

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of August, two thousand nine.

Present:

ROBERT D. SACK,
ROBERT A. KATZMANN,*
Circuit Judges.

BROADCAST MUSIC, INC.,

Petitioner-Appellee,

v.

No. 07-4998-cv

WEIGEL BROADCASTING CO.,

*Respondent-Appellant.***

* The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

** The clerk of the court is directed to amend the official caption to conform with the caption as written.

For Petitioner-Appellee: JAMES C. FITZPATRICK (Norman C. Kleinberg, Michael E. Salzman, and Jessica A. Feldman, *on the brief*), Hughes Hubbard & Reed LLP, New York, NY

Marvin L. Berenson, Joseph J. DiMona, and Kerri Howland-Kruse, Broadcast Music, Inc., New York, NY

For Respondent-Appellant: SCOTT A. CHESIN (Andrew L. Frey, *on the brief*), Mayer Brown LLP, New York, NY

Appeal from the United States District Court for the Southern District of New York (Stanton, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the case is **AFFIRMED**.

Respondent-appellant Weigel Broadcasting Company appeals from an October 9, 2007, order and judgment of the United States District Court for the Southern District of New York (Stanton, *J.*), clarifying and supplementing a May 30, 2007, opinion and order, granting petitioner-appellee Broadcast Music, Inc.’s petition and setting Weigel’s license fee. We assume the parties’ familiarity with the facts and procedural history of the case.

The district court “is responsible for establishing 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.” *United States v. Broad. Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005) (internal quotation marks omitted) (“*Music Choice IP*”). “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.” *United States v. Broad. Music, Inc.*, 316 F.3d 189, 194 (2d Cir. 2003) (“*Music Choice P*”).

In choosing a benchmark and determining how it should be adjusted, [the 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, as well as 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.

Music Choice II, 426 F.3d at 95 (citation and internal quotation marks omitted).

We review the district court’s findings of fact – including, for example “[its] evaluation of the facts surrounding the formation of the benchmark agreements, . . . the credibility of witnesses and other evidence at trial” – for clear error. *Id.* at 96.

On appeal, Weigel argues that the court relied on the wrong benchmark and failed to distinguish WCIU from other local broadcast stations when setting its license fee.

In setting Weigel’s license fee, the district court relied as a benchmark on the industry-wide license fee as allocated to the stations. *Broad. Music, Inc. v. Weigel Broad. Co.*, 488 F. Supp. 2d 411, 416 (S.D.N.Y. 2007). The court reasonably found that each station had agreed to the industry-wide fee allocation process and to their respective portion of the overall fee. *See id.* Nonetheless, transaction costs or self-dealing in the benchmark transaction might make the transaction one that does not reflect an “adequate degree of competition to justify reliance.” *Music Choice II*, 426 F.3d at 95. In this case, however, the limited evidence of self-dealing or transaction costs does not render the district court’s benchmark determination unreasonable.

Moreover, the court properly found that WCIU was not different from other local broadcast stations in a way that required the benchmark to be adjusted. *See Broad. Music, Inc.*, 488 F. Supp. 2d at 416-18.

Accordingly, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE, CLERK

By: _____