 Q And what would some of those other
16 preferred factors be?
17 A Revenues and program expenses associated
18 with web sites versus broadcast activity -- web site
19 audio streaming versus broadcast activity.
20 Q To the best of your knowledge, was that
21 information available for public radio?
22 A That information was not usable -- any

1 information that came back from the survey was not
2 usable.
3 Q And you were questioned by Mr. Garrett
4 about the subscription CARP in which you assisted in
5 Dr. Woodbury's testimony?
6 A Yes.
7 Q And I believe you testified that the
8 report submitted by Charles River Associates in that
9 case used an agreement as benchmark?
10 A Yes.
11 Q And were the parties to that agreement
12 parties in the digital CARP subscription proceeding?
13 A They were a subset of the very parties
14 that were participants. There were some record
15 companies and one of the digital audio services.
16 Q So they were the same parties that --
17 A There were the same identical parties, a
18 subset of them.
19 MS. LEARY: I have no further questions.
20 CHAIRMAN VAN LOON: Anything on recross,
21 Mr. Garrett?
22 MR. GARRETT: Just briefly.

1 RECROSS EXAMINATION

2 BY MR. GARRETT:

3 Q Ms. Leary asked you about blanket

4 licenses; do you recall that?

5 A Yes.

6 Q There's a provision in the Section 114.

7 In Section 114(d)(2)(a)(b), it talks about minimum

8 fees, the Panel adopting minimum fees; are you aware

9 of that?

10 A I've seen minimum fees in some fee

11 proposals. I haven't read the text surrounding the

12 provision.

13 Q Let me just read this to you. It says,

14 "Such rates and terms shall distinguish among the

15 different types of eligible non-subscription services

16 within an operation and shall include a minimum fee

17 for each such type of service. Such differences to be

18 based on criteria including but not limited to the

19 quality and nature of the use of sound recordings,"

20 and then it goes on. Are you aware of that provision?

21 A I think I've become aware that there's a

22 need for a minimum fee proposal that I -- no, I wasn't

1 aware of the wording of that provision.

2 Q All right. Were you not aware that in

3 setting fees that the nature and use of sound

4 recordings is a relevant consideration here?

5 A Oh, I think it is, broadly speaking.

6 Q I'm sorry?

7 A I think it is relevant, broadly speaking.

8 Q Okay. All right. I have no further

9 questions. Thank you, Dr. Murdoch.

10 A Thank you.

11 CHAIRMAN VAN LOON: The Panel has a couple

12 of questions.

13 ARBITRATOR VON KAHN: I have questions in

14 two areas, but it may take more than one question.

15 Early in your testimony, I think, Dr. Murdoch, in

16 discussing your methodology and the model that you

17 used, you referred to the earlier CARP decision that

18 fees paid for musical works could establish an upper

19 bound for the fees that would be paid for sound

20 recordings. And you said that sounded -- I think this

21 is about what you said -- that as an economist that

22 made sense to you, because the sound recording owners,

1 according to my notes, benefit more from performances
2 over the radio than the musical works owners; do you
3 recall that?
4 THE WITNESS: Yes.
5 ARBITRATOR VON KAHN: And I think I know
6 what you're talking about there, but I want to be
7 sure. When you say that they benefit more, are you
8 talking about the extent to which radio airplay of
9 sound recordings increases the sale of records?
10 THE WITNESS: Right. And that the
11 recording industry gets a larger profit margin than
12 the payments that may be paid to authors and composers
13 for mechanical rights.
14 ARBITRATOR VON KAHN: Okay. And let me
15 just explore that with you a minute. It is true,
16 isn't it, that -- let's just assume that indeed radio
17 airplay of sound recordings does increase the sale of
18 CDs, that there's considerable evidence before us to
19 that effect. Assume that is the case. Every
20 additional record sold generates an additional payment
21 to the holders of the sound recording copyright and to
22 the holders of the musical works copyright, correct?

1 They both benefit to some extent from the sale --

2 THE WITNESS: Yes.

3 ARBITRATOR VON KAHN: -- of additional

4 records.

5 THE WITNESS: Yes.

6 ARBITRATOR VON KAHN: Now, it also seems

7 to be true that the amount of that benefit, let's say

8 additional profit, that accrues to the holders of

9 sound recording copyright is greater than that which

10 the musical works copyright owners get. That seems to

11 be the case, correct?

12 THE WITNESS: Right.

13 ARBITRATOR VON KAHN: Isn't that a

14 reflection of some market price marketplace valuation

15 of these two respective components? I mean the fact

16 --

17 THE WITNESS: It may be a marketplace

18 valuation of the components that are embodied in the

19 CD that sold, but I don't think it's a reflection of

20 the rights that are in a performance right.

21 ARBITRATOR VON KAHN: Well, can I just

22 probe that a little bit more? Why -- I understand

1 that there are costs, obviously, that the record
2 companies have in producing the records, but at the
3 end of the day when those are taken out and whatever
4 is left as profit to the record companies and artists
5 goes their way and whatever goes to the musical works
6 folks, there seems to be a consensus, I think, among
7 all the parties that the amount that the sound
8 recording copyright holders could take to the bank, as
9 it were, and add to their savings account is greater
10 than that which the musical works holders could get.
11 I don't know if you -- have you looked into that at
12 all? But does that seem --
13 THE WITNESS: I haven't looked into the --
14 I've seen some of the numbers in testimony.
15 ARBITRATOR VON KAHN: And even after we
16 deduct the expenses, the manufacturing expenses,
17 distribution, whatever, the profit margin to the
18 holders of the sound recording rights seems to be
19 substantially greater. Does that --
20 THE WITNESS: Than the mechanical right.
21 ARBITRATOR VON KAHN: Yes, right.
22 THE WITNESS: Yes.

1 ARBITRATOR VON KAHN: Why doesn't that
2 reflect some comparative valuation by the marketplace,
3 as it were, for these two respective copyrights? Why
4 wouldn't the holder of the musical works, if it was
5 truly a more valuable copyright, say, "Look, sorry
6 folks, not going to let you make anymore records
7 unless you quadruple what we're getting or some other
8 number. We're not getting enough from these records.
9 We've got the valuable right here. We've got the one
10 that sets the ceiling. Our copyright tops you out,
11 and therefore would you please quadruple what we've
12 been getting from these record sales."
13 ARBITRATOR GULIN: Ms. Murdoch, might I
14 suggest to you it might have something to do with the
15 fact that the --
16 ARBITRATOR VON KAHN: Let me hear her
17 answer first, Commissioner Gulin, and then we'll hear
18 yours.
19 ARBITRATOR GULIN: Okay.
20 THE WITNESS: I was going to say it might
21 have something to do with the fact that music is more
22 competitively supplied, that the costs of producing

1 music are lower. The mechanical right, as I
2 understand it, isn't a profit margin; it's covering
3 some of the costs too. I don't know. I haven't made
4 a study of that, in part, I guess, because I view it
5 sort of in isolation from the value of the performance
6 rights or the price -- not the value of the
7 performance rights but the prices that a seller would
8 be willing to sell the performance rights for.
9 ARBITRATOR VON KAHN: I guess where I'm
10 having some difficulty is to -- it seems to me that to
11 some extent your analysis on this point sort of stands
12 reality on its head by saying, "Well, we think that
13 the value of the musical works copyright with respect
14 to performance over the Internet should sort of set
15 the ceiling for what is paid for the sound recording
16 right, because the performance generates a great deal
17 more money for the holder of the sound recording
18 copyrights," and that seems to me to be almost --
19 THE WITNESS: I sort of understand why
20 that seems counterintuitive to you, but I think that
21 from a user's point of view when they want to perform
22 a sound recording they know that they have to pay for

1 the musical work and for the sound recording. And
2 those things -- it's a left shoe/right shoe thing.
3 They don't really establish separate values for it.
4 ARBITRATOR VON KAHN: Right.
5 THE WITNESS: Now, from a seller's point
6 of view, the seller of the sound recording right who
7 is also going to be selling the CD knows down the
8 road, "I'm going to sell the CD and I'm going to make
9 this big return." And the guy who's selling the
10 musical works performance right is saying, "And I'm
11 going to sell some CDs too, and I'm going to make
12 something." But the guy who's selling the sound
13 recording right says, "I'm going to make twice as much
14 or however much more than the guy that's selling the
15 musical work," and therefore the fellow who's selling
16 the sound performance right will say, "I want to sell
17 this thing, because look at all the money I'm going to
18 make in this other very big market."
19 ARBITRATOR VON KAHN: So the holder of the
20 --
21 THE WITNESS: And it doesn't cost me
22 anything to make a sound performance, remember. I can

1 sell that over and over again to anybody who wants to
2 buy one.
3 ARBITRATOR VON KAHN: So the notion is
4 sort of that the holder of the sound recording
5 copyright, knowing that there is a hefty return coming
6 in another way, would be a little less greedy in this
7 particular negotiation?
8 THE WITNESS: He's want to encourage
9 people to buy it, so he'd charge them a lower price.
10 ARBITRATOR VON KAHN: As opposed to
11 sticking it to them, "Because I've got the thing that
12 people want."
13 THE WITNESS: Right.
14 ARBITRATOR VON KAHN: Okay. Let me ask
15 you about one other area, and then I'll desist. You
16 said that you thought the use of listenership data as
17 a way of comparing the radio broadcast arena with the
18 Internet arena was sort of what you had to use because
19 you didn't have better data, and you said that it
20 would really be preferable to use programming expense
21 as a mode of comparison, correct?
22 THE WITNESS: I did say that, yes.

1 ARBITRATOR VON KAHN: Why?

2 THE WITNESS: Well, I mean, first of all,
3 there's obvious complications of trying to sort out,
4 especially if public radio is using the same
5 programming on broadcast and also on the webcast --

6 ARBITRATOR VON KAHN: No, let me be a
7 little clearer. Not why you don't have the data, I
8 know why you don't have the data. Why is better to
9 use the program? Why would that be a better measure?

10 THE WITNESS: Okay. Because I think that
11 music is a creative input, it's part of programming,
12 and I would expect payments for music to sort of track
13 along with payments for other inputs. And if suddenly
14 everybody got new higher towers and increased their
15 listenership but didn't change their programming
16 expenses, I wouldn't expect their programming expenses
17 for music to change either. If they didn't change
18 their other program expenses, I would say, "Well, why
19 should music change either?" So, you see, I expect
20 things can go on, things can change listenership and
21 things can change programming expenses, and they may
22 often be related, but that probably there's a closer

1 relationship between expenditures on programming
2 inputs and music than there is on listenership and
3 music.
4 ARBITRATOR VON KAHN: Okay. Given that,
5 does it make sense for a body, say, for example, a
6 CARP Panel, in assessing what a willing buyer would be
7 willing to pay for one essential input of its
8 programming operations to look at what that willing
9 buyer has been willing to pay for other essential
10 inputs of its programming operation?
11 THE WITNESS: Yes, but you'd have to give
12 a lot of thought to the other essential inputs and
13 what was their nature. You know, it kind of comes
14 back to these musical works and sound recordings, do
15 the sellers have the same interest in selling the
16 product? I mean there's a lot to consider.
17 ARBITRATOR VON KAHN: Well, I'm actually
18 focusing on the willing buyer part of the equation.
19 I realize there are other sellers and that may affect
20 things, but let's say I'm trying to find how much is
21 a willing webcaster buyer willing to pay to get his
22 operation up and running? Why doesn't it make some

1 sense to look at what he's been willing to pay for
2 other essential inputs like bandwidth and software
3 license fees?
4 THE WITNESS: I just -- you know,
5 economists use supply and demand simultaneously, and
6 I would hesitate to look at just one side of the
7 transaction that way. I mean we know that the RIAA
8 could ask the highest price that public radio would be
9 willing to pay and get it, but that might be
10 reflecting a considerable exercise of market power,
11 and RIAA might be willing to sell it for less, and
12 public radio, obviously, would be willing to pay less.
13 And you could imagine competitive situations where the
14 selling entity couldn't exercise that market power.
15 I don't know if that answers your question, but I
16 would be looking at what a willing buyer will pay will
17 get you the highest price that they could possibly
18 afford.
19 ARBITRATOR VON KAHN: But you have not
20 made a study, I take it, of, for example, whether the
21 costs of bandwidth are distorted because there's some
22 monopolist out there that is driving the prices way

1 above fair market price.

2 THE WITNESS: No, I haven't.

3 ARBITRATOR VON KAHN: Okay.

4 THE WITNESS: No, I haven't.

5 ARBITRATOR VON KAHN: Or with respect to

6 software licensing fees?

7 THE WITNESS: No. And that's why I said

8 if you're going to make comparisons to other

9 suppliers, you probably need to understand what their

10 interests are in selling and what the competitive

11 situation is for them and so on.

12 ARBITRATOR VON KAHN: Well, I think -- I

13 mean I certainly -- it always helpful to know as much

14 as you can about everything, but I guess sometimes

15 there are so many moving pieces in this puzzle that

16 it's helpful to focus on just one, and it seems -- one

17 at a time, anyway.

18 And it does seem to me that in trying to

19 assess the willingness of a buyer -- I mean if I'm

20 looking at a buyer who has been unwilling or unable to

21 pay more than $100 for anything, there is nothing that

22 he uses that he will pay more than $100 for, I would

1 begin to be suspicious of his willingness or ability
2 to pay hundreds of thousands of dollars for something
3 else. This buyer is either unwilling or inadequately
4 capitalized or can't do it.
5 On the other hand, if I look at this buyer
6 and I note that he has been willing and able to pay
7 $1.2 million for this particular input and $3 million
8 for another input, doesn't that have some bearing on
9 my judgment about whether this buyer is willing and
10 able, if you will, to pay a royalty fee for another
11 input in a similar or smaller order of magnitude? Why
12 isn't it relevant in assessing willingness to pay to
13 see what the buyer has been willing to pay for other
14 essential ingredients of his operations?
15 THE WITNESS: Well, I guess I wouldn't say
16 that you shouldn't look at that, but I just -- it
17 seems to me that it's going down a track at finding a
18 high price for the buyer rather than asking the
19 question, "And by the way, how low would this seller
20 be willing to sell this for?"
21 ARBITRATOR VON KAHN: I agree with you.
22 That becomes --

1 THE WITNESS: That's the only --

2 ARBITRATOR VON KAHN: I agree that that's
3 another important part of the equation, but for the
4 moment I'm only -- I can only juggle so many things at
5 one time, and I'm trying to understand the buyer's
6 situation a bit more. I thought when you made some
7 reference to that you'd rather have programming
8 expenses what you were trying to convey is what it
9 seemed to me to be a sensible idea that it is not
10 irrelevant to look at the order of magnitude of the
11 other kinds of programming expenses or inputs that a
12 particular buyer has been willing and able to pay in
13 judging this one. Only part of it, of course, because
14 we have to look at the seller's motivations too; I
15 agree with you. But in trying to understand the
16 buyer's side of the equation, I thought you were
17 saying it's not unreasonable to look at what he pays
18 for his other inputs.

19 THE WITNESS: I think I was more saying
20 I would expect the changes in program expenses or
21 differences in program -- well, I guess I'm saying
22 that's not unreasonable.

1 ARBITRATOR VON KAHN: Okay.

2 CHAIRMAN VAN LOON: Judge Gulin?

3 ARBITRATOR GULIN: Let me go back,
4 firstly, to the first question put to from Judge von
5 Kahn. It was the question concerning what happens
6 when a CD is sold. And when a CD is sold it benefits
7 the record companies more than it benefits the
8 rightsholder and musical works. The record companies
9 receive a profit from the sale of the CDs, and the
10 rightsholders receive mechanical royalties. Do you
11 remember that discussion?

12 THE WITNESS: Yes.

13 ARBITRATOR GULIN: And the thrust of his
14 question to you was, well, if in fact the record
15 companies are making more on this, doesn't that show
16 that the sound recording performance right is worth
17 more than the musical works performance right; do you
18 remember that?

19 THE WITNESS: Yes.

20 ARBITRATOR GULIN: Didn't the Librarian
21 specifically address that issue in the subscription
22 case and found that, no, that's not the case, because

1 when you're dealing with mechanical royalties you're
2 dealing with a statutory rate that's not a fair market
3 rate, and therefore it's not fair to compare a
4 statutory fair market rate -- a statutory rate that's
5 not a fair market rate versus profits in an unfettered
6 free market? And, therefore, it's not fair to make
7 that comparison and say that the record companies
8 receive a greater benefit; therefore, the rate is
9 worth more?
10 THE WITNESS: I think there is -- I'm
11 recalling discussion of that in the Librarians
12 decision, and I think that the discussion may have
13 gone along the lines of weighing those two things, but
14 in the end the Librarian said, "I don't view these --
15 I don't see the nexus between the value of the profit
16 here and the mechanical right and the price that may
17 be charged -- and the value, I should say -- the
18 value, not the price -- the value of the performance
19 rights."
20 ARBITRATOR GULIN: Right. The mere fact
21 that there is a differential doesn't automatically
22 translate into a valuation.

1 THE WITNESS: No.

2 ARBITRATOR GULIN: Is that basically what

3 the Librarian said?

4 THE WITNESS: I think that's true

5 ARBITRATOR GULIN: Okay. Now, the only

6 other question I have is I'm a little bit unclear

7 about what happens with respect to all of these

8 college stations and public stations -- you may not

9 know the answer to this -- but that are not

10 represented by NPR before us? I'm unclear as to what

11 rate they're going to be paying. If they're not

12 subject to the rate we set for NPR, whether they have

13 separate agreements -- perhaps that's a question for

14 Counsel that maybe I could address to them and they

15 may be able to help me with it.

16 THE WITNESS: I think they'd be in a

17 better position to answer it.

18 ARBITRATOR GULIN: Okay. Would either of

19 you like to address that?

20 MS. LEARY: Our expectation, Judge Gulin,

21 is that there are few additional non-religious public

22 radio stations that are not CPB-qualified because they

1 maybe have too few personnel to qualify, they don't
2 have a 24-hour engineer, one sort of qualification or
3 the other. Our expectation is that the fee that you
4 would set in this proceeding would, in effect, be a
5 non-commercial, educational public radio/webcast rate
6 that could apply to all similarly situated.
7 ARBITRATOR GULIN: So if that's the fact,
8 then maybe we don't know how many out there who are
9 still going to come under this umbrella of a $24,000
10 a year rate. We don't even know how many there are.
11 THE WITNESS: We will be happy to supply
12 that information in our rebuttal case. It is a
13 finite, because spectrum is quite finite. There is
14 a quite finite number of stations that qualify for FCC
15 non-commercial, educational radio station licensees,
16 and the great bulk of them are represented in this
17 proceeding.
18 ARBITRATOR GULIN: Okay. So all CPB-
19 qualified stations are represented by NPR, correct?
20 THE WITNESS: That's correct, in this
21 proceeding. There is a small universe of educational,
22 non-commercial stations that are not religious

1 broadcasters that are not represented because they're
2 not CPB-qualified, but it's a fairly small portion,
3 and we'll get those precise figures for you in our
4 rebuttal case.
5 ARBITRATOR GULIN: I appreciate it.
6 MR. GARRETT: Can I just ask one for
7 clarification? And there also ought to be -- they
8 also fall under the umbrella of this $24,000 fee even
9 though they weren't even mentioned in Dr. Murdoch's
10 study?
11 MS. LEARY: No. We would expect, as I
12 stated to the Panel, that we are representing all of
13 the 807 stations whose call letters are represented on
14 Exhibit 1 to Mr. Stearn's testimony. We would expect
15 that there may be some individual stations that have
16 not been able to be represented in this proceeding
17 because of costs or other reasons for whom an
18 appropriate rate would be set based on the rate that
19 is set for public broadcasting in this proceeding.
20 ARBITRATOR GULIN: How would that rate be
21 set?
22 MR. STEINTHAL: It may be that we can come

1 up -- we, as Counsel, can come up with a formula that
2 would enable the Panel to extrapolate from the NPR
3 rate on a per station basis. I think that's something
4 for rebuttal we can give some thought to in light of
5 the Panel's question.
6 ARBITRATOR GULIN: Well, if you are unable
7 to come up with an agreement, then I guess that's a
8 rate that we also have to set, I take it.
9 MS. LEARY: Well, we would -- looking at
10 the Panel's order and the -- of the things that you
11 wish us to address in our rebuttal and the kinds of
12 questioning that we've paid careful attention to from
13 the Panel, we would anticipate coming back on rebuttal
14 with things like minimum rates and perhaps a rate for
15 similarly situated public radio stations that are not
16 within the 807 listed.
17 ARBITRATOR GULIN: Okay.
18 MR. GARRETT: I think as a practical
19 matter, we're going to oppose a flat payment here for
20 all of the --
21 ARBITRATOR GULIN: Surprised to hear that.
22 (Laughter.)

1 MR. GARRETT: Well, I didn't want to leave
2 you guessing. And so that, in part, prompts the
3 questions I had as to trying to use the data here in
4 some way to come up with at least a per station fee --
5 that data plus other data that's in the record here.
6 But I mean there's only -- under no circumstances are
7 we going to say that you can just throw out there a
8 pile of money and then as many people as want can sign
9 on, and I think that's inconsistent with the statute.
10 ARBITRATOR GULIN: So I guess you're on
11 notice that they're going to be coming up with some
12 kind of a performance rate or a rate like that, and
13 whether you want or wish to do the same, of course, is
14 up to you.
15 MS. LEARY: Well, the recording industry's
16 case, as they had presented it to this Panel on
17 direct, has no particular rate for any kind of non-
18 commercial webcaster or public radio
19 broadcaster/webcaster, and so we might welcome seeing
20 a proposal.
21 I will remind the Panel that historically,
22 and the CARP that we are using is the starting

1 benchmark, the 118 CARP has indeed set a fee for the
2 system, for the public radio station system which is
3 composed of National Public Radio stations and CPB-
4 qualified stations. That has been traditionally the
5 way performance rights music have been licensed to the
6 public radio system.
7 ARBITRATOR VON KAHN: But there are some
8 number of stations, I think, that are outside your
9 system and are nevertheless non-commercial stations.
10 I'm not sure -- Pacifica Radio, I'm not sure whether
11 that is --
12 THE WITNESS: They are represented by us.
13 ARBITRATOR VON KAHN: They are
14 represented. But I mean there may be some other non-
15 profit stations out there that are left out because
16 they aren't part of the public radio system and they
17 aren't one of these commercial webcaster/broadcasters
18 either.
19 THE WITNESS: Yes. And as I indicated, we
20 will supply those numbers in our rebuttal case. I
21 think off the top of my head we're talking about
22 approximately 80 very, very tiny stations, many of

1 whom may not have any web sites at all and may not
2 want to avail themselves of any rates set by this
3 proceeding, because they are simply not webcasting.
4 ARBITRATOR VON KAHN: There's a reference
5 in here, and I don't -- to 1,300, and you're talking
6 about 800. That looks like a 500-station gap as
7 opposed to --
8 THE WITNESS: I'm sorry. I believe, Your
9 Honor, that that is the -- that is from the Panel's
10 decision for the 118, and those are the religious
11 broadcasters. That's footnote 12 of the '98 Panel
12 decision.
13 ARBITRATOR VON KAHN: Okay.
14 CHAIRMAN VAN LOON: Are there any other
15 questions for the Witness?
16 MS. LEARY: I have one more.
17 CHAIRMAN VAN LOON: Please?
18 MS. LEARY: The Panel, I take it, is
19 finished.
20 CHAIRMAN VAN LOON: I have one, but you go
21 first.
22 MS. LEARY: I'm sorry, you go first, Your

1 Honor.

2 CHAIRMAN VAN LOON: After you.

3 REDIRECT EXAMINATION

4 BY MS. LEARY:

5 Q You were discussing with Judge von Kahn

6 your preference for using programming expenses as a

7 measurement for change over time in adjusting a rate;

8 is that correct?

9 A That's correct.

10 Q Were you talking about what we would call

11 creative inputs for programming expenses or were you

12 including such items as bandwidth and software?

13 A I was thinking of creative inputs.

14 MS. LEARY: I have no further questions.

15 CHAIRMAN VAN LOON: Mr. Garrett?

16 RECROSS EXAMINATION

17 BY MR. GARRETT:

18 Q You not consider software to be a creative

19 input?

20 A If it's -- I was going to say if it's

21 doing animation, but you wouldn't have that on radio.

22 Generally, no.

1 Q Software if copyrighted work, is it not?
2 A Yes, it is.
3 Q Okay. And software is necessary for
4 webcasters in order to transmit the sound recordings
5 that they transmit?
6 A Yes, it is. I think of it as more on the
7 transmission side.
8 Q But you wouldn't consider software to
9 involve any type of creative input?
10 A My knowledge of software is not terribly
11 deep except what I use on my computer, but --
12 Q Okay.
13 A -- based on what I know, no.
14 Q It probably isn't entitled to copyright
15 protection then.
16 A Sure it is.
17 CHAIRMAN VAN LOON: Nothing further? My
18 last question is only whether you're returning to
19 Massachusetts this evening?
20 THE WITNESS: No, I'm returning to
21 California tomorrow.
22 CHAIRMAN VAN LOON: California. Well, I

1 was going to tell you I have personally checked that
2 there's good weather for flying in the Northeast.
3 THE WITNESS: Oh, you're going home for
4 the weekend.
5 CHAIRMAN VAN LOON: But California I don't
6 know about.
7 THE WITNESS: There's always good weather.
8 CHAIRMAN VAN LOON: Thank you so much for
9 being with us today.
10 THE WITNESS: Thank you.
11 CHAIRMAN VAN LOON: You and your
12 colleague. And we appreciate the work that you've
13 done and the information you've brought us.
14 THE WITNESS: Thank you.
15 COURT REPORTER: One question, how do you
16 spell Herfindahl Hirschman?
17 MR. GARRETT: With an H.
18 THE WITNESS: Two H's.
19 MR. GARRETT: H-E-R-F-I-N-D-A-H-L, okay,
20 H-I-R-S-C-H-M-A-N.
21 ARBITRATOR VON KAHN: I was going to ask
22 what the measures are, 10,000 what? I have visions of

1 little German soldiers marching around.

2 CHAIRMAN VAN LOON: We have four remaining

3 matters, and given the hour and the day I would hope

4 and expect that we will treat each of them in a blitz

5 fashion. But, first, is there a sheet of paper with

6 an update on the time?

7 MR. HARDING: Yes, Your Honors. From our

8 agreement from yesterday, as I understand it, was one

9 hour and 19 minutes for the Copyright Owners and

10 Performers and one hour for the Services, as I

11 understand it.

12 CHAIRMAN VAN LOON: That's for yesterday.

13 And we can get a written update on Monday that's

14 through the close of business today?

15 MR. HARDING: Certainly. Yes.

16 CHAIRMAN VAN LOON: Great. Okay.

17 ARBITRATOR VON KAHN: Yesterday we go to

18 one, 12:30 or something. That's maybe even plausible.

19 CHAIRMAN VAN LOON: Second, we received a

20 motion signed by Mr. Cohen yesterday, the Launch.com

21 motion to withdraw. We would like to get on Monday a

22 draft order, and as a practical matter in the future

1 if administerial things like this we could just have
2 attached to draft order, it would move things along
3 more quickly and be valuable. And we could discuss on
4 Monday or perhaps I should ask at this point whether
5 there are any issues about granting this motion?
6 MR. GARRETT: About Launch?
7 CHAIRMAN VAN LOON: Yes.
8 MR. GARRETT: No.
9 CHAIRMAN VAN LOON: No. Excellent.
10 MR. GARRETT: I don't think we've seen a
11 motion, but --
12 ARBITRATOR VON KAHN: It's like the
13 others.
14 CHAIRMAN VAN LOON: It was --
15 MS. LEARY: It came yesterday? I got it.
16 I think it got delivered last night.
17 CHAIRMAN VAN LOON: Yes. At least it was
18 delivered to the Copyright Office last night.
19 MR. GARRETT: Well, I feel much better to
20 know that Denise got it.
21 MS. LEARY: Well, I was there last night.
22 CHAIRMAN VAN LOON: Okay. Well, that's

1 two. Three is just a reminder the exhibits list, what
2 we had talked about was through the end of today all
3 the exhibits that on Monday each side would present to
4 the other your version, as best you understand it. On
5 Tuesday, you'd discuss it and hopefully have none.
6 And then there will be a subsequent next week that
7 would include any exhibits that are offered next week.
8 There will be a subsequent one for next week that
9 would be later.
10 MR. STEINTHAL: There may be one or two.
11 CHAIRMAN VAN LOON: Yes. And I anticipate
12 -- I gather we're still scheduled to have Mr. Marks on
13 Monday morning.
14 MR. GARRETT: He's still in the country.
15 CHAIRMAN VAN LOON: Okay. And do you have
16 any other administrative matters?
17 MR. GARRETT: Has my motion on CoolLink
18 been granted yet?
19 MR. STEINTHAL: I think you're waiting for
20 my position. And that is I'm taking no position on
21 the motion. I have no basis in which to oppose it,
22 but the best I can say is I can take no position

1 because we haven't heard from CoolLink. If the result
2 is inevitable, then the result is inevitable, but I
3 don't think I'm in a position to do anything other
4 than not take a position.
5 CHAIRMAN VAN LOON: Could you give us a
6 draft order then on that?
7 MR. GARRETT: Sure. Definitely.
8 CHAIRMAN VAN LOON: Thank you. And our
9 last item, and, again, this is for your weekend
10 enjoyment and for discussion on Monday, is an
11 indication of some other things that we are thinking
12 about, offering to you very much in the vein, the
13 practical vein of a burden, usefulness, and all the
14 rest, we welcome your comments on Monday.
15 And if there are then no other matters
16 before the Panel, we will stand adjourned until Monday
17 morning at nine o'clock when we will see Mr. Marks.
18 MR. GARRETT: Have a nice weekend.
19 CHAIRMAN VAN LOON: You too.
20 (Whereupon, at 4:18 p.m., the CARP Hearing
21 was recessed until 9:00 p.m., Monday, September 10,
22 2001.)

CERTIFICATE

This is to certify that the foregoing transcript in

the matter of:	Hearing: Digital Performance Right in Sound Recording and Ephemeral Recording, Docket No. 2000-9 CARP DTRA 1 & 2
Before:	Library of Congress Copyright Arbitration Royalty Panel
Date:	September 7, 2001
Place:	Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

M+W #28 ft 28

RIAA Exhibit No. 213 DP-X

Public Broadcasting Revenue
Fiscal Year 1999
Final Report

Corporation for Public Broadcasting
March 2001

Table 2
Public Broadcasting Revenue by Public Television and Radio System and Source of Revenue, Fiscal Year 1998-1999
(In Thousands of Nominal Dollars)

Source of Revenue	System	FY 1998	Percent of total	FY 1999	Percent of total	% Change 1998-1999
Corporation for Public Broadcasting	PB	250,000	12.4%	250,000	11.6%	0.0%
	PT	187,500	12.2%	187,500	11.6%	0.0%
	PR	62,500	12.9%	62,500	11.7%	0.0%
Federal grants and contracts	PB	47,458	2.4%	50,960	2.4%	7.4%
	PT	43,780	2.9%	47,258	2.9%	7.9%
	PR	3,678	0.8%	3,702	0.7%	0.6%
Local governments	PB	60,300	3.0%	57,159	2.7%	-5.2%
	PT	51,710	3.4%	49,178	3.1%	-4.9%
	PR	8,590	1.8%	7,982	1.5%	-7.1%
State governments	PB	307,164	15.2%	297,816	13.9%	-3.0%
	PT	280,446	18.3%	272,507	16.9%	-2.8%
	PR	26,718	5.5%	25,309	4.7%	-5.3%
State colleges and universities	PB	165,405	8.2%	171,539	8.0%	3.7%
	PT	97,196	6.3%	97,588	6.1%	0.4%
	PR	68,209	14.1%	73,951	13.8%	8.4%
Other public colleges and universities	PB	10,831	0.5%	17,765	0.8%	64.0%
	PT	8,223	0.5%	13,158	0.8%	60.0%
	PR	2,607	0.5%	4,607	0.9%	76.7%
Private colleges and universities	PB	27,308	1.4%	31,359	1.5%	14.8%
	PT	14,474	0.9%	16,641	1.0%	15.0%
	PR	12,835	2.7%	14,718	2.7%	14.7%
Foundations	PB	113,483	5.6%	123,150	5.7%	8.5%
	PT	87,565	5.7%	96,993	6.0%	10.8%
	PR	25,918	5.4%	26,157	4.9%	0.9%
Business	PB	337,251	16.7%	314,890	14.7%	-6.6%
	PT	258,171	16.9%	219,016	13.6%	-15.2%
	PR	79,080	16.3%	95,875	17.9%	21.2%
Subscribers	PB	495,723	24.6%	550,427	25.6%	11.0%
	PT	341,285	22.3%	372,988	23.2%	9.3%
	PR	154,438	31.9%	177,439	33.1%	14.9%
Auction	PB	21,127	1.0%	17,217	0.8%	-18.5%
	PT	19,222	1.3%	15,933	1.0%	-17.1%
	PR	1,905	0.4%	1,284	0.2%	-32.6%
All others	PB	180,036	8.9%	264,516	12.3%	46.9%
	PT	142,246	9.3%	221,717	13.8%	55.9%
	PR	37,790	7.8%	42,799	8.0%	13.3%
Total nonfederal revenue	PB	1,718,627	85.2%	1,845,838	86.0%	7.4%
	PT	1,300,538	84.9%	1,375,718	85.4%	5.8%
	PR	418,089	86.3%	470,120	87.7%	12.4%
Total revenue	PB	2,016,086	100.0%	2,146,798	100.0%	6.5%
	PT	1,531,818	100.0%	1,610,476	100.0%	5.1%
	PR	484,268	100.0%	536,322	100.0%	10.7%

Legend: PB = public broadcasting; PT = public television; PR = public radio
Source: Corporation for Public Broadcasting

Note:

The amounts contained in Tables 1 and 2 include revenue from all federal sources and reportable nonfederal revenue for public broadcasting under the Communications Act of 1934, [47 U.S.C. 397] as amended, in reference to nonfederal financial support (NFFS). Tables 1 and 2 do not include revenue from business related activities (entrepreneurial revenue), which is reported separately. Also excluded is the fair market value of volunteer services in order to keep consistency in historical trends in revenue.

RIAA Exhibit No. 214 DP-X

"In its two decades, National Public Radio® has become a substantial force in the radio industry. It has even garnered the praise of influential commercial broadcasters, (one of whom) has called NPR's *Morning Edition* 'radio's sleeping giant'."

Billboard

"National Public Radio's vision is to serve the public as the leading provider of high quality news, information and cultural programming worldwide."

NPR Mission Statement

Every day, NPR® delivers the finest in news and cultural programs.

"This is NPR." Each day, public radio's biggest network delivers programming that has changed the face of American radio—and America. From NPR's newsmagazines *Morning Edition*® and *All Things Considered*® to *Making the Music with Wynton Marsalis*® and *Car Talk*® with Tom and Ray Magliozzi, NPR brings you the voices and sounds of our world as you've never heard them before. No wonder NPR has won every major broadcasting award—and the acclaim and loyalty of over 16 million listeners a week.

Heard on over 600 stations around the United States (including all major markets) and in over 50 countries abroad, NPR provides news, information, and cultural programming with depth, insight, and quality that both educates and informs. A non-profit, private membership organization, NPR thrives through a long-standing partnership among listeners, member stations, and organizations like yours. We invite you to join the hundreds of other companies who have discovered how supporting NPR through tax-deductible, on-air underwriting pays again and again.

npr℠

Sources: Arbitron/ACT 1 (Fall, 2000)

"I wanted to let you know how pleased we were with the response to our underwriting announcement on *Morning Edition*®. To our amazement, we received 95 calls in just two weeks!"
Richard Moyers, **National Center for Nonprofit Boards**

If you want to add might to your marketing, NPR® delivers.

If you want to reach America's most desired demographics effectively and efficiently, NPR delivers.

If you want to establish top-of-mind awareness, NPR delivers.

If you want to reach business decision-makers, NPR delivers for business-to-business marketing.

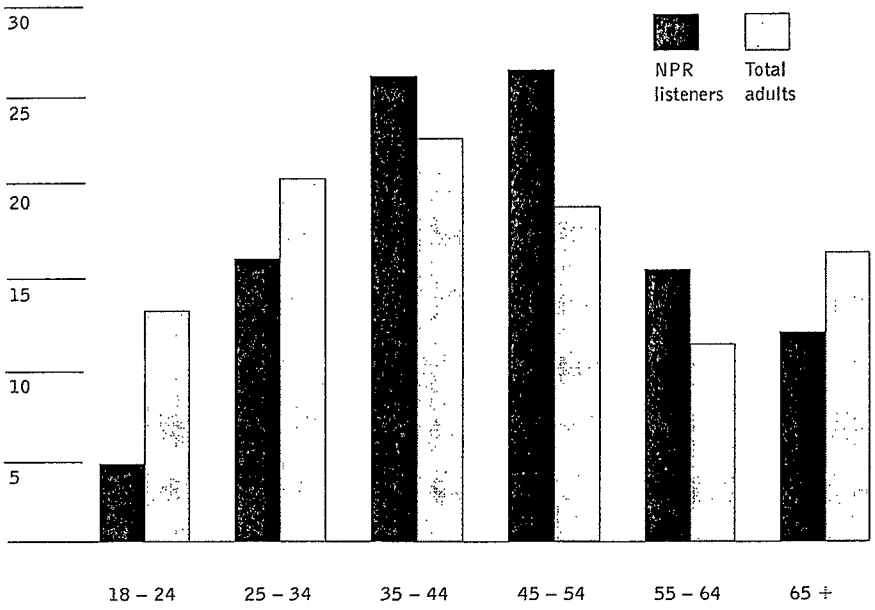
If you want to influence the policy-makers, NPR delivers an audience of government and business leaders.

If you want to make contact with seasoned investors, NPR delivers.

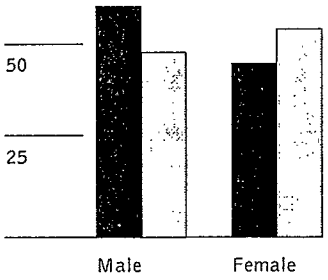
If you want to reach potential employees, NPR delivers a talented audience.

npr℠

NPR® delivers 25 – 54 year-old listeners.



67% of NPR's audience are 25 – 54 years old.



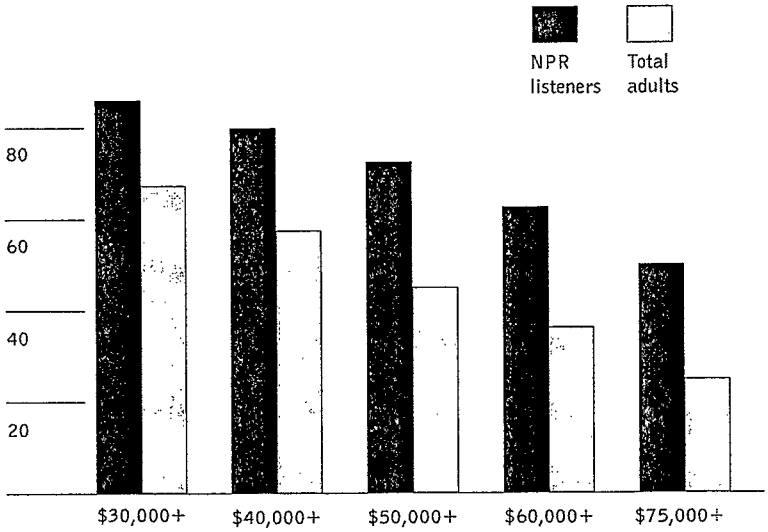
57% of NPR listeners are male;
43% of NPR listeners are female.

npr SM

Source: MRI, Fall 2000.

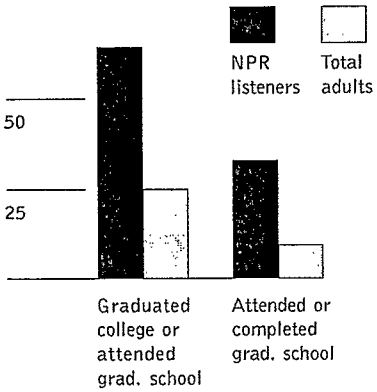
NPR® delivers the listeners you want to reach.

NPR delivers listening households who earn more . . .



71% have annual incomes over $50,000 and 50% have incomes over $75,000.

. . . and who have studied more.



66% of NPR listeners have graduated from college or have attended graduate school.

npr SM

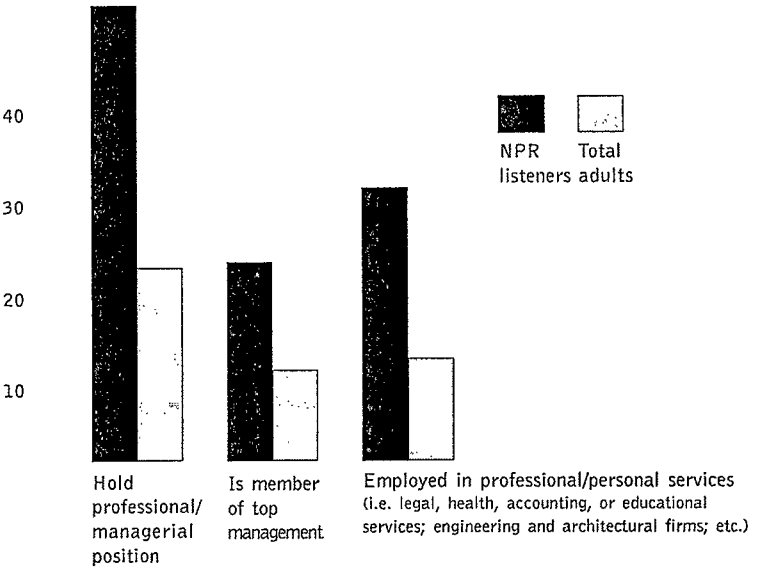
Source: MRI, Fall 2000.

"A letter from a Massachusetts listener to Hewlett-Packard president John Young thanks John and the company for supporting NPR's science reporting. And a postscript tells John that the (NPR) listener was the one who decided to buy HP medical systems for his hospital."

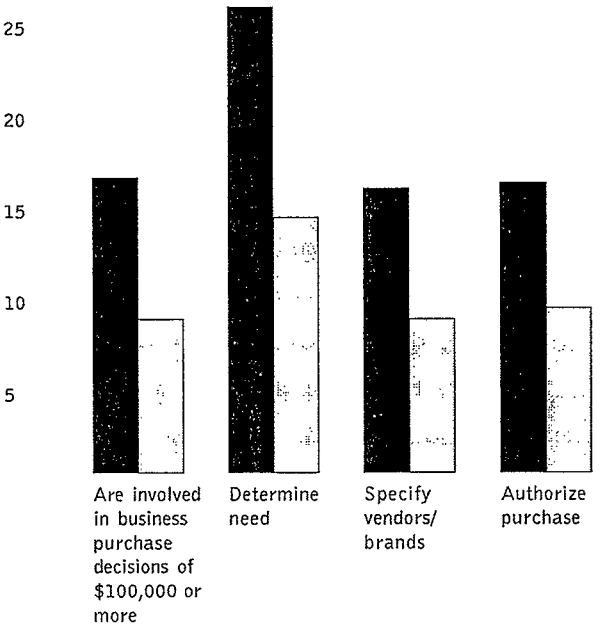
***Measure*, HP employee newsletter**

For business-to-business marketing, NPR® delivers.

NPR delivers people in positions of authority and responsibility.



52% of NPR listeners work in professional or managerial positions.



17% of NPR listeners are involved in business purchase decisions of $100,000 or more.

Source: MRI, Fall 2000 (top graph) & MRI 1999 Doublebase (lower graph).

npr SM

How to put NPR® to work for you: Credit guidelines

Your underwriting credit announcement can help provide important information and reinforce a positive image for your organization with our listeners.

In establishing on-air credit guidelines, NPR has endeavored to be sensitive to the expectations of the public radio audience and NPR member stations, and to remain faithful to public radio's mandate to provide educational, cultural, and informational program services independent of commercial obligations or influence. The following guidelines and procedures for acknowledging financial and/or in-kind support fall within the statutory framework and policies established by the Federal Communications Commission.

Principles

Funds may be accepted from any source; however, NPR reserves the right to turn down funding if there is any conflict of interest or possible perception of influence on program content.

On-air identification of underwriters is required by federal law. An underwriter is identified by mention of the legal or recognized name of the underwriter. Additional items of information may be used to further clarify identification but should not promote the company, products, or services of the donor.

Acknowledgment should not interrupt the continuity of the programs or detract from the content or sound quality of the programs with which they are associated.

All program content and editorial decisions related to distribution of NPR programs are the sole responsibility of NPR.

npr SM

Sample on-air credits

"Support for this program comes from National Public Radio® member stations and . . . ."

"SmartMoney.com, financial advice, analytical tools, and coverage of the financial world. On the Web at smartmoney.com."

"Merrill Lynch, featuring the 'Unlimited Advantage' brokerage service that lets investors plan, invest and bank. 1-800-Merrill or askmerrill.ml.com."

"Yahoo, providing daily news online, 24 hours a day. On the web at news.yahoo.com."

"Holland America, offering cruises to destinations worldwide, including the Caribbean, the Panama Canal, Alaska and Europe. On the Web at hollandamerica.com."

"Knopf, the publisher of 'Jazz, A History of America's Music,' the companion book to the Ken Burns PBS series."

Elements of your on-air credit

Your credit should be no more than 10 seconds in length and may include:

The legal name of the underwriter. Operating divisions may also be included in the credit, but only after acknowledgement of the legal name.

Non-promotional descriptions of a product line or service.

Brand or trade names and product or service listings that do not include qualitative or comparative language.

Location information, toll-free phone numbers and Web site URLs.

Duration of time in business.

Slogans (verbatim) that identify and do not promote.

Organization mission -- language that identifies but does not promote.

Mention of particular NPR programming supported.

npr℠

RIAA Exhibit No. 215 DP-X

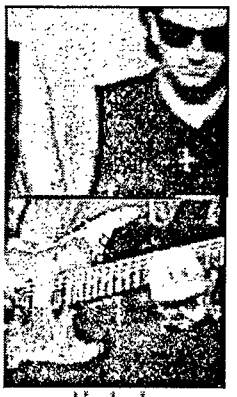
click here amazon.com

listen | learn | buy

home | new releases | music news | shopping basket

no one will know more than you

learn about music



click.learn.click.learn.

Learning about music as you listen is part of the fun at NetRadio.com. For example, listen to the music of these inductees just announced for the "performers" category in the 2001 Rock and Roll Hall of Fame ceremonies:

Aerosmith, who've epitomized American blues-rooted style rock and roll for the past three decades (check out the Hard Rock, Vintage Rock and 80s Hits channels); **Solomon Burke,** who is known for having one of the greatest voices in the history of soul, gospel and R&B (Solid Gold Soul channel); **The Flamingos,** Chicago's pioneering doo-wop aggregation who gave us the trend-setting classic hit "Golden Teardrops," and their soulful rendition of the pop standard, "I Only Have Eyes For You"; (try Rockin' Rhythm 50s channel); The King of Pop himself, **Michael Jackson**

choose a genre

- Blues
- Broadway/Movies
- Christian/Gospel
- Classical
- Country
- Electronica/Dance
- Folk
- Jazz
- Latin
- New Age
- Pop
- R&B
- Rap/Hip-Hop
- Rock
- World

(80's Hits, Groovin' 70s, Solid Gold Soul and Party Hits channels); **Queen,** whose epic songs and theatrical extravaganzas defined 70's glam rock (Groovin' 70s, Vintage Rock, Party Hits);the visionary singer-songwriter **Paul Simon,** already an Inductee as one half of the duo Simon & Garfunkel (try Adult Alternative, Jazz Rock, Lite Hits, Groovin' 70's and Fab 60's channels); jazz-rock iconoclasts **Steely Dan** (Groovin' 70s, Vintage Rock, Jazz Rock and Smooth Jazz channels) and **Ritchie Valens,** (Rockin' Rhythm 50's, Party Hits) who less than seven months after the release of his first single, "Come One Let's Go" and exactly 26 days after "La Bamba" hit the pop charts, was killed in a plane crash along with 22-year old Buddy Holly and 28-year old J.P. Richardson ("The Big Bopper") on "the day the music died," February 3, 1959.

By clicking on one of the music genres listed to the right, you'll discover artist profiles, feature articles and interviews. You'll also find insightful audio features prepared by NetRadio.com experts.

© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

Click in to win a mess o' the blues...

learn about/

jazz

Jazz has its roots in the experience of Africans brought to North America as slaves, but it is hardly limited to black culture. Over the past century, this indigenous music has evolved and branched out, becoming a true global music.

Though the term was kicking around even back in the 1890s, jazz as we know it really began when the roadhouse and ragtime music of the speakeasies of the early 20th century got pressure-cooked by the intermingling of races and cultures in New Orleans, a town whose name still remains synonymous with the music. Kansas City, Chicago, New York, and other urban centers rapidly followed suit.

Though early jazz was ensemble music meant to get people doing the fox trot, the Charleston, or other hot dances of the day, it quickly became distinguished by musical virtuosity and inventive solo improvisation. Jelly Roll Morton moved ragtime piano compositions into a new realm of complexity

essential collections

These must-haves for your jazz music library were carefully selected by our music experts to cover the full range of jazz's best talents and sounds. Make them a part of your collection today!

Young Lions
The new stars of jazz.
New Voices
And up-and-comers.
Classic Vocalists
Holiday, Sinatra, Armstrong...

with ingenious arrangements.

Louis Armstrong, with his legendary coarse growl and nonsense "scat" phrases and his equally legendary cornet and trumpet flourishes, elevated Dixieland from good-time bar music to an art form. Early female jazz blues singers Bessie Smith and Billie Holiday used their eloquent voices not only to convey the long-suffering plight of their gender and race, but also to demonstrate that the voice itself can be a powerful and finely tuned instrument.

But if one person could fairly be termed the inventor of modern jazz, that person would have to be bandleader, composer, and pianist Duke Ellington. Beginning in the '20s and continuing until Ellington's death in 1974, he (and sometimes his orchestra members) composed and performed hundreds of standards ("Caravan," "Take the A-Train," "It Don't Mean A Thing If It Ain't Got That Swing"). Throughout the '20s the conservative citizenry condemned jazz as immoral, coming as it did out of Prohibition speakeasies and brothels, speaking of sex and sin.

But the sophisticated arrangements and less risqué lyricizing of bandleaders like Ellington made jazz music respectable. Increasingly, jazz was heard on the radio, on mass-distributed records, and in the fanciest of ballrooms.

Holiday, Sinatra, Armstrong...

- Legends
  The timeless icons.
- Smooth
  Contemporary sounds of jazz and pop.

styles in this genre

Want to know more about the styles that are a part of this genre? Check out any of the following NetRadio styles to see descriptions, key recordings, and NetRadio.com channels where you can listen.

- Acid Jazz
- Bebop
- Big Band Swing
- Cool Jazz
- Free Experimental World
- Jazz Rock Fusion
- Lounge
- Modern Swing
- Smooth Jazz

channels in this genre

Want to know more about the channels that are a part of this genre? Check out any of the following NetRadio channels to listen in.

- Acid Jazz
- Bop
- Classic Jazz Vocals
- Café Jazz
- Big Band
- Jazz Rock
- Jazz Notes
- Modern Jazz Vocals
- Quiet Storm
- Lounge
- Swing
- Smooth Jazz

NetRadio has more than 100 Choice Channels of music in 17 major genres. Visit our complete list of music channels to go directly to the music you want to hear.

Ellington's orchestra toured throughout the '30s and '40s, swing's heyday. Other popular leaders of big band swing orchestras included Fletcher Henderson, Artie Shaw, Count Basie, and Benny Goodman.

In the '40s, orchestra leader and horn player Dizzy Gillespie began putting an adventurous new twist on big band jazz that came to be known as bebop, or simply, bop. In bop, the song-oriented framework of big band arrangements-main theme plus solos-remained relatively intact, but individual players pushed their solos further into the realm of experimentation and free expression, lifting off from the main melody line into dissonance and tempo changes. Gillespie's famously puffed-cheek trumpet playing and Charlie "Bird" Parker's dazzling saxophone skills are the two most influential styles to emerge from this movement.

And bop, no longer satisfied merely to retread the standard phrases and rhythms of blues and Tin Pan Alley, also began folding disparate influences into arrangements. Gillespie, for example, incorporated Cuban polyrhythms into his band's numbers. Vocals, too, became more inventive: Sarah Vaughan, a collaborator with Gillespie and Parker, began to incorporate bop's unexpected phrasings into her buttery smooth vocals, and likewise Ella Fitzgerald, formerly a more straight-ahead swing vocalist, began including dizzying scat patter in her singing with Gillespie's orchestra. Bop drew the roadmap for jazz's future.

Thanks to bop, a new breed of performers emerged, influenced by the great bandleaders but eager to display their skills in a more intimate setting. Smaller jazz groups, from nonets (9 players) down to trios, began forming. The new cool jazz stood in contrast to the hot, drumbeat-driven sound of big band swing: The spotlight was given over to improvisation on more melodious instruments such as piano and saxophone, and drums became brushed and muted. Miles Davis and The Modern Jazz Quartet were famous for their cool jazz, especially their classic 1949 album Birth of the Cool.

In the '50s, cool jazz continued in the light, lush sounds of West Coast artists such as Stan Getz and Dave Brubeck. However, bop's new variants-hard bop, post-bop-were the most cutting-edge form of jazz in this period. Charles Mingus brought a brash, even disturbing new edge to jazz with chaotic compositions anchored by his original bass playing. The iconoclastic piano playing of Thelonius Monk brought new phrasing and sensibility to the instrument that has never since been matched. And John Coltrane, who began his career playing with Miles Davis (the sextet's hard bop classic, 1959's Kind of Blue, is perhaps the most influential jazz record ever), began using his tenor sax to create sheets of atonal sound and new sonic possibilities.

These possibilities would be explored in the 60s by Coltrane and his fellow sax players, including Archie Shepp, Pharoah Sanders, Albert Ayler, and Ornette Coleman. Coleman's Free Jazz, along with Coltrane and Don Cherry's The Avant Garde (both, 1960), named the vast range of experimental music to come. Free jazz takes the radical improvisations of bop to their logical conclusion: it moves the scene of composition to the live performance itself, letting the musicians dictate the shape of the number as they improvise.

feature
learn more

While touring the United States to promote the newly released first volume of his compelling new two-volume biography of Bing Crosby, cultural critic and jazz expert Gary Giddins stopped by the NetRadio.com studios to talk with music programmer Arne Fogel about Crosby and the book.

Read more.

During the '60s, such freedom had an explicitly political subtext-especially for African-American performers-but also for European players such as the Peter Brotzmann. A blend of radical politics and Eastern mysticism would come to shape avant-garde jazz, as idiosyncratic bandleaders Sun Ra and Alice Coltrane (John's wife) pursued cosmic visions of unity; drummer Milford Graves espoused alternative healing along with alternative paths of rhythm; vocalist Abbey Lincoln was as outspoken about civil rights offstage as on; and Anthony Braxton, Roscoe Mitchell, and other alumni of Chicago's Association for the Advancement of Creative Musicians (AACM) simultaneously looked back to African folk tradition and forward to a new creative utopia. Suddenly, bop was the establishment.

The late '60s and '70s saw additional expansion of jazz's boundaries, as fusion began folding elements from other genres-rock, funk, soul, and folk-into jazz. Derek Bailey, John McLaughlin, and Pat Metheny all brought rock guitar work to jazz. Jaco Pastorius pioneered a novel electric bass style on his own and with the rock-jazz fusion group Weather Report.

Don Cherry acted as an ambassador of world jazz, importing instruments like the gamelan and the wood flute. Herbie Hancock fused soul and funk with jazz. Ever-present Latin influences were amplified in the Afro-Cuban jazz fusion of Tito Puente and Paquito D'Rivera. And Miles Davis, always keeping his finger on the pulse of modern jazz, managed to include a little of all of the above, particularly in 1969's Bitches Brew.

The '80s and '90s have seen the advent of smooth jazz, as traditional jazz elements-standards, solos, crooning vocalists-are dusted off and revitalized for a new urban crossover audience seeking sophisticated soundtracks. Among the most successful are saxophonist Kenny G, trumpeter Chuck Mangione, the brothers Marsalis, and vocalists George Benson and Anita Baker.

The avant-garde did not disappear, however, as a new generation of improvisers has sprung up around the globe. In New York, for example, post-jazz experimentalists like John Zorn and Arto Lindsay mix jazz with avant-rock, Brazilian samba and bossa nova, and even klezmer. These days, jazz is truly a universal phenomenon. The Buena Vista Social Club, a group of older Cuban African-Latino-jazz musicians who have made a recent comeback, are immensely popular. And look at the club kids who dance to a type of soul-funk polished up with jazz samples called acid jazz.

The jazz canon can feel as daunting to the novice as the great books authors on a college freshman's reading list. But go to any jazz club and watch the patrons tapping their toes and nodding their heads in spontaneous approval, and you'll see all you need to know. Jazz not only has intellectual appeal; it's a profoundly emotional and intuitive music that can be enjoyed by anyone with the ability to hear and feel.

about us | advertise | help | feedback | privacy policy

© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

amazon.com.

learn about/

blues

"The blues is dead; the blues will never die," writes Francis Davis in his panoramic 1995 The History of the Blues. It's a contradiction that speaks volumes about this long-lived and much misunderstood musical form. More popular today than ever, the blues has remained remarkably consistent since the 1940s. Audience numbers have surged and dwindled and surged again, and at the same time the genre has gone without significant innovation since the rural blues moved into the cities around the time of WWII.

what's true of the Blues is that it is an emotionally subtle and complex genre

Beginning as the music of African-Americans of the South in the early 1900s, the blues arose from a panoply of post-Civil War musical

styles in this genre

Want to know more about the styles that are a part of this genre? Check out any of the following NetRadio styles to see descriptions, key recordings, and

feature
learn more

New bluesman Keb' Mo' breathed new life into the world of acoustic blues when his self-titled debut disc was released in 1994. His tunes were clearly building on what acoustic-oriented artists like Mississippi John Hurt and Taj Mahal had done before him. Now his latest album, *The Door,* is perhaps an even greater departure from common blues themes.

Read more.

influences: work songs, field hollers, ragtime, church music, even white folk music. In the early part of the century, three distinct sorts of rural blues sprang up simultaneously: the blues of Georgia and the Carolinas, a melodic style practiced by musicians like Blind Willie McTell and Blind Boy Fuller, characterized by its regular rhythm, and influenced by white folk music and ragtime; Texas blues, the music of Blind Lemon Jefferson, a high-voiced style, accompanied by a picked-not strummed-guitar; and the Mississippi delta blues, the music of Charley Patton, Willie Brown, and Son House.

Most familiar to listeners today, Mississippi delta blues was the most influential branch of the burgeoning format, characterized specifically by the vocally imitative, rhythmic slide guitar. (As the names imply, the blues was often performed by men with physical handicaps, who were therefore freed from picking cotton.) W. C. Handy's 1912 "Memphis Blues" was the first published blues piece.

The blues is lyrical, emotive. It expresses longing and sadness-usually romantic sadness. But it's not about being depressed. That's likely a misconception that white culture has about an African-American musical style. What's true of the blues is that it is an emotionally subtle and complex genre.

descriptions, key recordings, and NetRadio.com channels where you can listen.

- Chicago Blues
- Country Blues
- Delta Blues
- Modern Electric Blues
- Swamp Blues
- Jazz Rock Fusion
- Texas Blues
- West Coast Blues

channels in this genre

Want to listen to the music of this genre? Check out any of the following NetRadio channels.

- Chicago Blues
- Blues
- Rockin' Blues

NetRadio has more than 100 Choice Channels of music in 17 major genres. Visit our complete list of music channels to go directly to the music you want to hear.

...Mississippi delta blues was the most influential branch of the burgeoning format, characterized specifically by the vocally imitative, rhythmic slide guitar.

The blues is, as well, in the style of call and response. In each line of music, the second measure-and-a-half consists of instruments complementing, repeating, or answering the vocals of the first two-and-a-half. It's an inherently improvisational style, one very closely related to jazz. But-again contrary to popular belief-blues evolved and exists independently from, albeit alongside of, that form.

Blues is a genre that from the first had influential and popular women artists. The first blues recordings were made in the 1920s by artists like Mamie Smith, Ma Rainey, Ida Cox (the uncrowned "queen of the Blues"), and Bessie Smith. In 1926, Blind Lemon Jefferson recorded "That Black Snake Moon"; in 1929, Charley Patton sang "Pony Blues." The depression and the two world wars caused massive urban, northward migration among Southern blacks. Blues lyrics, therefore, also became urban, and blues ensembles developed in the city clubs where the music was being played. What had been essentially an artist's solo endeavor expanded with the addition of the piano, the harmonica, and the rhythm section. And since these musicians were now playing in crowded clubs, amplification was needed-a change that turned out to be the format's last significant innovation.

The 1940s saw a flourishing of the blues as its white audience grew. In 1941, Louis Jordan's "G.I. Jive" was a huge hit. In 1946, T-Bone Walker recorded "Call It Stormy Monday"; in 1948, John Lee Hooker recorded "Boogie Chillen." The blues sprouted in Atlanta, Memphis, St. Louis, and Detroit. From the 1920s on, New York's Harlem featured some of the greatest black musicians alive playing to a well-heeled white clientele. But it was in Chicago that the format truly blossomed, as the home of musicians such as Muddy Waters (whose recording of "I Can't Be Satisfied" was enormously successful after WWII, while Waters was still driving a delivery truck in the city), Howlin' Wolf, Elmore James, and Otis Spann.

In the 1950s and '60s, the audience for the blues expanded and diversified to an even greater degree. Elvis helped make the blues palatable to white mainstream audiences. Chuck Berry appeared on the scene with his explosive guitar, and the blues gave birth to its most famous progeny, rock and roll.

The 1960s witnessed a blues revival: rock and roll had primed the pump for the blues to garner an even broader audience. Muddy Waters and B.B. King regained large followings, and the Southern rural blues, became newly popular, in the form of Horace Silver, Bobby Timmons, and Cannonball Adderley. Urban blues was also on the rise, with Buddy Guy and Eric Clapton played their popular brand of amplified, electric blues. By this time, African-American audiences had drifted away from the blues, as soul, then funk, and eventually rap began to surpass it in popularity. Young white audiences, though, were gravitating to the blues, and are partly responsible for its resurgent popularity today. Clapton remains hugely popular, and musicians like Robert Cray, John Lee Hooker, Buddy Guy, and Bonnie Raitt play to crowds at the summertime blues festivals held on waterfronts in cities around the country.

True, the form doesn't boast radical innovations, doesn't change, like some musical genres, as the social winds shift. It remains consistent, emotionally

powerful, resilient. The funeral for the blues may be over, the mourners long gone home...but the blues is alive and well.

about us | advertise | help | feedback | privacy policy

© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

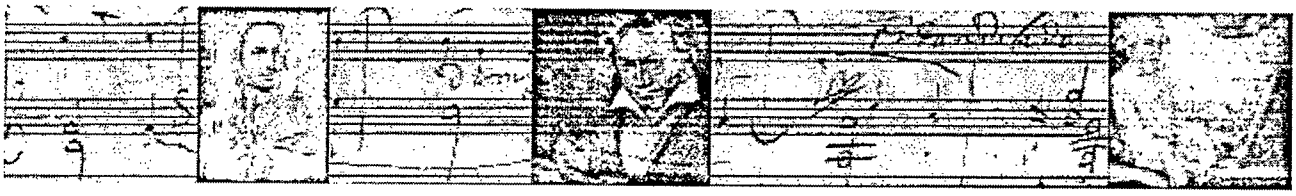
roxio

Easy CD Creator 5 Platinum
You save $30!
Regular price $99.95 $69.95 Get it now!

learn about/

classical

While classical music is popularly thought of as rarified, European, white, and male, it is in fact an indelible part of mainstream Western culture.



Classical music has penetrated every artery of the body public, widely used as it is for movie themes, cat food commercials, elevator music, sources for pop song hits, even telephone hold-button music.

The musical genre itself is defined by a period of roughly 1400 years, from the codification of Gregorian chant around 600 A.D., to the present. It comprises a multitude of composers great and unknown, along with the rules by which they wrote music, as well as the distinctive and innovative ways they broke those rules.

Classical is simply an umbrella term for a musical format that is as diverse and divergent as the keys on a piano. Classical runs the gamut of form and emotion from the elaborate embellishment of the baroque age, to the precision and accessibility of the classical era, to the sentimentalism and passion of the romantic period.

The baroque period (approximately 1600-1750) marked the beginnings

feature
learn more

Next time you go to a classical music concert, don't forget your flashlight.

Read about it.

styles in this genre

Want to know more about the styles that are a part of this genre? Check out any of the following NetRadio styles to see descriptions, key recordings, and NetRadio.com channels where you can listen.

- Baroque
- Medieval
- Modern
- Romantic

channels in this genre

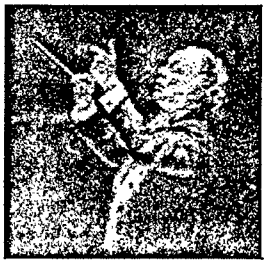
Want to know more about the channels that are a part of this genre? Check out any of the following NetRadio channels to listen in.

- Baroque and Before
- Chant
- Chamber
- Classical Notes
- Maestro
- Opera
- Piano
- Quiet Classics
- Symphony

of classical concert music, because the Catholic Church and its choral music were losing influence, because of the advent and proliferation of the orchestra, and because the aristocracy was commissioning musical work and demanding a fittingly elaborate, aristocratic style.Baroque is recognized by both its formal structure and its embellishments of musical trills, turns, and cadenzas (flourishes at the end of movements).

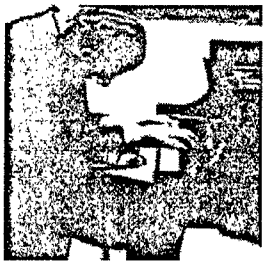
- Symphony

NetRadio has more than 100 Choice Channels of music in 17 major genres. Visit our complete list of music channels to go directly to the music you want to hear.



The technical requirements of the genre were strict, but it was this very rigidity that allowed composers like Bach, Handel, and Vivaldi to experiment within the forms and rise above other composers of the day. Baroque is a study in contrast, counterpoint, themes playing against each other, passion against structure, freedom against constraints. So, for example, Vivaldi's The Four Seasons, which is aptly subtitled "The Contest between Harmony and Invention," connotes musically an opposition between the birds of spring and the ice of winter.

The classical era (ca. 1750-1820) witnessed the rise of the middle class, and with it, a different set of musical demands upon the period's composers. As the system of royal commissions and noble patronage declined, the public became music's primary financial backer, and this public increasingly demanded a more accessible, mainstream form.



So the music adjusted: it became less elaborate, less flamboyant. The pre-eminent composers of the day (Haydn, Mozart, Beethoven) simplified and dramatized, at least in part in an effort to make sense to the public's untrained ears. The sonata and the symphony arose in this era, and simpler melodic themes were in vogue.

The romantic era (about 1820-1890) spawned today's dominant notions about art, notably that the great artistic individual-the genius-expresses himself emotionally through his music. Consequently, the music of the period is more individualistic than it had been before. Composers such as Schubert, Mendelssohn, Chopin, Brahms, Tchaikovsky, and Wagner all aimed to convey their passions and yearnings, their own personalities, through their art. Opera and lieder (art song) were big during the romantic period, and the symphony dominated instrumental music in ever-larger dimensions. Mendelssohn's fairy music is a good example of the romantic desire to express the dreamlike, the fanciful, and the mystical.

Finally, late (or post-) romanticism (about 1890-1915) bleeds into the modern era. This period was heavily underlined by nationalism, which caused classical music to cull ethnic tunes, dances, and folk tales for influences. The era also saw a rise in experimental movements, from the whole-tone-based mood music of Debussy's impressionism, to the lush tone poems of Richard Strauss, to the

challenging atonalism of Schoenberg. Modern classical music, the backdrop to the intense violence of the 20th century, is as often as not characterized by dissonance and the rejection of classical norms, by anxiety, and by a pervading sense of doom.

Now more than ever, contemporary composers play with the genre. John Cage, who studied with Schoenberg, was influenced by Zen Buddhist thought to create music that focuses on chance; his experiment with the use of a piano that had small common objects between the strings brought attention to the relationship between the composed and the random, high art and the everyday. George Crumb's Mundus Canus (A Dog's World), a series of humoresques, or short comic compositions, are based on the lives of his various canine companions, and artists such as Laurie Anderson and Phillip Glass have exposed audiences to the avant-garde, electronic forms of the genre.

What's increasingly clear is that classical music subtly permeates our lives, though it has seemed to be a thing of European history rather than the living, breathing present. But the music is still alive, still being created, changing and growing, awaiting the critique of the scholars of the next century.

about us | advertise | help | feedback | privacy policy

Virtual Stock Exchange
Monopoli Bank Unreal Petroleum Play Now? MMG Bonus
Pretend Airlines Conjured Bros Ltd Yes No MagicMoneyGenie.com

© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

learn about/

folk

In Webster's dictionary, the term folk song is defined as "a traditional or composed song typically characterized by stanzaic form, refrain, and simplicity of melody" and dates back to 1847 -- those traditional, European-flavored ballads woven throughout America's musical fabric. Yet why does this genre also seem so inextricably linked to this century -- to the depression-era and labor union musical manifestos in the 1930, protest songs of the '60s, storytelling of the '70s, poetic introspections of today?

Folk, it's clear, consists at this point of more than just the sum of its historical parts.

Folk music stems from an informal, oral tradition. It traces its roots back to Europe, to the Scots-Irish immigrants who settled in the Appalachians, where the stew in the melting pot was seasoned by a dash of rural delta blues.

Appalachian settlers preserved the sounds of the British Isles in the ballads and the fiddle, banjo, and guitar that accompanied the songs. Their African-American southern counterparts provided African-influenced melodies and rhythms, as well as a particular spiritual weight to the genre.

But American folk music is also shaped by the enormous variety of American immigrant history itself-French settlers in Louisiana, Spanish in the Southwest, and Scandinavians and Germans in the Mid- and Northwest.

It was in the 1930s that American folk music as we know it today truly began. Leadbelly, Cliff Carlisle, Woody Guthrie, all emerged in the '30s as chroniclers and critics of the times (think of the social commentary, for example, explicit in Guthrie's "This Land is Your Land," now considered a classic American popular tune).

Guthrie in particular redefined the genre by writing his own songs-tunes about the ongoing American struggle for human rights and the dignity of laborers, pleas for social equity, and economic justice-rather than relying on traditional ballads.

By the time the 1950s arrived, a true folk revival had taken place. Pete Seeger, Paul Robeson, The Weavers, and Oscar Brand took inspiration from Woody Guthrie, combining traditional fare with original material in live performance and recordings.

styles in this genre

Want to know more about the styles that are a part of this genre? Check out any of the following NetRadio styles to see descriptions, key recordings, and NetRadio.com channels where you can listen.

- Celtic
- Folk Rock
- Modern Folk
- Traditional Folk
- Trans Folk

channels in this genre

Want to know more about the channels that are a part of this genre? Check out any of the following NetRadio channels to listen in.

- Celtic
- Folk

NetRadio has more than 100 Choice Channels of music in 17 major genres. Visit our complete list of music channels to go directly to the music you want to hear.

Their topical, political, or protest folk continued to unite the traditional singer's voice and string band with messages of social justice, but its expression was stunted by McCarthy-era investigations into Communist activities. '50s and '60s followers of political folk included the Greenwich Village crowd, musicians and social activists like Bob Dylan, Phil Ochs, and Odetta. But during the 1960s there also developed a more poetic, individualistic, and sensitive folk style, personified by solo artists, armed with nothing more than heart-felt lyrics and an acoustic guitar.

This cadre of artists consisted of those drawn to the melodies and harmonies, as well as the message, of folk: Simon and Garfunkel, Judy Collins, Gordon Lightfoot, and The Mamas and the Papas, for example.

Folk music evolved during the '70s with personal introspection gaining a higher commercial profile, just as the political activism of the '60s evolved into the "party" atmosphere of the '70s and ultimately ushered in the "Me" decade of the '80s. Folk/rock artists such as Joni Mitchell, James Taylor and Jackson Browne enjoyed unprecedented Top 40 airplay and record industry attention.

David Geffen's fledgling Asylum label became a high-profile success story. But, even in that commercialization lay an appreciation for the hard road that folk music traveled -- a journey of self-discovery and introspection; of social

feature
learn more

A folk singer with a punk attitude, Ani DiFranco has successfully battled the corporate rock giants to emerge as one of the most influential and inspirational cult heroines of the 1990s. Through relentless touring and releasing roughly an album a year on her own Righteous Babe label, she has nourished a devout grass-roots following that appreciates her vocal versatility and sharp-witted songwriting.

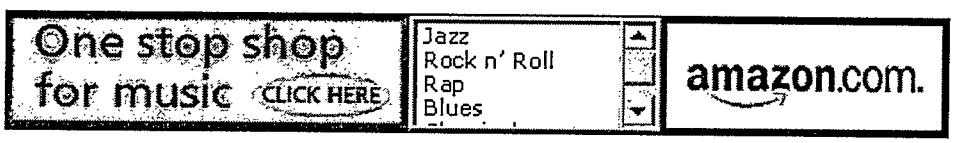
Read more.

commentary and criticism; of the realization that changing the world often begins by changing one's self. Singers like James Taylor, The Roches, Steeleye Span, Richard Thompson, Leo Kottke, and Joni Mitchell were heirs to the legacy of Peter Paul & Mary, Simon and Garfunkel, and Gordon Lightfoot of the '60s.

This collage of styles, agendas, and folk forms -- from the '30s through the '80s -- has, in the '90s and at the turn of the millenium, merged into an innovative and fresh kind of contemporary folk music. Displaying all of its roots in equal measure, from country to Dylan to Mitchell and everything in between, today's folk music is regularly in the spotlight and receiving more mainstream accolades than ever.

Lucinda Williams, Tracy Chapman, David Wilcox, Indigo Girls, Shawn Colvin: these artists move on and off bestseller charts and top-40 and alternative format radio stations, telling stories, singing of ordinary moments as well as larger truths, and exposing their inner lives in a musical form that is utterly straightforward and minimalist. Folk, it's clear, consists at this point of more than just the sum of its historical parts. It is a musical genre compatible both with calls to social action and with revelations of heart and soul.

about us | advertise | help | feedback | privacy policy



© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

learn about/

world

World music: the name describes the vast realm of all forms of music and the oceanic feeling this music can invoke in the listener.

Perhaps because familiar forms of music such as rock and jazz are so ubiquitous, influential and quintessentially American, world music is often defined as necessarily non-Western, non-American music, originating outside North America and Europe, even though this description leaves out many forms of music, from New Orleans Cajun to Portuguese flamenco, Native American chants to Jewish klezmer.

Instead of this limited view, it might be said that in the broadest sense, world music is an agglomeration of many musical cultures in constant interplay, mediated through personal contact and knowledge transfer made possible by technology, from printed sheet music to digital music files.

The first music was probably inspired by nature: the sound of wind whistling through reeds, the natural rhythm of horses' hooves on earth, or the tinkling of water streaming between rocks. To Western ears, much indigenous music around the world reflects an effort to mimic nature: the Japanese shakuhachi, a reed-like instrument sounds like wind through a bamboo forest, while African drums imitate

styles in this genre

Want to know more about the styles that are a part of this genre? Check out any of the following NetRadio styles to see descriptions, key recordings, and NetRadio.com channels where you can listen.

- Afropop
- Asia
- Australia Pacific
- European
- South Asian
- Latin

forest, while African drums imitate heartbeats.

The Javanese gamelan gongs sound like a melodious rain, while the Australian didgeridoo drones like wind across the outback. But what the Western listener may not realize about African music, for example, is that the African musician does not merely attempt to imitate nature by means of musical instruments; he reverses the procedure by taking natural sounds and incorporating them into his music. To the uninitiated this may result in cacophony, but in fact each sound has a particular meaning, emotion, or desire, inseparable from the context of the musician's life and his culture.

- Latin
- Mediterranean
- Middle East
- Native American
- Reggae Caribbean
- Worldbeat

styles in this genre

Want to know more about the channels that are a part of this genre? Check out any of the following NetRadio channels to listen in.

- Earthbeat
- Reggae
- Ska

NetRadio has more than 100 Choice Channels of music in 17 major genres. Visit our complete list of music channels to go directly to the music you want to hear.

It is the music arising out of the cross-fertilization of cultures that may most accurately be described as world music. The migration of African peoples, or Diaspora, has yielded scores of new music forms over many years. In the Caribbean, ska, reggae, soca, and calypso blend African rhythms with Western melodies. Reggae, with its trademark lilting backbeat, merges the political and the personal, in the form of social justice and Rastafarian religion and like jazz and the blues, has achieved worldwide familiarity.

Its practitioners include the legendary Bob Marley and Jimmy Cliff, dub innovators King Tubby and Lee "Scratch" Perry, and pop crossovers like Third World, UB40, Steel Pulse, and Maxi Priest. Calypso is another musical idiom of the African Diaspora; its euphoric signature instrument, the steel drum, was originally made by cutting and pounding out steel barrels, in much the same way that traditional African instruments like slit-drums are made from hollowed logs.

Native African and Western music have intensified their dialogue in recent decades. Paul Simon's 1986 Graceland introduced American pop fans to the infectious rhythms and harmonies of Ladysmith Black Mambazo, the Boyoyo Boys, and others. South Africa's Juluka and Johnny Clegg and Savuka are known for combining English and African lyrics, rock and traditional Zulu music and instruments, and emotional and political messages. From Zimbabwe, Thomas Mapfumo's chimurenga ("music of struggle") likewise melds African polyrhythms to Anglo-American rock's rebellious edge.

From Nigeria, King Sunny Ade disseminates irresistible guitar glissandos in his juju music. From North Africa, Morocco's Dissidenten introduced Middle Eastern tonal scales into hybrid rock fusion. In Algeria, Chaba Fadela and other rai artists have created an upbeat, modern synthesis of African, European, and American pop.

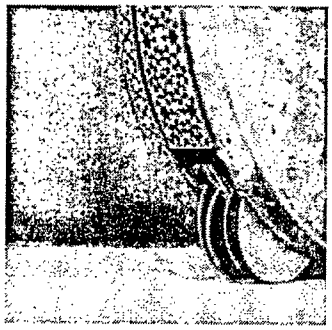
feature
learn more

If you have followed global pop for more than six months, you've known about Manu Chao for some time. Chao's frothy mix of subtle Latin textures, African grooves, American folk and rock en Espanol boisterousness may be the future of international music, a warped sound prepped to emerge as the first new genre of the 21st century.

Read more.

Ethiopia boasts a wealth of talented performers such as Mahmoud Ahmed, who combines traditional five-tone Ethiopian Amharic music with influences as diverse as James Brown and John Coltrane. Senegal's Youssou N'Dour pioneered mbalax, or afropop, a lively blend of African, Caribbean, and Western beats, introduced to many through his performance on Peter Gabriel's hit "In Your Eyes."

Another continent-spanning culture and music, that of the Gypsies, has performers and unique styles in Eastern and Western Europe, Asia, and the Middle East. The origins of flamenco, one of the most famous forms of Gypsy music, are unclear, but its 4 or 8 beat measures, exotic to the Western ear, hint at Arabic or Middle Eastern sources. With its blend of song, dance, guitar, and rhythmic handclaps, finger snaps, and heel stomps, flamenco is one of the best-known fusions of world music, and one of the most popular as represented by the Gipsy Kings.



Flamenco is one of hundreds of styles that fall under the enormous umbrella that is Latin music. Many of the most popular styles of world music have their roots in Latin and Hispanic cultures-Mexican mariachi, with its mellifluous trumpets; Afro-Cuban jazz; Puerto Rican salsa; the Brazilian tropicalia of Cataeno Veloso and Joa Gilberto.

Latin music steams with passion and fire, and the dance floor is never far away. The idols of Latin pop-Ruben Blades, Julio Iglesias, Gloria Estefan, Juan Luis Guerra, Selena-typify the twin streams of Latin music: upbeat dance music such as rhumbas, congas, meringues, and the salsa variants, and soul-stirring ballads of amor.

Celtic music refers to the music of Ireland, Scotland, Brittany, Wales, Cornwall, and the Isle of Man. Marked by a profusion of small string instruments (fiddle, harp), reeds (whistles, pipes), percussion (drums, spoons), and the occasional concertina. Except for the harp, portability seems to be key in a country with a long and colorful heritage of travelling minstrels. The great range of emotions in Celtic melodies-wistful ballads, joyous reels, patriotic airs and mournful dirges, as well as the epic and mystical lyrics-hearkens back to an ancient oral storytelling culture.

Traditional Celtic music is a strong presence in modern English and American folk music, and is a popular form of world music in its own right, as shown by the popularity of modern Celtic artist Mary Black in her own country, where she outsells fellow natives U2. Riverdance introduced Celtic instruments, Irish step-dancing, and Gaelic lyrics to audiences world-wide, and Celtic music can be heard in pubs, on movie soundtracks and radio, from Argentina to Australia, in the music of the Chieftains, Sinead O'Connor, and Enya.

Other European musics that have enjoyed worldwide appeal include klezmer, a traditional Jewish music with roots in Eastern Europe and New York City's immigrant Yiddish-speaking communities, where artists like Gloria Feidman, the Klezmatics and the New Orleans Klezmer All-Stars demonstrate its versatility; French cabaret pop, as intoned by Edith Piaf and Serge Gainsbourg as well as modernists Paris Combo; and the folk-pop fusions of Finland's Värttinä and traditional Bulgarian folksinging, with its otherworldly female, close-interval choruses.

The Asian /Pacific region encompasses another rich and diverse selection of cultures, each with many musical traditions, from Tuvan throat singing of Mongolia to the eerie, mystical sound of Australian Aboriginal music. The music of the Indian subcontinent is familiar to Western audiences through the recordings of Ravi Shankaar, the Hindustani classical sitar player, and Nusrat Fateh Ali Khan, the Pakistani Qawwali star with the melismatic voice.

But there is much more music of the East now influencing world music, from the melodramatic music of Bollywood, India's huge film industry, to the backbeats of Bhangra and Anokha, as popularized by electronica artists like Talvin Singh. By contrast, most Chinese and Japanese musical exports carry on ancient traditions. China's Peking Opera, for example, has received recent acclaim as New Yorkers discover lengthy ancients like The Peony Pavilion.

As the peoples of Asia migrated across the Pacific, they carried their music with them, where it fused with native forms into the Polynesian music of Bali, Indonesia, and Tahiti. Navigating by the rhythm of paddling and lyrics that located constellations, these peoples left their imprint on landfalls across the Pacific to the Americas, from Hawaiian slack-key guitar to the Andean pipe flutes of South America.

And in doing so, they set the pattern for world music of our century-a mix of cultures and influences, always in motion and ever adapting.

about us | advertise | help | feedback | privacy policy

© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

Email Address

Password

Launch Player!

Not a member yet?
Create your free account!

NetRadio's Privacy Policy

downloads
media players

essential
collections

- Traditional Folk
- Transitional Folk
- Folk/Rock
- Modern Folk

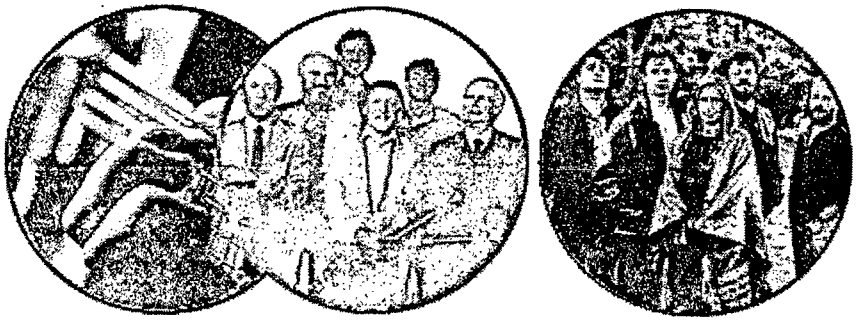
listen to /folk /

celtic

Traditional and modern music from the Celtic homelands.
key artists: Enya, Altan, The Chieftains, Loreena McKinnett

To start listening, click the button below:

You can always buy the music you're listening to by clicking on "buy now" under the track information. If you are a first time user, visit the Help area for more information.



FEATURE

by Jane Fredericksen

For all her breathy affectations, Maire Brennan's voice on her latest album, Whisper to the Wild Water, can be powerfully direct. On her second album as a solo artist, Brennan's voice addresses spirituality in a way almost more connected to Gospel music than the New Age music she has been connected to as a member of the modern Celtic group Clannad.

Read more

related channels

- Acoustic
- Bluegrass
- Earthbeat
- Folk
- Hearts of Space
- Music Industry News
- New Age
- Showtunes
- Soundtracks
- Starstreams

comments
from our listeners

I've never listened to country music much before (I like 70's rock and funk)but somehow have gotten completely

Read more
Features archive

FROM THE PROGRAMMER

by Jane Fredericksen

Tradition and innovation are key components of Celtic music. The last decade featured a wealth of young bands who honor the past, while pushing the edge to innovative new extremes, incorporating global influences and futuristic stylistic vibrancy.

Here's a look at some of today's trendsetters and their latest CDs:

Afro Celt Sound System, *Volume 3: Further In Time*: A cross-cultural romp through Rock, New Age, Hip-Hop and Electronica, yet deeply Celtic. This CD mines the guest vocal talent of Peter Gabriel and Robert Plant, as well as showcasing the group's own vocalists, Iarla O'Lionaird and Demba Barry.

Gaelic Storm, *Tree*: This California-based band attacks both traditional favorites and originals with energy and enthusiasm. A taste of their fire was heard in the blockbuster film *Titanic* -- they're the wild party band in the third-class passenger section.

Lunasa, *Merry Sisters of Fate*: One of Ireland's most popular traditional instrumental bands. This album continues their well-deserved reputation for intricate musical interplay.

Old Blind Dogs, *Fit?*: Tradition rests well but certainly doesn't sleep in the hands of this lively Scottish band. OBD has a knack for making everything old new again, in a balanced platter of vocals and instrumentals.

Shooglenifty, *Solar Shears*: Traditional Celtic instruments and modern technology merge in a quirky, intriguing blend of Electroniceltia.

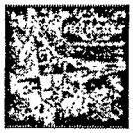
These are some of my recent favorites, as well as some of yours, judging from the emails you've sent

have gotten completely wrapped up in your '60s country channel. I love it. This makes my work day SOOO much better!

Leanne T., Roswell, GA
Channel: 60s country

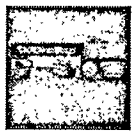
in. Stay tuned for more great music to come!

PROGRAMMER'S PICKS



Volume 3: Further in Time,
Afro Celt Sound System

BUY NOW amazon.com



Fit?,
Old Blind Dogs

BUY NOW amazon.com

The Merry Sisters of Fate,
Lunasa

BUY NOW amazon.com

Tree,
Gaelic Storm

BUY NOW amazon.com

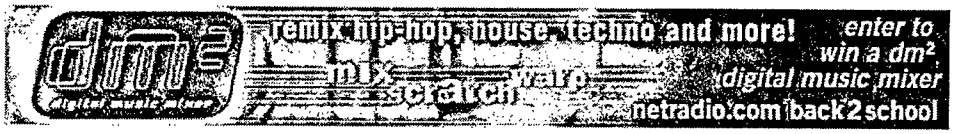
Solar Shears,
Shooglenifty

BUY NOW amazon.com

25 Years of Celtic Music,
Various Artists

BUY NOW amazon.com

about us | advertise | help | feedback | privacy policy



© 2001 NetRadio Corporation. All rights reserved. Reproduction of material from any NetRadio.com page without written permission is strictly prohibited. NetRadio.com is an officially licensed ASCAP, BMI and SESAC site.
Album cover graphics © 1948-2001 Muze Inc. For personal non-commercial use only. All rights reserved. TERMS OF USE

FROM Dow Jones Interactive®

Citation Search Result Database
3/9/01 PUBBRPT (No Page) ALLNEWSPLUS
3/9/01 Pub. Broadcasting Rep. (Pg. Unavail. Online)
2001 WL 10132907
(Publication page references are not available for this document.)

Public Broadcasting Report
(c) Copyright 2001 Warren Communications News, Inc. All Rights Reserved.

Friday, March 9, 2001

Volume 23; Issue 5

PBS AND NPR HEADS SAY THEY ARE REASSESSING WEB OPERATION

PBS and **NPR** are reassessing their online operations, heads of 2 public broadcasting organizations told **PBS-NPR** Online Summit in Washington Feb. 26. "I am reassessing it every day to make it stronger" because it's increasingly significant delivery system for content, which is "the business we are in," PBS Pres. Pat Mitchell said. Regardless of troubles commercial broadcasts of entertainment companies had on their Web sites, **NPR** is reassessing its online operations so it and its member stations can present high quality content easily on their Web sites, Pres. Kevin **Klose** said. "We believe there's an enormous audience out there," he said, and as nonprofit enterprise, **NPR** is facing issue of exploring stakes to offer content to new kinds of audiences. Mitchell and **Klose** were responding to question by moderator Scott Simon, host of Weekend Edition, on strategy of public broadcasting organizations in light of big corporations' reassessing their commitments to Web.

Saying "incredibly good" content site existed when she arrived at PBS, Mitchell said she wanted to strengthen it as extension of, and added value to, what was being produced for TV. Since 40% of audience already is involved in multicasting (using TV and Internet at same time), there clearly is need for added value for Internet-delivered content, Mitchell said, and that's why alliance between **NPR** and PBS in which each added something to users' Internet experience "is our ultimate goal." **Klose** said what was being done now were early experiments because nobody was sure how to figure out revenue stream or revenue model. "We are fortunate that we're a nonprofit, public service organization," he said, and **NPR** can maintain core of its values, which is to present high-quality news, information and cultural programming.

CPB Pres. Robert Coonrad said that rather than focus on technology, public broadcasters must concentrate on creating "superb content" for new media as in TV and radio. **Klose** said it made tremendous sense for PBS and **NPR** to swap content because 75 of more than 300 **NPR** member stations are dual licensees of both TV and radio.

Asked about trends of projects starting out on Web and migrating to radio and TV, Coonrod said CPB was encouraging such type of development to see what Web could do to attract audiences to main media. To test that concept, CPB

Copr. (C) West 2001 No Claim to Orig. U.S. Govt. Works

Westlaw. Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved. DOW JONES Westlaw.

had announced "digital incubator" project under which it provided grants to producers. He said one of notions was that one premiered something on Web and aggregated it to make it into TV show, and it seemed to be kind of technique that producers of radio and TV shows needed to think about.

Replying to question on public broadcasters' commitment to emerging noncommercial distribution channels, **Klose** said **NPR's** revenue model for Sirius Satellite radio was "related to underwriting credits in these streams as the audience builds." **NPR** has held precisely to model that exists for terrestrial broadcasting, he said, and subscription issues are those that have to be handled by Sirius. He said **NPR** was seeking to partner with N.Y. Times to create program on technology. **NPR** spokeswoman later declined to provide details, saying only that idea of collaborating with Times "has been discussed." **Klose** said **NPR** was integrating its online intellectual reach into its news operations by having online editor for each news desk. He said goal was to"create one, play everywhere," to create one piece of product that could be cross-referenced, cross-promoted and cross-branded across public broadcasting stage.

NPR is seeking to increase total audience across all distribution platforms by 10% in next 3 years, Exec. Vp **Ken Stern** said at general session. Outlining strategic goals for coming years, he said organization first would strengthen on-air programing. Despite change in technologies, radio on air will be core of service for years to come, he said. As for serving audience on new platforms, he said NPR2 would provide 2 satellite radio channels aggregating best of public radio, and "we anticipate a younger audience there." He said **NPR** also would create stronger Internet offerings in partnership with member stations because organization saw increased opportunity for service on air, online and with new technology for satellite radio. Other goals include: (1) Strengthening member station partnerships. (2) Developing internal resources. (3) Enhancing revenues. (4) Building public awareness across platforms.

Outlining NPR's Internet strategy, NPR Online Vp M.J. Bear said organization wanted to reflect same standards online as it did on air. She said NPR also planned to: (1) Create unique multimedia programming. (2) Increase Internet support to member stations and make content more available and usable. (3) Integrate local and national programming. No other broadcast network is doing it now and it was one way for NPR to advance, Bear said. Noting that "our dot-com colleagues are suffering now," Bear said it was "incredible" time for public broadcasters online because "we know how to do a lot with a little." She said goal was to increase NPR online audience to 1.2 million by end of year and 4.7 million by FY 2004.

---- INDEX REFERENCES ----

NEWS SUBJECT: English language content; Arts and Entertainment; Political and General News; Arts & Entertainment; Television and Radio; Internet: World Wide Web; Internet; Corporate and Industrial News (ENGL GENT GCAT ART GTVRAD IWWW NET CCAT)

Copr. (C) West 2001 No Claim to Orig. U.S. Govt. Works

Westlaw. Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved. DOWJONES

3/9/01 PUBBRPT (No Page)
(Publication page references are not available for this document.)

MARKET SECTOR: Consumer Cyclical (CYC)
INDUSTRY: All Entertainment & Leisure; Film, Television & Music; Broadcasting; Media; Media: Television Broadcasting (ENT MOV BRD MED IATU)

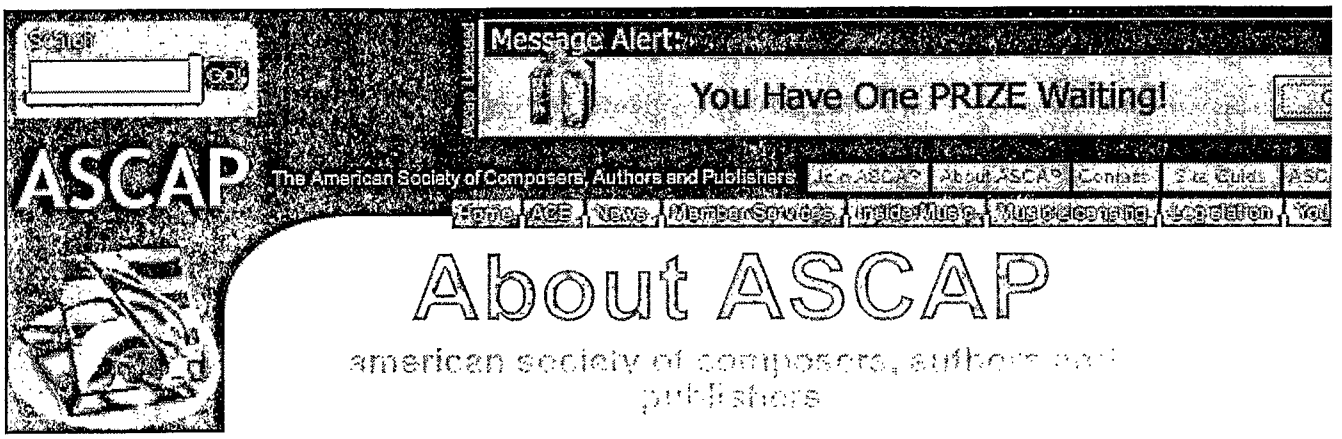
PRODUCT: Internet; Leisure; Media (DIT DLE DME)

Word Count: 831
3/9/01 PUBBRPT (No Page)
END OF DOCUMENT

Copr. (C) West 2001 No Claim to Orig. U.S. Govt. Works

Westlaw. Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved. DOWJONES

RIAA Exhibit No. 217 DP-X



About ASCAP

american society of composers, authors and publishers

Welcome

Who Is ASCAP?

What Is ASCAP?

THE ASCAP ADVANTAGE

How You Join

How You Get Paid [opens in new window]

Collecting Foreign Royalties

The ASCAP License

ASCAP Career Development
- Workshops
- Showcases
- Awards & Support
- ASCAPLU$ Awards (Standard and Popular) [opens new window]
- ASCAP Calendar

Services & Benefits

Useful Information for Members

Estate and Trust Planning Issues [opens in new window]

ASCAP Articles of Association (pdf)

Board of Directors

The ASCAP Advantage

ASCAP values your opinions.

ASCAP is the only performing rights organization in the U.S. created and controlled by composers, lyricists, songwriters and music publishers. Our Board of Directors is made up entirely of writers and publishers elected from and by the membership every two years. Writer members elect 12 writers to sit on the Board, and publisher members elect 12 publishers. This Board elects a President and Chairman, who has traditionally been a writer. The ASCAP Board knows the needs of the members first-hand and they represent no other special interest group. The Board has a clear agenda -- to provide the fairest and highest level of payments, the best service and the best copyright protection for the membership. To achieve these objectives, the Board relies on an exceptional staff of experienced business professionals to manage ASCAP's operations.

ASCAP collects significantly more money from music users for performing rights than any other organization in the world. Every penny we collect, less operating costs, is distributed to our members. Approximately 84 cents of each dollar we collect goes right back to our members in royalties. That is the highest distribution ratio in the U.S.

ASCAP pays faster. Royalty checks go out eight times a year; four distributions cover performances in the United States and four cover foreign performances. ASCAP has accelerated domestic royalty payments, with writers and publishers receiving full payment approximately six months after a performance quarter. Our four foreign distributions, in February, May, August, and November, also ensure that our members receive foreign royalties as quickly as possible.

ASCAP leads in securing rights for our members by actively licensing more music users and negotiating the best

ASCAP Offices
ASCAP Personnel
ASCAP Jobline

actively licensing more music users and negotiating the best license fees.

ASCAP is the first U.S. performing rights organization to distribute royalties for performances on the Internet and has been a leader in licensing web sites and new media. We have developed strategic alliances with leading technology companies to maintain our leadership in copyright protection in the digital world.

ASCAP has developed many technological innovations that have set international standards for performance identification. ASCAP is also a founding partner of the International Music Joint Venture (IMJV) which is building a shared service center for global music rights processing. The IMJV will save our members money and will improve accuracy in the documentation and identification of performances.

ASCAP's distribution system is based on fairness and ope similar performances are similarly credited. The newest membe on the same level as the most established member. Our memb paid based on performances, not who they are. ASCAP memb how they are being paid. Royalties are determined objectively o entire copyright life and not by discretionary voluntary payment term special deals or management favoritism. Payment change approved by the Board of Directors, elected by and from our m No changes in royalty rates are made arbitrarily without notice t membership as they are at other performing rights organization

ASCAP's books are open to all. ASCAP is the only U.S. perfo rights organization to provide full financial disclosure to our me the public.

ASCAP members have a voice. ASCAP is the only performin organization to hold annual membership meetings (in New York Angeles and Nashville), during which members have the opport learn about our operation from the president and staff, to ask q and to voice concerns. ASCAP members also participate in the the Society by serving on a variety of committees, such as the and Concert Committee; Latin Music Council; Commercial, Pro Announcement (CPA) Advisory Committee; East Coast, West Southern Region Advisory Committees; the Board of Review; a

ASCAP fights harder for your rights than any other group. and has always been the pioneer in fighting for the rights of mu in Congress and in the courts. We lead efforts to protect our me rights by vigorously opposing legislation that is harmful to creat initiating changes to the Copyright Law that will benefit creators always keep you informed of legislative matters that affect you, encourage your involvement in our efforts.

ASCAP helps new writers. We offer a wide variety of songwrit workshops, showcase programs, scholarships, grants and awar writers in the early stages of their careers. (See Career Develo details.)

ASCAP is the only U.S. performing rights organization to o Member Card with a full-range of benefits created for the w music professional. These include MusicPro Insurance offerin life, longterm care,
instrument, equipment, studio and tour liability insurance; a cre an investment projgram; Guitar Center benefits; discounts on m instruments and accessories, CD manufacturing, promotional merchandise, and
much more. (See Member Benefits for details.)

Top to bottom: Red Truck, Mary J. Blige, Eddie Kilgallon and Bud Lee. Donn James McBride, Monica, Mike Reid

Copyright and Terms of Use | Privacy Policy | | info@ascap.com
Reproduction or use of editorial or pictorial content in any manner is strictly prohibited without express written permission from ASCAP.
© 2001 ASCAP

RIAA 218 DPX

Music Rights Survey 2000

This survey is critical to negotiations to obtain music rights for webcasting. Please take a few moments to complete the following survey. Thank you for your participation!

THIS SURVEY IS PRIVILEGED AND CONFIDENTIAL

Station call letters _____

Web Background

1. How many Web sites does your station operate? _____

2. Please list the Web address of each of site your station operates:

   _____
   _____
   _____
   _____

3. Who operates/hosts your site(s)?

   _____

4. Does your Web site host/operator have a license to stream audio? Yes No Don't Know

5. Do any of your Web sites currently include audio content? Yes No

6. Do you stream on-air broadcast content at the same time as such material is broadcast over the air by your station? Yes No

7. Do you have audio available for programs that have aired in the past? Yes No

8. Do you provide audio on your Web site that has not been broadcast on your station? Yes No

9. Does your site permit downloading of audio material? Yes No

10. Do you provide content to aggregators (i.e, Public Interactive, Broadcast.com) Yes No

11. If yes to 10, please indicate to which aggregator(s) you provide content:

    _____

12. If you're not involved with aggregators presently, do you anticipate that you will enter into redistribution activities within 2 years? Yes No

13. What audio format(s) do you use to stream audio? (Circle all that apply)
    a. Real Media
    b. Windows Media
    c. Apple QuickTime
    d. Liquid Audio
    e. MPEG3
    f. Other _____
    g. None

14. What is the maximum number of people that may stream audio at the same time from your Web site? (i.e., maximum number of simultaneous connections) _____

15. What is the average number of people that stream audio at the same time from your Web site?
_____

16. In the next 2 years, how many simultaneous audio connections do you anticipate your Web site will be capable of handling? _____

Web Programming Mix and Audience Size

17. How many **hours per week** of the following content does your station provide or intend to provide ***at the same time as it is broadcast (live streaming)***?

	Currently Provide Hours/Week	Intend to Provide in 2 Years: Hours/Week
a. newscasts/news/public affairs/talk	_____	_____
b. drama/spoken word/story telling	_____	_____
c. jazz music	_____	_____
d. classical music	_____	_____
e. popular/rock music	_____	_____
f. other music	_____	_____
g. other programming (non-music)	_____	_____

18. Please indicate if your Web site has or you plan to have ***archived audio (on-demand streaming) of programs that have aired on your station***. If you do currently provide archived audio, please indicate total minutes available if known.

	Total Minutes of audio available (Just check if provide but don't know time)	Check if intend to provide in 2 Years
a. newscasts/news/public affairs/talk	_____	_____
b. drama/spoken word/story telling	_____	_____
c. jazz music	_____	_____
d. classical music	_____	_____
e. popular/rock music	_____	_____
f. other music	_____	_____
g. other programming (non-music)	_____	_____

19. Please indicate if you carry Web programming that ***has been created for broadcast but never been aired on your station***.

	Total Minutes of audio available (Just check if provide but don't know time)	Check if intend to provide in 2 Years
a. newscasts/news/public affairs/talk	_____	_____
b. drama/spoken word/story telling	_____	_____
c. jazz music	_____	_____
d. classical music	_____	_____
e. popular/rock music	_____	_____
f. other music	_____	_____
g. other programming (non-music)	_____	_____

20. Please indicate if your Web site ***contains original programming produced expressly for the Web*** for the following type(s).

	Total Minutes of audio available (Just check if provide but don't know time)	Check if intend to provide in 2 Years
a. newscasts/news/public affairs/talk	_____	_____
b. drama/spoken word/story telling	_____	_____
c. jazz music	_____	_____
d. classical music	_____	_____
e. popular/rock music	_____	_____
f. other music	_____	_____
g. other programming (non-music)	_____	_____

21. Does your station have a reliable way to measure unique visitors to your site? Yes No

22. If yes to 21, what resource(s) do you use to measure visitors?

_____

22. How many visitors do you have to your site each month? _____ Please check if unique visitors ☐

24. Does your station have a reliable way to measure listening to audio on your Web site? Yes No

25. If yes to 24, what resource(s) do you use to measure this listening?

_____

26. Please indicate the total number of listeners and time spent listening to audio on your station's Web site(s).

	Total number of listeners/ month	Listeners per month to live streaming	Listeners per month to archived streams	Total Time Spent Listening Overall	Total Time spent listening to live streaming	Total Time spent listening to archived streams
a. newscasts/news/public affairs/talk						
b. drama/spoken word/story telling						
c. jazz music						
d. classical music						
e. popular/rock music						
f. other music						
g. other programming (non-music)						
h. TOTAL time listening to any audio (if specifics not known)						

Other Web Activities

27. Please check if your station engages in or intends to engage in any of the following activities on its Web site(s):

	Check if current activity	Check if intend to provide in 2 years
a. member acquisition	_____	_____
b. member renewal	_____	_____
c. sale of premiums (excluding CDs)	_____	_____
d. sale of CDs	_____	_____
e. sale of tapes & transcripts	_____	_____
f. on-line chats	_____	_____
g. underwriting credits	_____	_____
h. banners	_____	_____
i. other sponsorship	_____	_____
j. community activity information	_____	_____
k. program schedule	_____	_____
l. additional information to support on-air stories or programming	_____	_____
m. other, please indicate _____	_____	_____
n. Do not provide any of these activities	_____	_____

28. Please check the top three most important Web activities to you as a station and the top three activities for visitors to your site.

	Check top 3 activities for station	Check top 3 activities for visitors to site
a. member acquisition	_____	_____
b. member renewal	_____	_____
c. sale of premiums (excluding CDs)	_____	_____
d. sale of CDs	_____	_____
e. sale of tapes & transcripts	_____	_____
f. music programming (audio)	_____	_____
g. news programming (audio)	_____	_____
h. spoken word programming (audio)	_____	_____
i. on-line chats	_____	_____
j. underwriting credits	_____	_____
k. banners	_____	_____
l. other sponsorship	_____	_____
m. community activity information	_____	_____
n. program schedule	_____	_____
o. additional information to support on-air stories or programming	_____	_____
p. other, please indicate _____	_____	_____

Financial Data

29. Does your station have a reliable way to measure expenses related to Web site operations? Yes No

30. What are your **bandwidth** acquisition expenses or anticipated expenses for the following time periods?

FY 2000 _____ Don't know
FY 2001 _____ Don't know
FY 2002 _____ Don't know

31. What are your **hardware** expenses or anticipated expenses for the following time periods?
    FY 2000 _____ Don't know
    FY 2001 _____ Don't know
    FY 2002 _____ Don't know

32. What are your **software** expenses or anticipated expenses for the following time periods?
    FY 2000 _____ Don't know
    FY 2001 _____ Don't know
    FY 2002 _____ Don't know

33. What are your **Internet content** expenses or anticipated expenses for the following time periods?
    FY 2000 _____ Don't know
    FY 2001 _____ Don't know
    FY 2002 _____ Don't know

34. What are your **other Internet** expenses or anticipated expenses for the following time periods?
    FY 2000 _____ Don't know
    FY 2001 _____ Don't know
    FY 2002 _____ Don't know

35. If you have 'other Internet' expenses, please describe below what types of purchases or services give rise to these expenses?
    _____

36. Does your station generate revenue from your Web site(s) Yes No

37. If yes to 36,
    a. What is your annual Web income from membership activities? _____
    b. What is your annual Web income from non-membership/other activities? _____

    c. Does your station's Web site have any net income? Yes No

RIAA Exhibit No. 219 DP-X

ID	Station	q5	q6	q15	q16	q23	q23a	q24
57	KTOO	Yes	No	na	50	unknown		No
59	WNPR	Yes	Yes	too new to know	do not know yet - too new	too new		Yes
60	WXPR	Yes	Yes	unknown	120	1,700		No
61	KCUR-FM	Yes	No		HUNDREDS	UNKNOWN		No
62	KCUR-FM	Yes	No		HUNDREDS	UNKNOWN		No
64	KCSM	Yes	Yes	200 -real audio 400 - chaincast	2000			Yes
67	WUIS-WIPA	Yes	No	N/A	N/A	1230		No
69	KOSU-FM	Yes	Yes	60	one	22,000	Unique visitors	Yes
70	WGBH FM	Yes	Yes	20	500	83,800	Unique visitors	No
71	KUNV	Yes	Yes	1	0			No
72	KUNI/KHKE	Yes	Yes	don't know	500	unknown		No
73	KAXE	Yes	Yes	25	300	197,460		No
75	KUOM-AM	Yes	Yes	60	200	6700		No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
76	KPBX and KSFC	Yes	Yes	don't know	50????	don't know		No
77	knpr	Yes	No	1	75	6505		No
78	KCCU	Yes	Yes	15 to 20	150	300	Unique visitors	No
79	WMNR	Yes	Yes	30	60	1243		No
80	wbgo	Yes	Yes	750	1000	not sure		No
82	wslu	Yes	No		1,000			No
84	WYSO	Yes	Yes	n/a	n/a	n/a (month just began and Servlet stats will not g		Yes
85	WIUM/WIUW	Yes	Yes					Yes
87	WVIK	Yes	Yes	2	200			No
88	WRVO	Yes	Yes	50	100	27,000	Unique visitors	No
89	WUFT-FM	Yes	Yes	10	up to Stream Audio	Just started, haven't been on a month		No
91	WKAR AM-FM	Yes	Yes	120	500	5000	Unique visitors	No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
92	WFUV	Yes	Yes	?? 1,400 per day, weekday average in recent report	see # 14!			No
93	KUNM	Yes	Yes	don't know	500	no counter		No
94	WCLK-FM	Yes	Yes	N/A	N/A			Yes
95	WETS-FM	Yes	Yes	?	virtually unlimited	150	Unique visitors	No
99	WYSU-FM	Yes	Yes	10	100	@2000		No
100	WICN	Yes	Yes	100	unlimited	7500	Unique visitors	Yes
103	wnin	Yes	Yes					No
106	WFYI	Yes	No	5	3	7500	Unique visitors	No
108	WUKY	Yes	Yes	5	100	105,956		Yes
109	WEVO	Yes	Yes	25	2000	30,000	Unique visitors	No
112	NDPR	Yes	No	1	20	1000		No
113	NDPR	Yes	No	1	20	1000		No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
114	WXXI-AM/FM	Yes	Yes			don't know	Unique visitors	Yes
116	WPSU	Yes	Yes	50	200+	4500		No
117	KRCC	Yes	Yes	unknown	unlimited	5500		Yes
119	WUCF	Yes	Yes	100+	500	1000+		Yes
123	wamc	Yes	Yes	unknown	unknown			No
124	WBAA AM/FM	Yes	Yes					No
126	WVPN	Yes	No	don't know	don't know			
128	WVPN	Yes	No	don't know	don't know	25,000		No
130	klcc	Yes	No	don't know	100	5000		No
132	WKNO	Yes	Yes					No
133	kuaf	Yes	Yes	?	1,000?	2,500		No
134	WAER	Yes	Yes			1900	Unique visitors	
135	wuot	Yes	Yes	30	200	4,200		No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
138	WSHU	Yes	No					No
139	kcrw	Yes	Yes	450	1000	150,000	Unique visitors	Yes
143	WAMU	Yes	Yes	200	1000	20000		No
144		Yes	Yes	75	1000+			Yes
145		Yes	Yes	75	1000+			Yes
146	WSIE	Yes	Yes					No
147	KVMR-FM	Yes	Yes	unknown	100+	unknown		No
148	KBYU-FM	Yes	Yes	80	1100	4251	Unique visitors	No
149		Yes	Yes	10	100	200		No
150	kstx-fm	Yes	Yes	don't know	don't know	2000	Unique visitors	No
151	wkgc-fm	Yes	Yes	10	100	200		No
152	KCSN-FM	Yes	Yes	10	1000	22000	Unique visitors	Yes
153	WOUB	Yes	Yes	30	500+	83,000		No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
154	WFIT	Yes	Yes	don't know	don't know	don't know		
155	wcpn	Yes	Yes	don't know	unknown	16,000		No
157	WITF	Yes	Yes	125	much more	500,000		Yes
158	KAZU-FM	Yes	Yes	20 to 25	100	120000		No
160	KSER-FM	Yes	Yes	10	100			No
161	WRTU-FM	Yes	Yes					No
165	KCSC-FM	Yes	Yes					No
166	WUSM-FM	Yes	Yes	10-15	unknown	3000	Unique visitors	Yes
170	KUSP	Yes	Yes	twenty five	possibly unlimited	@6,500	Unique visitors	Yes
172	KUOW	Yes	Yes	500-600	1000			
174	KUOW	Yes	Yes	500-600	1000	14000-20000		Yes
179	WGUC	Yes	Yes	80 - Real Media	1000	11,500 - average		No
180	WSUI	Yes	Yes		200			No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
181	WDNA-FM	Yes	Yes	1	1	1530	Unique visitors	No
183	KCCK-FM	Yes	Yes	20	80-100	2100	Unique visitors	No
184	Northwest Public Radio	Yes	Yes	25	750-1000	6,541		Yes
185	WWFM-FM	Yes	Yes	unknown	unknown	250	Unique visitors	Yes
186	KUWR	Yes	Yes	about 30	?	about 1,500		No
187	WMUK	Yes	Yes	4	don't know	838	Unique visitors	No
188	KPLU	Yes	Yes	250 average 1280 peak	unknown	45,000	Unique visitors	Yes
189	WPR (WHA/WERN)	Yes	Yes	100	500	83,000		No
191	Minnesota Public Radio	Yes	Yes	dozens	unknown	thousands	Unique visitors	No
192	WDUQ	Yes	Yes	38	100	25,000		Yes
193	WBST, Muncie, IN (Sorry it's not more	Yes	Yes	10-15	300 to 400 (entire university capacity)			No
195	KUSC	Yes	Yes	50	500			No
196	KCLU	Yes	Yes	30	100	150,000		Yes

ID	Station	q5	q6	q15	q16	q23	q23a	q24
199	KJZZ-FM	Yes	No	don't know	100			No
200	WNYC	Yes	Yes	126	436	123,625	Unique visitors	Yes
205	WEKU-FM/WEKH	Yes	Yes	Unknown	Unknown			No
206	WEMU	Yes	Yes	don't know	185	DON'T KNOW		No
210	KLON-FM	Yes	Yes	??				
211	KLON-fm	Yes	Yes	?	?	?		No
212	KSOR	Yes	Yes	no idea	we do this through Public Interactive	averaging 25,000 visits per month	Unique visitors	No
213	kbsu	Yes	Yes	25	100			No
214	WKSU	Yes	Yes	Currently approx 300	unknown			No
215	WXPN	Yes	Yes	100	1200	48000	Unique visitors	Yes
216	WXPN	Yes	Yes	100	1200	48000	Unique visitors	Yes
219	WCNY	Yes	Yes	30 - 40	unlimited	approx. 7000		No
221		Yes	Yes	don't know	don't know	3613 in October	Unique visitors	No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
223	WBFO	Yes	Yes	don't know	don't know	don't know		No
226	WNPR	Yes	Yes	30	120+	too new to tell		Yes
227	WDET	Yes	Yes	25-30	2000+	20,000+		No
228	woi...AM, FM and KTPR	Yes	Yes	Now...about 20 throughout the day	Don't know	2500 so far	Unique visitors	Yes
229	WAER	Yes	No		don't know	don't know		No
230	WAER	Yes	No		don't know	don't know		No
233	WETA	Yes	Yes	100 to 200	Same	60000	Unique visitors	No
234	KCCK-FM	Yes	Yes	don't know	80			No
235	WILL	Yes	Yes	50	two	8000	Unique visitors	No
236	WMPN-FM	Yes	No					No
238	kufm	Yes	Yes	5	100			Yes
239	vpr	Yes	Yes	8	no maximum			Yes
241	WFCR	Yes	Yes	Don't know	Don't know	33,000		No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
242	WBST	Yes	Yes	10-15	300-400			No
243	WRTE FM	Yes	No	don't know	10 or more	30,000		No
244	WMMT	Yes	Yes	10-20	unknown	1100	Unique visitors	No
245	KSER-FM	Yes	Yes	1	don't know58			No
248	KVMR-FM	Yes	Yes	Don't know	Don't know	4,000		No
251	WMMT	Yes	Yes	Guess: 5-10 maximum	Guess: 25-100	unknown		No
256	WMNF	Yes						
257	WMNF	Yes	Yes	20-30	50	8000+ audio requests		No
258	KMUD	Yes	Yes	not sure, <30?	>60	~3000		No
259	WOJB-FM	Yes	Yes					No
262	KBCS	Yes	Yes	20	100	200		No
264	WMPG	Yes	Yes	Don't know	Depends on technology advances.			No
265	WMPG	Yes	Yes	Don't know	Depends on technology advances.			No

ID	Station	q5	q6	q15	q16	q23	q23a	q24
266	WORT-FM	Yes	No	0	100?			No
267	KUGS	Yes	Yes	unsure -no counter on site -3 to 5 ?	undetermined			No
268	KNBA	Yes	Yes	5	unlimited	Approximately 5000		Yes
269	KAOS	Yes	Yes					
270	KZYX	Yes	Yes	Don't know	unsure	Don't know		No
272	WUMB-FM	Yes	Yes	34 on average, but 179 peak concurrent	unlimited	15,000	Unique visitors	No

RIAA Exhibit No. 220 DP-X

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

GENERAL COUNSEL
OF COPYRIGHT
JUL 22 1998
RECEIVED

In the Matter of	)	
	)	
ADJUSTMENT OF THE RATES	)	Docket No. 96-6 CARP-NCBRA
FOR NONCOMMERCIAL	)	
EDUCATION BROADCASTING	)	
COMPULSORY LICENSE	)	

REPORT OF THE PANEL

STATEMENT OF THE CASE
ISSUE
DISCUSSION AND FINDINGS
DETERMINATION AND ASSESSMENT OF COSTS
CERTIFICATION BY CHAIRPERSON

STATEMENT OF THE CASE

This proceeding was commenced and conducted pursuant to the compulsory arbitration provisions of Section 118 of the Copyright Act, 17 U.S.C. § 118 (1994); Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq. (1994 & Supp. II 1996); and the Copyright Arbitration Royalty Panel Rules and Procedures, 37 CFR § 251 et seq. (1997). It is the task of this Copyright Arbitration Royalty Panel ("Panel") to set the statutory compulsory license fees and terms for the Public Broadcasters' use of music[1] in the repertories of the American Society of Composers,

[1] More precisely, for the Public Broadcasters' public performance of programming containing published nondramatic musical works contained in the repertories of ASCAP and BMI. 17 U.S.C. § 118(d). As discussed *infra*, "Public Broadcasters" include those "public broadcasting entities" that have not voluntarily settled with ASCAP and BMI on a schedule of license rates and terms and that are represented in this proceeding. 17 U.S.C. § 118(b)(3).

Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), for the five-year period January 1, 1998 through December 31, 2002.[2] The Copyright Office of the Library of Congress ("the Copyright Office") initiated the process for setting the Section 118 license fees and terms by publishing a notice[3] announcing a negotiation period during which interested entities could negotiate voluntary license agreements that are "given effect in lieu of any determination by the Librarian of Congress". 17 U.S.C. 118(b)(2). The notice also established a schedule for filing notices of intent to participate, filing of direct cases, and prehearing discovery.[4] ASCAP, BMI, the Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and other entities, filed notices of intent to participate. *See* 63 FR 2142 (January 14, 1998). Upon request of certain entities, the Copyright Office[5] vacated the schedule set in its Order of October 18, 1996, to allow

---

[2] 17 U.S.C. § 801(b)(1) and § 118(c); Stipulation of the Parties dated March 13, 1998 (parties waived right to raise issue of retroactive rulemaking; "... rates and terms to be effective retroactively to January 1, 1998, even though actually determined thereafter ..."); Transcript, pages 347-48. Hereinafter, references to the transcript record shall be cited as "*Tr.*" followed by the page number. References to written direct testimony shall be cited as "*W.D. of*" followed by the last name of the witness and the page number. References to written rebuttal testimony shall be cited as "*W.R. of*" followed by the last name of the witness and the page number. References to exhibits submitted with the direct cases shall be cited as "*Direct Exh.*" preceded by the party that submitted the exhibit and followed by the exhibit number. References to exhibits introduced during the hearing shall be cited as "*Exh.*" preceded by the party that introduced the exhibit and followed by the exhibit number. References to proposed findings of fact and conclusions of law shall be cited as "*PFFCL*" preceded by the party that submitted same and followed by the page number.

[3] 61 FR 54458 (October 18,1996).

[4] *Id.*

[5] Title 17 U.S.C. § 801 (c) provides that "[t]he Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel."

additional time for negotiation of voluntary agreements or joint proposals pursuant to 17 U.S.C. § 118(b)(1),(2). 63 FR 2142 at 2143. However, in July 1997, the Copyright Office was advised that negotiations had been unproductive and that it would be necessary to convene a panel. *Id.* Accordingly, by Order dated July 30, 1997, the Copyright Office set a new prehearing discovery schedule and hearing date. Subsequently, several interested entities filed joint proposals and notices of settlement. The only license rates and terms not addressed in joint proposals[6] or settlement agreements concern the performance of musical compositions licensed by ASCAP and BMI to PBS and NPR stations represented herein. *Id.* at 2143. On October 1, 1997, ASCAP, BMI, and Public Broadcasters filed written direct cases pursuant to 37 CFR § 251.43.[7] Discovery was conducted under Rule 251.45 and, pursuant to 17 U.S.C. § 801(c) and Rule 251.45, the Copyright Office ruled upon all prehearing motions and objections until the Panel was convened. A procedural meeting was held before the Panel on February 3, 1998, and, in accordance with Panel Orders, the parties subsequently presented their oral direct cases under Rule 251.47. Thereafter, pursuant to Rule 251.43(f), in accordance with Panel Orders, the parties filed written rebuttal cases, conducted discovery, and presented oral rebuttal cases. Pursuant to Rule 251.52, in accordance with Panel Orders, the parties filed proposed findings of fact and conclusions of law ("PFFCL") on May 29, 1998, and replies to proposed findings of fact and conclusions of law ("Reply PFFCL") on June 8, 1998. Oral argument was heard on June 16, 1998, and the record was formally closed by Order of June 16, 1998.

---

[6] The proposed rates and terms were generally adopted by the Copyright Office as final regulations. *See* 63 FR 2142, *supra*, at 2143-44.

[7] Hereinafter, references to 37 CFR § 251 et seq. shall be cited as "Rule" followed by the appropriate section.

ISSUE

The Panel's task is to set the statutory compulsory license fees and terms for the five-year period January 1, 1998 through December 31, 2002, for the Public Broadcasters' public performance (broadcast) of programming containing published nondramatic musical works contained in the repertories of ASCAP and BMI.

DISCUSSION AND FINDINGS

Exhibits

A list of exhibits, denoting admissibility of each, is appended hereto as Appendix A.

Witnesses

In order of appearance, ASCAP presented written[8] and oral direct testimony of the following witnesses: Mary Rodgers, a composer, lyricist, and member of the ASCAP Board of Directors; Richard Reimer, ASCAP Vice President-Legal Services; Bennett Lincoff, ASCAP Director of Legal Affairs for New Media; Jon Baumgarten, an attorney and former General Counsel of the Copyright Office; James Ledbetter, a professional journalist and media critic; Seth Saltzman, ASCAP Director of Performances; Carol Grajeda, a legal assistant at White & Case; Ed Bergstein, Senior Vice President of Audits & Surveys Worldwide; Robert Unmacht, President of M Street Corporation; James Day, Professor of Television and Radio, Brooklyn College, and President of Publivision, Inc.; Horace Anderson, an attorney at White & Case; Lauren Iossa, ASCAP Assistant Vice President of Membership, Marketing and Promotion; and Dr. Peter

---

[8] Written direct testimony of Ray Schwind and David Bander, along with ASCAP Direct Exhs. 28, 29, 30, and 31, were voluntarily withdrawn by ASCAP and stricken pursuant to Order of March 24, 1998.

Boyle,[9] ASCAP Vice President and Chief Economist. ASCAP also presented written and oral rebuttal testimony of the following witnesses: Hal David, a songwriter and member of the ASCAP Board of Directors; Dr. Boyle, *supra*; and Dr. Elisabeth Landes, Vice President and Senior Economist at Lexecon Inc.

In order of appearance, BMI presented written and oral direct testimony of the following witnesses: Alison Smith, BMI Vice President, Performing Rights; Fredric Willms, BMI Senior Vice President, Finance and Operations, and Chief Financial Officer; Dr. Bruce Owen, President of Economists Incorporated; Michael Bacon, a composer and member of BMI; Janet McFadden, a television producer formerly associated with WGBH Educational Foundation and National Geographic Society's Television Division; and Roy Epstein, Vice President of Analysis Group Economics, and former economist for Lexecon Inc. BMI also presented written and oral rebuttal testimony of the following witnesses: Marvin Berenson, BMI Senior Vice President and General Counsel; Mr. Willms, *supra*; and Dr. Owen, *supra*.

In order of appearance, Public Broadcasters presented written and oral direct testimony of the following witnesses: Peter Downey, PBS Senior Vice President of Program Business Affairs; Peter Jablow, NPR Executive Vice President, Chief Operating Officer, Chief Financial Officer and Treasurer; Paula Jameson, PBS Senior Vice President, General Counsel, and Secretary; and Dr. Adam Jaffe, Professor of Economics, Brandeis University, and principal, The Economics Resource Group, Inc. Public Broadcasters also presented written and oral rebuttal testimony of the following witnesses: Ms. Jameson, *supra*; and Dr. Jaffe, *supra*.

---

[9] By agreement of the parties, Dr. Boyle testified out of order at the close of the BMI oral direct case and was further examined, regarding his music use analysis only, directly prior to his rebuttal testimony.

Description of the Parties

ASCAP and BMI are music performing rights organizations which license the non-dramatic public performance of the millions of musical works in their repertories. Together, they represent over two hundred thousand[10] songwriters, composers, and publishers. *W.D. of Rodgers 3; W.D. of Smith 2-4; W.D. of Willms 2.* They collect fees under these license contracts and then distribute those fees to their members in accordance with music use surveys. *W.D. of Rodgers 9-10; W.D. of Smith 3-5; W.D. of Willms 2.* ASCAP and BMI license their repertories to a variety of industries[11] including broadcast television stations and networks, cable operators, satellite carriers, cable networks, radio stations, nightclubs, restaurants, concert halls, arenas, theme parks, hotels, retail stores, studios, airlines, orchestras, sports teams, colleges and universities, and background music services. *W.D. of Smith 3; W.D. of Rodgers 5; W.D. of Reimer 2-3.* Large scale users of music, such as television and radio stations, generally purchase a "blanket license" which permits unlimited use of the entire repertory for one annual fee. *Id; W.D. of Willms 5.* As a practical matter, because songwriters and composers may affiliate with only one performing rights

---

[10] Collectively, ASCAP and BMI represent the vast majority of songwriters, composers, and publishers whose copyrighted musical works are performed by Public Broadcasters. The repertory of the third performing rights organization, SESAC, not a party to this proceeding, comprises only about one-half of one percent of PBS's music use. *W.D. of JAFFE 3, n.2.* Indeed, the impressive market share enjoyed by ASCAP and BMI have subjected each to antitrust scrutiny resulting in federal consent decrees governing certain aspects of their operations and the creation of a "rate court". *See e.g., U.S. v. ASCAP*, 1959-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950); *U.S. v. BMI*, 1966 Trade Cas. (CCH) ¶ 71,378 (Dec. 29, 1966).

[11] It would be impracticable for individual music users to directly negotiate license agreements with individual songwriters, composers, and publishers. Performing rights organizations act as clearinghouses that allow industry trade organizations (representing an entire industry, such as the commercial radio industry) to purchase blanket licenses covering the entire repertories of the performing rights organizations. *W.D. of Rodgers 5-6.*

organization, these large scale users must generally purchase blanket licenses from both ASCAP and BMI. *W.D. of Jaffe 3.* All parties herein agree that this Panel should set rates and terms for blanket licenses covering the entire ASCAP and BMI repertories. *W.D. of Boyle 14*; *W.D. of Willms 5*; *W.D. of Jaffe 4-6; Tr. 262-63.*

Public Broadcasters consist of PBS, representing virtually all of the approximately 357 non-commercial broadcast television stations licensed by the Federal Communications Commission ("FCC"), and NPR, representing some 700 non-commercial radio stations[12] licensed by the FCC and eligible to receive funding from the Corporation for Public Broadcasting ("CPB"). *Public Broadcasters ("PB") Direct Exh. 1*; *W.D. of Jameson 3; Tr. 888, 1967.* PBS is a private, non-profit television distribution system which purchases and develops programming for distribution to PBS affiliated stations, each of which pay an annual assessed fee. It does not produce programming and does not directly broadcast programming to the public. *W.D. of Downey 9*; *Tr. 1967.* NPR is a private, non-profit, radio system whose member stations broadcast NPR-produced and other programming throughout the United States. *W.D. of Jablow 4.* The vast majority of non-commercial radio stations, which are eligible to receive CPB funding, are NPR members. *Id.* For this proceeding, NPR also represents non-NPR stations, which are *eligible* to receive CPB funding. *W.D. of Jameson 3.* CPB, a Congressionally chartered, non-profit corporation, distributes funds, appropriated by Congress, to PBS, NPR, and their member stations. It does not produce, distribute, or broadcast programming. *W.D. of Jameson 6-7*; *ASCAP Direct Exh. 338.*

---

[12] Some 1300 non-commercial religious and college/university owned radio stations, unaffiliated with NPR, are covered by joint proposals adopted by the Copyright Office and not subject to the rates and terms set by this Panel. *See* note 6, *supra.*

Description and History of the Section 118 Compulsory License

Copyright law provides various exclusive, and transferable, rights to owners of copyrighted musical works including the right of public performance. 17 U.S.C. § 106(5); *W.D. of Baumgarten 3.* The broadcast of a copyrighted musical work via television or radio constitutes a public performance. 17 U.S.C. § 101; *Broadcast Music, Inc. v. CBS, Inc.* 441 U.S. 1, 16 (1979). Accordingly, any broadcast of a copyrighted musical work must be authorized by the owner, allowed under a legally prescribed exemption, or permitted pursuant to the terms of a statutory compulsory license. *W.D. of Baumgarten 4.* Effective January 1, 1978, Section 118 of the 1976 Copyright Act provided for a compulsory license to non-commercial educational broadcasters (public broadcasters) for the broadcast of copyrighted nondramatic musical works. 17 U.S.C. § 118. The Act authorizes owners of copyrighted musical works and public broadcasters to "designate common agents to negotiate, agree to, pay, or receive payments." 17 U.S.C. § 118(b). Under the original 1976 Act, in those cases where parties were unable to negotiate license rates and terms, the Copyright Royalty Tribunal ("CRT") was directed to conduct a rate setting proceeding in 1978 and, if necessary in 1982, and every five years thereafter to determine "reasonable terms and rates of royalty payments." 17 U.S.C. §§ 801(b)(1), 118(b)(3); *W.D. of Baumgarten 10.* The CRT was abolished in 1993 and replaced with the present system of Copyright Arbitration Royalty Panels ("CARPs") without substantive modification to Section 118 or to the "reasonable terms and rates" standard prescribed under Section 801. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 § 4(1)(E)(ii), 1993 U.S.C.A.A.N., 107 Stat. 2304, 2309 (effective Dec. 17, 1993).

The term "reasonable" is not defined in the statute. However, the legislative history of

Section 118 clearly reflects an intent for the Panel to determine the "fair market value" of the ASCAP and BMI licenses to Public Broadcasters. Both the Senate Judiciary Committee Report and the House Judiciary Committee Report contain language expressing the view that the compulsory license requires payment of a "fair value" license fee that does not constitute a "subsidy" by copyright owners to public broadcasters. S. Rep. No. 94-473, 1st Sess. at 101 (1975); H.R. Rep. No. 94-1476 at 118 (1976). The parties generally agree[13] that "fair value" means "fair market value". *See Tr. 8-10; 2786; W.D. of Boyle 3; W.D. of Landes 2; W.D. of Owen 1. Also see* 47 FR 57923 at 24 (December 29, 1982)(The CRT stated: "The Copyright Act does not contemplate the Tribunal establishing rates below the reasonable *market* value". Emphasis added.) The parties also generally agree that "fair market value" means the price at which goods or services *would* change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all material facts. *PB PFFCL 8; Tr. 1465, 2786.* It is a term with a well established meaning among economists and the law.[14] In the present context, a determination of fair market value requires the Panel to find the rate that Public Broadcasters *would* pay to ASCAP and to BMI for the purchase of their blanket licenses, for the current statutory period, in a hypothetical free market, in the

---

[13] *Cf. Tr. 532-34* (Baumgarten equivocates; stating that the terms may not be synonymous); *PB PFFCL 9-10; Tr. 4058, 4064-67* (Counsel for Public Broadcasters implies that a determination of reasonable [fair] value may require analysis of certain vague "policy prescriptives of 118").

[14] *See, e.g., BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) (Fair market value means "the price which [a commodity] might be expected to bring ... as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled..."; *United States v. ASCAP, Application of Showtime/The Movie Channel, Inc.*, 912 F.2d 563 at 568-69 (2d Cir. 1990)(Fair market value "is the price that a willing buyer and seller would agree to in an arm's length transaction").

absence of the Section 118 compulsory license.

As discussed *supra*, the 1976 Copyright Act established an initial compulsory license period of January 1, 1978, through December 31, 1982. 17 U.S.C. § 118 (1976). Pursuant to Section 118(b)(2), BMI and Public Broadcasters[15] successfully negotiated a voluntary license agreement for the initial five year period. *PB Direct Exh. 21*. The agreement provided for payment of $250,000 for the first year with certain possible adjustments for each of the succeeding four years. *Id.; PB Exh. 27X at 16*. Unlike BMI, ASCAP was unable to negotiate a voluntary license agreement with Public Broadcasters and, accordingly, the CRT convened a Section 118 proceeding. The CRT determined that payment of $1,250,000 per year[16] constituted a reasonable (fair market) rate for Public Broadcasters to pay for an ASCAP blanket license. 43 FR 25068 at 25069 (June 8, 1978). Both ASCAP and BMI successfully negotiated voluntary agreements with Public Broadcasters for successive five-year periods effective 1982, 1987, and 1992. *PB Direct Exhs. 11, 12, 13, 14, 15, and 16*. Each BMI agreement since 1982, contained a "non-disclosure" clause which prohibited disclosure of the license rates, without the consent of the other party, to any third party including the CRT. Each ASCAP agreement contained a "no-precedent" clause discussed *infra*. *Id.* Neither ASCAP, nor BMI, reached agreement with Public Broadcasters for the current five-year statutory period commencing January 1, 1998, and,

---

[15] When referring to prior licenses, we use the term "Public Broadcasters" somewhat generically. We presume, of course, that in 1978, the stations eligible to receive CPB funding were somewhat different than today.

[16] After the first year, the rate was subject to annual cost of living adjustments based upon the Consumer Price Index. 43 FR 25068 at 25070 (June 8, 1978).

accordingly, the Copyright Office initiated the instant proceeding.[17] Notwithstanding the non-disclosure clause contained in the BMI–Public Broadcasters license agreement for the 1992–1997 period, for strategic reasons, BMI and Public Broadcasters agreed, prior to the instant CARP proceeding, that both the confidential license rate and music use data provided to BMI pursuant to that agreement, could be disclosed to the Panel. *W.D. of Jameson 6, n. 4; W.R. of Berenson 5.*

Positions of the Parties

Numerous witnesses testified regarding the character and history of ASCAP and BMI and their repertories; music use and importance to Public Broadcasters' programming; the mission, history and business dynamics of Public Broadcasters; the similarities and differences between Public Broadcasters and commercial broadcasters; programming and business trends; prior agreements and relationships between ASCAP, BMI, and Public Broadcasters; and related matters. *See* "Witnesses", *supra*. Expert witnesses for ASCAP, BMI, and Public Broadcasters also presented economic analyses of the fair market value of the ASCAP and BMI blanket licenses to Public Broadcasters under Section 118.. Two general approaches to the valuation issue emerged. ASCAP and BMI, while employing somewhat differing adjustment parameters, advocate using music license fees recently paid by commercial television and radio broadcasters as a benchmark for valuing the license fees that Public Broadcasters should pay under Section 118. Public Broadcasters urge the Panel to set license fees based upon prior voluntary licensing agreements between Public Broadcasters and ASCAP and/or BMI. It should be noted that throughout the proceeding, each party offered a primary methodology, in addition to alternative

[17] *See* notes 2 and 3, *supra*.

approaches, and various versions of the primary approach. However, the parties occasionally appeared to equivocate with respect to the alternative approaches and subsequent versions of the primary approach, or even disavow them entirely. *See e.g., W.R. of Boyle 9, ASCAP PFFCL 32-33, 167-68* (ASCAP proposed a phase-in of increased fees throughout the licensing period but subsequently reserved the "right to object to its adoption by the Panel"); *W.D. of Willms 4, BMI PFFCL 84* (BMI initially urged the Panel to set a license fee for BMI which is not less than 38.6% of the combined fees payable to BMI, ASCAP and SESAC but subsequently modified its methodology to reflect a minimum request of 42.5% of all fees payable to BMI and ASCAP); *W.D. of Jaffe 13, W.R. of Jaffe 33-34, Tr. 2760-62, 4118* (Public Broadcasters initially advocated a 7.15% increase in license fees based upon a 7.15% increase in Public Broadcasters' programming expenditures. But, after conceding that revenues might be substituted for programming expenditures as an appropriate adjustment to the benchmark and performing calculations based upon that substitution, they argued that the calculations were performed merely "out of respect for the Panel" -- apparently alluding to questions posed by the Panel to Dr. Jaffe). Indeed, it is somewhat unclear which alternate methodologies or versions of primary methodologies, the parties truly endorse. In any event, we shall here generally address the salient aspects only of those approaches we perceive as primary.

The ASCAP Analysis

The primary ASCAP approach uses music license fees, recently paid by commercial television and radio broadcasters to ASCAP, as a benchmark for valuing the license fees that Public Broadcasters should pay to ASCAP under Section 118. *W.D. of Boyle 3*. Use of the commercial benchmark is predicated upon several basic assumptions: (1) unlike past agreements

between ASCAP and Public Broadcasters, recent agreements between ASCAP and commercial broadcasters reflect fair market value rates; (2) in recent years, Public Broadcasters have come to resemble commercial broadcasters due to a dramatic rise in "commercialization" (in programming, underwriting, and revenue generating endeavors), fiscal success, sophistication, and size; (3) after adjusting for music usage, Public Broadcasters should pay license fee rates which constitute the same proportion of their revenues as do the license fees paid by commercial broadcasters, and (4) to the extent that differences exist between Public Broadcasters and their commercial counterparts, the ASCAP methodology takes account of said differences by making adjustments for music use and revenues. *ASCAP PFFCL 105-12; W.D. of Boyle 2-3; W.D. of Day 9-21; W.D. of Ledbetter 21-47; W.D. of Unmacht 3-4*. In comparing revenues of Public Broadcasters to those of commercial broadcasters, ASCAP excluded all Public Broadcasters' revenues derived from government sources and considered only "private revenues"[18] (non tax-based revenues) such as corporate underwriting and viewer/listener contributions which are "audience-sensitive." *W.D. of Boyle 4-6; Tr. 1715-16, 1721-25*. By confining its analysis to private revenues, ASCAP argues that it recognizes and accounts for how Public Broadcasters' revenue sources differ from its commercial counterparts. *ASCAP PFFCL 29-30*. ASCAP performed separate license fee calculations for television and radio. Using 1995 data, the most recent Public Broadcasters revenue data available at the time Dr. Boyle performed his calculations, ASCAP first calculated the ratio of commercial broadcast license fees to total commercial broadcast revenues. This ratio yielded the commercial "effective license rate" which was then applied to Public Broadcasters by

---

[18] *See ASCAP Direct Exh. 301 at 12-14*. If ASCAP had used total revenues rather than restricting consideration to private revenues, the ASCAP methodology would have generated a much larger fee.

multiplying this figure times Public Broadcasters' 1995 private revenues. Finally, this resulting figure was multiplied by the ratio of commercial broadcasters' use of the ASCAP repertory to Public Broadcasters' use of the ASCAP repertory.[19] *W.D. of Boyle 8*. These calculations yielded 1995 Public Broadcaster license fees, for the ASCAP blanket license, of $4,612,000 for television plus $3,370,000 for radio--a total of $7,982,000. *W.D. of Boyle 4-9*; *ASCAP PFFCL 107-12*. Though calculated for the year 1995, with no adjustments for any increase in revenues since 1995, or throughout the entire statutory license period (January 1, 1998 -- December 31, 2002), ASCAP considers the $7,982,000 figure a "reasonable" license fee for each year of the license period and apparently does not seek any annual adjustments thereto. *ASCAP PFFCL 112*.

ASCAP also performed a confirmatory analysis which entailed projecting forward the Public Broadcasters license fee for the ASCAP blanket license which was set by the CRT in 1978. *W.D. of Boyle 9-11*. Under this analysis, ASCAP first calculated the ratio of 1995 Public Broadcasters' private revenues to the 1978 Public Broadcasters' private revenues and multiplied this figure by the 1978 fair market license fee set by the CRT. This latter result was then multiplied by the ratio of 1995 ASCAP music use by Public Broadcasters to 1978[20] ASCAP music use by Public Broadcasters. *Id.* This methodology generated total 1995 license fees for television

---

[19] Music use of the ASCAP repertory was derived from ASCAP surveys and application of the ASCAP "credit" system which assigns various weights based upon such factors as how the music was used in the broadcast programming. Dr. Boyle concluded, subject to certain caveats, that public television stations used ASCAP music 41% more than did commercial television stations (a ratio of 1.41) and public radio stations used ASCAP music 4% less than did commercial radio stations (a ratio of .96). *W.D. of Boyle 7, Appendix B at 4-5*.

[20] Actually, music use data for 1978 was not available; Dr. Boyle used data for 1990, "the first ASCAP distribution survey year for which detailed information was readily retrievable." *W.D. of Boyle 9*.

and radio of $8,225,000,[21] a figure ASCAP deemed confirmatory of its primary methodology.

The BMI Analysis

BMI's approach is philosophically similar to that of ASCAP. BMI also uses music license fees, recently paid by commercial television and radio broadcasters *to BMI*, as a benchmark for valuing the license fees that Public Broadcasters should pay to BMI under Section 118. However, in addition to examining revenues[22] and music use,[23] BMI examined two other parameters – programming expenditures and audience size. *W.D. of Owen 4-6.* BMI concluded that, comparing total revenues, programming expenditures, and audience size, public television was 4% to 7% the size of commercial television in recent years. *Id. at 13.* Because it determined that no adjustment is necessary for music use, BMI infers that a current free market negotiation between BMI and public television would result in music licensing fees between 4% and 7% of the fees BMI anticipates will be paid by commercial television in 1997. *Id. at 13.* BMI similarly concluded that public radio was 3% to 4% the size of commercial radio in recent years. *Id. at 16.* However, because a music use adjustment of one-third is necessary (*see* note 23, *supra*), BMI infers that a

---

[21] Dr. Boyle actually performed separate calculations for television and radio by allocating a portion of the 1978 license fees set by the CRT (which was not apportioned between television and radio) to television and the remainder to radio. He based this allocation upon the relative 1978 revenues of each. *Id at 9-10.*

[22] Unlike ASCAP, BMI did not distinguish between private and tax-based, "audience-sensitive," revenues. BMI considered *total* revenues of Public Broadcasters. *Tr. 1507-08.* Also, ASCAP based its estimate of commercial broadcasters' revenues upon a Commerce Department survey while BMI based its estimate primarily upon Paul Kagan Associates, Inc. and McCann-Erickson estimates. *W.D. of Boyle 5-6; W.D. of Owen 11,15.*

[23] Dr. Owen concluded that BMI music usage by public television stations and commercial television stations was approximately the same but, applying very conservative standards, BMI music usage by public radio stations was only one-third of BMI music usage by commercial radio stations. *W.D. of Owen 8-9,13-14.*

current free market negotiation between BMI and public radio would yield music license fees 1% to 2% (one-third of 3% - 4%) of the fees BMI anticipates will be paid by commercial radio in 1997.[24] *Id.* This methodology yields current year[25] BMI license fees of approximately $4 to $7 million for public television and $1 to $2 million for public radio. *Id. at 16-17.* BMI advocates using the approximate midpoints of these ranges to arrive at a reasonable yearly fee – $5.5 million for public television and $1.395 million[26] for public radio for a total yearly BMI blanket license fee of $6,895,000. *BMI PFFCL 56-57.*

Finally, BMI argues that, irrespective of the total combined license fees that the Panel sets for ASCAP and BMI, the Panel should set the BMI license fees at no less than 42.5% of the combined BMI and ASCAP fees. *Id. at 57.* This argument is based upon music use data adduced by Public Broadcasters[27] which BMI asserts, reflects that BMI has a 42.5% share of the total amount of ASCAP and BMI music used on public television. The 42.5% figure, that BMI

---

[24] BMI declined to estimate commercial *radio* license fees expected in 1997; actual figures for 1996 were used.

[25] As with ASCAP, BMI apparently does not seek any increases during the 1998–2002 statutory license period. *BMI PFFCL 56.*

[26] For reasons relating to the occasional use of non-blanket license agreements (per program license agreements) by commercial radio stations, and because it actually applied a music use adjustment of 31% rather than one-third, BMI did not advocate using the precise midpoint for public radio. Rather, BMI proposes the $1.395 million figure determined by Mr. Willms by calculating the ratio of commercial radio license fees paid to BMI to total gross revenues of the commercial radio industry and then discounting that figure by 69% to account for the presumed 31% BMI music usage on public radio as compared to commercial radio. *W.D. of Willms 25-26; BMI PFFCL 57, n. 12.*

[27] BMI's own music data is generally confirmatory. It reflects about a 39% share of *all* music used on public television in 1996, *including* SESAC music and public domain (non-copyrighted) music. *W.D. of Willms 21-22.*

advocates, constitutes the *average* BMI share on *public television* for the years 1992 through 1996 and is based upon an analysis of total music minutes (without regard to the type or purpose of the music). *Id. at 58*; *W.R. of Jaffe 24*. BMI argues that using public television music share data as a proxy for *public radio* is reasonable in the absence of any available evidence reflecting respective shares of ASCAP and BMI on public radio. *BMI PFFCL 58*. Indeed, BMI asserts, the parties have historically done so, and the prior license fees negotiated with Public Broadcasters almost precisely reflect those respective shares. *Id.; Tr. 2621-23, 2660, 2666; W.R. of Berenson 3.*

The Public Broadcasters Analysis

Public Broadcasters employ the most obvious and direct approach to valuing the license fees that it should pay for the ASCAP and BMI blanket licenses – using license fee agreements previously negotiated by the parties as a benchmark and adjusting that benchmark based upon changed circumstances. Moreover, Public Broadcasters argue, it is the only approach explicitly encouraged by the framers of Section 118.[23] *PB PFFCL 1.*

In the absence of evidence that the last license agreements negotiated in 1991, covering

---

[23] Section 118(b)(3) provides that the Panel "*may* consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2)." (Emphasis added). Section 118(b)(2) provides that voluntary license agreements shall be given effect in lieu of any determination by the Panel *provided that copies of such agreements are filed within 30 days of execution.* Citing legislative history, BMI presses the notion that reading these provisions in tandem leads one to conclude that "at any time" really refers to agreements successfully negotiated "around the same time as the CRT or CARP proceeding was taking place." *BMI PFFCL 80.* The Panel is skeptical of this exceptionally narrow interpretation. In any event, resolution of this issue is of no moment. The Section 118 invitation to "consider" prior license agreements is expressly permissive. Whether or not this invitation would include the prior ASCAP and BMI license agreements with Public Broadcasters, it would be wholly illogical for this Panel, charged with determining a fair market value rate, *not* to carefully examine them.

the 1992 to 1997 Section 118 statutory period, by Public Broadcasters with both ASCAP and BMI, were anything other than arms length, non-coercive, free market agreements, Public Broadcasters reasonably assume, they argue, that said agreements conclusively establish the fair market rates for that period. *W.D. of Jaffe; W.R. of Jaffe 3; Tr. 2707.* Accordingly, to determine fair market rates for the current statutory period, one need only adjust the prior rates to account for relevant changed circumstances since 1992. *W.D. of Jaffe 9; Tr. 2708.* While forthrightly conceding that "there is no unambiguous answer as to the set of circumstances that should be examined to determine [relevant changed circumstances]", Public Broadcasters' economic expert, Dr. Jaffe, opined that changes in Public Broadcasters' programming expenditures and music use provide the best indicators. *W.D. of Jaffe 9-12; Tr. 2710-12; also see Tr. 2760-62.* Dr. Jaffe performed a regression analysis with respect to the growth in programming expenditures and found a 7.15% rate of growth from 1992 through 1996. By mathematically increasing the combined ASCAP and BMI license fees payable under the prior agreement, he calculated the total license fees which should be paid during the current period before considering any adjustment for changes in music use. *W.D. of Jaffe 13.* Because the music data, upon which he relied, reflected essentially no change in music usage by Public Broadcasters since the prior agreements, he made no further adjustment. *Id. at 16.* Under this methodology, Dr. Jaffe calculated a total combined ASCAP/BMI license fee for both public television and radio[29] of $4,040,000 per year. *Id.* To appropriately apportion that combined fee between ASCAP and BMI, Dr. Jaffe then undertook an analysis of their respective music shares. *W.R. of Jaffe 23-25.* Dr. Jaffe again forthrightly testified

---

[29] None of the prior agreements recited an apportionment of fees between television and radio. *PB Direct Exhs. 11, 12, 13, 14, 15, and 16.*

that no single indicator exists to quantify use of music or relative shares of music. *Id. at 24*; *Tr. 3648*. Accordingly, he examined several parameters and determined that in 1996, the BMI share of total ASCAP/BMI music cues[30] on the PBS "feed"[31] was 35.4%; the BMI share of total ASCAP/BMI music minutes was 38.5%; the BMI share of total ASCAP/BMI feature[32] cues was 42.1%; and the BMI share of total ASCAP/BMI feature minutes was 37.7%. *W.R. of Jaffe* 24; *Tr. 3649*. Because feature music is generally deemed most valuable (*see* note 32, *supra*), Dr. Jaffe concluded that the BMI share of the total ASCAP/BMI music used by Public Broadcasters was 38% to 40% in 1996. *W.R. of Jaffe 24*. As did BMI, Dr. Jaffe apparently assumed it was reasonable to use public television music share data as a proxy for public radio — for which no music share data was available. *Id.*

The Panel's Analysis

Evaluation of the Parties' Methodologies

Both *general* approaches advocated by the parties suffer significant infirmities. The Panel agrees with Public Broadcasters that prior agreements, negotiated between the parties themselves, present the most logical *starting point* in the search for a fair market value benchmark. *See PB PFFCL 26-29* (and cases cited therein). However, upon close examination, the Panel concludes

---

[30] The number of music cues is the number of discreet instances or occurrences of music without regard to the duration or type of each instance. *Tr. 2750.*

[31] *Tr. 2740, 3647.*

[32] A feature performance of music is one which is the primary focus of audience attention as contrasted with theme music or background music. *Tr. 717-22; See also W.D. of Boyle, Appendix B at 4*. When calculating royalty distributions to their members, feature music is generally deemed more valuable by performing rights societies than theme or background music. *Id.; W.R. of Jaffe 24.*

that the 1982 through 1997 Public Broadcasters license agreements *understate* the fair market value of both the ASCAP and BMI blanket licenses (even after adjusting to reflect recent changes), and cannot be reliably used as benchmarks. The Panel also agrees with ASCAP and BMI that current agreements negotiated between similarly situated parties should also be examined as potential fair market value benchmarks. *See ASCAP PFFCL 159-60; BMI PFFCL 4.* Unfortunately, the Panel concludes that the commercial broadcasters' license agreements *overstate* the fair market value of the ASCAP and BMI blanket licenses to Public Broadcasters. Even with the attempted adjustments, these agreements can not be reliably used as benchmarks.

Prior Public Broadcasters' Agreement as a Benchmark

Public Broadcasters cite the persistent pattern[33] of license agreements voluntarily reached with ASCAP and BMI since 1982, as compelling evidence of freely negotiated, arm's length transactions, reflecting fair market value. *W.R. of Jaffe 5; Tr. 2708.* ASCAP and BMI apparently concede the agreements were voluntary, freely negotiated, and arm's length transactions, but argue the agreements reflect voluntary subsidies rather than fair market rates. *ASCAP PFFCL 126-130; BMI PFFCL 67-73.* Stated otherwise, ASCAP and BMI would not have acceded to these rates within the context of a truly free market – in the absence of the Section 118 compulsory license. ASCAP and BMI cite numerous reasons why they declined to litigate before the CRT and instead agreed to accept rates below fair market value throughout the period, and particularly with respect to the 1992–1997 agreement (the Public Broadcasters' preferred benchmark), including the following:

[33] The license fees negotiated with ASCAP and BMI closely approximate their relative shares of music (all parties apparently used music use data as a proxy for total music use on public television *and* radio). *W.D. of Jameson 5; Tr. 2608-11, 3399-3402.*

1. Other litigation throughout this period was extremely costly and time-consuming and ASCAP and BMI management possessed finite financial resources, staff, and time;

2. "Final" commercial television rates for BMI were not negotiated until after the last Public Broadcasters' agreement was concluded in 1991; BMI feared it would be in a weak position if it attempted to use "interim" commercial rates as a benchmark before the CRT;

3. By commencing a CRT proceeding in 1992, BMI feared unfavorable music share data would be made public to other licensees; and

4. Both ASCAP and BMI were reticent to initiate CRT litigation while Public Broadcasters were under political and fiscal "attack" by Congress. *Id.*

Though cited as reasons for declining to litigate, these enumerated reasons are not necessarily indicia of unilateral subsidization. One might expect these factors, among many more, to be typically considered by negotiating parties before arriving at a rate *which does* reflect fair market value. But, when viewed within the contexts of the no-precedent clause of the recent ASCAP agreements and the non-disclosure clause of the recent BMI agreements, the possibility of voluntary subsidization becomes much more compelling.

The 1992–1997 ASCAP license agreement with Public Broadcasters contained the following provision:

> [The parties] agree that said license fee will have no precedential value in any future negotiation, proceeding before the Copyright Royalty Tribunal, court proceeding, or other proceeding between the parties. *PB Direct Exh. 13 at 4.*

All ASCAP agreements with Public Broadcasters contained virtually identical language. *PB Direct Exhs. 11 at 4, 12 at 4.* These no-precedent clauses were included in each agreement at the insistence of ASCAP. *W.R. of David 5-7.* Indeed, ASCAP would not have reached agreement

with Public Broadcasters as to the prescribed rates *but for* inclusion of the no-precedent clause. *Id.* This clause clearly evinces an attempt by ASCAP to protect itself from future tribunals which might be tempted to use the prior agreement as a benchmark for establishing fair market value. And such an attempt to protect itself is corroborative of ASCAP's genuine belief that the agreed rates were below fair market value. *Tr. 3044.* The no-precedent clause constitutes strong evidence that ASCAP would not today, in the absence of a compulsory license, agree to rates based upon the prior agreement. The Panel does not here find that the mere existence of a no-precedent clause renders prior agreements unacceptable as benchmarks *per se*.[34] Rather, after considering the totality of circumstances, we find the no-precedent clause effectively corroborates ASCAP's assertion that it voluntarily subsidized Public Broadcasters in the past and now declines to continue such subsidization. Accordingly, in the absence of the Section 118 compulsory license, the 1992-1997 rate would *not* serve as a benchmark for current hypothetical negotiations.

Excepting the 1978 agreement, the prior BMI agreements with Public Broadcasters each contain a non-disclosure clause which provides in pertinent part:

> Except in response to lawful process of any legislative body or court, this writing shall be kept strictly confidential by the Parties, and its terms shall not be voluntarily revealed to any person, organization, or government or judicial body including, but not limited to, the Copyright Royalty Tribunal; nor shall it be shown, nor its terms be disclosed, to any person who has no business or legal need to know the terms. *PB Direct Exhs. 14, 15, 16.*

BMI insisted upon inclusion of the clause. *W.R. of Berenson 4; Tr. 2639.* While BMI approached the issue somewhat differently than did ASCAP, the clear intent of the provision was identical --

---

[34] Indeed, ASCAP advances several arguments that the Panel may not consider the prior agreements "as a matter of law." *ASCAP PFFCL 165-67.* We reject these arguments. The cases cited by ASCAP regarding enforcement of its contract and equitable estoppel are inapposite. Nor are we persuaded by ASCAP's "policy" theory.

to preclude use of a below market rate as a benchmark for setting future rates. *Tr. 3392.* No other plausible explanation has been offered by Public Broadcasters.

Finally, Public Broadcasters have not, or can not, cite any factual bases which might account for the huge disparity between recent ASCAP/BMI commercial rates and the rates for Public Broadcasters under the prior agreements (even after adjusting commercial rates based upon various parameters). Public Broadcasters merely offer the general, but unhelpful, observation that "[t]he difference in rates is accounted for by the fact that commercial and non-commercial broadcasters operate in separate and distinct markets." *PB PFFCL 81.* If, for example, evidence had been adduced demonstrating that Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as radio disk jockeys, musicians, producers, writers, directors, or equipment operators), the Panel might feel more comfortable accepting the heavily discounted music license fees as fair market rates. Virtually no such evidence was adduced. To the contrary, it appears that Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' "up front fees." *Tr. 1636.* As discussed, *infra*, the Panel is cognizant that commercial and non-commercial broadcasters do, in fact, operate under different economic models and one should not be surprised that these models yield somewhat different results, including differences in fair market rates. It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates. We have concluded they do not.

Recent Commercial Rates as a Benchmark

We previously expressed the view that commercial rates overstate the fair market value of

the blanket licenses to Public Broadcasters. That Public Broadcasters have become more "commercialized" in recent years, and appear more similar to commercial broadcasters, is patent to even a casual observer. *See generally ASCAP PFFCL 35-39, 49-80; BMI PFFCL 29-30, 38-40.* Indeed, this convergence may justify a *narrowing* of the vast gap between license fee rates paid by Public Broadcasters and those paid by commercial broadcasters. However, significant differences remain which render the commercial benchmark suspect -- particularly with respect to the manner in which broadcasters raise revenues. Commercial broadcasters generate their revenues through the sale of advertising while Public Broadcasters derive their income through a variety of sources including corporate underwriting, Congressional appropriations, and viewer contributions. *W.R. of Jaffe 15-17; PB Direct Exh. 4; Tr. 1972-73, 2271-73.* Though corporate underwriting may superficially resemble advertising (particularly as underwriting regulations are relaxed), the relevant economics are quite different. In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise -- increased costs are passed through to the advertiser. *Id.* No comparable mechanism exists for Public Broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary. *Id.* For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters and, even restricting the revenue analysis to "private revenues", as did ASCAP, does not fully reconcile the disparate economic models.

<u>The Panel's Valuation Approach</u>

Having concluded that the Public Broadcasters' suggested benchmark understates fair market value and the ASCAP/BMI general approach overstates fair market value, the Panel

adopts an alternate approach which incorporates certain elements of both. That this approach generates rates falling between those we deemed above fair market value (yielded by the ASCAP/BMI approach) and those we deemed below fair market value (yielded by the Public Broadcasters' approach) is confirmatory of its reasonableness.

The methodology that we craft is similar to alternate analyses employed by both ASCAP and Public Broadcasters to demonstrate the reasonableness of their approaches.[35] Our approach is predicated upon the fundamental assumption that the blanket license fee set by the CRT in 1978, for use of the ASCAP repertory by Public Broadcasters, reflects the fair market value of that license as of 1978. This is an eminently reasonable, and essentially uncontroverted, assumption. Indeed, this Panel is arguably bound by the 1978 CRT determination of fair market value of the ASCAP license.[36] We trended that benchmark rate forward to 1996 by adjusting for the change in Public Broadcasters' total revenues and the change in ASCAP's music usage share. This methodology yielded the fair market value of ASCAP's blanket license to Public Broadcasters as of 1996. We then determined the fair market value of the BMI blanket license by

---

[35] Neither ASCAP, nor Public Broadcasters, *appear* to rely upon this approach as an affirmative fee-generating methodology. *See W.D. of Boyle 9-11; ASCAP PFFCL 115-17; PB Reply PFFCL 65-67 and Appendix A.* But, its use as a confirmatory analysis implies tacit approval of its basic soundness.

[36] Section 802(c) of the Copyright Act provides that CARPs "shall act on the basis" of prior decisions of the CRT. 17 U.S.C. § 802(c). We are aware that in its 1978 decision, the CRT stated: "The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding." 43 FR 25068 at 25069. However, we do not believe this language was intended to disclaim the Tribunal's factual determination. Rather it appears calculated to encourage future consideration of other *approaches* -- which we have done. Indeed, both ASCAP and Public Broadcasters agree that this Panel is bound by the CRT's factual determination as to the fair market value of the 1978 ASCAP license. *Tr. 4018-21, 4110-11.*

applying its current music use share to the license fee generated for ASCAP for 1996. The trending formula we employed is represented as follows:

$$\text{1996 trended ASCAP license fee (fair market value, before music share adjustment)} = \frac{\text{1978 CRT license fee}}{\text{1978 PB total revenues}} \times \text{1996 PB total revenues}$$

$$= \frac{\$1{,}250{,}000^{37}}{\$552{,}325{,}000^{39}} \times \$1{,}955{,}726{,}000^{38}$$

$$= \$4{,}426{,}000$$

Adjustment for decline in ASCAP's share of total ASCAP/BMI music usage by PB:

Fair market value of ASCAP license to PB = $4,426,000 x .75 (25% decline in ASCAP's share of total ASCAP/BMI music usage)

= **$3,320,000.**

---

[37] 43 FR 25068 at 25069.

[38] *PB Direct Exh. 4* (CPB Report, FY 1996). All data and mathematical calculations are rounded to thousands.

[39] *W.D. of Boyle Appendix C* (CPB Report, FY 1978)

Fair market value of BMI license to PB	=	.63934[40] x $3,320,000	(based on current 39% BMI share of total ASCAP/BMI music usage)
	=	$2,123,000.	

We now undertake a discussion of the salient elements of the Panel's chosen methodology.

Use of revenues as a trending adjustment:

The Panel believes that, in addition to change in music share, the change in Public Broadcasters' revenues is the best indicator of relevant changed circumstances which require an adjustment of the chosen benchmark. Stated otherwise, in a hypothetical free market, Public Broadcasters would likely pay license fee rates that constitute the same proportion of their total revenues as did the license fees they paid in 1978 (the last occasion they paid fair market rates). This gauge of change is conceptually identical to that employed by ASCAP in its confirmatory trending analysis (though ASCAP used change in *private* revenues as the appropriate indicator of changed circumstances -- *see W.D. of Boyle 9-11*) and by Public Broadcasters (though Public Broadcasters' economic expert, Dr. Jaffe, preferred programming expenditures as the best indicator -- *see W.D. of Jaffe 9-12; Tr. 2710-12; also see Tr. 2760-62*).[41] There is no commonly accepted indicator that would allow a finder-of-fact to precisely adjust a fair market value benchmark to reflect relevant changed circumstances. *Id.* Indeed, other forums have relied upon

---

[40] Multiplying the ASCAP license fee by .63934 yields the mathematical equivalent of 39% of the *combined* license fees of both ASCAP and BMI (39% x [$3,320,000 + $2,123,000] = $2,123,000).

[41] Moreover, BMI employed total revenues to gauge the size of Public Broadcasters vis-a-vis commercial broadcasters. *W.D. of Owen 4-6.*

several adjustment parameters, in addition to music usage, in their attempt to appraise music licenses, including revenues, audience share, programming expenditures, and the Consumer Price Index ("CPI"). *See, e.g., PB Exhs. 1X, 3X,* 4X; 43 FR 25068. Of these, the Panel concludes that revenues is the best indicator of relevant changed circumstances because it incorporates the forementioned factors and others. Changes in audience share and programming expenditures are reflected in revenues. Changes in revenues over time also serve as a proxy for an inflation adjustment. While the CPI gauges inflation at the consumer level, revenues gauge inflation at the industry-specific level. *See e.g. ASCAP Direct Exh. 20 at 106.* Accordingly, in our analysis, an inflation adjustment from 1978 to 1996 is obviated.

We have noted Public Broadcasters' criticism of trending analyses which rely upon changes in revenues. *See PB Reply PFFCL 60-62; Tr. 4116-19.* Public Broadcasters contend that the relationship between revenues and license fees has not remained historically constant in the commercial broadcast industry, but rather has been declining. *Id.* Accordingly, we anticipate that Public Broadcasters would seek to "discount" the fee generated by the Panel's methodology to reflect this perceived decline. The Panel is not persuaded by this argument. Indeed, Public Broadcasters' position is somewhat ironic. As Public Broadcasters have consistently asserted throughout these proceedings, the economics governing commercial broadcasters differ markedly from that of Public Broadcasters, rendering any comparison inapposite. Perhaps even more significant, Public Broadcasters' own expert, Dr. Jaffe, conceded that revenues constituted a reasonable substitute for programming expenditures as an indicator of relevant changed circumstances and he expressed no need to discount same to reflect the commercial experience. Indeed, he applied no such discount when he performed his alternate calculations based upon

changes in revenues. *W.R. of Jaffe 32-34, Table 4; Tr. 2710-12, 2760-62.* Finally, the Panel does not accept Public Broadcasters' assertion that the ratio of commercial license fees to revenues has, in fact, been declining. The record is not sufficiently developed to render a finding on this issue. For example, it is conceivable that the ratio has remained constant, or even increased, if changes in music use were factored into the calculus.

Use of *total* rather than *private* revenues:

In both his primary analysis and his confirmatory alternate analysis, ASCAP's expert, Dr. Boyle, considered only *private* revenues in order to account for how Public Broadcasters' revenue sources differ from its commercial counterparts. *W.D. of Boyle 4-6; Tr. 1715-16, 1721-25.* By excluding government generated revenues, which are less predictable, and unrelated to music use or other programming inputs (not "audience-sensitive"), ASCAP claims to account for the Public Broadcasters' trend toward commercialization while concomitantly respecting the existing differences with commercial broadcasters. ASCAP argues this approach permits appropriate license fee comparisons between Public Broadcasters and commercial broadcasters. *ASCAP PFFCL 29-30.* We have already expressed our disagreement *supra*, and stated that commercial license rates can *not* be appropriately used as a benchmark to determine Public Broadcasters' rates. However, for the reasons cited by ASCAP, we accept the logic of restricting an analysis to *private* revenues *if* one does attempt to use commercial rates as a benchmark. Notwithstanding, when performing a *trending* analysis based upon the 1978 *Public Broadcasters'* rates, there is no need to restrict the analysis to private revenues because the methodology does not employ any data from the commercial context. In this instance, we need make no attempt to account for differences in the manner the two industries raise revenues. We need not massage the

methodology to obtain an "apples to apples" comparison. Accordingly, total revenues, reflecting the true increase in Public Broadcasters' ability to pay license fees, is the more appropriate parameter.

Use of 1996 revenue data:

As of the date that the parties filed their direct cases, the FY 1996 CPB report was not yet available to ASCAP or BMI. Hence, both ASCAP and BMI used FY 1995 revenue data, the most recent available to them. *W.D. of Boyle 4; W.D. of Owen 11, 14.* It is important that the most recent revenue data be used in our analysis for two reasons: (1) the fee generating formula that we employ requires the most recent data to yield the most accurate current fee; and (2) after obtaining the fair market license fee for 1996, we make no further adjustments for any revenue growth since 1996, or throughout the license period until December 31, 2002.

We recognize that in 1996, CPB instituted certain accounting changes that may cause 1996 revenues to be overstated relative to the reported revenues in prior years. *ASCAP Exh. 31X at 2-4; W.R. of Jaffe 33-34; Tr. 2964.* Notwithstanding, we are quite comfortable using FY 1996 data in our analysis. As we stated *supra*, we make no adjustment for revenue increases since 1996, nor for revenue increases which shall likely occur throughout the statutory license period. Though too speculative *to quantify*, Public Broadcasters appear poised for substantial revenue increases. *See ASCAP Exh. 17X.* Moreover, the Panel has excluded all "off balance sheet income" such as revenues derived from merchandising, licensing, and studio leasing. *See ASCAP Direct Exh. 301 at 7; ASCAP PFFCL 39-40.* Finally, no record evidence suggests that the potential overstatement of 1996 revenues would be mathematically significant to the analysis. For example, even assuming a zero increase in revenues from 1995 to 1996, an extreme position, the resultant

annual license fee, under our methodology, would decline less than two percent. Given the inherent vagaries and imprecision of estimating fair market value in an imaginary marketplace, we are comfortable concluding that the rate yielded for 1996 reasonably approximates a fair market rate for the entire statutory period.

Use of *1978* Public Broadcasters revenues:

In rebuttal to the ASCAP trending analysis, Public Broadcasters suggest use of *1976* revenues, rather than 1978 revenues because 1976 was the last year for which the CRT had data to set a fee. *PB Reply PFFCL Appendix A at 1* (citing PB 27X at 9). We do not believe the record necessarily supports this factual assertion. But, in any event, Dr. Jaffe used 1992 programming expenditures in his primary analysis though, presumably, in 1991, when the parties negotiated the 1992–1997 agreement, they did not have access to the 1992 data. *W.D. of Jaffe 12-13.* We feel comfortable doing likewise. Indeed, Public broadcasters actually benefit by using 1978 revenue data. Use of 1976 total revenues in our formula would yield *higher* license fees for 1996 because the growth in revenues would be higher.

Determining the 25% decline in ASCAP's share of total ASCAP/BMI music usage:

The parties devoted considerable hearing time and effort attacking other parties' music use analyses. Indeed, each analysis is vulnerable to legitimate criticism with respect to both the methodology employed and the data used. *See generally PB PFFCL 57-66; ASCAP PFFCL 92; BMI PFFCL 47-52. See also W.R. of Jaffe 24* (no commonly accepted indicator exists to quantify use of music or relative shares of music). The Panel has carefully reviewed the respective analyses and conclusions derived therefrom. We find the music analyses presented by Public Broadcasters to be the most comprehensive and reliable. No credible data is available with

respect to any trend in *overall* music usage by Public Broadcasters since 1978. However, we accept Public Broadcasters' conclusion that overall music usage has remained constant in *recent* years. *PB PFFCL 65-66*. Given the dearth of empirical, or even anecdotal, evidence to the contrary, it is reasonable to presume that overall music usage by Public Broadcasters has remained substantially constant since 1978. *See ASCAP PFFCL 152* ("[T]here is no evidence in the record that total music use on the [Public Television and Public Radio] Stations has changed significantly since 1978."). However, significant changes have occurred since 1978 with respect to *relative shares* of music used by Public Broadcasters. We find that the ASCAP share of total ASCAP/BMI music used by Public Broadcasters has declined from about 80%--83% in 1978 to about 60%--61% in 1996, representing about a 25% decline in its music share. Conversely, BMI's share of total ASCAP/BMI music used by Public Broadcasters has *increased* from about 17%--20% in 1978 to about 38%--40% in 1996. While 1996 music share data is readily available,[42] a determination of music shares in 1978 must be derived by inference. We based our determination upon the following record evidence:

(1) Since 1981, both ASCAP and BMI negotiated fees which consistently reflect relative shares of about 80%--20% of the music use by Public Broadcasters. *PB Direct Exhs. 11, 12, 13, 14, 15, 16; W.D. of Jameson 5-6; W.R. of Berenson 3; Tr. 2621-23, 2660, 2666, 3460.* We have already indicated that the license fees negotiated during this period do not fully reflect fair market

---

[42] The *1996* music share conclusions are derived from the Public Broadcasters' analysis which we found more comprehensive and more reliable than the BMI analysis (though the results were quite similar). ASCAP did not present a music share analysis. *W.R. of Jaffe 24-25; W.R. of Owen 1-3; BMI PFFCL 57-58, 84.* We hasten to add that we accept the use of public television music data as a proxy for music use on public television and radio *combined* as all the parties have historically done. *W.D. of Jameson 5; Tr. 2621-23, 3460.*

value. But, we are persuaded that the consistent division of fees reflects the parties perception of respective music use shares, as confirmed by data available to each party. Viewed in other terms, ASCAP's and BMI's subsidization of Public Broadcasters was in direct proportion to their music shares. In the absence of more reliable indicators, the Panel can reasonably presume that the same 80%/20% music use shares, that prevailed since 1982, also applied four years prior, in 1978. Indeed, we note in its trending formula, ASCAP did not hesitate to use its music use data from *1990* as a proxy for 1978. *See e.g., ASCAP PFFCL 116, n. 6* ("Because reliable music use data were not available for 1978, ASCAP relied on music use data starting from 1990, the first ASCAP distribution year for which detailed information was readily retrievable. Thus, the trended fee assumes that music use on the Stations did not change substantially from 1978 to 1990 *and there is no evidence in the record to contradict that assumption*") (emphasis added and parenthesis omitted). Similarly, our analysis assumes that the music use share of ASCAP did not change substantially from 1978 to 1982 (when the 1983–1987 agreement was executed), and there is no evidence in the record to contradict that assumption.

(2) The 80%/20% music share proportions we infer for 1978, is corroborated by the ASCAP license fee set by the CRT in 1978. The CRT determined that payment of $1,250,000 per year constituted a fair market rate for Public Broadcasters to pay for the ASCAP license. 43 FR 25068. The CRT was aware that BMI has already concluded a voluntary license agreement with Public Broadcasters prescribing a 1978 fee of $250,000. *PB Direct Exh. 21; PB Exh. 27X at 16.* We are cognizant that the CRT declined to use that 1978 license agreement as a benchmark to directly *determine* the appropriate ASCAP license fee. *See* note 45, *infra.* But, presuming the CRT did not arbitrarily determine fees without regard to relative music share, we infer music use

shares for ASCAP and BMI of 83% and 17%, respectively, *for 1978*.

Accordingly, we conclude that ASCAP's share declined from a range of 80%–83% in 1978, to about 60%–61% in 1996, representing about a 25% decline in its music share.[43] It is important to note that whether the music use shares we have adopted are actually accurate is not critical to our analysis so long as the parties *perceived* them to be accurate at the time they negotiated the agreements. As we have repeatedly expressed herein, our task is to attempt to replicate the results of theoretical negotiations. If the parties were to use the 1978 license fee as a benchmark, we have no doubt that the resulting fees from such negotiations would reflect the parties perceived change in ASCAP's music share since 1978, just as they would reflect the parties perceived change in Public Broadcasters' total revenues.

The propriety of deriving the BMI license fee from the ASCAP license fee:

The methodology crafted by the Panel contemplates determination of the ASCAP fee from a prior, reliable fair market benchmark (the 1978 CRT determination) and then deriving the fair

---

[43] The Panel considered, but rejected, two other potential indicia of ASCAP music share in 1978: (1)In a single sentence contained in PB Exh. 27X at 49, a "Touche Ross survey" is referenced purporting to show an 89% ASCAP music share in an unspecified year. Until cited by Public Broadcasters in their post-hearing brief, this survey was never mentioned throughout these proceedings. Without the benefit of examining this survey, nor any explication, we repose little confidence in the 89% statistic. Moreover, we do not know whether any of the parties, or the CRT, actually relied upon the survey. (2)The Panel also examined the proportion of fees actually paid by Public Broadcasters to ASCAP and BMI during the years 1979 through 1982. *See W.R. of Jameson 3-4.* ASCAP was paid an average of about 71% of total ASCAP/BMI license fees and BMI was paid an average of about 29%. However, we are reluctant to ascribe significance to these figures. ASCAP was paid pursuant to the CRT decision of 1978 which prescribed CPI adjustments beginning in 1979, while BMI was paid pursuant to its voluntary license agreement which prescribed certain adjustments beginning in 1979. 43 FR 25068; *PB Direct Exh. 21*. As we stated *supra*, the 1978 fee proportions corroborate our adopted music use shares, but we lack sufficient facts to evaluate the adjustments to both license fee schedules that became effective in 1979. Accordingly, we can not know whether the license fees paid from 1979 through 1982 can be meaningfully correlated to music use shares.

market value of the BMI license wholly on the basis of its relative music use share. Consequently, this methodology assumes that the value of a performing rights organization's blanket license is directly proportional to its music share without regard to the particular *content* of its repertory. ASCAP argues that this assumption is not valid -- that the ASCAP and BMI licenses have different intrinsic values due to differences "in their membership and repertories, operations, distributions to members and ways of measuring the value of nondramatic public performances of musical compositions in their respective repertories." *Tr. 3264; ASCAP PFFCL 150.* We disagree. We find no credible evidence that the music contained in ASCAP's repertory is more, or less, intrinsically valuable than the music in BMI's inventory. Indeed, we can not even envisage a means for performing such a measurement. Obviously, music preference (value) is wholly subjective. The value of a performing rights organization's repertory *to a licensee*, in any meaningful economic sense, can only be determined by the degree to which it is *used* by the licensee. Moreover, the manner in which the performing rights organization internally operates, or distributes royalties to its members, is clearly of no moment to the licensee. Finally, ASCAP's argument does not comport with reality. The protracted history of voluntary license agreements between ASCAP, BMI and Public Broadcasters reveal a consistent pattern of dividing the total license fee "pie" (though the total pie did not reflect total fair market value) purely on the basis of music share. *See discussion supra; see also Tr. 4086.* ASCAP's assertion (unsupported by affirmative evidence), that music share relative to BMI, was not considered during these negotiations, is simply not credible. *See ASCAP Reply PFFCL 28.*

In a related vein, both ASCAP and BMI argue that the type of methodology we advance here is impermissible, *as a matter of law*, because Section 118 requires that separate fees be set

for ASCAP and BMI that are based upon *separate* evaluations of their respective licenses. The legislative history behind Section 118, they argue, proscribes any methodology that yields a combined fee, after which the combined fee is divided between ASCAP and BMI. *ASCAP PFFCL 147-150; ASCAP Reply PFFCL 3-6; Tr. 3969-3973; BMI PFFCL 86-87.* The Panel finds no support whatever for this position in the legislative history of Section 118,[44] the express language of the statute itself, or in the 1978 CRT decision[45] cited by ASCAP.[46] It is undisputed that the statute requires the Panel to set separate rates for ASCAP and BMI but that is an obligation wholly distinct from the methodology we employ to determine those fees. *See* Order of the Copyright Office of December 9, 1997 at 8.

Confirmation of the Panel's Approach:

The Panel undertook to determine fair market license fees under an alternate approach using the rate prescribed by the 1978 BMI voluntary license agreement, for 1978, as a fair market benchmark. We note that this agreement constitutes the only Public Broadcasters' Section 118 voluntary agreement with either ASCAP or BMI which does *not* contain either a no-precedent or non-disclosure clause. However, because the circumstances surrounding this agreement were not adequately explored during these proceedings, we are not sufficiently confident that the rate

---

[44] Congress' adoption of the House, rather than Senate, version of Section 118 simply reflected an intention to modify the technical procedures by which license fees would be paid. *See ASCAP Direct Exhs. 4, 5.*

[45] The CRT declined to adopt a methodology which *directly* determined ASCAP fees from BMI fees (pursuant to its 1978 voluntary agreement with Public Broadcasters) solely because the BMI agreement was adjustable (based upon total payments paid by Public Broadcasters to performing rights organizations). 43 FR 25068 at 25069.

[46] We similarly find no support for the notion that the Panel must set separate license fees for public television and radio..

negotiated for 1978 truly reflects the fair market value of the BMI license.[47] Accordingly, this methodology is employed only for the purpose of demonstrating the reasonableness of our previously determined rates. Using the same general approach as previously crafted, we determine the fair market value of the 1996 *BMI* blanket license pursuant to the following formula:

$$\text{1996 trended BMI license fee (fair market value, before music share adjustment)} = \frac{\text{1978 BMI license fee}}{\text{1978 PB total revenues}} \times \text{1996 PB total revenues}$$

After adjusting for the *increase* in BMI's music use share (17%–20% in 1978, to 38%–40% in 1996), the BMI license fee generated by this formula comes very close to that generated by our prior methodology. Indeed, if one uses the end points of the music share ranges (17% to 40%) in this calculus, a BMI license fee of $2,082,000 is yielded–a figure within 2% of the license fee we generated under our adopted methodology. Of course, we could generate the ASCAP fee from the BMI fee just as we previously generated the BMI fee from the ASCAP fee -- with similarly confirming results.

As we earlier stated, we are more comfortable using the 1978 *ASCAP* license fee, expressly determined by the CRT as the proper fair market rate, as a fair market benchmark, than the 1978 BMI negotiated fee. Accordingly, we adopt our previously crafted methodology which

---

[47] For reasons articulated by the 1978 CRT, we would not attempt to use rates prescribed by this agreement for the out-years, *subsequent to 1978*, as a fair market value benchmark. *See* note 45, *supra*.

yielded an annual ASCAP license fee of $3,320,000 and an annual BMI license fee of $2,123,000. In adopting this methodology, we are fully cognizant of the several assumptions and inferences required. While we defend these assumptions and inferences as eminently reasonable, we must recognize the potential for imprecision. Such is the hazard of rate-setting based upon theoretical market replication. See *National Ass'n of Broadcasters v. Librarian of Congress*, 1998 U.S. App. LEXIS 13692, at *76-77 (D.C. Cir. June 26, 1998). The methodologies advanced by the parties involve, we believe, less reasonable assumptions and inferences. We do not here advance a perfect methodology (none exists), merely the most reasonable and least assailable based upon the record before us.

DETERMINATION AND ASSESSMENT OF COSTS

In accordance with the foregoing Discussion and Findings and pursuant to 17 U.S.C. § 118, the Panel determines that the annual compulsory license fees to be paid from January 1, 1998 through December 31, 2002, by Public Broadcasters for public performance of programming containing published nondramatic musical works contained in the repertories of ASCAP and BMI, should be as follows:

$3,320,000 to ASCAP, and

$2,123,000 to BMI.

Said license fees should be paid in accordance with the terms attached hereto as Appendix B.[48]

---

[48] Excepting the royalty *rates* prescribed under subsection (b), the parties agreed and stipulated to the language of the attached, proposed regulation, 37 CFR § 253.3. However, ASCAP advocated that the regulation be divided into two subparts with the first subpart prescribing terms applicable only to ASCAP, and the second subpart prescribing *identical* terms applicable only to BMI. *See* joint submissions dated July 8, 1998. The Panel sees no need for separate subparts.

After reviewing the totality of circumstances, including the 1978 CRT decision, the history of negotiations between the parties, and the manner in which the parties proceeded herein, for the sole purpose of assessing the costs of this proceeding, the Panel finds that ASCAP, BMI, and Public Broadcasters constitute three separate parties. Accordingly, pursuant to 37 CFR § 251.54(a)(1), costs shall be borne equally by the parties -- one-third each by ASCAP, BMI, and Public Broadcasters.

CERTIFICATION BY THE CHAIRPERSON

Pursuant to 37 CFR § 251.53(b), on this 22nd day of July, 1998, the Panel Chairperson hereby certifies the Panel's determinations contained herein.

Report by J. Gulin.

Lewis Hall Griffith,
Chairperson

Jeffrey S. Gulin,
Panelist

Edward Dreyfus,
Panelist