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HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870, and H.R. 5949

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MAY 14, 20, 21, 28, JUNE 10, 17, 24, 25, JULY 8, 9, 15, 22,
DECEMBER 2, 8, 9, 1981, AND MARCH 4, 1982

Part 1

Serial No. 44

Printed for the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

87-793 O WASHINGTON : 1982

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THURSDAY, MAY 14, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Railsback, Sawyer, and Butler.

Also present: Bruce A. Lehman, chief counsel; Timothy Boggs, professional staff member; Thomas Mooney, associate counsel; Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

We will commence and we expect three of our colleagues to be here shortly. I am pleased to note that there is a large attendance this morning. Many of you may be here for the first time. Others of you have followed the subject or this particular aspect of it for years past and we greet you again.

It has been nearly 5 years since members of this subcommittee participated in the first recodification brought into being of the copyright laws. It is the first one in more than 50 years.

For the most part our work product seems to have met with success when put into actual practice, and there have been complaints about the new law.

However, the 1976 act failed to deal with several issues, and debate continues with respect to them: namely, performance rights for sound recordings and protection for ornamental design. We resolved the question of copyright in computer software last year by processing into law the recommendations of CONTU—the Commission on New Technological Uses of Copyrighted Works.

Other areas in which the 1976 act has provoked criticism involve: The right of not-for-profit groups such as veterans and fraternal societies to have unrestricted access to copyrighted music, criminal penalties for infringement, the phaseout of the so-called manufacturing clause, off-air taping for educational purposes, and the compulsory license for cable television systems.

With respect to off-air taping by educators, we expect an agreement soon among the parties as to how the 1976 act should be interpreted. This will relieve the subcommittee of legislative pressure on the issue. Several of the remaining issues will be dealt with in the hearings which are beginning today.

Next week we will hear testimony on our colleague's bill, H.R. 1805 which deals with commercial uses of sound recordings—the

performance rights issues. We have held extensive hearings on this issue in past Congresses.

We will also provide a forum during these hearings for those who wish to testify regarding the copyright liability of fraternal and veterans groups as well as those with views on the adequacy of existing criminal penalties. In July we expect a report from the Register of Copyrights on the manufacturing clause.

Today, we will hear from three witnesses who advocate change in the law regarding the compulsory license for cable television systems.

Since passage of the 1976 act the compulsory license has come under increasing criticism, largely as a result of three developments:

One, the enormous growth of cable and entry of giant corporations into the market;

Two, the development of satellite technology and the superstation, and

Three, deregulation of cable by the FCC.

I am aware that critics of the existing system—who will be testifying this morning—advocate abolishing the compulsory copyright license. Similarly, representatives of cable television vigorously oppose any change in the existing law.

The gentleman from Massachusetts, Mr. Frank, and I have both introduced legislation on the subject. He has introduced H.R. 3528, which would abolish the compulsory license for cable systems with more than 2,500 subscribers.

I have introduced for consideration H.R. 3560, which attempts to highlight problem areas without fully favoring one side over the other. My bill conditions the compulsory license upon continuation of distant signal and exclusivity rules, but at the same time, it relieves approximately 80 percent of the Nation's cable systems from any royalty liability for the retransmission of distant broadcast signals. I invite comment and criticism on each of these approaches.

Finally, before proceeding to testimony, I would like to observe that there has been a great deal of discussion about the efficacy of the Copyright Royalty Tribunal. While there is as yet no legislation directed at the Tribunal mechanism, the subcommittee has requested a General Accounting Office study of the Tribunal. That study will be presented to us on June 11 and should provide objective guidance as to how the Tribunal has been working and whether there should be any changes in its structure.

[Copies of H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528 H.R. 3530, H.R. 3560 and H.R. 5870 follow:]

I

97TH CONGRESS
1ST SESSION

H. R. 1805

To amend the copyright law, title 17 of the United States Code, to provide for royalties for the commercial use of sound recordings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 6, 1981

Mr. DANIELSON (for himself, Mr. BEILENSON, Mr. BONIOR of Michigan, Mr. JOHN L. BURTON, Mrs. CHISHOLM, Mr. CLAY, Mrs. COLLINS of Illinois, Mr. CONYERS, Mr. DELLUMS, Mr. DIXON, Mr. FAUNTROY, Mr. FLORIO, Mr. FORD of Tennessee, Mr. GRAY, Mr. GORE, Mr. HAWKINS, Mr. HYDE, Mr. MCDADE, Mr. MINETA, Mr. MITCHELL of Maryland, Mr. MITCHELL of New York, Mr. MYERS, Mr. RICHMOND, Mr. SOLARZ, Mr. WAXMAN, Mr. WEISS, Mr. WON PAT, Mr. YATES, and Mr ZEFERETTI) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law, title 17 of the United States Code, to provide for royalties for the commercial use of sound recordings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Commercial Use of Sound Recordings Amendment".

SEC. 2. Section 101 of title 17 of the United States Code is hereby amended by deleting the definition of "perform" and inserting the following:

"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. In the case of a motion picture or other audiovisual work, to 'perform' the work means to show its images in any sequence or to make the sounds accompanying it audible. In the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists.".

SEC. 3. Section 106 of title 17 of the United States Code is hereby amended by deleting clause (4) and inserting the following:

"(4) in the case of literary, musical, dramatic, pantomimes and chorcographic works, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly; and".

SEC. 4. Section 110 of title 17 of the United States Code is hereby amended as follows:

(a) in clause (2) insert the words ", or of a sound recording," between the words "performance of a non-dramatic literary or musical work" and "or display of a work,";

(b) in clause (3), insert the words "or of a sound recording," between the words "of a religious nature," and the words "or display of a work,";

(c) in clause (4), insert the words "or of a sound recording," between the words "literary or musical work" and "otherwise than in a transmission";

(d) in clause (6), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a governmental body";

(e) in clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment";

(f) in clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "nondramatic literary work," and "by or in the course of a transmission"; and

(g) in clause (9), insert the words "or of a sound recording embodying a performance of a dramatic literary work that has been so published," between the words "date of the performance," and the words "by or in the course of a transmission".

SEC. 5. Section 111 of title 17 of the United States Code is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the

antitrust laws," and "for purposes of this clause" the words "and subject to the provisions of section 114(c),".

SEC. 6. Section 112 of title 17 of the United States Code is hereby amended as follows:

(a) in subsection (a), delete the words "or under the limitations on exclusive rights in sound recordings specified by section 114(a)," and insert in their place "or under a compulsory license obtained in accordance with the provisions of section 114(c)," and

(b) in subsection (b), delete the reference to "section 114(a)" and insert "section 114(a)(5)".

SEC. 7. Section 114 of title 17 of the United States Code is hereby amended in its entirety to read as follows:

"§ 114. Scope of exclusive rights in sound recordings

"(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

"(1) the exclusive right under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of

motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording;

"(2) the exclusive right under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality;

"(3) the exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording;

"(4) the exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; and

"(5) the exclusive rights under clauses (1) through (4) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially

distributed by or through public broadcasting entities to the general public.

"(b) RIGHTS IN SOUND RECORDING DISTINCT FROM RIGHTS IN UNDERLYING WORKS EMBODIED IN RECORDING.—The exclusive rights specified in clauses (1) through (4) of section 106 with respect to a copyrighted literary, musical, or dramatic work, and such rights with respect to a sound recording in which such literary, musical, or dramatic work is embodied, are separate and independent rights under this title.

"(c) COMPULSORY LICENSE FOR PUBLIC PERFORMANCE OF SOUND RECORDINGS.—

"(1) Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

"(2) When phonorecords of a sound recording have been distributed to the public in the United States or elsewhere under the authority of the copyright owner, any other person may, by complying with the

provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

"(3) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the following requirements:

"(A) On or before January 1, 1983, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

"(B) The compulsory licensee shall deposit with the Register of Copyrights, at annual intervals, a statement of account covering the preceding calendar year, and a total royalty fee for all public performances during that calendar year, based on the royalty provisions of clause (7) or (8)

of this subsection. After consultation with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the filing and contents of the statement of account and royalty payment.

"(4) Failure to record the notice, file the statement, or deposit the royalty fee as required by clause (3) of this subsection renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

"(5) Royalties under this subsection shall be payable only for performances of copyrighted sound recordings fixed on or after February 15, 1972.

"(6) The compulsory licensee shall have the option of computing the royalty fees payable under this subsection on either a prorated basis, as provided in clause (7), or on a blanket basis, as provided in clause (8), and the annual statement of account filed by the compulsory licensee shall state the basis used for computing the fee.

"(7) If computed on a prorated basis, the annual royalty fees payable under this subsection shall be calculated in accordance with standard formulas that the

Copyright Royalty Tribunal shall prescribe by regulation, taking into account such factors as the proportion of commercial time, if any, devoted to the use of copyrighted sound recordings by the compulsory licensee during the applicable calendar year, the extent to which the compulsory licensee is also the owner of copyright in the sound recordings performed during said year, and, if considered relevant by the Tribunal, the actual number of performances of copyrighted sound recordings during said year. The Tribunal shall prescribe separate formulas in accordance with the following:

"(A) for radio or television stations licensed by the Federal Communications Commission, the fee shall be a specified fraction of the 1 per centum of the station's net receipts from advertising sponsors during the applicable calendar year;

"(B) for other transmitters of performances of copyrighted sound recordings, including background music services, the fee shall be a specified fraction of 2 per centum of the compulsory licensee's gross receipts from subscribers or others who pay to receive transmissions during the applicable calender year; and

"(C) for other users not otherwise exempted, the fee shall be based on the number of days during the applicable calendar year on which performances of recordings took place, and shall not exceed $5 per day of use.

"(8) If computed on a blanket basis, the annual royalty fees payable under this section shall be calculated in accordance with the following:

"(A) for a radio broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend upon the total amount of the station's net receipts from advertising sponsors during the applicable calendar year:

"(i) receipts of at least $25,000 but less than $100,000: $250;

"(ii) receipts of at least $100,000 but less than $200,000: $750;

"(iii) receipts of $200,000 or more: 1 per centum of the station's net receipts from advertising sponsors during the applicable calendar year;

"(B) for a television broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend on the total

amount of the station's net receipts from advertising sponsors during the applicable calendar year:

"(i) receipts of at least $1,000,000 but less than $4,000,000: $750;

"(ii) receipts of $4,000,000 or more: $1,500;

"(C) for other transmitters of performances of copyrighted sound recordings, including background music services, the blanket royalty shall be 2 per centum of the compulsory licensee's gross receipts from subscribers or others who pay to receive transmissions during the applicable calendar year;

"(D) for commercial establishments such as discotheques, nightclubs, cafes, and bars at which a principal form of entertainment is dancing to the accompaniment of sound recordings, the blanket royalty shall be $100 per calendar year for each location at which copyrighted sound recordings are performed. This royalty fee shall not be applicable to establishments at which the performance of sound recordings is solely by means of coin-operated phonorecord players as defined in section 116(e)(1);

"(E) for other users not otherwise exempted, the blanket royalty per calendar year shall be established by the Copyright Royalty Tribunal within one year of the date this Act takes effect.

"(9) Public performances of copyrighted sound recordings by operators of coin-operated machines, as that term is defined by section 116, and by cable systems, as that term is defined by section 111, are subject to compulsory licensing under those respective sections, and not under this section. However, in distributing royalties to the owners of copyright in sound recordings under sections 116 and 111, the Copyright Royalty Tribunal shall be governed by clause (14) of this subsection. Nothing in this section excuses an operator of a coin-operated machine or a cable system from full liability for copyright infringement under this title for the performance of a copyrighted sound recording in case of failure to comply with the requirements of section 116 or 111, respectively.

"(10) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by

the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal, as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a compilation of all statements of account covering the relevant calendar year provided by subsection (c)(3) of this section.

"(11) During the month of May in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding calendar year shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(3) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may, subject to the provisions of clause (14) of this subsection, agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their

claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(12) After the first day of June of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees for which claims have been filed under clause (11) of this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(14) One-half of the royalties available for distribution by the Copyright Royalty Tribunal shall be paid to the copyright owners, as defined in subsection (e), and the other half shall be paid to the performers, as

also defined in subsection (e). With respect to the various performers who contributed to the sounds fixed in a particular sound recording, the performers' share of royalties payable with respect to that sound recording shall be divided among them on a per capita basis, without regard to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his or her right to the royalties provided in this subsection to the copyright owner or the performer, respectively.

"(d) EXEMPTIONS FROM LIABILITY AND COMPULSORY LICENSING.—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable calendar year, if during such year—

"(1) in the case of a radio broadcast station licensed by the Federal Communications Commission, its net receipts from advertising sponsors were less than $25,000; or

"(2) in the case of a television broadcast station licensed by the Federal Communications Commission, its net receipts from advertising sponsors were less than $1,000,000; or

"(3) in the case of other transmitters of performances of copyrighted sound recordings, including background music services, its gross receipts from subscribers or others who pay to receive transmissions were less than $10,000.

"(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

"(1) 'Commercial time' is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by or includes commercial matter.

"(2) 'Performers' are instrumental musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording, and, in the case of a sound recording embodying a musical work, the arrangers, orchestrators, and copyists who prepared or adapted the musical work for the particular performance of the sounds fixed in the sound recording. For purposes of this section, a person coming within this definition is regarded as a 'performer' with respect

to a particular sound recording whether or not that person's contribution to the sound recording was a 'work made for hire' within the meaning of section 101.

"(3) A 'copyright owner' is the owner of the right to perform a copyrighted sound recording publicly.

"(4) 'Net receipts from advertising sponsors' consist of gross receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies.

"(f) SOUNDS ACCOMPANYING A MOTION PICTURE OR OTHER AUDIOVISUAL WORK.—The sounds accompanying a motion picture or other audiovisual work are considered an integral part of the work that they accompany, and any person who uses the sounds accompanying a motion picture or other audiovisual work in violation of any of the exclusive rights of the owner of copyright in such work under clauses (1) through (4) of section 106 is an infringer of that owner's copyright. However, if such owner authorizes the public distribution of material objects that reproduce such sounds but do not include any accompanying motion picture or other audiovisual work, a compulsory licensee under sections 116 or 111 or under section (c) of this section shall be freed from further liability for the public performance of the sounds by means of such material objects.".

SEC. 8. Section 116 of title 17 of the United States Code is hereby amended as follows:

(a) in the title of the section insert the words "and sound recordings" after the words "nondramatic musical works" and before the colon;

(b) in subsection (a), between the words "nondramatic musical work embodied in a phonorecord," and the words "the exclusive right" insert the words "or of a sound recording of a performance of a nondramatic musical work,";

(c) in the first sentence of subclause (A) of clause (1) of subsection (b), delete the word "$8" and insert in lieu thereof the word "$9". In the second sentence of the same provision, delete the word "$4" and insert in lieu thereof the word "$4.50";

(d) in the third sentence of clause (2) of subsection (c), between the words "provisions of the antitrust laws," and "for purposes of this subsection," insert the words "and subject to the provisions of section 114(c),";

(e)(1) in clause (4) of subsection (c), redesignate subclauses (A), (B), and (C) as (B), (C), and (D), respectively, and insert a new subclause (A) as follows:

"(A) to performers and owners of copyright in sound recordings, or their authorized agents, one-ninth

of the total distributable royalties under this section, to be distributed as provided by section 114(c)(14);" and

(2) in the newly designated subclause (B), between the words "every copyright owner" and the words "not affiliated with" insert the words "of a nondramatic musical work".

SEC. 9. In section 801 of title 17 of the United States Code, amend subsection (b)(1) as follows: In the first sentence, between the words "as provided in sections" and "115 and 116, and" insert "114,"; and in the second sentence, between the words "applicable under sections" and "115 and 116 shall be calculated" insert "114,". Amend subsection (b)(3) by inserting, between the words "Copyrights under sections 111" and "116, and to determine" the following: ", 114,".

SEC. 10. In section 803 of title 17 of the United States Code, insert at the end of that section a new subsection (c) as follows:

"(c) With respect to the distribution of royalties under section 114, the Tribunal shall retain the services of one or more private, nongovernmental entities to perform the functions necessary to monitor the performance of sound recordings, to value said performances, to distribute royalty funds to recipients, and to perform such other functions as the Tribunal shall deem necessary, unless the Tribunal shall deter-

mine that it is inappropriate to do so. The performance of said functions by private entities shall not relieve the Tribunal of the responsibility to insure the fair and equitable distribution of royalty fees in accordance with section 801(b)(3).".

SEC. 11. In subsection (a) of section 804 of title 17 of the United States Code, insert "114," following the words "as provided in sections" and "115 and 116, and with", and at the end of clause (2) of subsection (a) add a new subclause (D), as follows:

"(D) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 114, such petition may be filed five years after the effective date of this Act and in each subsequent fifth calendar year.".

In subsection (d) of section 804, insert ", 114," between the words "circumstances under sections 111" and "or 116, the Chairman".

SEC. 12. Amend section 809 of title 17 of the United States Code by inserting ", 114," between the words "royalty fees under sections 111" and "or 116, the Tribunal".

SEC. 13. In section 804 of title 17 of the United States Code, insert at the end of that section a new subsection (f) as follows:

"(f) With respect to proceedings under section 801(b)(1), concerning the determination of reasonable terms and rates of

royalty payments as provided in section 114(c)(8)(F), the Tribunal shall proceed when and as provided by that subsection.".

SEC. 14. (a) Except as provided in subsection (b) of this section, this Act shall take effect on January 1, 1983.

(b) The provisions of section 114(c)(3)(A) of title 17 of the United States Code, as amended by section 7 of this Act, become effective upon the enactment of this Act.

I

97TH CONGRESS
1ST SESSION

H. R. 2007

To amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 23, 1981

Mr. YOUNG of Florida introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 110 of title 17 of the United States Code is amended—

(1) by striking out the period at the end of paragraph (8) and inserting a semicolon in lieu thereof;

(2) by striking out the period at the end of paragraph (9) and inserting ", and" in lieu thereof; and

(3) by adding at the end the following new paragraph:

"(10) performance of a musical work in the course of the activities of a nonprofit veterans' organization or a nonprofit fraternal organization.".

I

97TH CONGRESS
1ST SESSION

H. R. 2108

To amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements on the exclusive rights of copyright owners.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 1981

Mr. DONNELLY introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements on the exclusive rights of copyright owners.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 110 of title 17, United States Code, is amended—

(1) by striking out "a nonprofit educational institution" in paragraph (1) and inserting in lieu thereof "an educational institution"; and

(2) by inserting after paragraph (9) the following new paragraph:

"(10) performance of a nondramatic literary or musical work by a nonprofit veterans' or fraternal organization, without any purpose of direct or indirect commercial advantage, if the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for education, religious, or charitable purposes and not for private financial gain.".

SEC. 2. This Act does not affect the copyright protection for any work which is in the public domain on, or has been copyrighted on or before, the date of the enactment of this Act.

I

97TH CONGRESS
1ST SESSION

H. R. 3528

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. FRANK introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

SECTION 1. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by inserting immediately before the period the following: "in effect on July 1, 1980".

(b) Section 111(c)(2)(A) of chapter 1 of title 17 of the United States Code is amended by striking out "; or" and inserting in lieu thereof "in effect on July 1, 1980; or".

(c) Section 801(b)(2) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraphs (B) and (C) and redesignating subparagraph (D) as subparagraph (B).

(d) Section 804(a) of chapter 1 of title 17 of the United States Code is amended by striking out "(D)" in the first sentence and inserting in lieu thereof "(B)".

(e) Section 804(a)(2) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraph (A) and redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B) respectively.

(f) Section 804 of chapter 1 of title 17 of the United States Code is amended by striking out paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d) respectively.

SEC. 2. Effective January 1, 1983, section 111 of chapter 1 of title 17 of the United States Code is deleted in its entirety and the following substituted in its place:

"§111. Limitations of exclusive rights: secondary transmissions

"(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—Notwithstanding the provisions of section 106, the sec-

ondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

"(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission, and—

"(A) the secondary transmission is made within the local service area of such station; or

"(B) the signals are received by such establishment by means of the direct reception of a free space radio wave emitted by such station; or

"(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

"(3) the secondary transmission is made by any carrier, other than a satellite resale carrier, who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission con-

sist solely of providing wires, cable, or other communications channels for the use of others: *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

"(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

"(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided, however,* That such sec-

ondary transmission is not actionable as an act of infringement if—

"(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

"(2) the carriage of signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

"(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

"(c) CERTAIN SECONDARY TRANSMISSIONS BY CABLE SYSTEMS EXEMPTED.—

"(1) Notwithstanding the provisions of section 106 and subject to the provisions of clause (2) of this subsection, the secondary transmission to the public of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is not an infringement of copyright if carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authoriza-

tions of the Federal Communications Commission; and—

"(A) the cable system is located in whole or in part within the local service area of the primary transmitter; or

"(B) the secondary transmission is of a network television program that is not available from any television broadcast station located in whole or in part within the local service area served by the cable system; or

"(C) the cable system serves fewer than twenty-five hundred subscribers.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work otherwise exempt under clause (1) of this subsection is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter

during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

"(d) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

"A 'primary transmission' is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

"A 'secondary transmission' is the further transmitting of a primary transmission simultaneously with the primary transmission.

"A 'cable system' is a facility, located in any State, territory, trust territory, or possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the exemption under subsection (c)(1)(C), two or more cable systems under common ownership or control or operating from one headend shall be considered as one system.

"The 'local service area of a primary transmitter', in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations.

"The 'local service area of a primary transmitter', in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

"A 'network television program' is a program supplied by one of the television networks in the United States providing nationwide transmissions to television broadcast stations that are owned or operated by, or affiliated with, the television network".

SEC. 3. (a) Effective January 1, 1983, section 501(c) of chapter 1 of title 17 of the United States Code is amended by striking out "subsection (c) of section 111" and inserting in lieu thereof "section 106".

(b) Effective January 1, 1983, section 501(d) of chapter 1 of title 17 of the United States Code is amended by striking out "(3)" and inserting in lieu thereof "(2)".

(c) Effective January 1, 1983, section 510(a) of chapter 1 of title 17 of the United States Code is amended by striking out "(3)" and inserting in lieu thereof "(2)".

(d) Effective January 1, 1983, section 510(a) of chapter 1 of title 17 of the United States Code is amended by striking out ", and the remedy provided by subsection (b) of this section" both times it appears therein.

(e) Effective January 1, 1983, section 510 of chapter 1 of title 17 of the United States Code is amended by striking out paragraph (b).

(f) Effective January 1, 1983, section 804(a) of chapter 1 of title 17 of the United States Code is amended by striking out ", and with respect to proceedings under section 801(b)(2) (A) and (B)".

(g) Effective January 1, 1983, section 801(b) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraph (2) and redesignating subparagraph (3) as subparagraph (2).

(h) Effective January 1, 1985, section 801(b)(2) of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 and" and inserting in lieu thereof "section".

(i) Effective January 1, 1985, section 804(d) of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 or" and inserting in lieu thereof "section".

(j) Effective January 1, 1985, section 809 of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 or" and inserting in lieu thereof "section".

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Union Calendar No. 297

97TH CONGRESS
2D SESSION

H. R. 3530

[Report No. 97-495]

To amend the copyright laws to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. FRANK (for himself, Mr. MOAKLEY, Mr. RAILSBACK, Mr. PEPPER, Mr. BUTLER, Mr. PHILLIP BURTON, Mr. FAZIO, Mr. RICHMOND, Mr. FRENZEL, Mr. VENTO, and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 29, 1982

Additional sponsors: Mr. WAXMAN, Mr. CROCKETT, Mr. FOGLIETTA, and Mr. KILDEE

APRIL 29, 1982

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend the copyright laws to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Piracy and Counterfeiting Amendments Act of ~~1981~~ *1982*".

SEC. 2. Section 506(a) of title 17, United States Code, is amended to read as follows:

"(a) Criminal infringement

"Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18.".

SEC. 3. Section 2318 of title 18, United States Code, is amended—

(1) by respectively redesignating subsections (b) and (c) as subsections (d) and (e); and

(2) by striking out the section heading and subsection (a) and inserting in lieu thereof the following:

"§ 2318. Trafficking in counterfeit labels for phonorecords, and copies of motion pictures ~~and~~ *or other* audiovisual works

"(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or to a copy of a motion ~~picture,~~ *picture* or ~~an~~ *other* audiovisual work, shall be fined not more than $250,000 or imprisoned for not more than five years, or both.

"(b) As used in this section—

"(1) the term 'counterfeit label' means an identifying label or container that appears to be genuine, but is not;

~~"(2) the term 'traffic' means to transfer or otherwise dispose of, to another, as consideration for anything of value or obtain control of with intent to so transfer or dispose; and~~

"(2) the term 'traffic' means to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of; and

"(3) the terms 'copy', 'phonorecord', 'motion picture', and 'audiovisual work' have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17.

"(c) The circumstances referred to in subsection (a) of this section are—

"(1) the offense is committed within the special maritime and territorial jurisdiction of the United States or within the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1958);

"(2) the mail or a facility of interstate or foreign commerce is used *or intended to be used* in the commission of the offense; or

"(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copyrighted ~~audiovisual work or motion picture,~~ *motion picture or other audiovisual work*, or a phonorecord of a copyrighted sound recording.".

SEC. 4. Title 18, United States Code, is amended by inserting after section 2318 the following new section:

"§ 2319. Criminal infringement of a copyright

"(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section *and such penalties shall be in addition to any other provisions of title 17 or any other law.*

"(b) Any person who commits an offense under subsection (a) of this section—

"(1) shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if the offense—

"(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings;

"(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least sixty-five copies infringing the

copyright in one or more motion pictures or *other* audiovisual works; or

~~"(C) involves a sound recording, motion picture, or audiovisual work, and is a second or subsequent offense under this section;~~

"(C) is a second or subsequent offense under either of subsections (b)(1) or (b)(2) of this section, where a prior offense involved a sound recording, or a motion picture or other audiovisual work;

"(2) shall be fined not more than $250,000 or imprisoned for not more than two years, or both, if the offense—

"(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; or

"(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or *other* audiovisual works; and

"(3) shall be fined not more than $25,000 or imprisoned for not more than one year, or both, in any other case.

~~"(c) As used in this section the terms 'sound recording', 'motion picture', 'audiovisual work', 'phonorecord', and 'copies' have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17.".~~

"(c) As used in this section—

"(1) The terms 'sound recording', 'motion picture', 'audiovisual work', 'phonorecord', and 'copies' have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; and

"(2) The terms 'reproduction' and 'distribution' refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 118 of title 17.".

SEC. 5. The table of sections for chapter 113 of title 18 of the United States Code is amended by striking out the item relating to section 2318 and inserting in lieu thereof the following:

"2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures ~~and~~ *or other* audiovisual works.
"2319. Criminal infringement of a copyright.".

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97TH CONGRESS
1ST SESSION

H. R. 3560

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

SECTION 1. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That the compulsory license for television broadcast signals

provided for herein shall be limited, except as provided in section 801(b)(3), to the secondary transmissions of primary transmissions authorized pursuant to the rules on carriage of television broadcast signals of the Federal Communications Commission in effect on July 1, 1980. Transmissions unauthorized pursuant to such rules shall be actionable as an act of infringement under section 501 and subject to the remedies provided by sections 502 through 506".

(b) Section 111(c)(2)(A) of chapter 1 of title 17 of the United States Code is amended by inserting "or the Copyright Royalty Tribunal pursuant to section 801(b)(3)" after "Commission".

(c) Section 111(d)(2) of chapter 1 of title 17 of the United States Code is amended by striking out the last sentence of subparagraph (A) and by striking out subparagraphs (B), (C), and (D) and inserting in lieu thereof the following:

"(B) in the case of cable systems with 5,000 subscribers or more, a just and reasonable royalty fee covered by the statement, as determined by the Copyright Royalty Tribunal.".

APPLICATION OF THE COMPULSORY LICENSE TO SPORTS PROGRAMING

SEC. 2. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by striking out "Subject to the provisions of clauses (2), (3), and (4) of this subsection"

and inserting in lieu thereof the following: "Subject to the provisions of clauses (2), (3), (4), and (5) of this subsection.".

(b) Section 111(c) of chapter 1 of title 17 of the United States Code is amended by adding the following new clause:

"(5) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if—

"(A) the primary transmission consists of the broadcast of a game, or any part thereof, involving members of a professional sports league; and

"(B) the secondary transmission is made into an area which is (i) beyond the local service area of the primary transmitter, and (ii) within fifty miles of the place of a game of a member of that professional sports league.".

RATE DETERMINATION OF COPYRIGHT ROYALTY TRIBUNAL

SEC. 3. Section 801(b)(2) of chapter 8 of title 17 of the United States Code is amended to read as follows:

"(2) to make determinations concerning the establishment and adjustment of just and reasonable rates referred to in section 111".

APPLICATION TO THE COMPULSORY LICENSE TO SYNDICATED PROGRAMING

SEC. 4. Section 801(b) is amended by striking out "; and" at the end of paragraph (2) and inserting in lieu thereof a period, by redesignating paragraph (3) as paragraph (4), and by inserting after paragraph (2) the following new paragraph:

"(3) to establish rules under which syndicated copyrighted programing carried on those secondary transmissions for which a compulsory license is authorized in section 111(c).".

DISTRIBUTION OF ROYALTY FEES FOR RADIO PROGRAMING

SEC. 5. Section 801(b)(4) (as redesignated) is amended by inserting before the period at the end thereof the following: ": *Provided*, That in accordance with section 111(d)(4)(C), at least percent of such fees are distributed to copyright owners whose work consists exclusively of aural

signals, the distribution to those copyright owners to be based on the production of original programing".

PROCEEDINGS BEFORE THE TRIBUNAL

SEC. 6. (a) Section 804(a) of chapter 8 of title 17 of the United States Code is amended—

(1) by striking out "(A) and (D)" both times it appears therein.

(2) by striking out "1985" and inserting in lieu thereof "1982".

(3) by striking out "fifth" and inserting in lieu thereof "third".

(b) Section 804(b) of chapter 8 of title 17 of the United States Code is repealed and subsections (c), (d), and (e) of such section are redesignated as subsections (b), (c), and (d), respectively.

(c) Section 804 of chapter 8 of title 17 of the United States Code is amended by inserting at the end thereof the following new subsections:

"(e)(1) With respect to all proceedings under this chapter, the Tribunal shall be empowered to issue subpenas to compel the production of testimony of witnesses together with such documentary materials as are necessary to make determinations under this title.

"(2) If a person to whom a subpena is issued under this subsection refuses to comply with such subpena, the United

States District Court for the District of Columbia or for the judicial district within which such person is found or resides or transacts business may, upon application of the Chairman of the Tribunal, order such person to comply with the subpena. Failure to obey such order may be punished by such court as contempt thereof. Subpenas of the Tribunal shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure.

"(f) With respect to the authority provided under section 801(b)(3), the Tribunal shall initiate proceedings to establish or modify rules within thirty days of a petition by an owner or user of a copyrighted work subject to compulsory licensing under section 111(c).".

JUDICIAL STAY

SEC. 7. Section 809 of chapter 8 of title 17 of the United States Code is amended by striking out the first sentence and inserting in lieu thereof the following: "Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication.".

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 8. (a) Royalty rates established by the Copyright Royalty Tribunal pursuant to section 111(d)(2) and section 804 of title 17 of the United States Code and as modified by order of the Copyright Royalty Tribunal on January 5, 1981,

shall remain in effect pending a review by the Tribunal pursuant to the provisions of sections 2 and 4 of this Act and the implementation of a final order under section 809.

(b) Section 118 of title 17 of the United States Code is amended by striking out "in the Federal Register" wherever they appear therein.

(c) Sections 804(c) (as redesignated) and 810 of chapter 8 of title 17 of the United States Code are amended by striking out "in the Federal Register" wherever they appear therein.

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97TH CONGRESS
2D SESSION

H. R. 5870

To amend the manufacturing clause of the copyright law.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1982

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the manufacturing clause of the copyright law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 601(a) of chapter 6 of title 17 of the United States Code is amended by striking out "1982" and inserting in lieu thereof "1985".

Mr. KASTENMEIER. I am now pleased to welcome our opening panel of witnesses: Jack Valenti, president, Motion Picture Association of America; Vincent Wasilewski, president, National Association of Broadcasters; and Bowie Kuhn, Commissioner of Baseball. Each of whom is a national figure in his own right.

They have been witnesses before many committees of the Congress, indeed, of this subcommittee on a number of occasions. They are leaders of their industries, of sports, in the case of Mr. Kuhn. They are knowledgeable and we of course are very pleased to greet them.

First, I would like to greet Mr. Valenti, who represents they motion picture industry, who always expresses the views of his industry as eloquently as any person could imagine.

After Mr. Valenti, who I understand will open testimony, we will greet our other panelists.

Mr. Valenti.

TESTIMONY OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, ACCOMPANIED BY VINCENT WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS AND BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. VALENTI. I thank this committee very much and you particularly, Mr. Chairman, for giving us an opportunity to open a window on the Copyright Act of 1976. There are a number of us who believe with some vigor that what the Congress has wrought is not effective and is not sustainable in the years ahead due to the rather quick changing environment of the television marketplace. So I am grateful to you and I come to you really for two specific, and I hope simply stated, reasons.

The first is to ask this committee to respect the rights of copyright owners, of property owners, to respect the right of property owners. I think all of us on this panel believe that what people own should not be taken from them without their permission, without negotiating for the price to be paid, and without any knowledge by the owners to how, when and where their property is being used.

The question I might pose to this panel is what owners of other business enterprise in the Nation must sit idly by while property that belongs to them is taken without their permission by others who then sell it to the public for a profit.

I think it is fair to say that what we are asking this committee to do is to respect the right of a property owner which unhappily the act of 1976 does not do.

The second reason I am here is to ask this committee to establish competition in the television marketplace. It is not there now. What happens is that basic cable television has been given by the Congress a special grant of privilege which allows it to rummage in the market as it sees fit, taking programs it wants and then sell them for profit, paying only a pittance of the marketplace worth of that product.

At the same time, all of cable's competitors—independent television stations, network stations, pay cable, pay television, videocassettes, videodiscs, and soon direct broadcast satellite operations—must compete in the marketplace for their programs, negotiate with owners and pay market value for what they license.

Cable alone is exempt from competition: And to make matters worse, basic cable is a geographic monopoly, with no other cable systems operating in its area. To grant special privileges to a monopoly, no matter how benign that monopoly may appear, only multiplies the imbalance and anticompetitive nature of the cable marketplace.

To correct what is so plainly and clearly wrong, the MPAA proposes two reasonable revisions:

One, abolish the compulsory license for distant TV station programs imported by local cable systems.

Two, to protect localism and local programing for the community, the compulsory license should be retained only for local station programs required to be carried by cable systems under FCC rules.

That is all that needs to be done to recognize property rights, and to promote fair competition in the cable marketplace.

Two objective experts have examined this issue and have come to emphatic conclusions. Now remember, they are not on the payroll of anybody. They don't have clients in the business. Indeed, they are Government officials whose sworn duty it is to protect the public: Former Chairman of the Copyright Royalty Tribunal, Clarence James, has testified that the CRT is an unworkable mechanism and suggests it ought to be dismantled. David Ladd, the Register of Copyrights, has testified that the compulsory license is a blight on the competitive marketplace and should be abolished.

Cable interests will tell you, in the most plaintive tones, that: One, cable is really a mom and pop operation, with family owned systems the core of the cable community; two, that if you comply with our proposal, basic cable rates will have to be raised; and three, basic cable will not get programs because program suppliers will freeze them out.

Let me take each of their arguments and place before you what is both important and true:

One, is cable a mom and pop familiy operation? This may have been true some 5, 6, 7 years ago. It may even have had an element of truth in it when the Copyright Act of 1976 was passed. But not today. Consider the facts, all of which are verifiable by cable interests themselves:

Cable today is a big and profitable business. A mere 10 large companies control some 50 percent of all cable subscribers. Just 25 companies control over 60 percent of all cable subscribers. Only 50 companies control some 75 percent of all subscribers. This concentration of power and control by a few corporations grows stronger each week.

Cable systems have an average return on equity of almost 20 percent. This compares to an average of 14.4 percent return on equity for the Fortune 500 companies. I want to show you this in chart form because I think it is important; 12½ percent of all cable systems in America today have a return on equity of 40 percent or more. Cable Television Systems of Boston, in their proposal to the city of Boston, has committed themselves in an official document that it will achieve 57.5 percent return on equity in their third year of their operation in Boston.

Mr. SAWYER. If I may interrupt, without breaking your sequence, are those after taxes or pretax?

Mr. VALENTI. Pretaxes, I believe. Pretaxes on both sides, 20.8 percent of all cable systems return equity of 30 to 39 percent; 21.8 have return on equity of 20 to 29 percent. So 55 percent of all the cable systems in America have an average return of 20 percent or more. In the Fortune 500, only 15 percent of them have an average return on equity of 13.2 percent.

Some 55 percent of all cable systems in the United States reported net income—pretax—of 20 percent or more of owners' equity while only 15 percent of the 500 largest U.S. industrial corporations were able to match that figure.

Cable is an enormous money machine, called by Wall Street the only depression proof enterprise in the Nation. Today, cable revenues are $2.5 billion annually, and expected to rise to $8.5 billion in just 4 more years.

Yet, in a piece of sardonic irony, according to the FCC data for 1979, of all the expense categories for cable, if you took all the expense categories and put them in this little pie, copyright fees represent barely 1 to 2 percent of all the expenses of a cable system. The irony is that copyright costs are the lowest expense category sustained by a cable system.

The one identical item they must all have to stay in business is programing. It is the cheapest item on their expense ledgers. I find that rather amusing. It only hurts when I laugh.

Pretax income for cable in 1979 was up 45.4 percent over 1978. Total assets of cable were $3.2 billion in 1979, an increase of 12 percent over 1978.

Yet, according to FCC data for 1979, of all the categories of cable systems operating expenses, copyright fee payments represent only 1.2 percent of these expenses, the lowest of all expense categories in the cable operation. In other words, the most important single factor in a successful cable operation is programing, and that programing is the cheapest item in their expense ledgers. [See appendix III-a.]

Is cable today a mom and pop operation?

Consider these facts:

Daniels & Associates, the largest cable brokerage firm in the United States, values cable systems today at $650 or more per subscriber.

Mr. Chairman, let's talk about small systems, the so-called mom and pops. If you owned a 2,000-cable system, you could probably sell it on the open market today for $1.3 million. If you owned a 3,000-subscriber system you could sell it for over $2 million. If you owned a 5,000-subscriber system it would bring $3½ million.

Mr. Chairman, people who own these small systems are millionaires. Some of the companies which dominate the cable landscape today are Time, Inc., Westinghouse, the Los Angeles Times, General Electric, American Express, the New York Times, Cox Cable—which also owns huge chunks of newspapers and television—Newhouse Communications, also a newspaper dukedom, Warner Communications, and other giants are getting ready to get involved, like Knight Ridder newspapers, and Dow Jones, Inc., owners of the Wall Street Journal who want to buy U.S.-Columbia Cable. All these corporations, rich in resources and assets, are eager to buy small systems and to obtain franchises in the big cities.

My question to you: Does this sound like "small business?" Do these appear to be enterprises which need help from Congress? Is this the kind of corporate profit making center that deserves a subsidy, and especially a subsidy that comes out of the hide of those who own television programs?

I ask you, is it right, is it fair that program owners should have their property taken from them by some of the biggest corporations in the country? Is it fair that we should be subsidizing these hugh business operations?

Now, to the second argument of cable, which is if you pass this proposal, they will have to raise their basic cable rates. Mr. Chairman, Mr. Kuhn, Mr. Wasilewski, and every cable operator in America knows as a fact of life that all the cable proposals being made in the big cities, those big corporations, are pledging to bring in basic service at way less than $8 to $9 a month on the average and the proposal to Dallas by AMEX there says it is going to bring in basic service for $2.75 a month.

Cable operators, everyone of them—and the trade press is full of this—know that the profit action is not in basic cable. The profit action is in pay. Pay services. They want basic subscribers so they can load them up on pay services, which some operators predict will soon bring in $50 to $100 per month from each paying subscriber. No wonder the New York Times paid $120 million, $2,000 per subscriber to Irving Kahn for his 60,000-subscriber systems in New Jersey.

No wonder Westinghouse paid three-quarters of a billion dollars for Teleprompter.

Cable is also expanding advertiser supported programing, the hottest phenomenon in the cable business today. All of which, Mr. Chairman, is bargained for in the open market now.

Paul Kagan & Associates, the most respected research firm in the business, declares that cable revenues from advertising will amount in 1981 to $100.7 million, and in 1990 will rise to $2.2 billion.

Add to that revenues from pay cable, from ancillary pay services such as burglar alarms, fire alarms, two-way systems, and all their other revenue producing extras and you quickly perceive that the cable industry has four sources of huge revenues: One is basic cable subscribers; two is pay cable subscribers; three is advertising; and four is revenues from ancillary services.

Is there any doubt in any objective mind that a small increase in programing costs can be easily borne by any cable system without 1 cent increase in basic cable rates?

Let me give an example, Mr. Chairman. Today cable is paying about 1 percent of its subscriber basic revenues for programing. Let's suppose you took the compulsory license off and suppose what cable would then be paying triples to approximately 3 percent of their subscriber revenues.

You know what that would mean? It would mean that for each subscriber the cable system would incur an extra added cost of 16 cents per subscriber. From any pay cable subscriber the system now gets $10 a month for pay cable; the cable operator keeps 60 cents of every dollar, $6 out of the $10 and all he is adding is 16 cents to his basic programing cost. It does not make any sense.

The final argument of cable people—and then I am going to be through—cable systems won't get programs, either they will be frozen out or the administrative machinery will be too complicated. This is raw nonsense. I am going to tell you why:

First, the program suppliers are in the business to license programs, unlike broadcast stations which are in the business to broadcast programs. We have some 13,000 English language movies and 4,000 series ready to be licensed. New programs are being created every month. Cable systems can enter the bidding for popular programs against the local TV station, gaining exclusive rights to those programs.

Moreover, middlemen, like Ed Taylor's Satellite Program Network, will enter the business and license programs by the long ton to cable systems. After all, subscribers are not buying distant TV signals. They are buying programs. People in Virginia are not interested in news programs from Chicago or New York. In Madison, Wis., they don't care about watching Ed Koch or the mayor of Houston talking about sewer taxes and whether Westway will be built in the West Side of Manhattan. They are interested in programing.

Second, advertiser-supported programs will flood the cable market. Today there are some 35 cable networks doing just that, bringing in programs of all kinds, entertainment, sports, and religious programs. ABC, CBS, NBC, Rockefeller Center—the list grows daily—are all entering the cable program market.

Third, program suppliers today negotiate directly with some 600 television stations which program their stations from 16 hours to 24 hours a day. Bargaining with some 50 cable companies which reach some 75 percent of all cable subscribers and licensing to smaller systems via middlemen will be easier than dealing with 600 TV stations.

I dare say if programers negotiate with 150 companies—no more—they will reach 100 percent of all the cable systems in America, particularly if little tiny systems were exempted. Soon the FCC is going to order in or approve low-power and drop-in stations and you may have 2,000 television stations operating in the next several years and we will be negotiating directly with each one of them.

In comparison it will be a simple matter to negotiate with the country's cable systems and the recent trend in organizing statewide or regionwide cable networks will make it even easier. We call it interconnects in the business. This means groups of systems joining together sharing production facilities, acquisition of origination programing and sales forces, pooling all of this.

Cablevision magazine reports that by the end of the first quarter of 1981, approximately 80 systems representing 1.5 million subscribers will be linked in a dozen regional systems. This increases each week. For program suppliers to negotiate program license with such interconnects is practical, easy, and feasible.

Now, I want to sum up because I have used up my time and more than my time, and I thank you for it. I just want to sum up by asking a few questions:

Why would Congress want to persist in shielding cable from competition—basic cable, that is?

Why would the Congress feel it is in the public interest to protect Westinghouse and American Express and General Electric from the rigors of the competitive arena?

Does Congress believe cable, which is an explosive rapidly growing business should be subsidized? And if so, should not the Congress subsidize cable if it is in the public interest, rather than taking it out of the hides of private program owners?

Why would Congress persist in allowing profitmaking organizations to take things that don't belong to them and use it as they see fit without permission of the owner?

And finally, the final question that this Congress has to decide is does the Congress or does it not recognize and respect the rights of a proper owner?

Thank you very much.

[The complete statement of Mr. Valenti follows:]

A PLEA TO THE CONGRESS FOR EQUITY:

THE CASE FOR FAIR AND OPEN COMPETITION IN THE CABLE TELEVISION MARKETPLACE, INSTEAD OF THE ANTI-COMPETITIVE ARENA THAT EXISTS TODAY.

PRESENTATION OF JACK VALENTI, PRESIDENT
THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

FOR HEARINGS BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
ON MAY 14, 1981
IN THE RAYBURN BUILDING
OF THE U.S. HOUSE OF REPRESENTATIVES

CONTENTS OF THIS PLEA FOR EQUITY

EXHIBITS

(The arithmetic and numbers of the MPAA case)

Mr. Chairman, Members of the Committee, my name is Jack Valenti. I am president of the Motion Picture Association of America, Inc., whose members are the producers and distributors of theatrical and television programs in the United States. I also am the president of the Association of Motion Picture and Television Producers, Inc., in Hollywood, whose 80 members include the smaller producers and syndicators of television programming and theatrical films. Attached to my statement is a list of both MPAA and AMPTP Members.

THE MPAA POSITION

1. Congress should amend the Copyright Act of 1976 to require basic cable (as distinguished from "pay cable") to respect the property rights of program owners, and should abolish the anti-competitive statutory rate schedule which now governs the conventional cable program arena.

2. There should be no compulsory license for distant TV station programs imported by cable systems. This programming should be freely and openly bargained for between cable licensee and program licensor.

3. The compulsory license should be retained only for "local" station programs that are required to be carried by cable systems under FCC rules.

Simply put, property rights must be observed. Congress should return to the copyright owner his right of control over how his product is distributed.

If these revisions are made in the Copyright Act, then the principle of open and fair competition between cable systems, networks, broadcast stations, pay cable, videocassettes, videodiscs, direct broadcast satellites and all other new magic technology sure to make their appearance, will be observed to the benefit of the public.

Of the competitors listed above, only the cable system is a geographic monopoly. Only the cable system has the power of a monopoly. To grant special privileges to a monopoly, no matter how benign that monopoly may appear right now, only compounds the imbalance and anti-competitive nature of the cable marketplace. Monopoly breeds power, power corrupts, absolute power corrupts absolutely!

WHY THE COPYRIGHT ACT OF 1976 MUST BE REVISED

This Committee, and its Chairman, Mr. Kastenmeier, are to be commended for holding hearings to revisit the Copyright Act of 1976. We salute the Committee and its Chairman for their perception of how radically the cable environment has changed and how necessary it is to make congressional revisions to establish competition and thereby to keep pace with this still-whirling, still-changing marketplace.

These changes are necessary because:

1. The Federal Communications Commission has abolished its syndicated exclusivity and the distant signal importation regulations, rules that Congress had anticipated would keep the television marketplace in some kind of delicate balance when the Copyright Act of 1976 was written.

2. Vast new changes have taken place in communications technology and marketing techniques which have affected the distribution of television programs.

3. Cable's "compulsory license" and the statutory rate system to distribute basic cable copyright royalties are not working because the law prevents free negotiation in the marketplace as to the use and value of television programs.

4. There has been an enormous growth of cable. Giant multiple system owners now control major segments of the cable marketplace; 25 of the largest system owners control 60% of all subscribers. Small systems, individually owned, are vanishing like the mom-and-pop corner grocery.

These facts, well known to all informed persons, require the following changes in the law:

1. Congress should abolish the "compulsory license" for all imported distant TV station signals which basic cable (as distinguished from "pay cable") transmits to its subscribers. It is this compulsory license for distant television signals that gives basic cable an unfair advantage over its competitors.

2. Cable should continue to be granted a compulsory license to retransmit local programs required to be carried under FCC regulations. Cable should not be required to pay any copyright fee to copyright owners for using such programs. This policy is in accord with the concept of localism and better serves the public interest by protecting and guaranteeing the continued availability of locally-oriented programs. Thus cable viewers particularly would be assured of receiving local public affairs programs, local news and weather reports, and television coverage of events of local community interest.

For more than half a century since the enactment of the first Radio Act, it has been public policy in this country to foster local broadcasting service. To carry out this Congressionally-mandated policy, the FCC has encouraged the activation of additional television outlets: UHF stations, low-power "translators," and VHF "drop-ins." We believe that localism in television broadcasting best serves the public interest. Today there are 14,000 communities in

the United States that are not served by cable television. But even if cable service were available to all persons in this country, it is important to remember that distant television stations serve primarily the needs and requirements of their own local service areas, and not those of the distant communities into which their programs are imported by microwave and satellites for use by cable systems.

COPYRIGHT ROYALTY TRIBUNAL - AN INADEQUATE SOLUTION

It is simply not possible for any government agency, no matter how intelligently composed, to determine the marketplace value of television programs (television series and motion pictures). Only the marketplace can do that.

Cable interests have nourished the false belief that the Copyright Royalty Tribunal (CRT), which Congress established in 1976 to receive, distribute, and review basic cable copyright rates, has the authority and ability to set appropriate cable royalty fees. Mr. Chairman, your bill correctly recognizes the spurious nature of cable's claim that all is well in the operation of the Copyright Royalty Tribunal. You have heard testimony from CRT Chairman James on March 4, 1981 that the CRT is not functioning as it was intended and ought to be abolished.

The truth is that the Copyright Act does not grant the Tribunal sufficient flexibility to adjust royalty fees paid by cable systems to program owners nor can the Tribunal remedy the basic inequities that exist under that statute. The Copyright Act does not permit the CRT to change the rate schedule for signals that cable systems are presently permitted to carry

other than to maintain a constant dollar level of royalties.

But, most importantly, and this is absolutely crucial to the understanding of this complex issue, the CRT cannot set marketplace value. Therefore it is plain that even if the CRT were granted more power to set rates, how can five people, however intelligent they may be, but without any real knowledge of the marketplace, truly calculate what a program is worth? That is a matter between buyer and seller, and it varies from day to day, from market to market.

BASIC CABLE USES PROGRAMS WITHOUT PERMISSION OF THE COPYRIGHT OWNER PAYING GOVERNMENT-ESTABLISHED ROYALTY RATES THAT ARE RIDICULOUSLY LOW

Three special grievances exist under the current Copyright Act: (1) programs are used by basic cable without permission of the copyright owners, (2) competition is blighted, and (3) the royalty rates are absurdly low.

The most important distortion is the use of programs without permission of the owner of the program. This is counter to every precept of free enterprise in this country. It causes the owner of the program to lose complete control of the marketing of his program. What other business enterprise in the nation must sit by helplessly while others use its product without its permission and, to compound the injury, sell to others for profit that which they have no permission from the owner to use?

Moreover, in the matter of ridiculously low fees, only the free, unregulated marketplace can establish fair and reasonable compensation for the programs that basic cable imports from distant television stations. No precise economic formula can ever determine what that compensation should be in every situation, but after

five years of experience with the compulsory license, the evidence clearly shows that the cable royalty rates mandated in the 1976 Act have no economic justification and are ridiculously low. Consider these facts:

1. Cable's primary competitor, local television broadcast stations, expended over $426 million for "rental and amortization of film and tape" (i.e., syndicated) programs in 1979. The copyright license fees paid by cable systems in 1979 for all retransmitted programs was $12.9 million. These FCC data indicate that in absolute dollars, television stations paid 33 times more for this programming than did the cable television industry.

2. Copyright fees are among cable's smallest expense items, averaging a miniscule 1.2% of the total cable operating expenses, the lowest category of cable system expenses.

3. Cable systems pay more for the postage to bill their subscribers than they do for distant signal programming under the compulsory license. CableData, an organization which provides billing services to 900 cable corporations and 9 million subscribers - about half of all subscribers - reported

that its postage cost in 1980 "ran well over $10,400,000." Total royalties paid in 1980 by all cable systems amounted to $18.9 million. (Source: Cable Marketing, 4/81, p. 40)

4. Because royalty payments are computed on the basis of gross receipts from basic subscription service only, even the pittance cable systems are now paying faces substantial erosion. Virtually all "new builds" in major markets include multi-channel "tiers" of basic service to subscribers either "free" or at minimal cost. If retransmitted programs are offered on a "no charge" basis, the license fee that such cable systems would pay is also zero. More common is an arrangement along the lines of the Cablevision Systems Boston proposal, whereby "Cablevision will charge only $2 monthly for its 50-channel basic service on the assumption that subscribers to other services (such as Home Box Office for $7 monthly) will make the total service pay for itself." (Broadcasting, 5/4/81, p. 74) Cablevision Systems Boston would not be subsidizing the 52-channels of programming: the program suppliers will!

THE 'GIANTS' ARE TAKING OVER THE CABLE INDUSTRY, CONCENTRATING POWER AND INCREASING REVENUES

Cable has now reached a powerful and profitable economic status. If five years ago cable needed some kind of "subsidy," it most certainly does not need one now. Indeed those who compete with cable may be the ones who need a subsidy!

Cable is no longer a "mom and pop" struggling business.

Today there are about 4,100 cable systems with approximately 19 million basic cable subscribers.

Authoritative estimates predict that in four years, there will be 28-to-30 million subscribers, rising to some 46 million by 1990!

Cable is now an enormous business with annual revenues of $2.5 billion, with that sum expected to rise in 1985 to $8.5 billion!

Equally important, cable is now dominated by large corporate enterprises, who each day are buying up small systems, and by obtaining local franchises, creating new systems.

Consider these facts that describe today's cable industry:

According to Donaldson, Lufkin & Jenrette, Wall Street brokers, as of October 1980 the 25 largest

multiple system owners (termed MSO's), controlled over 60% of all U.S. subscribers! The ten largest operators control over 48% of the total number of subscribers! Acquisitions since October 1980 by American TV & Communications and Tele-Communications Inc. and the pending acquisition of Teleprompter by Westinghouse have increased the top 10's control to approximately 50% of the total subscribers. (Exhibit 1). This domination grows larger every day.

Never forget that each cable system is a geographic monopoly, a small AT&T, if you please. It has total control of its geographic area, with no other cable system competing with it. Moreover it, alone among monopolies, has a special privilege, the congressionally mandated right to take all the programming it wants and needs, without asking permission of the copyright owner, and paying "below-marketplace-value" for that programming! It is as if someone turned upside down the principle of equity and competition.

Consider more fiscal facts about the new cable industry, now touted on Wall Street as the "depression proof business" of the future:

1. FCC data for 1979 reveal that cable systems have an average return on equity of about 19.3%. This compares to an average of 14.4% for Fortune 500 companies. More than half (55.1%) of cable systems reported net

income (pre-tax) of 20% or more of owners' equity in 1979 vs. only one-seventh (15.0%) of the 500 largest U.S. industrial corporations in 1980. (Exhibit 2.)

2. A few years ago the sales value of CATV systems based upon the strength of basic cable services was $300 per subscriber. Cable systems are now valued at $650 per subscriber, according to the 1980 report by Daniels & Associates, the largest cable brokerage firm in the U.S.

3. Westinghouse has just arranged to purchase Teleprompter, the largest cable system operator in America, for $636 million.

4. The New York TIMES recently paid $119 million for a 60,000 subscriber chain in New Jersey. The Los Angeles TIMES, American Express, Cox Cable, Newhouse Communications, General Electric, Warner Communications, TIME, Inc., and other business giants are into basic cable up to their corporate necks with powerful entities such as Dow Jones and Knight Ridder bidding to acquire existing systems and new franchises.

5. According to FCC data released December 29, 1980, operating revenues in 1979 of cable systems in the U.S. were $1.8 billion (up 20.3% vs. 1978).

Total assets of cable in 1979 were $3.2 billion (up 11.9% vs. 1978).

Pre-tax net income in 1979 was $199.3 million (up 45.4%, a spectacular increase)!

Two facts account for the tremendous increase in cable profitability:

a. Once the investment has been made in system trunk lines and head-end equipment, each additonal subscriber contributes more to the "bottom line" than every previous subscriber.

b. The same is true of other incremental revenue producing services, mainly pay cable, which require only moderate modification of "plant." Cable systems obtain an increase of 100% (or more) in revenues from each subscriber that takes pay cable services offered by the system. Industry analysts estimate that sixty percent of pay cable revenues is retained by the cable operator; the remaining 40% is split between the program distributor (HBO, Showtime, etc.) and the program supplier (the owner of the copyrighted program).

One more fiscal point: Of all categories of cable system operating expenses in the U.S., according to FCC data for 1979, copyright fee payments represent only 1.2% of those expenses. In other words, the most important factor in any cable system's operations - - retransmitted television station programming - - is one of the cheapest products (services, personnel, equipment, etc.) it purchases to operate its business! (Exhibit 3)

FCC data also show dramatically the difference between basic cable and pay cable with respect to expenses vs. revenue. For pay cable (negotiated in the markeplace) payments to program owners were 39.9% of revenues. For basic cable (non-negotiated) payments which included both copyright fees and "origination expenses," cable systems' costs were less than 2.8% of revenues - - a differential of 15 to 1! (Exhibit 4)

THE SYNDICATED PROGRAM MARKETPLACE -- CABLE CAN GET AN ABUNDANCE OF PROGRAMMING

A. Syndicated Program Marketplace

To understand the problem, it is necessary to describe the syndicated program marketplace, why it is important to the public, to the broadcast industry, and to the program supply industry, and how it relates to the Copyright Act.

A syndicated program is a program licensed directly to individual television stations for exhibition in their own local markets. Syndicated programs do not include shows presented by the national television networks or programs produced by local broadcast stations. They may be programs that were previously on a national network or new, "first-run" programs never before shown on television. Generally, they consist of series and special programs produced for television, and feature films that have been exhibited in theaters. Frequently, prime-time network programs do not recoup their costs while they are shown on a network.

Many of these shows are 'deficit-financed' and must look to the syndication market to recoup costs and show a profit. Without a flourishing syndication market, the TV program producer will be forced, eventually, to withdraw from the "free television" market and go directly to "pay cable" and other market alternatives.

Indeed, the value of a TV program is gauged by the ability of the program owner to successfully market his program to local television stations. Licensing his program for limited periods of time in the syndication market is the sole entry-point to investment recoupment. A broadcast station does not want to license a show that is being exhibited in the same market by a competing station or imported by a local cable system from a distant television station. The broadcaster seeks to identify his station in the minds of viewers tuning to his station for his programs. The availability of those programs to cable subscribers via distant signals fractionalizes the TV station's audience potential and erodes the value of its programs.

In 1976, when Congress revised the Copyright Act, it granted to basic cable systems:

1. a compulsory license to take distant television station signals off the air, bring them into a cable head-end, and sell a package of these television station programs to paying subscribers;

2. a statutory rate schedule for determining the compensation received by copyright owners that has no relevance to the marketplace value of programs exhibited by cable. Cable royalty fees are computed on the basis of cable systems' gross receipts derived solely from retransmitting broadcast signals to cable subscribers.

The effect of the 1976 Copyright Act was to skew the television marketplace. Every television station must negotiate for the right to obtain programs and must pay marketplace prices for them. But with the recent repeal of the FCC syndicated exclusivity and distant signal carriage rules, the local cable operator

is entitled by law to pick up any broadcast program under a compulsory license and is obligated to pay only government-preset copyright fees (a pittance of the program's true value). Competition between basic cable systems and local television stations (which "perform" many of the same programs in the same market) is blighted. It is as if the government in its zeal to deregulate airlines, gave to one airline the right to purchase its jet fuel at, say, one-tenth or one-fifth the cost its competitors must pay.

There is a terrible unfairness in the statutory right of a cable system to take all of its television broadcasts

-- without the permission of the copyright owner,

-- without negotiating with the copyright owner for an agreed price for programs, and

-- without payment of the true worth of distant television station programs.

B. Cable Can Get An Abundance of Programming.

The question is repeatedly asked: If there were no compulsory license for distant signals, how will basic cable get programming to serve its subscribers?

Basic cable is playing "the demogogic game" by trying to instill fear in the minds of Federal legislators and their own subscribers by declaring that copyright owners will not make programs available to basic cable -- and cable will be put out of business.

This argument is both false and absurd. Let me explain.

There are rational, economic and intelligent reasons why cable will be provided with a boundless sea of programming from which it can choose and for which it can pay a reasonable, market value price.

Reason #1: Self-interest.

To the program supplier, conventional cable is the "parent" of pay cable, which is a most attractive supplemental market for programs.

Pay cable cannot exist without basic cable, therefore, it is in the long-range self interest of program suppliers to make certain that basic cable is provided with all the programming it needs so that it grows, continues healthy, so that it can spawn more pay cable operations.

Reason #2: Program material today is underused -- a vast supply of programs is now available to cable.

Program suppliers are in the business of licensing program material. This is the copyright owner's life. It is the only reason for producing program material!

There is available now for syndication over 13,000 English language feature films and over 4,000 series and specials. New ones come on the market each year. The only syndicated programs that I can conceive not readily marketable to basic cable would be those programs contracted for limited periods of time by local television stations. Relatively few syndicated series are licensed to as many as 100 television stations so that even this restraint is of

minimal significance to cable systems seeking syndicated programming. But it is of the utmost importance to program owners and television stations to grant individual television stations an exclusive right to show a program in its market for a limited time. Should not a program owner have the basic right to market his product in the most intelligent fashion?

But this should pose no problem. Why should cable systems want to program their own channels with material already being exhibited on local TV stations? Cable systems have no need to duplicate programming now being viewed either over the local station cable channel or over an available "pay channel."

The Nielsen Report on Syndicated Programs for November 1980 lists 281 series (exclusive of religious programs) which were carried by 5 or more stations. Exhibit 5 shows that most of these series would be available to be licensed to the vast majority of cable systems in addition to many thousands of series and specials which were not sold to even five television stations.

Here is how I see the marketplace operating for cable's licensing of its own programs.

First, middlemen could package programs for basic cable systems and program suppliers just as they

now package programs for existing cable origination services. The Satellite Program Network, a service of Southern Satellite Systems, is already providing such a program service to over 300 cable systems. The marketplace would quickly adjust to the new procedures.

Packagers of cable programs would license programming material, take it to a satellite, and make a variety of programming available to cable systems. By catalogues and price lists, based upon a per subscriber rate, the packager would beam to the cable system whatever programming that system owner has chosen. Paperwork would be at a minimum. There would be no need for a forest of bureaucratic filings.

Second, advertiser-supported programs, purchased by basic cable systems, are growing in number and revenue. It is one of the hottest phenomena in an industry that is full of tremendous changes. Research conducted by Paul Kagan Associates, Inc. indicates that cable network advertising revenues in 1980 were over $30 million and should more than double in 1981 to over $65 million. Cable TV network ad revenue may exceed $1.6 billion by 1990, and overall total cable ad revenue may exceed $2.2 billion that year, according to Kagan! (Exhibit 6)

This will be a boon to the cable operator and will provide an additional source of large revenue, without relying on an increase in subscriber costs.

The cable operator will have an opportunity to encourage local merchants to advertise on one or more of his program channels. The local toy store, for example, could advertise on a children's channel. Other local merchants could very well choose a sports channel or a movie channel or a documentary or special-interest channel. The cable operator could more than recoup whatever added costs he might incur in programming by advertising revenues flowing into his cable system. Indeed, cable will, by advertising support, turn a generous profit on programming it negotiates for in the competitive market.

Today there are at least 35 "cable networks," ranging from Cable News Network to Home Box Office, according to Ogilvy & Mather Advertising Agency. These networks include both "pay TV" operations such as HBO and advertiser-supported operations such as the Modern Satellite Network and the Satellite Program Network. In addition to these, there are a number of networks operated by religious organizations. According to the Ogilvy & Mather tabulation, 18 of the 35 networks accept advertising. And the number of "cable networks" is expanding almost daily, including

new ventures (not listed among the 35) announced by ABC, CBS, Rockefeller Center, and others.

Multichannel News (April 13, 1981) reporting on a recent cable programming symposium stated:

> According to John Goddard, Viacom president and co-chairman of the organizing committee, the symposium is designed to help cable operators bridge the gap between the days when there was an abundance of channels for programming and the time when operators will be forced to choose among program options.
>
> "This conference represents a whole new way of thinking," he said. "With all the options suddenly available, it's time to pick and choose and those choices have to be profitable."

Third, direct negotiations between program suppliers and cable operators. Right now, as noted earlier, 25 MSO's control some 60% of all cable subscribers. This concentration will grow even faster in the future, as large companies merge and/or buy out smaller operators.

This concentration will simplify direct negotiations between program suppliers and cable systems. Program suppliers today negotiate directly with some 600 television stations. Bargaining and negotiating with the small handful of large cable operators will be much easier than with over 600 television stations customers.

Reason #3: Better cable customer service

With the marketplace making choices, cable systems will be able to serve their customers far better than they are now and will provide them more for their subscription fee. Today, by picking up distant signals, cable systems are bringing into their areas a large amount of programming that is absolutely without interest to their subscribers. Cable systems in Wisconsin, Virginia, Michigan, Texas, California, Massachusetts have no interest in New York, Atlanta, or Chicago local news programs, or community programs exploring local problems in those distant cities.

Basic cable systems have claimed from the outset their eager desire to provide diverse, innovative and useful programming to their subscribers. For the first time, by eliminating the incentive to rely on virtually free distant signals obtained via the compulsory license, cable systems would be encouraged to do what they claim they want to do, but have not done up to now.

THE FCC'S FINDINGS IN ITS RECENT DECISION ABOLISHING SYNDICATED EXCLUSIVITY AND DISTANT SIGNAL CARRIAGE RULES SHOULD NOT NARROW THE SCOPE OF THIS COMMITTEE'S INQUIRY OR DETERMINE HOW THE COPYRIGHT ACT SHOULD BE AMENDED

The scope of this Committee's inquiry must not be narrowed by basic cable's self-serving assertions that the FCC has already decided all issues relating to signal carriage limitations and syndicated exclusivity.

First, the FCC's conclusions concerning sig l carriage and syndicated exclusivity regulations were grounded upon invalid analysis and factual errors. The FCC's staff placed major reliance on theoretical econometric studies published as far back as 1972, obviously outdated for the purpose of its study, and also upon seriously flawed statistical analysis (the Park study), which is replete with hundreds of errors, fully documented in our Comments filed with the Commission at that time. The reasonableness of the FCC's decision is now being reviewed by the Second Circuit Court of Appeals which has stayed its effective date.

Second, the cable deregulation decision rested upon the FCC's very narrow construction of its statutory authority to regulate cable under the "ancillary to broadcasting doctrine" established by the Supreme Court in Midwest Video. The FCC clearly stated: "The thrust of our analysis thus is that the syndicated exclusivity rules serve no necessary public purpose in terms of this Commission's regulatory responsibilities." (emphasis added) In the Matter of Cable Television Syndicated Program Exclusivity Rules, FCC 79-242.

The FCC did not even consider, much less decide, whether copyright owners were being fairly compensated for cable's use of their property, or whether cable deregulation was consistent with the Constitutional mandate to provide for the public welfare "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The FCC specifically left these copyright questions, to be decided by this Committee and the Congress. Those who argue that these issues have been settled by the FCC in

effect urge this Committee to subjugate its authority and responsibility to the judgments of an administrative agency with no interest in or legal authority with respect to copyright issues.

CABLE'S COMPULSORY LICENSE RESULTS IN PROGRAM DUPLICATION AT THE EXPENSE OF PROGRAM DIVERSITY AND HARMS LOCAL TELEVISION STATIONS

Cable's compulsory license to carry imported distant signals into the local cable market results in program duplication at the expense of program diversity.

This situation will be exacerbated by the Federal Communications Commission's decision to delete its syndicated exclusivity rule (which permits certain local broadcasters to exercise their exclusive program rights against cable systems that import the same programs from distant stations).

Exhibits 8 A-D illustrate how cable systems duplicate the programs licensed by local television stations. These exhibits portray graphically the basic inequity of a skewed marketplace where television stations must pay full copyright liability while cable systems must pay only a miniscule government-fixed rate.

Cable has long argued that the time diversity provided by broadcasting imported

distant television programs that often duplicate local television station programs is in the public interest. But is the public interest well served by broadcasting the SAME program at 4:30 p.m., 5:00 p.m., and 5:30 p.m. on three separate cable channels when it could damage local broadcasting services, and serve no useful public service?

The "compulsory license" is a dual impediment to the cable subscriber and the local television station. Cable subscribers are denied new and diverse programming because cable operators are encouraged to take the "cheapest route" by importing distant signals under "a take what you can" license. At the same time, local stations and their program suppliers are at the mercy of a governmental edict which says that once a program is licensed to any station it is fair game for any or all cable systems to use that program. This is so obviously unfair, there is no reason to continue what is terribly wrong.

VIEWS OF THE EXPERTS

A COMPENDIUM OF EXTRACTS FROM STATEMENTS MADE BY AUTHORITATIVE UNBIASED SOURCES THAT HOLD THAT THE EXISTING COPYRIGHT SYSTEM HAS NOT WORKED, IS UNFAIR AND SHOULD BE ABOLISHED

Nowhere has the case been better made for eliminating the compulsory license or the inadequacy of the Copyright Royalty Tribunal to deal with the problem of seeing to it that copyright owners are fairly treated and decently recompensed for their property than in the formal testimony of the Register of Copyrights, Dr. David Ladd, and by Clarence L. James, the retiring chairman of the Copyright Royalty Tribunal.

Dr. Ladd, in a letter to Senate Judiciary Committee Chairman, Strom Thurmond, on May 1 of this year, summarized testimony he planned to present before the Senate Judiciary Committee. The full text of Dr. Ladd's letter follows with pertinent points underlined.

Mr. James' May 1 letter of resignation to the President similarly summarizes his earlier testimony before this Subcommittee.

Once again, I have taken the liberty of underlining comments that urge the President to completely eliminate the Copyright Royalty Tribunal because, he says, its purpose to set adequate compensation for copyright owners is "impractical and unworkable". His strictures are aimed also at the compulsory license.

Dr. Ladd's letter strongly advocates the elimination of the compulsory license. This position, he explains, follows a lengthy, intensive study of the problem by the staff of the Copyright Office, the ultimate government authority on copyright matters.

April 21, 1981

The Honorable
Strom Thurmond
United States Senate
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The Copyright Office is preparing a statement for presentation at the Senate Judiciary Committee hearing on cable television under the Copyright Act, scheduled for April 29, 1981.

While the views of the Office will be presented in detail at that time, some members of Congress have indicated that it would be useful to have advance information about the general tenor of my testimony. I am therefore writing to express the general position of the Copyright Office regarding the compulsory license of section 111 of the Copyright Act.

The liability of cable television systems for secondary transmission of copyrighted works has been a major copyright law issue for almost 20 years. When I assumed the duties of Register of Copyrights last June, I decided that an evaluation of the compulsory license compromise embodied in the Copyright Act was in order. Then, in July 1980, the Federal Communications Commission ("FCC") announced a decision to "deregulate" cable television by deleting its rules with respect to importation of distant signals and syndicated program exclusivity. This decision is under appeal, and the court has granted a stay of the order. The debate on the merits of that decision and its effects continues into these scheduled hearings.

In the Copyright Office, we have made a thorough review of the cable compulsory license of section 111 of the Copyright Act, the probable impact of the FCC's decision (assuming it becomes effective), developments in technology and in marketing of programs, and changes in the cable television industry. The Copyright Office has concluded that the cable compulsory license of section 111 should be eliminated, or, at least, significantly modified.

Cable television systems perform copyrighted works for profit when they retransmit broadcast programming to their paying subscribers. As a matter of principle, the government should not impose a compulsory license mechanism on copyright owners that deprives them of full compensation for retransmission of their works. This was the conclusion reached originally by the Copyright Office when it drafted the 1964 and 1965 revision bills, the first bills in the modern effort that led to the Copyright Act of 1976. In its Supplementary Report, the Copyright Office reviewed the arguments by the copyright owners and cable systems for and against liability and concluded:

> On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill. [SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, (House Comm. print, 1965) at 42.]

In the course of legislative consideration of the various copyright revision bills from 1965-1976, Congress decided to impose a compulsory license for secondary transmissions by cable rather than full liability. This decision was influenced by two considerations. First, the Supreme Court in two cases [Fortnightly v. United Artists. 392 U.S. 390 (1968) and CBS v. Teleprompter, 415 U.S. 394 (1974)] ruled that cable systems did not "perform" copyrighted works within the meaning of the outdated Copyright Act of 1909 and hence did not infringe the copyrights when they retransmitted programs. Second, cable systems successfully argued that full copyright liability would likely stifle the growth of cable and perhaps drive most systems out of business, because of high transaction costs or the refusal by program owners and broadcasters to grant licenses to cable systems.

Under the principles of the current Act, it is clear that cable systems perform copyrighted works when they make secondary transmissions. The Supreme Court decisions in Fortnightly and Teleprompter simply represent interpretations of the former law. The Court recognized that copyright policy is set by Congress, and

the opinions in no way imply that cable systems have any entitlement to retransmit copyrighted programming except as Congress decides. The general principle of the copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. It is the opinion of the Copyright Office that copyright owners will be more confidently assured of rightful compensation, if that compensation is determined by contract and the market rather than by compulsory license.

In the last five years the cable industry has developed from an infant industry to a vigorous, economically stable industry with vast prospects. In our opinion, cable no longer needs the protective support of the compulsory license in order to flourish.

I will therefore urge in my testimony before the Senate Committee that the time has come to require that cable pay marketplace rates for the programs it retransmits. The fact that cable already pays full rates for programs it originates and thus makes a substantial contribution to the income received by copyright owners does not mean that cable should continue to carry retransmitted programming on a compulsory basis at rates that are clearly below the value of the programming.

If, as we shall propose, the cable compulsory license should be eliminated, the responsibilities of both the Copyright Royalty Tribunal and the Licensing Division of the Copyright Office will be much reduced, with a concomitant reduction in budget and personnel requirements. Moreover, administrative procedures will not, as now, delay compensation of copyright owners, whatever that is bargained to be.

A compulsory license mechanism is in derogation of the legitimate rights of authors and copyright owners. It should be utilized, I believe, only if compelling reasons support its existence. Compelling reasons may have existed in 1976 to justify the cable compulsory license. In our opinion, they no longer do.

In the event that Congress does find reasons for continuation of some form of a compulsory license, I will discuss alternative means of modifying the present system at the Senate hearing.

Sincerely yours,

David Ladd
Register of Copyrights

COPYRIGHT ROYALTY TRIBUNAL
UNITED STATES OF AMERICA

1111 20th Street, N.W.
Washington, D.C. 20036
(202) 653-5175

May 1, 1981

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In November, 1977, pursuant to the 1976 Copyright Act, the Copyright Royalty Tribunal was created. Its purpose, to set the adequate compensation to be received by copyright owners for the public use of their copyrighted work, has proven impractical and unworkable. After considerable thought and reasoning, I am convinced that the Copyright Royalty Tribunal should be eliminated.

The general principle of copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. It is my opinion that copyright owners will be more confidently assured of rightful compensation, if that compensation is determined by contract and the market rather than by a Federal Regulatory Agency. A copy of the contents of my presentation on March 4 before the House of Representatives Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, hereto attached, details the thrust and nature of my argument.

I am supportive of the policy and position that excessive government involvement in private industry is potentially harmful. The creation and further continuation of the Copyright Royalty Tribunal is a clear example of excessive government involvement in private industry. The budget and staff of the Copyright Royalty Tribunal is miniscule compared to those of other federal agencies. However, every penny saved in governmental dollars represents substantial savings to the American taxpayer.

So conclusive is the evidence supporting the inability of the Copyright Royalty Tribunal to fulfill the mandate of Congress, and so strong are my feelings that anything short of elimination is a blatant waste of taxpayer's money, I hereby respectfully submit my resignation as Chairman and Commissioner to the Copyright Royalty Tribunal, effective immediately.

Sincerely,

Clarence L. James, Jr.
Chairman

COPYRIGHT ROYALTY TRIBUNAL
UNITED STATES OF AMERICA

1111 20th Street, N.W.
Washington, D.C. 20036
(202) 653-5175

May 1, 1981

Honorable Strom Thurmond, Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

It is my understanding that Commissioner Brennan of the Copyright Royalty Tribunal presented testimony before your Committee on April 29, 1981. It is also my understanding that Commissioner Brennan stated that he represented my views.

I did concur, in principle, on the proposed draft of the testimony that was represented to me would be given. I would like to take this opportunity to say that in reviewing the testimony which was actually presented I find that it is not what I concurred in and in fact I am in substantial disagreement with it. Many of the views expressed completely contradicted my views.

I wish to inform you and the Committee in the strongest possible terms that my views are and will remain as stated before the House of Representatives Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on March 4, 1981, a copy of which is attached hereto.

I would sincerely hope that my fellow Commissioners would put aside their pecuniary and proprietary interest in the Tribunal. They could then, I believe, give an objective appraisal of the value of the Tribunal.

Thank you for your time and interest. I remain,

Very truly yours,

Clarence L. James, Jr.
Chairman

Attachment

THE KASTENMEIER BILL WILL NOT REMEDY THE INADEQUACIES OF THE COPYRIGHT ACT OF 1976

The Chairman of this Subcommittee, Mr. Kastenmeier, is to be applauded for making a serious effort to resolve the obvious flaws in the Copyright Act of 1976. Even so, the Kastenmeier bill will not remedy the great inadequacies of the Act. We strongly believe that the elimination of the compulsory license granted cable to import distant television signals is the only fair and efficient way to redress inequities of the present law. With this firm belief in mind, we offer these comments on the Chairman's legislation:

1. A government agency cannot perform the functions of the marketplace by setting "fair and reasonable" copyright royalties and establishing regulations maintaining syndicated exclusivity rights.
   (a) The CRT has a very limited budget (which may be reduced even further by this Congress) and no staff to execute the

major regulatory responsibilities that the Kastenmeier bill would impose on the CRT.

(b) Effective syndicated exclusivity provisions are essential to the operation of any compulsory licensing scheme intended to provide even minimal protection for the rights of copyright owners and their broadcast station licensees. Such provisions should be clearly set forth in the statute and not left to the vagaries and delay inherent to the administrative process.

2. Cable systems with up to 5,000 subscribers should not be completely exempt from copyright liability.

(a) No commercial enterprise, no matter how small, should be mandated to get programs free -- which it later sells to the public!

No business enterprise should be "excused" from compensating copyright owners whose material is being sold to the public for a profit.

(b) If some special treatment is to be afforded "small" systems, a more reasonable definition of "small" should be adopted. Cable systems with fewer than 5,000 subscribers represent over 80% of all cable industry systems, serve one-third of all cable subscribers and paid $1.3 million in all cable royalties in 1979. Moreover, such systems of 5,000 subscribers receives up to half a million dollars annually in basic subscribers revenues.

(c) No cable system owned by a large multiple-system-operator should be exempt from copyright liability. Large MSO's own or control more than 10% of all cable systems with fewer than

5,000 subscribers and such giant corporations should not benefit from provisions intended to assist so-called "mom & pop" systems.

(d) Cable systems located in the top-100 television markets should not be exempt from copyright fees. Cable systems in the nation's largest metropolitan areas which comprise the top-100 television markets have extensive growth potential, receive adequate (often abundant) local television broadcast services, and, if necessary, readily can join forces with neighboring cable systems to acquire programming for local origination. Cable systems located in these top-100 television markets have the ability, and should be required to compete openly in the marketplace for programming.

CONCLUSION AND RECOMMENDATION

Congress should declare that basic cable television must compete on an equal basis with all other segments of the television media in the program market with none having an unfair advantage.

MPAA recommends that the Congress:

1. Amend the Copyright Act of 1976 to require basic cable systems to respect the property rights of program owners and to abolish the anti-competitive statutory rate schedule which sets royalties for conventional cable.

2. Abolish the compulsory license for distant TV station programs imported by cable systems.

3. Retain the compulsory license only for "local" station programs that are required to be carried by cable systems under FCC rules.

EXHIBIT 1

CABLE'S TOP 25 MULTIPLE SYSTEM OPERATORS

(As of October 1, 1980)

SOURCE: Donaldson, Lufkin & Jenrette Study

		NUMBER OF SUBSCRIBERS	% OF TOTAL (17,500,000=100.0%)	
1.	Teleprompter	1,337,315	7.6	(1)
2.	ATC (Time, Inc.)	1,220,000	7.0	(2)
3.	Tele-Communications Inc.	1,034,000	5.9	(3)
4.	Cox Cable	883,585	5.0	
5.	Warner-Amex	725,000	4.1	
6.	Times-Mirror	545,361	3.1	
7.	Storer Cable	534,100	3.1	
8.	Viacom	467,000	2.7	
9.	Sammons	398,386	2.3	
10.	UA-Columbia	380,000	2.2	(4)
11.	United Cable	345,400	2.0	
12.	Continental Cablevision	325,000	1.9	
13.	General Electric	250,000	1.4	
14.	Cablecom - General (RKO General)	241,329	1.4	(5)
15.	Telecable Corp.	215,000	1.2	
16.	Service Electric Cable	21[illegible] 200	1.2	
17.	Midwest Video	2[illegible],848	1.2	
18.	NewChannels (Newhouse)	202,590	1.2	(6)
19.	Liberty Communications	177,200	1.0	
20.	Heritage Communications	159,620	0.9	
21.	Cablevision Systems Development	157,000	0.9	
22.	Comcast Corp.	152,000	0.9	
23.	Vision Cable	145,400	0.8	
24.	Western Communications	142,300	0.8	
25.	Texas Community Antennas	140,300	0.8	
	TOP 25	10,595,134	60.5	

MAJOR CHANGES SINCE OCTOBER 1980

(1) Acquisition by Westinghouse pending. Westinghouse was #40 with 78,407 subscribers.
(2) Exclusive of acquisitions of Midwest Video (#17) and 59,000-subscriber Honolulu system. Current total (with acquisitions) 1.4 million subs.
(3) Exclusive of acquisitions of Horizon Communications (#29) with 125,600 subscribers.
(4) Acquisition by Dow Jones/Knight-Ridder pending.
(5) Acquired by Capital Cities.
(6) Exclusive of acquisition of Vision Cable (#23) and Daniels Properties. Current total in excess of 500,000 subscribers.

EXHIBIT 2

RETURN ON EQUITY

CABLE SYSTEMS vs. FORTUNE 500

RETURN ON EQUITY	CABLE SYSTEMS (1979 - FCC) #	%		FORTUNE 500 (1980) #	%	
10% or Less	590	30.8		132	26.4	
10 - 19.9%	271	14.1		293	58.6	
20 - 29.9%	419	21.8		66	13.2	
30 - 39.9%	400	20.8	55.1	7	1.4	15.0
40% or More	239	12.5		2	0.4	
TOTAL	1,919	100.0		500	100.0	
AVERAGE	19.3% (Mean)			14.4% (Median)		

SOURCE: Cable systems - FCC Cable Television Industry Financial Data, 1979.
Fortune 500 - Fortune Magazine (May 4, 1981)

EXHIBIT 3

CABLE TELEVISION OPERATING EXPENSES, 1979

(Source: TV Broadcast Financial Data--1979)

"SERVICE" EXPENSES		
Pole and Duct Rentals	$ 38,911,213	3.68%
Microwave Services	21,419,753	2.02
Payments to Pay-Cable Suppliers	133,248,410	12.60
All Other "Service" Expenses	376,892,517	35.63
TOTAL	$570,471,893	53.93%
"ORIGINATION" EXPENSES		
TOTAL	21,984,342	2.08
"SELLING, GENERAL & ADMINISTRATIVE" EXPENSES		
Franchise Fees	$ 41,295,303	3.90%
Copyright Fees	12,917,644	1.22
All Other "S G & A" Expenses	411,203,825	38.87
TOTAL	$465,416,772	43.99
TOTAL OPERATING EXPENSES	$1,057,873,007	100.0%

SOURCE: FCC Cable Television Industry Financial Data, 1979, Schedule 2. Issued December 29, 1980.

EXHIBIT 4

PROGRAM REVENUES AND EXPENSES, 1979

PAY-CABLE	
Pay-Cable Revenue	$ 333,693,966
Payments to Pay-Cable Program Suppliers	$ 133,248,410
% Payments of Revenues	39.93%
BASIC CABLE	
Regular Subscriber Revenue	$1,261,480,701
Copyright Fees	$ 12,917,644
% of Regular Subscriber Revenue	1.02%
Origination Expenses	$ 21,984,342
% of Regular Subscriber Revenue	1.74%
Copyright Fees and Origination Expenses	$ 34,901,986
% of Regular Subscriber Revenue	2.76%

SOURCE: FCC Cable Television Industry Financial Data, 1979, Schedule 2. Issued December 29, 1980.

EXHIBIT 5

NUMBER OF STATIONS CARRYING POPULAR SYNDICATED TELEVISION SERIES DURING NOVEMBER 1980

Source: Nielsen Report on Syndicated Program Audiences

(Limited to non-religious series carried by five or more stations.)

NUMBER OF STATIONS	NUMBER OF SERIES	%
5 to 24	160	57.0
25 to 49	56	19.9
50 to 74	32	11.4
75 to 99	15	5.3
100 or more	18	6.4
TOTAL	281	100.0

EXHIBIT 6

FORECAST OF ADVERTISER-SUPPORTED PROGRAM REVENUES FOR BASIC CABLE

Paul Kagan Associates, Inc., a most respected research firm specializing in forecasting the future of cable television advertising, predicts that advertising-supported cable TV networks will have enormous growth over the next decade. Here is a summary of the Kagan projections:

Year	Cable TV Network Ad Revenue (millions)	% Change	Natl./Local Spot Cable (millions)	% Change	Total Cable Ad Revenue (millions)	% Change
1980	$ 30.1	-----	$ 15.0	-----	$ 45.1	-----
1981	65.7	+118.3%	35.0	+133.3%	100.7	+123.3%
1982	113.3	+ 72.5	63.0	+ 80.0	176.3	+ 75.1
1983	180.8	+ 59.6	99.0	+ 57.1	279.8	+ 58.7
1984	269.4	+ 49.0	143.0	+ 44.4	412.4	+ 47.4
1985	390.1	+ 44.8	195.0	+ 36.4	585.1	+ 41.9
1986	541.3	+ 38.8	255.0	+ 30.8	796.3	+ 36.1
1987	730.1	+ 34.9	323.0	+ 26.7	1,053.1	+ 32.3
1988	972.1	+ 33.2	399.0	+ 23.5	1,371.1	+ 30.2
1989	1,266.2	+ 30.3	483.0	+ 21.1	1,749.2	+ 27.6
1990	1,649.8	+ 30.3	575.0	+ 19.1	2,224.8	+ 27.2
Average annual growth.....		+ 51.2%		+ 47.2%		+ 50.0%

SOURCE: Paul Kagan Associates, Inc., Cable TV Advertising, February 18, 1981.

EXHIBIT 7

BASIC CABLE PROGRAM NETWORKS

(Source: Panorama Magazine, April 1981)

NETWORK	DESCRIPTION OF NETWORK
Appalachian Community Service Network (ACSN)	Broadcasts college-credit courses, teleconferences, continuing-education courses and general-interest community programming. This nonprofit network has 45 colleges (most in Appalachian region) affiliated with its services. Viewers can receive college credit for courses shown on ACSN.
Black Entertainment Television	Nation's first and only black-oriented cable network. Features mainly tape-delayed sporting events from black colleges, black films such as Which Way Is Up? and black special events. Advertiser-supported.
Cable News Network (CNN)	Round-the-clock live information network featuring news, interviews, commentary, reviews, business reports, sports and weather coverage. Commentators include Barry Goldwater, Coretta Scott King, Bella Abzug. Daniel Schorr is the anchor on the Washington desk. The network is owned and operated by cable-TV entrepreneur and sportsman Ted Turner. Advertiser-supported.
Cable Satellite Public Affairs Network (C-SPAN)	Televises gavel-to-gavel proceedings of the U.S. House of Representatives. Also covers National Press Club luncheon speeches and produces a highschool government series called Close-Up.
Christian Broadcasting Network (CBN)	The network's avowed purpose is to present family entertainment with a moral perspective that reaches a Catholic and Protestant audience. Shows movies, dramas, variety shows, holiday specials and kids' programs. Supported by its own telethons, which raise over 90 percent of the operating cost of the network.
Entertainment and Sports Programming Network (ESPN)	Round-the-clock sports network. Last year telecast more than 45 different types of sports, including Australian-rules football, tractor-pulling contests and table-tennis tournaments. Most programming focuses on NCAA basketball, boxing, tennis, skiing, and college and Canadian football. Backed by Getty Oil. Advertiser-supported.

NETWORK	DESCRIPTION OF NETWORK
Modern Satellite Network (MSN)	Division of Modern Talking Picture Service, distributor of sponsored films. This network is geared to the homemaker. Televises programs on health, cooking and consumer inquiries. Regular series include The Home Shopping Show, Fun and Fitness and Financial Inquiry.
National Christian Network (NCN)	Religiously oriented network representing over 70 denominations, which produce many of the shows televised. Programs include Faith for Today (Seventh Day Adventist), At Home with the Bible (Southern Baptist Convention) and Christopher Close-up (Catholic).
National Spanish TV Network (SIN)	Spanish-language television network televising sports, movies, sitcoms, variety shows and news. Advertiser-supported.
Nickelodeon	First and only young people's channel. Produced, created and packaged by Warner Amex Satellite Entertainment Company. Programming for preschoolers through teen-agers. Shows include Livewire, teen-age talk/variety program; and Pinwheel, a magazine-format show for preschoolers.
People That Love (PTL)	Network run by James Bakker, ordained Assembly of God Evangelist. All programming has religious overtones. Features talk shows (including The PTL Club, which is also carried by over-the-air broadcasters), preachers like Oral Roberts, children's shows, and two fund-raising telethons a year.
Satellite Program Network (SPN)	Varied programming mix featuring talk shows, how-to's, classic movies and women-oriented shows. Broadcasts Telefrance, a three-hour series of French movies and variety programs, seven nights a week. Other regular programs include Jimmy Houston Outdoors, The Gourmet and Real Money.
The Women's Channel	A TV network geared to women. Tapes previously written material from magazines like Family Circle and Women's Sports, adapts it to audio-script form, and then picks graphics to accompany the material. Video portion of network in slow scan; new image appears every 12 seconds giving the effect of a slow slide show. Programming includes Feeling Your Best & On the Job.

NETWORK	DESCRIPTION OF NETWORK
Trinity Broadcasting Network (TBN)	Christian programming representative of 18 mainstream denominations including Catholic, Baptist and Methodist. Network produces 48 regular series featuring variety programs, quiz shows, musicals and live special events. All have a Christian flavor.
USA Network	Seventy-five percent of programming devoted to sports, including professional baseball, basketball, hockey and soccer. Other programming features Calliope, the children's show, six days a week, eight hours total. Also televises The English Channel, a series of culturally oriented shows, most of which are produced in England. At press time, USA Network was on the sales block and several companies--including broadcast giant CBS--were bidding for acquisition.

EXHIBIT 8A

CABLE SYSTEM : Wilmington, Delaware

OWNER : Rollins Cablevision

SUBSCRIBERS : 6/30/79 50,867

GROSS RECEIPTS : (1st Accounting Period, 1979) $2,475,139

DSE'S : 4.0 % OF GROSS: 1.950

COPYRIGHT ROYALTY FEE PAID: $48,264

LOCAL SIGNALS	DISTANT SIGNALS
Philadelphia:	Baltimore:
KYW (NBC)	WBAL (NBC)
WTAF (IND)	WMAR (CBS)
WPVI (ABC)	WJZ (ABC)
WPHL (IND)	WBFF (IND)
WCAU (CBS)	
Camden:	New York:
WNJS (PBS)	WOR (IND)
Wilmington:	Washington:
WHYY (PBS)	WTTG (IND)
	Lancaster:
	WGAL (NBC)

SOURCE: Statement of Account filed at Copyright Office (Remittance #09646).

EXHIBIT 8B

SYNDICATED SERIES CARRIED BY TWO OR MORE

OF THE LOCAL AND/OR DISTANT COMMERCIAL STATIONS RETRANSMITTED

BY THE WILMINGTON CABLE SYSTEM, MONDAY, APRIL 20, 1981 4-8 P.M.

	LOCAL STATIONS		DISTANT STATIONS	
Evening Magazine	KYW	7:00 p.m.	WJZ	7:30 p.m.
Family Feud	WCAU	7:30 p.m.	WBAL	7:30 p.m.
Good Times	WPHL	5:00 p.m.	WMAR	4:30 p.m.
Happy Days Again	WTAF	6:00 p.m.	WBAL WTTG	5:00 p.m. 6:30 p.m.
I Love Lucy	----	----	WBFF WTTG	5:00 p.m. 5:30 p.m.
John Davidson Show	KYW	4:00 p.m.	WJZ	4:30 p.m.
Joker's Wild	WTAF	6:30 p.m.	WMAR WOR	7:30 p.m. 6:00 p.m.
M*A*S*H	WTAF	7:00 & 7:30 p.m.	WBAL WTTG	5:00 p.m. 7:30 p.m.
Merv Griffin	WPVI	4:00 p.m.	WGAL	4:00 p.m.
Scooby Doo	WTAF	5:00 p.m.	WBAL	4:30 p.m.
Tic Tac Dough	WPVI	7:00 p.m.	WOR	6:30 p.m.
Tom & Jerry	WCAU	4:00 p.m.	WMAR	4:00 p.m.
Welcome Back, Kotter	WPHL	5:30 p.m.	WBAL WTTG	4:30 p.m. 7:00 p.m.
What's Happening?	WTAF	5:30 p.m.	WBAL	4:00 p.m.

SOURCE: TV Guide Program Schedules for listed stations.

EXHIBIT 8C

CABLE SYSTEM	:	Bellaire, Texas
OWNER	:	Gulf Coast Cable Television
SUBSCRIBERS	:	6/30/79 3,806
GROSS RECEIPTS	:	(1st Accounting Period, 1979) $165,542
DSE'S	:	2.0 % OF GROSS: 1.10
COPYRIGHT ROYALTY FEE:		$1,821

LOCAL STATIONS	DISTANT SIGNALS
Houston:	Atlanta:
KPRC (NBC)	WTBS (IND)
KUHT (PBS)	
KHOU (CBS)	Chicago:
KTRK (ABC)	WGN (IND)
KRIV (IND)	
KHTV (IND)	

SOURCE: Statement of Account filed at Copyright Office (Remittance #11708).

EXHIBIT 8D

SYNDICATED SERIES CARRIED BY TWO OR MORE

OF THE LOCAL AND/OR DISTANT COMMERCIAL STATIONS RETRANSMITTED

BY THE BELLAIRE CABLE SYSTEM, MONDAY, APRIL 20, 1981, 3-7 P.M.

	LOCAL STATIONS		DISTANT STATIONS	
All In the Family	KRIV	6:30 p.m.	WTBS	6:00 p.m.
Barney Miller	KRIV	6:30 p.m.	WGN	6:00 p.m.
Bob Newhart Show	KPRC	4:30 p.m.	WTBS	5:30 p.m.
Brady Bunch	KHTV	4:30 p.m.	WTBS	3:30 p.m.
Carol Burnett	----	----	WTBS WGN	5.00 p.m. 6:30 p.m.
Gilligan's Island	KHTV	4:00 p.m.	WGN	4:30 p.m.
Good Times	KRIV	4:30 p.m.	WGN	5:00 p.m.
Sanford & Son	KRIV	5:30 p.m.	WTBS	6:30 p.m.
Welcome Back, Kotter	KRIV	5:00 p.m.	WGN	5:30 p.m.

SOURCE: TV Guide program schedules for listed stations.

The eleven major producers and distributors of theatrical and television programs in the United States comprise the membership of the Motion Picture Association of America, Inc. These companies are:

Avco Embassy Pictures Corp.

Columbia Pictures Industries, Inc.

Walt Disney Productions and Buena Vista Distribution Co., Inc.

Filmways Pictures, Inc.

Metro-Goldwyn-Mayer Film Co.

Orion Pictures Company

Paramount Pictures Corporation

Twentieth Century-Fox Film Corporation

United Artists Corporation

Universal Pictures, a division of Universal City Studios, Inc.

Warner Bros., Inc.

MEMBERS OF THE

ASSOCIATION OF MOTION PICTURE &

TELEVISION PRODUCERS, INC.

AARON SPELLING PRODUCTIONS, INC.
A & S PRODUCTIONS, INC.
(THE) ALPHA CORPORATION
AMERICAN INTERNATIONAL PRODUCTIONS
ANDRAS ENTERPRISES, INC.
ARTANIS PRODUCTIONS, INC.
ASPEN PRODUCTIONS
AUBREY SCHENCK ENTERPRISES, INC.
BING CROSBY PRODUCTIONS, INC.
BRISTOL PRODUCTIONS, INC.
(THE) BURBANK STUDIOS
CHARLES FRIES PRODUCTIONS
CHARLESTON ENTERPRISES, CORP.
CHRISLAW RPODUCTIONS, INC.
CINE FILMS, INC.
CINE GUARANTORS, INC.
CINEMA PAYMENTS INCORPORATED
OF CALIFORNIA
CINEMA VIDEO COMMUNICATIONS, INC.
COLUMBIA PICTURES INDUSTRIES, INC.
C-O-P PRODUCTIONS, INC.
DAISY PRODUCTIONS, INC.
DANNY THOMAS PRODUCTIONS
DARR-DON, INC.
DUBIE-DO PRODUCTIONS, INC.
EDPROD PICTURES, INC.
EGS INTERNATIONAL
FILMWAYS FEATURE PRODUCTIONS, INC.
FILMWAYS PICTURES, INC.
FILMWAYS PRODUCTIONS, INC.
FINNEGAN ASSOCIATES
FOUR STAR INTERNATIONAL, INC.
FRANK ROSS PRODUCTIONS
GJL PRODUCTIONS, INC.
GEOFFREY PRODUCTIONS
GUS PRODUCTIONS, INC.
HANNA-BARBERA PRODUCTIONS, INC.
HAROLD HECHT COMPANY
HERBERT LEONARD ENTERPRISES, INC.
JACK CHERTOK TELEVISION, INC.

JACK ROLLINS AND CHARLES H. JOFFE PRODUCTIONS
JOE R. HARTSFIELD PRODUCTIONS, INC.
LANCE ENTERPRISES
LASSIE FILMS, INC.
LASSIE PRODUCTIONS, INC.
LASSIE TELEVISION, INC.
LEONARD FILMS, INC.
LEVY-GARDNER-LAVEN PRODUCTIONS, INC.
LOCATION PRODUCTIONS, INC.
LUCILLE BALL PRODUCTIONS, INC.
(THE) MALPASO COMPANY
MARBLE ARCH PRODUCTIONS, INC.
MAX E. YOUNGSTEIN ENTERPRISES, INC.
MC DERMOTT PRODUCTIONS
METEOR FILMS, INC.
(THE) MIRISCH CORPORATION OF CALIFORNIA
MURAKAMI-WOLF PRODUCTIONS, INC.
NGC TELEVISION, INC.
NORLAN PRODUCTIONS, INC.
PAX ENTERPRISES, INC.
PAX FILMS, INC.
PROSERCO OF CALIFORNIA, LTD.
RAINBOW PRODUCTIONS
RASTAR ENTERPRISES, INC.
RASTAR PRODUCTIONS, INC.
RASTAR TELEVISION, INC.
RFB ENTERPRISES
ROBERT B. RADNITZ PRODUCTIONS INC.
RUBY SPEARS PRODUCTIONS, INC.
SAMUEL GOLDWYN JR. PRODUCTIONS, INC.
SHELDON LEONARD PRODUCTIONS
SPELLING-GOLDBERG PRODUCTIONS
STANLEY KRAMER PRODUCTIONS, LTD.
SUMMIT FILMS, INC.
SUNCREST CINEMA CORPORATION
T & L PRODUCTIONS, INC.
TORI PRODUCTIONS, INC.
TWENTIETH CENTURY-FOX FILM CORP.
WARNER BROS., INC.
(THE) WOLPER ORGANIZATION, INC.
WRATHER ENTERTAINMENT INTERNATIONAL

Mr. KASTENMEIER. Thank you, Mr. Valenti.

Do you want to ask any questions of Mr. Valenti?

Mr. RAILSBACK. Why don't we hear from everyone and then ask questions.

Mr. KASTENMEIER. Next, we would like to call on the Commissioner of Baseball, the Honorable Bowie Kuhn, who is one of our distinguished witnesses. We are pleased to meet again, Mr. Kuhn.

TESTIMONY OF BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. KUHN. Thank you, Mr. Chairman, members of the subcommittee.

I am delighted to have this opportunity to appear here and speak to you, as the chairman indicates, on behalf of professional sports. While I speak specifically on behalf of the 26 major league baseball teams, my statement is supported by the National Basketball Association, National Football League, National Hockey League, and North American Soccer League, all of whom have interests common to ours in this extremely troublesome area of cable television and its effects on professional sports. So on behalf of all of us, I would like to speak to the subject of the chairman's bill and the general subject of compulsory licensing.

I am very happy to tell you, and you will be delighted to know, that my remarks have been substantially reduced by the fine work of Wilt Chamberlain, on my left.

Our grave concern here is that unless something is done to dramatically alleviate the problem that we in professional sports face, there will be a significant loss in the vast quantity of over the air television presented to the American public by professional sports in North America.

This, for us, is a very grave concern and I believe it should be a grave concern for the subcommittee, for the Congress, and for the public at large, because obviously the vast amount of sports programing which is out there today over the air is one of the most valuable and cherished broadcast properties that come to the American public.

I find in the whole situation an extremely rich irony—perhaps more ironic for professional sports than for anyone else. That irony is that we are indeed subsidizing the cable industry. Perhaps, one could understand going back in 1975, when this subcommittee had hearings and when cable was more or less in its infancy, that possibly industries like ours could be asked to give a helping hand, so to speak. We objected to giving a helping hand, but we were asked to do so.

That was the result of the copyright law and obviously we gave it. And it has been an extremely valuable helping hand to a cable industry which has boomed in the intermediate years and has reached the proportions which Mr. Valenti has so effectively described. One has only to look at the Westinghouse, the Times Mirrors, New York Times, Dow Jones and Knight-Ridder to see the enormous conglomerate companies that have come into this business, attracted by the tremendous profitability and the prospect for profitability .

What we find so particularly ironic from the point of view of professional sports is that we in professional sports are continuing

under present law the subsidy, at a time when we are struggling very badly to make ends meet in terms of the finances of our businesses. It is characteristic of professional sports teams that they are marginal enterprises, is from an economic point of view.

The most recent year for which we in professional baseball have a comparative analysis of our profitability is 1979. Ernst and Whinney have made an analysis of that year for professional baseball. Their analysis shows that professional baseball was a loss operation in 1979. Eleven of our clubs made money. The rest either lost money or broke even in 1979.

We are an industry which is very significantly subsidizing the cable industry. There is something radically wrong with that arrangement. To make it worse, while cable has the most glowing prospect for the future—as Mr. Valenti has clearly demonstrated with the charts he has shown—Ernst and Whinney's projections for professional baseball show that we will suffer losses 10 times greater for the next 5 years than we have had in the last 5. So not only are our problems bad, but they promise to get very much worse. We must ask the subcommittee what sense does it make for us to be subsidizing cable under the circumstances such as these?

I suggest the answer obviously is that it makes no sense at all for the Fortune 500 to be subsidized by professional baseball and by the other professional sports who overall present a very marginal economic picture.

In 1975 when hearings were held on the revision of the copyright law, it was obvious everyone anticipated that the Federal Communications Commission would maintain a balance of regulation. Thus, we in professional sports reasonably expected, and the Congress I believe reasonably expected, that the Commission would see to it that, as far as distant signal carriage was concerned, there were reasonable regulations in place—regulations which would give reasonable protection to professional sports in the face of the compulsory license, which was imposed on us over our most strenuous objections.

Obviously, that expectation has not been fulfilled. As the chairman correctly stated in his opening remarks, what we have seen is a pattern of deregulation by the Commission to a point where, in the past year, the Commission has dropped its syndicated exclusivity rules and its distant signal rules. This has been the final blow to us in professional sports, taking away from us virtually the last vestige of the limited protection which we have had. Thus, the pattern of a balanced system of legislation and administrative regulation has vanished.

We, the subsidizers of cable are left with our product purloined on a daily basis and without help at this time from the Commission—except for the very limited sports rule, to which I will address a few remarks later.

Let's look at another direction—at the dramatic technological change which has occurred in cable television in those 5 or 6 years since you had hearings on the copyright revision bill. These dramatically impact on professional sports.

None is more dramatic than the superstation status of WTCG in Atlanta, now known as WTBS. In 1976 it became a superstation. Today, WTBS reaches almost 12 million cable homes in the United

States—in almost every State, if not every State, in the Union. WTBS reaches 56 percent of the cable homes in the United States, carries a schedule in 1981 of 150 Atlanta Braves games, which have plainly been added to the fare on WTBS so there would be additional baseball programing available.

Going on to look at the other superstations, all of whom have something very interesting in common, as you will perceive. WTBS is the flagship station of the Atlanta Braves obviously.

WSBK, which has been approved for superstation status but is not retransmitted via satellite carrier at the present time, is the flagship station of the Boston Red Sox.

WGN is the flagship station of the Chicago Cubs. WGN is also the flagship station of the Chicago White Sox.

KTTV, which has been approved for superstation status, is the flagship station of the Los Angeles Dodgers.

WOR is the flagship station of the New York Mets.

WPIX, New York, for which application has been filed and is pending is the flagship station of the New York Yankees.

And KTVU, for which application has been approved, is the flagship station of the San Francisco Giants.

Those are the actual or approved or pending flagship stations in the United States and every one is a flagship station of a major league baseball team. And I may tell you all—I am sure you realize this is so—it did not happen by chance. They were looking for baseball programing when they made their applications to the Federal Communications Commission for superstation status for these stations.

If you added up all of the professional sports programing available on those stations which I have just listed, from baseball, basketball, hockey, and soccer, you would have an average of three telecasts of major league sports events available to cable on each and every day of the year—this is an enormous flood of sports programing which is being put out into the marketplace.

This is done through the medium, as you know, of the resale carriers. The resale carriers do not seek the consent of baseball or basketball or football or hockey or soccer. They pay us nothing. They do not pay us even a compulsory licensing fee. And in the bargain they are among the most active advertisers and promoters of the value of the property of professional sports which they purloin.

We have attached as exhibits to our statement a number of the ads which appear on behalf of these resale carriers. They are quite dramatic.

Take WGN Chicago, the resale carrier of which is United Video. I have in front of me an add which appears among our exhibits. What this ad shows the logo of the Chicago Cubs on one side, logo of the Chicago White Sox on the other and says "Cubs if by day, Sox if by night. All on WGN." Because Chicago Cubs home games are played during the day, we've added the White Sox at night, the only American League schedule on satellite. This exciting combination features more than 200 American and National League games.

Mr. RAILSBACK. I am not watching the Cubs anymore.

Mr. KUHN. Somebody has to be out there, Congressman.

In addition to this kind of advertising by the resale carriers we have as exhibit 2 to my prepared statement, an ad that was run in Los Angeles at the beginning of April by Theta Cable Television. In this ad they say "39 games in April. If you run through it, they are all the superstations—the Braves, the Cubs, the White Sox, the Mets, all the superstations and they have games from everyone."

They lead in with this statement:

For the first time you will have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live, as it happens.

Four hundred games pumped into Los Angeles. It may be at the present time the Dodgers can withstand that kind of competition. But you can imagine how their flagship station feels; it thought that it had purchased exclusive television rights, and then there are 400 games coming into Los Angeles from around the country. Take this and transpose it to some of our struggling franchises. Look at Cleveland. Imagine what effect this would have in the Cleveland market. Look at Minnesota, a struggling club, and imagine what effect it would have on the Twins' gate, and on their ability to sell local television programing.

I can tell you that the impact would be enormous, and the destabilizing potential for professional sports is even more enormous. We pride ourselves in professional sports in trying to keep our franchises where they are. In baseball, we have prided ourselves, not with total success, but in the last decade, I am happy to say, with success in keeping our franchises stable. How long will we have stable franchises with this situation?

The Pittsburgh Pirates, one of our worst hit, has had to contend with 40 percent cable penetration. One of our worst hit franchises has actually had conversations with New Orleans about moving the Pittsburgh Pirates to New Orleans. One does not have to put too much imagination into it to think cable penetration has a role in the problems that the Pittsburgh Pirates are facing.

In 1979 the Pittsburgh Pirates won the National League pennant, won the World Series, and lost a million dollars. That was confirmed by a published, audited financial statement. There is no question that it is accurate.

That is the kind of problem we are facing in professional sports. When a world champion team loses a million bucks and plays in the World Series, which is a very valuable thing for a team to do, and loses a million bucks—this is the kind of problem that professional baseball is having and this could be multiplied throughout the other professional sports. And we are the ones who are subsidizing the cable industry today.

So for us, the ultimate conclusion is that while we struggle to create home markets where there is intensive interest in our product, where we can attract our own fans, bring them to the ball park, sell local broadcasting rights and make our franchises viable, the effort is undermined by the threat of enormous flooding and saturation of the markets by cable television.

It is a desperately serious problem for professional sports and I would ask that the panel and the Congress give serious consideration to the gravity of the problem which professional sports faces today in large measure because of cable television.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you for that informative statement.

[The complete statement of Mr. Kuhn follows:]

STATEMENT OF

BOWIE K. KUHN
COMMISSIONER OF BASEBALL

Before the House Subcommittee on
Courts, Civil Liberties and the
Administration of Justice

97th Congress, First Session

May 14, 1981

INDEX

Mr. Chairman, I am Bowie K. Kuhn, the Commissioner of Baseball. I appreciate the opportunity to appear before you and your Subcommittee to testify on the pressing need to alter the cable television compulsory licensing provisions of the Copyright Revision Act of 1976. In this regard, Mr. Chairman, your proposed bill, dated May 7, 1981, provides an enlightened starting point for discussion.

I am here today specifically representing the twenty-six clubs of Major League Baseball. However, the views that I will present are supported by the other major professional sports leagues -- the National Football League, the National Basketball Association, the National Hockey League and the North American Soccer League. They share Baseball's conviction that the existing compulsory licensing scheme is grossly inequitable, anachronistic and unnecessary, and that it will ultimately reduce the amount of sports programming on free television.

I. **Summary of Position -- The Compulsory Licensing of Live Sports Telecasts Should Be Abolished; At the Very Least, the Limitations on Compulsory Licensing in Sections 1 and 2 of Chairman Kastenmeier's Proposed Bill Should Be Enacted.**

The professional sports leagues strongly support the provisions of your draft bill, Mr. Chairman, which would restrict the overly-broad compulsory license now enjoyed by the cable industry. In particular, Section 1 would remove from compulsory licensing any programming not authorized to be carried under the FCC's signal carriage rules in effect on July 1, 1980, including the distant signal rules which the FCC recently voted to rescind. Section 2 would subject to copyright liability the retransmission of distant signal professional sports telecasts into the area within the home territory (50-mile radius) of a league member.

These amendments would correct some of the most serious shortcomings of the current statutory scheme. Indeed, absent the restrictions imposed by Sections 1 and 2, there would be virtually no limit to the vast amount of distant signal sports programming that cable systems might import into those major urban markets upon which sports clubs depend for their existence. Such home territory protection is especially critical

to the Major League Baseball clubs, which currently derive some 75 percent of their revenues from gate receipts.

While the amendments that you have proposed, Mr. Chairman, are sound and necessary, they do not completely address the inequities of the existing compulsory licensing scheme. This fundamental unfairness will continue to exist unless the Congress imposes full copyright liability upon cable for its retransmission of distant signal live professional sports events. Indeed, there is no justification for the compulsory licensing of any distant signal programming. But the case for sports is particularly compelling.

Live sports telecasts are unique among all programming fare. They are current, topical and ephemeral; unlike most other programming which can be shown time and time again, and from which revenues can be derived repeatedly, a live sports telecast has little or no value after the game is played. Accordingly, throughout the decade-long debate on the copyright revision legislation, the sports leagues have consistently maintained that compulsory licensing is inappropriate for sports telecasts. The leagues were never a party to, and indeed steadfastly opposed, the

compulsory licensing compromise between the Motion Picture Association and the National Cable Television Association which was incorporated into the 1976 Act.

It is important to note that, for a number of years, the copyright bills considered by Congress excluded sports from compulsory licensing. Those responsible for this exclusion correctly recognized that sports programming deserves "special consideration" because of its unique ephemeral nature and because

> "Unrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmission of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games."1/

These legitimate concerns, are of course, essentially the same as those which led Congress to enact the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 et seq.

In short, Mr. Chairman, the professional sports clubs create a very special product involving great

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1/ Senate Judiciary Comm., 93d Cong., 2d Sess., "Draft Report To Accompany S. 1361" at 33 (1974); Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., "Draft Report to Accompany S. 543" at 29 (1969).

effort, expense and risk. We strongly endorse the provisions in your draft bill which would afford sports some limited measure of control over the distribution of this product. However, our judgment continues to be that all distant signal professional sports programming should be excluded from compulsory licensing.

As you know, Mr. Chairman, we are not alone in our belief that compulsory licensing should be eliminated. During his recent testimony before the Senate Judiciary Committee, the Register of Copyrights, Mr. David Ladd, provided a thoughtful analysis of the theoretical underpinnings of the compulsory licensing scheme, its actual operation and technological and industry developments since 1976. Based upon this analysis the Register came to the unqualified conclusion that compulsory licensing of distant, non-network programming should be eliminated, explaining:

> "A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do." Ladd Statement at 56 (April 29, 1981).

The same position has been espoused by Mr. Henry Geller, the former head of the National Telecommunications and Information Administration of the Department of Commerce, and by others. In doing so, these eminent authorities have focused in part upon the "anomalies" and "unique problems" that compulsory licensing poses for sports. Certainly, there can be no stronger evidence of the need to reappraise the current compulsory licensing scheme than the recommendations of these individuals who have absolutely no economic stake in the controversy.

II. Basis for Position -- Compulsory Licensing of Sports Programming Is Inequitable, Anachronistic and Unncessary and Will Ultimately Lead To a Lessening of the Amount of Live Sports Programming on Conventional Television.

We earnestly believe, Mr. Chairman, that the retransmission of distant signal live sports telecasts never should have been subjected to compulsory licensing by cable. But we need not debate whether Congress' contrary determination in 1976 was appropriate. Since the enactment of the copyright revision legislation there have been a number of unforeseen and dramatic changes that have completely transformed the cable industry. These changes compel the conclusion that the current statutory telecasts must not be perpetuated.

A. Compulsory Licensing of Sports Programming Is Simply Inequitable -- It Requires Professional Sports Clubs, Which Typically Enjoy Only Marginal Economic Success, To Provide an Enormous Subsidy To the Cable Industry, Which Has Become Dominated By Some of the Nation's Largest and Most Profitable Conglomerates.

There is no question, Mr. Chairman, that the compulsory licensing fees paid by cable bear no relationship whatsoever to marketplace realities. They are shockingly inadequate. Consider, for example, the following facts --

> -- In 1979 the programming expenses negotiated by all U.S. television stations amounted to $1.34 billion, or approximately 25 percent of their gross broadcast revenues.[2/]
>
> -- In 1979 the cable industry, in bargaining with program suppliers, incurred $133.2 million in pay cable programming expenses, which comes to approximately 40 percent of its total pay cable revenues.[3/]

In stark contrast, the cable industry in 1979 paid $15.7 million in compulsory licensing fees[4/] -- or less than

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2/ See FCC, TV Broadcast Financial Data -- 1979, at Tables 4 and 5 (Dec. 9, 1980).

3/ See FCC, Cable Industry Financial Data -- 1979, at Tables II and IV (Dec. 29, 1980).

4/ Ladd Testimony at 18.

one percent of its total operating revenues.5/

These facts illustrate the size of the huge subsidy that all program suppliers have been forced to provide to the cable industry by way of cable's importation of distant signals under the compulsory licensing scheme. But the subsidy that has been extracted from the sports interests is even more telling.

In 1978, the first year of compulsory licensing, some 4,000 cable systems paid just under $13 million in royalties for their distant signal programming. The Copyright Royalty Tribunal allocated only 12 percent of this pool for all professional and collegiate sports telecasts, while the Motion Picture Association, which had negotiated the unrealistic fee schedule embodied in the Act, came away with 75 percent.6/ What this

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5/ See FCC, Cable Industry Financial Data -- 1979, at Table II (Dec. 29, 1980).

6/ Perhaps the most disturbing aspect of this entire chapter is the attempt by certain broadcasters to deprive the sports clubs of even this pittance. At several points during the decade-long consideration of the copyright legislation, representatives of the NAB and other major broadcast groups expressly asserted, before this committee and elsewhere, that the sports clubs would own the copyright in the telecasts of their games. Nevertheless, in the proceedings before the Copyright Royalty Tribunal, the NAB reversed its position and claimed that broadcasters are the copyright owners

[Footnote continued on following page]

means is that an average cable system, which might have imported some 200 live sports telecasts during 1978, would have paid less than $2 for each one of these telecasts. By way of comparison, individual television stations may pay tens of thousands of dollars for the right to televise a single regular season professional sports event locally, while a national network telecast of such an event may command hundreds of thousands of dollars.

It is simply wrong to require professional sports to provide such an enormous subsidy to any private commercial enterprise. But the absolute absurdity of it all is that the major recipients of these "contributions" are not small, struggling operations; to the contrary, they are the large, immensely successful conglomerates that now dominate the cable industry, entities such as --

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[Footnote continued]
entitled to the sports royalties. The Tribunal correctly rejected this argument, but the NAB has appealed the Tribunal's ruling to the United States Court of Appeals for the District of Columbia Circuit. See Copyright Royalty Tribunal Final Notice of Determination, 45 Fed. Reg. 63,026 (1980), appeals pending sub nom., National Association of Broadcasters v. Copyright Royalty Tribunal, Nos. 80-2273 et al. (D.C. Cir., filed Oct. 20, 1980).

-- Westinghouse, which has contracted to purchase the nation's second largest multiple system operator (MSO), Teleprompter, for an estimated price of $646 million.

-- Time, Inc., which in 1978 purchased American Television Communications, for $179.6 million, and which has recently purchased Midwest Video, to become the nation's largest MSO.

-- The Times-Mirror Company, which became the nation's sixth largest MSO when it purchased Communications Properties, Inc. for $128 million.

-- American Express and Warner Communications, which entered into a joint venture to become the nation's fifth largest MSO.

-- The New York Times, which purchased a chain of cable systems in New Jersey for $119 million.

-- Dow Jones/Knight Ridder, which has made a tender offer of $365 million for the stock of the nation's tenth largest cable company, UA-Columbia.

-- And a number of other major corporations, including the Hearst Corporation, Taft Broadcasting, Viacom, Newhouse Broadcasting, General Tire, Cox Broadcasting, Storer Broadcasting.

The domination of the cable industry by these corporate giants is beyond question. Industry sources disclose that the 25 largest MSOs control over 60 percent of all cable subscribers in the United States. Just the top 10 control nearly one-half of these subscribers.

It is not surprising that such prominent business concerns have rushed to take over the cable industry. According to the FCC's most recently available financial data, the cable industry had a pre-tax net income in 1979 of nearly $200 million, up over 45 percent just from 1978. This $200 million figure also represents an increase of some 640 percent over the approximately $27 million in net income that the cable industry had in 1975, just before Congress enacted the compulsory licensing scheme.7/ Moreover, industry sources disclose that in 1975 cable systems were purchased at a cost of approximately $300 per subscriber; today, the purchase price has tripled to some $900 per subscriber.

These glowing financial reports for the cable industry present a striking contrast to the situation of Major League Baseball. Indeed, in 1979 when the cable industry enjoyed its record high profit of some $200 million, only 11 of the 26 Major League Baseball clubs showed a profit. Baseball as a whole actually lost money.

7/ FCC, Cable Industry Financial Report -- 1979, at Table II (Dec. 29, 1980).

There is no doubt of the great popularity of Baseball. But popularity does not always translate into profitability. Because of the high costs associated with providing the public with quality baseball entertainment, more than half of the major league teams operate below or very near the break-even point. This pattern has been consistent over the last 15 years. Current projections show that losses in the next five years will be 10 times those of the previous five.

The question must be asked, Mr. Chairman: What justification can possibly exist for requiring business concerns which enjoy only marginal economic results, such as the Major League Baseball clubs, to subsidize some of the most successful of the Fortune 500 conglomerates? We submit that there is no basis, in reason or equity, to permit these corporate giants to expropriate the property of professional sports clubs pursuant to a compulsory licensing scheme.

B. In Light of Dramatic Technological and Regulatory Changes, the Compulsory Licensing of Sports Programming Has Become Anachronistic.

When your Subcommittee conducted hearings on the cable television aspects of the copyright legislation in the Fall of 1975 just before the passage of the

Copyright Act, technological and regulatory limitations permitted cable systems to import television signals only from the closest geographic markets. This situation has changed dramatically.

1. The Development and Proliferation of "Superstations," With Their Extensive Amounts of Sports Programming.

One year after you completed your 1975 hearings, Mr. Chairman, the signal of the Atlanta, Georgia television station WTCG (now WTBS) was first placed on satellite by a so-called "resale common carrier" and made available to cable systems throughout the country. The nationwide exposure of that signal has been phenomenal. As of March 31, 1981, WTBS reached a total of over 13 million homes on over 3,000 cable systems in virtually every state in the Union;[8/] this constitutes 65 percent of the approximately 20 million cable homes in America. The number of cable subscribers to WTBS is currently growing at the rate of some 57 percent each year.[9/] Other "resalers" have also placed

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8/ Cablevision Magazine, April 20, 1981 at p. 22.

9/ Id.

the signals of WGN-TV (Chicago, Illinois) and WOR-TV (New York, New York), on satellite. These signals are received by some 5.4 million and 3.3 million homes, respectively.10/

The lack of transponder capacity has apparently prevented the retransmission via satellite of other television signals. However, as a result of FCC authorization of additional satellites, this shortage will likely be alleviated in the next few years. When it is, there appears to be little doubt that additional superstations will be created. Indeed, the FCC has already approved the applications of various resalers who have sought authority to place the following signals on satellite -- WSBK-TV (Boston, Massachusetts); KTTV (Los Angeles, California); and KTVU-TV (San Francisco, California). Additional interest has also been exhibited in placing station WPIX-TV (New York, New York) on satellite.

It is no coincidence that a prime characteristic of each of the existing or potential superstations is its heavy concentration of sports programming. Each

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10/ Id.

of these stations is, in fact, the flagship station of one of the major league baseball clubs and televises a significant number of baseball games:

Station	Club	1981 Scheduled Telecasts
WTBS	Atlanta Braves	150
WSBK	Boston Red Sox	103
WGN	Chicago Cubs	146
WGN	Chicago White Sox	64
KTTV	Los Angeles Dodgers	49
WOR	New York Mets	100
WPIX	New York Yankees	109
KTVU	San Franciso Giants	31
	Total	752

When the 310 professional basketball, hockey and soccer games televised by these superstations are included, the total number of all sports telecasts swells to over 1062 per year. That means that superstation carriage of sports events averages nearly 3 telecasts each and every day of the year.

It is important to emphasize that the middlemen who place these sports telecasts on satellite and then sell them, for a profit, to cable systems nationwide have not sought the consent of the clubs concerned. Nor have they paid any compensation whatsoever to the clubs. To add insult to injury, these modern day pirates

market their superstation offerings by specifically promoting the programming that the sports clubs have created.

Attached as Exhibit 1 to this Statement are examples of the resalers' promotional literature. The emphasis that they place on sports programming is clear and unmistakable. It is also quite understandable since the cable systems themselves -- the customers of the resalers -- attempt to solicit their paying subscribers by emphasizing the sports telecasts on the superstation.

When you last conducted hearings on this matter in the Fall of 1979, Mr. Chairman, you emphasized that: "With respect to cable television the 1976 Act has been rapidly overtaken by changing business practices brought about by satellite technology . . . ."11/ FCC Commissioner Quello has also eloquently observed that "the advent of satellite distribution of TV signals has added a cataclysmic new dimension to copyright and to cable carriage of TV signals," and that: "There is a threat of gross basic inequities in program property

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11/ Cable Television and Performance Rights: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 96th Cong. 1st Sess. 2 (1979).

rights and also to an orderly system of TV allocations if satellite carriers continue to transmit broadcast signals to thousands of cable systems without retransmission consent."12/

There may be no better illustration of the point made by you and Commissioner Quello than that provided by the advertisement which one cable system placed in the Los Angeles Times at the start of this year's Baseball season.13/ (Exhibit 2.) The ad, which reprints the television schedule of the superstation baseball teams, is self explanatory:

> "For the first time you'll have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live, as it happens.
>
> "It's Theta's biggest baseball season! And you can reserve your box seat now by installing Theta Cable TV.

12/ Statement of Commissioner Quello on H.R. 3333, Before the House Communications Subcommittee, 96th Cong., 1st Sess. 3 (May 16, 1979).

13/ The ad was placed by Theta Cable, a 100,000 subscriber system which operates in the Los Angeles area. Theta Cable is owned by Teleprompter, the nation's second largest MSO.

"And that's not all. This year Theta also brings you pro basketball and hockey playoffs -- and more sports than any other single-channel subscription TV system in town!

"They're exclusive on Theta 24 hours a day. All at no extra charge to Theta subscribers who have a Channel Selector."

2. The FCC's Abdication of Responsibility for Cable Regulation.

Like the technology, the regulatory picture has changed drastically since the passage of the 1976 Act. During the six years since your Subcommittee considered the then-pending copyright legislation, the FCC has, for example --

-- deleted its "leapfrogging" rules, which generally prevented cable systems from importing independent television signals from any but the two closest television markets.

-- exempted cable systems with less than 1,000 subscribers from essentially all regulation.

-- eliminated the process by which it certified cable operations, thereby allowing cable systems to switch from one sports station to another on a seasonal, monthly and even daily basis.

-- expanded the categories of television signals which cable systems need not delete under the network nonduplication rules.

-- eliminated virtually all restrictions on the licensing of earth stations, which are used by cable systems for the reception of television signals from satellites.

-- as a result of court action, deleted its rules restricting the amount of sports and other programming available to pay cable.

-- as a result of court action, deleted its rules requiring cable systems to afford the public access to their facilities.

-- significantly relaxed its standards for granting waivers of the signal carriage rules which limit the number of distant signals cable systems may import; in so doing, it suggested that cable systems in major markets would typically receive such waivers.

As if this were not enough, a four-to-three majority of the FCC voted an end to virtually the last vestiges of cable regulation -- the signal carriage and syndicated exclusivity rules. The Commission majority, of course, did so notwithstanding your reasoned request and that of other Congressmen to defer such a substantial upheaval of the cable rules. If the Commission's action is upheld in the courts, the result will be that cable systems may carry any syndicated programming they wish without regard to the exclusivity arrangements for which syndicators and broadcasters

have bargained in the marketplace. Even more significant from our standpoint, the end of the distant signal restrictions will mean that cable systems may expropriate as much of our product as they wish -- subject only to the minimal, and wholly inadequate, restrictions of the Sports Rule discussed below. Indeed, recognizing the immense value of live sports programming, middlemen (such as the superstation resalers) may soon attempt to "cherry pick" this programming from a variety of television stations and to offer to cable systems throughout the country a single channel of highly desirable sports events.

In proposing elimination of the signal carriage and syndicated exclusivity rules, the FCC relied upon a number of studies that purportedly gauge the impact of this action on various parties. Significantly, the FCC studies fail even to mention, let alone discuss, the effect of eliminating these rules on professional sports. Although the leagues pointed this glaring omission out to the FCC, the FCC never undertook any separate study which attempted to assess the impact of its action on sports.14/

14/ The FCC's failure in this regard forms the basis of the sports leagues' separate petition for review of the Commission's action in the United States Court of Appeals for the Second Circuit. We respectfully

[Footnote continued on following page]

In short, we can understand, although we do not necessarily agree with, the decision to award cable the compulsory licensing privilege in recognition of heavy FCC regulation of that industry.15/ But we are at an absolute loss to comprehend the continued exemption of the cable industry from normal marketplace forces in light of today's virtually complete deregulation of that industry. Quite simply, Mr. Chairman, we do not believe Congress ever intended that cable should have it both ways.

3. The FCC's Failure to Impose Any Meaningful Restrictions on Cable Importation of Distant Signal Sports Programming.

As noted above, for a number of years the copyright bills considered by Congress excluded sports

[Footnote continued]
request that a copy of our brief on appeal, which we shall provide the committee, be incorporated into the transcript of this hearing.

15/ In its report accompanying the copyright legislation, the House Judiciary Committee noted:

> "[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

programming from compulsory licensing. However, it was later determined that because the FCC had initiated a rulemaking proceeding with respect to cable carriage of sports programming, such a legislative exclusion would be premature. Congress therefore included sports programming in the compulsory licensing scheme "without prejudice to the arguments advanced" by the sports interests.16/ As one leading proponent of this approach suggested: "[I]f the FCC's rules appear to reflect an improper balance between the concerns of sports and CATV, the Congress could investigate and hold full hearings for remedial legislations."17/

16/ The Senate Judiciary Committee noted:

> "The committee has considered excluding from the scope of the compulsory license granted to cable systems the carriage in certain circumstances of organized professional sporting events. . . . Without prejudice to the arguments advanced in behalf of these proposals, the committee has concluded that these issues should be left to the rule-making process of the Federal Communications Commission or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce." S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975) (emphasis added.)

17/ 120 Cong. Rec. S. 16155 (daily ed. Sept. 9, 1974) (remarks of Sen. Tunney) (emphasis added). See also 120 Cong. Rec. S. 16158 (remarks of Sen. Hruska).

The FCC's "Sports Rule," 47 C.F.R. § 76.67, reflects just such an improper balance. It does no more than prevent cable systems located within 35 miles of the home team's community from importing the distant signal telecast of a game involving that team -- provided that the home team does not televise the game locally; provided that the cable system does not have less than 1,000 subscribers; provided that the distant signal is not "grandfathered" on the system; and provided that the home team complies with all of the notice requirements adopted by the FCC.

As an illustration, if the California Angels were playing the Chicago White Sox in Anaheim, the only protection afforded is against the imporation by Los Angeles area cable systems of the signals from the White Sox television station, WGN-TV. These cable systems can still import the telecasts of games of all the other 24 major league teams, as well as the telecasts of any Angels' away games, thereby destroying the exclusivity granted to the Angels' flagship station and affecting the Angels' home gate. As noted above, Theta Cable boasts that it will import the telecasts of <u>over 400</u> baseball games on the three superstations in Atlanta, Chicago, and New York. Of this number, the Angels can

request, under the Sports Rule, that Theta Cable delete only 6 telecasts.18/

Furthermore, the Sports Rule's ban on cable's importation of the home game extends only 35 miles. Thus, the distant signal telecast of the home game is available to cable systems in scores of suburbs within an easy hour's drive of the home stadium. Ironically, the Commission refused to extend the zone of protection beyond 35 miles primarily because its signal carriage rules -- most of which it has now decided to repeal -- were geared to the 35-mile zone. See Report and Order in Docket 19417, 54 F.C.C.2d 265, 282 (1975).

Even where the Sports Rule does apply, there is no guarantee that cable systems will comply with it. In a recent pleading before the FCC, Baseball has documented its frustrating experiences with those cable systems which repeatedly seek to excuse their violations of the Sports Rule by advancing the cable industry talisman of "inadvertence."19/ We have asked the

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18/ The Dodgers can request the deletion of an additional 15 telecasts.

19/ We request that this pleaing, which will be provided to the Committee, be incorporated into the transcript of these hearings. See also Ladd Statement at 38, concerning "inadvertant" violations of the Sports Rule.

Commission to exercise its monetary forfeiture authority against certain systems in the hope that this will deter future violations. We anxiously await the Commission's response.20/

When the Sports Rule was adopted, the National Cable Television Association conceded that it is reasonable. See Report and Order in Docket 19417, 54 F.C.C.2d 265, 281 (1975). And, to be sure, the rule affords a measure of relief which is critically important. But this minimal protection is wholly inadequate and does not reflect that proper balancing of competing interests that Congress apparently envisioned when it last considered excluding sports programming fromrom compulsory licensing.

20/ Approximately one and one-half years ago, on December 6, 1979, and then again on February 1, 1980, the National Basketball Association filed similar petitions to initiate forfeiture proceedings against cable system that had allegedly violated the Sports Rule. The FCC is required to initiate such a proceeding within one year after the alleged violation. 47 C.F.R. § 1.80(c). The FCC has yet to take any responsive action. The failure of the Commission to take any such action to date means that it no longer has the authority to impose a forfeiture in the NBA cases.

C. In View of the Actual Marketplace Dealings Between the Sports Club and Cable, Compulsory Licensing of Sports Programming Is Unnecessary.

Congress adopted a compulsory license scheme believing that it would be "impractical and unduly burdensome" to require cable systems to negotiate with copyright owners. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976). Cable's experience in bargaining with the sports interests for the carriage of our games during the past several years conclusively demonstrates that there is no factual basis for this theoretical assumption.

For the third season in a row, Baseball has negotiated a contract with USA Network to distribute via satellite a game-of-the-week to cable systems across the country; the National Basketball Association, National Hockey League, North American Soccer League and other professional and collegiate sports interests also cablecast a number of their events over USA Network. Another cable program packager, the Entertainment and Sports Programming Network (ESPN), has contracted with professional, collegiate and amateur sports interests; it presents continuous sports programming to cable systems throughout the United States. Both USA Network and ESPN are currently received by more cable subscribers

than all but two of the approximately 30 program services available to cable systems via satellite.21/

It is also important to underscore that a number of individual professional sports clubs have successfully negotiated with cable systems and subscription television operations. As a result, the public has been offered telecasts of games that would not otherwise have been available:

Professional Sports Clubs
With Cable Deals

Club	Cable Packager	No. of Games
New York Mets	Cablevision Program Services	40
New York Yankees	Cable Vision Services	40
Pittsburgh Pirates	Action TV	12
Philadelphia Phillies	Prism	30
Cincinnati Reds	Warner Qube	7
	Reds on Cable	8
New York Islanders	Cablevision Program Services	40
New York Rangers	MSG Cable	40
	USA Network	37
Buffalo Sabres	International Cable	25
Philadelphia Flyers	Prism	40
Hartford Whalers	ESPN	10
Washington Capitals	ESPN	10
	USA Network	5
New York Knicks	MSG Cable	41
New Jersey Nets	Cablevision Program Services	41
Philadelphia 76ers	Prism	25
San Antonio Spurs	UA Columbia	10

21/ Station WTBS ranks No. 1; the Christian Broadcasting Network, whose service is available gratis, ranks No. 2. Another satellite package, C-SPAN, has approximately the same number of subscribers as USA Network. Cablevision Magazine, Apr. 20, 1981, at p. 22.

Moreover, a number of other clubs have successfully negotiated deals with subscription television operations, including the Los Angeles Dodgers, California Angels, Milwaukee Brewers, Detroit Tigers, Cincinnati Reds, Los Angeles Kings, Detroit Red Wings, New Jersey Nets, Los Angeles Lakers, Phoenix Suns, and Dallas Mavericks.

There is further evidence that the cable industry has the ability to negotiate in the marketplace for sports programming, and that it does not need a compulsory license. As discussed above, the cable industry has become dominated by some of the nation's largest corporate enterprisers who surely, at the very least, are the equals of the sports clubs at the bargaining table. Indeed, many of these enterprises are already bargaining for sports programming through their broadcast subsidiaries; there is no reason whatsoever that they could not bargain for the programming on their cable subsidiaries. As the following chart illustrates many of our clubs' "flagship" stations are owned by corporations with significant cable interests:

Professional Flagship Stations
With Cable Interests

Club	Station	Corporate Parent of Station
Chicago Cubs	WGN	Tribune Co.
Chicago White Sox	WGN	Tribune Co.
Chicago Sting	WGN	Tribune Co.
Chicago Bulls	WGN	Tribune Co.
Denver Nuggets	KWGN	Tribune Co.
Colorado Rockies	KWGN	Tribune Co.
Pittsburgh Pirates	KDKA	Westinghouse
San Francisco Giants	KTVU	Cox
Boston Red Sox	WSBK	Storer
Boston Bruins	WSBK	Storer
Los Angeles Kings	KHJ	General Tire
Los Angeles Lakers	KHJ	General Tire
New York Cosmos	WOR	General Tire
New York Mets	WOR	General Tire
New York Knicks	WOR	General Tire
New York Islanders	WOR	General Tire
New York Rangers	WOR	General Tire
New Jersey Nets	WOR	General Tire
Boston Celtics	WBZ	Westinghouse
Cincinnati Reds	WLWT	Multimedia
Hartford Whalers	WVIT	Viacom

Can one believe that Westinghouse, which negotiated on behalf of station WBZ with the Boston Celtics, would not be able also to negotiate on behalf of Teleprompter cable, which it has offered to purchase for approximately $646 million?

The sports leagues are in business to do business; they cannot afford to ignore obvious and valuable business opportunities. The Baseball clubs alone present nearly 1,600 broadcasts each season over conventional television (Exhibit 3), as well as a number

of others over cable and STV. Moreover, as the Register of Copyrights recently testified before the Senate Judiciary Committee, "Cable is aggressively moving to satisfy the insatiable American appetite for sports. Its widening success belies the need for a compulsory license to supply sports programs." Ladd Statement at 39. In short, when the marketplace has been left to function, there have not been any practical barriers to dealings between cable and the sports interests. Thus, the basis on which compulsory licensing has been explictly justified in the past simply does not exist.

D. Allowing Cable To Expropriate Our Product in a Way Which Is Destructive of the Very Concept of a Sports League Will Ultimately Result in a Reduction of Sports Telecasts. Thus, Compulsory Licensing Is Contrary to the Public Interest.

We earnestly believe, Mr. Chairman, that there is ample justification for eliminating the compulsory licensing scheme wholly apart from the direct effect that it has on the sports interests. This scheme is, as we have detailed above, inequitable, ill-suited to the present technological and regulatory climate, and plain unnecessary. Nevertheless, in our judgment, the most disturbing aspect of all is that compulsory licensing deprives the sports clubs of the inherent

right of any entrepreneur -- the right to control the distribution of his own product; and it permits cable to expropriate this product in a way which maximizes cable's profits but is squarely contrary to the best interests of the clubs themselves.22/

A sports club cannot continue to exist unless it successfully cultivates the loyalty and support of its hometown fans. It depends upon these local fans to come to the ball park and to view the club's games over television. As noted, some 75 percent of a Major League Baseball club's revenues are derived from gate receipts, and an additional 12 percent comes from local broadcast revenues -- obviously all of this is attributable to the local fan.

The professional sports interests have had over 30 years of experience dealing with conventional television. It is this experience which convinces us of the harm posed by the uncontrolled importation of a large number of competing telecasts. If the leagues

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22/ We have detailed our concerns over the effect of compulsory licensing on sports in several pleadings filed with the FCC. We request that our comments in the FCC's proceeding to eliminate the distant signal rules, which we will supply, be made a part of the transcript of these hearing to the Committee.

could successfully function with the clubs invading each others' home markets with their telecasts, the clubs would have long since changed their telecasting patterns to take advantage of the additional revenues which this extraterritorial telecasting would provide. However, as we have understood for years, the introduction of substantial amounts of competing telecasts over either conventional television or cable television poses a serious threat to the very determinant of a club's success -- to the following of its hometown fans as that is reflected in the size of its gate and the value of its broadcast rights.

The weaker teams in particular are susceptible to the potentially devastating effect of having their home territories saturated by a glut of sports telecasts from distant markets. And, as Congress concluded, when it passed the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 et seq., "Should these weaker teams be allowed to founder, there is danger that the structure of the league could become impaired and its continued operation imperiled."23/

23/ H.R. Rep. No. 87-1178, 87th Cong., 1st Sess. 3 (1961); S. Rep. No. 87-1087, 87th Cong., 1st Sess. 2 (1961).

The sports interests cannot long live with the effects of cable's uncontrolled importation of distant signal sports telecasts pursuant to the existing compulsory licensing scheme. For Baseball, at least, the only alternative may be to change its established telecasting practices by reducing the number of games available over local television stations. This is a result that we earnestly wish to avoid.

III. Conclusion -- The Congress Must Act Now Before Cable Becomes Entrenched in Those Major Urban Markets Upon Which the Clubs Depend.

In sum, Mr. Chairman, the professional sports leagues urge the abolition of compulsory licensing for sports programming. As we have discussed above, there are a number of reasons which compel this conclusion.

First, the present law is grossly inequitable. It requires professional sports clubs -- many of which are only marginally viable -- to subsidize the increasingly concentrated, profitable and rapidly growing cable industry, which has become dominated by some of the nation's largest and most financially viable conglomerates. Cable certainly can afford to enter the marketplace to bargain for its programming.

Second, compulsory licensing has become an anachronism. Since the Act's adoption in 1976 there have been profound changes in communications technology and the virtually total abdication of regulatory responsibility for cable by the FCC. The basic conditions of the communications industry, which were then thought to underlie compulsory licensing, no longer exist.

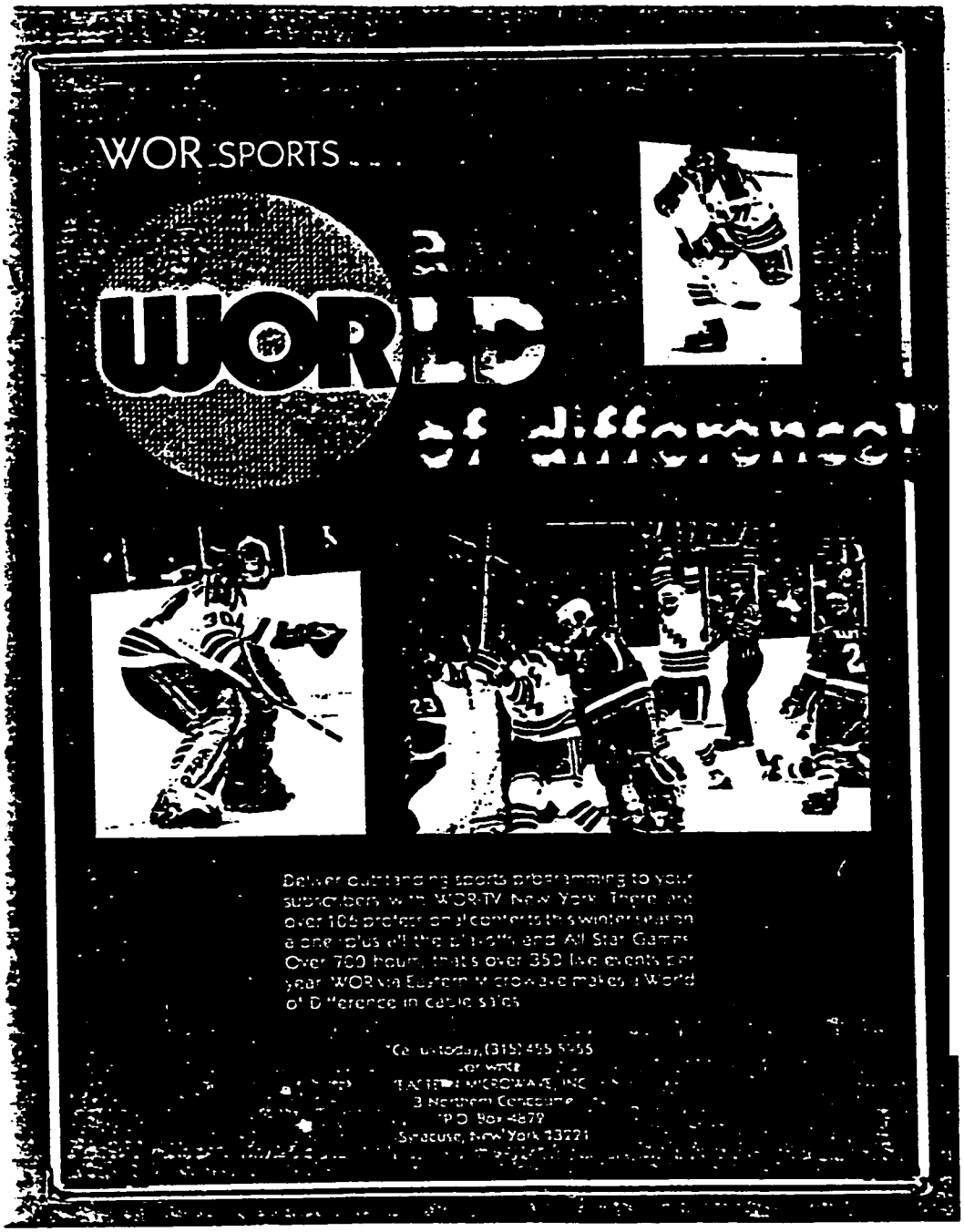
Third, cable companies have had no trouble in successfully negotiating with sports interests when they have wanted to do so. Our history of dealing with cable systems as entrepreneurs makes it clear that the fear that cable TV could not obtain programming in the marketplace is groundless.

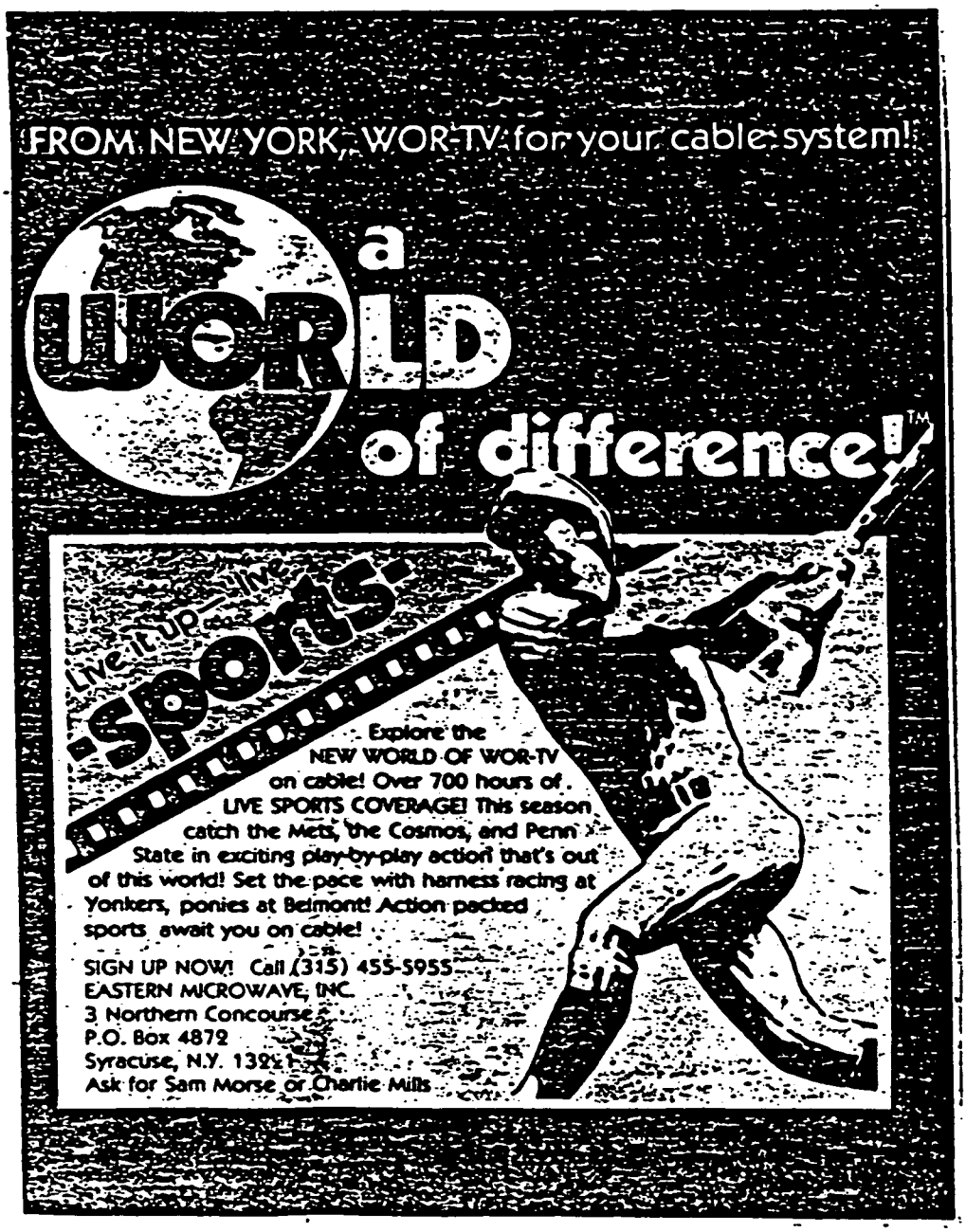
Fourth, the inexorable result of the present statutory system will be a decrease in live, over-the-air broadcasts of sports events. Only in this way can the sports interests ensure the successful operation of the league.

Mr. Chairman, for all the above reasons the professional sports leagues strongly urge you to abolish compulsory licensing. At the least, we urge adoption of Sections 1 and 2 of your proposed bill, which provide

some limitation on the overly-broad compulsory licensing scheme. Above all, Mr. Chairman, we urge you to act immediately. Cable is how entering those major urban markets upon which we depend so critically; virtually every one of these markets is in one stage or another of the cable franchising process. Don't wait for an autopsy before you take that action which is so pressingly needed.

EXHIBIT 1





1981 NEW YORK METS BASEBALL

WOR-TV Televised Games

EXH - EXHIBITION TWI-TWI NIGHT DH - DOUBLEHEADER

EXHIBITION SCHEDULE

					NYCT
MARCH					
Mon.	23	**Mets**	Los Angeles	at St. Petersburg	7:30 PM
APRIL					
Thurs.	2	**Mets**	Cincinnati	at St. Petersburg	7:30 PM
Sun.	5	**Mets**	Atlanta	at St. Petersburg	1:30 PM

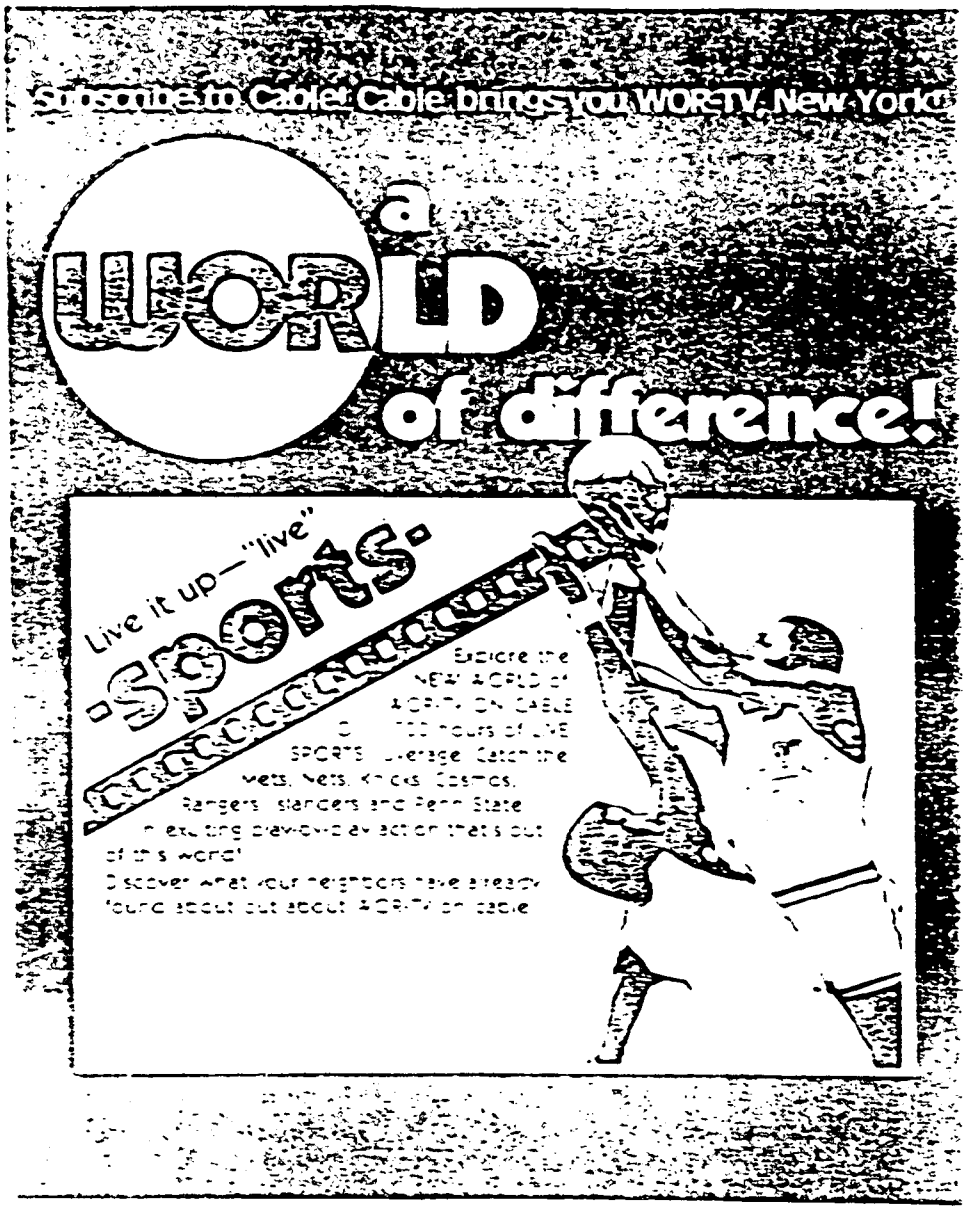
REGULAR SEASON SCHEDULE

Thurs.	9	**Mets**	Chicago	Away	2:30 PM
Sat.	11	**Mets**	Chicago	Away	2:15 PM
Sun.	12	**Mets**	Chicago	Away	2:15 PM
Tues.	14	**Mets**	St. Louis	Home (Open Day)	2:00 PM
Sat.	18	**Mets**	Montreal	Home	2:00 PM
Sun.	19	**Mets**	Montreal (DH)	Home	1:00 PM

					NYCT
APRIL					
Wed.	22	Mets	Pittsburgh	Away	7:30 PM
Sat.	25	Mets	Montreal	Away	1:30 PM
Sun.	26	Mets	Montreal	Away	1:30 PM
Wed.	29	Mets	Pittsburgh	Home	8:00 PM
MAY					
Sat.	2	Mets	San Diego	Home	2:00 PM
Sun.	3	Mets	San Diego (DH)	Home	1:00 PM
Wed.	6	Mets	San Francisco	Home	8:00 PM
Fri.	8	Mets	Los Angeles	Home	8:00 PM
Sat.	9	Mets	Los Angeles	Home	2:00 PM
Sun.	10	Mets	Los Angeles	Home	2:00 PM
Wed.	13	Mets	San Diego	Away	10:00 PM
Sat.	16	Mets	Los Angeles	Away	10:00 PM
Sun.	17	Mets	Los Angeles	Away	4:00 PM
Tues.	19	Mets	San Francisco	Away	10:30 PM
Fri.	22	Mets	St. Louis	Away	8:30 PM
Sun.	24	Mets	St. Louis	Away	2:15 PM
Mon.	25	Mets	Philadelphia	Home	2:00 PM
Wed.	27	Mets	Philadelphia	Home	8:00 PM
Fri.	29	Mets	Chicago	Home	8:00 PM
Sat.	30	Mets	Chicago	Home	2:00 PM
Sun.	31	Mets	Chicago	Home	2:00 PM
JUNE					
Wed.	3	Mets	Philadelphia	Away	7:30 PM
Fri.	5	Mets	Houston	Away	8:30 PM
Sat.	6	Mets	Houston	Away	8:30 PM
Tues.	9	Mets	Cincinnati	Home	8:00 PM
Thurs.	11	Mets	Cincinnati	Home	8:00 PM
Fri.	12	Mets	Houston	Home	8:00 PM
Sat.	13	Mets	Houston	Home	7:00 PM
Sun.	14	Mets	Houston	Home	2:00 PM
Thurs.	18	Mets	Cincinnati	Away	7:30 PM
Sat.	20	Mets	Atlanta	Away	7:30 PM
Sun.	21	Mets	Atlanta	Away	2:00 PM
Tues.	23	Mets	Montreal	Away	7:30 PM

					NYCT
JUNE					
Fri.	26	Mets	St. Louis	Home	8:00 PM
Sat.	27	Mets	St. Louis	Home	7:00 PM
Tues.	30	Mets	Chicago	Home	8:00 PM
JULY					
Wed.	1	Mets	Chicago	Home	8:00 PM
Sat.	4	Mets	Pittsburgh	Away	5:00 PM
Sun.	5	Mets	Pittsburgh (DH)	Away	1:00 PM
Tues.	7	Mets	St. Louis	Away	8:30 PM
Thurs.	9	Mets	St. Louis	Away	8:30 PM
Fri.	10	Mets	Philadelphia	Away	8:00 PM
Sat.	11	Mets	Philadelphia (DH)	Away	5:30 PM
Sun.	12	Mets	Philadelphia	Away	1:30 PM
Fri.	17	Mets	San Diego	Home	8:00 PM
Sat.	18	Mets	San Francisco	Home	7:00 PM
Sun.	19	Mets	San Francisco	Home	2:00 PM
Wed.	22	Mets	Los Angeles	Home	8:00 PM
Fri.	24	Mets	San Diego	Away	10:00 PM
Sat.	25	Mets	San Diego	Away	10:00 PM
Sun.	26	Mets	San Diego	Away	4:00 PM
Tues.	28	Mets	Los Angeles	Away	10:30 PM
Wed.	29	Mets	Los Angeles	Away	10:30 PM
Fri.	31	Mets	San Francisco	Away	10:30 PM
AUGUST					
Sat.	1	Mets	San Francisco	Away	4:00 PM
Sun.	2	Mets	San Francisco	Away	4:00 PM
Fri.	7	Mets	Pittsburgh	Home	8:00 PM
Sat.	8	Mets	Pittsburgh	Home	2:00 PM
Tues.	11	Mets	Chicago	Away	2:30 PM
Fri.	14	Mets	Philadelphia	Home	8:00 PM
Sat.	15	Mets	Philadelphia	Home	4:00 PM
Sun.	16	Mets	Philadelphia	Home	2:00 PM
Tues.	18	Mets	Atlanta	Away	7:30 PM
Sat.	22	Mets	Cincinnati	Away	7:00 PM
Sun.	23	Mets	Cincinnati	Away	2:15 PM

					NYCT
AUGUST					
Tues.	25	Mets	Houston	Home	8:00 PM
Wed.	26	Mets	Houston	Home	8:00 PM
Fri.	28	Mets	Cincinnati	Home	8:00 PM
Sat.	29	Mets	Cincinnati	Home	7:00 PM
Sun.	30	Mets	Cincinnati	Home	2:00 PM
SEPTEMBER					
Tues.	1	Mets	Houston	Away	8:30 PM
Wed.	2	Mets	Houston	Away	8:30 PM
Sat.	5	Mets	Atlanta	Home	2:00 PM
Sun.	6	Mets	Atlanta	Home	2:00 PM
Wed.	9	Mets	Pittsburgh	Away	7:30 PM
Fri.	11	Mets	St. Louis	Away	8:30 PM
Sun.	13	Mets	St. Louis	Away	2:15 PM
Tues.	15	Mets	Philadelphia	Home	8:00 PM
Wed.	16	Mets	Philadelphia	Home	8:00 PM
Sat.	19	Mets	St. Louis	Home	2:00 PM
Sun.	20	Mets	St. Louis	Home	2:00 PM
Mon.	21	Mets	Pittsburgh	Home	8:00 PM
Sat.	26	Mets	Montreal	Away	1:30 PM
Sun.	27	Mets	Montreal	Away	1:30 PM
Wed.	30	Mets	Chicago	Home	8:00 PM
OCTOBER					
Sat.	3	Mets	Montreal	Home	2:00 PM
Sun.	4	Mets	Montreal	Home	2:00 PM



A BULLETIN FROM EASTERN MICROWAVE ON WOR

SUBSCRIBERS SURRENDER TO WOR-TV SPORTS LINE-UP

As a cable system owner you know that the best way to add and keep subscribers is to offer top alternative viewing. This includes a station your customers can turn to for all the popular major sports. WOR-TV (New York) via Eastern Microwave is the winning strategy that will capture subscribers for your cable system.

As the nation's largest sports station, WOR programs more than 700 hours of live sports each year. This breaks down to approximately 200 live local events per year. No other station carries as many.

Included on the schedule are six professional teams. The Mets, Knicks, Nets, Rangers, Islanders and Cosmos.

In addition to these professional team sports, WOR programming includes Penn State collegiate football (delayed) and harness racing from Yonkers. Twice a week, 52 weeks a year. This year, the Amazin' Mets are scheduled for 132 televised games, while the Cosmos, North America's best soccer team, appear 13 times.

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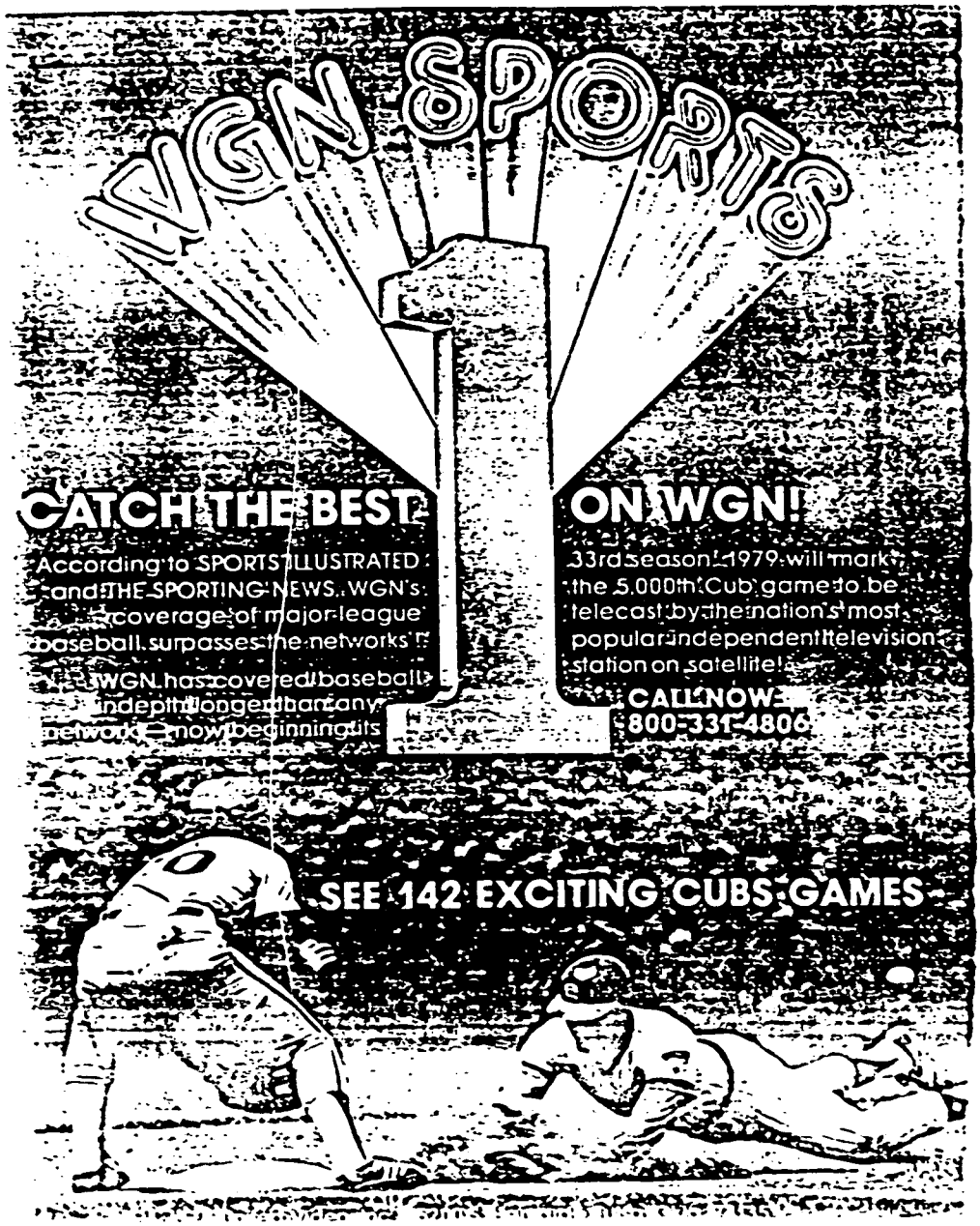
EASTERN MICROWAVE, INC.

3 Northern Concourse
P.O. Box 4872
Syracuse, NY 13221

EXHIBIT 2



Cablevision, January 12, 1981, Pages 62-63

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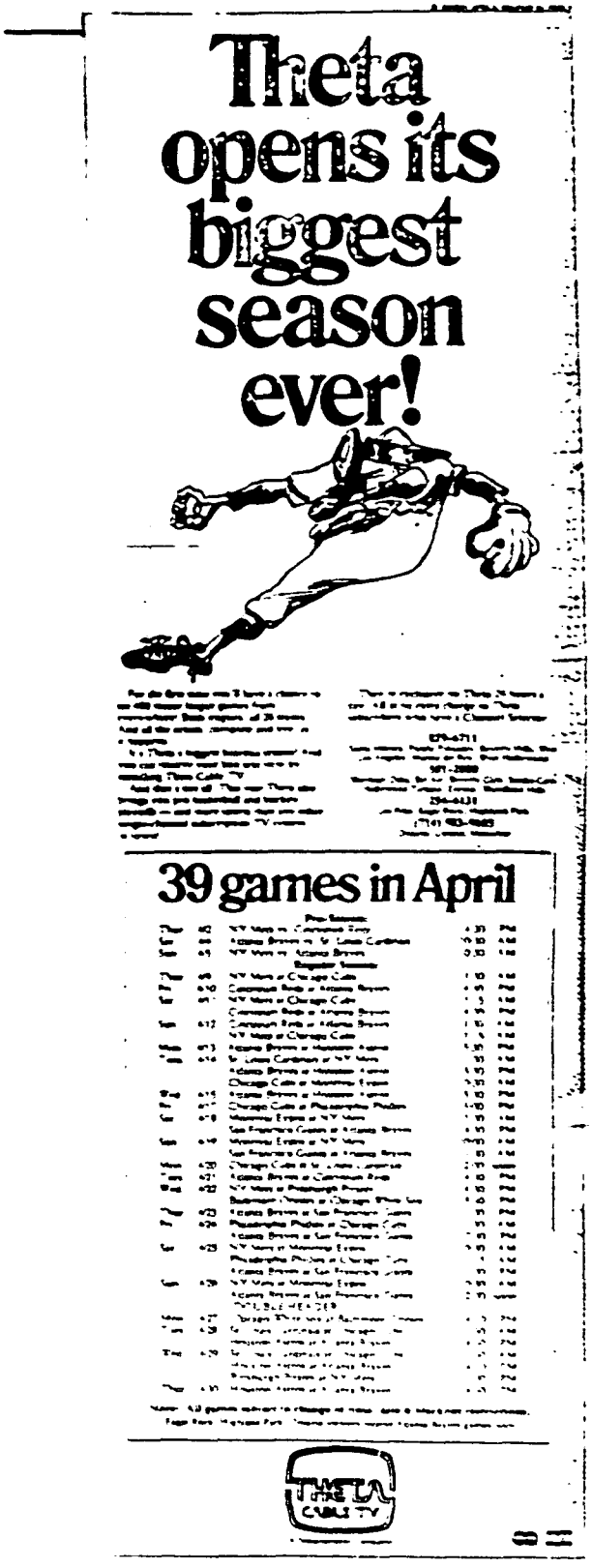

EXHIBIT 3

MAJOR LEAGUE BASEBALL SCHEDULED TELECASTS -- 1981

Team	Number of Games			
	Home	Away	Exhibition	Total
Atlanta Braves	77	70	3	150
Baltimore Orioles	5	50	2	57
Boston Red Sox	31	69	3	103
California Angels	5	25	1	31
Chicago Cubs	81	65	0	146
Chicago White Sox	12	52	0	64
Cincinnati Reds	0	43	2	45
Cleveland Indians	25	45	1	71
Detroit Tigers	14	38	0	52
Houston Astros	0	76	7	83
Kansas City Royals	0	44	1	45
Los Angeles Dodgers	0	45	4	49
Milwaukee Brewers	0	60	1	61
Minnesota Twins	4	46	0	50
Montreal Expos	22	17	0	39
New York Mets	50	47	3	100
New York Yankees	45	61	3	109
Oakland Ahtletics	10	20	0	30
Philadelphia Phillies	14	63	3	80
Pittsburgh Pirates	3	41	1	45
San Diego Padres	0	39	3	42
St. Louis Cardinals	0	38	2	40
San Francisco Giants	0	30	1	31
Seattle Mariners	0	19	1	20
Texas Rangers	0	26	1	20
Toronto Blue Jays	13	9	0	22
	411	1,138	43	1,592

Next, the Chair would like to call on Mr. Vincent Wasilewski representing the National Association of Broadcasters. Mr. Wasilewski is president of the NAB and has also been a witness before this committee. We are pleased to greet him.

Mr. WASILEWSKI. Thank you. I will cut down my statement also Mr. Chairman, and try not to be too redundant. We thank you for the opportunity to present our views. We are most appreciative that you are conducting these hearings as part of the process of reviewing and revising the nature of cable television's copyright liability under the 1976 Copyright Act. We enthusiastically endorse and support your effort. Your willingness to revisit and reopen a complex, controversial subject which you thought resolved once and for all only 5 years ago, is especially praiseworthy.

From our perspective, Mr. Chairman, the marketplace should be permitted to function freely unless there are compelling public interest reasons dictating governmental intervention.

Thus, we urge that cable carriage of distant signals no longer receive the special treatment accorded it by the present compulsory license. Cable carriage of the signals of local broadcast stations, which is required by FCC regulation, for valid reasons, should be subject to a gratis compulsory license. Apart from the communications policy rationale for requiring local signal carriage and justifying special copyright treatment, carriage of local signals poses none of the problems of harm or unfairness which demand normal liability for carriage of distant signals. In 1976, you recognized this by requiring no specific additional payment for carriage of local signals. This should carry through into the revision of the law you are now undertaking. We would suggest, however, that you also require carriage of all local signals. It would disrupt the present marketplace tremendously to open the door to noncarriage of local signals. Broadcasters produce the purchase programing on the basis of complete access to the audience within their service areas. Cable operators should not be permitted to foreclose competition from their local broadcast competitors. They should not be permitted to deny broadcasters access to the audience they rightfully anticipated serving in securing rights to show programing. In short, leaving cable operators total discretion to carry or not to carry local signals would unsettle the existing marketplace for copyrighted program product.

Without a doubt, the compulsory license does give cable systems an unfair competitive advantage not only over their broadcast station competitors, but also over any other video programing service such as MDS, the multipoint microwave service which now provides entertainment programing to hotels, apartments, condominimums, and private homes in certain areas. The compulsory license permits cable systems literally to escape the marketplace in the acquisition and exhibition of programing carried on distant broadcast signals. All they need do is pay miniscule royalty fees to the Copyright Office on a semiannual basis. Those fees range from a minimum of $15 to several percent of the systems' basic service revenus. In contrast, a broadcaster must enter the marketplace and compete with other stations for programing. Prices and terms are set in marketplace negotiations. Each program package or series is the subject of separate competition and negotiations. As a result,

the average broadcast station devotes over 26 percent of its revenues to production and procurement of programing to provide one channel of service, while its cable competitor provides multiple channels of comparable programing for or 2 percent of its subscriber revenue from that service.

On an industrywide basis, this disparity translates into a glaring inequity. In 1979, the latest year for which records are available, broadcast stations and networks paid over $4 billion for the programing they broadcast, while cable systems paid less than $16 million for the compulsory license to retransmit the same programming to their subscribers. We have attached as an appendix to my statement a more detailed program cost comparison which confirms that any way one looks at it, cable systems pay only 1 or 2 percent of the marketplace cost borne by broadcasters to show the same programing to a potential audience of comparable size. The disparity in program costs for the same programing, beyond its inherent unfairness, causes harm to broadcast stations. Bargain basement compulsory license fees have enabled cable sytems to carry multiple channels of broadcast programing. This subsidized competition has fragmented local stations' audiences. Because broadcast station revenue bears a close relationship to the station's audience, stations suffer economic harm. Consequently, the quality of program service they can provide deteriorates, and the majorty of the public which finds cable unavailable or unaffordable suffer that loss of service. Notably, the FCC in its so-called economic inquiry never denied the adverse effect of cable importation of distant signals on local stations' audiences. In fact, the FCC's studies, like those of NAB, confirmed that increased carriage of distant signals would produce increasing audience losses, which would be compounded by concurrent growth of cable television. In short, the present compulsory license subsidizes activities which result in economic harm to broadcasters. More to the point, it grants a further advantage to the cable system in that the harm from this subsidized activity is visited on a direct competitor, the local broadcaster.

The dramatic effect which cable televisions's carriage of distant signals can have on local station audiences is illustrated by audience data from Bakersfield, Calif., a heavily cabled market with substantial distant signal carriage. Those data are submitted in an appendix to this statement.

Despite its advantageous position outside the marketplace, cable relies on its compulsory license to flout and disrupt the program marketplace—again, in a manner especially harmful to broadcast stations. Syndicated programing is programing which is sold by a program producer or authorized distributor ("syndicator") directly to a local broadcast station for its use in its market. Network affiliated stations, as well as independent stations, purchase syndicated programing to complement their local and network programs. Although broadcast stations invariably bargain with producers for exclusive rights to show programs in their markets, and the producers agree not to permit other competing media to show the program, cable systems need not respect the contractual exclusivity provisions bargained for and paid for by local broadcast stations in their acquisition of syndicated programing. Thus, for

example, a Madison, Wis., station may purchase the syndicated version of "The Mary Tyler Moore Show" with exclusivity against exhibition of the show by both other broadcast stations and cable systems within its local market area—35-mile zone. Under the compulsory license a cable system still may carry "The Mary Tyler Moore Show" on a distant signal from Chicago or New York, for example, without the slightest regard for the exclusivity rights agreed to by the broadcaster and the program supplier. In fact, the cable system could import numerous signals in which "The Mary Tyler Moore Show" appears. The Madison station, having paid a substantial price for an exclusive right to exhibit "The Mary Tyler Moore Show" in its market then may find that the cable system is also showing it 10 or 15 times a week via carriage of distant stations which broadcast "The Mary Tyler Moore Show." To the local broadcaster who has paid a small fortune for "The Mary Tyler Moore Show," this represents real and present inhibition on his ability to compete and to provide the most attractive service to all the viewers in his community. The broadcaster simply may find especially attractive syndicated programing unaffordable if exclusive rights cannot be enforced. To the viewer, this may mean a program of lesser expense and lesser quality than an especially attractive series like "The Mary Tyler Moore Show" which enjoyed a long and successful network run. To the station it is uncertainty and confusion. Syndicated program purchases made, perhaps, well in advance of exhibition dates ultimately may prove to be unwise when local cable systems change distant signals or the distant stations themselves change their program schedules. In short, stations may be expected to compete with competitive stations or exhibitors who are on the same footing in the marketplace. It is something else, and indeed, nearly impossible, to anticipate the unknown, namely, what many local cable systems and more numerous distant broadcast stations will do in the selection and scheduling of syndicated programing.

The effect on the local station's audience is again illustrated by the Bakersfield example. The substantial potential for injury in dollar terms is discussed more thoroughly in the statement of David Polinger, vice president of WPIX in New York, also appended to this statement.

Congress and this subcommittee never intended that the deep and widespread economic harm and disruption would result from the establishment of a compulsory license to cover cable carriage of broadcast signals. As this subcommittee stated in its 1976 report on section 111, the compulsory license was designed to operate in concert with FCC rules which among other things limited the number of distant signals which could be carried and required cable systems in some circumstances to recognize local stations' contractual exclusive rights to show syndicated programs.

Now as the chairman pointed out, last July, the Commission repealed those rules. In the process, the Commission just closed its eyes to the concerns you expressed about the effect of its actions on the compulsory license scheme. Although they remain in effect pending judicial review of the Commissions's order, their demise would create a gigantic loophole and transform the compulsory

license into an instrument of substantial harm which Congress never envisioned or intended.

Cable now is a multibillion dollar industry, capable of standing on its own two feet and coping with the reality of marketplace competition which its competitors face daily. Cable, like its competitors, should succeed or fail on the basis of its ability to provide attractive services to consumers. If reuse of another industry's programing must remain part of that mix, then cable certainly can afford to pay marketplace prices.

I am quite confident that cable industry representatives, nonetheless, will bemoan the difficulties they believe they will encounter if each cable system must secure a license to retransmit each distant signal program. They will tell you that programing will not be licensed to cable and that even if the parties were willing, the so-called transaction costs or the costs of establishing licensing arrangements with numerous producers would be prohibitive.

Mr. Chairman, it is difficult to imagine any program supplier walking away from a sales opportunity. No rational entrepreneur will turn down a sale. They will seize opportunties to enhance sales and increase revenues. I fail to see any incentive rationale or otherwise to deny cable systems access to programing.

The supposed specter of cable systems thwarted from use of distant signals by the inability to deal with numerous program suppliers is no more than self-serving, unsupported, speculation by the cable industry. An industry which has embraced the marketplace to argue against regulation has no business withdrawing its confidence in the marketplace for purposes of retaining an advantageous regulatory scheme. When sellers have products that buyers want to buy, the pressure of supply and demand usually provides a mechanism for the sale. There is no reason to expect that will not happen if the compulsory license mechanism is abandoned.

On the other hand, continuation of the present compulsory license will prove increasingly unworkable. For example, the once simple determination of what constitutes basic subscriber revenues will become much more difficult, if not impossible to make. This will result from the growing inclination of cable systems to resort to tiering of services. Each of several tiers on a cable system may consist of a combination of distant and local signals and various pay and nonpay channels. Some subscribers will take some tiers of service, some others. Sorting out what proportion of the fee constitutes the charge for basic retransmission of broadcast signals will be an accountant's nightmare.

The present method of distributing royalties also creates problems for copyright owners. Putting aside the amounts awarded to the various claimants, let me just discuss for a moment the process by which the Tribunal reached its decision. It is extraordinarily burdensome: Day after day of hearings, page after page of testimony, and hour after hour of lawyers' time. No one can predict, and, indeed, we probably will never know the total amount of money expended by the parties in litigating the 1978 distribution proceeding. A safe guess, however, would place the answer into the millions of dollars. For parties which have been allocated less than a whopping share of the royalties—and broadcasters are not alone in that respect—the cost of the Tribunal's process ultimately may be

so great that the amount of royalties actually paid to claimants will be too small to justify participation in the process at all.

Why must the copyright owners who are entitled to royalties endure this ritual year after year after year? Certainly, the marketplace could handle this task much more efficiently than the Tribunal or any other governmental body. I might add the recently resigned Chairman of Copyright Royalty Tribunal has expressed the same view.

Last, Mr. Chairman, I would like to address portions of the legislation just recently introduced. Generally, we are pleased that the legislation proposed by yourself and Mr. Frank reflects your desire to remedy the difficulties we have discussed. We will study each bill closely and look forward to working with you in resolving the cable copyright problem through passage of legislation.

At this point, however, I would like to discuss two specific elements of your bill, Mr. Chairman. First, it would exempt all cable systems with fewer than 5,000 subscribers from any copyright liability. We oppose elimination of copyright liability for any cable system. The 1976 act established liability, even if minimal, for all cable systems. We see no reason to abandon that approach. The harm to broadcasters and the disruption of the marketplace is no less in the case of 10 1,000-subscriber cable systems than it is in the case of 1 10,000-subscriber system. If any rational basis exists for treating small systems differently, then at least maintain their present de minimis liability under a compulsory license.

We also question the use of a 5,000-subscriber cutoff. Up to 80 percent of the Nation's cable systems serving roughly a quarter of the Nation's cable subscribers could be exempt from copyright liability under such a high-exemption level. Among the 1,041 cable systems which paid royalties based on the regular distant signal equivalent formula in the first half of 1979, some 276 or 27.2 percent would have been exempt at a 5,000-subscriber level.

Add to which, many of these potential exempt systems are owned by multiple system operators. According to FCC records for 1979, the over 8,000 different communities served by cable reflected only 2,809 so-called "financial entities" or common owners. If an exemption of any sort is to be maintained, it should require meeting not only a per system subscriber count test, but also an aggregate per owner test. We urge you to review carefully current cable ownership patterns before establishing either per system or per owner exemption levels.

Second, we oppose a grant of broad subpena power to the Tribunal. Such subpena power would enable the Tribunal to conduct fishing expeditions and to expose highly confidential business information. This would serve to discourage otherwise proper participants from appearing before the Tribunal to assert their rights and make their cases. A broadcast claimant entitled, for example, to only several hundred dollars hardly can be expected to risk such substantial exposure to a Tribunal subpena for such an insubstantial stake.

Furthermore, the need for Tribunal subpena power is lacking. Already, the Tribunal conducts adversary proceedings. In the first royalty distribution proceeding, for example, every witness was subjected to cross-examination by counsel for numerous other par-

ties. Parties also were permitted to present evidence in a rebuttal phase. This process provides ample means for determining the probative value of evidence submitted.

Subpenas and the attendant legal proceedings involved in resisting them or securing their enforcement would add more clutter and confusion to an already burdensome and inefficient process.

In sum, Mr. Chairman, the marketplace is a far better determinant of program price than a fee schedule imposed rigidly by the Government and requiring an additional layer of regulation to adjust and apportion those fees in a manner easily leading to arbitrary results.

Cable interests also will insist that the present fees are fair and reasonable. If that is the case, the marketplace will bear them out, and their financial burden from normal copyright liability will not exceed royalties paid under the present scheme. When the cable industry sought deregulation at the FCC, it hawked a marketplace theory. Now, let it own up to its embrace of the marketplace and support efforts to get the Government out from between the cable industry and the suppliers of distant signal programing.

Thank you very much, Mr. Chairman.

[The complete statement of Mr. Wasilewski follows:]

Statement of Vincent T. Wasilewski
President
National Association of Broadcasters
before the
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary
United States House of Representatives

May 14, 1981

Mr. Chairman. My name is Vincent T. Wasilewski. I am President of the National Association of Broadcasters in Washington, D.C. NAB numbers among its members 662 of the nation's broadcast television stations and the nationwide commercial broadcast networks.

We thank you for the opportunity to present our views. We are most appreciative that you are conducting these hearings as part of the process of reviewing and revising the nature of cable television's copyright liability under the 1976 Copyright Act. We enthusiastically endorse and support your effort. Your willingness to revisit and reopen a complex, controversial subject which you thought resolved once and for all only five years ago, is especially praiseworthy.

No crystal ball could have predicted the rapid and compelling changes in the communications arena since 1976. We applaud your desire to revise the law in light of these changes. We hope that specific differences between our approaches, which we might suggest today, in no way obscure that we seek movement in the same direction, in response to the same problems, and

toward the same goal as you do -- namely, greater reliance on marketplace forces and less reliance on government intervention and regulation.

Broadcasters, of course, recognize that they will be -- as they have been -- competing with new technologies. In essence, these new technologies are nothing new. They are simply other means of delivering video programming to the consumer. When consumers turn on their television sets, do they really care whether the program is transmitted by a broadcast station over-the-air, through a cable, from a satellite, via microwave, or through the mails in the form of a cassette or disc? Broadcasters are willing and able to compete with those who use other transmission systems to provide programming, but ask only that competition be fair, that one competitor not be required to give another competitor a leg-up or compete with its own hands tied. Broadcasters, least of all among video technologies, should be required to operate with a copyright handicap or to subsidize, as they have for years, the growth and development of a competitive medium.

The commercial television broadcast system of this nation, engendered by Congress in the Communications Act of 1934, provides a level of video program service unparallelled anywhere else in the world.

The program services provided to the public by commercial television stations and networks in marked contrast to the services of cable television or the so-called "new tech-

nologies" are free and ubiquitous. They are available to all viewers, and they are available without charge.

Nearly everyone can receive numerous broadcast stations.

- There are over 78 million television households in the United States
- Ninety-eight percent of all households own at least one television set; 85% own color television sets; more than 50% own two or more sets.
- Ninety-seven percent of television households can receive 4 or more stations; 71% can receive 7 or more stations, and 43% can receive ten or more stations -- creating an extremely competitive environment within the television industry.

Today, it seems, program diversity is the holy grail of policy makers and new technologies constantly are portrayed more as ends in themselves rather than as a means of providing the public with something really new and distinctive.

"Diversity" and "new technologies" are nothing new to broadcasters. Mr. Chairman, you and several of your colleagues were able to attend our annual convention last month. You saw an exhibition of broadcast technology which stands as a monument to broadcasters' unceasing quest to improve and develop communications technology. Broadcasters have remained at the forefront of technological development not for the sake of doing the same thing a different way, but because technological development

enables them to provide more and better service to the public. Use of the latest newsgathering and satellite transmission techniques, for example, enabled this nation to share cohesively in the anxiety and joy of the release and return of the 52 American hostages from their captivity in Iran. Millions of Americans watched them land in Algiers, recuperate in Wiesbaden, and motorcade through Washington. Local stations' coverage also enabled entire communities to join in the homecoming of individual hostages. Broadcast television news, not surprisingly, consistently is rated the most trusted and relied upon news source in this country.

Diversity in broadcast programming just begins with the news. A wide variety of programming ranging from popular entertainment and sports programs to programming designed to serve the special needs and tastes of children and minorities is provided to the public by national and regional networks and local stations each and every day. Vigorous competition among stations and networks has assured that the public receives this great diversity of television programming.

That is why we are here today, Mr. Chairman. We are seeking the opportunity to compete with what many consider our most significant competition on a fair and equitable basis. We are seeking to establish a true marketplace and true competition, to dismantle a burdensome and wholly unnecessary regulatory framework, and to let the marketplace -- not government -- make determinations appropriately left to buyers and sellers of program product.