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

REPLY BRIEF FOR RESPONDENT-APPELLANT WEIGEL BROADCASTING CO.

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. BMI DEFENDS THE WRONG BENCHMARK 5

A. The TMLC allocation formula is an inappropriate benchmark 5

1. BMI does not dispute that the formula was derived unilaterally by the TMLC 5

2. BMI's arguments about "unanimity" fall flat 9

B. A revenue-based fee is more reasonable and results in less price discrimination than an audience-based one 12

II. WCIU IS NOT "SIMILARLY SITUATED" TO EVERY OTHER TELEVISION STATION 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

ASCAP v. Showtime/The Movie Channel,
912 F.2d 563 (2d Cir. 1990) 2, 8, 9

United States v. ASCAP (In re Buffalo Broadcasting Co.),
1993 U.S. Dist. LEXIS 2566 (S.D.N.Y. Oct. 28, 1993)..............................15, 17

United States v. ASCAP (In re Capital Cities/ABC, Inc.),
831 F.Supp. 137 (S.D.N.Y. 1993) 7-8

United States v. Broadcast Music, Inc. (Music Choice),
316 F.3d 189 (2d Cir. 2003) 1, 7

United States v. Broadcast Music, Inc. (Music Choice),
426 F.3d 91 (2d Cir. 2005) 8

PRELIMINARY STATEMENT

BMI begins its brief by mischaracterizing our argument. We do not claim, contrary to BMI's suggestion, that all music license fees "*must* be stated as a percentage of revenue," or that "*any* other way of determining BMI license fees is fatally unfair" (BB[1] 4). We do believe that revenue-based royalties are generally likely to be a fair measure of the value of a television music license, and would be in this instance. But we readily acknowledge the possibility that a non-revenue-based fee could be reasonable in the television industry under the proper circumstances – assuming (and this is key) that such a fee approximated the fair market value of the license being sold. The problem in this case is not that every other possible fee is unfair, but that the *particular* fee BMI proposes to charge WCIU – based on a formula that prioritizes Neilsen ratings over all else – is unreasonable. That fee does *not* reflect, even approximately, the fair market value of WCIU's license: it is grossly out of proportion to the fee BMI would be able to charge in a competitive market, and it is far higher than the fees other stations pay for the same product.

Despite its appellee status in this court, BMI still bears the burden of demonstrating the reasonableness of its proposed fee. *Music Choice I*, 316 F.3d at

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[1] BB__ refers to BMI's brief. WB__ refers to Weigel's opening brief. JA__ refers to the Joint Appendix.

194. In order to do that, it must show that its fee is comparable to one that has been negotiated at arm's length between buyers and sellers with roughly equal bargaining power. *Showtime*, 912 F.2d at 577. Absent such a showing, this Court cannot have confidence that the taint of BMI's monopoly power has been removed from its relationship with its captive customers.

BMI has utterly failed to carry its burden. It argues at length that its industry-wide total fee came about as the product of "contentious" negotiations, which we readily acknowledge. But this is a *non sequitur*; the reasonableness of the total fee is not the issue. What BMI brushes past is that the formula used to *allocate* the total fee among BMI's actual customers – which is the issue here – was never negotiated with anyone. The TMLC allocation formula was not set by any market; it was simply given to BMI by a small, self-appointed, and unrepresentative group of station owners and presented to the individual stations as a *fait accompli*. Such a formula is simply not an appropriate benchmark against which to measure the reasonableness of WCIU's exorbitant fee. On the contrary, the license that *did* come out of the hard-fought negotiations BMI defends – a license that calls for the industry to pay BMI a flat fee that amounts to a very small (and easily quantifiable) percentage of its annual revenues – is a far fairer measure of the actual value of the product WCIU is buying.

Unsurprisingly, BMI defends its use of the TMLC formula by asserting that "every other station in the industry has asked for it." BB 4. Of course, that is a misstatement: no station "asked" for an audience-based fee structure; the process was imposed on the industry unilaterally by BMI after having been devised by an ad hoc group of self-interested decisionmakers. What BMI is really saying is that the TMLC formula *must* be reasonable because other stations have acquiesced in its use. But as we argued in our opening brief, this Court can take little comfort in the supposed unanimity of the industry: near-universal acquiescence to an unfair price is not surprising where the seller is the only purveyor of the product and the buyers are required by law – under threat of severe sanctions for noncompliance – to purchase it. The fact that other stations have the "option" to challenge their rates is illusory. For most stations unfairly burdened by the TMLC formula, exercising this "option" costs far more than paying an unfair license fee, especially because the unfairness of the allocation formula falls mainly on comparatively low-revenue stations. This is precisely why this Court insists on comparing music license fees to market-derived benchmark rates; otherwise, there is no assurance that a proposed price is fair and non-discriminatory.

Presumably aware of the legal difficulties with its position, BMI devotes a substantial portion of its brief to what is essentially a harmless error argument: whether or not the audience-based allocation formula was properly derived, BMI

claims that its burden has not fallen unfairly on WCIU. Instead, BMI asserts (at BB 22-23) that use of the formula has resulted in only modest increases in the station's fees, comparable to its "dramatic" recent increases in revenues and audience share. This is a startlingly misleading claim. Since the TMLC formula was adopted, WCIU's monthly fees have risen by a factor of more than eight, growing from $2,562 in 1997 to $22,017 in 2004. BMI calculates the growth as "actually 145%" (similar to the station's growth in revenues) by comparing WCIU's 2004 fee to the fee it was charged in April 1998: a year *after* the TMLC formula was adopted. But WCIU's fee more than tripled in that first year alone, an increase that BMI's numbers game unjustifiably disregards.

BMI plays fast and loose with other numbers as well, as we will detail below. But the real point is this: the numbers are a sideshow, presented in service of BMI's self-serving claim that this appeal is nothing more than a quibble over the district court's factfinding. That is not what this case is about. The district court's factual conclusion – that WCIU is "similar" to every television station in the country – *was* clearly erroneous, as we will explain. But the court's larger (threshold) error was choosing as a benchmark for comparison an un-negotiated allocation formula imposed on the industry by unrepresentative insiders. Had the court chosen the *negotiated* BMI license as a benchmark, the question of WCIU's similarity to other stations would have been irrelevant. Instead, the district court

would have been obliged to compare WCIU's rate to the industry-wide rate. That comparison would have required quite different factual analysis. BMI's brief does not adequately grapple with this fundamental error.

ARGUMENT

I. BMI DEFENDS THE WRONG BENCHMARK.

A. <u>The TMLC allocation formula is an inappropriate benchmark.</u>

1. BMI does not dispute that the formula was derived unilaterally by the TMLC.

We explained in our opening brief that the district court erred by judging the reasonableness of BMI's proposed fee against the "uniform process" that allocates fees among other stations in the industry. This "process," we argued, is not a proper benchmark for comparison because it was concocted by a TMLC subcommittee instead of deriving from an arm's length negotiation between a buyer and a seller in a competitive marketplace. It also results in patently discriminatory rates among competing stations.

BMI appears to realize that this is a problem, because it attempts to subtly change the playing field in its appeal brief. It begins its defense of the district court's holding by claiming that Judge Stanton determined the proper benchmark to be "the 1999-2004 BMI/TMLC license." It then devotes several pages to a discussion of that license and its genesis, concluding that the agreement was

"clearly the result of arm's length negotiations *** between two parties with substantially equal bargaining power." BB 40-41.

So far, we do not disagree one whit. There is no dispute in this case that the industry-wide license, which calls for the 1,300 local commercial broadcast stations, *collectively*, to pay BMI $85 million per year for access to the company's repertoire, is a fair deal, arrived at in good faith and after considerable compromise on all sides. But that license is not what determines the fee *WCIU* pays for access to BMI's catalogue, compared to the stations against which it competes. What we dispute is the propriety of taking this admittedly fair $85 million total fee and slicing it up in a way that allows Tribune's WGN to pay a far lower rate than Weigel's WCIU for the same product. See WB 42 n.12 (citing JA40, 41, 44).

BMI never comes to grips with this problem. In 53 pages of briefing, it never answers our argument about why it is inappropriate to use the TMLC formula as a benchmark to judge the fairness of WCIU's fees. The central problem is that this formula was not the result of any sort of arm's length negotiation and is very poorly connected to the comparative value of the license to the various stations among whom the nationwide fee is allocated. It therefore does not reflect the fair market value of the product WCIU is buying.

The closest BMI comes to a response is to accuse us of "cherry picking" the portions of the license we "like" and "contest[ing] the portions [Weigel] seeks to

avoid." BB 42-43. This "selective adoption of the benchmark," BMI claims, "is unreasonable." BB 43. However, BMI never explains *why* it is unreasonable for Weigel to contest the TMLC's allocation formula, which unlike the industry-wide blanket fee, was not the product of an arm's length negotiation and is solely responsible for the price variation that forces WCIU to pay a materially higher percentage of its revenues to BMI than any other major station in Chicago and the great majority of other stations in the country.

The trial evidence was clear: while the $85 million total number was the result of a years-long negotiation between BMI and the committee, the allocation formula was not. The TMLC created the formula and "dictated" its use to BMI; its chairman testified at trial that the committee "didn't negotiate this allocation formula with BMI." JA269. Of course, BMI had no reason to care about the fairness of the allocation formula; regardless of which formula is used to split up the total fee, BMI still collects the same amount at the end of the day. This is why it is relevant that the industry license was determined in a market transaction while the allocation formula was not: as this Court's caselaw recognizes, a price agreed to by a buyer and a seller is likely to be fair to both parties. See, e.g., *Music Choice I*, 316 F.3d at 195 ("the price willing buyers and sellers agree upon in arm's-length transactions appears to be the best measure" of the fair value of a license); see also *In re Capital Cities/ABC, Inc.*, 831 F.Supp. at 145 ("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."). A price set unilaterally by one party does not have this critical indication of reasonableness and thus is highly suspect as a benchmark. See, e.g., *Music Choice II*, 426 F.3d at 95 (court must examine "'the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned'") (quoting *Showtime*, 912 F.2d at 577).

BMI seems to recognize this problem, because it liberally throws around the word "negotiation" when it describes the process the TMLC used to create the allocation formula. See, e.g., BB 14 n.9, 43. But even BMI cannot sustain the "negotiation" descriptor for very long. Ultimately, the company defends the formula on two grounds: (1) its provisions were "a matter of intense analysis" (BB 12) and the "product of 'compromise and discussion'" (BB 43); and (2) BMI "consider[ed] the reasonableness of the formula" and decided it was fair (BB 43-44).

But when considering the reasonableness of a music license fee under the BMI consent decree, this Court does not look to whether the fee was set after a lot of discussion, or whether *BMI* believes it is fair. The Court looks to whether the fee being charged is comparable to a fee that would result from negotiation in a

competitive marketplace. See, e.g., *Showtime*, 912 F.2d at 569 ("Fair market value is *** the price that a willing buyer and a willing seller would agree to in an arm's length transaction."). The point is to approximate what would happen in the open market if self-interested actors were actually negotiating with one another and competing for prices. "Intense analysis" by a small, self-appointed, and self-interested group does nothing to ensure that kind of validity but rather invites distortions.

2. BMI's arguments about "unanimity" fall flat.

As predicted, BMI's central argument in favor of the reasonableness of the TMLC allocation formula is that other stations have acquiesced in its use, apparently without complaint. BB 2, 17, 42, 44. But as we explained in our opening brief (at 35-38) such acquiescence will almost always exist in monopolistic markets, regardless of whether or not prices are reasonable, because customers have no choice but to buy the monopolist's product.[2] BMI counters, again as predicted, that television stations *do* have a choice in *this* market: they may bring a rate court proceeding to challenge any fee they believe to be unfair.

[2] That distortion is particularly acute in this market, because not only is BMI the only available seller, but the 1,300 buyers also do not have the option to forgo the product: every television station must purchase a BMI license; otherwise, they risk severe sanctions for copyright infringement merely for operating their businesses.

But what BMI fails to acknowledge is that the rate court mechanism is far from a perfect solution to the problems caused by BMI's monopoly power. Rate court proceedings are expensive. This case alone has cost Weigel over $1 million in legal fees – nearly as much as is at stake in disputed license fees. And as BMI's own evidence demonstrates, the stations that pay the highest percentages of their revenues to BMI – even higher than WCIU – have considerably lower *total* revenues than WCIU and pay royalties that are far smaller in absolute amount. WB 36 (citing JA351, 1316-46). For those stations, a rate court challenge simply does not make economic sense, because there is far less money at stake than the cost of a court proceeding.[3]

BMI calls this argument "bald[] speculat[ion]," accusing us of simply guessing (without record support) that "many stations are unhappy with the formula and have not wanted to expend the resources to challenge it in court." BB 17. That is not what we are arguing. Our position does not depend on the "speculation" that other stations are "unhappy." We do not know whether other stations are "happy" or not. We do know, however, that many stations, including WCIU, are *objectively* being treated differently from their competitors. It is not

[3] Moreover, as Weigel's experience demonstrated, many of the hardest-hit stations may not even know they are being treated unfairly: despite repeated requests, BMI refused to turn over any information on nationwide license fees until compelled to do so in discovery. WB 35-36 (citing JA554.2).

surprising, however, that they have not complained, because they have insufficient *incentive* to do so. Our modest point, therefore, is that the lack of complaint by other stations should not be taken to be a positive endorsement of the status quo, as BMI and the district court claim that it should be. In the end, BMI is "speculating" just as much as we are when it says (BB 4) that other stations "asked for" the formula the TMLC is peddling simply because they never complained about it. But it is BMI's speculation, not ours, that is irrational. In a world where the industry as a whole pays 0.33% of its revenues to BMI, why would any station "ask" for a fee considerably higher than that, while countenancing a much lower fee for its direct competitors?

The fact is, the consent decree *does* envision an affordable procedure for challenging an unfair proposal by BMI: individual negotiation of a reasonable fee. But the record is clear that BMI has eviscerated this procedure by forcing stations to choose between acquiescing to the TMLC license or taking on the unreasonable economic burden of challenging BMI in court. Weigel's experience is case in point: In 1997, immediately upon learning of the new formula, Weigel contacted BMI and asked to discuss its fees. JA358-59. BMI refused to meet until 1999, at which time Weigel told BMI that it was not represented by the committee and wanted to negotiate its own rate. BMI ostensibly agreed, but it then once again ignored Weigel's entreaties for nearly five years. By that point, BMI had

negotiated a new license with the TMLC and informed Weigel that it was bound by the consent decree's "non-discrimination" provision to license Weigel on the same terms. When Weigel refused to comply, BMI brought suit. An affirmance in this case will confirm that there is no real opt-out option under the consent decree: Whether they consent or not, every station in the industry will be bound by the decisions of a handful of self appointed, judicially unauthorized TMLC insiders. That can hardly be the way the consent decree was designed to work.

B. <u>A revenue-based fee is more reasonable and results in less price discrimination than an audience-based one.</u>

Significantly, BMI does not really dispute that an audience-based fee structure is a markedly poorer reflection of the value of the license, on an objective level, than a revenue-based structure. Indeed, BMI concedes that a revenue-based system "could also be reasonable," provided it applied universally. BMI's defense of the status quo boils down to three points:

(1) the industry "asked" for the TMLC formula (BB 4), and stations have "repeatedly accepted" it (BB 42);

(2) that formula is easier for the TMLC to administer than a revenue-based one, because it is based on publicly-available audience data, rather than self-reported revenue data (BB 15, 49-50); and

(3) the alternative is chaos, because offering WCIU a revenue-based fee would obligate BMI to "radical[ly] restructure[e]" its licensing policies so that every station in the country could "choose the option that would create *** lower fees" and thus deprive BMI of overall revenue (BB 18-19, 51-52).

It is important to note that none of these arguments is an actual, principled defense of the audience-based fee system itself. BMI makes no real effort to argue that the TMLC system is as reasonable as Weigel's proposal, let alone that it is fairer.[4] And the concerns BMI does raise are artificial or overblown.

First, the perceived unanimity of the industry does not demonstrate very much about the fairness of the system, as we explain fully above (see *supra* at 9-11). It certainly does not demonstrate that an audience-based system is *more* reasonable than a revenue-based one.

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[4] The closest BMI comes to such an argument is a paragraph on page 50 of its brief in which it claims that revenue-based fees are inequitable because some stations occasionally "barter" away commercial time to program suppliers instead of selling that time to advertisers. The "barter" stations thus have artificially low revenues, BMI claims, because they pay for programs with time rather than cash. An audience-based system, BMI argues, does not reward stations for engaging in such transactions, and more accurately measures the relative business success of different stations.

There is no evidence in the record to suggest that any group of stations uses "barter" transactions at greater rates than any other, so BMI's conclusion is suspect. Nor is there the least evidence that barter occurs to such a degree that it introduces more than minimal distortions into a revenue-based system – in contrast to the severe distortions caused by the current audience-based allocation. But even if the barter argument were sound, it is just another version of BMI's larger contention that an audience-based system is simpler for the TMLC to administer. A revenue-based fee system needn't allow stations to choose creative accounting methods that artificially deflate their revenues. BMI is capable of specifying a standard method of calculating revenues, including requiring stations to report the market value of any "barter" transactions.

Second, the fact that the TMLC would have difficulty administering a revenue-based fee system is not an argument for basing license fees on Neilsen data. It is an argument for eliminating the role of this small, voluntary committee in the fee-setting process. We do not dispute that a revenue-based fee system must rely on self-reported data, or that occasional audits may be necessary to ensure reliability. Nor do we dispute that the TMLC is "a very small committee" with "no ability to audit stations" or "to know that stations were reporting *** accurately" (BB 15). But BMI does not explain why it is necessary for the TMLC to take on the role of calculating stations' fees, or why the committee's inability to perform audits should require adoption of a fee system that uses such a rough, inaccurate measure of the value of BMI's license. BMI mentions early in its brief that the TMLC has been negotiating fees with BMI for a "half century" (BB 8), but the committee took on the role of actually calculating individual fees only in 1997. The consent decree does not envision this role for the "industry" group, and BMI's argument merely demonstrates the group's unsuitability for the task.

We argued in our opening brief (at 44) that a revenue-based system, which more accurately measures the value of a music license, would not be difficult for *BMI* to administer. It did so prior to 1997, for all stations, and it does so to this day for more stations than are licensed based solely on audience numbers. Even under the current system, any station electing a per-program license determines its fees

by calculating its network- and non-network-derived revenues, and then *self-reporting* those numbers to BMI. JA276. And as explained in our opening brief (at 44 n.13), low power stations (as opposed to the full-power stations subject to the license in dispute here) also determine their fees through self-reported revenues. In short, only a minority of the television stations in this country (full power stations that choose blanket licenses) are billed solely on audience statistics; most stations have their fees calculated on the supposedly impractical revenue basis. BMI offers no response in its brief to our showing that it is clearly capable of handling a system based on self-reporting.

Finally, BMI's argument about the need to "radically restructure" its fee-setting system and a supposed consequent loss of revenue is a straw man. Charging WCIU a fair fee would not require BMI to offer every station an "option" of revenue- or audience-based fees. For one thing, not every station is the same as WCIU, and nothing prevents BMI from offering different license terms to different stations based upon "applicable business factors." JA388. More importantly, however, nothing obligates BMI to offer an audience-based fee to *any* station. *Buffalo Broadcasting*, as we explained in our opening brief, merely holds that the industry is entitled to a capped blanket fee. How that fee is allocated among individual stations is entirely up to BMI and the stations it licenses. If BMI truly believes that it is required to use the same formula to determine every

station's fees, nothing prevents it from using a revenue-based formula for *every* station. As both parties explain in their respective briefs, BMI has still not reached an agreement with the TMLC for the license period that began in 2005; there is therefore no contractual obligation to continue using the audience-share system for *any* station. And the fact is, a universally applied revenue formula would be far less likely to result in discriminatory pricing than the current system.[5] As we explain in our opening brief (WB 40-42) – and once again, BMI fails to refute the point – revenues are a much better measure than audience share of the actual value of a music license.

In the end, BMI would like this Court to believe that audience share and revenues are equally valid methods of calculating a license fee, and that Weigel's complaint about the current system is no more valid than would be the complaint of a different station that stood to pay higher fees under a revenue-based system than it would under an audience-based one. See BB 17 ("'Plainly, any formula that is selected will be more advantageous to some stations and less advantageous

[5] Another option would be for BMI and the TMLC to adjust the audience-based allocation formula to eliminate inequities (both positive and negative) based on revenues. As we have explained, stations like WCIU pay outsized fees under the TMLC formula because they essentially subsidize the artificially low fees paid by other stations with more favorable revenue-to-audience ratios. Fixing this formula so that stations like WCIU paid fair fees would not require BMI to forego any revenue; the formula could easily be adjusted so that no station would either overpay *or* underpay.

to others than alternative formulas.'") (quoting *Buffalo Broadcasting*, 1993 U.S. Dist. LEXIS 15152, at *5). But this is not simply a case about two equally reasonable formulas, one of which benefits some stations and another of which benefits others. It is true that some stations fare better under the TMLC formula than they would under a revenue-based formula. But that is because the TMLC formula – devised mainly by a group that benefits greatly from it – allows some stations to underpay their fair share of the industry's fees while forcing others to overpay.

For this reason, it is the *current* system, and not Weigel's proposed modification, that violates the non-discrimination provision of BMI's consent decree. BMI uses the same formula nationwide to determine every station's fees, but that does not mean that every similar station is being offered a license on the same "terms" as every other. The fact is, the TMLC formula *itself* is discriminatory. And universal application of an unfair formula does not fulfill BMI's obligation to treat licensees even-handedly. Imagine, for example, a formula that determined music license fees based on a station's call letters. WCIU would pay a low fee because "C" comes early in the alphabet, while WWOR would pay a high fee because "W" comes late. This formula, while obviously irrational, would also be "more advantageous to some stations and less advantageous to others than alternative formulas." It would, as the district court

noted, "operate neutrally" as to all stations. But the mere fact that some stations benefit from an irrational fee structure does not mean that that structure is reasonable, non-discriminatory, or valid in preference to a more rational structure.

II. WCIU IS NOT "SIMILARLY SITUATED" TO EVERY OTHER TELEVISION STATION.

In any event, even if BMI *were* somehow obligated to offer an audience-based fee to the entire industry, there is no reason to believe that a victory for Weigel in this case would force BMI to change the way it bills most other stations. BMI is prevented by its consent decree from "discriminating" among stations, but it is nonetheless permitted to offer different license terms to different stations so long as "applicable business factors" justify the variation. JA388. And the evidence was clear that WCIU has unusual demographics that make it unable to compete with other stations in the one way that is relevant to the TMLC allocation formula: value per viewer.

BMI devotes a lot of space to an attempt to demonstrate that WCIU is "similar" to many other television stations around the country. It is not the only station, BMI notes, that broadcasts syndicated shows like *The People's Court* and *Montel Williams*. It is not the only station that is "family-owned and privately held." It broadcasts professional sports under a contract that is "not unique." It "primarily target[s]" an African-American audience, "as other stations around the country do as well." BB 45-46.

These observations are certainly true, as would be any number of other comparisons between WCIU and other stations. Like other stations, WCIU broadcasts its programming over the air, rather than delivering it through cable systems. It pays its employees in dollars rather than yen. It has four call letters. In short, WCIU is "similarly situated" to other TV stations in many different ways – but just not in the one way relevant to the reasonableness of the TMLC formula, ability to convert viewers into dollars.

The relevant evidence on this point was largely undisputed: WCIU has the lowest power ratio of any major station in Chicago. WB 48 (citing JA44). It therefore pays the highest percentage of its revenues in BMI fees of any such station. WB 42-43 (citing JA44). Nationwide, WCIU is near the very bottom of a long list of otherwise "comparable" stations in terms of power ratio. WB 48-49 (citing Weigel Exh. JS-5). The district court opinion, for example, notes that only eight percent of high-revenue stations in the entire country had power ratios lower than WCIU's. JA1596 (citing Weigel Exh. JS-5). That eight percent consisted entirely of Spanish-language stations and network affiliates that are able to pay BMI per-program license fees. Weigel Exh. JS-5. Thus, WCIU has the absolute lowest power ratio in the country of any high-revenue station subject to BMI's blanket fee structure.

The question in this case is not whether WCIU is "similar" to other stations. It is whether WCIU is similar in a manner relevant to BMI's fee structure. And when BMI chooses to employ a formula that assigns monetary value to a product based on audience size, the only relevant question is how valuable (in dollars) a station's audience really is. On that measure, WCIU is a clear outlier, no matter how BMI chooses to spin the numbers.

And spin it does. BMI tries very hard to argue that WCIU's complaint is ultimately a quibble, because the station has in fact not been terrifically disadvantaged by use of the TMLC allocation formula. These arguments are simply wrong. Most prominently, BMI challenges the notion that the formula has resulted in an eight-fold increase in WCIU's fees. "[F]rom the last monthly rate under WCIU's prior license," BMI claims, the station's fee growth "was actually 145%." This relatively modest increase, the company argues, was "primarily" due to increases in the size of the industry-wide fee and WCIU's own "significant" growth. BB 22-23.

This is seriously misleading. The TMLC formula was not put into effect at the end of the "prior license" period, in March 1999. BMI started using the formula 18 months earlier, in September 1997. WB 21; JA40. That was when Weigel first started complaining. Prior to implementation of the new formula, Weigel's fees were $2,562 per month. Immediately after the formula went into

effect, those fees jumped to $5,882. Eight months later, they rose again, to $9,002. WB 21 (citing JA134, 1347). This is where BMI starts counting – at $9,002 per month. See BB 24. Its justification for slicing the initial, nearly four-fold increase off the top of its chart? Weigel "agreed to the BMI/TMLC license" for the period that ran from 1995 through 1999. BB 22.

It is certainly true that Weigel signed the earlier TMLC license, but that was before the TMLC started using its audience-based allocation formula to set individual fees. As soon as that formula was implemented, Weigel complained. This litigation concerns only the 1999-2004 license period, but that is not because Weigel agreed that any portion of its post-1997 fees was reasonable; it is because Weigel and BMI settled their earlier dispute, which concerned only about $25,000. Our current challenge is to the propriety of the allocation *formula*; it is (or should be) beyond dispute that the change in formula was responsible for the sharp and immediate increase in WCIU's fees, half-way through prior license period, and that WCIU's license fee has risen eight-fold from its level under the prior, revenue-based allocation formula.

In the same vein, BMI also suggests, incorrectly, that Weigel pays roughly the same percentage of its revenues to BMI as its competitors do. For example, BMI cites a section of the district court's opinion that concludes that WCIU's allocated fees in 2003 "were similar to those of the Chicago stations affiliated with

ABC, NBC and CBS," when calculated as a percentage of revenue. BB 32 (citing JA1594). Those network stations were charged, respectively, "0.67[%], 0.84[%], and 0.57%" of their "non-network" revenues in that year; WCIU was charged 0.61% of its revenues in the same year. *Id*.

With all due respect to Judge Stanton, that conclusion (for which the court cited a misleading BMI exhibit) is clearly erroneous. To calculate WCIU's 2003 percentage, the district court divided the station's blanket license fees into its entire annual revenue. To calculate the other stations' percentages, however, the court divided their allocated blanket license fees – which those stations *do not pay*, because they choose per-program licensing – into their *non-network* revenues. BB 32 n.16. In other words, for the network stations, the district court decreased the denominator of the fraction while holding the numerator steady. As a percentage of their *entire* revenues, the three Chicago network affiliates were actually allocated fees very close to the industry average: 0.24%, 0.31%, and 0.37%, respectively. JA43-44. And because those stations were able to choose per-program licensing, they actually *paid* BMI considerably less: 0.15%, 0.20%, and 0.23%. JA44.[6] The fact is, WCIU pays more than double its nearest competitors' fees, when calculated as a percentage of revenues.

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[6] These values for fees as a percentage of total revenue (based on 2004 numbers) were the ones both parties stipulated to in the Agreed Findings of Fact. JA44.

Ultimately, however, this Court needn't resolve these sorts of factual disputes. Because the district court ordered Weigel to continue paying BMI based on the TMLC audience-based formula, it never needed to decide what a lawful fee would be, when calculated as a percentage of a station's annual revenues. Weigel believes the number is something close to 0.33% – the percentage of total industry revenue represented by the latest all-industry license. BMI believes the proper number is something higher – it cites (BB 33) a back-of-the-envelope guess by one of its lay witnesses that the proper number is in the ".6% range." JA151. Because it chose the wrong benchmark, the district court never resolved the issue. If this Court reverses on the threshold legal question and holds that revenues are a more reasonable method of calculating fees than audience share, the district court (or a special master) can take up on remand the multiple questions of calculation that were not addressed in the original opinion.

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.

Dated: New York, New York
June 20, 2008

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14-point type for text and footnotes.

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