

07-4998-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

BROADCAST MUSIC, INC.,

Petitioner-Appellee,

v.

WEIGEL BROADCASTING CO.,

Respondent-Appellant.

*On Appeal from the United States District Court
for the Southern District of New York*

**BRIEF FOR RESPONDENT-APPELLANT
WEIGEL BROADCASTING CO.**

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CORPORATE DISCLOSURE STATEMENT

Appellant Weigel Broadcasting Co. is a privately-owned corporation. It has no parent corporation, and no publicly-held corporation owns more than 10% of its stock.

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PRELIMINARY STATEMENT

This case involves the propriety of fees charged to a Chicago television station by a company that controls the market for performance licenses for approximately 6.5 million musical works. The company, Broadcast Music, Inc. (“BMI”), operates its business pursuant to a consent decree that settled a government antitrust suit brought in the 1960s, and it is required to charge its customers “reasonable fees” for licenses. We submit that the fees BMI proposes to charge the appellant are exorbitant and inequitable.

For the last ten years, BMI has permitted a small group of self-proclaimed “industry” representatives to set the formula by which the industry-wide, negotiated fees BMI charges are allocated to individual television stations throughout the country. The formula foisted upon the industry by this group bases stations’ fees primarily on their Neilson ratings, which measure audience size. Stations’ revenues are not accounted for in the formula. As a result, some stations (with large audiences but relatively low revenues) pay a disproportionate percentage of their revenues to BMI, compared to their competitors. Other stations (with relatively high revenues compared to their ratings) pay much lower fees, even though their programming, including the music it contains, is obviously more valuable to them. This is no surprise: most of the members of the “industry” committee that derived the formula are employed by stations in the latter group.

Appellant Weigel Broadcasting Co. (“Weigel”) owns an “independent” station in Chicago. Weigel is not a member of the “industry” group. Nevertheless, BMI has refused to separately negotiate a “reasonable fee” for Weigel’s music license as required by the consent decree, insisting instead that Weigel must accept the fees set by its direct competitors. Under the “industry” formula, Weigel’s fees increased nearly 800% between 1997 and 2004 – from approximately \$2,500 per month to over \$22,000 per month. Weigel’s competitors in Chicago (including the station that employs the chairman of the industry committee) have fared far better.

The district court held that such a massive and disproportionate increase was “reasonable” because it was based on a formula applied industry-wide. But in reviewing rate court decisions under the BMI consent decree, this Court has consistently held that challenged fees must be compared to “benchmark” rates that were arrived at through “arm’s length” negotiations between similarly situated parties. The formula to which the district court compared Weigel’s fee was not the result of such a negotiation; it was derived unilaterally by a self-interested, unrepresentative committee of Weigel’s competitors. It is therefore not an appropriate proxy for the “fair market value” of the product BMI sells. And approximating such a value is the central task of a rate court enforcing a consent decree that settled an antitrust suit against a seller with significant anticompetitive market power.

The local television industry is not monolithic, and it was error for the district court to conclude that a formula that might be “reasonable” for some stations is therefore reasonable for all stations. The judgment, ordering Weigel to pay fees at the “industry” rate, should be reversed.

JURISDICTION

This case was brought pursuant to the terms of a consent decree that settled a civil antitrust suit. See *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71, 941, 83, 323 (S.D.N.Y.1966), *amended*, No. 64-CV-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov.18, 1994) (1996-1 Trade Cas. (CCH) ¶ 71, 378). The district court had jurisdiction over the antitrust action pursuant to 15 U.S.C. § 4, 28 U.S.C. § 1331, and 28 U.S.C. § 1345. Under a 1994 amendment to the decree, the district court assumed jurisdiction to adjudicate rate disputes between BMI and its licensees. Jurisdiction in this case was exercised by the district court pursuant to Section XIV(A) of that amended decree. See *United States v. Broadcast Music, Inc.*, 1994 WL 901652, at *1. The district court entered judgment in this proceeding on October 9, 2007 and appellant filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred by holding that a rate-setting formula dictated by an unrepresentative “industry committee” is a proper benchmark for

evaluating the reasonableness of a music license fee pursuant to the terms of the BMI consent decree, even though it entirely ignores the value of the license as reflected in the revenues generated by the programming containing BMI music.

2. Whether the district court erred by holding that for purposes of calculating music fees under a formula based on audience share, appellant's television station is "similarly situated" to all other local broadcast stations, even though appellant's station has one of the lowest audience-to-revenue ratios in the country.

STATEMENT OF THE CASE

Pursuant to the BMI consent decree, BMI filed a petition seeking judicial determination of reasonable license fees on November 19, 2004. JA9.¹

A bench trial was held between April 24, 2007 and April 27, 2007. The court granted BMI's petition on May 30, 2007. JA1580. Weigel filed a notice of appeal on June 29, 2007. JA1599.

Because of an ambiguity in the original order that arguably rendered the judgment non-final, the parties withdrew the original appeal as "premature" pursuant to Fed.R.App.P. 42(b). The appeal was dismissed without prejudice on August 21, 2007. JA1601.

¹ Citations to JA__ refer to the Joint Appendix.

On October 9, 2007, the district court entered a subsequent order on consent resolving the ambiguities and rendering the judgment final. JA1602. On November 7, 2007, Weigel filed a second notice of appeal. JA1605.

STATEMENT OF FACTS

Weigel is a family-owned company that operates two full-power commercial television stations in the midwest: WCIU-TV in Chicago, and WDJT-TV in Milwaukee. JA31-32. BMI is a music licensing company that acts on behalf of several hundred thousand copyright holders to license performance rights for a large catalogue of music. JA31. This case involves a dispute over the propriety of the fees BMI has proposed to charge Weigel's Chicago station, WCIU, for the right to air programs containing music in BMI's repertoire.

BMI and its fee structure

There are approximately 1,300 full-power commercial broadcast television stations in the United States, including approximately 600 affiliates of the three major networks (NBC, ABC, and CBS), several hundred affiliates of other networks (such as Fox, "The CW," and "My Network"), and so-called "independent" stations, which have no network affiliation. JA127, 154. All of these stations air programs that contain at least some music from the BMI catalogue, often as background or incidental music. For this reason, every station in the country (with the exception of some home-shopping stations and stations

that broadcast exclusively religious programming) – as well as radio stations and various other types of entertainment businesses – requires some form of performance license from BMI.² JA31.

The fees BMI is permitted to charge are subject to oversight by the federal courts because the company operates its business pursuant to the terms of a court-approved consent decree that settled a civil antitrust suit brought against BMI by the government in the mid-1960s. The consent decree imposes a number of restrictions upon BMI, including the following:

First, the decree mandates that BMI charge a “reasonable fee” for music licenses. JA392. The term “reasonable fee” is undefined, but as we discuss below, courts interpreting the decree have measured “reasonableness” by extrapolating from benchmarks – generally estimates of the “fair market value” of proposed licenses, or “the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.”

Second, the decree prohibits BMI from “discriminating” between “similarly situated” applicants, “provided, however, that differentials based upon applicable

² This is true as a practical matter, even though it is not technically required. Theoretically, stations could seek direct licenses from the owners of each piece of music contained in each broadcast, but the transaction costs involved in such a feat would be prohibitive. As far as we are aware, every television station in the country (other than, as mentioned, some religious and home shopping channels) pays fees to BMI.

business factors which justify different rates or terms shall not be considered discrimination.” JA388. The terms “similarly situated” and “applicable business factors” are also undefined. However, a consent decree that governs the operations of BMI’s principal competitor, the American Society of Composers, Authors, and Publishers (“ASCAP”), contains a nearly identical “non-discrimination” provision and defines “similarly situated” to mean “licensees in the same industry that *** operate similar businesses and use music in similar ways and with similar frequency.” Factors relevant to “similarity,” according to the ASCAP consent decree, include “the nature and frequency of musical performances, *** whether the music users or licensees compete with one another, and *the amount and source of the music users’ revenue.*” JA449 (emphasis added).

Third, since 1994, the BMI decree has included a “rate court” provision that enables BMI or its customers to apply to the district court for determination of an appropriate fee, assuming the parties cannot agree to one. JA391-92. The BMI “rate court” is the U.S. District Court for the Southern District of New York. For the past several years, BMI rate cases have been heard by Judge Stanton.

Fourth, the decree provides a method for negotiating license rates and terms. Any prospective licensee may request a rate quote; upon making the request the applicant is automatically considered a provisional licensee and is permitted to broadcast BMI music without fear of copyright infringement. JA392. BMI is then

obligated to respond with a proposed license within 90 days. The parties are then to negotiate the terms and rate in good faith; if no agreement is reached, either party can apply to the rate court to settle the matter. JA391-92.

BMI offers two types of licenses to television stations: a “blanket” license and a “per-program” license. “Blanket” licenses entitle the holders, for a flat fee, to broadcast without limit all music in the BMI catalogue. JA36. A “per-program” license also grants users unlimited access BMI’s complete repertoire, but the fee depends on the portion of a station’s revenues that derives from programs containing BMI music that has not otherwise been licensed. JA38. Such licenses are often advantageous to network-affiliated stations, because those stations broadcast shows (such as primetime dramas and comedies, national news, and other “network-level” programming) that are provided to them by the networks, which have their own BMI contracts and pay separate license fees for music in network shows. JA154-55, 275. Thus, a local affiliate choosing a blanket license effectively pays twice for the right to broadcast music in network programming. “Per program” licenses allow these stations to avoid overpaying by determining the portion of their revenues that derives from network shows and pro-rating the otherwise-applicable blanket fee.³

³ The formula is slightly more complicated than a straight pro-rating, but not in a way that is relevant to this appeal.

WCIU

WCIU-TV is an “independent” television station broadcasting on channel 26 in Chicago. It is not affiliated with a network or any major corporate buying group. General-market stations like WCIU, that are unaffiliated and independently owned, are increasingly rare: WCIU is the only such station in a top ten market in the United States. JA328. Most commercial broadcast stations in large markets are either owned by large corporate groups (like Clear Channel or Infinity Broadcasting), affiliated with a national network, or both. Independent, unaffiliated stations used to be more common, and their interests were often represented by a trade group called the Association of Independent Television Stations. That organization no longer exists. JA68.

Unlike network affiliates, WCIU does not have the practical option to air highly popular first-run primetime shows. And unlike the large media companies that own many stations, Weigel does not have the resources to produce its own news or professional sports programs. JA328. Instead, WCIU broadcasts mostly syndicated programming, like *The People’s Court* and the *Montel Williams Show*. JA42. These sorts of programs attract viewers mostly during “daytime” hours (as opposed to “primetime” or other timeslots), when advertising rates are at or near their lowest. (For example, the Chicago rates for “daytime” slots are approximately one fifth of the rates for “primetime” slots.) JA330. In addition,

these programs draw viewers from less lucrative demographic groups than those associated with first-run shows. JA354, 356-58. WCIU also broadcasts local sports under a contract with its competitor, WGN, a station owned by a large media group called the Tribune Company. WGN produces these broadcasts and airs most of them on its own station; the “overflow” games are aired on WCIU. But the contract provides that Tribune, not Weigel, has the right to sell advertising during these broadcasts; Weigel is paid a flat fee for its agreement to air the games. WCIU benefits from the arrangement, but it generates a quirk in the station’s “numbers”: the games attract large numbers of viewers and high ratings, but WCIU’s revenues from these programs are proportionally low, compared to its audience share. JA41, 262-63, 423-44.

This is a relatively successful business model for WCIU, considering the structural limitations inherent in its status as an unaffiliated independent station. The business is profitable, but it does not generate revenue in the same manner as its larger competitors. Because WCIU’s audience is not as attractive to advertisers as other stations’ audiences, WCIU needs to attract considerably more viewers than its competitors in order to produce comparable revenues.

A helpful metric is what industry experts call the “power ratio.” This compares a station’s share of its market’s audience to its share of its market’s revenues. JA44, 202, 330-34. For example, a station attracting 10 percent of the

audience in a given market but earning only five percent of the market's total advertising revenues would have a relatively low power ratio of 0.50. A station with the same audience share (10%) that earns 15% of the market's revenues would have a very high power ratio of 1.50. By definition, the average ratio in a market is 1.00; a station with that ratio earns a share of its market's revenues in exact proportion to its share of its market's audience. A station with a ratio over 1.00 therefore has an above-average ability, within its market, to convert its audience into revenue; conversely, a station whose ratio is less than 1.00 is below average.

For every year between 2002 and 2005 (the only years for which evidence on this subject was presented at trial by either side), WCIU had the lowest power ratio of the seven principal stations in Chicago. JA44, 287-88. During this period, WCIU's power ratio fluctuated between 0.53 (in 2002) and 0.76 (in 2005). JA44. These numbers are among the very lowest in the country. Even in the best of these years, 2005, there were 179 stations nationwide that, like WCIU, had over \$30 million in revenues; of those, only eight had power ratios lower than WCIU's 0.76. JA291.⁴ All of those stations were network affiliates; in 2005, WCIU had the

⁴ We have no reason to believe that WCIU would fare better in this comparison if the sample included stations with lower revenues, but the record does not contain any information on that subject. BMI's expert witness (not Weigel's) initially undertook to perform the power-ratio comparison, and he chose to examine only

lowest power ratio of any independent station with comparable revenues in the country. JA292

The TMLC

Historically, BMI has not undertaken to negotiate licenses on an individual, station-by-station basis. Instead, it has negotiated with an industry negotiating committee, now called the Television Music License Committee, or “TMLC.” JA33. The TMLC has existed in some form or another for many years; it was originally a committee of the National Association of Broadcasters. *Id.*

The TMLC in its current incarnation is a non-profit volunteer organization. *Id.* At the moment, it has about 20 members (JA250). Its current chairman is Charles Sennett, a trial witness who is senior counsel to Tribune Company, the Chicago media group that owns Weigel’s competitor, WGN, along with 22 other stations. JA249.

Membership in the TMLC is open to any individual who has “an association with a local commercial television station.” JA264. Members are not elected, nor is there any requirement that the various types of local stations (network affiliates, independent stations, and so on) be specifically or equally represented. Members generally volunteer to serve. According to Mr. Sennett, the chairman, despite the

those stations with high revenues, stating that such stations were most “comparable” to WCIU and therefore most logical to examine.

liberal membership criteria, it is “not always easy” to recruit members. JA269. Music licensing is an “esoteric subject” (JA250, 269), and Committee members must “devote large amounts of time” to the Committee’s activities. JA269. TMLC members are not paid for their work, nor are their expenses covered, even though membership requires travel and time away from the office. JA250-51. Members’ time and expenses are generally covered by their own employers. JA269. Not surprisingly, most members work for large companies (like Tribune, Mr. Sennett’s employer) that own multiple stations and can afford to compensate their employees for serving on the TMLC.⁵ This is no accident: the Committee actively seeks to use membership recruiting as a fundraising tool by targeting potential members whose employers will donate money to fund the TMLC’s budget. JA251.

The TMLC / BMI License Structure

For the last decade or so, the TMLC has negotiated with BMI a series of four- or five-year license agreements, purportedly on behalf of the entire industry.

⁵ This is a disputed characterization, but we believe it is fair. The record does not reveal the TMLC’s full roster, and Mr. Sennett did testify that members were drawn from “groups of all sorts, big and small.” JA251. But when asked specifically for examples of “independent” stations whose employees were on the Committee, Mr. Sennett named his own employer (Tribune Company), CBS, Post-Newsweek, Scripps Howard, and Clear Channel – all very large broadcasters that own many stations (including some non-network-affiliates, which is why Mr. Sennett’s answer was technically accurate). JA252. When questioned further about “independent” stations’ representation, Mr. Sennett identified only one former (not current) member of the Committee who worked for a company that owned a single independent station. JA253.

Approximately 900 of the 1,300 local commercial stations in the country have signed authorizations that allow the TMLC to negotiate on their behalf. The remaining 400 typically execute “extension” contracts in which they agree to be bound by the outcome of the negotiations. JA33, 128-29.

The two most recent TMLC-negotiated license agreements covered BMI’s fees from 1995-1999 and 1999-2004, respectively. As of this writing, BMI and the TMLC have not yet agreed on the terms of a license for music use since 2004. Most stations, therefore, currently pay “interim” fees: their monthly payments are calculated based on the rates applicable under the last license agreement, and they have agreed in advance that their post-2004 payments will be retroactively adjusted to reflect the terms of a new license once BMI and the TMLC settle on terms. This is the procedure that has been used for the last several periods because the negotiations between TMLC and BMI often take years to complete. The 1995-1999 license, for example, was not finalized until 1997 (JA133), and the 1999-2004 license was finalized in 2002 (JA39). Thus, from 1995 until 1997, stations paid “interim” fees according to the terms of the pre-1995 contract; similarly, from 1999 until 2002, BMI billed local stations according to the rates in place at the end of 1999. For each period, once a new license was signed, BMI adjusted stations’ bills to reflect the terms of the new license as well as to recoup the difference between the interim rates and the fees due under the new contract. JA35-36.

Buffalo Broadcasting and the TMLC Allocation Formula

Before 1997, BMI billed local stations according to a formula that was based primarily on stations' revenues. Stations paid a percentage of their revenues as license fees; the exact percentage was negotiated periodically with the TMLC. This was the norm for the industry; BMI's competitor, ASCAP, also billed stations on a percentage-of-revenue basis. Many station owners, however, were dissatisfied with that arrangement. They felt that an open-ended fee tied to their revenues, particularly during a period when industry revenues were increasing dramatically, turned BMI and ASCAP into effective "partners" in the stations' businesses rather than suppliers of a product that had a relatively fixed value. These stations, through the TMLC, filed a proceeding in the ASCAP rate court, asking that court to set a flat industry-wide fee for music usage rather than continue to allow ASCAP to charge an open-ended fee tied to revenues. (As noted above, ASCAP operates its business pursuant to a similar consent decree to the one that governs BMI.) The case was named for its lead plaintiff, the Buffalo Broadcasting Company.

The TMLC won the *Buffalo Broadcasting* case. *United States v. ASCAP (In re Buffalo Broadcasting Co.)*, 1993 U.S. Dist. LEXIS 2566 (S.D.N.Y. Feb. 26, 1993). In a decision by Magistrate Judge Dollinger (later affirmed by Judge Conner), the court held that an industry-wide flat fee, capped each year at a

specific dollar amount, was more “reasonable” than an uncapped variable fee, particularly one directly tied to industry revenues. 1993 U.S. Dist. LEXIS 2566, at *121-22. The case did not address the method of allocation of any industry-wide fee among individual stations.

Following the decision, ASCAP and the TMLC agreed on a flat fee for the entire industry, and the TMLC set about to determine a method for allocating that fee among the 1,300 licensed stations. It convened a special “allocation” subcommittee, which held a “series of meetings” and engaged in “a lot of discussion” (JA255) to devise a uniform method for splitting up the ASCAP fee. Although nothing in *Buffalo Broadcasting* would have precluded an allocation formula based on revenues, the subcommittee eventually determined that the flat fee should be split among the 1,300 stations using a formula that assigns shares of the fee based mostly on a station’s “audience share” – that is, the total number of viewers its programs attract (regardless of the revenue value of those viewers) compared to other stations in its local market.

The allocation formula works as follows: First, the flat fee is divided among the approximately 210 television “markets” throughout the country. Markets are initially allocated a share of the fee based on the number of “television households” located within their boundaries. Next, these default allocations are adjusted, based on market size. Because “a household in the 150th market does

not represent the same value as a household in the New York market,” the subcommittee applied a “weighting formula” to the largest and the smallest markets. For example, markets 1 through 10 (the largest markets, including New York and Chicago) receive an allocation 19 percent higher than their share of television-viewing households, while markets 126 and below (the smallest markets) receive an allocation 20 percent lower than their audience share. JA477. In other words, if the New York market contained, say, 10% of television households in the country, it would be allocated 11.9% of the total fee (10 multiplied by a “weighting factor” of 1.19). Conversely, if a very small market contained only one percent of the nation’s television households, it would be allocated 0.8% of the total fee (one multiplied by a “weighting factor” of 0.8). JA37.

Once the fee has been split among the 210 markets, it is further divided among the stations in those markets based on those stations’ Neilson ratings (audience share). In other words, if a market has been allocated, say, \$1,000,000 as its portion of the flat fee, and a station within that market has ratings indicating that it attracts 10% of the market’s viewers, that station would be responsible for \$100,000 of the total fee (10% of \$1,000,000). JA37-38.

In short, the TMLC’s formula divided ASCAP’s industry-wide fee among stations pursuant to a formula that bases a station’s share on two factors: (1) the

size of its market, and (2) the number of viewers the station can attract compared to its market competitors. The formula does not take into account a station's revenues (*i.e.*, the economic value of each of its viewers) when determining its share of the industry fee.

Neither BMI nor ASCAP had any role in creating the TMLC allocation formula. JA225. Nor did the owners of the 1,300 stations whose fees were to be determined by the formula. Instead, the formula was devised by a subcommittee of the 20-member TMLC (which did not hire any outside consultants to determine the formula's fairness [JA270]), and then presented to the ASCAP rate court for approval. The district court invited affected parties to comment or object before approving the formula. This invitation did not include any analysis of the formula, or choice of different methods; owners were given the choice of approving the formula or challenging it. JA271. One owner did object, claiming that the formula was unfair to independent stations that had high ratings but low revenues, but the district court held that that station could not object because it had previously agreed to be bound by the decisions of the TMLC. *United States v. ASCAP (In re Buffalo Broadcasting Co.)*, 1993 U.S. Dist. LEXIS 15152, at *2 - *5 (S.D.N.Y. Oct. 28, 1993). Eventually, the ASCAP rate court approved the formula.

According to Mr. Sennett, the subcommittee never seriously considered any other method of splitting up the fee, and its members were opposed to any formula

that used relative revenues. Committee members did not favor a revenue-based approach because they believed it to be impractical. The TMLC does not have access to individual stations' revenue information, and thus it would be difficult for the Committee to determine fees using a revenue-based method. Also, revenue information is generally unavailable until the end of the year and it fluctuates from year to year. Therefore, the Committee believed it would be difficult to set revenue-based rates prospectively even if revenue information were freely available. Finally, different stations have different methods for measuring revenue, and the Committee felt that it would be difficult to determine relative revenues even if there were some method for self-reporting. Because the TMLC has no "enforcement power," Mr. Sennett testified, it would not be able to police stations and force them to report revenues consistently. JA257-59, 277-78.

BMI Adopts the TMLC Allocation Formula

The *Buffalo Broadcasting* decision was issued by the ASCAP rate court in 1993, and the allocation formula for the ASCAP fee was implemented in 1994. In 1995, the industry's BMI license came up for renewal. Having recently succeeded in its effort to impose a flat-fee structure on ASCAP, the TMLC "dictated" to BMI that for the upcoming period, it expected to negotiate a flat rate for industry-wide BMI fees, as it had with ASCAP. JA34. The ASCAP and BMI consent decrees are effectively identical; therefore, though ASCAP rate decisions are not

technically binding on BMI, both parties believed that the *Buffalo Broadcasting* decision effectively required BMI to accede to a TMLC request for a flat industry-wide fee.

The negotiations between the TMLC and BMI took approximately two years; the parties arrived at an agreement in 1997. Up until that point, member stations had been paying interim fees calculated on the basis of the pre-1995 methodology. Beginning in 1997, however, total fees were set by the negotiation between BMI and the TMLC, and that amount was allocated based on the same formula TMLC had devised for dividing the ASCAP fee. While the amount of the flat fee (\$79,000,000 [JA132]) was the product of a hard-fought negotiation (JA129, 253), there was no discussion about the allocation method. BMI gave the TMLC complete discretion to divide the flat fee among local stations however it chose. JA269.

Weigel's Rate Increases

Like many other owners of local commercial broadcast stations, Weigel had never agreed, prior to 1995, to be formally represented by the TMLC in negotiations with BMI and ASCAP, but it had signed a series of “extension” contracts with BMI agreeing to be bound by the licenses ultimately negotiated by the Committee. For the first two years of the 1995-1999 license period, Weigel was billed by BMI on an interim basis under the terms of the prior license.

According to the testimony of Weigel's chairman, Howard Shapiro, Weigel would occasionally execute the form BMI contracts that were sent to the stations following the conclusion of negotiations with the TMLC, but station executives never attempted to understand how the license rates were being calculated. The rates, Mr. Shapiro testified, were always "digestible" for his two stations, and the relatively small fees were not "something that really caught our attention." JA360.

In 1997, however, after the TMLC/BMI negotiations concluded and stations' fees were adjusted to reflect the implementation of the TMLC allocation formula, Weigel's fees jumped sharply. Specifically, in September 1997, WCIU's monthly fee more than doubled, rising from \$2,562 to \$5,882. Eight months later, in May 1998, WCIU's monthly fee nearly doubled once again, rising to \$9,002. JA134, 1347.

Weigel's management noticed immediately that something had changed. The company's comptroller, Dick Garb, called BMI in August 1997, soon after the company had been notified of the upcoming rate increase for September. Mr. Garb requested an explanation for the rate increases. BMI employees explained that the TMLC had allocated to Weigel a portion of a flat fee that had been assigned to the Chicago market, and Mr. Garb responded that Weigel's "share of the pie was way too high." He asked BMI to send him a breakdown of the Chicago allocation, but BMI never did so. JA359.

Three months later, in November of 1997, Mr. Shapiro wrote a letter to BMI requesting a meeting “as soon as possible” to “resolve” the problem of the escalating fees. JA359. That meeting was scheduled but then postponed by BMI executives (JA360); BMI did not actually meet with Mr. Shapiro until 1999, by which time WCIU’s fees had risen to over \$9,000 per month. JA359. Meanwhile, Weigel complied with the first major rate increase and began sending timely payments for \$5,882 in September 1997. When the rates increased again, however, to \$9,002, and BMI still would not agree to meet and discuss the increases, Weigel decided not to comply. Soon after the second rate increase, Weigel wrote to BMI and explained that it was enclosing with its letter “payments for May at the rate that we were previously paying, particularly since the increases in the billing that you have sent us for May over these numbers are so substantial that we will await an explanation on how they were obtained.” JA360. Mr. Shapiro sent a second such letter in August 1998, again requesting that a meeting be arranged and explaining that Weigel disagreed with the method of calculating its fees. “Therefore, we are going to pay you monthly at the rate that was in existence prior to April 1 until this matter is resolved.” *Id.*

BMI executives finally met with Mr. Shapiro and a handful of other Weigel employees in early 1999. The meeting was cordial. Mr. Shapiro told BMI’s representative, Michael O’Neill, that he believed the TMLC formula was unfair to

his station because it allocated fees based upon market share, and WCIU's market share was anomalously high compared to its actual revenues, and, therefore, the value of the license. Mr. O'Neill informed Mr. Shapiro that he had three options: He could join the TMLC and attempt in that way to influence the formula; he could sign an extension contract with BMI binding Weigel to the results of the TMLC negotiations for the upcoming license period (which would begin April 1, 1999); or he could send a letter to BMI stating that Weigel did not wish to be represented by the TMLC and requesting a separate fee negotiation, as permitted under the consent decree. JA137, 359.

Mr. Shapiro chose the third option. On February 22, 1999, he sent a letter to BMI stating that "[p]er your suggestion, this letter will serve as notice that we do not and have never wanted to be represented by the Television Music License Committee, and that we want to negotiate a separate contract for ourselves and for our stations at the appropriate time." JA360-61, 394.

The 1995-1999 BMI contract, which had been negotiated with the TMLC in 1997, expired on March 31, 1999. Soon thereafter, BMI and the TMLC began negotiations for a contract that would apply through the end of 2004. Meanwhile, Weigel (which had disclaimed TMLC representation in February 1999) continued to pay BMI \$5,882 per month and to periodically write to the company and request an opportunity to meet and negotiate a separate contract. Weigel sent several such

letters to BMI over the next five years. See, e.g., JA417. BMI did not respond, and Weigel was not given a meeting with BMI again until 2004. BMI continued to send monthly billing statements showing a growing unpaid balance.

In May 2002, the BMI/TMLC negotiations concluded, and BMI began sending form letters and proposed contracts to local stations reflecting the new agreement. Despite being aware that Weigel's stations were not represented by the TMLC and that Weigel had requested a separate negotiation, BMI sent such letters to WCIU and WDJT, both of which had, during the course of the TMLC/BMI negotiations, been allocated shares of their respective markets. The letter to WCIU stated that "[y]our new monthly blanket fee allocation is \$15,894." JA139. Weigel did not sign the new contract, and again requested a meeting. BMI executives, who testified that they were very busy attempting to secure signed contracts from the 1,300 local stations, continued to be unavailable for such a meeting. JA140, 192. Meanwhile, BMI continued to send Weigel monthly bills reflecting the TMLC's allocation of blanket fees to WCIU and WDJT under the new industry contract, a contract to which Weigel had never agreed. In 2003, WCIU's bills showed monthly charges of \$19,434, and by January 2004 those charges had risen to \$22,577. JA416. Weigel continued to pay \$5,882 per month and periodically to request a meeting; its unpaid "balance" continued to grow. By

the time of trial, BMI believed that Weigel owed approximately \$750,000 for the 1999-2004 license period, exclusive of interest. JA146.

BMI executives finally met with Mr. Shapiro and other Weigel personnel in 2004. This was over five years after the initial meeting – a meeting at which Weigel had exercised its right under the consent decree to request an individual fee negotiation. At the 2004 meeting, BMI took the position that the “non-discrimination” clause of BMI’s consent decree prohibited the company from charging WCIU any rate other than its allocable share of the TMLC flat fee. In the estimation of BMI executives, WCIU was “similarly situated” to the 1,300 other local broadcast stations throughout the country, and its fees should therefore be calculated using the same methodology as the one that determined those other stations’ fees – a methodology that hadn’t been agreed to by the TMLC at the time Weigel initially requested a separate negotiation. JA521-23. BMI requested that Weigel pay the now-sizeable unpaid “balance due” on its account, threatening litigation if payments were not forthcoming.

In January, 2004, BMI filed an arbitration proceeding seeking to recover Weigel’s unpaid balance for the license period that ended March 31, 1999. JA526. That claim, which sprung from Weigel’s decision to continue paying \$5,882 per month for the last several months of the 1995-1999 license period, after its rates increased to \$9,002, was eventually settled by a private agreement between the

parties. JA538. The much larger dispute over the unpaid “balance” for the 1999-2004 period was not similarly resolved. BMI eventually filed a proceeding in the rate court, seeking to recover license fees for that period.

Proceedings Below

BMI’s petition in the rate court, which was filed on November 19, 2004, sought a determination of “final fees” for Weigel’s two stations for the TMLC-negotiated license period that ran from April 1, 1999 until December 31, 2004. By the time the case came to trial in 2007, the 1999-2004 TMLC contract had expired, and BMI had not yet reached an agreement with the TMLC on a new industry license. As of this writing, negotiations continue. TMLC member stations, which have all signed extension documents agreeing to pay interim rates until the conclusion of the TMLC/BMI negotiations, have been billed since 2005 under the terms of the previous license, as was the case during the previous two license periods. BMI has continued to send Weigel monthly bills reflecting the TMLC allocation, and at trial, BMI requested that the court, in addition to setting “final” fees for the Weigel stations for the 1999-2004 period, set an “interim” fee (consistent with the TMLC allocation) for the current period as well.

Judge Stanton conducted a bench trial in April 2007, following which the parties submitted post-trial briefs. On May 30, 2007, he issued an opinion granting BMI’s petition and holding that the TMLC-allocated fees were “reasonable” under

the terms of the decree for Weigel's stations. Specifically, the ruling held that (1) the appropriate "benchmark" for Weigel's fees was supplied by the TMLC allocation formula applicable to the other local television stations throughout the country (JA1591-92), and that (2) BMI had demonstrated that Weigel was "similarly situated" to those other stations, such that application of a different formula would be inappropriate (JA1592-96). The court ordered Weigel to "pay BMI at the rates established by the BMI/TMLC license agreement and allocation from April 1, 1999 to date, with interest at the legal rate, but with credit for the payments already made." JA1598.

This appeal followed.⁶

SUMMARY OF ARGUMENT

In concluding that BMI had proposed a reasonable fee for the music licenses it offered to WCIU, the district court committed two basic errors. First, it erroneously held that the TMLC allocation formula was the proper "benchmark" to which Weigel's fees should be compared, even though that formula was not the result of the sort of "arm's length" negotiation this Court has previously held characterizes a proper benchmark. Instead, the formula was determined unilaterally by a TMLC subcommittee that was not shown to have represented

⁶ As noted in the statement of the case, *supra*, this appeal was technically taken from a subsequent order, entered October 9, 2007, which resolved a (non-substantive) ambiguity in the original order. JA1602-04.

anything like a fair cross-section of affected stations; there is no reason to believe that this formula is an authoritative proxy for the “fair market value” of the BMI license. Moreover, by eliminating revenues from consideration, the allocation formula unreasonably detached the amount a station would have to pay from the value the music contributed to its programming.

Having picked the wrong benchmark, the district court compounded its error by concluding that WCIU was, in the words of the consent decree, “similarly situated” to all the other local stations subject to the TMLC’s formula. The court reached this conclusion despite substantial evidence that WCIU’s abnormally low power ratio forces it to pay a vastly disproportionate share of the industry-wide fee if it is subject to the TMLC formula. Because the typical WCIU viewer is worth markedly less to advertisers than the typical viewer of other stations in the Chicago market, WCIU’s programming, including the music content of that programming, is markedly less valuable to the station. Basing its share of music royalties on the mere existence of those viewers, rather than their value, is thus especially unfair to WCIU, and therefore unreasonable within the meaning of the consent decree.

STANDARD OF REVIEW

Each of the district court’s holdings was ultimately the resolution of a legal question and as such, is reviewed *de novo*. See, e.g., *ASCAP v. Showtime/The Movie Channel*, 912 F.2d 563, 571 (2d Cir. 1990) (“*Showtime*”) (question of

whether a music license is “comparable” to a proposed license in a rate court proceeding is a “legal conclusion” reviewed *de novo*). To the extent the district court’s decisions involved subsidiary factual determinations, those determinations are reviewed under a “clearly erroneous” standard. *Id.* See also *United States v. Broadcast Music, Inc. (Music Choice)*, 316 F.3d 189, 194-95 (2d Cir. 2003) (“*Music Choice I*”) (“[T]he factual component of rate setting does not render all aspects of the district court’s decision subject to review under the clearly erroneous standard. This is because in making a factual determination, a decision-maker might rely on legally impermissible factors, fail to give consideration to legally relevant factors, apply incorrect legal standards, or misapply correct legal standards.”); *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (“We review the district court’s interpretation of a consent decree *de novo*, and its factual findings for clear error.”).

ARGUMENT

I. THE DISTRICT COURT CHOSE THE WRONG BENCHMARK

The BMI consent decree requires BMI to charge a “reasonable fee” for music licenses. JA391-92. According to the terms of the decree, BMI bears the burden, in the rate court, of proving the reasonableness of its fee; if it cannot do so to the court’s satisfaction, then the court is empowered to set a reasonable fee itself. *Id.*

This Court’s method for evaluating the “reasonableness” of a license fee under the BMI consent decree is well established: “the court attempts to make a determination of the fair market value” of the proposed license – that is, “the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.”” *Music Choice I*, 316 F.3d at 194 (quoting *Showtime*, 912 F.2d at 569).⁷ “This determination is often facilitated by the use of a benchmark – that is, reasoning by analogy to an agreement reached after arms’ length negotiation between similarly situated parties.” *Id.* at 194. As the district court noted, in choosing a benchmark, “a rate court must determine ‘the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, the comparability of the rights in question, and the similarity of the economic circumstances affecting the earlier negotiators and the current litigants.” *United States v. Broadcast Music, Inc. (Music Choice)*, 426 F.3d 91, 95 (2d Cir. 2005) (“*Music Choice II*”).

⁷ We note at the outset that when construing the BMI consent decree in cases like this one, this Court routinely looks for guidance not only to previous BMI cases, but also to the much richer trove of cases interpreting the ASCAP consent decree, which is substantially similar to the BMI decree. See, e.g., *Music Choice I*, 316 F.3d at 194 (“This is the first time our Court has been invited to review a rate-setting pursuant to the BMI Consent Decree. We see no reason why our approach to this case should differ from any of the numerous occasions on which we have reviewed rate court decisions pursuant to the ASCAP consent decree.”). We refer throughout this brief to cases interpreting both decrees.

The district court did not dwell long on the question of a proper benchmark in this case, concluding that “there is only one available ‘benchmark’” for music license fees in the local television industry. “It consists,” the district court held, “of the uniform process to which each of the 1,300 members of the industry have agreed, and which operates neutrally as to each of them.” JA1591.

This was error in several respects. The TMLC allocation formula was certainly not the result of any arm’s-length negotiation but was instead a unilateral decision by the TMLC in which BMI (indifferent to the outcome) acquiesced; and station owners’ mere acquiescence does not mean that industry members have “agreed” to its implementation. The formula is also anything but “neutral.” It operates to the disadvantage of a particular subset of stations, causing them to pay outsized fees compared to their competitors.

There is a benchmark available in this case: the total industry fee negotiated between the TMLC and BMI. That fee constituted approximately 0.33 percent of the industry’s total revenues.⁸ *That* is the price “a willing buyer and a willing seller” agreed to after arm’s-length negotiations.

⁸ As we discuss below (at 56), the parties disagree about the proper method for calculating the industry’s fee as a percentage of its revenue. BMI believes that the percentage is somewhat higher than 0.33%. As we argue below, we believe our number to be the most accurate, but in any case, the exact number is not relevant to the legal question before this Court, though it would be a consideration on remand if this Court agrees that an audience-share-based allocation is not reasonable.

A. The TMLC allocation formula is not a proper benchmark.

1. The station rates derived through the allocation formula are *not* the result of an arms-length transaction.

There is no dispute that the industry-wide flat fee, agreed to by BMI and the TMLC, is the product of an arm's-length negotiation. It is a hard-fought compromise that typically results from many years of complicated and often contentious negotiations. Both sides are well represented in these negotiations by attorneys and experts, and because in this respect the TMLC represents the interests of the entire industry, it is able to blunt the force of the negotiating imbalance that would normally result from BMI's monopoly power.

But the industry-wide fee is only one component of the formula that ultimately determines the fee paid by an individual station like WCIU. WCIU's fees are set by a formula that was derived unilaterally by a subcommittee of the TMLC, an unrepresentative ad-hoc body whose members are not fair representatives for Weigel and its stations. Neither Weigel nor, apparently, representatives of any similarly situated independent stations, had any input into the creation of this formula; indeed, neither did BMI. See JA269 ("We [TMLC] didn't negotiate this allocation formula with BMI."). WCIU's fees have gone up dramatically (eight-fold) in recent years, not because the industry-wide fee has gone up to any remotely comparable degree, and not even because its own business has prospered, but because its *ratings* have increased. And the use of ratings as the

primary determinant of a station's fee is a method that was not determined as a result of negotiation; it was dictated to Weigel (and BMI) by Weigel's direct competitors, who benefit from the formula.⁹

⁹ Of course, the TMLC claims that its membership constitutes a broad cross-section of the industry and that it fairly represents the interests of all local stations, including independent stations owned by small broadcasting companies like Weigel. There is serious reason to doubt that claim on its face: as a practical matter, membership on the TMLC is expensive, and the Committee specifically attempts to recruit members from wealthy station groups so that these groups will be more likely to donate money to fund the TMLC's operating expenses. JA251. But ultimately, even if the Committee truly believes that it is broadly representative, that is not enough.

We do not dispute that the TMLC is a fair representative for local stations when it is attempting, through negotiation, to minimize the total amount of money the industry pays in music license fees. Every station has an interest in paying as little as possible, and their interests are generally aligned for that purpose. But that does not mean that TMLC continues to be a fair representative for every individual station when it assumes the role of choosing a method for *allocating* total fees among stations.

Ultimately, the consent decree imposes court oversight over *BMI* and requires *BMI* to conduct its own negotiations with its applicants and set reasonable fees for those applicants. The TMLC was not a party to the consent decree, nor is its existence contemplated or even mentioned in that document. If BMI chooses to delegate its fee-setting responsibilities under the decree to an industry group, there would need to be safeguards in place to require that group not just to *assert* that it is representative for that purpose, but to actually *be* representative (and accountable) in some measurable way. See, e.g., *United States v. ASCAP (In re Salem Media)*, 981 F. Supp. 199, 208-09 (S.D.N.Y. 1997) ("*Salem Media*") ("[W]e decline to accept ASCAP's suggestion that by reaching agreement with the RMLC [Radio Music Licensing Committee], ASCAP can in effect also bind dissenting stations by subsequently invoking the sanctity of industry-wide negotiations. In our view, ASCAP's license agreements with the RMLC can fairly be characterized as the product of "industry-wide" negotiations in the loosest sense only. *** [T]he RMLC formally represented less than a quarter of the commercial radio stations in

This Court's insistence that proper benchmark rates be drawn from agreements negotiated between self-interested and properly-represented parties is not some arbitrary requirement to be brushed off as the district court effectively did. After all, "[t]he rate court was established as a component of the settlement of the Government's antitrust challenge to [BMI's] licensing practices." *Showtime*, 912 F.2d at 570. The central purpose of the consent decree and the rate court is to ensure, as best as possible, that the rates BMI ultimately charges its customers at least approximate the rates that would be charged in a truly competitive market. Rates that result from contentious negotiations between parties that each come to the table with substantial bargaining power are the best available models for a court charged with determining the "fair market value" of a proposed license. See, e.g., *United States v. ASCAP (In re Capital Cities/ABC, Inc.)*, 831 F. Supp. 137, 145 (S.D.N.Y. 1993) ("prices negotiated voluntarily in an arms-length transaction offer the only palpable point from which to proceed towards an estimation of fair value for later periods"). This Court routinely rejects the use of supposed "benchmarks" that do not bear this hallmark of reliability. See, e.g., *Showtime*, 912 F.2d at 567 (affirming district court's decision to reject use of a proposed benchmark as inappropriate "because this rate was agreed to at an early stage of the United States. Moreover, it does not appear that the members of the RMLC were selected with any precision to ensure that they reflected a truly representative cross section of the industry.").

the Disney Channel's existence and reflected considerations not pertinent to arm's length bargaining between ASCAP and an established cable service").

2. The industry has not "agreed" to the TMLC formula.

The district court also misapprehended the significance of the fact that the TMLC formula has been applied to all local broadcast stations except those owned by Weigel. In the court's estimation, "the virtual unanimity *** of the industry's acceptance of the negotiation-and-allocation method and its results, when each member had the ability to opt-out and make a rate court challenge as Weigel ultimately did," supports the use of the TMLC allocation formula and its results as a proper benchmark. JA1592.

But just because other stations have acquiesced in the result reached by the TMLC, that does not mean that they approve of the allocation formula or that they have chosen it freely. The fact is, most stations likely do not even know what formula is being used or how that formula affects their individual fees compared to their competitors' fees. Certainly, that was the evidence with respect to Weigel, whose chairman testified that he and other Weigel executives never paid much attention to their stations' BMI fees until the change in the allocation method resulted in a sudden and sharp increase. Even then, it took discovery in litigation for Weigel to confirm its suspicions that it was paying considerably more, as a percentage of revenue, than most other stations. Weigel had asked BMI, prior to

litigation, for a breakdown of its fees by station revenues, and BMI refused, stating that it was not “willing to provide” such information because it would be “unnecessary if the matter is to be resolved consensually.” JA554.2.

In any event, even a station’s fully-informed acquiescence is not an indication that it believes its own fee to be reasonable. Instead, acquiescence signifies nothing more than unwillingness – for whatever reason – to endure the burdens and considerable expense of a rate court challenge. The fact is, proceedings like this one are very expensive. The evidence showed that this case, prior to trial, had already cost Weigel over \$700,000. JA363. With trial expenses, the cost is over \$1 million, excluding the cost of the appeal. For most stations disadvantaged by the TMLC process, it simply would not make economic sense to initiate a rate court challenge. The evidence showed that nearly all stations disadvantaged by the TMLC process are far smaller than WCIU and earn considerably lower total revenues. Indeed, of the 100 stations that paid the highest percentages of their revenues in BMI fees following imposition of the TMLC formula, not one had revenues, like WCIU’s, over \$30 million. Of the 200 highest-paying stations, only two had revenues that high. JA351, 1316-46. These stations pay so little in total fees – the vast majority well below \$100,000 per year – that their willingness to accept the TMLC license rather than engage in the

lengthy and costly process that Weigel has endured is hardly indicative of whether the TMLC allocation is reasonable.

The rate courts in this Circuit have repeatedly recognized this principle when performing “benchmark” analysis. See, e.g., *Showtime*, 912 F.2d at 585 (even a “cautious businessman” would “likely” opt for an “excessive” music license fee in lieu of a rate court proceeding); *United States v. ASCAP (In re Capital Cities/ABC, Inc.)*, 157 F.R.D. 173, 181 (S.D.N.Y. 1994) (“*Capital Cities*”) (due to market leverage of music licensor, the fact that the station agreed in the past “does not in itself indicate they believed the terms therein were reasonable”); *United States v. ASCAP (In re Salem Media of Cal., Inc.)*, 981 F. Supp. 199, 210 n.11 (S.D.N.Y. 1997) (“No single station or small group of stations could easily afford [individual] negotiations, or if negotiations fail, to seek judicial relief.”). Here, however, the district court chose to accept, without question, the appearance of “unanimity” as the determining factor in choosing a benchmark.

Notably, this sort of industry-wide acquiescence to an unfair price is the paradigmatic problem the antitrust laws are designed to protect against. BMI is a monopolist; television stations have no choice but to buy the product it sells. It is the only purveyor of performance licenses for its repertoire of over 6.5 million musical works, and those works are contained in virtually every piece of television programming produced in this country. Stations simply do not have the option to

filter out BMI music or refuse to buy programs containing that music. They cannot refuse to purchase a license from BMI; the consequence of operating a television station without a BMI license would be liability for copyright infringement. Under these circumstances, court oversight is necessary to prevent abusive prices, precisely because individual customers often have no effective way to fight such prices on an individual basis.

3. A proper benchmark is a *fee*, not a formula.

Finally, even if BMI had proven that the TMLC formula produces a fee that is reasonable for most members of the industry (which it did not), that still would not be proof that the formula produces a fee that is reasonable for *Weigel*. Under the TMLC system, *Weigel*'s fees increased by nearly 800%, from approximately \$30,000 annually to over \$250,000 per year. As we will discuss below, that dramatic increase was the result of a peculiar combination of factors that caused the formula to have a disproportionate effect on WCIU specifically. For present purposes, however, it is worth noting simply that other stations' actual fees, rather than the formula used to obtain those fees, is the proper benchmark against which to measure the fees BMI has proposed to charge *Weigel*. As the ASCAP rate court explained in 1993, the consent decree requires determination of a reasonable *fee*, not simply a reasonable methodology. "[A]ny approach that completely ignores

the actual fee burden resulting from a particular formula fails properly to consider the reasonableness of the fee itself.” *Capital Cities*, 157 F.R.D. at 198.

B. The proper benchmark, if one exists at all, is the industry-wide fee, expressed as a percentage of industry revenues.

The only actual arm’s-length negotiation that occurs in this segment of the industry is the industry-level negotiation between BMI and the TMLC. That negotiation results in a flat, industry-wide fee for a period of years. We submit that *that* fee – the product of “contentious” negotiation (JA129) – is a fair benchmark for what willing buyers and willing sellers have agreed to as a fair price under circumstances analogous to Weigel’s. And *that* fee is about 0.33% of total industry revenues.¹⁰

¹⁰ Technically, the full negotiated fee constituted approximately 0.40 percent of industry revenues, on average. But BMI does not collect the entire negotiated fee from local stations, because many stations choose to purchase “per program” licenses that end up reducing their payments below their allocated share of the industry-wide “blanket” fee. When BMI’s actual *collections* are compared to industry revenues, the effective rate paid by the industry drops to approximately 0.34 percent. BMI has disputed this figure, claiming that it is inaccurate because it fails to account for fees paid by national networks for programs that are broadcast on local stations. But when those fees are added in (along with the corresponding network revenues), the effective rate drops *again* to 0.33 percent. Ultimately, as we explain in more detail below, the exact figures are beside the point. The question for this Court is whether a percentage-of-revenue allocation – however calculated – is more a reasonable method of determining WCIU’s fees than a system based on audience share. If this Court agrees that a revenue-based system is more reasonable, the district court can determine, on remand, exactly which revenue figure constitutes the proper benchmark.

The industry-wide fee is an appropriate benchmark for two reasons. First, as discussed, it is the only available benchmark fee that is the product of an arm's-length negotiation. Second, when considered as a percentage of industry *revenue*, the flat fee is the best measure of the true "fair market value" of the BMI license.

It is inherently difficult to set the value of a music license in the television industry, where music is an integral part of all programming but is rarely if ever the primary attraction of that programming. For this reason, there is no way to know for sure exactly how much marginal revenue a broadcaster earns by broadcasting shows containing music (as opposed to broadcasting some theoretical slate of identical programming containing no music at all). But as between two imperfect measures of value – audience share and revenue share – we consider it beyond reasonable dispute that revenue is by far the more logical choice. After all, the purpose of paying for *any* specific component of programming is not to attract viewers as an end in itself, but to attract viewers *for the purpose of generating revenue*. A music license is only valuable because it helps stations earn money; the value of the license is thus best reflected by the amount of revenue a station's licensed programming is able to generate.

The evidence at trial indicated that every actor in this market believes, at least at some level, that station *revenues* are at least relevant to the value of the license BMI sells. Certainly, that is BMI's perspective. The company's

representative at trial, Michael O'Neill, testified that a license fee computed as a percentage of the industry's revenues would not only be reasonable, but would be BMI's *preference* if it felt it had a choice. JA133, 200. Indeed, when BMI approaches its negotiations with the TMLC, it first determines its own negotiating position by looking at industry revenues and considering what it believes a fair percentage of those revenues would be as payment for the BMI blanket license. JA201; see also JA395-96 (BMI memorandum listing matters to be completed for the "upcoming" TMLC negotiation, including a "trend analysis" of local television stations' "estimated revenues & BMI fees"); JA1137-38 (BMI chart listing total music license fees as a percentage of net local television industry revenue).

Even the *TMLC* apparently recognizes that the higher a station's revenues, the more valuable a music license is to that station. As discussed, the TMLC allocation formula "weights" the various television markets throughout the country when determining each market's allocable share of the total industry fee. Each of the "top ten" markets receives an allocation nearly 20 percent higher than its share of viewing households, while the smallest markets receive allocations 20 percent lower than their respective shares. The purpose of this "weighting" is to correct (very roughly) for imbalances in *revenues* among markets, or, as the TMLC allocation committee explained, to recognize that "a household in the 150th market does not represent the same value as a household in the New York market."

JA201, 477. Of course, this sort of rough justice, in which every station in a top-ten market is arbitrarily *presumed* to have revenues nineteen percent higher than its audience share (which is certainly not true for WCIU), is neither accurate nor necessary; a system that allocated fees based on relative revenues rather than market share would automatically and accurately reflect differences in “household” value.¹¹

Using the industry-wide fee as a benchmark for evaluating the reasonableness of WCIU’s fee demonstrates just how disproportionate the latter is, compared to the station’s direct competitors. For example, WGN (the Tribune station that employs Charles Sennett, the TMLC chairman), has nearly four times WCIU’s revenue, yet it pays slightly less than two times WCIU’s fee.¹² The numbers are similar for other stations in the Chicago market: under the district

¹¹ To illustrate this in another context, suppose the owner of a retail shopping mall decided to base store rent on the value of the space to the store, and that it had stores of equal size occupied by Tiffany’s and Kay Jewelers. Suppose further that the Tiffany’s store made 10 sales per day at an average value of \$10,000, while Kay’s store made 100 sales at an average value of \$500. Under a per-customer allocation formula such as that developed by the TMLC (with Tiffany’s on the allocation committee but not Kay’s), Kay’s would pay 10 times as much rent even though it was generating only one-half the sales revenues from the store. It is that kind of illogical approach that the district court held to be “reasonable.”

¹² WCIU’s 2004 revenues, for example, were \$39,577,800 (JA41), and its TMLC-allocated BMI fees were \$22,017 per month, or \$264,204 per year (JA40). WGN’s revenues for that year were \$152,963,000, and its annual BMI fees were \$519,132. JA44. Thus, WGN paid approximately 0.34% of its annual revenues – the industry average – in BMI fees that year, while WCIU paid approximately 0.67%.

court's ruling, WCIU would pay the highest percentage of its revenues in BMI fees of any major full-power station in Chicago. JA44.

It is not surprising that such dramatic variation exists, given the process BMI has employed to set its fees. What has happened over the last several years is that after negotiating what every participant apparently agrees is a fair, carefully-considered industry-wide fee, BMI then turned the important process of allocation over to an unrepresentative group comprised mostly or entirely of stations whose revenue-generating structure is drastically different from WCIU's. That group invented a system that allows some stations to underpay their fair share of the industry fee, while forcing other stations, like WCIU, to dramatically overpay.

At trial, the TMLC's chairman testified that the Committee chose an audience-based system over a revenue-based one, not because audience share is a better measure of value than revenue share, but because it would be impractical for the TMLC to use revenues as a basis for allocating the industry's fee. The Committee, Mr. Sennett explained, does not have access to revenue information, and it does not have "enforcement power" to require stations to report their revenues accurately or consistently. Those may be good reasons to take the TMLC out of the allocation process, but they are not good reasons to force Weigel to bear the burden of paying a portion of its competitors' license fees – the practical effect

of a system that allows some stations to underpay and forces others to make up the difference.

The evidence was clear that *BMI* is capable of administering a revenue-based system. Such a system existed (and was defended in litigation by BMI) prior to the *Buffalo Broadcasting* decision in 1993, and such a system *continues* to exist, *currently*, for all stations that choose per-program licenses.¹³ These revenue-based systems do rely on self reporting, so there is admittedly a risk that stations can cheat by being dishonest about their revenues or employing internal accounting systems that minimize apparent revenues. But those are problems that BMI has been able to deal with by conducting periodic audits and by specifying particular definitions of “revenue” for purposes of calculating its fees. If the TMLC cannot similarly work around those sorts of problems, that is not an argument for adopting a system that assigns fees based on inaccurate estimates of fair market value of the license; it is an argument for removing the TMLC from the allocation process.

C. *Buffalo Broadcasting* supports our position

BMI has maintained that the district court decision in the *Buffalo Broadcasting* case somehow precludes using station revenues as a basis for allocating fees. This is not true.

¹³ BMI also charges revenue-based fees to low-power (as opposed to full-power) television stations, as well as a variety of other types of licensees.

Buffalo Broadcasting held that a blanket fee for the industry was more “reasonable” than a variable fee tied to industry revenues, because theoretically, such a variable fee would have continued to increase as industry revenues grew, even if the industry’s revenue growth had nothing to do with increased use of ASCAP’s music. Using a fixed percentage of revenues to set the industry-wide fee made ASCAP an effective “partner” in the stations’ businesses, the court held. That was not fair to the stations because it potentially vastly overstated the actual value of the music licenses. *Buffalo Broadcasting*, 1993 U.S. Dist. LEXIS 2566, at *109-122.

Whatever the merits of that logic, it does not control, or even apply, here. It may well make more sense for there to be a negotiated, fixed, industry wide dollar-amount fee than to have an open-ended fee based on industry-wide revenues or any other measure. But the question here, unlike in *Buffalo Broadcasting*, does not concern how much the industry as a whole should pay for music licenses. The question in this case is as follows: Once the industry-wide cap is set, how is the blanket fee going to be allocated among all the stations in the country? *Buffalo Broadcasting* did not address that question.

The TMLC’s answer is that the fee should be allocated based on relative market share. But that is a markedly less fair method of valuing a music license than a straight percentage of revenue. There is no reason to believe that

improvements in ratings have any more to do with use of BMI's music than improvements in revenues do. But certainly, *relative* revenue is a much *better* method for measuring the value of the license to the various businesses in the marketplace – that is, for determining what the economic benefit of the license is to the various stations relative to one another. Nothing in the *Buffalo Broadcasting* decision would prevent BMI from allocating its industry-wide fee on a relative-revenue basis.

II. THE DISTRICT COURT ERRED IN ITS “SIMILARLY SITUATED” ANALYSIS

We argue above that the district court erred in its “benchmark” analysis when it disregarded industry revenues in favor of the TMLC’s audience-share method. But even if the district court were *correct* that the proper benchmark is the TMLC *allocation*, as opposed to the TMLC *fee*, it still erred by not recognizing that WCIU is affected by that allocation in a sufficiently different manner from almost every other television station in the country to entitle it to relief from the unfair treatment to which the TMLC formula subjects it. That is, even if application of the TMLC formula may properly be considered a benchmark transaction, “applicable business factors” (in the language of the consent decree) justify imposition of different rates for WCIU.

A. Weigel is not “similarly situated” to most other stations represented by the TMLC.

The TMLC system, which the district court held was reasonable to apply to WCIU even though the station had explicitly opted out of TMLC representation, divides the industry-wide fee based on a station’s audience share – that is, how many viewers its programs attract compared to its competitors. But that system does not take into account *at all* the actual strength of a station’s business, which is ultimately measured by that station’s revenues. Audience share is a useful number, but ultimately it is interesting only because it is a rough proxy for revenue. More viewers *generally* mean more advertising dollars, which means more success for a television business.

But here, as in *Animal Farm*, some stations’ viewers are distinctly more equal than others. As we have discussed, not every television station can turn viewers into dollars as easily as the others. Some stations, like WCIU, are hobbled in that effort by structural barriers. WCIU is not a network affiliate; it plays mostly syndicated programming that draws high viewership, but from relatively unprofitable demographic groups, during non-primetime hours when advertising rates are lowest. It does not have its own local news broadcasts, which are attractive to advertisers. It plays local sports, which generate very high ratings, but it does not share in the advertising revenue from that programming. In addition, as a family-owned station that is not part of a large buying group, it does not have the

bargaining power of its larger competitors, who are able to purchase lucrative syndicated programming by offering to air it not just in Chicago, but throughout the country.

All of this means that WCIU, like other independently-owned, non-network-affiliated stations, “undersells” its ratings. Another way to put it is that Weigel has a great deal of difficulty – more difficulty than almost any other station in the country – turning its ratings into actual dollars.

This is reflected in WCIU’s power ratio, which is the lowest such ratio of any major station in the Chicago market. In 2005, for example, WCIU had a power ratio of 0.76. Its major competitors had power ratios of 0.82 (WLS – ABC), 0.99 (WBBM - CBS), 1.00 (WPWR - UPN), 1.14 (WMAQ - NBC), 1.44 (WGN - Tribune), and 1.48 (WFLD - Fox). JA44. Power-ratio comparisons for prior years are even more imbalanced. In 2002, for example, WCIU had a power ratio of 0.53 (meaning that its revenue share was only slightly more than *half* its audience share), while its competitors’ ratios ranged from 0.94 (WPWR) to 1.36 (WGN). Indeed, WCIU’s power ratio is consistently among the very lowest in the country. In 2005, for example, only eight stations nationwide with revenues “comparable” to WCIU’s (in the estimation of BMI’s own expert witness) had power ratios lower than WCIU’s 0.76, while 170 such stations had ratios that were higher. Even *this* ranking overstates WCIU’s standing: the station’s 2005 ratio was the *highest* it

achieved in all years that the trial experts examined. In 2002, WCIU's power ratio was 0.53. It grew to 0.59 in 2003 and 0.62 in 2004. JA44. At least as of 2005, only two English-language stations in the country with "comparable" revenues had ratios below 0.62, only one station was below 0.59, and not a single station was as low as 0.53. Weigel Ex. JS-5.

BMI argued below, and the district court agreed (JA1595), that stations in different markets cannot appropriately be compared by power ratio, because the ratio shows only the relationship between a station's revenues and audience share within its own market. That may be true for some purposes, but for purposes of measuring the fairness of the TMLC fee, which splits up a fixed fee *within* a market based solely on audience share, power ratio is the *best* way to compare stations. A station's power ratio indicates the extent to which it is underpaying or overpaying its fair share of its market's allocated BMI fee, assuming (as we think is fair) that the actual value of a BMI license is best approximated by examining a station's revenues from shows containing BMI music. A station with a power ratio of 1.00 is paying its proportional share of the BMI fee, regardless of what market it is in. A station with a power ratio over 1.00 is getting BMI music at a discount from actual value, and a station with a ratio under 1.00 is paying not only its share, but also portions of its competitors' shares. It is thus very significant that WCIU

has among the lowest power ratios in the country; that means its BMI fees are among the most disproportionately *high* in the entire country.

B. Applying the TMLC formula to Weigel results in a per-se unreasonable fee.

As a result of these factors, WCIU pays a highly disproportionate share of its market's allocated BMI fee. We acknowledge, readily, that WCIU is not the absolute worst off in this regard of all the 1,300 local stations in the country. Indeed, as the district court pointed out, a handful of high-revenue stations have even lower power ratios than WCIU (though many of these stations are network affiliates that choose per-program licenses and are thus able to blunt the prejudicial effect of the allocation formula), and around 100 stations have at some point over the last five years paid fees that constituted even higher percentages of their revenue than WCIU's fees.¹⁴

But regardless whether WCIU is the only outlier in the country or whether it is one of a handful of such outliers, there should be no question that its fees are objectively unreasonable, given what most other stations pay. Over the course of seven years, WCIU's allocated monthly fee rose to almost *nine times* its prior

¹⁴ As we discussed above (at 36-37), most of the stations in the latter group have very low revenues and thus very low overall music fees. We believe these stations are also unfairly being forced to shoulder more than their fair share of the industry's fee, even though the small dollar amounts involved explain the stations' silence in the face of this unfairness.

level, soaring from \$2,562 in 1997 to \$22,577 in 2004 – an increase of 781%. JA40, 1347. This staggering increase does not correlate in any way to any increase in WCIU's revenues, or even to its ratings. The station's revenues grew about 123% from 1998 to 2004, and its ratings increased by about 78% over the same period. JA32, 41. BMI's revenues also did not increase by nearly this much during that period. In other words, by any reasonable measure, the *value of the license* (measured either by the amount of money WCIU was able to generate from its music-containing programs *or* by the amount of money BMI earned in the aggregate from sale of its product) did not increase by anything near the amount by which Weigel's fees increased.

It is not difficult to understand why this has happened to WCIU. The station is doubly harmed by the TMLC system, in a way that very few other stations are: it has an abnormally low power ratio in a top-ten market. Top-ten markets receive a disproportionately high share of the flat fee (19% higher than their share of viewing households) on the theory that advertisers are willing to spend more in those markets than in others. WCIU is thus in the worst possible position: its fees are increased because of a *presumption* that its revenues are higher than those of stations in smaller markets, but its revenues are *actually* quite low compared to its direct competitors. Of course, a system based on revenues would not need to

“weight” fees by market, because differentials in advertising rates would be directly reflected in each station’s fee.

III. BMI’S OBJECTIONS TO A REVENUE-BASED FEE FOR WEIGEL ARE WRONG.

BMI’s representative at trial testified that the company would actually prefer a revenue-based fee system to one based on market share, assuming that such a system applied to the entire industry. JA200. Weigel would certainly be content with such an outcome, which would presumably prejudice no one other than the stations, like Tribune’s WGN, that benefit unfairly from the current system by underpaying their fees. A system that divided an industry-wide fee based on relative revenues would end up generating as much income for BMI as the current system does; the burden of individual contributions would simply be redistributed in a fairer manner.

That said, BMI advocated below for a preservation of the status quo, primarily based on its apparent concern that a ruling for Weigel in this case would result in a two-tiered fee system in which some stations would pay fees based on their revenues, at lower rates than an audience-share allocation would generate for them, while those such as WGN who benefit from the TMLC’s allocation formula would continue to follow it. BMI’s concerns are overblown.

A. The “non-discrimination” provision of the decree does not require BMI to include Weigel in the TMLC contract.

BMI argued below that it could not offer Weigel a license based on a fair share of its stations’ revenues because if it offered such a license to Weigel, it would then be obligated, under the “non-discrimination” provision of the consent decree, to offer an identical license to every station in the country. This would result in lower revenues for BMI, it argued, because stations that would benefit from the revenue formula would choose that formula, while stations that fare better under the audience-share formula would choose to continue to pay their current fees. We disagree.

First, the consent decree does not require that every license applicant in a particular industry be granted the exact same license. Instead, BMI may not “discriminat[e]” among “similarly situated” licensees, but “differentials based upon applicable business factors which justify different rates or terms” are *not* considered “discrimination.” JA388. As we argue above, WCIU is *demonstrably* different from most other stations in the country with respect to the effect of the TMLC formula on the station’s allocated fees. The station’s very low power ratio, reflecting its particular combination of low revenues and high ratings, is an “applicable business factor” that justifies a different rate from stations with very different business models. Indeed, the ASCAP consent decree explicitly includes a

provision listing “factors relevant” to licensees’ “similarity.” Those factors include “the amount and source of the music users’ revenue.” JA449.

More importantly, it is the *current* system, not the proposed one, that results in disparate treatment of similar applicants. BMI has allowed the TMLC to impose a fee structure on the industry that permits some stations in a market to dramatically underpay their share of the industry-wide fee, shifting the burden unfairly to other stations in the same market. If there is a “discrimination” problem with offering Weigel a revenue-based share of the industry-wide fee, that problem is not solved by denying Weigel its fair fee; the problem is solved by denying the stations that unfairly *benefit* from the current system the opportunity to do so.

Ultimately, BMI is attempting to use the non-discrimination clause to avoid its clear responsibility under the decree to negotiate fair licenses with any individual applicant who requests such a negotiation. The consent decree does not contemplate the existence of the TMLC, let alone a central role for the Committee in the fee-setting process. Rather, the consent decree requires BMI to propose a license to “any unlicensed broadcaster” who requests one. JA389. Over the years, in order to eliminate the disparity in bargaining power between individual stations and BMI, most station owners have found that it is in their interest to band together and allow the TMLC to conduct collective negotiations on behalf of the industry. But station owners’ decision to negotiate collectively does not obviate BMI’s

responsibility to deal individually with a particular applicant who for whatever reason does not wish to be represented by the collective industry group. In this case, Weigel's interests, at least at the allocation level (as opposed to the negotiation level) are *not* fairly represented by the Committee, for which reason it explicitly exercised its right to opt out. BMI ignored Weigel's decision, purposely avoiding a separate negotiation for *five years*. During those five years, BMI negotiated a deal with the TMLC that placed an unfair burden on Weigel, and then, when it finally agreed to sit down with Weigel, asserted that any deviation from the "industry-wide" allocation would violate the non-discrimination clause of its consent decree.

BMI's interpretation of the non-discrimination provision would make a station's "opt out" right utterly meaningless. One way or another, Weigel is bound to the decisions made by the TMLC. That is a bastardization of the consent decree's non-discrimination clause, which was designed to *protect* the rights of small licensees. See *Salem Media*, 981 F. Supp. at 208 ("[W]e decline to accept ASCAP's suggestion that by reaching agreement with the RMLC, ASCAP can in effect also bind dissenting stations by subsequently invoking the sanctity of industry-wide negotiations."); *Id.* at 209-10 ("Either ASCAP's proposed per-program license fees comport with the Consent Decree, or they do not. The possibility that a ruling adverse to ASCAP in the instant matter may complicate

future negotiations and encourage additional applicants to exercise their right to obtain a rate setting by the court, while perhaps unfortunate, cannot be allowed to dominate our analysis. Whether ‘industry-wide’ negotiations continue to receive the court’s imprimatur as an appropriate means of setting music license fees depends entirely upon whether this process yields acceptable licenses. If ASCAP feels that it is important that the process not be jeopardized, ASCAP need only ensure that the process produces agreements that offer reasonable fees for all music users.”) (internal citations omitted).

B. Calculation difficulties are irrelevant to the legal question before the Court.

As we mentioned above (at n.8), BMI also objected to Weigel’s calculation of a proper revenue-based fee. BMI’s collections as a percentage of industry revenues could not possibly be a proper benchmark, BMI argued, because the “collection” numbers are artificially low.

Suffice it to say, this argument is irrelevant to the legal question before this Court. The district court held that the proper “benchmarks” in this case were the fees generated by the TMLC’s allocation formula, rather than the fee negotiated between the TMLC and BMI. Having made this determination, the district court never reached the question of exactly how a revenue-based benchmark would be calculated. We believe that the most accurate measure of the industry’s total negotiated fee is approximately 0.33% of relevant industry revenues. BMI has

proposed different measures, ranging from 0.40% to 0.61%. If this Court determines that a revenue-based approach is more reasonable under the decree than the current system – either for Weigel’s station individually or for the industry as a whole – it can remand to the district court for factfinding to determine the exact percentage that makes the most sense and would yield the appropriate level of total revenues to BMI.

* * *

For the past forty years, the government has allowed BMI to continue operating a monopolistic business, so long as, under the supervision of the federal courts, it charges rates that approximate the rates that would be charged in an actually competitive market. By ceding fee-setting responsibility under its consent decree to an ad hoc, unrepresentative “industry group,” BMI has abdicated its responsibility to negotiate and charge reasonable rates for its services. This system is unfair and unreasonable.

CONCLUSION

The judgment should be reversed, and the case should be remanded to the district court with instructions to determine a reasonable fee based on a percentage of Weigel's revenues.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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