Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

In the Matter of	**)**
	)
ADJUSTMENT OF THE RATES	**) Docket No. 96-6 CARP-NCBRA**
FOR NONCOMMERCIAL	**)**
EDUCATION BROADCASTING	**)**
COMPULSORY LICENSE	**)**

REPORT OF THE PANEL

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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, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), for the five-year period

[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).

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 additional time for negotiation of voluntary agreements or joint proposals pursuant to 17 U.S.C.

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[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."

§ 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.

ISSUE

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[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.

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

[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.

Dr. Peter 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*.

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[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

[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.

rights 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*.

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[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,

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[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").

in the 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,

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[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

[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.

was then applied to Public Broadcasters by 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

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[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*.

music use by Public Broadcasters. *Id.* This methodology generated total 1995 license fees for television 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

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[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.*

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 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

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[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-

amount of ASCAP and BMI music used on public television. The 42.5% figure, that BMI 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.[28] *PB PFFCL 1.*

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copyrighted) music. *W.D. of Willms 21-22.*

[28] 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

In the absence of evidence that the last license agreements negotiated in 1991, covering 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

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illogical for this Panel, charged with determining a fair market value rate, *not* to carefully examine them.

[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.*

$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 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

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[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.*

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 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

[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.*

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:

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

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[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.

> 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 -- 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.

The Panel's Valuation Approach

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

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[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

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 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:

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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.*

[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 ASCAP license to PB	=	$4,426,000 x .75	(25% decline in ASCAP's share of total ASCAP/BMI music usage)
	=	**$3,320,000**.	

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

[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).

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 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

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[41] Moreover, BMI employed total revenues to gauge the size of Public Broadcasters vis-a-vis commercial broadcasters. *W.D. of Owen 4-6*.

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 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

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[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.*

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

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[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.

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 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

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[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.

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 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:

$$\text{1996 trended BMI license fee (fair market value, before music share adjustment)} = \frac{\text{1978 BMI license fee}}{\text{1978 PB total revenues}} \times \text{1996 PB total revenues}$$

[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*.

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 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]

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.

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[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.

Report by J. Gulin.

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Lewis Hall Griffith,
Chairperson

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Jeffrey S. Gulin,
Panelist

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Edward Dreyfus,
Panelist