

In the Matter of	}	
	}	
Adjustment of the Rates for	}	Docket No. 96-6 CARP NCBRA
Noncommercial Educational	}	
Broadcasting Compulsory License	}	
	}	

ORDER

The Library has before it seven motions to compel document production filed by the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and the Public Broadcasting Service and National Public Radio (collectively, "Public Broadcasters"). The motions are as follows:

1. A motion of Public Broadcasters to compel document production from ASCAP or, in the alternative, to strike those portions of ASCAP's written direct case and exhibits related to the document requests.
2. A motion of Public Broadcasters to compel document production from BMI or, in the alternative, to strike those portions of BMI's written direct case and exhibits related to the document requests.¹
3. A motion of ASCAP to compel document production from BMI.
4. A motion of ASCAP to compel document production from Public Broadcasters.
5. A motion of BMI to extend the precontroversy discovery schedule vis-a-vis ASCAP.
6. A motion of BMI to compel document production from ASCAP.
7. A motion of BMI to compel document production from Public Broadcasters.

I. Guidelines For Production of Documents

This Order directs production of documents, detailed in the rulings below, which the Library

¹ This motion incorporates a letter-motion filed by Public Broadcasters on October 24, 1997 seeking certain BMI music usage studies.

has determined are nonprivileged underlying documents within the meaning of 37 C.F.R. 251.45(c)(1). In order to speed the process and promote efficiency, the party ordered to produce documents shall, to the extent possible, produce such documentation in electronic format. The Library is not specifying the precise format to be used (ASCII, WordPerfect, etc.), but instead is directing counsel to negotiate an acceptable format that will permit viewing of the materials. Documents which exist in hardcopy only shall be produced in an organized fashion identifying which documents produced are responsive to the specific Rulings provided below. See Order in Docket No. 96-5 CARP DSTR A at 5 (January 21, 1997). All production shall take place no later than the close of business on January 16, 1998, except as otherwise provided in this Order.

In several instances, where documents exist only in hard copy and not electronic format, the Library has ordered that the documents be made available for inspection and copying. All inspection and copying shall take place at the following locations:

1. For documents of Public Broadcasters, the New York City office of Weil, Gotshal & Manges.
2. For documents of ASCAP, the New York City office of ASCAP.
3. For documents of BMI, the New York City office of BMI.

Each party ordered to make documents available for inspection and copying shall bear the expense of making the documents available at the above-described locations. Each party examining and copying documents shall bear the expense of copying. In those instances where inspection and copying is ordered, counsel for the affected parties are directed to negotiate mutually agreeable dates and times for inspection and copying. All inspection and copying must be completed by January 30, 1998.

II. Initiation of the CARP Proceeding

Initiation of the CARP in this proceeding, an commencement of the 180 days, is scheduled for December 31, 1997. Due to the large volume of document production that still must take place, as described below, the Library has determined that December 31 is no longer an appropriate date.

Consequently, to accommodate document production, the CARP will not be initiated until January 30, 1998. Notification of initiation will appear in the **Federal Register** on or before that date as required by the statute.

III. Document Production Motions of the Parties

1. Public Broadcasters' Motion to Compel Production From ASCAP

Public Broadcasters seek document production from ASCAP in four instances:

1) documents verifying bottom-line figures contained in the testimony of Peter M. Boyle; 2) documents cited by James Ledbetter and underlying interviews; 3) documents underlying the form of a survey cited by Ed Bergstein; and 4) documents verifying bottom-line figures contained in the testimony of Seth Saltzman.

a. **Testimony of Mr. Boyle.** Public Broadcasters made the following document request of ASCAP with respect to Mr. Boyle's testimony:

All data underlying Dr. Boyle's estimates of average music use per hour in public television, public radio, commercial local television, commercial network television, and commercial radio for the years 1990 through 1995, including, without limitation, the following:

a. With respect to Dr. Boyle's calculation of ASCAP credits for commercial television network programming, commercial television local programming, public television programming, commercial radio programming, and public radio programming:

(i) All data used in calculation of ASCAP Credits in programs aired for 1990 to 1995 (e.g. 20, 510.7 ASCAP Credits in 1990 in commercial television network programming, see Appendix B, p. 9; 39, 616.1 ASCAP Credits in 1990 in commercial television local programming, see Appendix B, p. 8; 1, 753.9 ASCAP Credits in 1990 in public television programming, see Appendix B, p. 7; 192, 706.8 ASCAP Credits in 1990 in commercial radio programming. see Appendix B, p. 12). At a minimum, this should include both program data

and date on music use compiled from cue sheets. Program data should include a program identification code, program name, program length, Network identifier (if applicable), station identifier, and any other data used in the analysis. Music use data should include individual cue number; individual cue duration; cue type (e.g. background, feature, or other usage type utilized by ASCAP in calculating ASCAP Credits); licensing affiliation (e.g. ASCAP, BMI, etc.); program identification code (to provide a link with airplay data); and any other data used in the analysis. Please provide data in electronic (any commonly used database or spreadsheet) format and include the necessary layout tables for utilizing the data (see Appendix B).

(ii). An identification of any programming (by program identification code and name) included in the samples assigned by "ASCAP's independent survey experts" (see Appendix B, p. 3) for which cue data was not available. Please provide documents or information describing the methodology used in these cases to ensure the randomness of the sample and the validity of the sampling methodology (see Appendix B).

b. With respect to Dr. Boyle's estimates for commercial television local programming and public television programming, provide documents or data sufficient to identify which cues came from cue sheets from programs for which a "complete count" of performances was included and which cues came from cue sheets for which "a sample of...performances" was taken (see Appendix B, pp. 2-3).

c. With respect to public television programming, provide documents or data sufficient to identify which cue sheets came from cue sheets provided by PBS and which cue sheets came from cue sheets provided by member stations or other non-PBS sources.

In response to this request, ASCAP produced a diskette. The diskette contained spreadsheets with the total music credits assigned by ASCAP for general uses of music on public television, public radio, commercial

local television, commercial network television and commercial radio. The diskette also contained two tables: one table explained the "credit symbols" used in the spreadsheets, while the other contained information regarding "strata."

Public Broadcasters contend that ASCAP must produce all documents that underlie the ASCAP credit data utilized by Mr. Boyle in his testimony. Public Broadcasters request cue sheets and program information databases to verify the accuracy of the credits assigned, documents describing the station weights used to adjust certain credits, and documents reflecting the percentages of local and network programming necessary to combine local and network figures for 1990-1994.²

ASCAP objects to Public Broadcasters request on the grounds that Mr. Boyle did not rely upon the underlying data used to calculate ASCAP credits. Rather, Mr. Boyle relied only upon the summary spreadsheets of credits contained on the diskette produced by ASCAP, and only made use of the ASCAP credits in his testimony. ASCAP contends that Public Broadcasters seek not only the data underlying calculation of the ASCAP credits, but all data that ASCAP has compiled on other repertoires' music as well which is beyond the scope of discovery. ASCAP further objects to producing program data because Mr. Boyle does not rely on any particular programs or program episodes. ASCAP alleges that there is no need to test the randomness of ASCAP's surveying methods because these are regularly scrutinized by the Justice Department and the federal courts as part of ASCAP's antitrust consent decree. Finally, ASCAP contends that producing the requested documents would constitute an enormous burden.

RULING: Public Broadcasters' motion is granted in part. Mr. Boyle's testimony sets forth ASCAP's methodology for calculating its proposed fee for both noncommercial radio and television stations. The methodology is in the form of an algebraic formula multiplies a total revenue figure for both noncommercial television and radio by a music use ratio for both television and radio. The music use ratio is derived from ASCAP surveys that determine the amount of ASCAP music (measured in "credits") performed on public television, commercial local television

² ASCAP produced this information for 1995.

stations, the national television networks, public radio, and commercial radio stations from 1990-1995. Because Mr. Boyle's testimony is essential to ASCAP's proposed fee, see Order in Docket No. 93-3 CARP CD 90-92 (October 30, 1995) at 2 (requiring production of documents underlying survey where testimony based on survey forms basis of distribution), documents underlying calculation of the music use ratio must be produced. ASCAP is ordered to produce the lists of credits for individual compositions and performances for the years 1990-1995, and the cue sheets and other relevant program information databases that were used to calculate these credits. To the extent that Public Broadcasters' request seeks documents and information on music use that are not part of the calculation of ASCAP music credits, the motion is denied. Any such information contained in documents that are otherwise producible under this Order may be redacted.

In addition, for the same time period, ASCAP is ordered to produce documents underlying the calculation of "station weights" for radio and television stations as described on page 6 of the confidential appendix to Mr. Boyle's testimony. Also, for the years 1990-1994, ASCAP is directed to produce all documents underlying the weighting of music use per hour for commercial local broadcast stations and commercial broadcast networks as described on page 10 of the confidential appendix to Mr. Boyle's testimony.

ASCAP is directed, to the extent possible, to produce the above documentation in electronic format. For those documents which exist only in hard copy (such as cue sheets), ASCAP shall make such documents available for inspection and copying.

b. Testimony of Mr. Ledbetter. Public Broadcasters seek production of all non-public documents cited by Mr. Ledbetter in his testimony which are not otherwise attached as exhibits. In addition, Public Broadcasters seek notes and documents underlying Mr. Ledbetter's interviews with network officials referred to in footnote 28 on page 16 of his testimony, as well as the identity of the CBS employee referred to, and notes and documents underlying Mr. Ledbetter's interviews with CPB employees referred to in footnote 40 on page 23 of his testimony, as well as the dates on which such interviews were conducted.

ASCAP asserts that the only documents that it did not produce are non-public notes from Mr. Ledbetter's interview of various media personnel, and objects to Public Broadcasters' requests on the grounds that such documents are protected by the privilege afforded to journalists, and need not be produced as provided in section 251.45(c) of the rules. ASCAP asserts that under relevant federal case law, ASCAP is

only required to produce such journalistic information if it is of crucial and central importance to this case and the moving party has exhausted other reasonable means of obtaining the information, and that Public Broadcasters cannot make such a showing here. Public Broadcasters counter that these cases are not applicable because Mr. Ledbetter is appearing as ASCAP's expert witness and should not be allowed to shield his statements by claiming journalistic privilege.

RULING: Public Broadcasters' motion is denied. Section 251.45(c)(1) of the rules allows parties to "request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony." Examination of footnotes 28 and 40 do not reveal whether Mr. Ledbetter conducted the interviews as preparation for his testimony in this proceeding or as part of his journalistic activities. ASCAP asserts that these interviews were conducted as part of Mr. Ledbetter's journalistic activities. Consequently, they are privileged documents and need not be produced. The sufficiency and weight of the statements, if any, made in the interviews may be tested on cross-examination.

c. **Testimony of Mr. Bergstein.** Public Broadcasters seek documents related to communications between ASCAP and Audits and Surveys Worldwide ("ASW") regarding the survey questionnaire used by ASW. These documents underlie Mr. Bergstein's statement that ASW created the survey which was "approved by the client." ASCAP counters that there are no documents constituting a formal approval, and that Public Broadcasters are not entitled to communications between ASCAP and ASW regarding solicitation and construction of the survey.

RULING: Public Broadcasters' motion is denied. There are no documents underlying Mr. Bergstein's assertion that the ASW survey was "approved by the client." Documents underlying communications between ASCAP and ASW regarding the survey are outside the scope of discovery under section 251.45(c)(1) of the rules.

d. **Testimony of Mr. Saltzman.** Public Broadcasters seek documents underlying ASCAP exhibits 203 and 204 which reflect the results of Mr. Saltzman's matching title code analysis. Specifically, Public Broadcasters seek production of the 1996 distribution survey data in electronic format.

ASCAP objects to Public Broadcasters' request as overbroad, stating that Mr. Saltzman's

examination of the 1996 distribution survey data reveals 3,465 examples of the same songs broadcast by public television and the commercial networks and local stations, and 2,039 examples of the same songs broadcast by public television and commercial cable program services. ASCAP asserts that it need not produce the whole database because Mr. Saltzman's examination does not purport to be exhaustive.

In reply, Public Broadcasters limit their request to the data underlying Mr. Saltzman's assertions of the 3,465 and 2,039 song matches. Public Broadcasters assert that ASCAP should produce documents that verify that ASCAP songs were in fact used on the programs identified by Mr. Saltzman, by identifying the specific programs in which the songs were used.

RULING: Public Broadcasters' motion is granted in part and denied in part. ASCAP is directed to produce those portions of data from the 1996 distribution survey that verify Mr. Saltzman's assertion that there are 3,465 matches between songs broadcast by public television and the commercial networks and local stations, and 2,039 matches between songs broadcast by public television and commercial cable program services. To the extent such documentation exists, production should include both identification of song titles and the programs on which they were broadcast. Public Broadcasters' motion is denied with respect to production of the entire 1996 distribution survey.

ASCAP is directed, to the extent possible, to produce the above-described documentation in electronic format. For those documents which exist in hard copy only, ASCAP shall make such documents available for inspection and copying.

2. Public Broadcasters' Motion to Compel Production From BMI

Public Broadcasters seek document production from BMI in five instances:

- 1) documents underlying certain statements of Fredric J. Willms and accompanying exhibits;
- 2) documents underlying certain statements of Michael Bacon and accompanying exhibits;
- 3) documents underlying certain statements of Janet R. McFadden and accompanying exhibits;
- 4) music data underlying the direct testimony of Bruce M. Owen and Fredric J. Willms; and
- 5) music data underlying the direct testimony of Roy. J. Epstein.

a. **Testimony of Mr. Willms.** Public Broadcasters seek documents underlying several

assertions of Mr. Willms. First, Public Broadcasters seek documents underlying Mr. Willms' statement regarding BMI's proposal to adjust the rate for college and university radio stations not affiliated with NPR by an annual cost of living increase. BMI asserts that there are no underlying documents and that Mr. Willms' statement was based upon his recollection, knowledge and expertise, and that Public Broadcasters' request should be denied because fees paid by unaffiliated radio stations is not in issue in this proceeding.

Second, Public Broadcasters seek documents underlying Mr. Willms' statement that "in the absence of any compelling reason to cross-subsidize...payments [to its authors and publishers based on music performed on public television] with money received by BMI from other licensees, the money to pay for performances on PBS stations must come from the fees awarded by this Panel." Willms, Direct Testimony at 17. Public Broadcasters seek documents describing any BMI practice or policy regarding cross-subsidization in other mediums, and documents describing BMI's practice of paying its affiliates for performances on PBS and NPR. BMI asserts that Mr. Willms relied on his general knowledge and expertise in making the statement.

RULING: Public Broadcasters motion is denied. Mr. Willms' relied upon his general knowledge and expertise and his statements may be tested on cross-examination.

b. Testimony of Mr. Bacon. Public Broadcasters seeks documents underlying statements made by Mr. Bacon regarding his earnings and expenses as a composer of music used in television programming. Specifically, Public Broadcasters seeks documents regarding the up-front fees received by Mr. Bacon for a number of television programs, documents underlying Mr. Bacon's assertion that one third of his up-front fees are used for expenses, documents underlying his assertion that his expenses are the same when composing music for both PBS and commercial networks, and documents underlying his assertion that 60 percent of his composing music for television in 1996 was for PBS. BMI objects to the request as burdensome and asserts that the statements were made based upon Mr. Bacon's recollection, knowledge and

experience.

Public Broadcasters also seek documents for Mr. Bacon's assertion that two-thirds of a documentary such as "American Experience" is filled with music. BMI produced a cue sheet for one episode of "American Experience." Public Broadcasters seek a minimum of 25 cue sheets from "American Experience" to verify Mr. Bacon's assertion. BMI asserts that it has already produced computerized data showing the amount of BMI music on episodes of "American Experience." In reply, BMI offers no response.

RULING: Public Broadcasters' motion is granted in part and denied in part. BMI is directed to produce documents which underlie Mr. Bacon's assertion that 60 percent of his composing in 1996 was for PBS. The motion is denied with respect to the up-front fees paid to Mr. Bacon for the television programs to which he contributed music, his assertion that one-third of his fees are used for expenses, and his assertion that his expenses are the same for PBS and commercial network composing because these statements are based upon his knowledge and expertise and may be tested on cross-examination. The motion is also denied with respect to cue sheets for the "American Experience" because such information has already been produced.

c. **Testimony of Ms. McFadden.** Public Broadcasters seek documents underlying Ms. McFadden' assertions that NBC has bigger program budgets than PBS and that National Geographic's music budgets range between \$12,000 and \$18,000." ASCAP asserts that these statements are based upon Ms. McFadden's knowledge and experience as a television producer at National Geographic for three years and that if underlying documents exist, they are not likely in her possession because she no longer works at National Geographic. In reply, Public Broadcasters assert that if no underlying documents exist, BMI should be required to state so.

RULING: Public Broadcasters' motion is denied. Ms. McFadden's statements are based upon her knowledge and experience and may be tested on cross-examination.

d. **Testimony of Mr. Owen and Mr. Willms.** Public Broadcasters seek documents underlying statements of Mr. Owen and Mr. Willms concerning music use, as measured by BMI, on public television from 1992-1996 and commercial television in 1992 and 1995. Public Broadcasters filed a letter

motion on October 24, 1997 to strike all testimony based upon the results of these studies. BMI asserts that Public Broadcasters' motion is moot because BMI has produced in electronic form all the music performance data in its possession underlying the noncommercial television usage study for 1992-1996, the commercial network music usage study for 1992 and 1995, and the local television music usage study in 1991 and 1992.

In reply, Public Broadcasters assert that they have been unable to analyze BMI's data because it has been produced in non-standard formats. Counsel for Public Broadcasters has subsequently informed the Library that the diskettes produced by BMI are either blank or corrupted.

RULING: BMI is directed to produce again the music usage studies in complete form in accordance with the Guidelines for Production described above.

e. **Testimony of Mr. Epstein.** Public Broadcasters served follow-up requests to certain documents underlying a music use study for commercial local television referred to by Mr. Epstein. Response to the follow-up requests were due after the deadline for filing motions, and Public Broadcasters reserve their right to engage in additional motion practice with respect to the responses. Neither BMI nor Public Broadcasters make further mention of this request in their respective opposition and reply.

RULING: Public Broadcasters request for additional motion practice with respect to the music usage study referred to by Mr. Epstein is moot.

3. ASCAP's Motion to Compel Production From BMI

ASCAP informs the Library that it has negotiated a n agreement with BMI for the production of music usage data, and that both ASCAP and BMI agreed to exchange such data simultaneously on November 7, 1997. ASCAP asserts that it was informed by BMI that BMI would not be able to meet the November 7 deadline, and requests that the Library compel BMI to produce such data as soon as possible and allow ASCAP to refrain from production of its data until such time as BMI produces its data. BMI responds that it produced its data on November 14, 1997, thereby mooting ASCAP's motion.

In reply, ASCAP agrees that its motion is mooted. However, ASCAP notes that BMI has,

in a separate motion (addressed below), requested that the Library order ASCAP to produce to BMI any documents that the Library may order ASCAP to produce to the Public Broadcasters. ASCAP asserts that if the Library orders such production to BMI then BMI should produce to ASCAP any documents that the Library may order BMI to produce to Public Broadcasters. In surreply, BMI requests that the Library deny ASCAP's motion.³

RULING: ASCAP's motion is moot. ASCAP's request in its reply that the Library order BMI to produce to ASCAP any documents that BMI may be required to produce to Public Broadcasters is untimely and is denied.

4. ASCAP's Motion to Compel Production From Public Broadcasters

ASCAP seeks production of documents underlying certain testimony of Adam B. Jaffe, Paula Jameson, Peter Jablow, and Peter Downey, and documents underlying certain statements made in Public Broadcasters' exhibits.

a. **Testimony of Mr. Jaffe.** ASCAP seeks document production for several statements and references made by Mr. Jaffe. First, ASCAP seeks documents supporting Mr. Jaffe's statement that "the parties own most recent license agreement forms the most logical starting point for determining fair and reasonable license fees for the next succeeding period." Public Broadcasters assert that there are no documents underlying this statement and that Mr. Jaffe relied upon his knowledge as an economist and experience with music licensing agreements. Public Broadcasters note that they did cite several unrelated rate court decisions as evidence reasonable rate setting.

RULING: ASCAP's request is denied because there are no underlying documents and Mr. Jaffe's statement may be tested on cross-examination.

Second, ASCAP seeks documents underlying Mr. Jaffe's statement "[p]ublic television and

³ The rules do not provide for the filing of surreplies to motions. Absent any showing of good cause for accepting BMI's surreply, it is stricken.

radio stations have budgets for program production and acquisition," including individual station budget information and documents reflecting station budgeting of ASCAP licensing fees; Mr. Jaffe's statement that "[i]f music royalties rise, there is no mechanism that adjusts the budgets upward to reflect this increased cost," including documents concerning the budget practices and policies of public broadcasters; and Mr. Jaffe's statement that "unless the programming budgets are rising, any increase in music royalties can only be paid by decreasing some other category of program production or acquisition cost." Public Broadcasters assert that these statements are based upon Mr. Jaffe's knowledge and experience. With regard to individual program budgets, Public Broadcasters assert that Mr. Jaffe relied upon aggregate expense data developed by CPB in the ordinary course of business, which have been produced to ASCAP. Public Broadcasters' assert that the raw data used in compiling the aggregate expense data need not be produced.

RULING: ASCAP's motion is denied. Mr. Jaffe is not offering bottom line figures to calculating Public Broadcasters' proposed royalty fee, but rather is making general observation regarding public broadcast stations budgeting of music. In making these general statements, which may be tested on cross-examination, Mr. Jaffe relied solely upon the aggregate expense data already produced by Public Broadcasters. If Mr. Jaffe had offered specific numbers from this data, then the underlying raw data would have to be produced, but Mr. Jaffe did not do so.

Third, ASCAP seeks documents regarding Mr. Jaffe's reference to "the estimated value of in-kind donations to the stations of programming and production activities." ASCAP seeks individual station budgets and documents demonstrating how individual stations value in-kind donations of programming and production activities, as well the estimated value of such in-kind donations. Public Broadcasters assert that they have produced the system-wide data Mr. Jaffe used in making his calculations, and need not produce individual station information regarding in-kind donations because such information is kept by the station's in the ordinary course of business, is burdensome to produce, and there is no reason to suspect that either the information itself or the methodology of collecting it is inaccurate. ASCAP counters that its music usage data is collected in its ordinary course of business and that if it is required to produce the underlying data, then so

too should Public Broadcasters.

RULING: ASCAP's motion is granted in part and denied in part. Mr. Jaffe states at pages 12-13 of his testimony that in-kind donations to stations of programming and producing activities are removed from his chart (figure 1 of his testimony) of total programming and productions costs for public broadcast stations. Public Broadcasters are directed, to the extent that they have not already done so, to produce documents demonstrating the total value of in-kind donations removed from Mr. Jaffe's chart. ASCAP's motion is denied with respect to production of data from individual stations regarding in-kind donations.

Fourth, ASCAP seeks the data described in Mr. Jaffe's reference to "fairly comprehensive data on [radio] programming formats," as well as his statements that "[g]iven this static programming mix on public radio, it seems extremely unlikely that there have been any significant changes in the average music intensity of public radio programming," and "overall music use has probably declined." Public Broadcasters assert that with respect to radio programming formats, they have produced the radio programming data which are the relevant portions of the annual Public Radio Programming reports prepared by NPR and CPB for the years 1987 through 1996. As to the two statements, Public Broadcasters assert that Mr. Jaffe relied on his experience and knowledge in making the statements.

RULING: ASCAP's motion is granted in part and denied in part. Mr. Jaffe states at pages 15-16 of his testimony that music in public broadcasting "has probably declined slightly" and then, in support of this statement, performs an analysis of both public radio and television. He states at page 16 that "[w]e do not have detailed music use information for public radio. We do, however, have fairly comprehensive data on programming formats." Public Broadcasters have produced the annual Public Radio Programming reports which Mr. Jaffe used in analyzing trends in music use. Figures 2 and 3 of Mr. Jaffe's testimony contain data on music programming as a percentage of the overall programming broadcast on public radio for the years 1992-1996. These are bottom-line figures, essential to Mr. Jaffe's contentions of an appropriate royalty fee, and must be verified. Public Broadcasters are directed to produce the documents used to prepare the analysis of programming formats and changes in same over time, including individual station survey responses, as contained in the annual Public Radio Programming reports prepared by NPR and CPB for the years 1987-1996. Such information is to be produced in electronic format where possible. For those documents which exist in hard copy only, Public Broadcasters are directed to make such documents available for inspection and copying.

ASCAP's motion is denied with respect to Mr. Jaffe's two statements regarding music intensity and overall music use because he relied upon his knowledge and experience in making these statements and they may be tested on cross-examination.

Fifth, ASCAP seeks documents underlying Mr. Jaffe's statements that "the composition of PBS programming has changed over the period (in contrast to NPR," and "[i]n 1994, programs from the PBS feed comprised almost two-thirds of all broadcasts by public television stations." In response to the first statement, Public Broadcasters produced the radio program data, public television music use data, and relevant portions of the PBS Program Information Notebooks for 1990-1995. Public Broadcasters assert that ASCAP is not entitled to the complete Radio Programming Reports and Program Information Notebooks because the balance of these documents do not contain underlying documentation.

In response to the second statement, Public Broadcasters referred ASCAP to Exhibit PB 3, which is a complete copy of "Twenty Years of Public Television Programming: Highlights of the 1994 CPB Programming Survey." This document summarizes the results of twenty years' worth of biennial public television programming surveys.

RULING: ASCAP's motion is granted in part and denied in part. Public Broadcasters are directed to produce to ASCAP complete copies of the annual Radio Programming Reports and the PBS Program Information Notebooks for 1992-1996. ASCAP's request with respect to Mr. Jaffe's statement that two-thirds of PBS programs came from the national feed in 1994 is denied and the statement may be tested on cross-examination.

Sixth, ASCAP seeks documents from 1988-1992 underlying Mr. Jaffe's statement that "[t]he programming funding of the public broadcasting system, which determines the resources that public broadcasting has available for music royalties and other program elements, is little different today than it was then [in the prior license period]." Public Broadcasters contend that ASCAP has misread Mr. Jaffe's statement, submitting that the "then" in his statement refers solely to 1992, and not the prior licensing period of 1988-1992. Public Broadcasters have produced the relevant portions of the annual revenue reports

prepared by CPB for the years 1992-1996.

RULING: Public Broadcasters are directed to produce complete copies of the annual revenue reports for 1992-1996.

b. **Testimony of Ms. Jameson.** ASCAP seeks documents supporting three statements of Ms. Jameson. First, ASCAP seeks documents underlying Ms. Jameson's statement that "[t]he reduction in federal funding affects the availability of funds for the payment of the compulsory license fees at issue in this proceeding." Second, ASCAP seeks documents underlying Ms. Jameson's statement that "[w]ere ASCAP and BMI to achieve significantly larger fees for the 1998-2002 period, the System Support fund would be severally taxed." Third, ASCAP seeks documents underlying Ms. Jameson's statement that "Congress has also directed CPB to use System Support to support other critically important activities such as the cost of operating public television's satellite distribution system." Public Broadcasters respond that Ms. Jameson's statements are based on her knowledge and experience, as well as 47 U.S.C. 396(k)(3)(A)(i)(II), and not on underlying documents.

RULING: ASCAP's motion is denied. Ms. Jameson's statements may be tested on cross-examination.

c. **Testimony of Mr. Jablow.** ASCAP seeks documents supporting several of Mr. Jablow's statements. First, Mr. Jablow states that "public radio's use of music has not been increasing," and "news and talk format programming is accounting for an ever-greater portion of public radio's broadcasting hours." Public Broadcasters produced certain portions of the annual radio programming data reports from 1987-1995. ASCAP seeks production of the entire reports.

RULING: ASCAP's motion is granted. Public Broadcasters are directed to produce complete copies of the radio programming data reports for 1987-1995.

Second, ASCAP seeks documents underlying Mr. Jablow's statements that "overall programming expenditures in public radio have been essentially flat over the past five years," [a] particularly

pertinent trend reflecting the changing financial environment in public radio is the flattening out of programming expenditures by public radio stations throughout the country," and "[w]hile, for its part, NPR has managed to increase somewhat its programming expenditures during the same period, that increase has been channeled to support news and information, rather than music-format programming." ASCAP seeks in particular individual member station expenditures. Public Broadcasters state that they have produced documents reflecting aggregated public television and radio programming and production costs for the years 1992-1996 and should not be required to produce individual station data used to determine the aggregated costs.

RULING: ASCAP's motion is granted. Public Broadcasters are directed to produce the following: 1) complete copies of annual revenue reports for public radio for the years 1992-1996; and 2) documents used in calculating that annual aggregated radio programming and production costs for the years 1992-1996, including the documents identifying the annual programming and production costs of individual NPR member stations, as used in the annual aggregated reports, for those same years. Production is to be made in electronic format. For those documents which exist in only hard copy, Public Broadcasters are directed to make such documents available for inspection and copying.

Third, ASCAP seeks documents underlying Mr. Jablow's reference to "NPR Audience Research, CPB/NPR Public Radio Programming Surveys 1987 to 1996," and, specifically, the documents underlying these surveys and the chart on page 7 of Mr. Jablow's testimony. Public Broadcasters state that they have produced the relevant portions of the annual Public Radio Programming reports for 1987-1996 and should not be required to produce the individual station data used to compile these reports.

RULING: ASCAP's motion is moot. See Ruling 4(a) above.

Fourth, ASCAP seeks documents underlying Mr. Jablow's statement that classical music features "a large number of compositions written prior to 1922 and hence in the public domain." Public Broadcasters assert that this statement is based on Mr. Jablow's knowledge and experience.

RULING: ASCAP's motion is denied. Mr. Jablow's statement may be tested on

cross-examination.

d. **Testimony of Mr. Downey.** ASCAP seeks documents supporting several of Mr. Downey's statements. First, ASCAP seeks documents underlying Mr. Downey's statement that "[n]either can it be said that the mix of public television programming has moved in a direction involving greater use of copyrighted music." Public Broadcasters respond that Mr. Downey's statement is based upon his knowledge and experience, and Exhibit PB 3.

RULING: ASCAP's motion is denied. Mr. Downey's statement may be tested on cross-examination.

Second, ASCAP seeks documents underlying Mr. Downey's statements that "PBS finances the production of new programming," "[t]he majority of these funds are aggregated from member stations; additional funds are provided by CPB and other sources," and "PBS-supported programming accounts for the majority of programming aired on public television." Public Broadcasters respond that these statements are based upon Mr. Downey's knowledge and experience.

RULING: ASCAP's motion is denied. Mr. Downey's statements may be tested on cross-examination.

Third, ASCAP seeks documents underlying Mr. Downey's statement that "PBS-distributed programming (both original and re-released) over the course of the past license term, has accounted for nearly two-thirds of the total number of hours broadcast by all public television stations." Public Broadcasters note that this statement is similar to one made by Mr. Jaffe and that ASCAP's request should be denied.

RULING: ASCAP's motion is denied. Mr. Downey's statement may be tested on cross-examination.

Fourth, ASCAP seeks documents underlying Mr. Downey's statement that "[b]i-annual surveys performed by CPB provide a summary of the general mix of public television programming." ASCAP seeks the surveys, and documents underlying the surveys, for 1992-1996. Public Broadcasters

respond that exhibit PB 3 contains the survey results through 1994 and that the 1996 survey has not yet been finalized by CPB.

RULING: ASCAP's motion is granted. Mr. Downey provides a chart at page 21 of his testimony describing the percentage of broadcast hours represented by various program types for the years 1978-1994. These figures are taken from exhibit PB 3, the 1994 CPB programming survey. Mr. Downey offers these figures to identify the general mix of public television programming as part of his general contention that PBS programming has not changed significantly in recent years to warrant a royalty fee increase. These are bottom-line figures which must be verified. Public Broadcasters are directed to produce complete copies of the biannual programming surveys for 1978-1994 and the documents used to calculate the programming mixes appearing in the chart on page 21 of Mr. Downey's testimony, including the individual station responses to these surveys. Production is to be made in electronic format. For those documents that exist only in hard copy, Public Broadcasters are directed to make such documents available for inspection and copying.

e. **Exhibit PB 3.** ASCAP seeks documents supporting certain statements and data contained in Public Broadcasters' exhibit PB 3. Exhibit PB 3 is a report highlighting twenty years worth of public television programming surveys conducted by CPB. The report discusses and analyzes trends in public television programming from 1974-1994, providing numerous charts and statistical information as well as stating numerous conclusions. The report is sponsored by Messrs. Jaffe, Jablow and Downey who relied on the information contained in the report in preparing their testimony. Neither of these witnesses, however, were responsible for preparing the report. Public Broadcasters resist producing any underlying documentation to the report, asserting that such production is burdensome and that its witnesses only used the statistics provided in the report and did not consult the base data.

First, ASCAP seeks documents supporting the statements contained in the report that "[w]hile PTV's cultural component is generally on the decline, it continues to constitute a large portion of pledge drive schedules," and "[p]ublic TV was simply priced out of the market."

RULING: ASCAP's motion is denied. These are conclusory statements and may be verified by examination of the statistics contained in the report, and the underlying documents that are ordered produced below.

Second, ASCAP seeks underlying documents supporting the statement that "the most significant difference from pledge and non-pledge period comparisons came from a single program subgenre, music/dance performance. During non-pledge periods this program type was 4.4% of the schedule, but on pledge days the category shot up to 11.1%."

RULING: ASCAP's motion is denied. The rules only allow discovery of documents which underlie a witness's testimony. Although the report contains information regarding programming broadcast during pledge and non-pledge days in 1994, none of Public Broadcasters' witnesses relied on data in his/her testimony. ASCAP's request is beyond the scope of discovery.

Third, ASCAP seeks documents underlying the information contained in the line-items figure 6 of the report. Figure 6 is a chart of the types of programming shown on PBS stations during pledge and non-pledge days.

RULING: ASCAP's motion is denied. See above Ruling.

Fourth, ASCAP seeks documents underlying the line-items contained in Table 1 (parts I and II) of the report. Table 1 is a two part chart delineating historical trends in public television programming from 1974-1994. The chart contains, among other things, the number of programming hours broadcast during this period, and the percentages of the total hours by content (news and public affairs, cultural, instructional, etc.). Public Broadcasters assert that production of underlying documents to this chart would be burdensome and unnecessary because the information contained in the chart is kept in the ordinary course of business and is presumptively accurate.

RULING: ASCAP's motion is granted. Table 1 contains bottom-line figures identifying amounts of programming broadcast by PBS stations by category and forms much of the basis of Public Broadcasters' testimony regarding music use of public television. Public Broadcasters are directed to produce documents underlying the information provided in Table 1 of the report, including the individual station responses to surveys used to compile the table. Production is to be made in electronic format. For documents which exist in hard copy only, Public Broadcasters are directed to make such documents available for inspection and copying.

f. **Exhibit 4.** ASCAP seeks documents underlying each of the line items in Table 2 of exhibit 4 for 1996. Table 2 is a chart of public broadcasting revenue by source assembled by CPB for fiscal year 1996. Public Broadcasters assert that their witnesses relied only upon the information presented in the Table and that ASCAP is entitled to nothing more.

RULING: ASCAP's motion is granted. Table 2 contains bottom-line figures which are relevant to Public Broadcasters testimony regarding public broadcasting revenues and ability to pay music licensing fees. Public Broadcasters are directed to produce all underlying documents used in compiling Table 2, including the individual station responses to surveys used to compile the table. Production is to be made in electronic format. For documents which exist in hard copy only, Public Broadcasters are directed to make such documents available for inspection and copying.

g. **Exhibit 5.** ASCAP seeks documents underlying each of the line items listed in Tables 5 and 6 of exhibit 5. Table 5 contains entrepreneurial revenue information for public television grantees by source for 1990-1995, while Table 6 contains entrepreneurial revenue information for public radio grantees by source for 1990-1995. Public Broadcasters assert that their witnesses relied only upon the information presented in the tables and that ASCAP is entitled to nothing more.

RULING: ASCAP's motion is granted. See Ruling in (f) above. Public Broadcasters are directed to produce all underlying documents used in compiling Tables 5 and 6, including the individual station responses to surveys used to compile the tables. Production is to be made in electronic format. For documents which exist in hard copy only, Public Broadcasters are directed to make such documents available for inspection and copying.

h. **Exhibit 6.** ASCAP seeks production of all documents underlying the line items of exhibit 6, including individual financial reports or records of each and any of the Public Broadcasters relating to such entities' "programming and production expenditures" for each of the fiscal years 1992-1996. Exhibit 6 is a one page chart containing the total programming and production expenditures for public television and radio for 1992-1996. Public Broadcasters assert that production is burdensome and not required.

RULING: ASCAP's motion is granted in part and denied in part. Exhibit 6 contains

bottom-line figures which are relevant to Public Broadcasters' testimony regarding programming budgets and ability to pay music licensing fees. Public Broadcasters are directed to produce all documents underlying the figures in exhibit 6. Production is to be made in electronic format. For those documents which exist in hard copy only, Public Broadcasters are directed to make such documents available for inspection and copying. ASCAP's motion is denied with respect to production of financial reports or records of Public Broadcasters to the extent that they do not underlie Public Broadcasters' programming and production expenses contained in exhibit 6.

i. **Exhibit 18.** ASCAP seeks production of all documents underlying the line items appearing in exhibit 18, including the "Listeners Hours ARA/Arbitron" and "NPR Audience Research" materials referenced as data sources. Exhibit 18 is a table from the "1995 and 1996 Listener Hour Analysis" compiled by NPR's Department of Strategic Planning & Audience Research. Listener hours reflect how much programming is consumed by listeners in a given week. Public Broadcasters assert that they have produced the radio programming data and pages from "Programming Economics" by David Giavanonni, and independent contractor who provided NPR with the listener hours, describing the methodology by which he calculated listener hours. In reply, ASCAP does not contend that Public Broadcasters' production was insufficient.

RULING: ASCAP's motion is moot.

j. **Exhibit 19.** ASCAP seeks a complete copy of the financial statements of NPR included in exhibit 19 and all documents underlying the "Membership Dues," "Non-Broadcast Income," "Donated Goods, Services & Equipment," "Distribution Income," and "Donated Goods & Services" line items in each statement, including documents concerning each member station's share of the amounts set forth in the line-items. Exhibit 19 contains the financial statements and independent auditors' report for NPR for fiscal years 1992-1996. Public Broadcasters reply that they have produced complete copies of the financial statements.

RULING: ASCAP's motion is denied. As the Library has stated before, see Order in Docket No. 96-3 CARP SRA at 5 (February 7, 1997), resolution of document production issues requires a balancing between the attending increase in the veracity of information presented to the CARP as a result of ordering production, and the burden and expense associated with ordering the production. Exhibit 19 is the

financial statements and accompanying independent auditors' reports compiled by the accounting firm of Deloitte & Touche. The burden and expense of providing all documents underlying these statements and reports outweighs the benefit, if any, of ASCAP's verification of Deloitte & Touche's work. ASCAP's request for complete copies of the statements is moot.

5. BMI's Motion to Extend the Precontroversy Discovery Schedule Vis-a-Vis ASCAP.

BMI asserts that extension of the precontroversy discovery schedule is necessary because ASCAP served a redacted copy of its written direct case on BMI on October 1, 1997 (the date for exchanging cases in this proceeding) and did not receive an unredacted copy until October 22, 1997 when ASCAP and BMI negotiated an agreement for a higher level of confidentiality than exists under the protective order entered in this proceeding. BMI states that ASCAP and BMI agreed to a schedule for serving document requests for the unredacted written direct cases, but ASCAP has yet to respond to BMI's requests. BMI requests that the Library establish deadlines for responses, production, follow-up requests and production, and document production motions.

ASCAP opposes BMI's motion, asserting that it has produced documents responsive to BMI's requests. ASCAP asserts that any further delay in the commencement of this proceeding would be prejudicial to its members.

Both ASCAP and BMI have filed letters with the Library regarding a statement made in BMI's reply regarding negotiations leading up to the protective order entered in this proceeding.⁴

RULING: BMI's motion is granted. The following is the schedule for document production between ASCAP and BMI:

Action

Deadline

⁴ The rules permit oppositions and replies to oppositions in response to motions filed with the Library. They do not provide for additional pleadings or filings. In the area of document production, the Library encourages additional filings after the reply stage that inform the Library of the status of production, thereby assisting the Library in its ruling and, perhaps, eliminating the need for a ruling. The Library, however, discourages additional pleadings which attempt to rebut arguments or statements made in the replies. Because the filings of ASCAP and BMI fall into the latter category, they are dismissed as improperly filed.

Responses to requests for underlying documents	January 6, 1998
Exchange of underlying documents	January 9, 1998
Follow-up requests for underlying documents	January 14, 1998
Responses to follow-up requests	January 20, 1998
Exchange of underlying documents	January 23, 1998
Motions related to document production	January 28, 1998

The above schedule applies to document exchange between ASCAP and BMI only. No additional initial document requests may be made. Motions for document production will be ruled upon by the CARP.

6. BMI's Motion to Compel Production from ASCAP

BMI seeks an order compelling ASCAP to produce to BMI all documents which ASCAP has already produced to Public Broadcasters. BMI made such a request of ASCAP in its initial document requests to ASCAP. BMI also seeks an order requiring ASCAP to produce to BMI all documents which ASCAP will produce in the future to Public Broadcasters, including those produced as a result of this Order. BMI notes that Public Broadcasters have produced to BMI documents which they produced to ASCAP, and that BMI is willing to produce to ASCAP the documents that it has produced to Public Broadcasters, subject to the additional layer of confidentiality that BMI has negotiated with ASCAP.

ASCAP opposes BMI's motion, asserting that it has produced to BMI all documents which it has currently produced to Public Broadcasters. As to documents that ASCAP will produce in the future, in particular as a result of this Order, ASCAP asserts that BMI's request is improper because it is unrelated to specific testimony, and was filed after the November 7, 1997 deadline for filing motions related to document production (the motion was filed on November 14, 1997, the deadline for all motions other than those related to document production). ASCAP notes that if production to BMI is required, the existence of additional

confidentiality between ASCAP and BMI and "fundamental fairness" requires "specific determination as to each identifiable document, taking into account the document itself, the CARP rules, and other relevant criteria as between ASCAP and BMI."

In reply, BMI agrees that its request for documents already produced by ASCAP to Public Broadcasters is moot. As to future documents produced by ASCAP to Public Broadcasters, BMI favorably notes Public Broadcasters proposal that all documents produced in this proceeding be exchanged among ASCAP, BMI and Public Broadcasters and that the parties enter into a three-way stipulation to do so. BMI submits that the confidentiality agreement that it negotiated with ASCAP is not a bar to such document production. BMI also asserts that its motion is timely because it did not receive ASCAP's response to its initial document requests until after the November 7 deadline for document production motions, and that ASCAP should be estopped from arguing untimeliness.

RULING: The Public Broadcasters, ASCAP and BMI shall exchange with each other the documents which they have produced in response to document requests, production required by this Order, and any present or future voluntary or CARP directed production. Counsel for Public Broadcasters, ASCAP and BMI are directed to enter into a three-way stipulation no later than January 9, 1998 providing for such exchange. The stipulation shall include a provision for the inspection and copying by each party of documents which are required by this Order to be made available for inspection and copying. The dates and terms provided in this Order for inspection and copying shall apply. In addition, the stipulation shall include a provision for any inspection and copying of documents that may be ordered by the CARP.

7. BMI's Motion to Compel Production From Public Broadcasters

BMI makes two requests. First, BMI requests any documents produced to ASCAP as a result of ASCAP's motion for production from Public Broadcasters. Second, BMI asks that if the Library grants Public Broadcasters' motion to compel production from BMI (for what BMI categorizes as corroborative, as opposed to underlying, documents) that Public Broadcasters be required to produce certain

documents to BMI. The document requests made to Public Broadcasters for which BMI seeks production are 3,5,6,11,13,17,20,22,23 ,24,25,26,27,28,29,30,41,42,44,45, 46,48,50,51,52,54,55,58,59,60,61,62,63,72,76,77,78,79 and 82. BMI asserts that Public Broadcasters declined to produce documents in response to these requests on the grounds that the witnesses were relying upon their knowledge and experience in making the statements.

In response, Public Broadcasters assert that neither of the matters raised in BMI's motion are in dispute. Public Broadcasters note that they have already produced to BMI the documents which they have produced to ASCAP, and will continue to do so irrespective of whether the production is voluntary or ordered by the Library. As to BMI's individual document requests, Public Broadcasters assert that their requests do not seek corroborative documents, and that the premise of BMI's motion is therefore faulty. Public Broadcasters state that BMI's motion to compel production is untimely because it was filed seven days after the November 7 deadline for filing document production motions. BMI does not reply.

RULING: BMI's motion as to documents produced by Public Broadcasters to ASCAP is moot. BMI's motion seeking to compel production in response to document requests 3,5,6,11,13,17,20,22,23,24,25,26,27,28,29,30, 41,42,44, 45, 46,48,50,51,52,54,55,58,59,60,61,62,63,72,76,77,78,79 and 82 is denied as untimely. The precontroversy discovery order, see Order in Docket No 96-6 CARP NCBRA at 6 (July 30, 1997), provides that all document production motions were to be filed on November 7, 1997, not November 14, 1997 which was the date for filing all motions not related to document production. BMI has not offered any reason for its failure to comply with the deadline, and has not sought leave to file its motion late.

SO ORDERED.

Marybeth Peters
Register of Copyrights

By: William J. Roberts, Jr.
Senior Attorney

DATED: December 30, 1997