CRT REFORM AND COMPULSORY LICENSES

HEARINGS

BEFORE THE

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

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 2752 and H.R. 2784

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JUNE 19, JULY 11, SEPTEMBER 18, AND OCTOBER 3, 1985

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CRT REFORM AND COMPULSORY LICENSES

WEDNESDAY, JUNE 19, 1985

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, DC.

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

Present: Representatives Kastenmeier, Mazzoli, Synar, Schroeder, Moorhead, Kindness, and DeWine.

Staff present: Michael J. Remington, chief counsel; Deborah Leavy, assistant counsel; Thomas E. Mooney, associate counsel; and Audrey K. Marcus, clerk.

Mr. Kastenmeier. The committee will come to order.

The purpose of this morning's hearing is to examine the possibility, both from an oversight and legislative perspective, of either revamping or entirely eliminating the Copyright Royalty Tribunal.

Previously, on the first of May, the subcommittee held an oversight hearing, you will recall, on the functioning of the Tribunal. (See Ser. No. 20.) We heard testimony from Marianne Mele Hall, the administration-appointed Chairman of the Tribunal, who shortly thereafter resigned from office, due to public disclosure of her coauthorship of a controversial book entitled "Foundations of Sand."

Due to heightened public and press interest in Chairman Hall's ability to preside over the Tribunal, the initial oversight hearing did not really focus, regrettably, on the general effectiveness of the agency and the need for statutory reform. Therefore, the subcommittee was not able to determine whether the Commissioners' relative lack of experience in copyright is critical or whether judicial review has been meaningful, whether a ratemaking entity can function without staff and clear statutory guidelines to structure the decisionmaking process.

Ms. Hall's resignation means that the Tribunal is now functioning with only two of five authorized Commissioners. That situation, in my opinion, puts the proposition squarely on the table: That the Tribunal is broken beyond repair and possibly a waste of effort in terms of not only taxpayers' dollars and sources, but the placement of statutory responsibility.

I sure do not mean to attribute culpability to the two sitting Commissioners, Mr. Ray and Mr. Aguero, who will be testifying before this committee on July 11. To the contrary, I look forward to

whatever constructive information the Commissioners might share with us when they appear.

The core function of this subcommittee is to assess whether the statutory structure of Government agencies within our jurisdiction is sufficient. This legislative oversight and authorization responsibility flows from the Congress' obligation to provide good Government.

In dealing with copyright issues, we must proceed from the assumption that the primary objective of copyright is not simply to reward the author. Rather, in Professor Nimmer's words, it is to "secure the general benefits derived by the public from the labors of authors." This objective, rooted in the Constitution and reaffirmed continually in court cases, applies not only to Congress, but also to the two entities—the Copyright Royalty Tribunal and the Copyright Office—delegated administrative and ratemaking responsibilities by the Congress.

If I had to give a reason why I feel the Tribunal is broken, I would list neither Ms. Hall's resignation nor the White House's treatment of the Tribunal as sometimes a resting place for political appointments. Although I would mention lack of staff and inadequate statutory guidelines as being important, they are not dispositive.

The reason I would offer is that the Tribunal has either forgotten or ignored the lesson of both the Constitution and the statutory compulsory licenses; that is the limited monopoly rights of copyright proprietors must be balanced against the rights of users so an important public purpose can be achieved.

There are presently two bills on the table. The gentleman from Oklahoma, Mr. Synar, and the gentlewoman from Colorado, Mrs. Schroeder, have introduced H.R. 2752, the Copyright Royalty Tribunal Sunset Act of 1985 and I compliment them for their initiative. In order to stimulate and focus debate, I introduced legislation yesterday to create a dispute resolution scheme and Copyright Royalty Court within the judicial branch of Government. (See H.R. 2784.)

Other alternatives are possible, indeed, including delegation to the executive branch of Government, binding arbitration and statutory reform of the Tribunal, such as was attempted by the subcommittee last year in H.R. 6164.

This background is necessary to make witnesses feel comfortable with making broader observations about problems and solutions than perhaps are addressed by the two bills on the table.

With this thought in mind, I would introduce the first witness unless my colleague——

Mr. MOORHEAD. I have an opening statement.

Mr. KASTENMEIER. I would like to yield, then, to my colleague from California. Before I yield to my colleague, I would ask unanimous consent that the subcommittee permit the meeting today to be covered in whole or in part by television broadcast, radio broadcast, and/or still photography pursuant to rule 5 of the committee rules. Without objection, it is so ordered.

Now I would like to yield to my colleague from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

We have often heard the phrase that if "something is not broke, don't fix it." We have something that is clearly broke and we have to fix it. This something is the Copyright Royalty Tribunal. I am not sure if it ever had an opportunity to function as we envisioned it back in 1976. Neither the Democratic nor the Republican administrations took this little agency very seriously.

Probably one of the main reasons for its present condition is the nomination and confirmation of inexperienced Commissioners, but there are other factors as well, and we must also share of the blame for its problems. In an attempt to be frugal and keep the taxpayer cost to a minimum and avoid the creation of a large new Federal bureaucracy, we have provided it with virtually no staff.

When you combine this with inexperienced Commissioners and a complex subject matter, results are predictable. I don't think that this agency is broken beyond repair. I think that we could appoint a permanent Chairman. We could raise the salaries. We could give it a staff that is adequate to do the job and perhaps make it work. But there are other approaches that could also work.

I know that there has been some talk that we perhaps could adopt a flat fee per customer for cable television to pay into a fund, rather than having the complicated procedure that has been set forth by the commission at the present time. That certainly would take away one of the big responsibilities of the Tribunal.

The second thing that could be done is to adopt a more permanent formula for distribution of the funds. If this were done, it would be possible to have an administrative agency virtually doing the job that the Tribunal has done to this point.

Both of these things take a lot of negotiation and agreement between the parties that are involved and are concerned with the funds that come through the Tribunal at the present time.

I didn't come here this morning with any preconceived notions of how to fix this machinery. Some of the subcommittee members have introduced bills which address the problems and will provide a good catalyst for debate. I believe that doing something about the CRT should be the No. 1 priority of this subcommittee and would like to commend the chairman for his prompt action in scheduling this hearing this morning and calling as witnesses today some of the most knowledgeable people in this country on the subject of copyright law.

We are looking forward to this hearing and thank you, Mr. Chairman, for setting it up.

Mr. KASTENMEIER. I thank my colleague.

Does the gentlewoman from Colorado care to make a statement?

Mrs. SCHROEDER. No; that is all right, Mr. Chairman. Thank you very much. If I have to leave, I just apologize, but the armed services bill is on the House floor.

Mr. KASTENMEIER. We are competing with very important legislation on the floor.

Our first witness this morning is an old friend and former chief counsel of this subcommittee, Bruce Lehman. Mr. Lehman is currently a partner with the law firm of Swidler, Berlin & Strelow here in Washington, DC, a graduate of the University of Wisconsin Law School and is one of the Nation's leading experts in the Copyright Reform Act of 1976 and the Copyright Royalty Tribunal. He

served as counsel on the committee for a 9-year period spanning 1974 to 1983.

Welcome, Mr. Lehman. We have your statement before us. You may either proceed from that—it is not a very long statement, actually—or as you wish. In any event, your statement in its entirety will be accepted and made part of the record.

TESTIMONY OF BRUCE LEHMAN, ATTORNEY, SWIDLER, BERLIN & STRELOW, WASHINGTON, DC

Mr. LEHMAN. Thank you very much, Mr. Chairman, it is a pleasure to be back here in my old bailiwick.

First, before proceeding, I would like to say that I would like to have the longer 28-page statement submitted for the record, and I won't go through that entire statement. I know that is not the normal procedure of the subcommittee. We would never get out of here if everyone read their full statement.

What I would like to do is basically proceed from the summary which I have supplied you and, if you will permit, to make a few personal comments in addition to those that are actually written into the executive summary. I would also to elaborate a little bit more on the nine options which I have offered as possibilities for restructuring the Tribunal as I go through the statement.

Having said that, I would like to begin with a personal observation and that is that the subcommittee is unlikely, in my judgment, to ever relieve itself of the kind of pressure it feels today. Pressure, which has resulted in the introduction of the two bills, as long as the fundamental question of the existence of compulsory licenses and possibly the creation of new compulsory licenses continues to exist.

As I was preparing for my testimony, I looked back at some of the early hearings on copyright, and, interestingly, the first hearing in the revision process was in this very room, 2226 Rayburn, just about 20 years ago. It was 20 years ago last month, and you presided over that hearing, Mr. Chairman, and the second witness was George Carey, the Deputy Register of Copyrights. Mr. Carey presented a bill to this committee which was the bill that eventually, in a modified form—emerged as public law in 1976.

In presenting that bill, Deputy Register Carey identified three controversies. They were: Cable television, jukebox, and educational uses of copyrighted works. In advising the committee as to what to do on all of those three controversies, Mr. Carey suggested that Congress extend full copyright liability to uses of copyrighted works in each one of those three areas, cable television, jukebox, and not-for-profit educational uses.

Previously, the law had either been unclear or it was very clear that copyright did not cover those three uses. Now, if the committee had adopted and Congress later enacted the legislation that Mr. Carey had recommended, we wouldn't be sitting here today because there wouldn't be any compulsory licenses and there wouldn't be a Copyright Royalty Tribunal. There would have been one compulsory license—a compulsory license which had then been in existence for 56 years, the mechanical license for sound recordings, and the

rates for that license undoubtedly would have continued to have been set, as they were previously, by Congress itself.

I should add that when Congress had that ratesetting authority, it acted in 1909 and in 1976, but did not act at any time in that intervening period, which shows some of the problems when Congress engages in ratesetting.

But in any event, the committee did not accept Mr. Carey's suggestion. Why didn't they accept the suggestion? I think there are two reasons: One is just plain political and that is that legislation never could have been passed to extend copyright to cover those uses had it not been for political compromise, the kind of compromise that resulted in a compulsory licence; and then I think there is another factor which is more philosophical, Mr. Chairman, and I think characterizes your stewardship of copyright law for this entire 20-year period. You referred to it in your opening statement. That is the necessity to balance the rights of owners and users of copyrighted works.

Such balance is necessary, as you have pointed out, because copyright law is quite amorphous. Copyright law doesn't cover every single use of a creative work. We have major uses today that are still uncovered. At one point, the Senate passed a bill which provided performance rights in sound recordings. There still is not a performance right in sound recordings. At the time that Deputy Register Carey appeared before this committee, there, indeed, was not even any copyright protection for sound recordings at all. That wasn't added until 1971.

As you know, last year the subcommittee moved to extend copyright-like protection to semiconductor chips. The fact of the matter is there never has been in this country—and there is unlikely to be because Congress will never keep up with the technology—full copyright protection for every single use of a work of authorship. Therefore, the committee, or any entity which it tries to create, is constantly going to be confronted with the resolution of two conflicting points of view. On one side, you are going to have people who want to have copyright protection and to receive the economic reward that comes with that and, on the other hand, you are going to have users of copyright who are going to resist. Both sides are going to appeal to the Congress or any agency which is ever created to resolve disputes between those two sides, and neither side is ever going to be happy with the result.

By way of illustration, we are having an extremely distinguished witness, counsel for the Author's League, Irwin Karp, later on in the day who has submitted an excellent statement to this committee. I have heard Mr. Karp on many occasions suggest that there is no such thing as fair use. I think that illustrates one point of view.

On the other hand, many educational groups believe that fair use ought to have been extended far, far beyond its present statutory limitations.

With that introductory statement out of the way, Mr. Chairman, I would like to review very briefly the history of the Copyright Royalty Tribunal.

The early versions of the 1976 copyright legislation provided that the Copyright Royalty Tribunal would be a part-time body of professional arbitrators appointed by the Register of Copyrights and

these part-time arbitrators would resolve both ratemaking and distribution disputes that arose out of the compulsory licenses created in the new copyright law.

The present structure, a Presidentially appointed panel of five full-time members, was adopted very late in the revision process. The reason that the original version—a part-time body of professional arbitrators to be selected by the Register of Copyrights on an ad hoc basis—was rejected, was reaction to a Supreme Court decision which came down very late in the revision process, *Buckley* v. *Valeo.* That case dealt with the appointment of officials to the Federal Elections Commissions by the Speaker of the House and the Secretary of the Senate, and the Supreme Court held that to be violative of the appointments clause of article II of the Constitution.

Since the Register of Copyrights is an official of the Library of Congress, there was an obvious constitutional flaw in this Tribunal as it had been proposed. A solution was to transfer the appointment of the Tribunal to the President of the United States. This change, however, necessitated the abandonment of the concept of an ad hoc Tribunal, which had been for several years in various bills, and the full-time body that we have today was born.

It may be fair to say, Mr. Chairman, that had you enacted the legislation as proposed by the Senate, we certainly would not have had some of the criticisms that we have had over the last several years with the Copyright Royalty Tribunal.

First of all, we would not have had the criticism that the Copyright Royalty Tribunal members are underutilized Government officials because these part-time arbitrators would have been designated only as they were needed and they would have sat to hear particular distribution hearings and then they would have gone off to do something else, other kinds of things, other cases that professional arbitrators handle.

Certainly, I think the Copyright Office, to the extent that it would have had enhanced responsibilities, would have carried them out very professionally, as it has carried out all other responsibilities over the years that have been assigned to it. Indeed, Ms. Schroeder's testimony this morning demonstrates its professional competence.

However, that just simply wasn't possible because of the *Buckley* v. *Valeo* decision, and so we had a five-member full-time body known as the Tribunal. I should add that the original House version provided for a three-member Copyright Commission. It was the Senate which insisted on five members and, in conference, the House conferees, led by you, Mr. Chairman, acceded to the Senate on that.

The Tribunal, unfortunately, has been surrounded by controversy from its creation. President Carter missed the statutory deadline for appointing the initial Commissioners, and I remember, Mr. Chairman, that only after a number of letters from you and others on Capitol Hill were the Commissioners finally appointed. Only one of his five appointments possessed the qualifications were outlined in the legislative history of the Copyright Act, which has already been referred to in some of the opening statements. Most of them had been Presidential campaign workers rather than experts in copyright policy or in administrative litigation.

Though the Tribunal vastly underspent its original budget, it was criticized by the Appropriations Committee for spending too much, especially on frills like office plants. You may remember, Mr. Chairman, there was some publicity in the newspapers and, indeed, some discussion about it at the first oversight hearing that you conducted with regard to the Copyright Royalty Tribunal.

The General Accounting Office, in a 1981 study, found that the members of the Tribunal were underutilized as high Federal officials, working only about half the time. At the same hearing in which that testimony was presented, one Chairman of the Tribunal said that the agency wasn't needed at all and he later resigned in a blast of publicity.

Like his predecessor in the White House, President Reagan has been slow to fill vacancies on the Tribunal and, as we know, its most recent chairperson resigned under pressure. That is just a brief thumbnail sketch of the history of the Tribunal, well known to most people here.

I would like now to outline nine alternatives which the subcommittee may wish to consider, and I would like to say that after doing that, I would be happy to answer any questions about the particular bills that have been introduced as well, and how they fit into these alternatives, and I would like to say that I have no pride of authorship in these. I have tried to identify a range of alternatives that the subcommittee might wish to consider in reconstituting or restructuring the Tribunal. Obviously, within each one of these nine alternatives, there are several different variations which I am sure members of the committee and others will think about.

The first alternative would be to simply abolish the Tribunal and substitute some sort of private, arbitration procedure. The difficulty with that is that if you really abolish the Tribunal, you are talking about abolishing the compulsory licenses for all practical purposes. If you retain the compulsory licenses, then you have to have some mechanism which is either going to set rates, or else there would be a statutory rate set by Congress, or you have to have some other mechanism for distributing the royalties which are collected among parties covered under some of the blanket licenses involved in these compulsory licenses.

Obviously, abolition of the Tribunal puts you right back to the questions that were posed by Deputy Register Carey in 1965. To abolish the Tribunal and to abolish the compulsory licenses, again, would be to tilt completely with respect to this very controversial three areas on the side of the copyright owner.

The second thing that could be done is you could place the Tribunal in the Department of Commerce and vest the authority to appoint its members in the Secretary of the Department. You could retain the Tribunal just exactly as it is, but just put it in the Commerce Department. That would be consistent with the *Buckley* v. *Valeo* decision but the advantages of it would be that the Department of Commerce could supply as needed, professional staff and expertise, to help the Tribunal when it had decisions to make. Then, when the Tribunal wasn't fully functional, those employees of the Department of Commerce could go back to other duties.

The Department of Commerce has some experience in this. In fact, in the Patent and Trademark Office, a sister entity to the

Copyright Office, you have two boards, the Trademark Trial and Appeals Board and the Board of Patent Appeals, which are both quasi-judicial administrative law tribunals, which regularly hear cases and whose opinions are appealed to the Court of Appeals for the Federal Circuit. So, there is some experience in the Department of Commerce.

In addition, the Department of Commerce also has experience in what I would characterize as administrative litigation in the trade area, where you can file unfair trade practice complaints and so on with the Secretary of Commerce, and then there are procedures to review those. So the Department of Commerce does have some experience which might be helpful.

Third, as another alternative, you could vest the functions of the Tribunal in an agency such as the FCC or FTC. I notice later on that you will hear from Mr. Karp that he recommends the use of administrative law judges to resolve these problems. Actually, if you read my full statement, I very specifically refer to that as one of the advantages of putting the Tribunal in an agency such as the FCC or the FTC. When the FTC hears a case that has a controversy, it assigns it to an administrative law judge who is a professional with many, many years of experience, having worked his way up through the Federal Government's legal system, approved by the Civil Service Commission. The administrative law judge conducts a hearing and sifts through all of the factual material presented. Then he presents that record to the full Commission, the FCC, or the FTC, and that could be done with respect to the issues that are dealt with by the Copyright Royalty Tribunal.

Now, certainly, we think of the FCC as having a different subject matter expertise, or the FTC as having a different subject matter expertise, but I see no constitutional reason why these responsibilities also couldn't be given to those agencies which have a lot of experience in this kind of work. The FCC has more than just experience in the adjudicatory process; the FCC actually has some experience with some of the very issues that are confronted by the Tribunal. In fact, prior to the 1976 act, the FCC, in effect, acted as a substitute for copyright coverage with respect to the question of copyright liability of cable television systems in enacting the distant signal limitations and syndicated exclusivity rules in, I believe, early 1970's, the FCC really was substituting for a copyright pending the congressional resolution of that issue. Until recently, the FCC actually had a Cable Bureau.

The fourth——

Mr. KASTENMEIER. Before——

Mr. LEHMAN. Sure.

Mr. KASTENMEIER. I am sorry to have to interrupt our witness, but we have a quorum call followed by a vote, and we will have to recess for 15 minutes. You have just reached the fourth recommendation, your fourth alternative or option, and at that point we will recess.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

When the committee recessed, we were hearing from Mr. Bruce Lehman, our first witness, who had reached the point in his testi-

mony of listing nine options the Congress may wish to consider relating to the Tribunal.

He had, at that point, discussed the possibility of abolishing the Tribunal and compulsory license placing the Tribunal in the Department of Commerce and, third, vesting the functions of the Tribunal in an agency, such as the FCC or FTC. He was about to discuss the fourth item when we recessed.

Mr. Lehman.

Mr. LEHMAN. Thank you, Mr. Chairman. I will try to wrap up quickly in view of the activity on the floor and the strain that that puts on the committee's time.

The fourth option was to vest the appointment of the Tribunal members in a Federal court and I had mentioned the Court of Appeals for the Federal Circuit as simply one option. Obviously, there could be another court as well. The Court of Appeals for the Federal Circuit comes to mind because it has had some experience in that its predecessor court, the Court of Claims, appointed trial commissioners who heard claims against the U.S. Government. In addition, that court now does bear some intellectual property jurisdiction and has some sense of that area.

Now, I want to point out that this option is different from actually—from an option which I will mention—I think it is No. 8, which would be to actually transfer the powers of the Tribunal to a court which is what you had proposed in the legislation you introduced yesterday.

Mr. KASTENMEIER. Just for purposes of clarity, when you vest appointment of Tribunal members in the Federal court, you are saying that the Tribunal members should be drawn from a Federal court——

Mr. LEHMAN. No; I am saying that the Tribunal could be just as it is right now excepting having the President appoint the Tribunal members. They could be actually appointed by the court, and I believe that that would be consistent with *Buckley* v. *Valeo* because, interestingly, while under article II of the Constitution, Congress doesn't have the power to appoint, by itself, officials of the United States, the courts do, and along with the President, and there is some discussion of that in that case.

The advantage, presumably, of that would be that you would get—you presumably would get the courts appointing, just as when they appoint special masters to hear cases or when the Court of Claims appointed its Commissioners, you would get them appointing people solely on the basis of professional expertise and experience with adjudication. Therefore, you might get, theoretically, a little higher quality appointment.

No. 5 is to make the Tribunal membership part time with appointment by the President, but have it convened when it was necessary for it to do something by the Register of Copyrights. This was a proposal which was made in 1981, but something the Congress might want to consider by the General Accounting Office. It gets to the issue the General Accounting Office raised that the Tribunal members were generally underutilized. The Tribunal found that most of the members of the—I mean the GAO, found that most of the members of the Copyright Royalty Tribunal were basically only working half time. It was a half-time job. One of the

ways of resolving that would be to make it a part-time job. But in order to do that, you have to have somebody to bring the Tribunal together when they need to do work and that—in the view, at least of that time, of the General Accounting Office could be done without violating the *Buckley* v. *Valeo* decision and the separation of powers by the Register of Copyrights. Presumably the President would appoint people, just as he does now. They would be paid less money and they would have other jobs. They might be law professors or lawyers in private practice who do not have interests before the Tribunal and so on.

Option No. 6 is very similar and it would be to make the members of the Tribunal part time, excepting to have a full-time chairman and probably a full-time general counsel designated by statute. This would enable you to have a permanent person who would do a little more than the Register of Copyrights would do under the earlier version I just suggested. It would enable you to have somebody who would be there for the purpose of liaison with the public, for the purpose of doing economic studies, following legal developments during periods when the Copyright Royalty Tribunal actually wasn't meeting and then that permanent Chairman could call into session these part-time Commissioners when they had some work to do, when there were disputes that had to be resolved, either ratemaking proceedings that needed to be initiated or distribution proceedings which needed to be initiated.

The seventh option that I have outlined here is to abolish the Tribunal entirely and substitute a private arbitration procedure. This would lead you into something like much as what is done in European countries. You could still retain, in effect, a compulsory license, but what you would do is you would say that the copyright owners have to make these particular rights available to users under the terms and conditions which would be established in direct negotiations between the two sides.

In order to make that work, what you would have to do—as is done in Europe, really, and the Register of Copyright Office refers to this under the terms of agreed licensing in their testimony—is that you would really have to authorize statutorily, collective entities which would represent either side, like collecting societies. I suppose you could do that be defining a collecting society as a group like ASCAP or BMI and you could say they would be a collecting society which would represent for each one of the license which would represent *x* number of copyrights, maybe 10,000 copyrights, so that you would be certain that you would have a manageable number of these collecting societies. Then, again, the users would designate a bargaining agent, in effect. Those agents really already exist in the form of the trade associations, like NCTA, and NPAA, and so on. But then what would happen is that anybody who wasn't a member of these bargaining units would have to be bound by the agreement that they came to. In order to obviously make that possible, Congress would have to authorize it by statute.

Where they can't agree, you are still stuck with the same problem, though, that you have with the Copyright Royalty Tribunal; you have got to have somebody standing above these two parties where the private negotiations doesn't work, so you would still have to have some kind of review by a court or some other kind of

an agency. That is, indeed, the system that works in Europe and it works actually quite well in Europe. In Belgium, there was just recently a license for the retransmission of cable television signals that was negotiated between a collecting society representing rights owners and between copyright users.

Now, one of the differences is that in Europe, a lot of the user organizations, broadcasters and so on, and I think even cable systems in many cases, are state owned.

Another possibility of—eighth possibility is to really—a version of it is embodied in your bill which you put in yesterday, Mr. Chairman, and that is just transfer these—the responsibilities of the Tribunal—to a court of law. This could permit a court to appoint a special master—the court wouldn't necessarily have to hold all of the hearings, but part of your legislation—and I believe your legislation does provide for that in one section—you could permit the court to appoint a special master to actually hold all the hearings, and take all of the complex testimony, and so on so that you wouldn't have to use scarce time of Federal judges for all of this, but you would still bring to the functions performed by the Tribunal all of the professionalism, the objectivity, the experience with adjudication and resolution of disputes which characterizes our Federal court system, which I think we all think functions pretty well in a very high degree of professionalism.

There may be constitutional problems with this. The Register of Copyrights refers to those in the Copyright Office testimony. What I would suggest that the committee might want to do is to get the American Law Division over at the Library of Congress to do a constitutional memorandum on that issue. It is a developing area right now. To get a better sense of whether or not there are flaws in preparing this testimony, I did not have a chance to research that extensively. I think it would be interesting for the subcommittee to look into those constitutional difficulties.

The final option that I have outlined would be to basically retain the Tribunal as it is right now, but reform it, if you will. When you actually think of how you would reform it, it is a little bit difficult to think of how you would reform it and really make substantive changes. The General Accounting Office, in 1981, explored this option quite thoroughly and proposed a number of options to the committee. One of those options was to reduce the number of members from five to three to provide right in the statute some more explicit guidance as to the kind of people who should be appointed to the Tribunal; to provide it with subpoena power; to statutorily require it to have certain kinds of staff available to it.

Those are options which the subcommittee could consider if it didn't want to abolish the Tribunal, but just wanted to reform it.

Let me say that with reducing the size of the Tribunal from five to three members, that really doesn't get at the problem of underutilization of Commissioners because presumably a Tribunal member, Commissioner, is like a judge. Each one has to make a decision about these complex proceedings that are brought before them, a judgment, balancing the interests of each side and then that judgment is collectively expressed by the Tribunal and, just like a court of law which has a panel of several judges, they fight it out among themselves and so on, but the actual workload that is

involved in making those judgments doesn't change if you change from five to three Commissioners.

It does save the taxpayers a little more money. Although, on the other hand, it may lessen the opportunity for the kind of balance that you referred to in your opening statement, Mr. Chairman, because you are going to have just fewer members, fewer opinions, fewer points of view, at least in theory considered.

So those are the nine options. They are certainly not—I don't think that the—there are others who can think up other options. Mr. Karp, who will be testifying later, proposes basically just to keep the Tribunal as it is, but give it the power to assign administrative law judges to perform these functions. I suppose that is another option and I mentioned the advantage of the administrative law judge concept when I discussed transferring the powers of the Tribunal earlier to agencies which have administrative law judges already, like the FCC or FTC.

I am sure there are other options that can be considerd, Mr. Chairman, but I have tried to offer these to give the subcommittee an idea of the range of possibilities that there might be. I would be happy to answer any questions that you have.

If I could make just one closing comment. I think one of the things the subcommittee might want to keep in mind is that we may not be done with compulsory licenses. There has been a lot of discussion about doing away with some of the existing compulsory licenses, but on the other hand, your committee is being requested continually to add, to expand powers of copyright owners. You are being requested to enact royalties for blank tapes and recording machines under certain circumstances, performance rights in sound recordings is still an issue which is out there, and yet history repeats itself with respect to these new requests that are made of the committee. There is going to be some compromise and part of the compromise is going to have to maybe be a compulsory license. Then you are right back with who makes the decisions about what rates are paid and how are the proceeds going to be distributed and so you may need a Tribunal-like mechanism for that as well.

With that, I would be happy to answer any questions, either on my statement or on the legislative proposals which are already in the hopper or anything else.

[The statement of Mr. Lehman follows:]

Statement of Bruce A. Lehman

Mr. Chairman,

The purpose of today's hearings is to assess the functioning of the Copyright Royalty Tribunal during its seven years of operation and to explore alternatives to the present structure.

My purpose this morning will be to assist the subcommittee in that process by reviewing the reasons the Tribunal came into being as it is, and to outline possible alternatives to the present scheme.

Perhaps the best way to begin is to ask the question: why do we need a Copyright Royalty Tribunal? The answer is that, without the Tribunal, or something fulfilling the same functions, the compulsory licenses provided for in the 1976 Copyright Act could not operate as they were designed. Therefore, the first step in any examination of the Tribunal is to look at the four compulsory licenses: what they are and what are the reasons for their existence.

The Compulsory Licenses and Their Relationship to the Tribunal in the 1976 Copyright Act

The four compulsory licenses of Title 17, United States Code, are: section 111, authorizing retransmission of signals carrying copyrighted music and audiovisual works by cable television systems <u>without the permission of the copyright owners</u>; section 115, the so-called "mechanical license," authorizing the use of copyrighted music in sound recordings without the permission of the copyright owners; section 116,

authorizing public performance of musical works in jukeboxes <u>without the permission of the copyright owner</u>; and section 118, which permits the use by public broadcasting of copyrighted music and pictorial, graphic, or scultural works <u>without the permission of the copyright owner</u>.

The key words in my description of each of these statutory licenses is "without the permission of the copyright owner." With respect to all other copyrighted works, the exclusive rights to copy or to publicly display or perform can only be exercised with the permission of the copyright owner. And, this permission is normally granted only upon the payment of a sum of money (royalties) which is determined by what the market will bear. A vivid illustration of the normal process is the well-publicized negotiations currently underway between the Speaker of the House of Representatives and various publishing houes for the right to reproduce in copies his autobiography. According to Saturday's <u>Washington Post</u>, the market will apparently "bear" a price of over $1 million for these rights.

But, for the four categories of works covered under the compulsory licenses, there is no such market place negotiation. Indeed, there can't be, because the engine which drives a marketplace -- the right to withhold a product until acceptable payment is agreed upon -- is missing. In these four instances, copyright owners are <u>compelled</u> to make their works available.

Since the Tribunal would not be needed were it not for the restrictions of these licenses, we have to look at why Congress established these restrictions in the first place, before we can fully judge the need for and functioning of the Copyright Royalty Tribunal.

The answer is quite simple: were it not for a compulsory license, there probably would be no copyright protection, no right of authorship, in these four instances. A good illustration is the oldest compulsory license, the "mechanical license," developed over 70 years ago as the result of the struggle between music copyright owners and the makers of player piano rolls, the predecessors of today's record industry giants. The music copyright owners attempted to gain control over the use of their product in the context of a new technology.

Like their successors who have confronted cable television and videotaping machines with lawsuits, the owners of music copyright in the first decade of the century confronted mechanical player piano roll makers with a copyright infringement action. And, as later in the century, copyright owners lost. The Supreme Court in White-Smith Music Publishing Co. v. Appollo Co. 1/ held that the then-existing copyright law did not contemplate the use of copyrighted music in a mechanical context.

Copyright owners then sought to modify the statutory law to close the loophole recognized by the Court. However, Congress was in no mood to grant music publishers full copyright control

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1/ (209 U.S. 1 (1908).

at the expense of a major new industry, and settled upon a compromise between the two competing interests. Music copyright was extended to cover mechanical reproduction, but once the first license was granted, other mechanical users of music would have a compulsory license to use the copyrighted composition as well. The copyright owner could not deny the right to use his product; he could merely demand a statutory royalty of "2 cents on each...part manufactured."[2]

With regard to the mechanical license, the Congress itself performed for over 50 years one of the basic functions now performed by the Copyright Royalty Tribunal, setting and adjusting theprice to be paid for the use of a work in the absence of any market mechanism. And, how well did Congress perform this function?

The answer depends on your point of view, but rates remained at "2 cents on each part manufactured," from 1909 to 1976 when Congress, in the process of turning the issue over to the new CRT, raised the rate to 2 1/2 cents per record.

History was to repeat itself 67 years later when, after decades of battle with jukebox owners, and a shorter but similarly difficult struggle with cable television operators,copyright owners' efforts to assert full copyright control resulted in a political battle which ended in compromise.

2/ Act ot March 4, 1909 (35 stat. 1075), section 1(e).

In 1976, copyright owners received copyright protection for jukebox performances and cable retransmissions, but at the price of a compulsory license which gave them little control over their product and produced royalty income, in the case of cable, under a complex statutory formula agreed to prior to enactment of the legislation in negotiations by the key industry groups involved.

Finally, the fourth compulsory license, section 118, dealing with uses of copyrighted works by public broadcasting stations came about because the 1909 Copyright Act granted the copyright owner only the power to control the use of his work "publicly for profit if it be a musical composition." Although an industry with receipts in the hundreds of millions of dollars, public broadcasting is by definition not a profit making industry. Thus, it was able to grow to great size outside the orbit of control of music copyright owners. As in other areas where a major industry had developed without copyright liability, Congress in 1976 finally agreed to recognize an obligation by public broadcasting to owners of copyright in music and similarly situated owners of copyright in sculptural, pictorial, and graphic works and non-dramatic literary works. But, Congress limited copyright by attaching a compulsory license with terms and royalties to be established by the Copyright Royalty Tribunal.

The common feature of each of these four compulsory licenses is that Congress was confronted in each case with a demand from copyright owners to grant them rights where none had previously

existed. The response to these demands was compromise: the principle of copyright was extended to cover the use involved, but the powers of copyright owners to sell their newly created rights in the market place were severely restricted. The Copyright Royalty Tribunal was created in 1976 to substitute for what, in the case of other kinds of copyrighted works or uses of works, would be market place mechanisms for determining the price of a particular use. Also, since compulsory license revenues for cable television, jukeboxes, and public broadcasting involve payment of fees for blanket users of many individual copyrighted works, the Tribunal was necessary to divide the revenues received among the many individual claimants whose works were covered under the compulsory license.

Thus, the Copyright Royalty Tribunal performs two basic functions: it establishes the fees to be paid by users of the four compulsory licenses, and, in the case of three of the licenses, it settles disputes about the proportion of the fees collected to be paid to the individual copyright owners whose works are licensed.

The rate setting function could be performed by Congress itself. Indeed, it was for 56 years in the case of the mechanical license. And, in 1976, the initial fee structures for cable and jukebox were established by Congress, with the Tribunal empowered under certain circumstances to adjust them later.

Distributing fees received from blanket licenses, however, among numerous individual copyright owners would be difficult for Congress to perform. It involves periodic factual determinations more appropriate to a judicial authority like the Tribunal than a legislative authority.

Options Considered by Congress during the Copyright Revision Process

Mr. Chairman, twenty years ago (May 26, 1965), in this very same room, you presided over the first hearing on comprehensive legislation to revise the 1909 copyright law. The focus of the Subcommittee's deliberations was a bill, H.R. 4347 (89th Congress), introduced by Chairman Celler at the request of the Librarian of Congress. That bill reflected a ten-year process of study, consultation with various parties, and drafting by the Copyright Office of the Library of Congress. It contained nothing comparable to the Copyright Royalty Tribunal. It also contained only one compulsory license, the mechanical license, which it retained from the earlier 1909 Act. That 1965 bill retained with Congress the power to establish rates under that particular compulsory license. It provided for an increase of the mechanical royalty which had then been in effect for 56 years, from two cents per record to 3 cents, or one cent per minute of playing time, whichever was greater.

Although it did not provide for any other compulsory licenses, that 1965 bill did address the subject matter dealt with by the other three present day compulsory licenses. It

provided that there would be full copyright liability for cable television systems, full copyright liability for non-commercial users of music, pictorial, sculptural, and graphic works, and full copyright liability for jukeboxes. Because there were no compulsory licenses other than the mechanical license, an adjudicatory mechanism like the Tribunal apparently was not considered necessary.

Back in 1965 when the Librarian and Deputy Register of Copyrights, Mr. Carey, testified, he identified each of the areas now covered by compulsory licenses as "controversies." Of course they were controversial: the existing copyright law simply recognized no rights of the copyright owner in those three areas.[3/] And, the Copyright Office was proposing to resolve these controversies by going from no liability to full copyright liability in each of the three areas.

To characterize these three issues as controversial in 1965 may have been an understatement. Resistance to the Copyright Office's solution to these three issues was the primary reason it took 21 years for Congress to revise a clearly antiquated copyright law.

3/ At the time of Mr. Carey's testimony to the subcommittee, copyright owners were asserting that the 1909 Copyright Act gave them control over retransmission of broadcast signals bearing their programs. The 1909 statute was obviously silent on the issue. In 1968 in Fortnightly v. United Artists Television, Inc., 302 U.S. 390, the Supreme Court held that copyright owners had no interest in retransmission of local signals. And, in 1973, in Teleprompter Corp. v. Columbia Broadcasting Systems, Inc., 415 U.S. 294, the high Court held that copyright owners had no rights under the 1909 Act in distant signals either. The opinion by Mr. Justice Stewart suggested that the copyright owners seek relief in Congress.

During this 21 years, all U.S. copyright-based industries were denied benefit of the basic thrust of the legislation which was to bring the U.S. law into compliance with the legal standards accepted by nearly all of the other countries of the developed world. These standards were: a term of copyright based on life of the creator plus 50 years, abolition of common law copyright and elimination of many of the arbitrary formalities which had been required under the old system. It should be kept in mind that, in 1965 as today, U.S. copyright law did not cover all commercial and non-commercial uses of works of authorship. For example, a major U.S. industry, the record business, at that time had no copyright protection for its own creations. Congress did not extend copyright to cover sound recordings until 1971.4/

4/ H.R. 4347 (89th Cong.), the Copyright Office bill, would have extended copyright to cover sound recordings, but only to the extent of providing protection against unauthorized duplication. The Copyright Office proposal specifically exempted the other basic right of copyright owners, the right of public performance and display, from sound recordings. When Congress did act in 1971, public performance was exempted. The record industry, however, continued its efforts to seek full copyright protection with legislation being introduced in succeeding Congresses. The Subcommittee held extensive hearings in the 95th and 96th Congresses until the industry abandoned its attempts to enact a performance right in favor of efforts to receive payments for home taping of sound recordings. See Performance Rights in Sound Recordings, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, 95th Cong. 2d. Sess. (1978); Copyright Issues: Cable Television and Performance Rights, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, 96th Cong. 1st Sess. (1979).

I think that it is fair to say that the original bill presented to Congress by the Library of Congress could never have been enacted as drafted. It was inevitable that the "controversies" identified by the Deputy Register of Copyrights on that May morning 20 years ago could only have been resolved either by rejecting extension of copyright protection in the three areas outright or by compromise. Outright rejection of the Copyright Office recommendations would have solved the problem now confronting the Subcommittee today: there would be no copyright protection, therefore, no compulsory license, therefore no Tribunal.

But you, Mr. Chairman, and the Congress did not reject outright Mr. Carey's suggestions to extend copyright protection into new areas. Instead, you recognized that legitimate needs of copyright-based industries underlay their requests for expansion of the scope of copyright, but you approached it with what has become a hallmark of your stewardship of copyright law in this country: a balancing of the interests of owners and users of copyright works.

Indeed, when granting copyright-like protection to computer semi-conductor chips only last year, you issued a Committee Report which expressed this "balancing" approach very eloquently. Your report stated,

> Balancing between the rights of the creator and the needs of the public clearly is necessary. In fact, where changes have occurred and new technologies have developed, Congress has engaged in precisely such a balancing approach.[5/]

Mr. Chairman, you have created a sound and rational legal theory for guiding the development of American law on a path between two opposed philosphies. However, in examining the history of the four compulsory licenses in the Copyright Act, I think it is fair to say that your approach was more than theoretical. It has been, in fact, the only practical way to achieve enactment of copyright legislation in an era when commercial interests with vast economic and political resources have no qualms about directing them toward lobbying efforts on Capitol Hill. Any approach other than balancing would have

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5/ H.R. Rep. No. 98-781, 98th Cong. 2d Sess. 5 (1984). The balancing philosophy expressed in H.R. Rep. No. 98-781 follows a middle course between two competing views of copyright: that copyright's only purpose is to generate works for the public domain as is stated in Professor David Lang's 1983 testimony to the Subcommittee and the European view of copyright, embodied in the Berne Convention. The European view stems from the notion that rights of authorship are among the fundamental rights of man. Professor Andre Kerever of the French Conseil D'Etat, a leading European copyright authority, has stated:

> Quite simply, copyright is the right of a person in his intellectual creation, in the sense of materialization of the creator's personality. This was very neatly and concisely put by a French Court of Appeal on March 26, 1848: 'The purpose of copyright protection is to establish men's rights in his thought...recognition [of copyright] was a social achievement in the same way as the rights progressively granted to salaried workers throughout the 19th and 20th centures. "Reflections on the Future Development of Copyright: Is Copyright an Anachronism?," <u>Copyright</u>, Dec. 1983 at 369.

resulted in a standoff -- the kind of standoff which left U.S. copyright law woefully out of date for much of the post-World War II period.

The balancing of owner and user interests in resolving the three controversies identified by George Carey 20 years ago led this subcommittee, its Senate counterpart, and the Congress as a whole on a course which inevitably led to the creation of the Copyright Royalty Tribunal. The application of a balancing test to the cable, jukebox, and public broadcasting issues meant that something short of unfettered copyright coverage had to be developed. This something was the compulsory license.

The compulsory license recognizes the principle of copyright but, since it compels the copyright owner to license his rights involuntarily, it removes the basic free market mechanism for determining the price and terms of any business deal. This mechanism is the ultimate right to withhold access to a product until the price and terms the market will bear are met. Therefore, as in the case of any other industry not controlled directly by the market (such as electricity, natural gas transmission, and local telephone service), some regulatory mechanism is needed to substitute for the market place resolution of controversies over price and terms for delivery of a particular product.

Because the decisions which need to be made are not nearly as complex or numerous and the dollars involved not as great as those within the jurisdiction of agencies such as the Federal

Communications Commission, Federal Energy Regulatory Commission, or our 51 state Public Service Commissions, the Congress, in considering the 1976 Copyright Act, never contemplated a full-time, permanent government agency, until the very end of its deliberations on the legislation.

The original Tribunal was a creation of Senator McClellan and of the Senate Judiciary Committee.

The Senate Committee Report accompanying its proposed Copyright Law Revision in 1974 stated:

> This legislation establishes statutory rates applying to cable television systems, the performance royalty in sound recordings, the mechanical royalty, and jukeboxes. The legislation also provides that, with respect to cable television, the performance royalty in sound recordings and jukeboxes, the royalty fees shall be deposited with the Register of Copyrights for distribution to the respective claimants. The Committee believes that sound public policy requires that rates specified in the statute shall be subject to periodic review. It is neither feasible nor desirable that these rates should be adjusted exclusively by the normal legislative process. Therefore, Chapter 8 establishes in the Library of Congress a Copyright Royalty Tribunal for the dual purpose of making determinations in certain circumstances concerning the distribution of royalty fees deposited with the Register of Copyrights.6/

This Tribunal, provided in Chapter 8 of the 1974 Senate bill, was not the full-time independent agency we know today. Rather, it was to operate entirely within the Copyright Office under the supervision of the Register of Copyrights. It was to function as follows. In 1975, 1982, and every fifth year thereafter, the Register of Copyrights was to publish a notice of

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6/ Sen. Rep. No. 93-983, Copyright Law Revision, 203, 93d Cong. 2d. Sess. (1974).

the commencement of proceedings for the review of royalty rates under the four proposed compulsory licenses. Upon the filing of a petition for an adjustment of the existing royalty rates by either an owner or user of copyrighted works with a "significant interest," the Register of Copyrights was to convene a Copyright Royalty Tribunal to establish "reasonable rates."

The membership of the Tribunal was to be appointed by the Register from individuals proposed by the American Arbitration Association or a similar organization. One of these professional arbitrators was to be designated as Chairman for the purposes of the particular proceedings. The Tribunal was to operate on an *ad hoc* basis and cease work once its rate adjustment decisions had been made.

In addition to appointing a Tribunal to undertake these rate adjustments every five years, the Register of Copyrights was empowered to appoint a Tribunal once each year if he or she determined that a controversy existed with respect to the distribution of fees generated by the Tribunal.

These Tribunals were *ad hoc* in nature. In fact, it is clear under the 1974 Senate bill that several different Tribunals would be in operation at once, each working on a different rate adjustment or distribution proceeding.

The three members of each tribunal clearly were to be non-political, professional arbitrators. There was to be no permanent supporting staff. Tribunals were authorized to procure temporary and intermittent services, but "facilities and

incidental service" was to be furnished by the Library of Congress. Compensation and expenses of Tribunal members were not specified in the legislation. This was left to the Register of Copyrights. Parties in interest to any proceeding were to be given an opportunity to object to any particular proposed Tribunal member, with the Register of Copyrights deciding on whether to accede to such objections.

All fees of Tribunal members and expenses of the Tribunal were to be paid out of royalties from the compulsory licenses administered by the Tribunal.

Although the nature of the four compulsory licenses themselves changed considerably between adoption or the 1974 report by the Senate Judiciary Committee and passage by the full Senate in 1976 of the Copyright Act, the Tribunal mechanism outlined above remained in all subsequent Senate versions.7/

The Impact of the Buckley v. Valeo Decision on the Copyright Royalty Tribunal

Had it not been for a landmark Supreme Court decision on the separation of powers at the eleventh hour in the birth of the 1976 Copyright Act, the Tribunal mechanism today would probably function as described in the 1974 Senate bill.

However, in January 1976, just before this Subcommittee began markup of copyright revision legislation, the Supreme Court handed down an historic decision in Buckley v. Valeo, 424 U.S. 1

7/ The 1974 Senate Committee version contained the right to public performance for sound recordings. This was later deleted, and a new compulsory license for public broadcasting added.

(1976). In that case, the Supreme Court upheld a challenge to the constitutionality of the Federal Elections Commission on the grounds that the appointment of some of the FEC's members by the President Pro Tempore of the Senate and the Speaker of the House violated Article II of the Constitution, which reposed the appointment of "Officers of the United States" in the President, the heads of Departments, and the Courts of Law. The Court found that members of the Federal Elections Commission were "officers of the United States" within the meaning of the appointments clause and that Congress' powers in their selection were limited to the Senate's advise and consent authority.

Since the pending copyright bills vested power of appointment of Tribunal members in the Register of Copyrights, an employee of the Legislative Branch, it was clear that the Buckley v. Valeo decision threatened the constitutionality of the compulsory license provisions which were then a part of the legislation. Simply granting power of appointment of Tribunal members to the Librarian of Congress would not have solved the problem because the Librarian was not the head of a Department as required under the Constitution. Therefore, the solution devised by this Subcommittee and later agreed to with minor changes by the Senate in conference, was to vest appointment of Tribunal members in the President.

Of course, this change required a radical change in the nature of the Tribunal. The President could not be expected personally to engage in the supervisory activities required of

the Register under earlier versions of the legislation. The only solution appeared to be to make the Tribunal a full-time, independent agency with permanent members appointed for a term by the President. Holding to the scheme set forth in the Senate-passed bill would have required moving the Register of Copyrights out of the Legislative Branch and vesting the appointment of Tribunal members, at least technically, in a Cabinet officer. That also was too serious a change to consider at the eleventh hour in what had been a 20-year legislative effort.

So, the Tribunal came to be as it is. It was created as an independent agency within the Legislative Branch, consisting of five Commissioners appointed by the President for 7-year terms. The chairmanship was to rotate among the Commissioners annually and the periodic rate adjustment proceedings which had been provided to take place simultaneously at five-year intervals, were staggered so as to provide a somewhat continual flow of work for the Tribunal. The House-passed bill provided for a three-member body, called the Copyright Royalty Commission. However, in conference, the Senate insisted on retaining the name, Tribunal, but expanding it to consist of seven members, called Commissioners. The law as enacted reflects these two Senate amendments.

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Brief History of the Tribunal Since Its Creation

Section 801 (c) of Public Law 94-553 provided that:

> As soon as possible after the date of enactment of this Act, and no later than six months following such date, the President shall publish a notice announcing the initial appointments provided in section 802, and shall designate an order of seniority among the initially appointed Commissioners....

Since the Act was signed by President Ford on October 19, 1976, the President was required to appoint all of the initial seven members of the Tribunal before April 19, 1977. This timetable was specifically provided by the Congress so that the Tribunal would be in place and organized quickly enough to begin proceedings establishing a royalty for use of copyrighted musical, pictorial, scultural, and graphic works by public broadcasting, and so that it would be able to begin rate distribution proceedings for royalty income generated by the cable television and jukebox licenses. Under the new law, these activities were to begin as early as July of 1977.

Unfortunately, the expectations of the Congress were never met by the Tribunal from the beginning. President Carter failed to meet the statutory deadline. Its members were appointed months later than the Congressional mandate. In addition, the initial appointees did not reflect a bi-partisan background, and only one, Thomas Brennan, who had been counsel to the Senate Copyright Subcommittee, met the qualifications outlined in the legislative history: "that the President shall appoint members....from among persons who have demonstrated professional

competence in the field of copyright policy."[8] In biographical sketches submitted to this Subcommittee following their appointment, three of the five Commissioners listed either service on the Carter campaign staff or the Democratic National Committee as their most recent professional qualification.[9]

From the beginning, there was disagreement and controversy surrounding the Tribunal's budget and administration. The original appropriation, which had been granted pursuant to an estimate prepared by the Copyright Office, was far larger than that actually used by the Tribunal. Its first Chairman, Thomas Brennan, apparently took to heart the admonition in the House Committee Report that

> the Commission is authorized to appoint a staff...However, it is expected that the staff shall consist only of sufficient clerical personnel to provide one full-time secretary for each member, and one or two additional employees for the entire Commission.

Yet, in spite of the fact that the Commission began its first proceedings with a staff consisting only of five clerical employees, it was severely criticized by the House Appropriations

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8/ H. Rep. No. 94-1476, Copyright Law Revision, 174, 175, 94th Cong. 2d. Sess. (1976).

9/ General Oversight on Patent, Trademark, and Copyright Systems, Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 96th Cong. 1st Sess. 1979 at 79.

Subcommittee on the Legislative Branch for careless spending when it issued a $468 per year contract "for maintaining office plants."10/

If I may insert a comment, Mr. Chairman, I believe that this lack of professional staff and support was particularly harmful to the Tribunal precisely because most of its members had no personal experience either with copyright policy or regulation and adjudication. The members, by and large, lacked the personal experience "to perform all professional responsibilities themselves" as suggested in the legislative history, and they had no professional staff to compensate for this lack of expertise.

I also believe that, because the Appropriations Committee never really understood the need for and functions to be performed by the Tribunal, it was never in a position to offer very positive support.

Yet, for all of its early difficulties, the initial Copyright Royalty Tribunal did manage to promulgate rules of procedure and carry out the statutory responsibilities assigned to it. The Tribunal also survived all law suits challenging its procedures and its constitutionality.11/

In response to a request by you, Mr. Chairman, the General Accounting Office undertook a study of the Copyright Royalty Tribunal in 1981 and generally gave it favorable review. The GAO

10/ Id. at 51.

11/ Id.

Report noted that the Tribunal had operated according to its legislative mandate, held all proceedings on schedule, and had its determinations upheld by the courts.

However, the GAO did find that the Tribunal could be improved by ensuring that future appointed Commissioners possess "experience and expertise" and, by removing organizational limitations that result from lack of legal counsel; access to objective, expert opinion; subpoena power, and clear criteria on which to base its decisions.

The GAO Report also found that Tribunal Commissioners were underutilized as high-level government officials, finding that their work load consumed only about half of their work time.

To deal with this and other problems, the General Accounting Office also recommended that Congress consider: reducing the size of the Tribunal to three members; restructuring it with a full-time chairman and general counsel, but with part-time Commissioners; transferring the Tribunal to the Department of Commerce along with the Copyright Office under an Assistant Secretary for Intellectual Property; and restructuring it as a Presidentially-appointed part-time body, convened by the Register of Copyrights.

Perhaps the most controversial incident surrounding the Tribunal until recently was the appearance before this Subcommittee of Commissioner Clarence James, then Chairman of the Tribunal. Commissioner James called for the abolition of the Tribunal and, shortly thereafter, resigned from the body.

Mr. James suggested that other alternatives to the Tribunal could be found. He cited a 1980 report by the Tribunal suggesting that the compulsory license for public broadcasting simply be abolished. He suggested that the mechanical royalty be fixed by Congress as a simple percentage of the suggested retail list price of records, and that jukebox and cable rates be set by Congress itself, with jukebox royalties adjusted automatically on the basis of the consumer price index (CPI) and cable rates set by Congress on a system-by-system basis with adjustments annually to reflect the CPI.

Since Commissioner James' resignation, the Tribunal has been beset with an almost continual shortage of members. Like President Carter before him, President Reagan has been slow to make appointments. It may be that the Administration has simply decided to implement by executive action (or inaction) the GAO proposal to reduce the size of the Tribunal to three members. Since the death of Commissioner Burg, the Tribunal has never had more than three members, and, at present, it is operating with two Commissioners. Also, to my knowledge, neither of these two Commissioners has the background in copyright policy requested in the 1976 House Committee Report.

Possible Options for Restructuring the Tribunal or Its Functions

1. Simply abolish the Tribunal with no other mechanism for adjusting royalty rates or making distributions.

This option would require abolishing at least three of the four compulsory licenses (cable, jukebox, and public broadcasting) and would amount to an acceptance by Congress of the suggestions made by the Copyright Office in 1965 to resolve the "controversies" in these three areas by extending full copyright protection to each of the uses involved.

With regard to cable television, it would mean that retransmission of distant broadcast signals simply would cease. This is because there is no practical way, in the absence of special legislation, for each and every one of the copyrights represented in a broadcast program schedule to be known about and cleared in advance by a cable system. And if only one of hundreds of copyrights involved in a typical daily broadcast schedule were overlooked, or clearance not obtained, the cable system would be liable for infringement.

With regard to the royalty revenue now received from cable television, jukeboxes, and public television, in the absence of a Tribunal, there would be no way of settling claims for distribution of the royalties collected under the blanket licenses involved.

2. Place the Tribunal in the Department of Commerce and vest authority to appoint its membership in the Secretary of Commerce.

This would meet the test of Buckley v. Valeo and permit resort to the kind of ad hoc Tribunal provided for in the original Senate bill discussed earlier. There are already two

other adjudicatory panels in the Department which deal with intellectual property: the Trademark Trial and Appeals Board and the Board of Patent Appeals. In addition, the Department has a number of adjudicatory functions under the trade laws which have provided it with a cadre of personnel who have experience with the kind of economic adjudication and the procedural issues involved in administering the compulsory licenses under the Copyright Act.

3. Vest the functions of the Tribunal in another independent regulatory agency such as the FCC or FTC.

These two independent agencies certainly have the experience with administrative adjudication, economic analysis, and procedure which has always been lacking in the CRT. The FCC also has had considerable experience with the cable industry. Prior to the 1976 Act, its Distant Signal and Syndicated Exclusivity Rules were considered to be a partial substitute for copyright protection.

For the most part, the functions of the CRT could be turned over to either of these bodies without any modification of the compulsory licenses themselves or the procedures established in Chapter 8 of the Copyright Act. Should this option actually be implemented, the FCC or FTC could assign the entire fact-finding hearing process to one of the administrative law judges who now carry out comparable responsibilities under other aspects of their jurisdiction.

4. Vest the appointment of Tribunal members in a federal court such as the Court of Appeals for the Federal Circuit.

The Supreme Court, in Buckley v. Valeo, at 126, observed that the Constitution permits appointment of certain officers of the United States by Courts of Law. Indeed, prior to the recent reorganization of the Court of Claims and the creation of the Court of Appeals of the Federal Circuit, suits involving claims against the federal government were tried before Commissioners appointed by the judges of the Court of Claims.

This practice could be resurrected in part and the successor of the Court of Claims, the Court of Appeals for the Federal Circuit, could be empowered to appoint a Tribunal on the same kind of ad hoc basis set forth in the original Senate bills. Appeals could perhaps then be heard by the Court of Appeals for the Federal Circuit which also hears all appeals from the Tradmark Trial and Appeals Board and the Board of Patent Appeals.

5. Implement the 1981 GAO suggestion of making Tribunal membership part-time, with Presidentially-appointed members meeting at the call of the Register of Copyrights.

The 1981 GAO study of the Tribunal found that a major problem was the underutilization of high government officials. This would resolve the problem by making the Tribunal a part-time job. The only duty of the Register of Copyrights would be to convene the Commissioners when the need to make determinations arose. The General Accounting Office found that the Register's function in convening the Tribunal would not conflict with the Supreme Court's teaching in Buckley v. Valeo.

6. Implement the 1981 GAO suggestion that only the Chairman and General Counsel of the Tribunal be full-time employees.

This is somewhat similar to the suggestion above, except that it would result in a Chairman and General Counsel with far more responsibility and authority than under present law or under a system where part-time Commissioners were merely convened by the Register of Copyrights. Economic and legal analysis, record keeping, and liaison with the public could be performed by the two full-time officers of the Tribunal. Part-time Tribunal members, when convened, could then concentrate on the adjudicatory functions of the Tribunal.

7. Abolish the Tribunal and substitute a private arbitration procedure.

This alternative follows the approach used in a number of European countries where the law provides for collecting societies which are authorized to negotiate on behalf of copyright owners with organizations representing users. The essence of this approach is that the collective bargaining units involved, both for owners and users, have the power to bind all other owners or users of copyright, regardless of whether they choose to participate in the collective organization.

The royalty rates paid are presumably "market place" rates.

This system requires some sort of government authority, such as a court, to intervene when neither side can agree.

8. Transfer the Tribunal's powers to a court.

Federal courts have performed functions similar to those of the Tribunal. The United States District Court for the Sourthern District of New York functions as a "rate court" under the terms of the consent decree entered into many years ago between ASCAP and broadcasters. In fact, a proceeding in the ASCAP rate court is now underway as a result of the inability of broadcasters and ASCAP to agree on the terms of a new license.

This function could be assigned to a particular court such as the United States District Court in New York, Washington, D.C., or Los Angeles. It could also be assigned to an Article I court such as the United States Court of Claims. District courts could be specifically empowered to appoint special masters to conduct rate review and distribution proceedings. These special masters might be precisely the kind of professional arbitrators envisioned in the original Senate bill.

9. Retain the Tribunal, but restructure it and give it greater statutory guidance.

Chapter 8 of the Copyright Act could be amended to implement several of the 1981 GAO recommendations such as:

a. the creation of a full-time Chairman;

b. granting the Tribunal subpoena power;

c. specifying the qualifications of Commissioners, possibly including a requirement of minority party representation;

d. reduction in the number of Commissioners to three;

e. mandating statutory procedures, including rules governing the conduct of hearings and the handling of *ex parte* contacts by Commissioners.

BRUCE A. LEHMAN:
BIOGRAPHICAL NOTES

Bruce A. Lehman is currently a partner in the Washington, D.C. law firm of Swidler, Berlin and Strelow. His practice with the firm has included representation of major corporate and governmental clients in matters involving communications, intellectual property, and entertainment law. Recent matters have included representation of clients in two major Federal Communications Commission rule-making proceedings, negotiation of the cable television franchise for the District of Columbia, and representation of corporations and trade associations seeking congressional approval of amendments to the copyright, trademark, and patent laws.

Prior to joining the firm in January, 1983, Mr. Lehman served as Counsel to the Committee on the Judiciary and Chief Counsel of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, United States House of Representatives. His nine years of service with the Committee involved him intimately with the wide range of legal issues, from the Presidential impeachment inquiry in 1974 to antitrust, bankruptcy, immigration, international law, and administrative law questions for which the Committee has primary responsibility in the House of Representatives. As Chief Counsel of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Mr. Lehman was responsible for all intellectual property and communications legislation affecting our nation's patent, trademark, and copyright system. As the Subcommittee's name implies, he also bore responsibility for all laws relating to the structure and procedures of our federal courts as well as First and Fourth Amendment civil liberties questions such as freedom of the press and search and seizure law, especially legislation relating to interception of oral and wire communications.

A partial list of laws for which Mr. Lehman served as the chief legal draftsman and Congressional counsel are: the Copyright Act of 1976, the Computer Software Copyright Act of 1980, the Patent Law Amendments of 1982 and 1980, the Court of Appeals for the Federal Circuit Act of 1981, and the Privacy Protection Act of 1980, which legislatively reversed the Supreme Court's decision in *Stanford Daily v. Zurcher*, 436 U.S. 547 (1978). Mr. Lehman played a principle role in the Financial Institutions Privacy Act of 1978, relating to third-party held financial records, and the Foreign Intelligence Surveillance Act, establishing for the first time a statutory law for national security wiretapping and electronic surveillance.

Bruce Lehman has lectured extensively on intellectual property and communication law before forums such as the National Council of Patent Law Associations, the Bureau of National Affairs Symposium on Government Patent Policy, the UCLA Communications Law Symposium, and the New York University School of Law Conference on Law and Television. He is the co-author of "How Uncle Sam Covers the Mails," Civil Liberties Review, May-June, 1977; the author of "Electronic Surveillance - Outline of the State of the Law," Advanced Criminal Trial Tactics for Prosecution and Defense, 1977; "Copyright and the New Technologies," published as a chapter in Law and Television in the 1980s, by Oceana Press in March, 1983; and "Legal Rights in Intellectual Property," published in Thought and Action, a journal of the National Education Association, in the fall of 1984. He is currently co-editor-in-chief of the Piracy, Counterfeiting, and Infringement Report, published by Harcourt, Brace, Jovanovich, Inc.

He has long been involved in international legal issues, having been a member of the U.S. delegation to the Second Session of the Diplomatic Conference on Revision of the Paris Convention on Industrial Property in October, 1982, as well as the joint meetings of the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union in Paris, France in both November, 1977 and October, 1979. In January, 1983, he attended the annual meeting of Non-Governmental Organizations at the World Intellectual Property Organization in Geneva. While serving with the Congress, he was among the first governmental officials to travel to the Republic of Cuba during the process of reestablishment of relations between the two countries. He has served on the Advisory Committee on International Intellectual Property of the United States Department of State.

Prior to service with the Congress, Bruce Lehman was a trial attorney with the Criminal Division of the United States Department of Justice and a staff atorney with the Wisconsin Legislature. From 1971 to 1973, he was a First Lieutenant in the United States Army. Mr. Lehman received his law degree from the University of Wisconsin, Madison, in 1970 and his undergraduate degree from the same institution in 1967. He is a native of Wisconsin and is admitted to practice in that state and the District of Columbia.

Mr. KASTENMEIER. Thank you very much, Mr. Lehman, for your statement.

On your last observation, if you had not put it in your statement, I would have asked you about it. I do think that the experience of the last 10 years may provide sufficient disincentive to resort to additional compulsory licenses at least in the near future. Nonetheless, you are right that some problems among parties or between parties tend to suggest occasionally that perhaps a compulsory license might be the answer.

Do you have a preference among your list of nine?

Mr. LEHMAN. I guess I will say, yes, I do, Mr. Chairman. I changed my preference as a result of working on this testimony.

When I started out, I thought that the best thing to do would be to move the Tribunal to the Department of Commerce and have it have the symmetry where you would have the Trademark Trial and Appeal Board, and the Board of Patent Appeals, and then the Copyright Royalty Tribunal. They would be staffed by professional staffers of the Patent and Trademark Office and so on.

Actually, in reviewing the testimony—in doing the work that led to this testimony, I think that—I have reviewed the GAO report in 1981 and I don't think the subcommittee should overlook that report. It was a very excellent analysis of the Copyright Royalty Tribunal and I thought the suggestion of some kind of a part-time tribunal was a good suggestion and I think either having the Register convene the Tribunal members or I think the preferable course of action would be to have one permanent person who would be responsible for all the day-to-day administration, and recordkeeping, and liaison with the public, which I think is an important factor, and perhaps conducting economic studies who would be responsible for sort of day-to-day activity, but then convene part-time Tribunal members as they were needed. I think that that might provide a solution to the subcommittee's problem.

Now, I think that you still the difficulty of the professional competence of the Tribunal members and I think that you could, within the context of that concept, substitute—also include access of an administrative law judge so that what you would have is the day-to-day hearings would actually be conducted by the administrative law judge. Then, when the final decision had to be made, that these part-time Tribunal members could be convened.

Mr. KASTENMEIER. In other words, you tend currently to lean toward option No. 6, modified by the Karp proposal with reference to administrative law judges?

Mr. LEHMAN. That is correct, but obviously that is—any of these other options also might be effective. I don't feel terribly strongly about that, but if I were advising you, I think that could do it.

Mr. KASTENMEIER. Let me ask your comments about two other proposals. One, as you know, appeared recently as an "op-ed" proposal by Messrs. Toohey and Gunther that we have a Federal copyright agency which I gather would have an FCC-like authority in an independent regulatory sense. In terms of its umbrella authority. It would administer all copyright matters, including the Copyright Office and the Copyright Royalty Tribunal, and probably any other copyright matters, including various mechanisms for disposing of disputes between parties on copyright matters.

The assumption is that it would deal with issues as they arose. It also would presumably write some regulations, rather than let Congress deal with these policy matters. I am not clear on the delination there, but essentially we would create a larger, more powerful authority called a Federal copyright agency. Then, too, I would like to make illusion to another idea the gentleman from Ohio, Mr. Kindness, just mentioned to me while walking over here. Maybe he would care to explore it a bit further. He doesn't claim it as his own, but I first heard the idea from him. That idea is to somehow conceive of the Patent and Trademark Office and Copyright Office as a single intellectual authority and try to fuse the two together and move some of the functions into a larger umbrella organization. This would proceed on the theory that the overall competence that is put into the patent field is so massive in terms of adjudicatory structure and other bureaucratic apparatus that it could easily handle copyright.

The gentleman from Ohio mentioned that, but I thought it was rather intriguing.

Mr. LEHMAN. Mr. Chairman, I think those two suggestions, the copyright agency and the suggestion you have just referred to by Mr. Kindness are very much related because I think, as you may recall, several years ago, the committee was requested by many patent interests to create an independent Patent Office and they didn't do that. The result was to upgrade the Commissioner of Patents and make him an Assistant Secretary of Commerce instead. That seems to work reasonably well.

It did give the Patent Office more visibility within the administration and more resources and so on. I think that one of the problems that we have with the Copyright Royalty Tribunal, which is identified in Mr. Moorhead's statement, is that Presidents don't take it seriously enough when it is just a little bitty agency that they don't understand out there in the middle of nowhere. One reason they don't take it seriously enough, I think, is because of the fact that the executive branch has no experience with copyright, by and large. The Copyright Office, which is really by far the most, just in terms of sheer size, the most important part of the copyright system is in the Library of Congress, and of course, we go back to the *Buckley* v. *Valeo* decision which gave rise to this whole problem in the first place.

I think that undoubtedly, if there were a copyright office like a Patent and Trademark Office in the executive branch under the control of the President; if this were a major Presidential appointment, responsibility that was clearly a responsibility of the President to make national policy in this area, I think you might have a different outcome. You might have a lot more attention paid to the appointment.

The fact that appointments are political appointments doesn't mean that people who have them are not going to be competent at all. Certainly some of the most competent public servants in the history of our country have been political appointments, if not the most competent. It is a great honor to be appointed by the President to a high political position, no matter what your party is.

I think the problem is that the White House and the President have to understand that this is an important—that there are im-

portant public policy issues in copyright. The way the system is structured at the moment, they don't—that is not apparent to them.

Mr. KASTENMEIER. Thank you.

I would like to yield to my colleague. The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I would also like to welcome Mr. Lehman here this morning. He was with our committee as counsel for almost a decade and we really appreciate having him back and his expertise in this field.

One of the things when we consider the Tribunal's duties that we sometimes forget is the substantial administrative function they have and I think this is one of the areas that they have fallen down on, probably as much as anything because of the delays and the distribution of moneys that they collected and working out their formulas.

If you would go to the part-time Tribunal, obviously, these administrative functions would have to be worked out by somebody. Did you have it in mind that there would be a staff under this general counsel?

Mr. LEHMAN. Yes, Mr. Moorhead. The proposal that I expressed some preference for was number—my number six. What you would do is you would set a—in terms of the expenditure of resources for the Tribunal, you would spend less on Tribunal members and more precisely on those kinds of issues that you just raised because presumably this Chairman, a permanent Chairman of the Tribunal, would have full-time administrative authority with the advise of a general counsel would be in a better position to develop procedures, office procedures, procedures for the distribution of royalties and so on and so forth.

I think one of the problems of the Tribunal has been the rotating chairmanship. It is hard for any organization to function administratively in an effective way where the head changes every year.

Mr. MOORHEAD. No continuity from year to year.

Mr. LEHMAN. Right.

Mr. MOORHEAD. That, of course, is one of the advantages of putting it in the Department of Commerce where it does have a working force that would be more capable of handling that. One of the suggestions that has come up, and I think one that is somewhat favored by the people who need the services of the Tribunal, is of the four compulsory licenses considered by CRT: Cable, jukebox, records, public broadcasting, would it be more appropriate to set a flat rate for one and a different type rate perhaps for other services that are provided? Do you think that would be possible?

Mr. LEHMAN. That is a possibility. In fact, when Commissioner James resigned from the chairmanship of the Tribunal and said it should be abolished, basically what he recommended was that Congress try to establish most of these compulsory licenses some sort of flat rate which could be adjusted by—and I believe the Copyright Office refers to that kind of a notion in its testimony as well for some of the compulsory licenses, you could establish—Congress itself, could establish an initial flat rate which then could be adjusted—self-adjusting—based on the Consumer Price Index or something like that.

I think the only compulsory license that it might be hard to do that for would be the one for public broadcasting because I am not certain that, since public broadcasting entities are not profit-making entities, they don't have any gross revenues to look at when you are trying to assign how many—the royalties that they pay, plus there is a big difference. Some of the system which may, in fact, have large subscriber base—this is where they get most of their revenue—may not necessarily be the systems that produce the television programs that are involved.

So I think for the public broadcasting license, there may be that—there may be some difficulty, but I think it could at least in theory, be done for the other licenses. You are going to end up then subjecting yourself to a lot of pressure about what that initial rate base should be.

Mr. MOORHEAD. They still use some of the potential audience for the particular program that is there, and in that, take some of the value off of the product that has been created by the holder of the copyright, though, so you do have to consider it somewhat. At least I would think so.

I would think, also, that one of the big problems, and one I know that they have had, is working out formulas for the distribution of the moneys that have come in. There have been a lot of problems in getting the sports people brought in into any kind of an agreement.

There is also the argument that present formulas that have been set which depend upon which types of programming are adopted by cable systems will affect the kind of programming that is made available so it has a policymaking function in and of itself.

A cable system might decide they are not going to carry distant signals because they are going to have to pay a higher percentage. That is one of the advantages of having a fixed customer rate and perhaps make it more fair because programs are not cut down because of having such a complicated formula.

Mr. LEHMAN. I think, Mr. Moorhead, the formulas could very much be simplified, but you do have—and I really should have mentioned this in response to your earlier question—that at least in theory, Congress could set simpler—could establish simpler formulas and establish simple flat rates on the basis of some kind of criteria that would be periodically adjusted by the rate of inflation or something like that.

But you still do have the problem with distribution of funds because you are dealing with blanket licenses here where a whole big pool of money comes in, particularly in the case of cable television, and then it has to be distributed among the copyright owners. That is a function which would be almost impossible, I think, for Congress to undertake.

You have got to have some mechanism for doing that, or at least to resolve disputes among the various people who are—who think that they should get some of that money and, in fact, there have been very significant disputes and I believe the Tribunal right now has two distribution proceedings pending where the parties haven't been able to agree on how much they should get.

Mr. MOORHEAD. Thank you very much.

Mr. KASTENMEIER. The gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman, and Bruce, it is nice to see you.

I am very much intrigued by your suggestion No. 1, which is to abolish the Tribunal and, as well, compulsory licenses, and I thought maybe I could ask a couple of questions. I realize this is a very immense subject and highly complex involving all the players in this drama. I have not read your extended remarks, just the executive summary, but in your longer statement you might explain it. Do you get into the question of "must-carry" and the dependency of two or three elements of the 1976 act and the question of abolishment of the CRT?

Mr. LEHMAN. No, I did not discuss the must-carry issue, Mr. Mazzoli, and must-carry has several different aspects to it. One of the aspects of it is that if a signal must be carried by a cable system, then presumably there should be some royalties paid for that signal and so it does affect the compulsory license. As you may recall when the committee was considering, however, an earlier resolution of the cable copyright controversy, must-carry also came into play in a political sense as a quid pro quo, in effect.

Mr. MAZZOLI. As a matter of fact, my recollection of 1976, and I didn't serve on the subcommittee, is that that is as much a political document as it is a statement of constitutional rights and free speech and whatever. It was trying to get everybody under the tent at least for that one brief moment in which they could get their signature on the dotted line.

I bring that up only because it seems to me, and I am not anywhere an expert on this subject, but to deal in terms of abolishment of that, as well as the compulsory license, is, of course, to practically go back into the whole subject and assess where each of the players happens to be. That is, as you also know, I have thought that the idea of compulsory licensing is a concept which has outlived its usefulness and I have advocated and felt that there is a time now when all of the players have gained maturity since 1976 in which they could at arm's length with one another to, as you have mentioned, umbrella organizations, consortium of groups, and perhaps eliminate a lot of the complexity of the subject by letting the market force and the routine of bargaining and selling take over.

In that sense of the word, I was also interested in one of your other suggestions here. I am aware that a new council has been put together, a copyright council, which puts together the motion pictures, the authors, the recording industry, and several others, which seems to me to portend a movement away from compulsory licensing into the direct dealing between the user or the infringer and the copyright owner, rather than perhaps more into the question of compulsory copyright.

But in this sense, you mentioned, Bruce, about if Congress were to set a flat fee to start the dealing and then let in later years, perhaps, cost-of-living adjustments be made to that. Let me just ask you a question as a person who has practiced and also worked on our side of it, do you think that we would be able to set an initial round of fees that would fairly compensate the copyright owners because you remember the battle when the CRT went to that 3.75 percent, everybody said that that is not their mandate. They

should have just simply bumped up the rate by cost of living, but they said that the market value of the additional distance signals was something which they had to accommodate to. I wonder, do you think that if we set a flat fee, that that would then be a fair system; and second, would it allow whoever administers that to then compensate for programming which becomes greatly more attractive in 1 or 2 years than it was when the rates were set. At least the question is raised of what the CRT can do to accommodate to the increased popularity or the decreased popularity of shows from that base point.

Mr. LEHMAN. I think that the fault of the flaws in a mechanism like CRT, that you are probably likely to get a more dispassionate and objective ratesetting there than on the Hill, simply because any rate which is set by Congress is going to be the result of political influence, and I think this committee is remarkably judge-like in its assessment. I think that is due partly to the chairman of the committee and, I think, that probably this committee could—this subcommittee could result in a reasonably fair rate. I think it would take all of this present 99th Congress. I think you would be deluged with lobbyists. I think you could do it.

Whether or not you could sustain that when you got to the floor or with the Senate, I just think you would be subjecting yourself to a lot of political headaches, and so in that sense, it is easier to have somebody else do it. If you can perfect a mechanism which is likely to operate in a fair and objective manner and in the public interest, it might be easier.

Mr. MAZZOLI. My last question, and I thank the chairman for his indulgence, would be that if we were to set, at the end of an arduous task, a set of fair flat fees to begin with, would you envision those just to be adjusted for the cost-of-living factor or do you think they would ever have to be adjusted for the rise or fall of the entertainment value of the particular copyrighted work?

Mr. LEHMAN. I think it would be almost impossible to have any adjustment which would be based on anything other than something very simple and very arbitrary, like the CPI. I think the moment you get into subjective determinations about the value of a work, then you are getting into something that can—perhaps can't even be done very well by some kind of tribunal.

One point that I think I should emphasize, Mr. Mazzoli, that is very important to keep in mind with respect to any proposal to abolish the compulsory license for cable television. I don't think there is any way to simply abolish the compulsory license for cable television that doesn't result in the elimination of distant signals from cable television systems all over the country. It means that people are—that Ted Turner is not going to be on the air and the Chicago superstation, WGN, is not going to be on the air. These stations are going to go blank if you abolish the compulsory license.

Mr. MAZZOLI. Can I ask you just a question on that. It would seem that based on the health of all of the industries, and especially the increased health of cable and the fact that they now have done a lot of the capital work and now, not having this initial construction which is very costly and requires a lot of capital, they now are in a position, it seems, to perhaps consolidate and to be in a position where, if the people demand Ted Turner; if people

demand WOR or WGN or whatever, that that local cable, through its perhaps national owner, would perhaps be able to dicker and develop it.

That is an interesting point and one we will have to deal with.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Thank you very much, Mr. Chairman.

Bruce, thank you for joining us today. We have enjoyed your testimony. It is always good to have you.

I would like to follow up on my colleague from Kentucky's question. Give me about a 60-second explanation if you could why the distant signals would be off the air under that scenario. Why would that necessarily follow?

Mr. LEHMAN. Keep in mind that what I am talking about here is just flatly doing away with——

Mr. DEWINE. I understand.

Mr. LEHMAN. No other agreed licensing mechanism or anything like that. The reason that they would go off the air is—there are really two reasons. The first and foremost one is that there would simply be no practical way of clearing the individual copyrights that are on each signal in advance for all the cable systems which are receiving and then redistributing the signal. The cable systems do not know in advance what the programming schedule of the particular distant broadcast stations are which they are retransmitting and keep in mind that they would have to know every single copyright interest involved, every music copyright owner, every owner that controls sculpture and graphic work that might be displayed, much less the owner of a particular sports program or a movie. There are literally hundreds, if not thousands, of copyrights reflected in the daily broadcast schedule of a television station. So, as a practical matter, they would not know about that in advance; they would not be able to get those clearances.

Second, let's assume hypothetically that even if they could do that, that they could figure out some computerized way to do that, the way television contracts are written in this country today is that an individual television station is given an exclusive license to the work, and in the absence of some sort of statutory abrogation of that exclusivity, no one else could buy the right to retransmit that signal. So you basically have to abrogate all those contracts that have been assigned to give particular television stations.

Mr. DEWINE. The relationship could not exist between, for example, Ted Turner's superstation and the copyright people. Explain to me why the local broadcast station if it is all done by contract, doesn't know who is picking up the station.

Mr. LEHMAN. I suppose that WTVS could make its program schedule available and that—in advance—and it could be studied and there might be an opportunity to negotiate for these rights. The difficulty is that Ted Turner doesn't have the power to license a cable system to utilize the signals that are broadcast by his station. The power to do that is in the copyright owner of the program, who normally is in Hollywood, in California.

In all the contracts that his station has signed with those program suppliers, they have very specifically reserved the right to

make those kinds of licenses and he wouldn't have the right to do so.

Mr. DeWine. OK, but under—assuming that the law was changed, everyone would know how the law was changed and wouldn't contracts made prospectively have to deal with that some way.

Mr. Lehman. They could be——

Mr. DeWine. Why can't you go with that contract?

Mr. Lehman. That assumes two things. It assumes, one, that the copyright owners would, in fact, agree and keep in mind that there are hundreds of copyright owners and if just one of them says, no, I am not going to do it, then you are stuck. Second, you have a problem in that you would have a time gap involved in that these syndicated programs are normally purchased well in advance of their actual showing and I am sure that that particular—the Atlanta superstation and the Chicago superstation are operating under probably having much of their programs purchased for the next several years under these existing programs.

Furthermore, a lot of distance signals are retransmitted that are not superstation signals. You know, you might get the Philadelphia station in Baltimore, for example, and those—there is very little incentive or interest for people to go through this elaborate procedure.

Mr. DeWine. Let me move to another area. CRT. It seems rather strange that in your testimony, you are talking about the fact that studies have shown that they are really not totally utilized; that they are certainly not overworked and that is one of the arguments for making it a part-time job. On the other hand, the complaint comes in that they are slow in making distributions; they are slow in getting some of the work out.

How do you put those two facts together? Are we just talking about the fact that those are staff functions and the staff function is not getting done?

Mr. Lehman. I think it is more than that. I think that is part of it, but also, one of the reasons distributions haven't always been rapid is simply because there were a lot of legal questions and there has been litigation that prevented the distribution from——

Mr. DeWine. Then the fault does not necessarily lie with the CRT.

Mr. Lehman. It is not necessarily the CRT, that is correct. I think that it is not just a clerical problem. If it were a clerical problem, at least in theory the Commissioners could get in there with their adding machines and their pen and pencil and do that themselves.

Mr. DeWine. In looking at the makeup of the CRT and the Commissioners, how much technical expertise do you think they actually have to have? In other words, can you take an average, moderately intelligent lawyer—or pick whatever profession you want—and put them on there? Are we looking for generalists or are we looking for technicians?

Mr. Lehman. I think that it makes a difference whether you are expecting the Tribunal to perform their own staffing, their own staff functions, which is the way this Tribunal was set up, or

whether you intend them to be purely policy-oriented officials. If you expect the latter, then you can have generalists.

Mr. DEWINE. Which should they be in an ideal world?

Mr. LEHMAN. My own view is that they should be more policy-oriented because this gets back to the chairman's concern about balancing. You want people who are able to make judgments, but balancing the rights of major interests in this country and that is not a technical function at all.

Mr. DEWINE. How do you perceive them operating now? Do you think they are too technical now?

Mr. LEHMAN. I think they have operated in a somewhat confused way up until now. I think basically they have made policy judgments.

One of the difficulties is that they have not had, and the court of appeals has really referred to that, they have not had the kind of technical support they need to make to totally justify in a legal record, with economic data and so on and so forth, those policy judgments.

Mr. DEWINE. Is that their fault or is that Congress' fault for the way it was created?

Mr. LEHMAN. I think that is very largely Congress' fault for the way it was created. But the difficulty is that then you get into the problem, are you going to have a huge bureaucracy to support this function and certainly in this day and age, when there is a reaction to costs of regulation, that is very unpopular as well.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Oklahoma.

Mr. SYNAR. First of all, Mr. Chairman, let me commend you for holding these hearings today. I don't think it is any secret that you and I share the same belief, that we have a CRT situation that is broken and needs correction. I'd like to submit for the record a prepared statement. I will highlight three points now.

Mr. KASTENMEIER. Without objection, that will be done.

[The information is reprinted in additional statements:]

Mr. SYNAR. First, Pat Schroeder and I introduced the Copyright Royalty Tribunal Sunset Act of 1985 because, as you have said, the CRT is a broken agency. There is no confidence in the CRT and I doubt if it is able to make acceptable decisions.

Second, this measure is intended to serve as a starting point for the discussion over how to replace the CRT. We will follow your lead, Mr. Chairman, because a permanent solution is much preferable to what we have offered.

Third, while many consumers, creators, artists, and the recording, cable and movie industries are affected by the CRT, it's important for us to remember our larger duty here. The Commissioners are not giving the taxpayers their dollar's worth and one of our job as Members of Congress is to make sure the Government works.

I thank you for your leadership and for scheduling these hearings. Again I apologize that I will be down the hall but I will review the testimony today and look forward to further action to replace this broken agency.

The Copyright Royalty Tribunal Sunset Act of 1985 eliminates the disastrous CRT and freezes copyright rates until Congress es-

tablishes a more workable ratemaking scheme. The bill requires congressional action before January 1, 1988.

The CRT was a good experiment in Government but has proved to be nothing more than a dumping ground for startlingly inept political appointees. It has failed in its mission to develop the expertise necessary to administer the copyright compulsory licenses. Since its creation in 1976, the CRT has not generated less work for Congress and the courts, but more.

Pat Schroeder and I introduced this measure because the public interest demands the CRT's elimination. We hope to begin a debate that will result in a better copyright ratemaking system. At a minimum, we should enact this measure to end the wasteful and unnecessary expense of an agency whose $70,000 a year Commissioners only randomly show up for work.

Those affected by the CRT have no confidence in it. Several court challenges to its ratemaking decisions and procedures have shown how embarrassingly little thought goes into CRT actions. Recently, copyright users and owners subject to two of the compulsory licenses under the CRT's jurisdiction—public broadcasting and jukebox—have privately negotiated rates rather than risk the capricious ineptitude of the CRT.

Among its duties, the CRT is responsible for distributing cable copyright royalties. The 1979 fees have not yet been distributed despite the decision of the U.S. Court of Appeals for the D.C. Circuit in *Christian Broadcasting Network, Inc.* v. *CRT* 720 F.2d 1295, 1983, which had substantially—although not without criticism—affirmed the CRT's distribution decisions.

The three items remanded to the CRT in that decision were decided by the CRT again. These are the subject of yet another pending court appeal. Indeed all cable distributions for the years 1979 through 1982 were the subject of appeals pending in the D.C. Circuit as of April 1985.

In Christian Broadcasting, the court was troubled by the near inability of the CRT to explain its distributional decisionmaking. This was the court's second admonition to the CRT along these lines, the first having been in *National Cable Television Association* v. *CRT* 689 F.2d 1077, 1982.

The revelation that former CRT Chairperson Marianne Hall was the author/editor of a racist book is only the most recent problem. Many of us were also disturbed by the most recent nomination by President Reagan: a personal aid of his former political director who has no experience in copyright whatsoever.

The two remaining Commissioners have little or no experience in copyright. Both have been active politically in Republican organizations. During oversight hearings this year it was disclosed that these $70,000 per year public employees do not regularly show up at work.

The Copyright Royalty Tribunal Sunset Act eliminates the CRT on the date of enactment. Further, it provides that any action taken by the CRT from today forward shall have no effect. I recognize that this is unusual action but it is not unprecedented and, in my opinion, it is necessary.

The CRT in its present form is incapable of giving adequate consideration to the complex issues involved in ratemaking. The two

sitting Commissioners on the five-member CRT may not represent a quorum and there is by no means a clear answer to whether or not the CRT can function at all even if this legislation were not enacted.

I do not believe the cable copyright rates in place today are fair. In the past I have introduced legislation to correct an urban/rural bias in the rates and I have supported related legislation to correct this and several other rate inequities. Nevertheless, freezing these rates for 2 years is the best alternative, given the need for efficient government and the irreparable condition of the CRT.

Under current law, an owner or user of a work subject to the cable copyright compulsory license can initiate a rate proceeding anytime during 1985. As I mentioned, only one proceeding has been intiated so far this year and it is on an extremely narrow question.

This does not mean that cable operators or copyright owners are happy with the status quo. Rather, they are afraid of the CRT because it is irreparably broken and incapable of rendering a sensible decision.

I want to stress that this is only a temporary measure. I strongly support the compulsory license for cable retransmission of copyright materials and I oppose the current rates. But the system is such a mess, this is a necessary first step toward finding a solution. I ask the cable industry to live with the current rates for the time being.

The bill would not affect the recent compromise reached between the performing rights organizations and jukebox operators which was engineered by Representative Kastenmeier. And present challenges in court regarding interpretations of the cable rate collections would likewise not be affected.

Copyright owners will be affected by this legislation only if Congress fails to act by January 1, 1988. In that circumstance, no distribution system will be in place to distribute the copyright royalties and no distributions will occur.

It is my hope that with the passage of this legislation we can then expeditiously address the substantive issue of correcting the basic inequities which have been identified in the copyright law. We must develop a sensible mechanism for the distribution and collection of royalties well in advance of the sunset date.

Mr. SYNAR. I have no questions.

Mr. KASTENMEIER. Thank you, Mr. Lehman, for your contribution here this morning. It was, I think, a very useful and appropriate analysis of value and it does set the stage for the appropriate deliberations of this committee. We are indebted to you.

Mr. LEHMAN. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Next, the Chair would like to express thanks to the Acting Register of Copyright, Mr. Donald Curran, who was scheduled next, but has graciously agreed that we should call our last witness for the day in order to accommodate that witness, Mr. Irwin Karp. So, I am delighted to call Mr. Karp, who represents the Author's League of America as its counsel and has for many, many years. He has testified before this subcommittee many times in the past, including once over 20 years ago. While, as he points out, his organization has perhaps less direct interest in terms of appearances before the Copyright Royalty Tribunal, it is nonetheless

the organization which, in every traditional aspect, represents authors and proprietors of copyrighted works. We are delighted to have him come and share his views with us.

Mr. Karp.

TESTIMONY OF IRWIN KARP, COUNSEL, THE AUTHOR'S LEAGUE OF AMERICA

Mr. KARP. Mr. Chairman, thank you very much for giving us this opportunity to express our views and I want to thank you and Mr. Curran for your generosity in allowing me to testify before he was scheduled to testify.

Mr. KASTENMEIER. We understand you have time constraints and we want to help you out.

Mr. KARP. The one subject I have not addressed in my statement—and I request that my statement in full be included in the record——

Mr. KASTENMEIER. Without objection, your statement will be received and made part of the record and you may proceed as you wish.

Mr. KARP. One subject I haven't addressed is the point just raised by Representative Mazzoli as to whether the solution to the problem of the CRT might not be to abolish both the Tribunal and compulsory licensing. I understood that that wasn't to be the point of today's discussion and I won't involve myself in it, because I think it would take me down a different path for a considerable period of time.

But I should point out that I agree with Representative Mazzoli. To some extent, at least, many of the problems could easily be avoided. There is not, for example, any reason to have a compulsory license for making phonograph records. It is long outdated. To adjust the license fee, both sides spent enormous sums of money in a CRT proceeding instead of doing something they could easily have done themselves, and very likely will do in the next round, partly thanks to the very existence of the Tribunal. But I think that is a result they could have achieved by their own voluntary efforts, with the realization that the setting of royalty rates for records is something that is done by private negotiation day in and day out, every day of the year.

The same is probably true for the public television license. I think that the parties would continue doing exactly what they are doing now, which is to negotiate privately and arrive at agreements, just as ASCAP and BMI do in other areas with other users.

On the cable problem, I will not have the temerity to discuss what would happen if the license were eliminated. I haven't got the background, which I could acquire for you, but it would take me a couple weeks to do it.

I would like to go, then, to the question you have, in effect, asked: What sort of reform should be accomplished to put to right some of the problems that exist, or have been charged to exist, with respect to the Copyright Royalty Tribunal. The criticism of the Tribunal actually focuses, I think, on three points: One, alleged incorrectness of some of its decisions; two, possible flaws in its structure and procedures; and three, the qualifications of some of

the Presidential appointments, is a bipartisan criticism because, as we all know, that charge has been made, both as to the appointments of a Democratic President and of the present incumbent.

We don't propose to defend the correctness of the CRT's decisions, partly because, and most importantly because the courts have dealt with it. I think that the imprimateur the courts have given to the correctness of the decisions, as the CRT has applied the criteria set down in chapter 8 of the Copyright Act, indicate that the primary problem is not correctness. The Copyright Royalty Tribunal actually has fared very well in meeting the test of judicial review. When you go through the court of appeals' decisions on its ratemaking decision, you find that the Tribunal has not been faulted or criticized for any serious errors of judgment or errors in applying the criteria contained in the statute.

As the Court of Appeals here in the District of Columbia pointed out, the Tribunal had a very difficult task to discharge. It was charged with the responsibility of setting the statute machinery in motion, making the parts work efficiently and smoothly while yet an untried and new agency.

I am addressing myself to rulemaking; I am not talking about distribution. I am talking about the basic problem of rulemaking and ratesetting.

I think that the fact that the Tribunal did do well, given some weaknesses in the qualifications of its members is really a tribute to the committee's basic concept that an administrative agency of this sort was an appropriate way to set rates.

What we are deeply concerned about—and this is basically an aside from the general thrust of this particular hearing—is that the Tribunal not be dismantled before something else is put in place. If Congress concludes that reforms are required or that a better mechanism can be substituted for the Tribunal, or that no mechanism is needed, those changes should be made. But until that is accomplished, the existing mechanism should not be terminated, for that would deprive copyright owners of the means of seeking adjustments of royalty rates and resolving disputes over the allocation of the royalties.

Let me turn then to the question of possible flaws in the CRT's structure and procedure. This committee expected, as the Judiciary Committee's report said, that the President would nominate persons who have demonstrated professional competence in the field of copyright policy and this has not been done.

There was also a criticism addressed to the general qualifications or lack of them and I deal with that later. I think Congress can do much to remedy that particular flaw without great difficulty. But as far as expertise in copyright policy goes, I don't think that is a qualification for serving on this Tribunal.

Court of appeals judges are not experts in copyright policy. In fact, copyright policy is a phrase that is quite different from expertise in copyright. I don't think anybody really wanted copyright experts on the Tribunal because it is not dealing with technical copyright problems, such as what is infringement, how to deal with the remedies provided in the act and so forth. The CRT basically is dealing with the application of the policies enunciated by this committee in its report and in the statute, the determination of how

rates should be set in view of those criteria. That requires a general ability to make decisions and adjudicate disputes that isn't confined to so-called experts in copyright policy.

As I say, the court of appeals' opinions indicate that the Commission wasn't lacking in that ability to any marked extent. It affirmed most of those policy decisions.

What the courts have noted, particularly here in the District of Columbia, is a certain lack by the CRT of technical expertise, both in making a record and in preparing a satisfactory report from which the appellate courts can determine whether a proper review has been had; and I quote at page 6 in my statement, two comments by the district circuit court of appeals on that problem.

As Mr. Lehman has pointed out, the Author's League does recommend to the committee that it provide the needed expertise. This can be done very easily because there is already in place a longstanding machinery for providing many of administrative agencies with the same expertise; namely, the system of administrative law judges.

At pages 7, 8, and 9 of my statement, I describe briefly the purpose of the administrative law judge system, the manner in which the Office of Personnel Management, formerly the Civil Service Commission, certifies administrative law judges and the qualifications that the Commission requires be met before certifying such a judge. These are the qualifications that would help meet the expectations of the court of appeals which said it hoped that, given the difficulties the Tribunal faced in the early grounds, its decisionmaking ability would improve with time.

Also, as Bruce has noted, we, as well as he, believe that with the assistance of administrative law judges to conduct the hearings and prepare recommended reports, much of the burden that now weighs down the Tribunal could be lifted, and it would be possible to have a Tribunal consisting of three members or, as we note, even one permanent member and two members serving on a per diem basis to be convened at those times when either ratemaking or distribution disputes have to be resolved.

We also note that the CRT wouldn't necessarily face a problem of overstaffing because under the Administrative Procedures Act, the administrative law judges can be either borrowed by it from another agency when there is a greater demand for them than usual, or loaned by it to another agency when they are not being put to use in their home agency.

As to the qualifications of the appointees: we don't think that the problem really is one of lack of people who have a command of copyright policy. The criticism—and some of it is valid—is that people are being appointed not because they have any qualifications at all for the job, but because they met another qualification, namely, they served admirably in somebody's political campaign.

The Congress has it within its power now to deal with that to a very significant extent. As I point out, in *Myers* v. *the United States*, the Supreme Court said the Congress has the power to prescribe qualifications of office for individuals appointed by the President, so long as the qualifications aren't so limited that they actually trench upon executive choice and in effect amount to a legislative designation. In other words, if you write qualifications so nar-

rowly drawn that only one person can be appointed by the President, you are preempting the Presidential power of appointment.

But as the Court said, Congress does have the right to prescribe by statute reasonable and relevant qualifications and rules of eligibility of appointees. Without belaboring the point, I offer a few samples from various statutes dealing with appointments to other executive offices where Congress wrote in qualifications. One sample is from the Agriculture Act. The Secretary of Agriculture is authorized to appoint a Chief of the Bureau of Animal Industry who shall be a competent veterinary surgeon. I am not recommending you put that into the Copyright Act. But it is an illustration. If the Chief of the Bureau of Animal Industry has to have experience and has to be a doctor, there are qualifications that obviously suggest themselves here.

Again, in an area that apparently wasn't too controversial, title XVI of the code, 742(b), authorizes the President to appoint the Director of the U.S. Fish and Wildlife Service and goes on to say: "No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management."

Another approach is that used in appointing the Comptroller General, who, according to section 703 of title 31, is to be appointed by the President from the recommendations of a committee, which includes the majority leader and the minority leader of the House, the Speaker of the House and comparable officers of the Senate.

The Archivist of the United States has to be appointed without regard to political affiliations and solely on the basis of professional qualifications required to perform those duties.

The National Science Board, which is appointed under section 1863, has qualifications even more detailed than the ones I have read.

I suggest that Congress make use of that power. I think it can deal both with the question of political-reward appointments and the question of qualifications by amending the Copyright Act to write in prescriptions of qualifications as suggested by this sampling.

As to the suggestions for alternatives to the CRT, I would like to talk briefly about them. Arbitration sounds attractive. I think it may have constitutional problems. I can tell you from experience of my own and from people I have talked to in a area of the law where arbitration is frequently used, the selection of arbitrators by the American Arbitration Association, which I respect, is no guarantee that you are going to get seasoned, qualified decisionmakers. Even assuming that the panel chosen would be prestigious, I think there does remain a constitutional problem of whether you can turn over to private arbitrators what are basically administrative, executive functions in fulfilling the mandate of the statute.

I have not had a chance to read the bill introduced by Chairman Kastenmeier, but I do address very briefly the question of putting the functions of the Tribunal in a court. I face at the outset a problem of would there be a case or controversy? Is this really a judicial function or is the court to be established under the bill being asked to perform executive functions and can that properly be done under the Constitution?

Also, whether the courts today, the district courts, can afford to staff judges for this purpose? I think probably they could or they could be provided.

But more basic to me is that it seems pointless to dismantle the CRT as an administrative agency at this juncture, assuming that there is regulatory work still to be done. It has done the groundwork. It has established a body of rules and principles that had to be established. Everybody knew the act itself didn't give the particularized guidance that was necessary to get into this type of ratemaking. And the Tribunal has developed under the close—and I must emphasize—close supervision of the courts of appeals, a body of administrative law and principles.

If we transfer the CRT's functions to an arbitration system, or even to courts, that might mean starting all over again on the lengthy, difficult, and costly process of developing a new body of law on the foundations that have already been built on; namely, the specifications in chapter VIII of the Copyright Act. That would impose an enormous cost, both on creators of copyright works, the organizations that represent them, and on those who use copyrights in their organizations.

Also, I think it ignores the fact that the Copyright Royalty Tribunal is not going to be performing ongoing ratemaking functions year in and year out. It has that staggered timetable and only does it in some areas once every 10 years or once every 5 years. We are seeing more evidence that the Tribunal is accomplishing another objective; namely, to encourage voluntary negotiations. There have, too, been voluntary negotiations thanks to the encouragement of Chairman Kastenmeier in the area of jukebox royalties.

Negotiations, in the area of distribution, has worked to a very large extent. Some of the problems of distribution are quite minimal, I think, because in many instances, by voluntary arrangements, the large societies that represent most copyright owners have been able to agree among themselves and what is left to resolve are the claims of a very small body of people.

I would hate to see all of that work, and the concrete results that it has achieved, lost by a dismantling of the agency before a real effort is made to reform it. I think it can be reformed.

As Bruce said, suggestions had been made in a prior study. Bruce has suggested some of these changed, as have we, and I think they deserve very serious consideration of the subcommittee and the Congress.

I would be glad to answer any questions you have, Mr. Chairman. Thank you.

[The statement of Mr. Karp follows:]

Statement of Irwin Karp, Counsel, the Author's League of America

STATUTORY REFORM OF THE COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman, my name is Irwin Karp. I am counsel for The Authors League of America, the national society of professional dramatists and authors, with a membership of 12,000 creators of literary, dramatic and musical works.

The Authors League is grateful for the invitation to testify at this hearing on statutory reform of the Copyright Royalty Tribunal ("CRT"). While the League has not appeared before the CRT, the Tribunal's decisions on the adjustment of compulsory royalty rates and distribution of royalties affect hundreds of League members who write musical plays for the stage, or screen or television plays, or books or plays that are adapted as motion pictures or television dramas. These authors and dramatists share in the royalties paid under the various compulsory licenses imposed by the Copyright Act for: cable retransmissions of broadcast programs (Sec. 111); making and distributing phonograph records of nondramatic music (Sec. 115); juke box performances of nondramatic music (Sec. 116); and public broadcasting uses of nondramatic musical and graphic works (Sec. 118).

Many Authors League members thus will be affected by any reform

of the CRT, or its replacement by other mechanisms for performing its essential functions. The League therefore welcomes this opportunity to discuss these issues.

Criticism of the CRT

Criticism of the CRT has been voiced within and outside of Congress. It has been directed at decisions of the Tribunal, possible flaws in its structure and procedures, and the qualifications of some Presidential appointees to serve as Commissioners. This criticism is reported in a Washington Post article (May 13, 1985; p. A11). It also appears in the June 12th statements of Representatives Schroeder and Synar on their Bill to terminate the Tribunal immediately, freeze all current compulsory royalty rates for three years, and have the Copyright Office distribute royalties until the end of 1988.

The Correctness of the CRT's Decisions

We do not propose to defend the correctness of the CRT's decisions, since the Court have dealt at length with that question. We will discuss the other two areas of criticism, and offer suggestions for dealing with the problems they raise.

It is important to note that the CRT's primary decisions on the adjustments of compulsory license royalty rates and distributions of royalty income earned by creators under the four compulsory licenses have been reviewed by U.S. Courts of Appeal, which have affirmed the Tribunal's major conclusions, in detailed and intensive opinions (ftn. 1). Despite the barrage of criticism leveled against it, the CRT has passed the test of judicial review with respect to the substance of

those conclusions and its application of the criteria formulated by Congress in Sec. 801(b).

In evaluating the Tribunal's substantive decisons, we also should keep in mind Judge Bazelon's observation that the it was construing a new statute and was

> "'charged with the responsibility of setting (the statute's) machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" National Cable TV v. CRT, 689 F.2d 1077, 108 (D.C.Cir. 1982)

Moreover, the CRT was required to break new ground in not one, but rather three major areas of rate-making and distribution, each presenting different economic factors and business practices; none resembling the more traditional areas of rate-making dealt with by long-established administrative agencies. That the CRT fared as well as it did in the Courts, in this difficult and pioneering period, evidences the soundness of this Subcommittee's concept that adjustments of compulsory royalty rates and allocations of royalty shares should be made by an agency such as CRT.

An Effective Mechanism Must Be Maintained

The Authors League is deeply concerned that so long as the Copyright Act imposes compulsory licenses for the four uses of its members' works, a suitable mechanism be provided for making the adjustments of rates provided in the Act, and settling conflicts over distribution of royalties, when voluntary negotiations cannot do so.

Given the complexity of the rate-making problems and

distribution issues the Tribunal dealt with, the affirmance of its substantive decisons by the Courts of Appeal does not suggest that the CRT - qua mechanism - is flawed beyond repair and must be scuttle. There is even less reason to scuttle it even before a workable and better alternative is created by Congress -- as the Synar/Schroeder bill proposes. This, the Authors League submits, would be grossly unfair to dramatists, composers, authors, screen writers, motion picture companies and other creators and producers of copyrighted works on whom the Copyright Act imposes compulsory licenses that allow others to make these uses of their works without permission . If Congress concludes that reforms are required in the CRT mechanism, or that a better one can be substituted for it, those legislative changes should be made ... but until that is acccomplished, the existing mechanism should not be terminated, depriving copyright owners -- and users -- of the means to seek adjustments of royalty rates or to resolve disputes over the allocation of royalties among copyright owners.

Changes in the CRT's
Structure and Procedure

The House Judiciary Committee's Report on the CRT provisions of the 1976 Copyright Act said:

> "The Committee expects that the President shall appoint members of the Commission (CRT) from among persons who have demonstrated professional competence in the field of copyright policy." Rep. No. 94-1476; p. 174.

Representatives Synar and Schroeder, and other critics of the

CRT, note the appointments of Presidents Carter and Reagan have not fulfilled this expectation. The League believes that Congress can deal with that problem without dismantling the CRT, for reasons I will discuss. But we doubt that lack of expertise in copyright policy is the basic cause of flaws in the CRT's structure.

Court of Appeals judges are not experts in copyright policy, yet no one reading their opinons in the CRT appeals or other rate making cases would doubt their capacity to analyze the issues and and evidence, or to apply the relevant criteria. And the opinions in the CRT appeals indicate that the Courts have not found that the Commissioners lacked the capacity to make reaosnable decisions, lack of professional competence in copyright policy notwithstanding. (Of course, the Commmission was fortunate to have a good measure of such competence in the person of its first Chairman, Thomas Brennan, fomer Counsel to the Senate copyright Subcommittee) Rather, the critical note sounded in some Court of Appeals opinions was directed to another type of competence ... the CRT's ability to make "a fuller explanation" of its conclusions.

In Recording Industry Ass'n v. CRT, the Court noted that while "the statutory criteria" for the reasonableness of record royalties "provide significant guidance", they left the CRT "considerable discretion in charting royalty policy". And the Court said it expected that in future years the staggered rate-making schedule :

> "will permit a fuller explanation of the Tribunal's conclusions, more facilitative of judicial review..." (662 F.2d, at p. J8)

The Court then said "but we find on the whole that the Tribunal had adequately explained its reasons and adduced support for its adjustment of the royalty rate." (ibid.)

The D.C. Circuit Court of Appeals returned to this theme in in National Cable TV v. CRT, 689 F.ed 1077, 1091 (1982) and in Christian Broadcasting v. CRT, 720 F.2d 1295, 1319 (1983). In National Cable TV, the Court, having found "support for virtually all of the Tribunal's conclusions", affirmed then, but went on to say:

> "We wish to emphasize, however, that precisely because of the technical and discretionary nature of the Tribunal's work , we must especially insist that it weigh all of the relevant consdierations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully."

The Court said that while the CRT "was not always explicit" in rejecting evidence, or indicating whether a decision resulted from a policy choice or its view of statutory authority:

> "We have regarded (these lapses) charitably in light of the Tribunal's lack of a professional staff and the novelty of the proceeding. We expect the quality of the Tribunal's decision making to improve with experience." (689 F.2d 1077)

We think the Court's comments demonstrate that the problem is not lack of competence in copyright policy, but rather in certain technical aspects of conducting hearings, be it on record royalty rates or the price of natural gas, and in preparing an opinion that satisfies the provisions of the Administrative Procedure Act, the canons of judicial review, and Sec. 803(b) of the Copyright Act, which requires of the CRT detailed statements of the criteria it applied, the facts it

found relevant and the specific reasons for its determination.

What the CRT needs, and Congress can provide, is technical competence in the rate-making process, competence that is made available under Section 3105 of the Administrative Procedure Act (5 U.S.C.) to other agencies that perform comparable functions.

Administrative Law Judges

Section 3105 provides that "Each agency shall appoint as many administrative law judges as are necessary for procedings required to be conducted in accordance with sections 556 and 557" of the Act.

If an Administrative Law Judge conducted the CRT's hearings and prepared a recommended report for the Commissioners, the prospect of realizing the Court of Appeals "expectation" that "the quality of the Tribunal's decisionmaking (will) improve" would be greatly enhanced. Adminstrative Law Judges "are an integral part of the rule making and adjudicatory procedures required by the Administrative Procedure Act..." In order "to insure the independence and impartiality of of the administrative process, section 556 of title 5 requires ALJ's to serve as presiding officers with repect to rule making or adjudicatory hearings (unless the agency itself, or one or more of its members, presides)". Senate Report 96-697 (1978) p.2

Adminstrative Law Judges are selected under a merit, not a political-appointment, system. "Although each agency appoints its own ALJ's (5 U.S.C 3105), it may appoint only those individuals which the

Civil Service Commission (now the Office of Personnel Management) has certified as qualified." (ibid.)

The Office of Personnel Management requires

> "applicants for ALJ certification to 'clearly establish' at least seven years of experience in the preparation, presentation, or hearing of formal cases in governmental regulatory bodies or court proceedings relating thereto'" Friedman v. Devine, 565 F. Supp. 200, 202. (emphasis added)

The Authors League submits that these qualifications and experience are preciseley what are needed to fulfill the Circuit Court's expectations concerning improvement in the quality of the CRT's decisionmaking. Indeed, without recourse to this expertise, we suspect that the quality of decisionmaking of many other agencies would not exceed, or even equal, that of the CRT. Bolstered by this essential resource , we believe the CRT could effectively perform the essential functions assigned to it by the Copyright Act.

We believe that The appointment of an Administrative Law Judge by the Tribunal would be cost effective. It probably would reduce the length of hearings, certainly make for a better record and intial report, and probably reduce the number of appeals (or at least the number of issues presented). And it would permit a reduction in the number of commissioners. I believe Mr. Brennan has suggestd that the Tribunal might consist of three commissioners, rather than five -- a reduction that would more than cover the cost of one or two ALJ's. Relieved of the burden of conducting hearings, and with the preparation of its decisions made far less time-consuming , the CRT might

conceivably function with one full time commisisoner and two members compensated on a per diem basis for the time actually spent performing their duties.

Moreover, the Administrative Procedure Act provides sufficient flexibilty so that the CRT need not be understaffed or overstaffed with ALJ's for any prolonged period. Section 3344 provides that an agency which is occasionally understaffed with ALJ's may use other ALJ's selected by the Office of Personal Management from and with the consent of other agencies.

Qualifications of Appointees

Critics of the CRT have objected that individuals nominated to the CRT are not qualified and do not possess the "demonstrated competence in the field of copyright policy" that this committee expected. It is also objected that they are "political appointees" and that nomination to the CRT has been used to reward active workers in presidential campaigns -- of both parties.

We doubt that demonstrated competence in the field of copyright policy is a necessary requirement for competently performing the duties of CRT commissioners. And we believe that providing the techincal expertise (through ALJ's) that makes for effective adjudication in other administrative agencies will solve the basic problem, raised by the Court of Appeals. But in any event, if Congress believes that such competence or other qualifications are necessary, it can do something about it without abolishing the CRT. It also can deal with the problem

of political appointments without terminating the CRT.

In Myers v. United States, the Supreme Court noted that Congress had the power to "prescribe qualifications for office" of individuals appointed by the President, "provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." The Court said that the legislative power of Congress includes "the establishment of offices, the determination of their functions and jurisdiction" and

> "the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees..." 272 U.S. 52, 1288-9 (1926).

Section 802 of rthe Copyright Act does not not specify any qualifications for the members of the CRT. We suggest that the Congress amend the section to add appropriate qualifications.

We have not had time to assemble a meanigful array of qualifications from other statutes but here is a small and random sampling.

....5 U.S.C 391 authorizes the Secretary of Agriculture to appoint a chief of the Bureau of Animal Industry, "who shall be a competent veterinary surgeon."

... 10 U.S.C 142 authorizes the President to appoint The Chairman of the Joint Chiefs of Staff "from the officers of the regular components of the arnmed forces."

... 15 U.S.C 78d authorizes the President to appoint to the SEC five commissioners. "Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practical."

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For the Authors League

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These are some additional statutory provisions prescribing qualifications:

... 16 U.S.C. 742b authorizes the President to appoint the Director of the U.S. Fish and Wildlife Service. "No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgable in the principles of fisheries and wildlife management."

... 31 U.S.C. 703 provides for presidential appointment of the Comptroller General, and establishes a commission "to recommend individuals to the President for appointment to the vacant office."

... 30 U.S.C. 1 authorizes the President to appoint the Director of the Bureau of Mines "who oshall be thoroughly equipped for the duties of said office by technical education and experience.

.... 44 U.S.C. provides for presidential appointment of the Archivist, "who shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist."

... 42 U.S.C. 1863 authorizes the President to apoint members of the National Science Board and prescribes very detailed qualifications."

We submit that Myers v. United States gives the Congress adequate power to provide meaningful qualifications in Section 802. The requirement of proven competence in copyright policy could be written into the section. And if Congress can provide that the head of the Bureau of Animal Industry must be a competent veterinary surgeon, it can provide that commissioners of the CRT must be lawyers , or certified accountants, or competent economists ... or even that they must have competence in the presentation or hearing of formal cases in governmental regulatory bodies or in related court proceedings. Too, if Congress can protect the SEC against over-politicizing of the nominating process, it might consider a similar approach to the "political dumping ground charge" made by CRT critics. It might, for exmaple, provide that no one may be appointed to the CRT if he has worked actively in, or raised funds for, a presidential election campaign within x years preceeding the date of nomination.

Other Aletrnatives

Suggestions have been made that the funcitons and duties of the CRT be peformed by another "mechanism".

One proposal is that each rate-adjustment or distribution hearing be conducted by three arbitrators, selected from a panel created by the Librarian of Congress, or the Register of Copyrights, who would be given authority to make the necessary determinations , based on thoe proceedings. We doubt that the use of arbitrators, even if selected by the American Arbitration Association, assures a high

degree of expertise in copyright policy or in conducting such ratemaking and rulemaking hearings. Even assuming that this delegation of an administraive function to arbitrators is constitutional, we think that the Committee is correct in its 1976 judgment that there is a considerable advantage to having the continuity of adminstration than a permanent agency provides.

Moreover, it seems pointless to dismantle the CCRT as an administrative agency after it has done the necessary groundwork, and established a body of rules and principles that have been affirmed and further elaborated by the U.S. Courts of Appeals. Transfer of the CRT's functions to an arbitration system might mean starting anew on the lengthy, difficult and costly process of developing the necessary body of law on the foundation of the general criteria set out in Section 801 of the Copyright Act. That process would impose enormous costs on creators of copyrighted works and the organizations that represent them in such proceedings, and on users and their organizations.

If Congress determines that any of its criteria have been increcltly applied by the CRT and the Courts of Appeals, it would be more sensible to deal with that specific problem by amending Sec 802, not by destroying the entire adminstrative structure and the intricate body of agency and case law that has developed to implement the congressional criteria.

Anther proposal is that the functions of the CRT be performed by the courts. The role of the District Court in implementing the ASCAP

consent decree is cited as an example. But the judge charged with enforcing that decree is performing a judicial function. He is not charged with implementing, by ratemaking and rulemaking, legislation which prescribes the payment of royalties under compulsory licenses. It is possible that whatever the device, placing that adminstrative function in the courts would not be constitutional, assuming the judicial system had the resources to deal with the process. In reality, the Courts already play a considerable role in the determinations made under Chapter 8 of the Act, through their review of the CRT's decisions. And their contribution might be increased by revising the standards of review, and by requiring full record hearings under the Adminstrative Procedure Act.

Conclusion

The Authors League believes it is essential that an effective mechanism for implementing the statutory license provisions of the Act remain in place at all times; and that the provisions for adjustment of rates and resolution of allocation disputes likewise continue in force, without any interuption. We believe that flaws in the CRT mechanism can be remedied, and that it would be better to take that approach rather than start again from scratch to reinvent this particular wheel.

We thank the Subcommittee for giving us this opportunity to submit our views.

Mr. KASTENMEIER. Thank you, Mr. Karp.

If, indeed, we might resort to administrative law judges, why is it necessary to have a Copyright Royalty Tribunal make the references? If that is basically what they are going to be doing, why not dispose of them and provide for some other structure which calls into play administrative law judges?

Mr. KARP. Two reasons——

Mr. KASTENMEIER. Presumably that would be the principal role——

Mr. KARP. The administrative law judge can't make the determination. What the administrative law judge does is conduct the hearing, unless a member of the Commission chooses to preside, and to make a recommended report, but under the same principles that Bruce spoke about, under *Buckley* v. *Valeo*, an executive officer has to make the decision. The law judge doesn't, so you need somebody above the judge, someone who is constitutionally empowered to do that.

Second, I think there is an advantage in not leaving simply to the technicians, the administrative law judges, the final word on determining policy and its application under the Copyright Act.

I think that as the decisions and opinions point out, the agency did provide a very important contribution in fleshing out the details that were set down in general principle in chapter VIII.

Now, if Congress disagrees with a particular principle that the Tribunal has established, it has available to it the same remedy it has had for almost 200 years, when it disagrees with the results achieved by any administrative agency; it amends the law to correct what it thinks was the misapplication. It clarifies the principle or establishes a new one.

I think also, the Tribunal performs administrative functions, as Bruce has pointed out, and others have, which are just as well performed by a permanent ongoing agency staff, albeit with a small staff, that has expertise in those areas.

Mr. KASTENMEIER. I am not persuaded that of the mere fact the court of appeals didn't criticize them any more severely than they did is important. From a policy perspective, the court of appeals is not really responsible for the Copyright Royalty Tribunal. I think we are, however, in terms of both oversight and in terms of statutory creation of function.

Mr. KARP. I can't agree with you, Mr. Chairman. The court of appeals, both in the Seventh and District of Columbia Circuits, conducted very intensive reviews of these Copyright Royalty Tribunal decisions. These were by no means cursory, and they weren't in substance decisions which said, "Well, we wouldn't have decided that way, but the CRT has this degree of discretion under the Administrative Procedure Act, (etc)." The opinions took great pains to analyze the CRT's findings. I am talking about the basic ratemaking and distribution decisions. Whether the CRT has been inefficient in distributing; is a separate question.

I think the act itself was partly responsible for the success the Tribunal had and I think the other factor is that the Tribunal heard evidence from both sides. What I am suggesting is that if somebody doesn't agree, for example, with a CRT cable-rate decision, that may have to do with the criteria set out in the act. And

if a majority of Congress, in its wisdom, thinks the courts, as well as the Tribunal, were wrong, then you can go back and amend that provision of the Copyright Act to deal with it. That is the usual way of dealing with errors not only by administrative agencies, but by judges.

I think we are coming to a time when some people feel that the Supreme Court in certain areas is consistently wrong, just as the other end of the political spectrum thought it was a few years ago, yet you don't abolish the Court for that reason.

Mr. KASTENMEIER. Although some people have come close to making——

Mr. KARP. Well, I don't think you and I——

Mr. KASTENMEIER [continuing]. Recommendations.

Mr. Karp, we get recommendations in this committee every day to limit the jurisdiction of the Supreme Court of the United States, so no institution is above criticism or even above potential alteration because of the way its work is viewed.

Doesn't it concern you that there are merely two members of the Copyright Royalty Tribunal—instead of five—who are going to have to deal with issues this year and next? Even though we neglected to suggest that a quorum of three or more would be required, we are in a situation where certainly the public perception of the Tribunal is damaged, perhaps because of the quality of appointments——

Mr. KARP. I agree with you. I think that a statutory quorum would have helped solved the two as against three-or-four problem. I think that this also is a general problem of relationship of the executive branch. That could arise with any agency and I would hate to see us abolishing agencies left and right because the President had shirked his responsibility of filling vacancies.

Mr. KASTENMEIER. Excepting we have now a track record wherein two Presidents have chosen to regard this as not a very important agency. That is perhaps something we wouldn't have contemplated and have no reason to suspect, but it clearly is true. Therefore, we may have to view this Tribunal differently in terms of how it is doing, as a matter of fact.

Mr. KARP. I think you can upgrade the importance of the Tribunal in image as well as in substance by providing more substantial qualifications in the statute. I don't think the President is beyond or above reading, or having read to him, the requirements at a given time. Nor is his Chief of Staff. And they would not ignore something as substantial as that.

Mr. KASTENMEIER. I think we did make suggestions in the report and we did not in the statute for the very reasons you cite—that it is not essential that a Commissioner, in fact, have special copyright expertise. In fact, you may not even want that, as you have suggested. That, however, does not mean that we did not expect people of really high competency to fill these positions.

Mr. KARP. Let me suggest this as a model. In nominating members of the National Science Board, which is done by the President, Congress said:

The persons nominated for appointment as members of the Board shall be eminent in the fields of the basic medical, social, engineering, agricultural, or other sciences, research, management or public affairs. They shall be selected solely on the

basis of established records of distinguished service and shall be so selected as to provide representation of the views of scientific leaders in all areas of the nation and that the president is requested in making the nomination to give due consideration to recommendations from various stated organizations.

Now, I think that may be a little too verbose for the Copyright Act, but again, there is a model—and we certainly haven't reached a point of overstating qualifications in chapter VIII. I think it is worth a try.

As far as the numbers are concerned, I either was fortunate, or unfortunate, enough never to have participated in a hearing or ratemaking proceeding before the Tribunal. But I daresay I would not have preferred five judges up there conducting a trial to one or two. I think that in itself is a problem. The Tribunal went on for 45 days in the phonograph record industry—copyright/owner mechanical license hearings. In a court, assuming a court took over the CRT function, or before a trial examiner, I daresay the hearing would be much shorter and probably might have come out with much the same results.

Mr. KASTENMEIER. The gentleman from Ohio.

Mr. KINDNESS. Thank you, Mr. Chairman, and I am sorry I have to absent myself in this part of this.

I wonder, sir, if you would care to address yourself to the potential suggestion that intellectual property matters might be centralized in one office, something like a Patent and Trademark and Copyright Office, and the difficulties that you might see presented by such a transfer. Perhaps there are benefits to it, too, on which you might care to comment.

Mr. KARP. I would, thank you.

Mr. KARP. I think in balance that would be a bad thing to do. First of all, it is oversimplistic. Second, it has a nice authoritarian ring to it, the suggestion made in the Washington Post article particularly. We have to remember copyright is something Congress was charged with providing in the Constitution, and after 200 years, most of what has been traditionally the subject matter of copyright has been dealt with, not only adequately but very efficiently and without cost in the courts.

In other words, Congress legislates what is or is not protected by copyright and the courts are well equipped to decide, given cases, whether or not the Congress intended protection or not. We all have been able, not only to live with that system, but to find that publishing and so forth have flourished under it. To set up a Tribunal to start making copyright law—and I gather that would be one of the functions—would be a very bad business.

Mr. KINDNESS. I didn't contemplate that, excuse me.

Mr. KARP. I was addressing what I think was the tenor of the suggestion in that one article.

As far as dealing with such things as the distribution of royalties is concerned, I tend to agree with Representative Mazzoli. Again, in many areas, organizations have been able to deal collectively under the Copyright Act in both ratemaking and distribution without imposing any burden on the executive branch and without requiring agencies. They do it voluntarily. In one major area, they do it, in effect, under judicial supervision because of a consent decree.

It works much more efficiently than anything else that has been suggested in these proposals.

Mr. KINDNESS. Let me see if I understand correctly the implication of that. I missed what Mr. Mazzoli said.

Is it your view that you are expressing that it would be better to leave the CRT function to the private sector with the alternative of court resolution being necessary on occasion?

Mr. KARP. What the Congressman suggested was that you abolish both the CRT and compulsory licensing, and in effect, leave rates to the private sector. And deal with abuses—as alleged abuses have been handled in one or two major areas by recourse to the courts which can resolve them.

I might say, if you take the court approach, I think it might constitutionally present no problem if it were structured in a way that created controversy. In other words, to create provisions in an act which allow somebody to sue, and perhaps even require suits to be class-action suits, in order to determine some of those issues.

But by and large, even the problems that Mr. DeWine raised with Bruce about cable television can be covered by voluntary negotiations, such as ASCAP and BMI, both with cable and with other users.

Mr. KINDNESS. Well, to follow up, then, the intellectual properties that are represented by patents and trademarks similarly are dealt with in the private sector in large measure with recourse to the courts being a mixed blessing. I see a certain parallel between patents and trademarks on the one hand and copyrights on the other hand.

Perhaps it is even consistent with the view of Mr. Mazzoli, that doing away with the CRT function as such, but still possibly considering whether there is some good purpose to be served in establishing the administrative part of the copyright law in the same Office of Patents and Trademarks might have some merit. It would be the lawmaking function there, deciding what is and is not to be protected by copyright. That would remain, of course, in the legislative function.

But if that part were not present, would it be your view that there is still not any particular reason to make such a consolidation?

Mr. KARP. I think it would be better not to do it. First of all, copyright and patent—I don't want to get into a legal analysis—are quite different, both in legal concept and in their economic and social aspects. In the area of copyright, where people are interested in using work, the problem usually is only price. There is no composer who wants his composition to be restricted in use. The more times you can play his musical compositions, the more money he and his publisher will make. The problem is just the mechanics of how to license some uses. As I say, in that area, for example, licensing systems work in the private sector and have for many years.

As far as cable goes, I think that is pretty much the same thing. But you do have other problems in trying to impose a single mechanism like that in all copyright areas. The whole relationship of an author and publisher to their audiences and markets are quite different than those of composer and publisher.

If everybody could publish the same book, nobody would ever get it published. And when it comes to distributing books, you have mechanisms that are quite different from anyplace else. There is practically no other intellectual product in the world that anybody can get for nothing if he doesn't wish to buy it. But readers go to the library and borrow it.

You have a number of different factors that, in my mind, make it dangerous to equate copyright, both legally and administratively, with patent and trademark. Trademark, after all, is a purely commercial matter. There is nothing creative about a trademark even though its author may tell you what a wonderful work of art it is. It is simply a way of identifying a source in business transactions. It has nothing to do with how copyrighted works are created and how they are dealt with in the business area.

I think the expertise that it takes to deal with patent and trademarks are quite different than with copyright.

Mr. KINDNESS. I would offer just one thought. Within the area of patents, there is great diversity as to the relationship of inventor to the marketplace, just as there is in the copyright field. I know we are accustomed to thinking of copyright laws as separate and apart and different, but we are involved in an era in which the advance of technology has created some innovative problems, I guess you would call it, which suggest that the dynamism of the field of copyright law, as well as the field of patent law, needs to be enhanced or met with in some manner.

Mr. KARP. I have had the pleasure of appearing before the Office of Technology Assessment as it makes its journey through that morass, and I am always amazed at why they think the invention of radio, telegraph, the telephone, motion pictures, broadcasting, were all sort of humble backwoods developments as compared to the computer, which seems to intrigue them so much. Actually, copyright has lived with, and helped develop, technologies of communication that are far more complicated and have had far more of an impact on the areas of copyright we are concerned with than this new technology does.

We haven't had to change the law or think about setting up agencies like the Washington Post article suggested in order for copyright and those new technologies, which were far more innovative than the current one, were able to coexist and help each other.

Mr. KINDNESS. Thank you.

Thank you, Mr. Chairman, I yield back.

Mr. KASTENMEIER. I can well understand why a copyright lawyer or copyright interests would think twice about being consumed by patents and trademarks.

I think there are questions about the distinction. Is a trademark more like an invention than a copyright? We ran into these problems with respect to semiconductor chips and also typeface. Is typeface the same as an author's creation? I think not.

Copyright has covered an awful lot which is not, frankly, creative in the sense of the authorship contemplated 200 years ago.

Thank you very much, Mr. Karp, it is good to see you again.

I am delighted to call, then, as our last witness, representing the Copyright Office as Acting Register, Mr. Donald Curran, who is nobly serving in this position temporarily. I don't know whether

there is news for us when he is going to be replaced and by whom; however we do welcome him and we believe he and his very able colleagues in the Copyright Office are doing a good job.

Mr. Curran personally joined the staff of the Library of Congress in 1961, worked in a variety of positions, including Associate Librarian of Congress, the title he currently holds, apparently with that of Acting Register.

Mr. Curran is accompanied today by Dorothy Schrader, general counsel, and Christopher A. Meyer, policy planning advisor. All three of you, I guess, have appeared before this committee. I know Ms. Schrader has been for many years very important in the Copyright Office and we have seen her on more than one occasion.

We have your comprehensive statement, Mr. Curran, and you may summarize it or proceed as you wish.

TESTIMONY OF DONALD CURRAN, ACTING REGISTER, U.S. COPYRIGHT OFFICE, ACCOMPANIED BY DOROTHY SCHRADER, ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS, COPYRIGHT OFFICE; AND CHRISTOPHER A. MEYER, SENIOR ATTORNEY/POLICY PLANNING ADVISOR, COPYRIGHT OFFICE, LIBRARY OF CONGRESS

Mr. CURRAN. Thank you, Mr. Chairman, and, of course, I will summarize my statement. I have a few pages of summary and I would like to go through that with you this morning.

Mr. KASTENMEIER. Your full statement, then, without objection, will be received and made a part of the record.

Mr. CURRAN. In our prepared statement, we have reviewed the development and administration of the four compulsory licenses of the Copyright Act, the creation of the Copyright Royalty Tribunal, an independent body in the legislative branch, and examined options for statutory reform of the Tribunal.

The Copyright Office is at the service of the Congress. We have accepted statutory responsibilities you entrusted to us and have attempted to carry them out in an equitable way. We would, of course, accept any further responsibilities the Congress might give us in the same spirit.

The Library of Congress and the Copyright Office express no opinion about whether the Copyright Royalty Tribunal should be retained, changed, or abolished. We accept your judgment about how the four compulsory licenses, the way notes it should be set, and what mechanism should be employed to apportion the revenues derived from the cable and jukebox licenses.

It is assumed that the four compulsory licenses in the present law will be retained, although rulemaking and distribution mechanisms might be adjusted. We have identified five general options for reform of the Tribunal or modification of the administration of compulsory licenses, not all of which are mutually exclusive.

I would like to run through those five. Actually, I have labeled them: A: Retain the Tribunal, but adjust the law concerning the professional copyright or related qualifications of the commissioners; the use of professional staff, and the standards governing delegation of ratemaking authority; B: Abolish the Tribunal, freeze the rates, and give the Copyright Office the authority to distribute roy-

alty funds and to decide other matters pending before the Tribunal at the time of its dissolution as an interim solution pending the permanent solution. This, of course, is what would happen should H.R. 2552 be enacted into law.

C: Abolish the Tribunal and create a new administrative structure to perform ratemaking and distributional functions; D: Abolish the Tribunal and adopt a system of court-annexed arbitration in which the parties, with minimum Government intervention negotiate the rates with distribution issues resolved either by the parties or the Government; and finally, abolish the Tribunal and adopt a passive mechanism to adjust rates automatically over time with either Government or private collective society distribution of the royalties.

While we do not advocate any given solution at this time, options A and E appear to us comparatively better than the others; that is, to retain the Tribunal but adopt a series of reforms or abolish the Tribunal and establish passive rate adjustments.

As an interim solution, H.R. 2552 would freeze the rates as they are now in effect for all four compulsory licenses. It would transfer the ratemaking and distributional function to the Copyright Office, but suspend the former except for pending matters. If this is the intent, we suggest the bill's language in section 3(c) be clarified. This authority would expire January 1, 1988. It is designed to put the CRT out of business immediately upon enactment, to freeze all rates as they are now, to assure the distribution of funds raised under the compulsory license is continued in the near time and, perhaps more significantly, to encourage the parties to reach some agreement and accommodation before 1988.

The Copyright Office would be able to assume the responsibilities set out in H.R. 2552, but we have reservations about certain of its provisions. Ratemaking is a sensitive issue, as, of course, we have heard today. The Copyright Office has long played the dual role of registry and depository of the claims to copyright and copyrighted works on the one hand, and advisor to the Congress and the executive branch agencies on the other.

If you assign the distribution functions to us, we believe the Copyright Office can accomplish that mission with fairness and dispatch at reasonable cost to the public. If the Office were to get into ratemaking, Mr. Chairman, we would have to seek increases in our budget in order to accomplish this new task.

As a technical matter, we suggest that the transfer of functions and funding in sections 3 and 5 of the bill should be made to the Librarian of Congress, the agency head, and a Presidential appointee who will carry them out through the Register of Copyrights. The workload transferred under H.R. 2552 appears to assign the following tasks to us and we have made some effort to analyze this in the near term.

First, under ratemaking, one petition for review of the 3.75 cable rate as it applies to the Turner Broadcasting System station WTBS is pending. Although this may not be intended, the bill apparently prevents three semiautomatic rate increases from going into effect in 1986 and 1987, under sections 115, 116, and 118 on those three compulsory licenses. The bill precludes the periodic review of section 115 and sections 118 in 1987.

Under distribution, the Tribunal has begun a proceeding for distribution of the 1983 cable royalties. A controversy has been declared recording in 1983 jukebox royalties and a proceeding will be necessary.

Certain aspects of the 1979 through 1982 cable distribution and the 1982 jukebox distribution have been appealed. If any part is remanded, further administrative proceedings will be necessary.

If it is intended that the Copyright Office should initiate distribution proceedings in 1986 and 1987, the language of section 3(c)(1) should be clarified.

Finally, under litigation, in the distribution of appeals noted above, the Copyright Office would assist the Department of Justice in defending Tribunal decisions, which we do not now currently do.

Finally, Mr. Chairman, you might wish to consider as part of an interim solution asking the Copyright Office to submit a report to the Congress, perhaps due July 1, 1986, which would examine these permanent ratemaking distribution reforms. Such a report could, among other things, discuss in greater detail any options your subcommittee might wish to consider, the practice of other nations, the regulation of voluntary licensing, antitrust issues, and the like.

My colleagues are here today, along with myself, to assist you, and, of course, as you observe, I don't claim to have quite the expertise myself as some of your previous witnesses in copyright matters, but I feel that among us, the three of us can answer all your questions.

[The statement of Mr. Curran follows:]

STATEMENT OF DONALD C. CURRAN, THE ASSOCIATE LIBRARIAN OF CONGRESS AND ACTING REGISTER OF CYPYRIGHTS, COPYRIGHT OFFICE

Thank you Mr. Chairman. My name is Donald Curran, and I am the Associate Librarian of Congress and Acting Register of Copyrights.

In our testimony we will review the development and administration of the four compulsory licenses of the Copyright Act, the creation of the Copyright Royalty Tribunal (an independent body in the legislative branch), and consider options for statutory reform of the Tribunal.

The Copyright Office is at the service of the Congress; we have accepted those responsibilities which you have entrusted to us and tried to carry them out in an equitable way, and we would accept any further responsibilities Congress might give us in the same spirit. The Library of Congress and the Copyright Office express no opinion about whether the Copyright Royalty Tribunal should be retained, changed, or abolished. Both the Copyright Office and the Tribunal are overseen by this Subcommittee; we accept your judgment about how the four compulsory license rates should be set and what mechanism should be employed to apportion the revenues from the cable and jukebox licenses.

Our statement is based on the assumption that the four compulsory licenses in the present law will be retained, although rulemaking and distribution mechanisms might be adjusted. After examining both the history of the present chapter 8 of the copyright law -- which creates the Tribunal and sets out most of its responsibilities -- and of the four compulsory licenses, we

address several alternatives, not all of which are mutually exclusive, for reformation of the Tribunal or modification of the administration of the compulsory licenses. They are:

1. Retain the Tribunal but adjust the law concerning the professional, copyright-related qualifications of commissioners, the use of professional staff, and the standards governing delegation of the ratemaking authority.

2. Abolish the Tribunal, freeze the rates, and give the Copyright Office the authority to distribute the royalty funds and to decide other matters pending before the Tribunal at the time of its dissolution as an interim solution, pending a legislative decision on a permanent solution. This, of course, is the method which H.R. 2752 would adopt.

3. Abolish the Tribunal and create a new administrative structure to perform ratemaking and distributional functions.

4. Abolish the Tribunal and adopt a system of court-annexed arbitration in which the parties, with minimal government intervention, negotiate the rates, with distribution issues resolved either by the parties or the government.

5. Abolish the Tribunal and adopt a passive mechanism to adjust rates automatically over time, with either governmental or private collective society distribution of the royalties.

I. BACKGROUND: THE FOUR COMPULSORY LICENSES AND THEIR ADMINISTRATION BY THE TRIBUNAL AND THE COPYRIGHT OFFICE

Before the Copyright Act of 1976 became law in 1978, our copyright law had only one compulsory license -- one governing the mechanical reproduction of musical works, i.e., the making of musical recordings. The royalty rate was fixed by statute in 1909 and never adjusted until superseded by the revised mechanical compulsory license of the Copyright Act of 1976. There was no governmental involvement in the collection and distribution of the royalties: copyright owners established a private licensing agent (the Harry Fox Agency) to collect and distribute most of the royalties. The governmental role was limited to the receipt and filing of "notices of use" (filed by copyright owners to entitle them to demand royalties) and "notices of intention to use" (filed by recording companies and others who sought to invoke the compulsory license).

In practice, the compulsory license of the 1909 Act was seldom invoked by legitimate recording companies, and the statutory license served as the framework within which voluntary licenses were negotiated (usually at lower than statutory rates) for recording music.

In revising the out-of-date 1909 Act, the Congress in the 1960's and 1970's was faced with a series of complex economic and social issues engendered by technological developments that impacted copyright owners and users of copyrighted works. Compulsory licenses were frequently proffered as a method of

balancing the interests of authors and copyright owners with those of users; authors and copyright owners would receive fair remuneration but they would not be granted the right to restrict use of their works or to negotiate the rates and terms of the use; the statute would set the rates and terms of the use. While Congress rejected compulsory licensing in some instances,1/ it retained in modified form the 1909 Act's mechanical reproduction license (section 115), and created three additional compulsory licenses. The new compulsory licenses are found in section 111 (secondary transmission of copyrighted works by cable systems), section 116 (public performance of nondramatic music on "jukeboxes"), and section 118 (use of published nondramatic music and published pictorial, graphic, and sculptural works by public broadcasting entities.)

The crucial issues in the case of each new compulsory license were: what is the royalty rate, should the rate be subject to periodic adjustment without new legislation, and if so, by whom? At the 1981 House Subcommittee Hearing2/ on the role of the Tribunal, Mr. Chairman, you noted that "back in 1975 . . . [Congress] had concluded definitively that we would not

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1/ A proposed compulsory license for the use of nondramatic literary works by public broadcasting entities was rejected in favor of an exclusive right. A proposed compulsory license for the performance of sound recordings was rejected, and no public performance in sound recordings was granted in the current Act.

2/ Oversight Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st Sess. (1981) (hereafter, the "1981 Oversight Hearings").

entertain every application for changing compulsory license [rates] . . ."[3] Congress decided in 1976 that equity required periodic adjustment of the royalty rates, and created a new administrative body -- the Copyright Royalty Tribunal -- for that purpose primarily, and also to distribute the royalties in the case of the cable and jukebox compulsory licenses.

A. Development of the CRT

The concept of the Copyright Royalty Tribunal ("CRT") was first considered by Congress when the Senate Judiciary Subcommittee reported S. 543, a general copyright revision bill, to the full Committee on December 10, 1969.[4] That bill provided for four compulsory licenses: a license for the mechanical reproduction of music on records (section 115); a license for the public performance of certain musical works by means of a jukebox (section 116); a license for cable retransmission of broadcast signals containing copyrighted works (section 111); and, a license for certain public performances of sound recordings (section 114).

Chapter 8 of the bill would have created the Copyright Royalty Tribunal in the Library of Congress. The CRT was devised because the Subcommittee believed that "sound public policy requires that rates specified in the statute shall be subject to periodic review," and that it is "neither feasible nor desirable" that the

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3/ Id. at 57-58.

4/ S. 543, 91st Cong., 1st Sess. §§801 et seq. (1969).

rates be adjusted by the normal legislative process.[5] The CRT was to have the duties of making determinations concerning the adjustment of the copyright royalty rates established by the four compulsory licenses to insure that the rates continued to be reasonable, and to determine in certain circumstances the distribution of the royalty fees deposited under sections 111, 114 and 116. As it was conceived in this bill, the Tribunal would have consisted of three-member ad hoc panels constituted for each rate or distribution dispute, which panels would conduct compulsory arbitration. The determinations of the CRT would have been subject to legislative veto by either House. Later revisions of this proposal[6] added sections providing for an effective date of royalty distributions made under Tribunal determination and for judicial review of Tribunal decisions in cases of corruption, fraud, partiality or other prejudicial misconduct. They also gave the Tribunal a broader discretion in ratemaking by allowing it to adjust the revenue basis to which the cable royalty rates would have applied (i.e. gross receipts).

In hearings before the House Subcommittee held in 1975, the above conception of the CRT was challenged on constitutional grounds by Teleprompter Corporation, a cable system.[7]

5/ H.R. Rep. No. 93-983, 93d Cong., 2d Sess. 203 (1974).

6/ S. 644, 92d Cong., 1st Sess. (Feb. 8, 1971). S. 1361, 93d Cong., 1st Sess. (March 26, 1973).

7/ Appendix 1, Part 3, Hearings before Subcomm. on Courts, Civil Liberties, and the Administration of Justice, Comm. on the Judiciary, H.R. 2223, 94th Cong., 1st Sess. 1917, 1923-24 (May 7 - Dec. 4, 1975).

Teleprompter argued that because the Tribunal would consist of shifting panels, there would be no continuity of personnel and hence no Tribunal expertise in the field of copyright licensing. It concluded that the perpetually "amateur" status of the Tribunal would preclude development of consistent principles and policies to guide its decisions. Furthermore, it argued that the legislative veto would be at most a theoretical political check on arbitrary rate adjustments and not a careful oversight mechanism. Teleprompter urged that the CRT as it was then envisioned would violate the constitutional guarantee of due process of law because it did not encompass adequate procedural safeguards against arbitrary and capricious government action. These arguments were rebutted by the Motion Picture Association of America, which argued that the proposed CRT would, together with the compulsory licensing provisions of the revised legislation, constitute a constitutional mechanism for periodic adjustment of royalty rates and a large improvement upon the rigid compulsory license model incorporated in the 1909 Act.[8/]

Following its 1975 hearings, the House Subcommittee proposed a bill[9/] which amended chapter 8 to provide for a permanent three-member Copyright Royalty Commission, which was to be an independent body but would receive administrative support from the Library of Congress. The Commissioners were to be appointed by the President for staggered five-year terms. Any final

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8/ Id. at 1949, 1957-60.

9/ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 41-44, 173-179 (Sept. 3, 1976).

determinations made by the Commission would be reviewable by the U.S. Court of Appeals on the basis of the record before the Commission. Under sections 111, 116, and chapter 8 of the House bill, the Register of Copyrights was to perform the recording functions and do the paperwork and initial accounting connected with the compulsory license procedures established for cable transmissions and jukebox performances. After the Register had deducted the costs involved in these procedures and deposited the royalties in the U.S. Treasury, the Commission would assume all duties involved in distributing the royalties, regardless of whether or not there was a dispute.

In 1975 both the House and Senate bills were amended to eliminate the compulsory license for public performance of sound recordings (section 114) and to add a compulsory license for the public performance of certain works by noncommercial broadcasters (section 118). The conference substitute that finally passed in both houses conformed generally to the House bill, with several changes.[10/]

The body finally established by the Copyright Act of 1976 is named the Copyright Royalty Tribunal. It consists of five Commissioners appointed for staggered seven-year terms by the President with the advice and consent of the Senate. The Tribunal is an independent agency in the legislative branch that receives administrative support from the Library of Congress, regarding personnel records, travel, and similar housekeeping

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10/ Conference Rep. No. 94-1733, 94th Cong., 2d Sess. 60-65, 81-82 (Sept. 15, 1976); 17 U.S.C. §§801 *et seq*. (1976).

matters. In accordance with the intention of Congress, the CRT was not authorized to hire permanent professional staff nor does the Library of Congress provide such assistance. In conference, the bill was also amended at section 801(b)(1) to give the CRT specific guidelines for determining rates applicable under sections 115 and 116, the jukebox compulsory license and the compulsory license for mechanical reproductions.

The concept of the Copyright Royalty Tribunal that finally emerged after years of consideration and debate was an innovative and experimental body designed to handle the controversial ratemaking and distribution functions that were part of compulsory licenses established in the new Copyright Act. Three of the four compulsory licenses were new and experimental at the time the CRT was created, and some of the problems besetting the CRT are arguably caused by the inherently problematic nature of governmental ratemaking. 11/

B. Administration of the Compulsory Licenses by the Copyright Office and the Copyright Royalty Tribunal

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11/ Because the compulsory licenses represent a difficult compromise between copyright owners and copyright users, it is doubtful that any administrative body can make all parties happy. Regardless of what kind of agency exists to adjust rates and make distributions of compulsory license royalties, the interested parties will likely take advantage of whatever judicial appeal is available under the law, until precedents have become so well-established that appeals are unproductive. Moreover, since judicial appeals have the effect of temporarily delaying the date when increased royalties are due, appeals of rate adjustments will be taken as long as the costs of appeal do not exceed the interest on money saved by delayed payment of royalties.

Under the Copyright Act of 1976, authors generally enjoy certain exclusive rights to negotiate the terms under which their works are used. In special circumstances, the copyright law has created compulsory licenses to give certain users guaranteed access to copyrighted works, if statutory and regulatory procedures are followed, in exchange for assuring the author remuneration for the use. The four compulsory licenses of the current Act have common features, but are also markedly different in several respects.

In summary Congress set the initial royalty rates for the cable, jukebox and mechanical reproduction licenses, and allowed the Tribunal to set the rates for the public broadcasting license, failing agreement on negotiated rates. The Tribunal is empowered to adjust the rates for the four licenses under different statutory criteria. The Tribunal distributes the cable and jukebox royalties paid initially to the Register of Copyrights, while the mechanical reproduction and public broadcasting royalties are paid directly to the copyright owners or their designated agents. The Copyright Office receives and examines, as appropriate, the data and documents required to be filed under the compulsory licenses, maintains records, receives the cable and jukebox royalties and deposits them in the Treasury in interest-bearing accounts, issues jukebox recordation certificates, and transfers the cable and jukebox royalties to the Tribunal when a distribution decision has been made. In issuing regulations governing the form and content of the cable

Statements of Account and jukebox filings, the Register of Copyrights consults with the Tribunal, as required by statute. 17 U.S.C. §§ 111(d) and 116(b).

1. Cable compulsory license

Under the Copyright Act of 1976, the retransmission by a cable system to the public of a television or radio broadcast signal is a public performance of the copyrighted programming embodied in the signal.12/ Because Congress recognized that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system, it established the cable compulsory copyright license in section 111 of the Act. The license allows a cable system to retransmit over-the-air broadcast signals that the system is authorized to carry pursuant to the rules of the Federal Communications Commission so long as the system complies with certain accounting and other filing requirements and pays the statutory royalty fees to the Copyright Office.

Under this scheme, a cable system must file with the Licensing Division of the Copyright Office semi-annual Statements of Account which detail its signal carriage 13/ and the computation of royalty fees owed under the statute, and pay the statutory royalty fees. The Copyright Office examines the

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12/ H.R. Rep. No. 94-1476 at 63.

13/ By statute cable systems must also report initial signal carriage and system ownership, and changes of signal carriage and system ownership.

Statements of Account for errors in computation of royalties, and then deposits the royalty fees with the U.S. Treasury in interest-bearing accounts. The burden to distribute the royalty pool to various copyright owners shifts to the Copyright Royalty Tribunal.

Copyright owners claiming royalties from the annual pool must file an annual claim with the CRT. The CRT then determines whether a controversy exists concerning the distribution of the royalty fees. If none exists, it distributes the fees among the claimants; if there is a controversy, the CRT initiates proceedings to determine a percentage distribution of the fees. Under the statute, these proceedings must be concluded within one year.

The royalty fee to be paid by a cable system is based on a statutorily-set formula that comprises three factors: a percentage of the system's gross receipts (royalty rate) applied against the gross receipts and the number of distant signal equivalent values (DSE's) -- values assigned statutorily to the distant signals carried by the system. The Copyright Royalty Tribunal has the authority to adjust the cable royalty rates in three situations: 1) every five years beginning in 1980 it may adjust the royalty rates to reflect national monetary inflation or deflation; 2) upon petition by an interested party it may conduct a rate adjustment proceeding if the FCC changes its rules to permit the importation of more distant signals than those allowed on April 15, 1976, to adjust the rates applicable to

those additional signals; and 3) a rate adjustment proceeding may be instituted if the FCC changes its rules on syndicated or sports exclusivity after April 15, 1976, to adjust rates for carriage of the broadcast signals affected by the change. Except when there is an FCC rule change, the cable ratemaking authority of the CRT is more circumscribed than in the the case of other three licenses. The major FCC deregulation order effective June 25, 1981, largely exhausted the authority to adjust rates on this ground except for the sports exclusivity rules.

The CRT has recently made an adjustment of the cable royalty rates and the gross receipt limitations, based on an agreement of the cable systems and the copyright owners.

2. The Compulsory License for Making and Distributing Phonorecords

Section 115 of the Copyright Act of 1976 retains, with modifications, the compulsory licensing system for the making and distribution of phonorecords of copyrighted music that was established in the 1909 Act in former §§1(e) and 101(e). Under the 1976 Act, a musical composition that has been reproduced in phonorecords and distributed to the public with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

Anyone who wishes to take advantage of this compulsory license must serve a "notice of intention to obtain a compulsory license" on the copyright owner before any phonorecords are distributed; if the owner is not identified in the Copyright Office records, it is sufficient to file the notice in the Copyright Office. The specified royalty is payable monthly for every phonorecord made and distributed in accordance with the license. The compulsory licensee must file with the copyright owner or, if the copyright owner is unidentified, with the Copyright Office, Monthly and Annual Statements of Account that detail the number of phonorecords that were made and actually distributed under the license, and pay the statutory royalty fee monthly to the copyright owner. To be entitled to receive royalties under the compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office.

The statutory royalty rate set in 1976 was adjusted by the CRT in a 1980-81 proceeding and is subject to review again in 1987 and at ten-year intervals thereafter upon petition by any owner or user of a copyrighted work whose royalty rates[14/] are specified by section 115. Like the similar compulsory license of the 1909 Act, section 115 is seldom invoked, and provides a framework for negotiated licenses. Royalties are paid directly

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14/The current rate is either 4 1/2 cents per work embodied in the recording, or .85 cents per minute of playing time or fraction thereof, whichever is larger. A rate increase has been set by the Tribunal for January, 1986.

to copyright owners or their designated agents (usually the Harry Fox Agency). The Copyright Office's record-keeping role is minimal.

3. The Jukebox Compulsory License

Section 116 of the Copyright Act of 1976 establishes a compulsory license for the performance of nondramatic musical works on coin-operated phonorecord players ("jukeboxes"). To obtain the compulsory license, a jukebox operator must record each jukebox annually with the Copyright Office, pay the statutory annual royalty fee per jukebox to the Copyright Office, and affix the certificate of recordation issued by the Copyright Office at an appropriate place on the jukebox so recorded. The fees are deposited with the United States Treasury for later distribution by the Copyright Royalty Tribunal to copyright owners and the performing rights societies, such as the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc.

Each January copyright owners claiming to be entitled to compulsory license fees under section 116 for performances during the preceding year must file a claim with the Copyright Royalty Tribunal. After the first day of October of that year the CRT must determine whether there exists a controversy concerning the royalty fees deposited the previous year. If there is no controversy, the Tribunal deducts its administrative costs from

the royalty pool, and then distributes the fees to the copyright owners entitled. If, however, a controversy exists, it must conduct a proceeding to determine the distribution.

The statutory rate set in 1976 for the jukebox compulsory license was adjusted by the Copyright Royalty Tribunal in a 1980-1981 proceeding with adjusted rates effective in 1982 and 1984,[15] and an inflationary adjustment is set for 1987 based on the relevant Consumer Price Index. The Tribunal is authorized to again review the rate in 1990 and every ten years thereafter.

4. The Compulsory License for Use of Certain Works by Noncommercial Broadcasters

Under section 118 of the Copyright Act of 1976, public broadcasters are granted a compulsory license for the use of published nondramatic musical works and published pictorial, graphic and sculptural works, subject to the payment of reasonable royalty fees to be set by the Copyright Royalty Tribunal, absent negotiated rates. The voluntary licensing agreements between copyright owners and public broadcast entities as to the use of these works supersede the terms and rates established by the Tribunal, provided that copies of the agreements are properly filed with the Copyright Office within 30 days of execution. The Copyright Royalty Tribunal set the

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15/The current rate is $50 per jukebox.

initial schedule of rates and terms for this compulsory license, and it is required to adjust them at five-year intervals beginning in 1982.

This compulsory licensing mechanism is close to the European concept of "agreed licensing," under which voluntary negotiations precede establishment of compulsory rates. To a large extent, this license, like the mechanical reproduction license, provides the framework for private agreements. In fact, the Tribunal in a 1980 Report to Congress[16/] suggested elimination of this compulsory license because it was unnecessary.

II. OPTIONS FOR REFORM

In this section we will explore some of the options for "reforming" the ratemaking and distribution functions of the Copyright Act's compulsory licenses. While we do not advocate any given solution, options "A" and "E" below appear to us comparatively better than the others.

A. Retain and Modify the Tribunal

Much of the controversy which has surrounded the Tribunal's ratemaking and distribution functions appears to be attributable, at least in part, to its innovative organizational structure and the novelty of its duties as applied to copyright law. To say that many of the Commissioners have been purely partisan appointees does not distinguish the CRT from numerous other

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16/Reprinted as Appendix A to the 1981 Oversight Hearings, at 137-142.

agencies. To state that that those appointees have had to function without professional staff may go a substantial way toward explaining many of its problems.

As recounted above, membership in what is now the Tribunal was originally to have been established on a case-by-case basis with shifting panels of three arbitrators selected by the Register of Copyrights from an American Arbitration Association ("AAA") list. Because of the integrity of the AAA and the ability of the parties to object to proposed arbitrators, the professional skill of the Tribunal was widely assumed. Logistical and clerical support would have been provided by the Copyright Office.[17]

Concern over the constitutionality of having the Register "appoint" Tribunal members led this Subcommittee to propose that the President appoint three commissioners. In the legislative history, but not in the statute, one sees the intent that in addition to the commissioners, only clerical staff be hired. This appears to have been based on the additional expectation "that the President shall appoint members of the Commission [as the Tribunal was designated in the bill at that time] from among persons who have demonstrated professional competence in the field of copyright policy."[18]

17/ See generally Sen. Rep. No. 473, 94th Cong., 1st Sess. at 155-158 (1975).

18/ H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 174-175 (1976).

Congress was rightly concerned to adopt an efficient organizational structure to handle the ratemaking and distribution functions both to keep taxpayer costs to a minimum and to avoid substantial deductions from the royalty pools. 19/ By designating an existing organization -- the Copyright Office -- to assume the royalty collection and recordkeeping functions, Congress hoped to avoid creation of a large new federal bureaucracy. The Tribunal experiment has attained this objective. In FY 85, the four compulsory licenses were administered by the Tribunal and the Copyright Office at a taxpayer cost of approximately $217,000, and the royalties were collected and distributed to copyright owners at a cost of approximately $1,250,000 to them.20/

With respect to the competence of Tribunal members, of all of the individuals nominated to the Tribunal since its inception on January 1, 1978, only one has had a substantial background in copyright matters. And the only professional staff member to be hired in seven and a half years is the recently acquired general counsel, who appears to have a substantial background in communications law, but little direct copyright experience. While it is probably not necessary that all Commissioners have a background in the fine points of copyright law, and a mix of

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19/ The Tribunal's ratemaking expenses are borne by taxpayers; copyright owners pay the Tribunal's distribution expenses. The Tribunal's statement to this Subcommittee at the May 1, 1985 oversight hearing shows that of the FY86 budget request of $758,000, copyright owners would pay $531,000.

20/For 1984, the cable royalty pool to date is $84 million, and the jukebox royalty pool exceeds $5 million.

lawyers and business people with experience in copyright industries is probably ideal, it would seem desirable that either most Commissioners have the requisite background, or that there be a competent professional staff of people with demonstrable skills in copyright law and economics.

While the power of the executive to appoint federal officers subject only to confirmation by the Senate is clear, Buckley v. Valeo, 424 U.S. 1 (1976), the United States Code is neither devoid of language concerning the qualifications of appointees, nor of requirements that they devote full time to their federal offices. In setting out criteria for governors of the Federal Reserve System, the law provides that "the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commerical interests, and geographical divisions of the country," and that "members of the Board shall devote their entire time to the business of the Board."21/ Members of the Postal Rate Commission "shall be chosen on the basis of their professional qualifications."22/ And the Code strictly limits what interests Federal Communications Commissioners may have, and the partisan division of the Commission.23/

21/ 12 U.S.C. §241.

22/ 39 U.S.C. §3601.

23/ 47 U.S.C. § 154.

It thus seems likely that if fair objective qualifications for appointment to the Tribunal were set out in the statute rather than the legislative history, both the Executive and the Senate would take them into account in the nomination and confirmation processes. If a professional staff were authorized it could ameliorate or solve many of the problems which have beset the Tribunal.

The United States Court of Appeals for the D.C. Circuit has on occasion criticized the Tribunal for its failure adequately to articulate the rationale underlying its decisions.24/ At the same time, the court has deferred to the CRT's findings and approved its decisions on the grounds that it was a new agency and, that, with respect to ratemaking, the scope of the review was necessarily circumscribed.25/

In a June 1981 Report to this Subcommittee on the operations of the Tribunal, the General Accounting Office recommended amendment of the 1976 Copyright Act and appropriation of additional funds as follows:

"-- Require full distribution of royalty payments as decided by the Tribunal within 30 days of the decision unless a claimant can satisfy the requirements for obtaining a court injunction.
-- Provide the Tribunal with access to a general counsel.
-- Provide the Tribunal with subpoena power.
-- Provide the Tribunal with adequate funding to obtain objective, expert opinion when needed.

24/ See, e.g., Christian Broadcasting Network, Inc. v. CRT, 720 F.2d 1295 (1983) and National Cable Television Assoc. v. CRT, 689 F.2d 1077 (1982).

25/ NCTA v. CRT, 724 F.2d 176 (1983).

-- Require that future commissioners be knowledgeable in matters related to copyright." 26/

An attempt to change the CRT without abolishing it was H.R. 6164 in the 98th Congress. That bill would have reduced the number of commissioners to three, provided for a general counsel and chief economist, sought to reduce judicial deference to CRT decisions, and provided that the policy objectives which now apply to "mechanical" and juke box ratemakings should also apply to cable television ratemakings: maximum availability of creative works to the public, a fair return to copyright owners and a fair income to users, respect for the creative contributions of creators and users, and minimizing disruptive impacts on industry structures. A bill on that order, perhaps including instructive language about commissioner qualifications, partisan divisions, and full time employment of Tribunal members might merit serious consideration today.

B. H.R. 2752; Abolition and Rate Freeze

1. Basic scheme

This bill would freeze the rates as they are now set for all four compulsory licenses. It is intended apparently to transfer the ratemaking and distribution functions to the Copyright Office, but suspend the former except for pending matters. 27/ Finally, it would only be in force until January 1, 1988. It is,

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26/ 1981 Oversight Hearing at 107.

27/ If this is the intent, we suggest that the bill's language at SEC. 3(c) be clarified.

tnus, an interim measure designed to put the CRT out of business immediately upon enactment, to freeze all rates as they now are, to ensure that distribution of funds raised under the compulsory licenses continue in the near term, and, perhaps equally significantly, to encourage the parties to reach some permanent accommodation before 1988.

2. Copyright Office Concerns

The Copyright Office is willing to assume the responsibilities set out in H.R. 2752, but we have certain reservations about some of its provisions.

Ratemaking is a sensitive issue at best, where legal, economic, statistical and policy arguments all are relevant. It was Congress' awareness of the problems of ratemaking which led to the creation of the Tribunal. The Copyright Office has long played the dual role of registry/depository of claims to copyright and copyrighted works on the one hand, and advisor to Congress and executive branch agencies on the other. If you assign the distribution function to us, we believe we can accomplish that mission with fairness and dispatch at reasonable cost to copyright owners. If we were ever to get into ratemaking -- and we believe that this bill puts us at the threshold of doing so -- our resources would be severely strained. We would, Mr. Chairman, have to seek increases in our budget in order to accomplish a task new to our experience. While we take the point that all ratemaking power we would receive is suspended by the

bill's own terms, except that necessary to deal with pending matters, prudence dictates that we at least consider the possibility that we would have ratemaking responsibility for a period beyond 1987, and express reservations about the magnitude of that task in comparison to our resources and experience.

Under the interim solution, obviously, we will have to plan to complete whatever business is pending before the Tribunal and to carry out the annual distribution proceedings through 1987. We anticipate assigning two or three of our personnel, probably from the Register's office, the General Counsel's Office, and our Licensing Division, to this planning endeavor. We might need temporary replacement help for the duties they leave behind. If H.R. 2752 is enacted, we would be inclined immediately thereafter to appoint,perhaps on a temporary basis, a "Copyright Royalty Administrator" who would be selected by standard Library of Congress procedures. That Administrator would be able to call on the substantial expertise in the Copyright Office and the support of the Library of Congress in the performance of the tasks associated with distribution proceedings. While this work would be of a type never before done by the Copyright Office, I am confident that the Library and the Office can accomplish the task. We would seek an appropriate amendment in the pending fiscal year 1986 budget.

Finally, on this point, the transfer of functions and funding authority, as set out in SECS. 3 and 5 of the bill, should be made to the Librarian of Congress -- the agency head

and a presidential appointee -- who will carry them out through the Register of Copyrights. We will suggest appropriate language at a later time.

3. Workload transferred

a. Ratemaking. Under the Copyright Act and H.R. 2752, the costs of ratemaking are not deducted from the royalty pools, but are covered by regular appropriations to the Tribunal.

At this time, one petition for ratemaking is pending before the Tribunal. Turner Broadcasting System has requested a review of the 3.75% distant signal rate as it applies to cable retransmission of its station -- WTBS (Atlanta). In its oversight statement, the Tribunal estimated that 20-30 days of hearings would be scheduled to review the rate.

The Office notes that the bill, if enacted before December, apparently prohibits us from adjusting the rates under section 118 for performance of music by college and university noncommercial radio stations. Under the Tribunal's regulations and practices, an annual cost-of-living adjustment is made in this rate, which is established by publication of the relevant Consumer Price Index inflation rate, effective in December. The bill also apparently prohibits the taking effect of the cost-of-living adjustment in 1987 to the jukebox compulsory license rate, which the Tribunal had previously set, but which requires further action by the Tribunal to be put into effect. A third future increase is the revised rate for mechanical reproduction of music, which is set now for January, 1986. These three rates can

apparently not be adjusted because of SEC. 3(c)(2)(B), which freezes all compulsory license rates "in effect on the date of the enactment of this Act." (Emphasis added.)

Two other instances of impacted ratemaking are the periodic reviews in 1987 of the machanical reproduction of music (section 804(a)(2)(B) now allows the review upon petition) and the general public broadcasting license rates (section 118(c) now requires such review).

b. Distribution. The tribunal has declared the existence of a controversy with respect to both the cable and the jukebox royalties for the year 1983. (Distributions are made annually; a distribution proceeding is initiated if there is a controversy.) The Tribunal's oversight hearing statement indicates 20-30 days of hearings have been allocated for the two proceedings. The cable distribution hearings were announced to begin today (June 19, 1985). The cable proceeding may be more complex than in recent years because arguments are being made for the first time about the distribution of royalties collected under the 3.75% and syndicated exclusivity surcharge rates, which became effective in 1983.

If it is intended that the Office under this bill should initiate distribution proceedings in 1986 and 1987, a clarifying amendment seems necessary, in view of the restrictive language of SEC. 3(c)(1). Distributions for 1986 and 1987 are not now "pending."

c. <u>Litigation</u>. While the Justice Department represents the Tribunal and the Copyright Office in court, both the Tribunal and the Office separately assist the Department in preparing the defense in challenges to our respective decisions. If HR 2752 is enacted, we anticipate that some Copyright Office staff would provide assistance regarding pending litigation where the Tribunal is now a defendant. (We are not presently assisting in these cases.) Moreover, depending upon the decision in the case, the Office under H.R. 2752 might have additional distribution proceedings on remand. Presently, certain points regarding the 1979-1982 cable distributions have been consolidated and are on appeal. The 1982 jukebox distribution has been appealed.

C. <u>Abolition and New Entity</u>

H.R. 2752 would give the Congress and the private sector time to develop a permanent solution. A new entity might be created to replace the Tribunal, and, in theory, it might be constituted in the legislative branch as the Tribunal was (either as a new independent body or in some way as part of the Library of Congress), in the executive branch, in the judicial branch, or as an independent agency.

At this exploratory hearing, the Copyright Office takes no position about the advisability of housing the tribunal functions in the Library of Congress permanently. This option, however, presents institutional and possibly constitutional policy issues

that require further reflection. At this time, we merely note the bare possibility, and make the following very tentative observations about possible constitutional issues.

First, <u>separation of powers</u>: This principle would not seem to present a serious problem since the existing Tribunal is part of the legislative branch and ratemaking has been identified by the Supreme Court as a legislative function.[28/] The distribution function is quasi-judicial, but that does not seem to require that the courts ab initio make distributions. Judicial review of distribution decisions would seem to satisfy any separation of powers question.

Second, <u>the appointments clause</u>: This was one of the major reasons why the initial copyright revision proposals regarding the role of the Register of Copyrights in constituting the Tribunal were not enacted. It seems likely that the Register cannot appoint the members of the Tribunal. It is possible that other methods of constituting the Tribunal within the Library of Congress would be constitutional,[29/] and the Copyright Office could provide staff assistance to the Tribunal.

If, for constitutional, policy, or other reasons, Congress decides to abolish the CRT but to transfer its powers elsewhere than to the Copyright Office, it has been suggested that a court, possibly containing U.S. District and Circuit Judges, be created

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28/D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

29/For example, appointment by the President, but the Tribunal members would be independent of the Copyright Office. or, possibly, appointment by the Librarian, who is a presidential appointee.

to set the rates and apportion the funds. The advantages of such an arrangement are several: the use of federal judges would likely bring a high level of impartiality and professional competence to all proceedings; the possession of subpoena power could improve the findings of fact upon which rates are made and monies distributed; and the process by which federal judges are chosen has a long and largely successful history. But there are potential problems: there is case law stating that ratemaking is not a judicial function[30/] and a recent case suggests that the use of Article III judges to perform non-Article III tasks poses serious constitutional questions.[31/] Assuming that such issues can be resolved, the Copyright Office believes the "copyright court" model worthy of more study.

D. Abolition and Arbitration

One of the more creative suggestions concerning how to set rates and divide revenues would involve the delegation to the parties in interest of those functions. Ideas in this area have included variations on the home recording royalty model set out in H.R. 1030 of the 98th Congress, which would have encouraged parties to negotiate rates and, if they failed to agree, would have subjected them to compulsory arbitration. This approach is similar to the "agreed licensing" concept of compulsory licensing followed in Europe. We discuss foreign analogs to the Tribunal in Part III of this statement.

30/ D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

31/ In re Scaduto No. 85-5232, 11th Cir., May 29,1985.

Another area of interest involves court annexed arbitration. As provided by experimental local rules in the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California, this process of mandatory arbitration, even though it is not binding, has resulted in rapid dispositions and expeditious settlements.[32] One should note, however, that its use has thus far always been limited to personal injury and contract claims in which the damages sought did not exceed $100,000. Whether ratemaking could ever be deemed a "case or controversy" and thus a proper subject for a federal court and whether the division of tens of millions of dollars should be handled in this manner are important questions whose answers should be sought by this Subcommittee.

E. Abolition and Passive Ratemaking

One of the reasons for granting the CRT periodic ratemaking authority was that under the only compulsory license contained in the previous copyright law, the price for invoking the license for the mechanical reproduction of musical works remained static from 1909-1978. Because of the frequency of technological, market, and price level changes, Congress sought to delegate the ratemaking to an administrative agency. If you decide that the

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32/ See Lind and Shapard, Evaluation of Court Annexed Arbitration in Three Federal District Courts (1983).

costs of doing so outweigh the benefits, you may wish to consider setting the rates in the law in such a manner as to permit changes by either:

a) voluntary ratemaking by the parties in the nature of a license fee upon which they agree, or, perhaps to apply only in default of voluntary agreements,

b) creating self-adjusting methods of fixing the rates, or

c) indexing or otherwise pegging initial rates to some objective measure of the price level in the economy so as to change rates in a fair manner.

Different solutions might be chosen for different compulsory licenses. For example, the present cable rates are partly expressed in percentage terms, and the monies generated by those rates will increase over time if the number of cable subscribers and the price of cable services both increase. The distant signal equivalent formula and the gross receipts limitations, however, impose rigidity, unless rates are adjusted by an entity such as the Tribunal. A more flexible cable royalty formula might be a simple percentage of gross receipts or a fee per subscriber.

For the mechanical reproduction of music, the statutory rate could be expressed as a percentage of the suggested retail list price of the record.

For the jukebox license, a fair rate could be set in the statute, adjusted every five or ten years for inflation. A similar solution would be feasible for the public broadcasting license, making current rates the baseline.

We do not suggest that any of these possibilities would be politically acceptable to the interests affected, but they are methods of avoiding governmental ratemaking by entities other than Congress.

As to voluntary ratemaking, it is worth noting that at present both the public broadcasting rates and the net transactions between jukebox owners and musical copyright owners are the subjects of agreements among the parties. It may well be that a statute can be crafted in such a way as to encourage the parties to reach their own accommodations while still providing a rate setting mechanism to operate if no agreement can be reached.

III. FOREIGN LAW ANALOGS TO THE COPYRIGHT ROYALTY TRIBUNAL

While the Copyright Royalty Tribunal was a revoltutionary concept when the United States Copyright Act was revised in 1976, analogs to the Tribunal already existed in several foreign countries for the purpose of administering compulsory or voluntary licensing provisions of those countries' copyright laws. The organization, jurisdiction and procedures of three such entities, the United Kingdom's Performing Rights Tribunal, Canada's Copyright Appeal Board, and Australia's Copyright Tribunal, are briefly set forth below.

In comparing these entities to the United States' Tribunal, it is important to note a fundamental difference in the nature of licensing in the foreign countries from the American compulsory license systems. The foreign systems were established generally

as a regulatory measure to prevent abuse of private rate-setting,[33/] and not as a means of government ratemaking. Thus, the entities herein described have jurisdiction to supervise and revise rates initially set by various methods, (including by the copyright owners) so that copyright users have standing to object to the rates on the basis of reasonableness. This method of rate-making oversight most closely resembles the compulsory license for use of copyrighted works by noncommercial broadcasters established in section 118 of the United States Copyright Act.

A. The United Kingdom's Performing Rights Tribunal

Based on the recommendations of the Gregory Committee, the United Kingdom set up a Performing Rights Tribunal in the 1956 Copyright Act.[34/] The standing Tribunal consists of a chairman, appointed by the Lord Chancellor, and from two to four members appointed by the Board of Trade (the governmental entity responsible for intellectual property matters). The Chairman must have seven years of experience as a barrister, advocate, or solicitor, or be a person who has held judicial office.[35/] The Whitford Report noted that, although the qualifications of members are not laid down, in practice they have been account-

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33/ In this country, a similar result is obtained by court review of rates set by the American Society of Composers, Authors, and Publishers ("ASCAP") under an antitrust law consent decree.

34/ Copyright Act of November 5, 1956, 23 et seq. CLTW United Kingdom: Item 1 [hereafter referred to as the 1956 Act].

35/ 1956 Act, section 23(2).

ants, economists, or businessmen.[36] This Tribunal was established in order to control possible abuses by persons or organizations in the exercise of certain of the rights conferred on them by the Copyright Act. Accordingly, the Tribunal has jurisdiction to issue licenses under the performing and broadcasting rights granted in the 1956 Act. Specifically, these licenses cover:

1. The right to perform in public, to broadcast, or to diffuse a literary, dramatic, or musical work or an adaptation thereof.
2. The right to cause a sound recording to be heard in public or to be broadcast.
3. The right to cause a television broadcast to be seen or heard in public.[37]

The Tribunal "has no 'watch dog role.' It is only able to deal with abuses to the extent to which cases are brought before it."[38] In exercising its jurisdiction the Tribunal has two functions: the power to confirm or vary license schemes put into operation by the organizations under which licenses are granted to the public in stated classes of cases,[39]; and the power to hear complaints from individuals that a private licensing body

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36/ Copyright and Design Law, Report of the Committee to Consider the Law on Copyrights and Designs, 193 (March 1977) [hereafter Whitford Report].

37/ 1956 Act, §24(2)(a)-(c).

38/ Whitford Report at 192.

39/. For a discussion of these classes, see 1956 Act §25 et seq; Whitford Report at 193.

has not granted them a license under an existing scheme, or, where there is no applicable scheme, that the private licensing body unreasonably refuses or fails to grant a license, or that the proposed charges, terms, and conditions for a license are unreasonable.[40]

The determinations of the Performing Rights Tribunal are binding. Proceedings before the Tribunal are governed by rules that went into effect in 1957.[41] Any question of law that arises during the course of these proceedings may be brought before the High Court.[42] In a twenty-three year period, thirty-seven cases were referred to the Tribunal. Three cases were still pending at the end of this period, eight had been withdrawn, and four were settled without a hearing. Of the remaining cases fifteen hearings, covering twenty-two different references, were held. The average length of these hearings was five days; however, the most recent hearing during this period took eighty days.[43]

The 1977 Whitford Report made several suggestions for reform of the Performing Rights Tribunal. It recommended that the jurisdiction be extended so that the Tribunal could take care of

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40/. Whitford Report at 192-3.

41/ Proceedings Before the Performing Rights Tribunal under Part III of the Statute, CLTW United Kingdom: Item 7.

42/ In Scotland the Court of Session 1956 Act section 30.

43/ "Reform of the Law Relating to Copyrights, Designs and Performers' Protection," 53 (July 1981) [hereafter Green Paper].

other copyright matter[44] -- this would enable the Tribunal to settle disputes which arise as a result of the operations of any collecting society that issues blanket licenses as a main part of those activities. The Report recommended that the name be changed to "Copyright Tribunal." It also recommended that, after the statutory royalty rate for the recording license was set, this Tribunal should have the power to review both the rate and the basis on which it was calculated.[45]

Since the issuance of the Whitford Report in 1977, further study has been made concerning the recommended revisions. One problem noted has been the increased costs of running the Tribunal; another is the difficulty in finding suitable persons to constitute the Tribunal in long cases.[46] The Whitford Report

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44/ Whitford Report, paragraph 788. The Report suggests that with respect to the existing Copyright Act, the Tribunals's jurisdiction should be extended in the following manner: 1) the Tribunal should have the power to review the basis on which the statutory recording license rate is calculated; 2) the Tribunal's jurisdiction should cover synchronization licenses in respect of the United Kingdom reproduction rights in single musical works, or musical works of a single author; 3) the Tribunal should be specifically required to take into account the factor of total potential audience when it examines the diffusion royalty rate to be paid by broadcasters for broadcasting works in the United Kingdom; 4) in relation to copyright clearance, the Tribunal should have the power to give clearance in advance for prima facie infringing acts in cases where the copyright owner cannot be traced and such clearance is reasonable; and 5) the Tribunal should have jurisdiction to regulate rates set and licenses granted by organizations who issue blanket licenses with respect to the reproduction right. The Report also recommended that the Tribunal have jurisdiction for various duties in respect to a proposed blanket licensing scheme for reprographic reproduction, a proposed levy on recording equipment, and a proposed educational licensing scheme for recording.

45/ *Id.* paragraphs 771, 788.

46/ Green Paper, at 53-54.

had noted that "the Tribunal could continue to be staffed by members with no particular expertise in copyright law, even though their jurisdiction is extended to a consideration of terms, other than terms relating solely to rates, which are in dispute."47/

B. The Canadian Copyright Appeal Board

The Canadian Copyright Appeal Board has existed since 1936.48/ It approves the rate schedules of the two performing rights societies now existing in Canada; the Canadian Authors and Publishers Association of Canada, Ltd. (CAPAC), and BMI Canada, Limited. The Board was established in response to a large increase in performing rights fees charged by the Canadian Performing Rights Society, Ltd. ("CPRS"), the predecessor of CAPAC, to compensate for a loss in revenue from sales of records which occurred when radio began to gain popularity in the home. To protect the public from possible excesses by monopolistic fee-setting of CPRS, the Government created the Board to review the fees set by the Society to ensure equity between copyright owners and users.49/

The Copyright Appeal Board is an administrative tribunal that reports to Parliament through the Minister responsible for copyright. It consists of three members who are appointed by the

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47/ Whitford Report, paragraph 787.

48/ 55 Can. Rev. Stat. SS48-51 (1952).

49/ See generally, Savignac, The Canadian Copyright Appeal Board, 74B E.B.U. Review 31 (July 1962).

Governor in Council. The Chairman of the Board must hold or have held a high judicial office; the other two members must be selected from "officers of the public service of Canada."

The present Canadian Copyright Act requires each performing rights society to file with the Minister lists of its current repertoire of musical or dramatico-musical works in use for which they have acquired and exercise the copyright. The societies must also annually file with the Minister statements of proposed tariffs (royalty fees) they intend to collect during the next year in consideration for their granting a license for performance of the repertoire in Canada. The Minister publishes the statements in the Canada Gazette giving the public notice. Anyone can file written objections to the proposed tariffs for consideration by the Copyright Appeal Board. It is the function of the Board to review these proposed tariffs and objections to determine the reasonableness of the proposed tariffs or to recommend different tariffs.

The Board holds public hearings with regard to every tariff to which there is an objection. If the character of the objection is founded on a factual issue, such as whether the tariff is excessive, the Board has power to adjust the tariff. However, if the objection relates to a legal issue, such as whether the society has the authority to collect fees from a particular user, the Board has no power to adjust the tariff. Such issues must be brought before a competent court or Parliament.

The Board's hearings take place in courtrooms, but are of an informal nature. No oral evidence is adduced as a general practice, but an objecting party may give evidence under oath. The parties' counsel may present written statements of fact or other material in support of a given argument, all of which are filed as exhibits. The proceedings are transcribed by a court reporter. At the close of the hearings the findings of the Board are taken under advisement and published in the Canada Gazette. There is no appeal from its decisions.

In practice, the Canadian performing rights societies negotiate with the major music users, such as broadcasters. The Board is not bound by these agreements, but negotiated agreements have on occasion been accepted by the Board as a basis for the fixing of tariffs. The Board is not bound by previous decisions or tariffs and, in effect, starts anew with each application for approval of a tariff.

C. The Australian Copyright Tribunal

Australia's Copyright Act of 1968[50/] establishes a Copyright Tribunal to deal with various questions arising under the Act.[51/] The Tribunal consists of five members who hold office for seven-year periods. To be eligible to be a member a person must be or have been a federal court or State Supreme Court judge, or a

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50/ Copyright Act of June 27, 1968, No. 63 (CLTW Supplement 1970, Australia: Item 1) (hereafter referred to as the "1968 Act").

51/ The 1968 Act, Part VI.

barrister or soliciter of the High Court or a State or Territory Supreme Court of at least five years' standing. Members are appointed by Australia's Governor-General.

The Copyright Tribunal makes the following determinations under the Copyright Act: 1) it holds public hearings concerning the adjustment of the royalty rates to be paid for the compulsory license for mechanical reproduction of a sound recording of a musical work under section 58 of the Act; 2) it arbitrates in disputes as to the equitable remuneration to copyright owners for use of their works in records or cinematographic films under sections 47(3) or 70(3) of the Act; 3) it arbitrates disputes as to apportionment of royalties between the owner of a copyright in a musical work and the owner in a literary or dramatic work included in the record of the musical work under section 59(3)(b) of the Act; and 4) it makes other determinations concerning the reasonableness of a proposed or existing voluntary license scheme under sections 154 and 155 of the Act.

The Australian Copyright Tribunal does not have the power to fix a new royalty for the compulsory license for mechanical reproduction of sound recordings. Its function is to report the results of its hearings on rate adjustment to the Attorney-General. A new royalty may be fixed by regulations providing for a variation of the existing statutory royalty which the Governor-General 'thinks equitable' after taking into account the report of the Tribunal. After the Tribunal makes a report

with respect to the royalty rate for records of a particular class, the Attorney-General may not request a further inquiry into the royalty for records of that class for a period of five years. Thus, any change to the statutory rate made by the regulations with respect to a given report would operate for at least five years after the date of the report.

The Australian Tribunal may take evidence on oath or affirmation, and may summon a person to appear before the Tribunal to give evidence and to produce documents or other records.52/ The Tribunal may interrupt its proceedings of its own motion or at the request of a party to refer a question of law arising in the proceedings for determination by the High Court. After the Tribunal has given its decision in a proceeding, and refuses to refer a party's question to the High Court, the requesting party may apply to the High Court for a hearing. If the High Court decides the question was erroneously determined by the Tribunal, the Tribunal must reconsider the matter in dispute and either reopen the case or make an order revoking or modifying its previous order.53/

52/ The 1968 Act, §§167, 168.

53/ The 1968 Act, §161.

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We have presented this information about foreign analogs to the CRT, since their greater experience with copyright rate-setting may be illuminating. At the same time, we recognize that jurisprudential and constitutional differences make it difficult to transport the foreign systems to the United States.

In conclusion, we are prepared to assist the Subcommittee to the limit of our resources, as you consider the various options for reforming the ratemaking and distribution functions.

Mr. Chairman, you might wish to consider, as part of any interim solution, including the one set out in H.R. 2752, asking the Copyright Office to submit a report to Congress, due perhaps 1 July 1986, which would examine permanent ratemaking-distribution reform. Such a report could, among other things, discuss in greater detail any options you wish to consider, the practices of other nations, the regulation of voluntary licensing, antitrust issues, and the like.

I and my colleagues will be pleased to respond to any questions now or later for the record.

APPENDIX A

Types and Frequency of Proceedings of
The Copyright Royalty Tribunal

Type	Frequency
1. Rate Setting	
Cable television (§111)	1980 by statute, and every 5th year thereafter by petition; also any time rules of FCC are amended to permit the carriage by cable systems of additional distant television broadcast signals not permitted under the FCC rules in effect on April 15, 1976.
Mechanical (§115)	1980 by statute,* 1987 and every 10th year thereafter by petition.
Jukebox (§116)	1980 by statute,** every 10th year thereafter by petition.
Public Broadcasting (§118)	1977 and 1982 by statute, and every 5th year thereafter by statute.***
2. Royalty Distribution	
Cable television (§111)	Annually, if there is a controversy.
Jukebox (§116)	Annually, if there is a controversy.

* When the CRT amended the mechanical license rates pursuant to its 1980 proceeding, it established a schedule of rate increase, of which one is scheduled for 1986.

** When the CRT established the compulsory license fees for jukeboxes pursuant to its 1980 proceeding, it established rate increases to begin on January 1, 1982 and January 1, 1984, and determined that an inflationary rate increase based on the Consumer Price Index should go into effect on January 1, 1987.

***The CRT annually sets a cost of living adjustment for performances of music by college and university noncommercial radio stations, under the public broadcasting compulsory license.

Mr. KASTENMEIER. Thank you very much, Mr. Curran, that was a marvel of conciseness that we seldom see in this committee.

Mr. CURRAN. It is getting near lunch.

Mr. KASTENMEIER. I think you covered at least the high points very expeditiously and in a fashion designed to make us understand the points you are making.

You discuss five options briefly and then you discuss the workload proposed by H.R. 2752, a bill sponsored by two members of this committee. Historically, has the Copyright Office ever been asked or ever been vested with either the authority or the task to do anything such as distribution proceedings as contemplated in H.R. 2752 or assisting the Department of Justice in defending Tribunal decisions? Was there anything comparable in the history of the Copyright Office in terms of serving these functions?

Mr. CURRAN. I am going to ask Ms. Schrader to comment on that. She is in a better position than I am to do so.

Ms. SCHRADER. Mr. Chairman, the short answer is no, we don't perform and have not performed anything exactly like or even very closely similar to the distribution function. We would analyze it as a quasi-judicial function. Others, of course, will be heard on this, but we wouldn't think that there is any separation of powers barrier to the Copyright Office's carrying out the distribution function with appropriate court review; the courts presently review the decisions of the Royalty Tribunal.

Of course, as to the historical context, Bruce Lehman has very fully recounted that and refreshed your recollection of the copyright revision process. At one point in the process, the Copyright Office would have had a much more definitive role in declaring the existence of a controversy with respect to distribution and constituting the Tribunal to actually carry out the distribution.

But largely because of the *Buckley* v. *Valeo* decision, it was determined that would be constitutionally defective if the Register appointed those officials.

Mr. KASTENMEIER. Let me ask you this, Ms. Schrader. Let us assume for the purpose of debate that something like H.R. 2752 might pass the Congress. I don't know that that is true, but we will just assume it. You say you would have to have an increase in your budget to accomplish both ratemaking and administrative proceedings relating to distribution. Do you see one as more difficult than the other or at least more questionable in terms of a function that is appropriate for assignment to the Copyright Office? Do you regard them as the same in terms of either a burden administratively or as a function which may be inimicable to the Copyright Office? In other words, do you distinguish the ratemaking function and the distribution proceedings?

Ms. SCHRADER. I would say that they are quite different. Of course, the Copyright Office is not expressing any support for the solution of H.R. 2752, or indeed, certainly not for a long-time solution that would confer ratemaking and distribution authority on the Copyright Office.

In terms of the constitutional issues that might arise, we have only had an opportunity to think about these in a general way at this point since H.R. 2752 has not been public very long. It would seem preliminarily that ratemaking is essentially a legislative

function. The Tribunal itself was constituted in the legislative branch and has carried out its duties without any constitutional challenge, really. So arguably ratemaking, from a constitutional point of view, could be placed in the Copyright Office in the Library of Congress. The main problem is that of appointing the members who would make the decisions regarding rates.

I think the feeling is that these either should be Presidential appointees or should be persons who are perhaps appointed by a head of a department. There is the possibility—and I only say a possibility—that the Librarian of Congress might be able to appoint members of the Tribunal. We are not suggesting this. The Librarian hasn't been consulted about this, at least except in a general way. But in terms of the constitutional issue, there is a footnote, I believe, in *Buckley* v. *Valeo*, that suggests that the Comptroller General is the equivalent of a head of a department and could constitutionally appoint inferior officers of the United States.

So arguably perhaps that could be done, but the larger question that you are asking is really is this the direction in which the Copyright Office and the Library of Congress should go? As to that, I think we have expressed concerns and I don't know that we can go any further at this point unless Mr. Curran would like to add to that.

Mr. CURRAN. I think in our larger statement, of course, we make the point that ratemaking, obviously, is a very controversial matter and draws you into an arena that neither the Library, nor the Copyright Office, has been much involved with at any time in their history. That isn't to say that there aren't reasons for giving these responsibilities to us—depending, again, on how you want to write the law in the final analysis. That is why we made the point that in option E, ratemaking becomes essentially a legislative issue. You decide the rate and then you provide some way that that can be periodically adjusted. Perhaps you don't want to do that. I understand the problems that have been discussed here by other witnesses when you do that kind of thing. Then you are simply executing and carrying out and we would view distribution as less controversial and probably easier to do by the Copyright Office than, say, the ratesetting function.

Mr. KASTENMEIER. In brief, if you had to choose you would be more comfortable with the distribution problem than the ratemaking.

Mr. CURRAN. Again, I am sure there are many issues here to deal with in terms of fairness to the parties who are going to get this pot of money, but the pot of money is not being set by the Office. It is what is the most equitable way to distribute that pot of money, and that is probably more subject to a process that we would be more comfortable with.

Mr. KASTENMEIER. Now, earlier you gave us five options because we solicited options from you. We understand this is not the position of the Office or the Librarian, but in respect to our request, you have offered five possibilities and you indicate among them a preference for the first and the last. The last option abolishes the Tribunal and adopts a passive mechanism to adjust rates automatically over time with either governmental or private collection soci-

ety distribution of the royalties. Would you expand on what is meant by a passive mechanism?

Mr. CURRAN. In the body of our—and I will ask both Dorothy and Chris to comment on this as well—in the body of our statement, we identify—for example, we say cable rates, we suggest—and these are simply suggestions, not strong commitments—a percent of gross receipts of—or a fee per subscriber. I think Bruce Lehman talked about that possibility as one way to deal, for example, with cable. Under mechanical reproduction of music, a percentage of the suggested retail list price, for example, might be a way and there might be two or three others.

Under the jukebox license and under public broadcasting, probably a statutory fee with a periodic adjustment every 5 or 10 years to take inflation into account would be a possible. So it would be that kind of thing that might be considered in our estimate.

Would you like to add, Chris?

Mr. MEYER. Just briefly, Mr. Chairman. It strikes us that among the problems that you have seen with respect to the Tribunal's checkered history at best, those related to the difficulty of adjusting the rates that initially represented the congressional compromises in the act of 1976 are the worst. Here you see, for example, in the case of cable television, the difference between assessing a rate based upon some percentage of a company's gross receipts, there may, if that rate is fairly large, be an effective cap on the number of distant signals which come in.

On the other hand, if you adopt or permit parties to adopt a flat rate of some kind and then provide for passive adjustment of that rate by reference to a reasonably noncontroversial scheme such as the Consumer Price Index or otherwise, then the level of conflict inherent in these changes seems, at least personally to me, to have to be reduced.

The level of controversy inherent in appeals to justice, equity, the sovereignty of the marketplace, or what have you, must be reduced. If you provide for an automatic self-adjusting mechanism to which, ideally, the parties agree and then works its will over time. We don't pretend it is a perfect system, but we think it would reduce some of the problems.

Mr. KASTENMEIER. Thank you.

At this point, I would like to yield to my colleague, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I would like to express my appreciation for the thoughts expressed here, Mr. Curran, and to your associates. Without seeking to create an adversary relationship, but in order to examine the suggestion that was mentioned before, and realizing that you may not be prepared at this point to respond fully, I would like to ask, Mr. Chairman, that the record of this subcommittee might be—might remain open to receive further written responses to this and other questions of the subcommittee.

Mr. KASTENMEIER. I thank the gentleman for raising that question and we will do just that. As a matter of fact, we will have several more days of hearings on this subject, and so the record will be left open for a lengthy period of time.

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Mr. KINDNESS. I would like to afford the opportunity, since it has been brought up, for you to make such responses as you might care to at this time to this suggestion that has been ruminating around in my mind of consolidation of the intellectual property administrative functions into one office that would presumably reside in the executive branch, but not necessarily so.

Some years ago, the Congress saw fit to create an independent agency called the Interstate Commerce Commission, which dealt with ratemaking and rate-division cases and I haven't taken the time yet to research that, but it would appear to me that rate-division cases are of a similar nature to the distribution problem to which we are directing our thoughts today.

In fact, while there are some differences in the functions in the marketplace that are involved, I believe we might find a precedent for the acceptability under the Constitution of that functioning being performed in an independent agency, at least, such as the ICC. That is, both of those functions in the same agency, but I would invite your comments as to things that you might find that ought to be presented just immediately in response to the concept of consolidation of the administration of intellectual properties in one agency, wherever it might reside.

Mr. CURRAN. I would be very happy to do so. Of course, I have the advantage of being forewarned, so I can speak——

Mr. KINDNESS. I didn't. I have just been thinking about it when we——

Mr. CURRAN. We have, of course, spoken about this in part, I think, before this committee and the Senate committee and also involving the OTA study, the same issue comes up, so we are more than willing to talk about it and anxious to talk about it actually.

Somewhat along Mr. Moorhead's observation that if it ain't broke, don't fix it, so what are we fixing and what is broken? Compulsory licenses are a problem and we are here today talking about the problem and how to deal with compulsory licenses, which is one aspect, of course, of copyright. As far as we are aware, the other issues concerning copyright, which are many, are not in—we are not aware of grevious problems of the same order and dimension we have been talking about here with regard to the Tribunal and the compulsory license system.

We receive about 500,000, 10,000 a week, requests to register a copyright every year, and the problem we are having right now is it is getting to be about 11,000 a week and we are dealing with that 11,000 as it creeps up. That is a lot of mail. So when you want to deal with that side of the problem, you have to say, "Well, would that be dealt with more efficiently, more effectively? Would the Government, would the public be better served by putting this someplace else and what is wrong with the way it is being done now?"

There may be answers to that. Lots of things might be wrong with it, but you have to be assured that this process is going to continue and that the 500 people who do it—well, they won't be the same 500, presumably, and the first thing that will happen is they will start looking for another job or what will happen. There is a very practical problem of how to deal with the 10,000 that are going to come in next week when you make these kinds of changes.

In the larger sense, that can presumably be worked out and we can deal with it. But from our standpoint, we really don't know that the copyright system would work better in another place. As a matter of fact, it is our view that it works rather well where it is. That is, the Library of Congress is a very supportive and compatible place for an agency that deals with intellectual property and it is the place where, you have brought together, in one place in the United States where the users of intellectual property who are served through a Library of Congress, and the creators of intellectual property are served by the Copyright Office, in the Library of Congress. We think that over a period of time since 1870, or since the Copyright Office was established, I guess, 1897, that they have been well served in this environment. Therefore, the problems dealing with these four compulsory licenses—really two compulsory licenses, as far as I know, only cable and jukebox—ought not overwhelm the success story.

Mr. KINDNESS. I would yield back at this point, Mr. Chairman, with the indication that, indeed, it might be helpful for us to submit further questions in writing subsequent to today.

Mr. KASTENMEIER. We certainly will leave the record open so that members can submit written questions to any of the witnesses.

The Copyright Office has been most cooperative and forthcoming in aiding this committee over the many years. It had a major role with respect to the 1976 revision. The number of hours that people in the Copyright Office, the general counsel and the Register, Deputy Register, and Assistant Register used to play with respect to that was monumental.

I have a question here and maybe you accept the premise or maybe you don't, but I am concerned. Part of the criticism that gave rise to the Copyright Royalty Tribunal is not merely because of vacancies and faulty appointments and resources that the Tribunal didn't have and so forth. Part of it quite candidly, has been because of complaints about the outcome of several major contested areas, two of them being the jukebox area and the cable area. That is no mystery. Everybody understands that.

One of the problems is that within a very large segment of the industries or communities whose interests are adjudicated in terms of rate adjustment, there is a lack of confidence in the Tribunal. Indeed—and these have to do with users versus proprietors—Mr. Karp, representing the proprietors, more predictably would not want to see anything radical happen in the area of CRT reform.

I am afraid there is that user-proprietor alignment, quite apart from other considerations. I should ask you in connection with the Copyright Office itself, since it does make decisions affecting tiering and substitutability for cable and the like, about charges that the Office has tilted in the direction of copyright proprietors. I don't know whether you accept this criticism or whether you, indeed, think that the Office should or does try to balance the rights of the creator and the needs of the public.

Do you have any view about that?

Mr. CURRAN. I can first express a view of my own as the Associate Librarian of Congress, and in the last 6 months, as the Acting Register of Copyrights. It has been a wonderful opportunity for me

to get some on-the-job training on what is going on in the office and I have no great vested interest in this.

I can only say that I have done all I can in the past 6 months to strike as much of a balance as is possible because I don't feel—and as I said, I think, before this committee the last time we were here—we work for anybody except the U.S. Government and specifically the legislative branch. We have no favorites in this process between the owners and the users and we try as best we can to obey the law, whatever is required by law and regulation. We don't feel that one side or the other has got the best of the bargain and now it is time to balance it off, whether through the courts or our regulations. I think Ms. Schrader can certainly speak for the regulations, which is her area.

We do all we can to have an open forum. We announce that we are going to issue regulations. We receive comments on those regulations. We take into account, and I can assure you from my personal experience, that we do that in the fairest way we know how to do. But as you rightly say, at some point, a regulation has to be issued on a controversial subject. There are people who perceive themselves to be winners or losers in that process. But while I don't accept the criticism, I welcome it in one sense. I think it is important and a healthy thing to have public reaction. As far as I can tell, certainly in the time that I have been directly associated with the Copyright Office, we have tried to avoid that kind of thing. Nonetheless, we are going to be sued. People will sue us and take issue with what we do.

Maybe Ms. Schrader could add a little bit to that.

Ms. SCHRADER. Just briefly, to say that from my perspective there does seem to be a certain rigidity in compulsory licenses—I mean, in their very nature. The user community sometimes believes that there should be the same kind of regulatory flexibility in administering the compulsory licenses as you find before the Federal Communications Commission, before the ICC, before agencies that are basically setting policy under broad delegation of authority from the Congress.

Rightly or wrongly, we have not seen our role that way. We have not seen that we had a broad delegation of policymaking authority; rather, we have tried to interpret the statute as fairly as we could. Of course, as Mr. Curran has said, when we issue regulations, clearly we comply with the Administrative Procedure Act and have, on occasion, held public hearings, otherwise we receive written comments, and we review the comments and consider them very carefully.

Basically, we have interpreted the act as of necessity to try to give some coherence to the administration of compulsory licenses. If no interpretations were made by the office, cable systems, jukebox operators, and other users would file under their individual interpretation of the law and we would have thousands of interpretations, perhaps, on particular issues.

The two issues that you mentioned, Mr. Chairman—tiering and substitution of distant signals—are, of course, comprised in regulations that we have issued, and we are in court now to see whether our interpretation of the act was correct in those cases.

Mr. KASTENMEIER. I think that is a fair and intelligent reponse on your part. I think that it is defensible for you to say that you do not have the flexibility of regulatory agencies; that you feel that you are bound more specifically by the terms of legislative enactments and perhaps sometimes that results in decisions that are not perceived as equitable.

I don't know whether it is possible—this was one of the problems we had in the first place 10 years ago, but how could we enable a ratemaking body to develop expertise and yet not become a captive of one side or the other of the industry it regulates? We have seen that happen in agencies over the scores of years and I guess there isn't a particularly good way we can assure agency ratemaking that is fair, balanced, and dispassionate.

But I suspect that is the unspoken factor that plays a role in review of this question, along with some of the other more obvious problems that have nothing, perhaps, to do with the perceived equities of the parties.

I want to thank all three of you today for appearing here. You have, over the years, been enormously important to this committee. We have regarded you as an advisor to this committee on many occasions. So, Mr. Meyer, Ms. Schrader, and Mr. Curran, the Acting Register, we thank you all for your appearance here today.

Mr. CURRAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We will be having another hearing on July 11, on the same subject. We will have the two extant commissioners as witnesses. We will have Mr. Danial Toohey as one witness. I did not ask you what you thought of a Federal copyright agency under which, presumably, the office would be a part.

Perhaps Prof. Paul Goldstein will also be testifying on July 11.

Until that time, for the purposes of review of the Copyright Royalty Tribunal, this committee stands adjourned.

[Whereupon, at 1:20 p.m., the subcommittee was adjourned, to reconvene, subject to the call of the Chair.]

CRT REFORM AND COMPULSORY LICENSES

THURSDAY, JULY 11, 1985

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

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

Present: Representatives Kastenmeier, Mazzoli, Moorhead, Swindall, and Coble.

Staff present: Michael J. Remington, chief counsel; Deborah Leavy, assistant counsel; Thomas E. Mooney and Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerk

Mr. KASTENMEIER. The committee will come to order.

Pursuant to rule 5, without objection, we will permit these proceedings to be covered, in whole or in part, by photography or media coverage.

This morning, the subcommittee is holding a second day of hearings on the issue of Copyright Royalty Tribunal reform. Today's hearing is a continuation of the subcommittee's oversight responsibility affecting the subject, and it is also a legislative inquiry into what legislative changes should be made to the Tribunal's statutory charter, whether the Tribunal should be abolished; and, if so, what entity might be created.

We will receive testimony this morning from three witnesses. In the past, we received excellent testimony from three other witnesses, Bruce Lehman, Don Curran, and Irwin Karp, who appeared on the first day.

I would expect the testimony today to be not any less informative and important to the subject.

Our leadoff witness this morning is Prof. Paul Goldstein, Stanford University Law School. Although this is the first time, I believe, he has appeared before the subcommittee, he is very well known to us from the Congressional Copyright Technological Change Symposium, that this subcommittee, along with the sister subcommittee in the Senate, held 2 years ago in Fort Lauderdale, FL.

I would be remiss if I didn't mention Professor Goldstein's authorship of an oft-used legal textbook on copyright, patent, trademark, and related State doctrines.

The subcommittee is very pleased, indeed, to take advantage of his knowledge and teaching experience. Professor Goldstein, you

are warmly greeted. We have your statement. You may proceed from it, if you wish, or if you care to summarize, you may also do that.

TESTIMONY OF PAUL GOLDSTEIN, PROFESSOR OF LAW, STANFORD UNIVERSITY, STANFORD, CA

Mr. GOLDSTEIN. Thank you, Mr. Chairman, members of the subcommittee. With the subcommittee's permission, I would like to submit my formal statement for the record, and only take the time here to go over some of the high points of the testimony.

Mr. KASTENMEIER. Without objection.

Mr. GOLDSTEIN. Mr. Chairman, my name is Paul Goldstein, I am professor of law at Stanford University. I should perhaps note that, in testifying before you today on the subject of the Copyright Royalty Tribunal, I am speaking strictly for myself and not on behalf of any client.

The 1976 Copyright Act assigned two fundamentally distinct responsibilities to the Copyright Royalty Tribunal. The first responsibility was to adjust the rates to be paid under the act's four compulsory licensing provisions. The second responsibility was to distribute, among affected copyright holders, the royalties that were gathered under two of those provisions.

The brunt of my testimony before you today is that within the terms and resources specified by Congress for the Tribunal's operation, the first task is virtually impossible and the second task is clearly impracticable.

Why is it impossible to determine the proper size of the copyright royalty pie? The core of the problem, I believe, is that the ratemaking criteria prescribed by section 801 of the 1976 act direct the Tribunal in adjusting rates to do no less than the Constitution directs Congress to do in determining the scope of copyright—simply, to strike a balance between the needs of producers and the needs of consumers. The difference, of course, is that the Tribunal is asked to justify each of its decisions rigorously against these criteria, while Congress is not.

There is a good reason why the Constitution does not ask Congress to justify its decisions in such rigorous terms, and why Congress should not ask the Tribunal to do so. As you well know, these are, at bottom, empirical questions, but empiricism cannot provide Congress or the Tribunal with the needed answers.

It is, for example, one thing to ask a State public utility commission, when discharging its ratesetting function, to determine the level of returns required for power companies to provide consumers with electricity. We know that the rates have been set too low when the lights goes off.

By contrast, because copyright involves information, and because information is a unique commodity, we do not know, and I venture we will never know, the level of royalties that will assure the optimal balance between production and consumption.

Now, since no amount of factfinding or analysis will produce correct answers, it seems to me that it wastes taxpayer dollars to demand compliance with the present statutory criteria in setting compulsory royalty rates. Since no institution—neither Congress

nor the Tribunal—will ever be able to set a royalty rate optimally, I believe that the best solution on the rate question will be the solution that is least costly and most politically responsive.

Specifically, I believe that Congress should, as it has in the past, initially set the compulsory license rate at the level that it judges appropriate, and then provide that this rate float up or down, according to some predetermined index chosen by Congress for each compulsory license.

I would like to turn to the second responsibility of the Tribunal: dividing up the royalty pie. Unlike the first task, determining the size of the pie, the expense of gathering and analyzing the information needed for this second task seems well-justified by the results produced. Some adjustment, though, is probably in order. I believe, for example, that responsibility for gathering the relevant facts from industry and consumers should continue to be left to the interested parties. They are best placed to gather these data most accurately and at lowest cost. I believe, however, that for reasons of accuracy and economy, the function of analyzing those data should be shifted primarily, if not exclusively, from the parties to the Tribunal or to any successor organization to the Tribunal.

Finally, having gathered facts and analyzed them, the last question is, who decides how the pie should be sliced up? From the viewpoint of an effectively functioning copyright system, I believe that it is of no great consequence whether this decisionmaking authority is lodged in the legislative branch, the executive branch, the judiciary, the Copyright Office, the FCC, or the FTC.

In short, I believe that Congress was correct when, in 1976, it vested distributional authority in the Copyright Royalty Tribunal. Although hindsight my suggest some areas that are in need of improvement, nothing has occurred to impeach the wisdom of Congress' decision on this score.

A few suggestions may be in order, though. First, since independent, objective analysis of the facts bearing on the appropriate distribution or royalty fees is desirable, I believe it would be good public policy to give the Tribunal the resources it needs to hire a full-time staff economist, as well as to commission economic studies as needed.

Second, since distributional decisions call for fact judgments rather than value judgments, and since there is no reason to believe that in making fact judgments, five heads are any better than three, I believe it would be good policy to reduce membership on the Tribunal to no more than three members.

The short of my testimony, then, is first, the ratemaking function presently assigned to the Tribunal should be contracted sharply, if not eliminated entirely, and replaced with congressional adoption of an initial rate for each of the four compulsory licenses, and of an automatic adjustment index for each rate.

Second, the Tribunal's distributional functions should be retained, but enhanced and economized by an allocation of resources to support the necessary independent analyses, and by reduction in the number of Tribunal members.

Finally, Mr. Chairman, I should note that I have taken care in my testimony to assume the continued force of the provisions in the act for compulsory licensing. My testimony would be incom-

plete, however, if I did not observe that at least some of the problems perceived to lie in the operations of the Copyright Royalty Tribunal, may in fact lie with some of the compulsory licenses that dictated the Tribunal's formation in the first place.

A virtue of the compulsory license in the copyright setting is that it can serve a useful transitional function as copyright industries, and the copyright system, accommodate themselves to the uncertainties created by new technologies, to assure that neither producers nor consumers suffer from the mistake of either no liability or full liability.

It may, for that reason be appropriate for this subcommittee at some early time to consider whether, for at least some of the act's compulsory licenses, this transitional function has been exhausted, and it is time to move on to a regime of exclusive rights.

Thank you, Mr. Chairman.

[The statement of Professor Goldstein follows:]

Statement of Paul Goldstein
Professor of Law
Stanford University

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   C. What Improvements are Needed?

Mr. Chairman, members of the Subcommittee. My name is Paul Goldstein. I am Professor of Law at Stanford University. In testifying before you today on the subject of the Copyright Royalty Tribunal I am speaking strictly for myself and not on behalf of any client. Specifically, to my knowledge, no present client of mine has, or is in the reasonably foreseeable future likely to have, any matter pending before the Tribunal or before any body that may be created to take over the present functions of the Tribunal.

The 1976 Copyright Act assigned two fundamentally distinct responsibilities to the newly-formed Copyright Royalty Tribunal. The first set of responsibilities was to prescribe and periodically adjust the rates to be paid under the Act's compulsory license for public broadcasting, and periodically to adjust the statutory rates prescribed for the Act's three other compulsory licenses -- for mechanical reproduction and cable and jukebox performances. The second set of responsibilities was to distribute the proceeds paid under the cable and jukebox licenses among affected copyright holders. The first responsibility essentially calls for the Tribunal to <u>determine the size</u> of the royalty pie. The second responsibility requires the Tribunal to <u>divide</u> that pie into appropriate portions

for copyright producers.

The brunt of my testimony before you today is that, within the terms and resources specified by Congress for the Tribunal's operation, the first task is virtually impossible and the second task is clearly impracticable. There is obviously no need for me to document that this Subcommittee is all too often asked to resolve both the impossible and the impracticable. I hope that my testimony today will help the Subcommittee to formulate the correct legislative solutions to these problems of impossibility and impracticability.

1. Ratemaking: Determining the Size of the Royalty Pie. Why is it impossible for the Copyright Royalty Tribunal, or any other agency for that matter, to set rates in compliance with the statutorily-dictated criteria? What strategies might Congress adopt in responding to this impossibility?

A. Why is It Impossible to Determine the Proper Size of the Pie? The core of the problem is that the ratemaking criteria prescribed by section 801(b)(1) and (2) of the 1976 Act direct the Tribunal in adjusting rates to do no less than the Constitution directs Congress to do in determining the scope of copyright -- in a word, to strike a balance between the needs of

producers and the needs of consumers; to mark the boundary line between private property and public domain that will at once assure optimal investment by creators and optimal access by consumers. The difference, of course, is that the Tribunal is asked to justify each of its decisions rigorously against these criteria while Congress is not.

Consider, for example, just three of the criteria specified in section 801(b)(1) for determining the proper rates for the mechanical and jukebox licenses:

> (A) To maximize the availability of creative works to the public;
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expansion and media for their communication....

It should be clear that the question whether an $8.00 jukebox fee or a $50 jukebox fee will induce the correct level of investment in musical compositions without disserving the interests of consumers is no different at bottom from the question that Congress faces when, for example, it asks whether by creating a home audiotaping right it will induce the correct level of investment in musical compositions without

disserving the interests of consumers.

There is a good reason why the Constitution does not ask Congress to justify its decisions in such rigorous terms -- and why Congress should not ask the Tribunal or any other agency to do so. As you so well know, these are at bottom empirical questions. But empiricism, no matter how rigorous, cannot provide the Congress -- or the Tribunal -- with the needed answers.

The reason that empiricism cannot provide the answer is that we are dealing here with information, and information is unlike any other product sold in the marketplace. It is one thing to ask state public utility commissions, when discharging their rate-setting functions, to determine the level of return required for power companies to be able to provide users with the needed amount of electricity. We know that rates have been set too low when the lights go off. By contrast, it is clear that <u>some</u> level of information will be produced even if no copyright royalties are paid, just as it is clear that <u>more</u> information will be produced when royalties are paid. What we do not know -- and, I venture, what we will never know -- is the level of royalties that will assure the optimal balance between production and consumption. Neither Congress nor the Tribunal can

ever be confident that it has struck the balance correctly.

Indeed, the Tribunal's task is even closer to impossible than that of the Congress -- if that can be imagined. The copyright system, as dealt with by the Congress, rests primarily on the free play of market forces. When, for example, Congress decides that a reproduction right should attach to literary works, it can be confident that the exclusive right thus given will channel rewards to authors and publishers corresponding to the value of those works to consumers. The Tribunal, by contrast, must in the context of compulsory licenses strike its balance categorically. It must, for example, set a single rate for <u>all</u> musical compositions, some of which, doubtless will be more popular than others. The Tribunal must keep its fingers crossed that the rate selected will not too greatly undercompensate the more popular compositions -- which the public desires -- and not too greatly overcompensate unpopular compositions -- which the public despises.

Briefly, since no amount of fact-finding or analysis will produce correct answers, it is quixotic at best, and wasteful of taxpayer dollars at worst, to demand compliance with the present statutory criteria

in setting compulsory royalty rates. I do not question the good faith, energy or competence that the Copyright Royalty Tribunal has invested in trying to conform its ratemakings to the prescribed statutory criteria. Nor do I question the good faith, energy and competence that the parties appearing before the Tribunal have invested in their submissions and that the Court of Appeals has invested in reviewing these ratemakings. I do think, though, that the effort has been a waste of valuable private, administrative and judicial resources.

B. How Should Rates Be Set in the Face of Uncertainty? Since no institution -- neither Congress nor the Tribunal -- will ever be able to set a rate for mechanical recordings or cable television, jukebox or public television performances that will optimally balance incentive and access in each context, I believe that the best solution will be the solution that is at once most economical and politically responsive. Specifically, I believe that the Congress should, as it has in the past, initially set the compulsory license rate at the level that it judges appropriate and then provide that this rate float up -- or down -- according to some predetermined index chosen by Congress for each compulsory license.

Politically, the virtue of this approach is that it would vest what is essentially a value judgment -- the appropriate licensing rate -- in the appropriate political body -- the Congress. Economically, the virtue of this approach is that, once the appropriate index is created, its application would be automatic and costless, saving the considerable expense entailed by the charade that the question of rates can be answered in a strictly empirical weighing of costs and benefits.

This is not to understate the importance of selecting the proper initial rate or of selecting the proper monetary index for adjustment. Whenever political judgments are required to substitute for market processes they must be made very carefully, indeed. Particular care should be taken in choosing the appropriate adjustment index. Congress, or possibly the Tribunal, should select an index that is at once sufficiently specific to respond to changes in the affected industry -- thus, presumably excluding some such generalized measure as the Consumer Price Index -- and sufficiently general to avoid problems of strategic behavior -- under which an industry could specifically calculate its pricing behavior to affect the governing index.

Indices will fail when the industrial realities on which they are premised change dramatically. Thus, in addition to administering the applicable index, the Tribunal or its successor could be directed to report to Congress in the event that industry dislocations make the indexed rate compensate producers dramatically above or below the once-prevailing norm. In my judgment, this will be the occasion for Congress, and not an administrative agency, to reevaluate the situation and to choose a new index, or possibly, decide to replace the compulsory licensing regime with a regime of either no liability or absolute liability.

2. Distribution: How Should the Pie be Sliced? Dividing the royalty pie calls roughly for proportioning the amounts paid to copyright owners to the uses of their works by consumers. Unlike the first task--determining the size of the pie--the expense of gathering and analyzing the information needed for this second task seems well justified by the results produced. I believe that the Tribunal has performed this task as ably as can be expected--in light of the limited resources made available to it and in light of the fact that this has been a pioneering venture with few trails blazed. Thus, I will confine my observations to three specific areas for improvement.

A. <u>Who Gathers the Data? Who Analyzes Them?</u> The task of dividing the royalty pie consists of three separable functions: gathering the relevant industry and consumer data; analyzing that data; and, finally, dividing the royalty pie on the basis of that analysis. As I understand the Tribunal's operations, the first, fact-gathering function has been left primarily, if not exclusively, to the interested parties, while the second, analysis function has been divided between the parties and the Tribunal, and the third, decisional function has, of course, been reserved exclusively to the Tribunal subject to judicial review.

I believe that responsibility for fact-gathering should continue to be left to the interested parties. They are best placed to gather these data most accurately and at the lowest cost.

I believe, however, that for reasons of accuracy and economy, the second, analytical function should be shifted primarily, if not exclusively, to the Tribunal or its successor organization. The accuracy ground should be self-evident: interested parties are also invariably self-interested parties with every reason to shape their analyses to support their receipt of the largest possible share of the royalty pie. Independent, objective analysis will better assure

accuracy. The cost-saving ground, though less evident, is equally important. Analyses performed by disparate groups are likely to rest on disparate premises and methodologies, requiring the Tribunal in the final analysis to go to the considerable effort of rendering the disparate analyses comparable. It would involve less cost--and no sacrifice in accuracy--for the Tribunal itself to employ a single methodology for analysis at the outset.

B. Who Decides How the Royalty Pie is Divided? Decisions on how the pie is to be divided are essentially fact judgments rather than value judgments. In a perfect world of perfect information, these decisions would not have to be made at all for the fact-gathering and analysis processes just described would perfectly divide the entire pie, leaving nothing for authoritative decision. That we live in an imperfect world is well-attested by Judge Mikva's observation in Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal that, had each claimant been awarded its desired allocation, the distribution would have totalled over 160% of the funds available for distribution--more than a pie and a half!

The fact that we live in an imperfect world means, of course, that the introduction of an authoritative

decisionmaker is inevitable. But it does not mean that the structure and locus of that decisionmaker is all-important. From the viewpoint of an effectively operating copyright system--in which producers are paid for what they produce and consumers pay for what they use--it is of no great consequence whether decisionmaking authority is lodged in the legislative branch, the executive branch, the judiciary, in some hybrid arbitral body or in the Copyright Office, the F.C.C. or the F.T.C. I underscore the words, from the viewpoint of an effectively functioning copyright system, because I appreciate that other values may be served or disserved by the determination to locate the function in one place or another. But from the viewpoint of copyright policy, the important issue is the quality of the decisional facts and their analysis, and not who makes the decisions based on them.

In short, I believe that Congress was correct when, in 1976, it vested distributional responsibility in the Copyright Royalty Tribunal. Although hindsight may suggest some areas that are in need of improvement, nothing has occurred to impeach the wisdom of Congress' decision on this score.

In these terms, the case so far for retention of the Copyright Royalty Tribunal is essentially a

negative case--the Tribunal is no worse than the alternatives. But, there is also an affirmative case for the Tribunal that probably makes it preferable to the alternatives. In the course of its proceedings dividing up the royalty pie, the Tribunal has in the few years of its existence already developed a considerable body of precedent, providing the basis for a desirable stability and certainty of expectation in both producer and user communities. Doubtless, if the Tribunal is retained and this body of precedent is allowed to consolidate, the patterns of distribution will over the years increasingly follow well-worn grooves, enhancing stability still more and reducing the costs of decision still further.

C. What Improvements are Needed? The question of what adjustments will make the Tribunal run better has already been thoroughly addressed in the testimony before your Subcommittee on 19 June as well as in the 11 June 1981 report to your Subcommittee from the General Accounting Office. In the interests of time, I will just note some points on which I concur.

First, since independent, objective analysis of facts bearing on the appropriate distribution of royalty fees is desirable, I believe it would be good policy to give the Tribunal the resources it needs to

hire a full-time staff economist, as well as to commission economic studies as needed.

Second, since distributional decisions call for fact judgments rather than value judgments, and since there is no reason to believe that in making fact judgments five heads are better than three--or, for that matter, better than one--I believe it would be good policy to reduce membership on the Tribunal to no more than three members.

Third, the Tribunal's workload is likely to diminish over time--particularly if, as suggested in the first part of this testimony, the Tribunal's ratemaking functions are reduced. This suggests that, if it is decided that the Tribunal should consist of three members, it may be appropriate for at least two of these members to serve on a part-time basis.

3. Conclusion. The short of my testimony is: First, the ratemaking functions presently assigned to the Tribunal should be contracted sharply, if not eliminated entirely, and replaced with Congressional adoption of an initial rate for each of the Copyright Act's four compulsory licenses, and of an automatic adjustment index for each rate. Second, the Tribunal's distributional functions should be retained, but enhanced and economized by the allocation of resources

to support the necessary independent analyses, and by a reduction in the number of Tribunal members.

Finally, I should note that I have taken care in my testimony to treat as a given the continued force of the Act's four compulsory license provisions. My testimony would be incomplete, however, if I did not observe that at least some of the problems perceived to lie in the operations of the Copyright Royalty Tribunal may lie not so much with the Tribunal as with at least some of the compulsory licenses that dictated the Tribunal's formation in the first place. I shall not attempt to rehearse the pros and cons of the various compulsory licenses here. But I should note that one virtue of the compulsory license in the copyright setting is that it can serve a useful transitional function, as copyright industries and the copyright system accommodate themselves to the uncertainties created by new technologies--to assure that neither producers nor consumers suffer from the mistake of no liability or full liability. It may be appropriate for this Subcommittee, either in connection with these oversight hearings, or in some future connection, to consider whether, for at least some of the Act's compulsory licenses, this transitional function has been exhausted, and it is time to move on to a regime of exclusive rights.

RESUME

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EDUCATION

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EMPLOYMENT

1975 -	Professor of Law, Stanford University
1972 - 1975	Professor of Law, State University of New York at Buffalo
1972 - 1973	Visiting Associate Professor of Law, Stanford University
1969 - 1971	Associate Professor of Law, State University of New York at Buffalo
1967 - 1969	Assistant Professor of Law, State University of New York at Buffalo

PUBLICATIONS

Books

Real Property (Foundation Press 1984)

Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on Intellectual Property Law, 2d Ed. with Statutory and Problem Supplement (Foundation Press 1981)

Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance, with Statutory and Problem Supplement (Foundation Press 1980)

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On the Control of Air Quality: Why the Laws Don't Work, 29 Science and Public Affairs 31 (1973) [with Robert Ford]

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Mr. KASTENMEIER. Thank you, Professor Goldstein.

You are saying that in 1976, when we created an $8 annual fee for compulsory license for jukeboxes, that we should have allowed that fee merely to be adjusted by some objective standards, such as Consumer Price Index or something.

We effected the fee by statute, and we should have prevented other factors from entering into the process. Consideration of other factors have caused the most difficulty, particularly in the jukebox area, but possibly in other areas.

Periodic adjustments would therefore not be necessary, except in furtherance of a given formula, let's say an inflationary adjustment.

Mr. GOLDSTEIN. That is essentially correct, Mr. Chairman. Perhaps it would be helpful for me to elaborate on three specific points that you alluded to. First, with respect to selection of the index, the CPI is one that we ordinarily think of, and it may turn out to be an appropriate index. But, I think that care needs to be taken in selecting the correct index for each of the four licenses. The CPI may turn out to be too general an index for some of these, and there may be a more appropriate, narrower index that could be used.

Second, let me say that, in requiring that other factors not be considered, I am saying that it costs money to consider other factors, and I don't think we are getting a better decision for having spent more money.

Third, I recognize that just indexing for inflation might be unsatisfactory over the long term. My thought, though, is that to the extent that it is unsatisfactory, it will be because of major dislocations in the affected industry or industries. And it is precisely those kinds of dislocations that I think Congress ought to attend to specifically as the occasion arises—perhaps adjusting the rate dramatically, or perhaps getting rid of the rate entirely and moving to a system of no liability or a system of full liability.

But I think that to ask the Tribunal to adjust rates in some ad hoc fashion would probably just mask what is doubtless a more fundamental problem.

Mr. KASTENMEIER. I have another question. If Congress were to decide that it would be responsible—or at least it or some other entity than CRT—for fixing the rate, and that responsibility were taken away from the Copyright Royalty Tribunal, the Tribunal would still have the problem of dividing the pie, or the distribution. One would have to ask, how much of the time of the Tribunal is devoted to dividing the pie?

If it is indeed too little time, like 25 percent of the time, even though you only had three members, it would seem that it would not be a sufficient task to justify the permanent creation of a continuing body. Perhaps distributions could be handled by a special master or some other type of decisionmaker, which only would be convened when necessary.

How would you respond to that?

Mr. GOLDSTEIN. First, the basic point seems to be clearly correct. I know that there are perceived problems with demoralization in the Tribunal as it is presently constituted. I imagine that the prospect of three full-time members not having to work full-time would be further demoralizing.

The response might be to have one full-time Commissioner of the Tribunal and two part-time members, or even to have three essentially part-time members and a delegation of the basic efforts to a special master.

Something along that line would certainly seem appropriate in terms of efficiency and, I think, also in terms of reinvigorating the Tribunal with the needed morale.

Mr. KASTENMEIER. Let me change the emphasis somewhat. I don't know if you have had an opportunity to read Mr. Toohey's statement or his earlier suggestion publicized in the Washington Post, if not elsewhere, that we should think more comprehensively about the problem. He suggests that Congress create a copyright agency, an agency with regulatory authority to make decisions that are currently either reserved to the Congress or possibly to the CRT or the Copyright Office.

If you have had an opportunity to consider that proposal, what are your thoughts?

Mr. GOLDSTEIN. I did have the opportunity to consider it.

I would say, first, that the proposal is to be applauded for its creativity. We need creativity in dealing with the kinds of issues that face the copyright system today.

On the other hand, I think that, from a public policy perspective, the proposal for a Federal copyright agency is just about as wrong headed as any legislative proposal in this area could possibly be.

I feel like the proverbial flea perched on an elephant in trying to identify for you what I see that is wrong with the proposal. I just don't know where to begin. In the interests of time, and in fairness to Mr. Toohey, who, I understand, will be making a statement to you this morning, let me just focus on what I perceive to be a fundamental flaw in the proposal. It is that the proposal fundamentally misconceives the nature and function of copyright.

Copyright is a property system. Like other property systems—real property is the example that immediately comes to mind—many or some of its edges, are subject to administrative rulemaking and decision. In the real property area, we have zoning boards and commissions making decisions, as administrative agencies, on how property can be used. In the case of copyright, we have the CRT.

But at the same time property—real property, personal property, intellectual property—is left primarily, if not exclusively, to forces other than administrative agencies, and I think for very good reasons, reasons that are essentially historical. There is, on reflection, no system of property in this country that is subjected to the kind of plenary administrative control that this proposal suggests, and again, I think for good reason.

The fact that the statement reaches to false analogies to make its point further underscores its error and the misconception of copyright that underlies it.

It talks, for example, about the functions of the Patent and Trademark Office as being analog to a Federal copyright agency with plenary power. In fact, as you well know, since this falls within your subcommittee's jurisdiction, the work of the Patent and Trademark Office differs in only one respect from the work of the Copyright Office, and that is, the Patent and Trademark Office

searches patents and trademarks to determine patentability or registrability under the Patent and Trademark Acts.

That kind of search and examination function, which is the only function that separates the Patent and Trademark Office from the Copyright Office, cannot be performed by the Copyright Office. It is not performed by any Copyright Office in any country in the world, for the simple reason that, given the fundamental assumptions of the arts—literature, music, and the visual arts—one cannot perform a search to determine whether that which is being presented for registration represents an advance over the prior art. That would involve value judgments that, I think, too seriously implicate first amendment concerns, as well as more general concerns for the marketplace for creativity.

I think, then—and I use that just as an example—that the proposal is indeed wrong. Plainly wrong, in terms of copyright policy, in terms of history, and in the terms that should always be paramount—the welfare of consumers.

Mr. KASTENMEIER. Thank you.

One other question I would like to ask dealing with what we really ought to anticipate in terms of new technologies. Do you have any feeling that Congress might be asked to create compulsory licenses in the near future for new technologies?

I say this because I am aware that even some entities or interests that really do not like the compulsory license would just as soon not have it. They are sometimes disposed, if it is to their advantage to consider it as an option in dealing with other parties, as a possibility.

Therefore, it may be that various interests or industry groups may or may not suggest changes of the copyright law in the form of new compulsory licenses. From your perspective, do you envision that possibility, or do you think in response to new technologies, Congress might be confronted with this eventuality? Are we necessarily dealing with a fixed number of compulsory licenses here, or may we be confronted by some new ones?

Mr. GOLDSTEIN. To begin with I shall not try to second-guess the strategies of different copyright producer groups, in terms of whether they feel it is in their best interest to propose a compulsory license, on the theory that half a pie is better than none. I might say, though, that if they do, it reflects their own travel over the same terrain that I traversed over the last 2 years, in looking at the new technologies and their intersections with copyright, and that leads me to the conclusion that for certain very narrow functional reasons—transitional reasons—the compulsory license may make very good sense.

When we have a new industry whose contours aren't yet clear and where, as a result, patterns of negotiation have not developed between producers and users, the compulsory license might be the appropriate route to take to make certain that some rewards are provided, while assuring that consumers have access to copyrighted materials and, at the same time, providing the basis for the development of channels of communication and negotiation, between producers and consumers, so that 5 or 10 years later, Congress might take another look and say, well, those patterns of negotia-

tions have become established, maybe it is time now to turn to an exclusive right.

If I might add one point. I think it important to distinguish among licenses. There is a danger in viewing all compulsory licenses as being the same. In fact, the term "compulsory license" can summon up at least five different, very different notions, and your subcommittee might want to be careful to attend to which specific notion it is dealing with.

One example is the compulsory license—we have some experience with it in the international patent system—under which if a patent proprietor hasn't worked his or her patent, and put it into the marketplace, the proprietor can be compelled to work it, and will be compensated on the basis of the relative value of the patented subject matter. Now, the effect of that compulsory license is to reward the producer according to the value of the invention. A major, pioneer invention will get a greater compulsory license rate than a minor invention. We have, I might add, no such compulsory license in the copyright law.

Another form of compulsory license is the mechanical recording license which, although it doesn't proportion the returns to the value of a particular musical composition, at least tries to approximate it by compensating the producer on a per-phonorecord basis. The more records that are made and sold, the greater will be the producer's return.

A third form of compulsory license would look to the revenues of the user—that, basically is the way the cable retransmission compulsory license works under section 111.

Another form would be a flat license fee, as we have with jukeboxes.

Yet another—and one probably could multiply these as well—would be a surcharge on products paid by the consumer. For example, the approach has been adopted in other countries levying a fee on blank tapes, or audiotape players. That would be yet another form of compulsory license.

The reason for my going on at such length about this is, I think it would be useful, if the subcommittee deals with proposals characterized as involving compulsory licenses, to focus on the specific kind of compulsory license that is involved, and to consider whether one of the alternative forms might be better in the circumstances.

Mr. KASTENMEIER. If I may add to the complexity of the situation, and certainly you have stated that element correctly, we have another possibility. If one compulsory license is phased out, and an important one goes to the market, or, if the parties start to decide that they don't like the protracted and costly presentations to the CRT and use other routes—putting antitrust considerations aside—to reach accommodations with the other groups, the need for the CRT may diminish considerably.

At least its function will be eroded, in terms of the sheer numbers of either compulsory licenses, or if the compulsory license remains the parties have reached other accommodations, and to pursue applications through the Tribunal process, at least contested proceedings.

So, I would invite your comments, but first note that there are major factors which, if we were able to foretell, we could judge better what we might now do.

Mr. GOLDSTEIN. That is a very valuable point. It never struck me before quite as clearly as it just has now, listening to your remarks. When I spoke of transition, I naturally thought of the Congress coming back and looking at the situation in 5 or 10 years. But the nature of the process itself, of working under a compulsory license, might very well lead to these private negotiations. We didn't have the Copyright Royalty Tribunal under the 1909 act, but the way the mechanical license was administered then was privately, and parties actually negotiated for a rate lower than the statutory rate in section (e), and revenues were collected and distributed privately by the Harry Fox Agency.

Mr. KASTENMEIER. Thank you.

I would like to yield now to my colleague from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you.

I want to congratulate you first, on your excellent statement. The written statement was excellent, as well as your oral statement.

One of the suggestions that has been made that could simplify the work of the Tribunal, and perhaps get it out of the area where it affects programming, would be to have a flat fee per subscriber for cable television units.

Right now, a lot of the cable stations and operators are making their decisions as to what programming to offer to the consumer based upon what they were going to have to pay to the Tribunal. And that, of course, could have an adverse effect on the people that want to watch programs from all over the country. It can also affect the success or failure of a system, or even of television stations that happen to be unfortunately located outside of the close area that they need to be in, in order to have the lower rates.

I have heard that both cable and the motion picture industry are thinking about the possibilities of agreeing with each other as to such a rate. Do you think that this would be feasible, and what would you think are the advantages of——

Mr. GOLDSTEIN. That is a tough question, to which I wish I had the answer. I really don't. I have no knowledge of what kinds of discussions are going on between the cable and motion picture industries, nor do I know the extent to which a tax on users might begin to approximate the realities of the marketplace for pay TV. It might really be converting over to that kind of system, if that is what you were suggesting.

Mr. MOORHEAD. Well, if they had a flat fee per subscriber that would give them an equivalent amount of revenue to what they are receiving now, but which would not force decisions upon the cable companies that would require them to change programming or would eliminate certain stations just outside the fringe area.

It would perhaps give them a better way to operate their franchises, but would also give the listener or the watcher a better opportunity to have more programming available to them.

Mr. GOLDSTEIN. I suspect if the returns to producers will be the same, the only difference is who is paying the dollars out, users or the cable systems——

Mr. MOORHEAD. It is always going to be the user, because the cable——

Mr. GOLDSTEIN. In the end, exactly. Then, the only decision is who is actually laying out the dollars, and it looks like they are paying for it. I imagine that the motion picture producers would be indifferent as to how the tax was levied, and thus it would be up to the cable industry, which might say somethink like "Well, we think it is going to work better for us if we do it this way. Why don't you come to the table with us on that to discuss that kind of proposal."

That strikes me as being essentially a private decision.

Mr. MOORHEAD. It also would eliminate some of the controversy that is always present as the rates go up and down, with a lot of complicated schedules.

Mr. GOLDSTEIN. And it might increase the complexity, though, of bookkeeping for the cable system.

I am just suggesting this. I am not questioning the proposal, but I am suggesting it is the kind of thing the cable industry could probably decide well for itself, in terms of what its best interests are, and if the interests of the motion picture industry are not adversely affected, I don't know why they would not come to the table on it.

Mr. MOORHEAD. One of the things we have been talking about, and I know even the people on the Tribunal have been talking about themselves, are ways that they could organize that would be more effective than what they have now, as you have a floating chairmanship that floats from year to year from one person to another, really very little leadership responsibility that is continuous.

The suggestion has been made that we have a more permanent Chairman, perhaps reduce the numbers from five to three on the Commission, but also we give them a staff. You have already suggested that they have an economic advisor. Perhaps they have a legal counsel that is available at least to the Chairman, but which could be used by the others, and to give them an organization that could more effectively work than what they have at the present time.

What would be your feelings about what changes could be made in the present formulation of the Tribunal that would be of assistance to us.

Mr. GOLDSTEIN. I agree that reduction of membership would be desirable, certainly in terms of saving taxpayer dollars, since I don't think that the workload is there to justify five members and, perhaps, not even to justify three. In any event, even if the workload were there, the question is, Do we get a better decision from five than we get from three? I don't think we necessarily do, since we are talking about analyzing facts rather than making value judgments. Staff certainly seems important to me, professionalizing the venture.

I think your comments also point in the direction of making an affirmative case for the Tribunal. My comments to this point have essentially made a negative case—that the Tribunal is no worse

than the alternatives. I think that the positive case for it follows the direction of your comments, Congressman Moorhead, in the sense that if we retain the Tribunal, if we professionalize the staff, we will be laying the basis for the development of precedent, continuity and stability in the Commission, a basis on which parties, contending parties, can rely. I think that, as a result, the work of the Commission would begin to shrink over the years as a common law of decisions developed.

Mr. MOORHEAD. One thing that has been suggested that we might do, and you, of course, have heard the criticism of the members of the Tribunal that have been prevalent recently, and others, is—should there be a set of statutory qualification for the members of the Tribunal? Should the Congress set a set of minimum standards that they had to meet before they were appointed, as far as training, as far as performance prior to the time they were on the Tribunal?

Mr. GOLDSTEIN. That is a good question. Again, it is a tough one. On principle, I have nothing against minimum standards. In practice, I might encounter some difficulty specifying what those minimum standards should be.

For example, I think it would be mistaken to establish experience in copyright law as a minimum standard. For the kind of decisions the Tribunal is asked to make—particularly if its ratemaking function shrinks and its allocational function becomes paramount—I don't know that copyright expertise is either a plus or a minus.

One could make minimum standards that don't identify copyright expertise, but identify good judgment, balance and wisdom. We hope that all Federal appointees have those qualifications.

My concern about getting more specific than that is, the more specific you get, the more you narrow the field, and the greater you increase the difficulty of getting qualified people.

Mr. MOORHEAD. Our chairman, Mr. Kastenmeier, has a bill, H.R. 2784, which would establish a Copyright Royalty Court, using existing article III judges. Do you believe that the use of strict court procedures would hinder or help in the gathering of adequate information for a decision?

In the *D.C. Court of Appeals* v. *Feldman*, the court said that the establishment of a rate is the making of a rule for the future.

Therefore, it is an act legislative, not judicial in kind. Do you see a constitutional problem with the way the bill is presently drafted?

Mr. GOLDSTEIN. I am afraid, Congressman Moorhead, I can't comment on the constitutionality of the bill. I just don't have the expertise required for that.

In terms of the first part of your question, though, I see no great problem having a court deal with the allocational, as opposed to the ratemaking functions, reserving the question of ratemaking, I just don't know about its constitutional posture.

The question I would return to is whether we really have gained anything in terms of the quality of decision by shifting from one institution that is presently in place and is, in fact, working to another that is yet untried.

Mr. MOORHEAD. One of the other things that has come up quite frequently is, whether this Tribunal is better left independent, as it

is, without any supporting agency, supporting staff, or anything else, or whether it would be beneficial to locate it in the Department of Commerce or in the Copyright Office, as a Tribunal, but where it would have some support backup.

I know that most of the members of the Tribunal that I talked to wanted to stay independent, but there has been suggestions of that kind that have been made.

There have been suggestions that have been made about providing limited judicial review of the CRT decisions, with appeal only to the U.S. court of appeals for the Federal circuit.

Are there any changes of this kind that you think might improve the quality of work that is presently being done?

Mr. GOLDSTEIN. No, I think not. As a practical matter, if the Tribunal were moved to the Copyright Office, or the Patent and Trademark Office or elsewhere in the Department of Commerce, people would have to be hired in any event, to do the difficult work of analyzing the data. My hunch is, they are going to be the same people, regardless of the umbrella under which they work. I prefer given to change. I can't see any great benefit coming from change in that connection.

I really don't see any difference occurring in the quality of the Tribunal's decision by moving the Tribunal function from one place to another, so long as staff is provided. And I think that is crucial.

On the question of judicial review, I really have no firm thought. The notion of review being in the court of appeals for the Federal circuit is certainly an attractive one, in some respects. It is a court of appeals that, after all, does deal with intellectual property in other domains. But, I have read the decisions of the D.C. Circuit, which has been reviewing the decisions of the Tribunal, and they strike me as being absolutely first rate.

Mr. MOORHEAD. I had just one last question.

When you talked to various groups, a number of them seem to want to abolish the Tribunal, feeling that perhaps they will get rid of a cost that they are having to bear right now, and by getting rid of the Tribunal, there will still be compulsory licensing, but there will be no payout.

Other groups would like to get rid of it, or at least talk as if they would, because they feel that they will get rid of the compulsory license, and be able to get more money from it.

In reality, would we be going to a lot more confusion and really trying to resolve something that has been solved in a way already, if we abolish the Tribunal and were forced into those pressures from either side, that we once faced?

Mr. GOLDSTEIN. You have painted the picture a lot more graphically than I possibly could. I think the answer is yes.

Mr. MOORHEAD. The last question I have.

Mr. GOLDSTEIN. Thank you.

Mr. KASTENMEIER. The gentleman from Florida.

Mr. SWINDALL. No, I am from Georgia.

Mr. KASTENMEIER. From Georgia.

Mr. SWINDALL. No questions, Mr. Chairman, thank you.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. Coble. Mr. Chairman, I apologize to you for my late arrival. I had another meeting. I will be very brief, Professor. I join my colleagues in expressing thanks to you for having appeared before us.

Some weeks ago, you all would recall, we had a hearing concerning a copyright law in space, involving inventions that occurred in space, determining which countries would prevail.

And after that meeting, Professor, I told the chairman that the law of copyrights is confusing enough to me. When that is coupled with the law of outer space, the complexity is compounded.

With that in mind, I am not a copyright lawyer, I have never practiced in that area, but I am interested in Congressman Moorhead's suggestion concerning minimum standards or minimum experience.

And I think you pretty well discarded minimum experience relating to copyright expertise, and I am not in disagreement with that. You indicated perhaps sound judgment. Would you have any other suggestions that you could share with us?

Mr. Goldstein. Well, the only suggestion I would make in response is that this does turn to some extent on the staffing decision. If you have a professional staff, a staff economist, people who can crunch numbers, to the extent that you have that kind of staff, I think the level of expertise required among the Tribunal members diminishes.

To the extent that you don't have staff, I would hope that the qualifications would include some facility with numbers, ability to analyze numbers, yes.

Mr. Coble. I would like to pursue that as time develops here. Mr. Chairman, that is the only question I had, thank you.

Mr. Kastenmeier. I thank my colleague, and I certainly thank Professor Goldstein for his superb, and very thoughtful presentation this morning. The committee benefits, certainly, from his testimony.

I will not call our next witness now, because we have a recorded vote on, but I hope my colleagues can return following the vote. We will call the Acting Chairman of the Commission, Commissioner Ray, as our next witness when we return.

But in the meantime, the subcommittee will be in recess for 10 minutes.

[Recess.]

Mr. Kastenmeier. The committee will come to order.

Our next witness this morning is Acting Chairman of the Copyright Royalty Tribunal, Edward W. Ray.

Mr. Ray was appointed to the Tribunal in 1982 by President Reagan, and has previously appeared before us, and it is good to have you back. I note that you have with you counsel, Mr. Robert Cassler.

Regrettably, I understand that Commissioner Mario Aguero, who also was invited to testify, and doubtless would have been here, is unable to attend due to illness. And I have a telegram from him to that effect.

Mr. Ray.

TESTIMONY OF EDWARD W. RAY, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL, ACCOMPANIED BY ROBERT CASSLER, GENERAL COUNSEL

Mr. RAY. Thank you, Mr. Chairman.

I have a brief statement that I would like to read for the record. We are honored to have been invited to appear before you and the subcommittee to testify on the reform of the Copyright Royalty Tribunal.

We are especially appreciative to you, Mr. Chairman, for rescheduling our appearance from June 19, in order to allow us to proceed with our previously scheduled hearings in the Tribunal's 1983 cable royalty distribution proceeding.

Appearing with me today is Mr. Robert Cassler, General Counsel of the Tribunal. As you have just mentioned, Commissioner Aguero is not able to be present here today because of illness.

It is my understanding that he has sent a telegram to the subcommittee advising of his illness, and you have just informed us of that.

Mr. Chairman, our written testimony is divided into three separate sections.

The first section provides the subcommittee with information on the current status of the Tribunal's membership, responsibilities, staff, budgets, and activities.

The purpose of this section was to, as I said, provide the subcommittee information that may be useful in whatever ultimate determinations you may make in regards to the status of the Tribunal.

In section two, we have submitted our recommendations on the reform of the Tribunal, and have also submitted comments on House bills H.R. 2752 and H.R. 2784.

In the third section of our testimony, we have presented a series of Tribunal position papers in response to concerns expressed by certain members of the committee regarding the Tribunal's 3.75 cable rate determination, industry private settlements, court decisions, and partial royalty distributions.

Mr. Chairman, we do not agree with the observation that the Tribunal is a broken agency beyond repair. However, it is not the purpose of our testimony today to attempt to save the Tribunal or our jobs.

The primary purpose of our testimony is to provide constructive input into whatever ultimate determination is made by the subcommittee and the Congress.

Thank you, Mr. Chairman. I would be happy to answer any specific questions or to turn to any portion of my testimony to give more detailed comments, if you request it.

Thank you, sir.

[The statement of Mr. Ray follows:]

SUMMARY STATEMENT

Mr. Chairman, we are honored to have been invited to appear before you and the Subcommittee to testify on the reform of the Copyright Royalty Tribunal. We are especially appreciative to you Mr. Chairman for rescheduling our appearance from June 19, in order to allow us to proceed with our previously scheduled hearings in the Tribunal's 1983 cable royalty distribution proceeding.

Appearing with me today, are Commissioner Mario Aguero and Mr. Robert Cassler, general counsel to the Tribunal. Mr. Cassler will not testify today.

Our written testimony is divided into three separate sections.

The first section provides the Committee with information on the current status of the Tribunal's membership, responsibilities, staff, budgets and activities.

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Mr. Chairman, we do not agree with the observation that the Tribunal is "a broken agency beyond repair", however, it is not the purpose of our testimony today to attempt to "save" the Tribunal or our jobs. The primary purpose of our testimony is to, hopefully, provide constructive input into whatever ultimate determination is made by the Subcommittee and the Congress.

Thank you Mr. Chairman.

Commissioner Edward W. Ray
Acting Chairman
Copyright Royalty Tribunal
July 11, 1985

CREATION, HISTORY, MEMBERSHIP, STAFF

The Copyright Royalty Tribunal (Tribunal) was created by §801(a) of the Public Law 94-553, the General Revision of Copyright Law of 1976, (Title 17 of the United States Code). It commenced operations in November 1977 with five Commissioners: Thomas C. Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia. Edward W. Ray was appointed to succeed Clarence James. Katherine D. Ortega succeeded Frances Garcia and resigned in September 1983 to become the Treasurer of the United States. Mario F. Aguero was appointed to succeed Mary Lou Burg. Marianne Hall was appointed to succeed Katherine D. Ortega and resigned May 8, 1985.

Currently, the Tribunal is composed of two commissioners, Edward W. Ray (September 1989), Acting Chairman, and Mario F. Aguero (September 1991). Three seats remain vacant. The chairmanship rotates annually.

In keeping with the legislative history and mandate, the Copyright Royalty Tribunal has remained a small, independent, legislative agency. In February 1985, Mr. Robert Cassler was selected to serve as General Counsel for the agency. At present, the Tribunal is served by two confidential assistants: Christy Blackburn-Rodriguez, Assistant to Commissioner Ray, and Barbara N. Gray, Assistant to Commissioner Aguero. The General Counsel's office is also assisted by two volunteer law students through the agency's legal extern program: Wallace Butler of Georgetown University Law Center and Carroll Hauptle of American University College of Law.

In planning the Tribunal requirements for the WTBS Cable Rate Adjustment proceeding, the Commissioners advertised for an economist/consultant in the Washington Post and Washington Times in early June. We have received approximately 25 resumes from individuals and firms which are currently under review. Copies of the classified advertisements are included in Appendix A.

The biographies of the current commissioners and general counsel are included in Appendix B. Commissioner Edward W. Ray, Acting Chairman, has submitted a more detailed resume of his professional experience in response to a question by Representative Mike Synar as to whether his professional background was as "a former road manager for Chuck Berry."

STATUTORY RESPONSIBILITIES

The Tribunal's statutory responsibilities are detailed in sections 111, 115, 116, 118 and 801 of Title 17 U.S.C. The Tribunal is involved in rulemaking and in adjudication. The rulemaking proceedings consist of setting royalty rates for the four compulsory licenses authorized under Title 17. The compulsory licenses are for:

1) secondary transmissions of copyrighted works by cable systems (§111),

2) production and distribution of phonorecords of nondramatic musical works (§115),

3) public performances of nondramatic musical works by coin-operate phonorecord players (jukeboxes) (§116),

4) the use of certain copyrighted works in connection with noncommercial broadcasting (§118).

The Tribunal's adjudicatory functions are to distribute the cable television and jukebox royalties collected to the copyright owners. The Tribunal does not distribute royalties for phonorecords (§115) or noncommercial broadcasting (§118). This is handled privately by the parties involved.

CURRENT PROCEEDINGS

After the resignation of Commissioner Hall, the commissioners directed the general counsel to research the status of the Tribunal with only two sitting commissioners. An analysis was formulated and directed in letter form to all members of the bar who practice before the Tribunal and the Administrative Conference of the United States. No objections were filed by any of the affected parties in regard to the ability of the Tribunal to legally function (Appendix C).

CRT Docket No. 84-1-83CD: 1983 Cable Royalty Distribution

On October 1, 1984, the Copyright Royalty Tribunal solicited public comments on (1) whether a controversy existed with regard to the distribution of 1983 cable royalties; (2) the scheduling of the 1983 royalty distribution proceedings; and (3) the procedures to be followed in the proceeding. A notice commencing the 1983 Cable Distribution Proceeding effective April 15, 1985 was published in the Federal Register of April 8, 1985.

On May 13, 1985, the parties filed their written direct cases with the Tribunal. On June 3, 1985 the Tribunal issued an Order directing 50% partial distribution of the fund to be distributed June 27, retaining sufficient funds to resolve the amounts in controversy. On June 7, 1985, a pre-hearing conference was held to resolve objections to direct evidence. The hearing of Phase I direct case evidence began June 19, 1985. A recess is scheduled for August 9, 1985. Hearings will resume after Labor Day. It is anticipated that direct case testimony will be concluded about the middle to late September. The hearing of the rebuttal testimony for Phase I, and the hearing of Phase II has not yet been scheduled. As required by statute, the Tribunal must render a final determination by April 14, 1986.

CRT Docket No. 84-2 83JD: 1983 Jukebox Royalty Distribution

On November 5, 1984, the Tribunal declared a controversy as to 5% of the distribution of the 1983 Jukebox Royalty funds (49 FR 44231). A pre-hearing conference was held with the interested parties on January 7, 1985. On February 15, 1985, the parties filed comments on methodology for determining entitlement. On June 24, 1985, the parties filed their responses to the Tribunal's May 16, 1985 request for further information. On May 30, 1985, the 2nd Circuit Court of Appeals reversed the Tribunal's decision in the 1982 Jukebox Distribution Proceeding, and remanded the case for further fact-finding. Once the Court's mandate is issued, the Tribunal expects to consolidate the remanded 1982 Jukebox Distribution Proceeding with the 1983 Jukebox Distribution Proceeding. The Tribunal must render a final determination in this matter by November 4, 1985.

CRT Docket No. 85-3 85CA: Cable Rate Adjustment for WTBS

The Tribunal was petitioned on March 25, 1985 by Turner Broadcasting Systems, Inc. to review the rate for distant signals which were deregulated by the FCC in 1980 as it applies to cable carriage of WTBS, Atlanta, Georgia. On April 8, 1985, the Motion Picture Association of America, Inc. (MPAA) filed a motion with the Tribunal requesting the Tribunal to establish a notice and comment proceeding for resolving certain questions raised by the TBS petition. On June 3, 1985, the Tribunal published a Notice of Inquiry requesting comments to be filed by July 8 and, reply comments by August 8, 1985 (50 FR 23349) on the following questions: To TBS alone: (1) What is the exact nature of the relief requested by TBS? (2) How would it work? To the public and TBS: (1) Is TBS an owner or user of copyrighted works with a significant interest in the royalty rate in which an adjustment is requested, as required by 17 U.S.C. 804(a)(2)? (2) Should the same procedures recently adopted in the 1983 distribution proceeding (Notice Commencing 1983 Cable Distribution Proceeding, 50 FR 13845 (April 8, 1985) be used for a TBS rate adjustment proceeding? Should TBS be required to put forward its case first, with a period for rebuttal cases to follow, or should all parties who intend to put in evidence be

required to file their cases at the same time? (3) What burden of proof should TBS have to sustain to obtain the rate it seeks?

PENDING APPEALS

(1979 Cable Distribution Final Determination (Remand)
Consolidated(1980 Cable Distribution Final Determination
(1982 Cable Distribution Final Determination

Under consideration before the U.S. Court of Appeals, District of Columbia Circuit are: (1) the CRT's final determinations in 1979 and 1980 in regard to NAB; (2) the CRT's final determinations in 1979, 1980 and 1982 in regard to the Devotional Claimants; and (3) the CRT's final determination in 1982 in regard to Multimedia Entertainment, Inc.

EXPENDITURES AND FISCAL STATEMENT OF ACCOUNT

Since its inception in November of 1977, the Tribunal, in cooperation with the goals of both the Legislative and Executive Branches has been vigilant in keeping its expenses to a minimum. (See Appendix D.) The financial highlights of the Copyright Royalty Tribunal's seventh fiscal year of operations are as follows:

FY 1984 Authorized	FY 1984 Obligated	FY 1984 Unobligated
$ 700,000	$ 480,064	$ 219,936

The major expenditures were for administration, with the largest for salaries and personnel benefits ($361,021/11 positions), and rental of space ($55,570).

In FY 1985, the Tribunal has an authorized budget of $722,000 (11 positions). The Tribunal's budget request for FY 1986 was $758,000 (11 positions) but, the House Appropriations Committee has recently recommended only $519,000 for 7 positions. A detailed chart of these budgets broken down by allotment is included in Appendix D.

SECTION II: COMMENTS ON RESTRUCTURING THE COPYRIGHT ROYALTY TRIBUNAL

The Tribunal offers its position on restructuring the Copyright Royalty Tribunal:

Number of Commissioners: The Tribunal is divided on the optimal number of Commissioners.

Acting Chairman Ray maintains his earlier opinion that there should be three Commissioners. Chairman Ray believes that a reduction from five to three Commissioners would represent an important budget saving, and would not impair the quality of decision-making so long as sufficient professional staff is available. However, Chairman Ray conditions his support for a reduction in the number of Commissioners on amending the Copyright Act to provide express provisions regarding quorum and vacancies.

Commissioner Aguero believes that there should be five Commissioners on the Tribunal. In his statement of May 2, 1985, Commissioner Aguero stated, "I do not support any change in the Copyright Act which would reduce the number of commissioners from five to three. The cable royalty funds which the Tribunal distributes have grown from about $17 million in 1978 to approximately $100 million in 1984. I believe we can expect that the claimants will advance their claims more vigorously than ever before. I also believe that we have a greater responsibility than ever before to study and discuss the issues. If we have fewer commissioners involved in making determinations, fewer opinions will be expressed, and the Tribunal's collective thinking will become that much narrower.

With the present composition of a three commissioner Tribunal, if one of the commissioners became ill or was for any other reason temporarily incapacitated, the Tribunal might be faced with a deadlock between the two remaining commissioners."

Qualifications of the Commissioners: The Tribunal believes that the Commissioners of the Tribunal should have a complement of backgrounds.

Acting Chairman Ray, who supports a three-Commissioner Tribunal, believes the complement should be drawn from various professional and business disciplines.

Commissioner Aguero, who supports a five-Commissioner Tribunal, believes that the complement should consist of one lawyer, one economist, and three business persons who have achieved success in various disciplines.

The Tribunal considers that a complement of backgrounds would result in better decision-making. Each Commissioner would contribute to the process his or her own perspective based upon different professional training and experiences.

The Chairmanship. Section 802(b) of the Copyright Act provides for a one-year rotating chairmanship.

Acting Chairman Ray supports a rotating chairmanship because of the different perspectives that each Commissioner could provide the Tribunal as Chairman.

Commissioner Aguero believes that the Chairman should be permanent, and should be specifically appointed by the President and confirmed by the Senate.

The Tribunal believes that the powers of the Chairman should be similar to those of other agencies -- the right to represent the Tribunal, and to preside at hearings. The Tribunal believes that the Chairman should be able to hire staff or authorize budget expenditures only with the approval of a majority of the Tribunal. The Tribunal also believes that the present system in which each Commissioner is personally entitled to hire, supervise and fire his/her confidential assistant should be retained.

Professional Staff. The Tribunal hired its first professional staff person, the general counsel, in February, 1985. In June, the Tribunal advertised for a part-time economist or consultant to analyze the evidence in the distribution proceedings, and the cable ratemaking proceedings (to the extent it is petitioned). We are in the process of interviewing candidates. No decision on a part-time economist has been made yet. The Tribunal believes that a general counsel and a part-time economist is necessary to satisfactorily carry out its functions. Further, the Tribunal believes that additional professional staff may be needed depending on the workload of the Tribunal and the complexity of decision-making.

Independent, Non-Biased Research. The Tribunal's major function is fact-finding. The Tribunal should have some means of determining facts outside of an adversarial arena. This could include the hiring of additional part-time staff persons to conduct research, or being able to contract out to reputable, neutral organizations such as graduate schools, or research groups.

Subpoena Power. The Tribunal believes that it should have the power to subpoena documents to aid in fact-finding. The Tribunal believes that the subpoena power should be limited to documents only, and should not include witnesses. The drafting of the subpoena power should take into consideration the problem that many industries keep business records which they maintain are confidential.

Quorum and Vacancy. The Tribunal believes that the Copyright Act should have express language taking into consideration the problem of multiple vacancies on the Tribunal, and the number of Commissioners necessary to carry on agency business.

Judicial Review. The Tribunal is currently faced with a potential split between the Second Circuit and the D.C. Circuit Courts of Appeals. The Second Circuit has recently decided a case involving the burden of proof of settling parties versus non-settling parties. The D.C. Circuit has a similar issue pending in another distribution proceeding. The Tribunal recommends that the Copyright Act be amended to allow that no court other than the United States Court of Appeals for the District of Columbia shall have jurisdiction to review a final decision of the Copyright Royalty Tribunal.

COMMENTS ON H.R. 2752, "THE COPYRIGHT ROYALTY TRIBUNAL SUNSET ACT OF 1985"

Sec. 3(c)(2) Rates. H.R. 2752 freezes all existing copyright royalty rates and specifically states that "The Register of Copyrights may not increase, decrease, or in any other manner change the royalty rates established by the Copyright Royalty Tribunal under sections 111, 115, 116, 118, and 801(b) of title 17, United States Code, and in effect on the date of the enactment of this Act." H.R. 2752 would maintain the freeze on royalty rates until January 1, 1988. Pursuant to a privately negotiated agreement reached in 1982, the royalty rates for the use of certain works by noncommercial broadcasting entities are adjusted each December. The Tribunal believes that H.R. 2752 is not consistent with this private settlement.

Sec. 6. Certain Functions of Tribunal Exercised After June 12, 1985, To Have No Effect. Pursuant to a motion by the parties to the 1983 Cable Distribution Proceeding, the Tribunal distributed 50% of the 1983 Cable Royalty Fund ($39.7 million) to the parties on June 27, 1985. The Tribunal believes that this partial distribution and any further distribution that takes place after June 12, 1985 is in the public interest and would be frustrated by Sec. 6.

COMMENTS ON H.R. 2784, "THE COPYRIGHT DISPUTE AND RESOLUTION AND ROYALTY COURT ACT OF 1985"

The Tribunal has certain concerns regarding H.R. 2784 which it would like to present to the Subcommittee:

Federal Rules of Evidence. Rule 101 of the Federal Rules of Evidence states, generally, that "These rules govern proceedings in the courts of the United States and before United States magistrates,..." The Tribunal does not believe that the Federal Rules of Evidence should apply in royalty distribution proceedings or ratemaking proceedings. It has been the Tribunal's experience that much evidence which would have been inadmissible as hearsay under the Federal Rules of Evidence has been very important in helping the Tribunal reach its final determinations. The Tribunal recommends that H.R. 2784 expressly exempt the Court from the strictures of the Federal Rules of Evidence.

Formality of Proceedings. Pursuant to H.R. 2784, if the parties cannot agree on a dispute resolution procedure under Section 810, the Court shall set the procedures under Section 803. Section 803 is not clear as to how formal the Court's proceedings must be. Under the Copyright Act of 1976, Section 804 requires the Tribunal to institute proceedings, but the Tribunal, as an administrative agency, has wide discretion in regard to the formality of the proceeding. For example, in the 1983 Jukebox Distribution Proceeding, the Tribunal, in its discretion, has determined that it shall be a "paper" proceeding. As a second example, the Tribunal did not take evidence in the 1985 Cable Inflation Adjustment Proceeding. The Tribunal adopted the new rates through informal rulemaking (notice and comment) rather than holding a formal hearing. The Tribunal believes that the Court should be expressly delegated the flexibility that the Tribunal has found useful for the past seven years.

Cost to Claimants. The Tribunal strongly feels that the cost to the claimants should be taken into consideration in structuring the Copyright Royalty Court. The Tribunal has already mentioned its views on the Federal Rules of Evidence, and the formality of procedures. These two issues impact on the cost to the claimants in advancing their claims, as well as on the quality of dispute resolution or ratemaking. The best evidence and the best witnesses are very costly. Long, formal hearings are also very costly. Last fall, the Tribunal solicited comments from the parties on improving procedures for the 1983 Cable Distribution Proceeding. The Canadian Claimants supported tighter procedures but reminded the Tribunal that there are claimants, "whose budgets are necessarily more limited by the significantly

smaller share of the fund that they claim," and urged the Tribunal to take into account the cost to the claimants of the new procedures. Similarly, on June 24, 1985, Jamie Gorelick, counsel for National Public Radio, explained to the Tribunal that "counsel for NPR has not been attending the hearings regularly due to the cost in relation to the size of our claim." In the jukebox proceedings, the Tribunal has traditionally been very flexible in its consideration of two individual claimants because of cost. This year, we hope to institute an informal rulemaking addressing the issue of cost with an objective toward lessening the burden on the smaller parties.

Repeal of Section 807 of the Copyright Act. The Tribunal strongly disagrees with Section 806(g) of H.R. 2784 which would repeal Section 807 of the Copyright Act of 1976. Section 807 reads, "Before any funds are distributed pursuant to a final decision in a proceeding involving distribution of royalty fees, the Tribunal shall assess the reasonable costs of such proceeding." Pursuant to Section 807, 70% of the Tribunal's budget ($505,000 out of $722,000 for Fiscal Year 1985) is deducted from the royalty fund. The Tribunal has always believed that it was proper that the parties pay for the proceedings rather than the taxpayers. The Tribunal acts essentially as a clearinghouse for the affected industries only because Congress found that direct negotiations would prove too cumbersome. Since this is a service the government provides the industries, the industries, not the taxpayers, should bear the cost.

Judicial Review. The Tribunal supports Section 809 of H.R. 2784 which provides that no court other than the United States Court of Appeals for the District of Columbia shall have jurisdiction to review a final decision of the Copyright Royalty Court. We have discussed the problem of a potential split in the circuits in our earlier comments regarding restructuring of the Tribunal and for the same reason the Tribunal believes that Section 809 is in the public interest.

SECTION III: THE RECORD OF THE COPYRIGHT ROYALTY TRIBUNAL

Criticism No. 1: "The parties have privately negotiated royalty rates rather than risk coming before the Tribunal."

Private Negotiations

The Tribunal has stated repeatedly, and for the record, that it favors and encourages private negotiations between parties. The Tribunal is mindful of the fact that it was created only because private negotiated settlements among many owners and many users were in certain instances too cumbersome to achieve. However, where private settlements have been achieved, it has been the Tribunal's view that they should take precedence.

For example, in 1978, when the Tribunal set certain rates concerning public broadcasting, it reminded the parties, "It is clear that Congress sought to encourage voluntary agreements." The Tribunal's urging of the parties to reach a settlement was finally successful in 1982, and the public broadcasting royalty rates have been adjusted by private negotiations every year since. See, Public Broadcasting Service letter, Appendix E.

But the Tribunal has done more than urge private settlements. It has made them possible by establishing clear precedent. For example, in 1980, the Tribunal was called upon to adjust the statutory cable royalty rates for inflation for the first time. Its method for making the inflation adjustment was affirmed by the Court of Appeals. By 1985, when the next inflation adjustment was due to be made, there were no issues to litigate. Consequently, all parties could agree on the proper adjustment, and no hearing was held.

One last point must be made. Negotiations between parties take place because they offer more flexibility and alternatives than an agency hearing. Once the Tribunal adopted its jukebox rate, which was affirmed by the Court of Appeals, the horse-trading between the owners and the users could begin. The copyright owners offered the users a $10 rebate in the royalty rate if the copyright users promised better compliance by the jukebox operators in filing with the Copyright Office. That kind of result could never take place in an agency hearing, because a government agency could never offer to the parties what the parties could offer to each other.

The Tribunal believes that an agency that has steadfastly insisted on private settlements rather than give in to the tendency of other agencies toward greater government involvement in the marketplace has served the public interest very well.

Criticism No. 2: "The Tribunal has been dilatory in distributing the jukebox and cable royalty funds."

The Tribunal has three obligations regarding the distribution of the jukebox and cable royalty funds under the Copyright Act: (1) to act as expeditiously as possible in resolving controversies (reflected in Sec. 804(e) which places a one-year time limit on rendering of final determinations); (2) to distribute any amounts which are not in controversy: Sec. 111(d)(5)(C); Sec. 116(c)(4)(C); and (3) to withhold from distribution an amount sufficient to satisfy all claims which are in controversy. Id.

In his extensions of remarks, Representative Synar stated that the 1979 fees have not yet been distributed. Therefore, the Tribunal would like to recount for the Subcommittee the history of the 1979 Cable Distribution Proceeding to show that the Tribunal has met all three obligations under the Copyright Act and would have been less than responsive to the clear mandate of the Act if it had done otherwise.

Cable systems report twice to the Copyright Office during each calendar year their gross receipts and how much they are obligated to pay under the compulsory license. At the conclusion of calendar year 1979, cable systems had until March 1, 1980 to deposit their royalty fees with the Copyright Office. Those copyright owners who believed that they were entitled to some portion of the 1979 cable fees were required by the Act to file a claim with the Copyright Royalty Tribunal during the month of July 1980. Sec. 111(d)(5)(A). The Tribunal solicited comments as to whether a controversy existed, and after analyzing the comments determined that a controversy existed as to 100% of the 1979 fund. Proceedings were instituted in March 1981. In March 1982, the Tribunal published its final determination. After the 30-day period to appeal the Tribunal's final determination lapsed, the Tribunal ordered on May 7, 1982 a 50% partial distribution of the 1979 fund because, "no matter the outcome of the appeals, no party will be awarded less than 50% of the amount the Tribunal originally allocated." 46 FR 21638 (1981).

On October 25, 1983, the United States Court of Appeals, District of Columbia Circuit reached its decision in Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal 720 F. 2d 1295 (1983). The court affirmed the Tribunal's distribution

but remanded for further explanation why the Devotional Claimants were denied an award from the Tribunal, and why the National Association of Broadcasters were denied an award for commercial radio and for local broadcast contributions to sports programs. On December 6, 1983, the Tribunal determined that the Court of Appeals' affirmation of the Tribunal 1979 distribution, except for those portions which were remanded, permitted the Tribunal to make another partial distribution of 35.5%. On March 15, 1984, the Tribunal ordered a further partial distribution of 5.5% after the Joint Sports Claimants and the National Association of Broadcasters reached a settlement on the contribution of local stations to the sports category. On May 11, 1984, the Tribunal published its remand decision. The Devotional Claimants were awarded 0.35%. The National Association of Broadcasters were again denied an award for commercial radio. Both parties appealed the remand decision. Although 9% was still retained in the fund pending the outcome of these two appeals, the Tribunal determined on February 21, 1985 that it could distribute another 5% of the fund and retain sufficient funds to satisfy all controversies. Consequently, as of the date of this report to the Subcommittee, 96% of the 1979 fund has been distributed and 4% has been retained pending the outcome of the two appeals.

The Tribunal's record on distribution is as following:

<u>Cable</u>

1978 - 100% distributed
1979 - 95% distributed, 4% retained pending outcome of appeals.
1980 - 86% distributed, 14% retained pending outcome of appeals.
1981 - 96% distributed, 4% retained pending outcome of appeals
1982 - 96% distributed, 4% retained pending outcome of appeals.
1983 - 50% distributed, distribution proceeding now under way.
1984 - 0% distributed, claimants for 1984 are filing in July 1985.

<u>Jukebox</u>

1978 - 100% distributed
1979 - 100% distributed
1980 - 100% distributed
1981 - 100% distributed
1982 - 95% distributed, 5% retained pending outcome of appeals.
1983 - 95% distributed, 5% retained pending outcome of appeals.
1984 - 0% distributed, claimants for 1985 filed in January 1985.

CRITICISM NO. 3: "The Tribunal's record in the Court of Appeals has been very poor."

The Copyright Royalty Tribunal was delegated by Congress the responsibility to set four copyright royalty rates, and to distribute two copyright royalty funds. Prior to the 1976 Copyright Act, there had been only one statutory copyright rate, commonly known as the "mechanical" rate, and no governmental body had ever performed the task of dividing royalty pools among competing copyright owners. Therefore, the Tribunal has been conducting rate-setting and adjudication proceedings in areas almost wholly without precedent. In addition, the very nature of the Tribunal's work is that if it awards something to party A, it must necessarily deny something to party B. Therefore, the likelihood of appeals under these circumstances are apparent, and the Tribunal disagrees with any inference that the number of appeals of Tribunal final determinations is an indication that the CRT's decisions have not been reasonable. Further analyses of the appeals must be made, and are here provided.

Royalty Rates

Section 111 - Secondary Transmissions by Cable Systems

1980 Cable Inflation Adjustment - National Cable Televiion Assocation appealed. The Court affirmed the Tribunal's decision, except it remanded to correct or explain a mathematical error. National Cable Television Association v. Copyright Royalty Tribunal, 689 F. 2d 367 (1982)

1982 Post-FCC Deregulation Distant Signal and Syndicated Exclusivity Surcharge Rates - NCTA appealed. Decision affirmed. National Cable Television Association v. Copyright Royalty Tribunal, 724 F. 2d 176 (1983)

1985 Cable Inflation Adjustment - No appeal.

Sec. 115 - The "Mechanical" Rate - the making and distributing of phonorecords

1980 Mechanical Rate Adjustment - Recording Industry Association of America, Inc., Amusement and Music Operators' Association and National Association of Recording Merchandisers appealed that the rate was too high. The American Guild of Authors and Composers, National Music Publishers' Association, Inc. and Nashville Songwriters Association International petitioned that the rate was too low. Decision affirmed, except that part which permitted the Tribunal to make discretionary inflation adjustments prior to the next statutory year for rate review. Case remanded for the purpose of adopting an alternative scheme. Recording Industry of America, Inc. v. Copyright Royalty Tribunal, 662 F. 2d 1 (1981)

Sec. 116 - Jukebox Rate

1980 Jukebox Rate Adjustment - Amusement and Music Operators Association appealed that the rate was too high. ASCAP, BMI, SESAC, INC., appealed that the rate was too low. Decision affirmed. Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F. 2d 1144 (1982)

Sec. 118 - Use of Certain Copyrights Works by Noncommercial Broadcast Entities.

1978 Noncommercial Broadcasting Ratemaking Proceeding - No appeal.

Rate Adjustment

The Tribunal's record in rate-setting in the Court of Appeals has been quite good. It has been affirmed on every decision for which a party has instituted an appeal. Two cases were remanded. In the 1980 Cable Inflation Adjustment, a mathematical error was made in computing the difference between inflation and the increase in subscriber charges from 1976. In the 1980 Mechanical Rate Adjustment, the court determined that the Tribunal erred in setting up discretionary inflation adjustments prior to 1987, the next year in which mechanical rate adjustments are allowed under the Act. Significantly, when the Tribunal established non-discretionary inflation adjustments in the 1980 Jukebox Rate Adjustment (i.e., inflation adjustments that are purely mathematical, and require no discretionary action on the part of the Tribunal), such a method was affirmed as reasonable by the Court of Appeals.

Cable Distribution Proceedings

1978 Cable Distribution - National Association of Broadcasters appealed denial by CRT of any award for commercial radio broadcasters, for compilation of the broadcast day, and for contribution to sports broadcasts by local station owners. The Joint Sports Claimants appealed for a higher award at the expense of the Program Suppliers award. ASCAP appealed for higher Phase I and Phase II awards. The Canadian Broadcasting Corporation and National Public Radio appealed the denial by CRT for any award for noncommercial radio. Decision affirmed, except case remanded to "provide a specific statement of the reasons" for the recision of initial allocation to NPR. The Court stated, "The Tribunal's decision has achieved an initial allocation of the Fund that is well within the metes prescribed by Congress." National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F. 2d 367 (1982)

1979 Cable Distribution - Motion Picture Association of America appealed for a higher award. The Devotional Claimants appealed the denial of any award for religious programming. NAB appealed the denial of the CRT to award for contribution to sports broadcasts by local station owners, and for commercial radio broadcasters. Spanish International Network appealed for a higher award in the Program Supplier category. The Devotional Claimants appealed for a portion of SIN's award. The Joint Sports Claimants intervened to protect its award from MPAA. The Public Broadcasting Service intervened to protect its award from MPAA and the Devotional Claimants. The Music Claimants intervened to defend the CRT's award to ASCAP and BMI, and the CBC intervened to appeal the CRT's failure to award a share to commercial Canadian Radio.
--The Court reiterated its earlier observation, "it seems clear that these claims are motivated essentially by each petitioners feeling that it deserved a larger share of the Fund. Such reactions flow naturally from the not insignificant consequences of changing one or two percentage points in the distribution..." Decision affirmed, except case remanded to reconsider NAB's claims to sports broadcasters and commercial radio, and the non-award to the Devotional Claimants. Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F. 2d 1295 (1983).

1979 Cable Distribution Remand - NAB settled its sports claim with the Joint Sports Claimants. The CRT explained why it gave an award for commercial radio to the Music Claimants and none to NAB. The CRT reconsidered its non-award to the Devotional Claimants, and awarded them 0.35%. NAB and the Devotional Claimants appealed. Other parties opposed the appeal. Appeal pending.

1980 Cable Distribution Proceeding - The Devotional Claimants appealed for a higher award. NAB appealed for a higher commercial television award and for an award for commercial radio, and for the value of the compilation of the broadcast day. The other parties opposed the appeal. Appeal pending.

1981 Cable Distribution Proceeding - Full settlement. No appeal, based on court resolution of 1979 and 1980 appeals.

1982 Cable Distribution Proceeding - All parties settled in Phase I, except the Devotional Claimants. In Phase II, Multimedia received an award from the Program Suppliers. The Devotional Claimants and Multimedia appealed for a higher award. MPAA, the Joint Sports Claimants, the Music

Claimants, and NPR appealed for a lower award to the Devotional Claimants. The Canadian Claimants and PBS intervened to oppose the Devotional Claimants' appeal. MPAA opposed the award to Multimedia. Appeal pending.

In the two cable distribution cases which have been decided, the Tribunal has basically been sustained in its overall cut of the pie among various very competitive claimants. Certain issues, however, re-appear from year to year. NAB has claimed consistently that they should receive an award for the compilation of the broadcast day, and for commercial radio. NAB has also claimed that the Tribunal has given too much precedential value to earlier proceedings and will only change an award from year to year when it sees "changed circumstances." The proper award to the Devotional Claimants has also been an issue every year. Some parties argue that the Devotional Claimants seek the widest audience possible, and that they incur no harm when cable systems retransmit their programs. In fact, the parties, argue, they incur a great benefit. The Devotional Claimants argue that their programs benefit the cable system operators and they should receive compensation. The Devotional Claimants have also argued that they were put to an unfair burden of proof as the only non-settling party in the 1982 proceeding. These issues have been consolidated by the Court of Appeals in one case and will be determined shortly. It is significant that the parties feel that the outstanding issues are relatively few, and therefore they could reach a full settlement of the cable royalty fund for 1981, and almost a complete settlement of the royalty fund in 1982.

Jukebox Distribution Proceedings

All jukebox distribution proceedings reached full settlements for the jukebox royalty funds of 1978-1981. For the jukebox royalty fund of 1982, three new claimants, Latin American Music, Latin American Music, Inc., and A.C.E.M.L.A. were the only non-settling parties. They were denied any award by the Tribunal and appealed to the Second Circuit. On May 30, 1985, the Second Circuit remanded the case to the Tribunal for further fact-finding to determine whether the three claimants are performing rights societies. The Second Circuit also ruled on the burden of proving entitlement of settling parties vis a vis non-settling parties.

Overall Conclusion: Appellate Record

The Tribunal has accomplished its two major functions. It has set royalty rates which have been affirmed in every instance by the Court of Appeals, and it has achieved a basic allocation of the cable royalty fund (Appendix F). Issues abound which are ones of first impression in copyright law, and thus appeals are inevitable.

The Tribunal would be less than candid, however, if it did not acknowledge the criticism addressed by the courts to the quality of its final determinations. At times, they have been imprecise in expressing the connection between the record evidence and the ultimate decision. With the addition of a general counsel, the Tribunal will improve the quality of its decisions.

CRITICISM No. 4: "The best example that the Copyright Royalty Tribunal has acted unreasonably as an administrative agency is the 3.75% cable copyright royalty rate it set in 1982 for certain distant signals which became available after FCC deregulation."

First, we would like to state that what we believe is the overriding philosophy of the Copyright Royalty Tribunal. It is an independent agency, free from political pressures, engaged in balancing the equities of copyright owners and copyright users based solely on the record evidence placed before it. It is neither owner friendly nor user friendly, but a completely neutral arbiter.

The impression many would like to leave is that the Copyright Royalty Tribunal has been negligent in its duty and indifferent to Congressional intent. Many point to the 3.75 rate as the best example. Therefore, we feel it is most important to explain the 3.75 rate decision, and to show why it was a reasonable decision.

The use of copyrighted material by commercial enterprises is a cost of doing business, no more, no less. It must be paid for. To deny it must be paid for would be to deny an owner of property just compensation solely because the property he or she owns is intellectual property. The first decision the Tribunal was faced with, therefore, was not whether the copyright owners should be reimbursed for the use of their property, but whether that reimbursement should be based on a reasonable marketplace value. The Court of Appeals found that the Tribunal's effort to set a market price was "more than reasonable" in light of "Congress' evident intent to have the Tribunal operate as a substitute for direct negotiations."

The second decision the Tribunal needed to make was whether it could look to the rates established by the Copyright Act for pre-deregulation distant signals as a benchmark for fair market value, and if Congress intended the rates to have precedential effect on the Tribunal. The Court of Appeals agreed with the Tribunal's conclusion that the statutory rates did not represent fair market value, and did not bind the Tribunal on

future ratemaking proceedings. The Court cited Senate Judiciary Committee Report No. 473, 94th Congress, 1st Session, "The committee does not intend that the rates in this legislation shall be regarded as precedents in future proceedings of the Tribunal." The Court also found "compelling support" for the Tribunal's position that the fee schedule in the Copyright Act reflected a political compromise, not an effort to arrive at a reasonable rate.

Therefore, without reference to the Copyright Act fee schedule which was arrived at politically, the Tribunal took evidence from parties representing the owners and the users as to the fair market value of the copyrighted works. The copyright owners argued that 5 percent of a cable system's basic subscriber gross receipts for each post-deregulation distant signal was fair compensation. The National Cable Television Association (NCTA) argued for a fee schedule not very different from the statutory schedule. The Tribunal found the evidence presented by NCTA not persuasive on the issue of fair market value. The study NCTA submitted contained acknowledged errors, and employed judgment and intuition on the part of the witness which the Tribunal could not evaluate. The evidence submitted was highly speculative because it was based to a large extent on future events. The Tribunal found the evidence submitted by the copyright owners, on the other hand, to be far more relevant to what the actual marketplace would be like. However, the Tribunal could not accept the copyright owners case entirely, because the copyright owners' analyses, however well established, were based on analogous market situations and were not necessarily appropriate in the context of distant signals. The Tribunal therefore made an adjustment downward from 5% to 3.75%. The Court of Appeals found the analysis of the record clearly reasonable.

At this point in our statement, we must discuss whether the Tribunal's insistence on fair market value in any way contradicts the earlier statement that the Tribunal is neutral between owner and user. We believe just the opposite. We believe that the only way the Tribunal can be neutral is to be committed to fair market value. If the Tribunal were to adopt a rate that overcompensated the owners, it would be subsidizing the owners. If the Tribunal were to adopt a rate that undercompensated the owners, it would be subsidizing the users. Some argue that the Tribunal's action in adopting the 3.75% rate somehow "undid" the FCC's deregulation of 1980. We disagree entirely. The FCC stated that there was no public interest to be served by continuing to limit the number of distant signals a cable operator could import. However, the FCC did not contemplate that these signals would go unpaid for. The Tribunal simply reimposed upon the cable operators a cost of doing business which the law states must be paid. As to whether the Tribunal should subsidize the cable

industry, we stated in our decision, "Congress has not assigned to the Tribunal the determination of national policy as to fostering of various competing methods of transmitting programs to the public. If the payment of fees based on the reasonable value of the programs causes operators to drop distant signals with resulting adverse public policy consequences, the Congress may wish to consider if some form of assistance to the cable industry is appropriate. Clearly that is not the function of the Tribunal or copyright owners."

Section 801 requires that the Tribunal consider "the economic impact on copyright owners and users." The Tribunal did not believe that there would be any undue harm to users, but recognized that the evidence was speculative. The Tribunal preferred to await the effect of the actual marketplace, recognizing that review of the new rates would be held only two years after the effective date of the new rates.

Of course, the question in 1985 is, was the Tribunal accurate in its determination that 3.75% approximates the market place value of the copyrighted works? We have often been asked, "Is the 3.75% rate correct?" We must say that the Tribunal has had a difficult problem in trying to monitor the situation to see what impact the 3.75% rate has had. Until quite recently, when we hired our first general counsel we have had no professional staff. We do not have the resources to conduct independent, non-biased research, such as the Office of Science and Technology at the FCC. Of course, we read the trade press, we read letters, and we receive comments from owners and users. However, we find that such impressions can only give us an approximate idea of the impact. And in addition, most statements by the press, and individuals are, in our opinion, unreliable because they are based on one premise: it is the 3.75% rate which is the straw that breaks the cable's back. The compensation of copyright owners for their works is only one cost of business. Another major cost of business is the price required by common carriers to import the distant signals. We cannot say, without evidence placed on the record, what causes cable operators to make certain business decisions. We have also read in the trade press statements from the copyrights owners that the 3.75% rate has had almost minimal impact on cable operators. Jack Valenti, head of the Motion Picture Association of America has said in Cable Television Business that cable operators are paying only about 22 cents a month per subscriber for all Section 111 royalty fees. And of course, most jurisdictions allow the cable operator to pass the cost through to the subscriber.

This year, in 1985, to the extent we are petitioned, the Tribunal will review the 3.75% rate to see if it does, in fact, approach the fair market value of the copyrighted works and to evaluate the economic impact on both copyright owners and users.

APPENDIX A

The Washington Times

PAGE 6D / THURSDAY, JUNE 6, 1985

ECONOMIST—The Copyright Royalty Tribunal, an independent federal agency, is seeking a part time economist or independent consultant. Economist must have experience in federal regulatory adjudication and rate setting procedures. Send resume and salary/rate requirements to:

Suite 450 - 1111 20th St., N.W.
Washington, D.C. 20036
By June 17th, 1985
Please do not call.
EOE M/F/H/V

E32 SUNDAY, JUNE 9, 1985 — THE WASHINGTON POST

ECONOMIST—The Copyright Royalty Tribunal, an independent federal agency is seeking a P/T economist or independent consultant. Economists must have exp. in federal regulatory, adjudication & rate setting procedures. Send resume & sal/rate requirements to Suite 450, 1111-20th St., N.W., Washington, D.C. 20036 by JUNE 17, 1985.
PLEASE DO NOT CALL.
EOE/M/F/V/H

APPENDIX B

COMMISSIONER EDWARD W. RAY

PROFESSIONAL CAREER:

1982 - Present Commissioner	COPYRIGHT ROYALTY TRIBUNAL, Washington, D.C. Appointed by the President with the advice and consent of the Senate to serve as a United States Commissioner. Served as Chairman from 12/1/82 to 11/30/83. As Senior Commissioner, currently serving as Acting Chairman.
1979 - 1982 President	CALIFORNIA MULTIPLE INDUSTRIES, INC., Los Angeles, CA. Responsible for corporation's operations in real estate management and record/music publishing consultant services.
1976 - 1979 Vice President and General Manager for Memphis Division	CREAM-HI RECORDS, Los Angeles, CA. Responsible for total management/supervision of company's artist and repertoire department, recording studio, music publishing companies, and administration.
1974 - 1979 President	EDDIE RAY MUSIC ENTERPRISES, INC., Memphis TN. Responsible for all operations including record productions; music publishing; recording studio management; and the operation of a commercial music vocational school, The Tennessee College for Recording Arts. As Founder and President of the Tennessee College, I developed and supervised the instructions for courses in commercial recording studio engineering, music productions, record/music marketing, and legal and business contracts utilized by the recording and music publishing businesses.
1970 - 1974 Vice President	MGM RECORDS, Los Angeles, CA. As Vice President of Artist and Repertoire, I was responsible for the acquisition and development of artists, artist relations, the development and administration of a multi-million dollar annual A&R budget, management and direct supervision of the Copyright Licensing Department, and for the company's recording studios. Successful artists such as the Osmonds, Hank Williams Jr., Sammy Davis Jr., Kenny Rogers, and Mel Tillis were contracted to MGM during my administration.

1969 -1970 Executive Vice President	BURT SUGARMAN/PIERRE COSSETTE TELEVISION PRODUCTION COMPANY, Beverly Hills, CA. As Chief Operating Officer of the Record/Music Division, I was responsible for the total operation of the division, including, artists and repertoire, marketing, and the management/supervision of the division's music publishing companies. The division was also responsible for music clearances for the parent company's major network television specials.
1964 - 1969 Vice President of Artist and Repertoire	CAPITOL RECORDS (TOWER RECORD DIVISION), Los Angeles, CA. Named by Capitol Records, Inc. as the company's first Black officer, I was responsible for the acquisition and development of all artists; artist relations; and the management and supervision of the division's Copyright Licensing Department.
1955 - 1964 Executive Assistant to the President	IMPERIAL RECORDS, Los Angeles, CA. During my tenure at Imperial Records, I served as National Promotional Director; National Marketing Director; and Director of Artist and Repertoire before becoming Executive Assistant to the President. As an officer of the company, I was instrumental in the acquisition and development of successful artists such as Fats Domino, Rick Nelson, Johnny Rivers, and Slim Whitman. I was also directly involved in the acquisition and marketing, exploitation of the company's music copyright properties.

EDUCATION:

Memphis State University, Bachelor of Arts Degree in Professional Studies with major emphasis in commercial music and media communications. While at Memphis State, I completed a law course in intellectual copyright properties: The course included a detailed review and analysis of the Copyright Act of 1976.

Los Angeles City College, Los Angeles, CA. and University of California, Los Angeles, CA. Advanced studies in real estate appraisal, marketing, finance and taxation. Received California Real Estate Certificate.

Los Angeles City College, Los Angeles, CA. Associate of Arts Degree in Business Administration. Successfully completed courses in economics and business law.

Howard University, Washington, D.C. Specialized training program for the United States Army.

PROFESSIONAL AFFILIATIONS:

CALIFORNIA COPYRIGHT ASSOCIATION (Former Member) - For many years, I was actively involved in all the association's programs including numerous seminars and studies of intellectual properties. Many of the seminars were related to an analysis of the compulsory license provisions of the Copyright Act of 1976.

NATIONAL ACADEMY OF RECORDING ARTS AND SCIENCES - Founding Member and Former National Trustee. The Academy chapters regularly sponsored seminars to study the impact of copyright legislation on the recording industry.

MEMPHIS COUNTRY MUSIC ASSOCIATION - Former Member of the Board of Governors.

MEMPHIS MUSIC INDUSTRIES, INC. - Former member of the Board of Governors. The association regularly sponsored seminars and studies relating to recording and copyright legislation.

MEMPHIS STATE UNIVERSITY COMMERCIAL MUSIC ADVISORY BOARD - Former Chairman of the Research Committee of the Advisory Board. The Board was concerned with all legislation and industry practices relating to commercial music and intellectual property rights as they related to the University's commercial music curricula and to its noncommercial television station.

NATIONAL BLACK TELEVISION AND RADIO ANNOUNCERS OF AMERICA - Former National Associate Member.

POLITICAL AFFILIATIONS:

Former Member of the Executive Committee of the California State Republican Committee.

Former Delegate to the California State Republican Committee.

Delegate to the Republican Party's 1980 National Convention.

Sustaining Member of the Republican National Committee.

Member of the Republican Presidential Task Force.

Sustaining Member of the National Republican Congressional Committee.

Sustaining Member of the National Republican Senatorial Committee.

APPENDIX B

COMMISSIONER MARIO F. AGUERO

Mario F. Aguero was born in Cuba. He received a bachelor's degree in science and letters from the Camaguey Institute, and a degree in business administration from Havana University. He came to the United States in 1960 and is a naturalized citizen.

Mr. Aguero has had a long career in entertainment. From 1950 to 1961 he was President-Owner of Caribe Artists Corporation which was dedicated to booking talent in Cuba, South America and the U.S. From 1953 to 1955 he was General Director of musical entertainment for all television programs on Channels 2 and 4 in Havana Cuba. He was sponsor and personal manager of the Roberto Iglesias Ballet Espanol. He presented Roberto Iglesias and his Ballet Espanol at Carnegie Hall in New York, and in association with Sol Hurok Attractions, he introduced Roberto Iglesias at the Broadway and Winter Garden Theaters.

Mr. Aguero later became Vice-President of Mariomar, Inc. in charge of booking musical talent for Channel 13 in Buenos Aires, Argentina, and Channel 8 in Caracas, Venezuela. He was producer-sponsor of both the First and Second Cuban Festival at Carnegie Hall. Mr. Aguero also produced 65 one-half hour episodes of a tv comedy series, "Popa in New York," and was Producer-Sponsor in association with Columbia Pictures of the motion picture, "Popa in New York."

Mr. Aguero is president of Mario Aguero Productions. Mario Aguero Productions produced "Latin Stars Salute the Hemis Fair," which opened the San Antonio Hemis Fair in 1968. In 1971, Mario Aguero Productions produced 75 episodes of the first soap opera produced in Spanish in the U.S., "Santa Barbara - Virgin and Martyr."

Mr. Aguero has had a successful political career as a campaign organizer. He specializes in fundraiser activities and Spanish campaign medias. Mr. Aguero was nominated by President Ronald Reagan as a Commissioner of the Copyright Royalty Tribunal for a term of seven years from September 1984. He is married to Lilia Lazo, an actress and a painter. They have one son, Mario Alexander.

APPENDIX B

ROBERT CASSLER

ROBERT CASSLER was born in Queens, New York. He was graduated from Brandeis University in 1972 where he majored in history. He received his J.D. degree from Georgetown University Law Center in 1975. He is a member of the Bar of the State of New York and the District of Columbia.

Mr. Cassler studied copyright law at Georgetown University Law Center with Dorothy Schrader, General Counsel of the U. S. Copyright Office. In 1975, he was awarded First Prize for Georgetown University Law Center in the Nathan Burkan Memorial Copyright Writing Competition sponsored by ASCAP for a paper he wrote on copyright law.

After a year in private practice in New York, Mr. Cassler joined government service with the Federal Communications Commission. His first assignment at the FCC was conducting rulemaking proceedings in the Private Radio Bureau. In 1979, he transferred to the Mass Media Bureau where he rose to the level of supervisory attorney in the AM Branch. In 1983, he joined the support staff in the Office of the Administrative Law Judges which was created especially to assist the judges in determining which communications companies would receive cellular radio licenses in the top 30 markets of the country.

Mr. Cassler enjoys theater, and has written a full-length historical drama which received a production from the Unitarian Universalist Chapter of Manassas, Virginia. He also contributes original songs and sketches each year to the musical revue produced by the Young Lawyers' Section of the Bar Association of the District of Columbia.

Mr. Cassler joined the Copyright Royalty Tribunal as General Counsel March 4, 1985.

APPENDIX C

1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

TO: Members of the Bar who practice before the Tribunal;
Administrative Conference of the United States

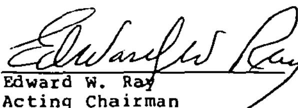
The Copyright Royalty Tribunal was created by the Copyright Act of 1976 to be composed of five commissioners, but currently consists of two sitting commissioners. Several procedural questions have been raised because of this situation. The purpose of this letter is to inform you of conclusions reached by the Tribunal and to solicit your comments on these conclusions.

First, Section 802(c) of the Copyright Act of 1976 (Act) states, "Any vacancy in the Tribunal shall not affect its powers . . ." Section 301.7(b) of the Tribunal's rules states, "A majority of the members of the Tribunal constitutes a quorum." 37 C.F.R. 301.7(b). It is the conclusion of the Tribunal that a quorum consists of a majority of sitting Commissioners, whatever its number. We find support for our conclusion in FTC v. Flotill Products, Inc. 389 U.S. 179 (1967), and Assure Competitive Transportation, Inc. v. United States, 629 F. 2d 467 (1980). Therefore, the Tribunal believes it has legal authority to carry out the functions conferred on it by the Act so long as both sitting Commissioners concur in the action.

Secondly, the Tribunal has also researched the question of whether a Commissioner appointed during or after the course of an on-the-record proceeding, whether adjudication or rulemaking, may participate in the decision. The Tribunal believes that a deciding officer, in this case a Commissioner, does not have to be present to hear the testimony, except when the demeanor and credibility of the witness is of such a substantial factor that the absence of the deciding officer would be a denial of a fair hearing. The Tribunal believes that it is enough if the deciding officer considers and appraises the written record. The Tribunal has drawn upon the Administrative Law Text by Kenneth Culp Davis for this conclusion.

The Tribunal solicits comments as to whether the Bar and the Administrative Conference of the United States agree with our conclusions. The Tribunal is especially interested in whether any party believes that the demeanor and credibility of any witness is of a substantial factor in the forthcoming proceedings. Although the Tribunal does not know when future Commissioners will be appointed and confirmed, it believes it is important to resolve this question at this time. Comments on the Tribunal conclusions must be filed by June 4, 1985. The comments will be discussed in our pre-hearing conference already scheduled for June 7.

Thank you for your cooperation.



Edward W. Ray
Acting Chairman

Dated: May 12, 1985

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APPENDIX D

ACTUAL EXPENDITURES COMPARED TO AUTHORIZED BUDGETS

FISCAL YEAR	AUTHORIZED BUDGET	ACTUAL EXPENSES	UNOBLIGATED ALLOTMENT	PERCENT UNEXPENDED
1977	$ 276,000	$ 32,351[1]	$ 243,649	88%
1978	$ 726,000	$ 469,775[2]	$ 256,225	35%
1979	$ 805,000	$ 485,979	$ 319,021	40%
1980	$ 471,000	$ 461,196	$ 9,804	2%
1981	$ 470,000	$ 437,640	$ 32,360	7%
1982	$ 487,000	$ 476,614	$ 10,386	2%
1983	$ 626,000	$ 540,967	$ 85,033	14%
1984	$ 700,000	$ 480,064[3]	$ 219,936	31%

BUDGETS FY 1984-1986

	FY 1984 Actual Expenses	FY 1985 Authorized[4]	FY 1986 Request[5]	House FY 1986 Recommended[6]
Salaries & compensation	$ 326,322	$ 512,000	$ 524,200	$ 336,000
Personnel benefits	34,699	52,000	71,500	43,000
Unemployment comp.	3,117	0	0	0
Travel & transportation	354	500	2,000	2,000
Postage	1029	1,000	1,000	1,000
Local telephone	3,464	2,500	3,500	3,000
Long distance telephone	824	1,500	1,500	1,000
Equipment rental	417	400	400	0
Rental of space	55,570	73,000	73,000	73,000
Printing, forms	10,462	20,000	18,000	10,000
Services of other agencies/LOC	15,000	20,000	20,000	20,000
Professional & consultant	5,000	0	0	0
Repair to equipment	2,331	2,400	3,100	3,000
Cost of hearings	7,865	34,000	32,500	20,000
Office supplies	937	1,500	2,000	2,000
Books & library materials	1,559	1,200	2,000	2,000
Equipment	11,114	0	3,600	3,000
TOTALS	$ 480,064	$ 722,000	$ 758,300	$ 519,000

APPENDIX D - FOOTNOTES

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[1] Expenses were for purchase of office furniture and equipment only.

[2] Expenses were for 10 months operation only.

[3] Although authorized for 11 positions (5 commissioners, 5 assistants, and a general counsel), the vacancies that were created by the death of Mary Lou Burg and resignation of Katherine D. Ortega and their respective assistants were not filled until late FY 1984.

[4] The Tribunal's authorized FY 1985 budget includes funding for 11 positions: 5 commissioners; 5 assistants; and, a general counsel.

[5] The Tribunal's budget request for FY 1986 includes funding for 5 commissioners, 5 assistants, and a general counsel.

[6] The FY 1986 recommendation of the House Committee on Appropriations only includes funding for 3 commissioners, 3 assistants and a general counsel.

APPENDIX E

June 27, 1985

Bruce L. Christensen
President

The Honorable Michael L. Synar
United States House of Representatives
2441 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Synar:

I am writing to you regarding the following portion of your Congressional Record statement of June 12, 1985, concerning H.R. 2752:

> Recently, copyright users and owners subject to two of the compulsory licenses under the CRT's jurisdiction-public broadcasting and jukebox-have privately negotiated rates rather than risk the capricious ineptitude of the CRT.

Without commenting on the various other matters outlined in your statement or in H.R. 2752, I would like to state our reasons for privately negotiating rates and entering into other settlement agreements in matters within the jurisdiction of the Copyright Royalty Tribunal.

The only negotiated rates involving the Copyright Royalty Tribunal in which public broadcasting has been involved relate to Section 118 of the Copyright Act. That section provides for the negotiation of rates for the use of music and visual works by public broadcasting, and for the adoption of rates by the Tribunal in the event that private negotiations are not successful. That section promotes private settlements by granting an anti-trust exemption for that purpose.

Section 118 is a desirable and useful mechanism, and has worked and continues to work effectively. The 1982 settlement between public television and the music industry, which you mention, was successfully concluded pursuant to the intent and procedures of Section 118. In our experience, the Section 118 mechanism was the significant, essential reason this settlement was reached.

Incidentally, for your information, for reasons similar to our efforts in the Section 118 context, public television has entered into settlement agreements with certain of the parties to

The Honorable Michael L. Synar
June 27, 1985
Page 2

proceedings before the Copyright Royalty Tribunal for distribution of cable royalty funds under Section 111 of the Copyright Act, which encourages private settlements.

I appreciate this opportunity to address these matters with you. I thank you for your support of public broadcasting and I would be happy to respond to any questions you may have regarding these or any other matters.

Sincerely,

Bruce L. Christensen

cc: The Honorable Charles McC. Mathias,
United States Senate

The Honorable Edward W. Ray, Acting Chairman
Copyright Royalty Tribunal

The Honorable Mario F. Aguero, Commissioner
Copyright Royalty Tribunal

Peter M. Fannon, President
National Association of Public
Television Stations

Gene A. Bechtel, Esquire
Bechtel & Cole

APPENDIX F

Monday Memo

A Copyright Royalty Tribunal commentary from Bruce Forrest, Farrow, Schildhause, Wilson & Rains, Washington

Coming to the defense of the Copyright Royalty Tribunal

The necessity of a Copyright Royalty Tribunal and the role of the compulsory license have been the subject of fair-minded debate for some time. There have also been less useful *ad hominem* attacks on the tribunal members and their decisions. The tribunal's commissioners are called "political hacks" and "incompetent," their rulings "plucked out of thin air," sometimes "outrageous." Cries for abolition or reform have recently been propelled by an episode (the resignation of the tribunal's chairman) which, in the long run, should prove irrelevant to the tribunal's work. Making funeral plans for the tribunal has become something of a Washington parlor game.

It is time to take more objective stock of the tribunal. If one takes into account the agency's difficult, and very subjective, functions and the records put before it, I submit that one will find that the tribunal has done precisely what Congress told it to do, and it has done its job quite well.

Reform may well be in order. But it must be based upon careful review of the tribunal's statutory role and analysis of its performance based upon the records the parties put before it. Anything short of this will surely make things worse.

One must appreciete the nature of the tribunal's work. It sets fees for intellectual property created by a population of artists as diverse as our culture. It then allocates the collections among competing claimants.

The tribunal inherited three low-balled statutory rates which were nothing more than political compromises. The legislative history of the two-and-three-quarter-cent song fee for "mechanical recordings" shows that Congress rejected a proposal to maintain that rate pending the occurrence of "relevant factors" after enactment. The $8 fee set for each jukebox for each year was absurdly low. The statutory fees for cable television signals were premised upon the FCC's anti-cable operator restrictions of distant-signal carriage and the syndicated program deletion option given to local broadcasters. The new tribunal was directed to commence proceedings to adjust the phono record and jukebox fees to make them "reasonable." The cable television fees were to be adjusted, again to be "reasonable," when the FCC's anticipated deregulation steps took place.

It was *assumed* that substantial upward adjustments of fees would occur. But the tribunal was given only very blunt instruments to decide by how much.

Setting fees for compulsory copyright licenses is not like setting rates for a public utility. The tribunal is not determining a reasonable rate of return on capital investment, or remunerating the cost of service.

Bruce G. Forrest joined the Washington office of the Oakland, Calif., law firm of Farrow, Schildhause, Wilson & Rains in December 1984. Before that, he was with the appellate staff of the Justice Department's civil division. While at Justice, Forrest defended a number of the Copyright Royalty Tribunal's administrative decisions before the courts.

For cable television, Congress was even less helpful. The tribunal was specifically told only to consider the "economic impact" on copyright owners and users in setting the new fee after repeal of the FCC's distant-signal rules. And for its distribution cases, *Congress candidly declined to give the tribunal any guidelines at all.*

The tribunal's struggles to explain "in detail" the reasons for its decisions have been met with scorn. But anyone who participated in drafting this statute should be dissuaded—or at least embarrassed—from criticizing the tribunal for vagueness.

In the first two tribunal rate proceedings (the "mechanical fee" for the record industry and the juke box fee), the copyright users largely relied upon an attempt to impose a burden of proof on anyone seeking to change the statutory fee levels, and poormouthing about the plight of their industry. But by any measure those fees were inadequate. If inflation alone were used to adjust the mechanical phono record fee, it would have risen to 14 cents per song. The jukebox fee was a small fraction of comparable fees charged in a wide variety of western nations. No one should have been surprised when the agency declined to impose a burden of proof on copyright owners or when it refused to require copyright owners to subsidize copyright useres by supressing rates.

Counsel for the cable industry were fully aware of these matters when the tribunal entered its most controversial proceeding: the setting of cable rates in light of FCC deregulation. The cable operators put on an affirmative case to show that the rates were already high enough. But this presentation was successfully rebutted by the coordinated presenations of many copyright owners' groups. They proved overwhelmingly that a very substantial rate increase was in order.

The reviewing courts have unanimously affirmed the tribunal's rate decisions substantially in their entirety. The reviewing courts were correct because there was ample evidence of record to support tribunal decisions.

Whether the compulsory licenses should be abolished is a policy question beyond the purview of this note. But proposals to keep the compulsory licenses, and to replace the tribunal with a Federal Copyright Agency ("Cablecasting," June 3), or move its function to the Department of Commerce or the Library of Congress, should be scrutinized most carefully. In absence of changes in the substantive statutory guidelines, it should not be assumed that a different decision maker would have made a substantially different decision. Based on the records I've seen, the tribunal's decisions were not at all surprising.

The worst route, which all interests should avoid, is the delegation of any initial decisional authority to the courts. Any lawyer familiar with the range of personalities and judgments available from the judicial branch will shudder (perhaps gleefully) at the prospect of courthouse shopping battles.

Ideally, legislation will fix compulsory license fees and negotiation will divide the pool. The cable television fee schedule, especially, needs revision. Even if overall receipts are maintained, the schedule is too rococo, and it dictates results based more on history than economic reality.

Meanwhile, absent statutory change, copyright users should still be able to substantially improve their evidentiary showings before the agency. The tribunal has discounted the "marketplace" analogies presented by copyright owners, finding that resulting fees would be unfairly high. Certainly some effort should be made to better quantify the value of these differences. Experience with current fee levels should provide valuable information as to whether those fees were set at levels that were too high or too low.

But absent statutory changes or improved administrative presentations, don't expect new commissioners or new bureaucratic structure to satisfy complaints about performance under this statute. ■

Mr. KASTENMEIER. Thank you, Commissioner Ray.

We are pleased to receive your testimony in its entirety, together with the appendices to be accepted for the record.

Mr. RAY. Thank you, sir.

Mr. KASTENMEIER. I take it you do not agree, then, with Professor Goldstein's observation this morning that copyright royalty ratemaking is an impossible job?

Mr. RAY. I will say it is a very difficult job. I don't believe it is an impossible job, but it would be made much easier if we had sufficient professional staff.

And in my recommendations, Mr. Kastenmeier, we have made certain recommendations on that, and on the reform of the Copyright Act. I believe it is in section 2.

The Tribunal's major function is factfinding. And the Tribunal should have some means of determining facts outside of an adversarial arena.

And we feel this should include the hiring of additional part-time professional staff to conduct research, being able to contract out to reputable, neutral organizations such as graduate schools or research groups that could do some research for us.

We also believe there is a need for the services of a part-time economist.

Mr. KASTENMEIER. You are presently advertising for an economist.

Mr. RAY. Yes.

Mr. KASTENMEIER. Is this position authorized under law?

Mr. RAY. Yes. Under the act, we have the authorization if the budget is available to hire needed professional help. It is section 805.

Mr. KASTENMEIER. Now, I think you did a good job when you asked interested organizations and members of the bar for advice on whether the Tribunal can function with two Commissioners.

What advice did you receive on that inquiry?

Mr. RAY. We received positive advice that we could function, in the comments from the parties that are involved. There were no negative responses from parties.

Mr. KASTENMEIER. You have proceedings that are scheduled to come up very shortly.

Mr. RAY. We are in the midst of proceedings, Mr. Chairman. In the 1983 cable royalty distribution proceeding, we actually had our preconference hearing on June 7, and we started our direct case on the 19th. We have had proceedings each day since, up until last Friday.

Mr. KASTENMEIER. Considering the health problems of Commissioner Aguero who is not able to be here this morning, can the Copyright Royalty Tribunal function with one Commissioner?

Mr. RAY. Absolutely not. In fact, Mr. Chairman, in our recommendations for the restructuring of the Tribunal, I would like to point out that I support a Tribunal of three Commissioners. I believe I submitted recommendations to you earlier——

Mr. KASTENMEIER. You have.

Mr. RAY [continuing]. On H.R. 6164. Right. And I might add that if we have a Tribunal of only three Commissioners, I think it is important that the Copyright Act be amended to provide express pro-

visions regarding quorum and vacancies, so we could avoid some of the questions and problems that confronted us with only two Commissioners.

Commissioner Aguero disagrees with me, and recommends five. He mentioned in this report that one of the problems he anticipates could happen is that if you have only three, and one gets sick, then you have only two. You have the potential of not being able to reach a final determination in the same manner that is occurring currently at the Tribunal.

Mr. KASTENMEIER. He actually has a point. If you had three Commissioners and one saw fit to resign, another is ill, then you are left alone at this point.

Mr. RAY. It could be a problem that I feel must be addressed by the White House and the Senate confirmation process.

Mr. KASTENMEIER. I am going to have to vote myself. I would like to yield to my colleague, at the risk of asking him to preside. He has just himself returned from the floor.

Mr. MAZZOLI. I will certainly——

Mr. KASTENMEIER. He can preside or recess the committee as he wishes, or ask questions. I yield to the gentleman from Kentucky.

Mr. MAZZOLI [presiding]. I thank the chairman. I would be very happy to cover for him until he can return from the vote.

Thank you very much, Mr. Ray. I did come in only at this moment, and I am sure I will ask a lot of questions which are either those which have been asked by the chairman before, or which are self-evident.

But let me proceed with some of the questions which have not yet perhaps been asked.

I was not here for Professor Goldstein's statement earlier today, but I am sure you were, and I wondered if I might generally ask your reaction to it. Do you feel comfortable with it?

Mr. RAY. I feel very comfortable. In fact, to a large extent, I believe this is exactly the position that we are taking in some areas. We feel that the Tribunal is a viable—can be, with restructuring, and will be able to render the kinds of decisions and determinations that the act has mandated.

It is in need of some repair, and hopefully, these kinds of oversight hearings, the information that you gather from these hearings will be helpful in the subcommittee arriving at means to restructure it.

Mr. MAZZOLI. I am accepting on faith that the professor said something more to the general effect that perhaps the job of the CRT is an impossible job, whether or not it is restructured.

Do you sense that——

Mr. RAY. I have not had a chance to read in detail Dr. Goldstein's remarks, because I received it about 11:30 last night.

Mr. MAZZOLI. I understand.

Mr. RAY. I do not, of course, agree with that position.

Mr. MAZZOLI. Apparently, his analysis dealt with the size of pie, in effect, to decide the total amount of royalties which would be first of all, developed, and then distributed.

Mr. RAY. Yes, sir.

Mr. MAZZOLI. Do you feel that the universe of applicable royalties can be determined, and that you are able to handle the distri-

bution, given the great numbers of copyright owners which would be involved?

Mr. RAY. I believe, with sufficient professional staff, the Tribunal can render even greater quality determinations than in the past.

Mr. MAZZOLI. You now have how many active Commissioners, Commissioner Ray?

Mr. RAY. Now, we have two.

Mr. MAZZOLI. Two.

Mr. RAY. For the first period in the history of the Tribunal.

Mr. MAZZOLI. And it should be—there is a number of five authorized Commissioners.

Mr. RAY. Yes, by the act.

Mr. MAZZOLI. And the situation, for the moment at least, would be one that practically would be impossible, given two Commissioners——

Mr. RAY. Over a period of time, Mr. Congressman, you are absolutely right. We are hopeful—we are mandated by the act that when a controversy has been declared, which we had done prior to the resignation of Chairman Hall, we must proceed. We first inquired as to the legality of proceeding with two, and then we inquired of the parties themselves as to their feelings about continuing the process.

Mr. MAZZOLI. Do the parties that you deal with feel like the two Commissioners can make lawful decisions, assuming that decisions must be made before the Tribunal is reconstituted?

Mr. RAY. We sent out for comments, and received the comments back, and on the basis of the comments from the parties, we started the actual proceedings. There were no objections.

Mr. MAZZOLI. The parties had not objected?

Mr. RAY. Right.

Mr. MAZZOLI. When is the next distribution likely to be made?

Mr. RAY. Well, this distribution process, a decision will have to be made by the early part of 1986. We still have several months left in this proceeding. And then if a controversy exists, next year we will start again in the spring on the 1984 cable royalty distribution.

Mr. MAZZOLI. How many staff people do you have right now?

Mr. RAY. We have two Commissioners that each have one assistant, we have a general counsel, and working with him are two volunteer externs. We have a very small budget, Mr. Congressman.

Mr. MAZZOLI. How much is that budget?

Mr. RAY. Let's turn to—let me check this.

Fiscal year 1986, the Tribunal requested a budget of $758,000. We have learned that the House has recommended only $519,000, the difference being that the House has recommended funding for only three Commissioners and two less confidential assistants.

Mr. MAZZOLI. Was that $758,000 the figure approved by the Office of Management and Budget? Is that what actually reached the Hill?

Mr. RAY. Yes. As a legislative branch agency, OMB does not amend our budget requests.

Mr. MAZZOLI. You have submitted that. So the $758,000 is what was sent up to the Hill, because of the change of numbers of Commissioners, it was $519,000, which is in the House budget figure?

Mr. RAY. I am not sure I know what the rationale was for that.

Mr. MAZZOLI. And let me ask you just a general, roundabout figure, how much money do you distribute? How much was, say, in the pot the last time you made a distribution? Just rounded out figures.

Mr. RAY. We have included——

Mr. MAZZOLI. A couple million dollars?

Mr. RAY. We have included in our report——

Mr. MAZZOLI. $20 million.

Mr. RAY [continuing]. If you give me one second, I will give it to you.

Mr. MAZZOLI. I am just kind of ratcheting it up, because I expect that it is a fairly sizable figure.

Mr. RAY. The current one is approximately $80 million, but I will have to check.

Mr. MAZZOLI. So, you are dealing with a budget of just a blip compared to the amount that you are actually distributing?

Mr. RAY. Absolutely right.

Mr. MAZZOLI. And part of it, I guess, could be laid at the feet of the House or the Congress in the sense of trying to be fiscally responsible, but is, for example, even $700,000, which is a requested figure, enough to really, assuming that you have a job to do, to be able to do it well?

Mr. RAY. Well, Mr. Congressman, I do not believe there is a direct correlation between the quality of our doing a job and the size of the budget. I do feel, and have supported, a need for a general counsel, sir, during the entire 3½ years I have been on the Tribunal.

And finally, 2 years ago, I believe, $50,000 was included in our budget for counsel. But, I was not able to get support from other commissioners in order to hire the general counsel.

With the appointment of two additional members, Mrs. Hall and Mr. Aguero, I was able to get the vote in order to hire the general counsel.

In our budget request, we have included moneys to continue to have a general counsel.

In the new budget, as proposed by the House Appropriations Committee, there is no money for any additional professional help, and that can be very bad for us next year.

Mr. MAZZOLI. I may be going over plowed ground here, but I gather that you had some problems, even within your group in deciding upon an adequate budget. You felt that you needed more, some of your colleagues didn't feel that way.

On one hand, I don't think there is necessarily a relationship between quality of work and salary, because I think we on the Hill are not in each case paid what we think we are producing and work.

But on the other hand, it does seem a little bit startling to the outside observer where you might have an $80 million or $100 million pot to be distributed, and you have maybe $500,000 or $600,000 total moneys to pay for the Commissioners and for professionals who will somehow have to figure out who is entitled to what.

And it just seems to me that even that outside curbstone, obviously fundamentally flawed analysis, is still somehow something which has to be cranked into the——

Mr. RAY. And I agree——

Mr. MAZZOLI [continuing]. The way you handle it——

Mr. RAY. I agree with you in that I feel, as we recommended, in the restructuring of the Tribunal, there is a need for unbiased surveys that will be very helpful to the Tribunal, so if we could have additional professional staff, maybe temporary or part-time staff to render those kinds of services for us, it would certainly aid in the quality of our final determinations.

Mr. MAZZOLI. Mr. Commissioner, before I yield back to the chairman, who has returned, let me ask you one last question. Could you fairly quickly, and again, I apologize for not having had a chance to read your statement, but could you give me quickly, one, two, three, or four points of what you think would constitute an adequately functioning CRT in numbers and in staff and perhaps even in dollar figures?

Could you give me the highlights of what you think would be a CRT that could carry, assuming that there is a need, because I myself have some question of whether or not there is a need for compulsory licensing. I sometimes think that maybe we ought to just abandon this effort, and just let the parties negotiate and get done what they need to get done.

But assuming that there remains a CRT, because there remains a compulsory licensing, can you give me the quick highlights of what it should look like?

Mr. RAY. In my opinion, I believe that the CRT could function quite well with three Commissioners, three confidential assistants, who would have the time to work exclusively for their Commissioners, and not be telephone operators, not be receptionists, not be the many things that they are.

I believe that we should have a general counsel. I believe the general counsel should have a secretary. I believe we should have——

Mr. MAZZOLI. I hope he or she would be able to have a typist or somebody.

Mr. RAY. I don't believe that there is a sufficient workload for a full-time economist. I believe an economist should be hired, or we should contract out for the services of an economist as needed, on a part-time basis.

Mr. MAZZOLI. So a total work force——

Mr. RAY. And then probably one extra girl to do these types of things I said, answering the phone, a girl or man——

Mr. MAZZOLI. I was going to say.

Mr. RAY. I am sorry.

Mr. MAZZOLI. Person might be a better term.

Mr. RAY. A person.

Mr. MAZZOLI. We learn to sanitize our way of talking.

Mr. RAY. As you can see, it is very difficult at my age.

Mr. MAZZOLI. You are still a young man.

Mr. RAY. But I believe the budget would not be any more than $750,000, $800,000 which would include moneys for nonbiased studies and research.

Mr. MAZZOLI. And a full-time work force of 8 or 10, is what that comes to, say, three Commissioners, three assistants, a General Counsel, and an assistant, plus general work force, secretarial and office help; is that basicaly how you see the office to be a functioning office?

Mr. RAY. Yes, sir.

Mr. MAZZOLI. Mr. Chairman, thank you very much. I am afraid I may have gone over old ground, but we generally covered what the Commissioner thought would be a Copyright Royalty Tribunal.

Mr. KASTENMEIER [presiding]. My colleague has done well, and I thank him for presiding in my absence, and pursuing these matters with this very important witness.

There have been a number of criticisms. Some, as you know, have been raised by then-existent or former members of the Tribunal, including two Chairs of the Tribunal.

I think it was Commissioner James, who recommended, when he was chair, that the Tribunal be abolished. We have very detailed statements from a former chair, Marianne Hall, who is quite critical of its operations, and talks about the frustrations of chairing your organization.

I assume that Ms. Hall's frustrations would probably be some of the frustrations you must have confronted yourself. To quote her, "The chairman could not exercise any influence over the other commissioners or staff (other than his own personal secretary) nor could the chairman seek support from the White House or Congress. Further, the chairman had no authority to make changes, and not really any higher authority to appeal to for making changes."

Mr. RAY. Yes, well, Mr. Chairman, I am not certain that the kind of influence that probably had been requested should be granted. I think Commissioners are independent, should be independent, and I think Commissioners' confidential secretaries or assistants need to be independent to that particular Commissioner.

I think in order to ensure the impartiality of decisions, in my opinion, the Chairman, whether it is on a rotating basis, or on a full-time basis, should not have the power to hire, supervise, terminate at will, the confidential assistants of any Commissioner.

And I am not certain I understand the kinds of influence over the Commissioners Chairman Hall is talking about, but if it is the kind of influence that I have experienced during her chairmanship, under no circumstances should she have it, or any other chairman have it.

Mr. KASTENMEIER. You are saying as Chairman, you should not have the authority to hire a counsel or an economist?

Mr. RAY. In my opinion, Mr. Chairman, the Chairman of a small agency like the CRT, should not have the right to hire a General Counsel without the approval of the other Commissioners, because a General Counsel is more than a General Counsel for the Chairman.

I believe that one of the real criticisms that has been made about the Tribunal's determinations was the manner in which its decisions were explained. I believe the General Counsel should be available and be a General Counsel for the entire Tribunal, and not just for the Chairman.

I also do not agree that the Chairman should have the right to make major expenditures without approval of the Commissioners.

Mr. KASTENMEIER. All of the Commissioners?

Mr. RAY. A majority of Commissioners.

I am sorry, this is true also with the selection and hiring of a General Counsel, a majority of the Commissioners.

Mr. KASTENMEIER. Former Chairman Hall goes on to say, and I quote: "The agency, as composed and as positioned within the legislative branch is effectively paralyzed. Its 7-year precedents for incompetence, ineffectiveness, apathy and apparent corruption have rendered it totally useless and totally unjust."

Mr. RAY. Mr. Chairman, it is very strange, that 1 week before the oversight hearings for the CRT in May, this same Chairman recommended and submitted to this same subcommittee, I believe, a recommendation for the restructuring of the CRT. She had the same opportunity to gather all the information, in the report that you now have, but at that time. She made a recommendation not to abolish the CRT, but to expand it, even to the point of adding the Copyright Office License Department as a part of it.

And as you know, in those recommendations, it seems quite strange without having the advantage of working in the CRT any length of time after that period, now to have the kind of recommendation to abolish immediately.

It is also—I am a little concerned, sir, that even the former chairman—I was not here at the time—Mr. James—it was quite strange that it took almost the total tenure of his 5 years before he reached that decision.

Mr. KASTENMEIER. There must be some reason for it. In any event, the remarks of Ms. Hall will have to be made part of the record. Of course, one does not know if being chairman of the Tribunal leads one to one conclusion, and not being chairman leads to another conclusion. You were the chairman——

Mr. RAY. Yes, I was the Chairman for 1 year; 1982.

Mr. KASTENMEIER. I gather questions have been asked on the filing of ethics in Government forms. As I understand it, you or your Commissioners do not file ethics in Government forms?

Mr. RAY. That is true, sir. There was—before I became a member of the CRT, and our record shows, I think it was Chairman Thomas Brennan, had inquired as to what the status of the CRT members were, and we got a ruling and interpretation that we were not required to file yearly ethics in Government forms.

And just as recent as this spring, our new general counsel also has inquired and has received an interpretation that we do not come under that.

Mr. KASTENMEIER. Also, as a matter of practice, there is no limitation on the part of Commissioners having ex parte meetings with parties in interest. Is that correct?

Mr. RAY. I am not aware of that, sir, but I will tell you this: With the general counsel, one of the first requests I made to the chairman is that one of the first assignments—the general counsel is here, and he will support this—was for him to write for us a document on ex parte communications. I think it is extremely important.

I will say, from my—during my years' experience with former members, I think our record has been extremely clean on that issue.

Mr. KASTENMEIER. Well, it is good to have your endorsement on that. The committee would be interested to know what recommendations you have made to the Tribunal Commissioners with respect to ex parte communications.

I say that because notwithstanding the Commissioner's comments, there have been other comments, negative comments, as to ex parte meetings in the past, whether within 2½ years.

It is not my intention to delve into that, but I do think it is as a matter of policy. It is of interest to this committee to know what your policy now is with respect to such meetings.

Mr. CASSLER. Is the question addressed to me, sir?

Mr. KASTENMEIER. Yes.

Mr. CASSLER. I joined the Copyright Royalty Tribunal on March 4, 1985. On my first day of work, I received a list of projects to start my job off with. One of the listed projects was ex parte communications.

When I applied for the job, I was asked to give a writing sample, and I gave a writing sample on ex parte communications that I had written at the Federal Communications Commission.

I first discussed with the Commissioners the question of ex parte communications in three different regards. There are ex parte communications in adjudication; ex parte communications in formal rulemaking; and ex parte communications in informal rulemaking.

The research project I had seen at the Federal Communications Commission regarded ex parte communications in informal rulemakings, where the FCC had gotten reversed in *HBO* v. *FCC*, because of contacts made with Commissioners in regards to an informal rulemaking.

I advised the Commissioners that there were rules that the FCC had adopted in the early part of the 1980's which they felt comfortable with, but were not sure were absolutely accurate, because there was a split in the D.C. Circuit Court of Appeals between the case of *HBO* v. *FCC*, in the case of *ACT* v. *FCC*.

But I felt that if the Tribunal generally followed the FCC's way of handling things, they would be all right.

But I was a little bit concerned, and I was involved in researching the problem of whether the restraints against ex parte communications were greater or lesser when it came to formal rulemaking and adjudication.

There was a problem, and continues to be a problem at the Tribunal that if all connections with all people who are outside of our group of seven employees is to be maintained, the Tribunal may lose all contact with reality whatsoever.

And it had had a policy in the past of accepting visitors. The first problem was, we accepted visitors from the California Cable Television Association, and in the meeting that we accepted the visitors are, they did talk about the 3.75-percent rate, and I recall Chairman Ray—well, then Commissioner Ray—explaining to them that one of the things that we would like to do is to keep contact with the public, but reminded them that if there were to be any real discussion of the rate, it would have to be for a later time, it would

have to be for the formal hearings that would have to be conducted in 1985 or 1986, if the Tribunal is petitioned.

Another problem that came up was Chairman Hall was invited to California to participate in the California Cable Television Association Convention and to speak. That was to be on April 30, and the expenditures were offered to her that the cost of going out there would be paid by the association.

And I advised her not to do so, and she did not do so. And if I had been given more time, until May 1, from starting on March 4 until May 1, when Marianne Hall was called before this committee in regards to the book that she participated in, if I had more time, I was going to recommend an informal rulemaking that the Tribunal conduct in regards to ex parte rules, but unfortunately, I have not had the time and the Tribunal has not had the opportunity to amend its rules.

Mr. KASTENMEIER. Thank you for that background. I certainly commend that course of action that you recommend.

Mr. RAY. And, Mr. Chairman, I might add, that has been the policy, at least for the 2½ years I have been here. We will not accept those kinds of invitations. Perhaps we would be a little more knowledgeable if we did, but we did not, so we have to try and gather our information from other sources.

Mr. KASTENMEIER. I don't mean to pursue this at any great length. We have other things we want to pursue, but you say this has been the policy. Is it set down in——

Mr. RAY. No——

Mr. KASTENMEIER. Is it an understood——

Mr. RAY. An understood policy between the Commissioners. We do not participate in those kinds of things, and especially when a proceeding is under way, we do not——

Mr. KASTENMEIER. And you are certain——

Mr. RAY. Excuse me, sir.

Mr. KASTENMEIER [continuing]. Your own understanding of that policy is that which is shared by the other four Commissioners?

Mr. RAY. Excuse me, sir. Yes. It was just pointed out, we do have, in 301-17, ex parte communications in our rules and regulations. If you like, I can submit this as part of the record.

Mr. KASTENMEIER. I would request that, yes.

[The information follows:]

§ 301.17 Ex parte communication.

(a) No person not employed by the Tribunal and no employee of the Tribunal who performs any investigative function in connection with a Tribunal proceeding shall communicate, directly or indirectly, with any member of the Tribunal or with any employee involved in the decisions of the proceeding, with respect to the merits of any proceeding before the Tribunal or of a factually related proceeding.

(b) No member of the Tribunal and no employee involved in the decision of a proceeding shall communicate, directly or indirectly, with any person not employed by the Tribunal or with any employee of the Tribunal who performs an investigative function in connection with the proceeding, with respect to the merit of any proceeding before the Tribunal or of a factually related proceeding.

(c) If an ex parte communication is made to or by any member of the Tribunal or employee involved in the decision of the proceeding, in violation of paragraph (a) or (b) of this section, such member or employee shall promptly inform the Tribunal of the substance of such communication and of the circumstance surrounding it. The Tribunal shall then take such action it considers appropriate; provided that any written ex parte communication and a summary of any oral ex parte communica-

tion shall be made part of the public records of the Tribunal, but shall not be considered part of the record for the purposes of decision unless introduced into evidence by one of the parties.

(d) A request for information with respect to the status of proceeding shall not be considered an ex parte communication prohibited by this section.

Mr. MAZZOLI. Mr. Chairman, if I could just have a couple of minutes to ask our friend and the chairman a general question. This is really away from the nuts and bolts of how you would see your group, but back to the fundamental question of whether there really should be a CRT, in the sense of evaluating whether or not royalties should be acquired under the compulsory license, and how they are to be distributed.

While you were talking to the chairman, I was going over this statement of Dr. Goldstein, and let me just read a little bit from it, and then maybe ask you your view about it, and I am greatly condensing this material.

But the professor starts off on page 3 of his statement by listing the criteria in 801(b)(1) by which you determine the proper rates for mechanical and jukebox licenses.

And then, at the top of page 4, he says, "There is good reason why the Constitution does not ask Congress to justify its decisions in such rigorous terms as you are required to justify yours. And therefore, why Congress should not ask the Tribunal and other agencies to do the same thing."

And then, on the bottom of page 5, the professor goes on and says, "Briefly," in his conclusion, "no amount of factfinding or analysis will produce correct answers. And therefore, it is quixotic at best, and wasteful of taxpayers' dollars at worst to demand compliance with the present statutory criteria in setting compulsory royalty rates."

And then finally he says this: "How should rates therefore be set?" He said, "You can't set them currently.

"So, specifically, I believe that the Congress should, as it has in the past, initially set the compulsory license rate at a level which it judges appropriate, and then provide that this rate float up or down according to a predetermined index chosen by Congress for each compulsory license.

"Politically," the professor says, "the virtue of this approach is it would vest what is essentially a value judgment in the appropriate licensing rate in the appropriate political body, which is the Congress, and economically, the value of this approach is that once the appropriate index is created, its application would be automatic and costless."

He then finally concludes by saying that "in the event the Tribunal or its successor would find that there is some industry dislocation, then the index chosen could be altered," or something.

I remember last Congress, when we argued back and forth in this subcommittee and the Congress about what do with the 3.75 percent decision, you all reached on distant signals. And many of our colleagues on the subcommittee felt that you went beyond your authority by saying that the market value should be involved at all.

They said simply a matter of up or down by the index of inflation, or something.

Let me ask you a couple of questions, Mr. Ray. One is, do you agree with Dr. Goldstein's conclusions, first, that it is impossible for a group like yours to handle the discretion and the value judgment which is required under the statute?

I will ask that first question.

Mr. RAY. Again, as I attempted to answer Chairman Kastenmeier, it is a very difficult thing, extremely complex and difficult, to try to arrive at a rate. First, you must take into consideration a marketplace value, and then consider as mandated by the act the harm to either the copyright owner or the copyright user.

We try to arrive at a reasonable marketplace value, and then, adjust in a downward trend in order to try to maintain that balance between the user and the owner.

Mr. MAZZOLI. I think what the professor——

Mr. RAY. And then, I believe it would be at a stage where we are right now—like 2 years later, 1 year later—to have an evaluation and analysis of the actual marketplace and see what happened.

Mr. MAZZOLI. Well, I think what the professor is saying, if I understand him correctly, is that that kind of value judgment of deciding whether or not something is worth more, whether it will hurt the creative community, or whether it will hurt the consumer and so forth, that kind of judgment ought not to be made by a group like yours, but is in the province of Congress.

And therefore, it should be made by us. In effect, we would set a standard, and then the only opportunity you would have would be as a minister to, using the index the Congress has already agreed upon. Whether it is the CPI or some other entity percentage would be applied, and the rate would go up or down.

My question is, do you think that your group, constituted as it would be under your projection, would be able to make an evaluation of the various value factors involved, or do you think that that is literally beyond your ability, because you just don't have before you the public of the country, in a sense?

Mr. RAY. I believe, Mr. Congressman, that the kind of decisions, determinations that we make set the parameter that makes it possible for the kind of private settlements that occurred between the jukebox operators and the music people.

And what I understand the chairman is doing with cable. If that happens, then I feel the Tribunal has done its job, and has done it well. From that standpoint, I believe that is what will happen with the early determinations that the Tribunal made.

Mr. MAZZOLI. Let me ask you one last question, because the chairman has, I think, another witness. We will have other opportunities to talk. Let us assume that your job became one of being a body which would simply use the index, which would be already chosen by Congress and apply that index to a given activity——

Mr. RAY. Excuse me, sir, would it be similar to what we do with adjusting cable rates for inflation, or similar type?

Mr. MAZZOLI. I would assume that that is what the doctor is talking about, I would assume, I am not sure.

But if you do that, is that enough reason to have a CRT? If you are simply carrying out this congressional activity, you are just acting more or less as an accountant or a minister, making certain arithmetical calculations. Do you think the CRT does have, if it is

to stay in existence, a need to go beyond the pure arithmetic and get into the evaluation of the marketplace, the consumer's interest, the creative community, and make some kind of a decision subject to court approval?

Mr. RAY. I believe if such a system, where the CRT would not be involved in dividing the pie, was substituted by Congress, there would certainly not be any need for the CRT.

Mr. MAZZOLI. I see. Well, thank you, Mr. Chairman, thank you. This is an interesting line of discussion which we will get into later. Thank you very much.

Mr. KASTENMEIER. The committee thanks you, Chairman Ray, for your appearance this morning, and your counsel for being with us. Indeed, we hope that your colleague, Commisioner Aguero is restored to good health, and you are able to meet your obligations.

Mr. RAY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Our last witness this morning, and I know the hour grows late, is Daniel W. Toohey, practicing lawyer with the law firm of Dow, Lohnes & Albertson, here in Washington, DC.

Mr. Toohey, a copyright and communications expert, has done some very innovative and stimulating thinking about reform of not only the Copyright Royalty Tribunal, but indeed more generally about copyright, as exemplified by his recent op-ed piece in the Washington Post, and his Wilson Quarterly article, both of which I, without objection, will insert in the appendix to the hearing record. (See app. 2 at p. 564.)

Mr. Toohey, you are most welcome here. We have your 32-page statement. It is an excellent statement. It will be received as a part of the record. You may proceed as you wish, sir.

TESTIMONY OF DANIEL W. TOOHEY, ESQ., DOW, LOHNES & ALBERTSON, WASHINGTON, DC

Mr. TOOHEY. Thank you, Mr. Chairman. I am honored by Chairman Rodino's invitation to testify.

I offer for the record the written statement that you mentioned.

It may be appropriate for me to comment that I am not here on behalf of a client. I am here as a practicing lawyer, and occasional teacher of copyright law. I deal with copyright questions on almost a daily basis, and my ideas are really sprung more from that experience than from any particular case I am now handling.

I hope to persuade you to take a broad brush to copyright law reform by creating a Federal agency with plenary powers to adjudicate and to administer this country's copyright laws.

I urge you to recognize that occasional statutory repair, even omnibus overhaul every few years, is insufficient. Even the best copyright statutes quickly become outdated.

Congress' role is to shape the policy. Day-to-day implementation is a regulatory task for an agency. Many areas of the law that need attention are not matters of statutory import.

Congress can't continue to tie itself up resolving esoteric disputes over copyright technicalities. You have an opportunity in these proceedings to consider creating an agency that will concentrate upon copyright law, become thoroughly expert in it, and implement

specific, detailed protection for authors, and for the public that wants access to these protected works, all through regulation.

I urge you to take H.R. 2784 as a starting point. It is a proposal which recognizes the need for sound legal judgment in dispensing the pool of cable royalties. You should, I think, expand that notion to include the need for sound legal judgment in all copyright law matters, but judgment that is more readily available and less costly of both time and money.

Add to it the idea that expert administration of the law by a fully equipped agency can bring closer an ideal constitutional balancing of protection and access.

These are always opposing goals, but both can be more readily accommodated through rulemakings. Interested parties can propose solutions. The agency can hold inquiries to determine how new technologies need to be protected, and can modify rules to govern specific copyright relationships, rules which can be waived when necessary to achieve a more equitable result.

The agency can hold hearings to resolve disputes more quickly and less expensively than in Federal courts. I see no reason to change the U.S. Copyright Office. The Library of Congress should continue to serve as the repository of all of our national treasures; receiving copyrighted works for deposit is a natural library function.

I would, however, place original jurisdiction over registration disputes in the proposed agency. While the Copyright Office would continue to register or deny registration, it would be bound by an agency decision to grant or cancel registration.

Were you to propose the creation of such an agency, its principal immediate tasks would be to clarify the copyright obligations of cable and other telecommunications systems, and to create a reasonable fair system for royalty distribution; to explore the uses of compulsory licensing as a remedy for the minutiae of copyright law problems; to revisit, if necessary, the work made for hire doctrine, to examine its overall fairness; to provide compensation, fair compensation to authors, while recognizing the modern library as a repository of knowledge in many different media; to ensure the essential suppleness of the fair use doctrine; and to guarantee that the economic interests of the United States in its various forms of intellectual property are safeguarded and expertly advanced in international treaties and conventions.

This proposal may run contrary to some people's view of deregulation. Others may see it as a make-work scheme for lawyers, but I hope that most will see that without an efficient, logical method of administering the copyright law, lawsuits will proliferate as never before.

The present confusion about computer software protection alone could produce dozens of cases. And under our present system, it can only get worse. Deregulation is a twofold process of repealing obsolete rules and bringing others up to date. It is a constant chore.

If you agree that the present system improperly forces Congress out of policymaking and into the intricacies of administration, and that already-crowded Federal courts are no place to go for quick answers to routine copyright disputes, you have few choices.

In my view, you will have made the best choice if, under the terms of a well-drawn statute, you place the administration of the copyright law in a single agency. Then, give that agency the authority it needs to protect our authors, artists, and computer software designers, and at the same time, provide clear guidance to the educators, librarians, and the rest of the people who need access to their works.

Thank you, Mr. Chairman.

[The statement of Mr. Toohey follows:]

STATEMENT OF DANIEL W. TOOHEY, PARTNER, DOW, LOHNES & ALBERTSON, WASHINGTON, DC

Summary Of Testimony

The premise of this testimony is that progress in science and the useful arts cannot be bridled while federal statutes are written or federal lawsuits take years to conclude, and argues that a fully-empowered federal agency should be created to administer and to adjudicate all matters arising under the copyright law.

The testimony favors leaving the U.S. Copyright Office unchanged in its present functions except that it would no longer need to issue non-binding opinions on copyright matters. Instead, binding interpretations would be issued by the proposed federal agency, relieving Congress of the need to write excessively detailed statutes and creating a broader range of remedies than can be offered by our federal courts. Since neither Congress nor the courts can keep pace with today's novel questions of copyright law, Congress should have only to enact broad standards to apply to key areas of copyright; the courts should only be asked to review the soundness of agency decisions once administrative remedies are exhausted. That scheme has served this country well in the administration of commerce, the environment, trade, and communications, and will work well in copyright law.

The testimony argues that the present administration of copyright law does not answer questions that affect small businesses, libraries, and schools as well as motion picture studios, communications equipment manufacturers, and cable systems. All would benefit from a conveniently accessible forum, able to rule relatively quickly and inexpensively with consistent policy. The need for such a forum will intensify if it is not satisfied, as will disrespect for a law which is impotent in smaller matters. Attempts to circumvent it will multiply, or it will simply be ignored, to the detriment of copyright owners' legitimate expectations.

Congress is urged to go beyond the well-advised first step represented by H.R. 2784, and to coalesce copyright law administration and enforcement into a single fully-empowered expert agency. Congress has an opportune moment, as it sets about to reform, to create an enduring copyright law that wisely leaves the details to regulation.

1. Introduction

Mr. Chairman. I am honored to appear before you today to present my views on the need not only for reform of the Copyright Royalty Tribunal, but for broader revisions in the way our country administers its copyright laws. Congress has an opportunity to enact an enduring law which will, for all who are affected by the law, improve the speed, reduce the expense, and enhance the skill with which their claims are administered or adjudicated.

My testimony begins from the premise that the law cannot bridle technology, or scientific and artistic progress while it tries to catch up. Instead, respect for the law diminishes, as it is seen to be outdated, cumbersome, or too confining. My purpose is to suggest a method of reforming the administration of the law in a way which will make it dynamic, effective in its ability to accommodate change, and equitable in its treatment of both authors and those who use their copyrighted works.

H.R. 2784 effectively addresses the need to enhance the judicial character of one area of copyright law administration and to put the intellectual and legal skills of federal judges to work in the dispensing of the enlarging pool of collected royalties. I recommend that you take that idea several steps further, enlarge its scope and create a lasting statutory design for copyright law administration.

I propose that Congress establish a new federal agency, an independent regulatory forum for administering the law of copyright.[1/] An administrative agency is needed to relieve Congress and courts of regulatory burdens which they cannot carry and to provide constant, adaptable oversight needed by those who want to protect intellectual property as well as those who wish to use it.

In these days of deregulation, federal regulation's disasters are recounted more frequently than its triumphs. But just as the modern air traveller longs for the good old days of regulation, circumstances can still arise when the weight of matters forces Congress and the judiciary to make a prudent delegation of their powers.

The idea is long settled that Congress should delegate significant discretionary authority to agencies when a law's administration involves complex, technical matters in need of vigilant, flexible supervision by specialists. Congress, the White House, the Supreme Court and legal scholars have at various times supported the principle that administrative process is sometimes preferable to both legislative and judicial lawmaking and law enforcement.

1/ This proposal also has been discussed in Toohey, The Only Copyright Law We Need, 59 Wilson Library Bull. 27 (Sept. 1984), and Toohey & Gunther, End the Plagues of Copyright Law, Washington Post, May 29, 1985, at A21, col. 1.

Seventy years ago Elihu Root proclaimed in his 1916 presidential address to the ABA's annual meeting, agencies can "furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."[2/]

The Federal Communications Commission is one such agency. Its regulatory ambit extends not only to the civilian limits of the electromagnetic spectrum, but to countless forms of communication, many of which were unheard of when the agency was created in 1934. The FCC's name appears on certificates approving everything ranging from garage door openers, walkie-talkies, CB radios and other rather unassuming devices, to the computer-enhanced terrestrial and celestial communications marvels of our nation's telephone, broadcast interconnection, and computer networking systems. Each of these is the product of invention, protected by patents issued by yet another federal agency, the United States Patent and Trademark Office. It, like the FCC, has a broad range of power to do what it needs to do, including the power to state in legally binding fashion what

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2/ Address by Elihu Root, American Bar Association Annual Meeting (August 30, 1916), *reprinted in* Root, *Public Service by the Bar*, 2 A.B.A. J. 736, 749-50 (Oct. 1916).

any of its rules, regulations, policies or governing statutes means.

Neither the U.S. Copyright Office nor the Copyright Royalty Tribunal, the two federal offices now concerned with copyright, has that power. However, there are probably more users of copyrighted works in this country than all the operators of garage door openers, CB radios and licensees of the electromagnetic spectrum combined. There are more holders of copyright than all of the communications common carriers.

Our Constitution does not speak of electronic communications, but in Article I, Section 8 it does speak of copyright. Is it not anomalous that a fully empowered federal agency is at hand to deal with the former, but not the latter?

The communications marvels mentioned earlier hold great promise for our civilization, but no greater promise than that in a short time they will be replaced by a more powerful generation of wonders. The creative forces that produce this constant replacement begin in the intellect. The expressions of intellectual product are held to be property, so theoretically they are protectible by law. But our system provides no means for securing the property rights that attach to emerging science and technology except hand-me-down statutes of limited elasticity. The

Constitution's authors knew that progress in science and the useful arts called for particularly intense human creative effort, the products of which could all too readily be alienated from their creators. The particularly intense human creative efforts of our day will endure only if effective legal protection is conveniently available.

The products of one mind can nourish the endeavors of another. The constitutional plan depends on the right of access, often forgotten in the protection of authors. The need to protect property, which in many cases is the need to assure the stimulus of compensation, must not be observed to the point of suppression, a clearly unconstitutional result. The balancing must be preceded by an adequate comprehension of the property involved, whether a volume of poetry or a microprocessor mask work.

How can Congress, with enormous foreign and domestic problems to solve, hope to hold on to the reins of a copyright law that needs to run at pace with technology? How can our federal courts, with overworked judges deciding complex disputes arising from every imaginable human and commercial relationship, and bound to decide passively within the limits of facts at hand, fashion relief of broad application upon which owners and users can rely without peril?

Clearly they cannot and, as a result, our existing mechanisms are overloaded. The present copyright system will collapse under its own weight, at least to the point of disrespect for the copyright law, unless a change is made. We thus arrive at the point where delegation of plenary power to an administrative agency staffed by experts must be considered.

2. Copyright Law, In Both Its Substantive and Procedural Forms, Must Be Capable Of Responding To Changing Conditions.

The constitutional premise of copyright law is that securing to authors an exclusive right to exploit their works for a limited time will advance the public welfare by encouraging creative efforts.[3/] Administration of the copyright law is needed because the public interest in spurring creative activities by protecting a livelihood in original expression collides constantly with the public interest in access to intellectual products. The balance shifts as changing economic conditions and technologies produce changes in the adequacy of compensation to creators or heighten the public's need for access. The responsiveness

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3/ Art. I, § 8, cl. 8 of the U.S. Constitution grants Congress the power to promote the progress of "science and the useful arts" by giving authors and inventors exclusive rights to their writings and discoveries for limited times.

of copyright law to changing circumstances is the true measure of its effectiveness. As one commentator recently wrote of the "fair use" doctrine, which is integral to copyright law, "Its very survival depends upon its ability to adapt to changing technology and factual situations."[4/]

Copyright law in the 1980's must be far different from the statutes of limited application that preceeded it. Copyright has become important to many industries -- as well as to many individuals -- to the point where it demands a system capable of responsibly balancing the rights of creators and users in a flexible, accessible forum. Congress and the courts operate far too slowly and inflexibly to respond effectively to changing circumstances. Many of the provisions of the latest copyright legislation, the Copyright Act of 1976,[5/] are already outdated.

3. The Copyright Office and the Copyright Royalty Tribunal Do Not Have the Broad Authority Needed To Meet Current Requirements.

The administration of the 1976 Copyright Act is the responsibility of the Copyright Office, an arm of the

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4/ Off-the-Air Educational Videorecording and Fair Use: Achieving a Delicate Balance, 10 J. C. & U. L. 341, 349 (Winter 1983-84).

5/ Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § § 101-810).

Library of Congress. The office, established in 1897 and directed by the Register of Copyrights, is responsible primarily for accepting deposits of copyrighted materials, registering copyright claims, recording documents and collecting royalties paid under certain compulsory license provisions of the 1976 act.

The Copyright Office's authority is overwhelmingly ministerial, however. The Register lacks authority to issue binding interpretations of the complex provisions of the 1976 act to meet new, unforeseen circumstances.[6/] While the Copyright Office has issued occasional interpretations in an effort to provide some guidance, the absence of a formal mechanism for securing definitive interpretations is sorely felt, for answers that offer no legal assurance are inhibiting.

6/ The Copyright Office is severely limited in the current organizational scheme. This is vividly illustrated by a provision of the Code of Federal Regulations which categorically states that the office "does not undertake the making of comparisons of copyright deposits to determine similarity between works." The office, the regulations state, also does not "give legal opinions or advice on such matters as: (i) The validity or status of any copyright other than the facts shown in the records of the Office; (ii) The rights of persons, whether in connection with cases of alleged copyright infringement, contracts between authors and publishers or other matters of a similar nature; (iii) The scope and extent of protection of works in foreign countries or interpretation of foreign copyright laws or court opinions; (iv) The sufficiency, extent or scope of compliance with the copyright law." 37 C.F.R. § 201.2(a)(1) (1984).

Take for example, the controversy involving so-called "tiered revenues" -- i.e., monies which are paid for the cable television viewing of certain distant signals and certain pay channels like Home Box Office, Showtime and ESPN. After six years of dispute over whether cable systems could compute royalty rates under compulsory license separately for each service tier, the Copyright Office issued an interpretation disallowing the practice. The Copyright Office based its opinion on the absence in the statute of any reference to this rate calculation practice. It lacked the authority, however, to assess the practice in light of the general policy objectives of the 1976 act or to coordinate with the Federal Communications Commission, which controls cable policy, or the Copyright Royalty Tribunal, which sets royalty rates for distant signal carriage. As a consequence, two federal lawsuits on tiering are now pending in federal district court in Washington, D.C.[7/]

The Copyright Royalty Tribunal is a new independent agency created by the 1976 act. The tribunal makes

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7/ National Cable Television Association, Inc. v. Columbia Pictures Industries, Inc., No. 83-2785 (D.D.C. filed Sept. 21, 1983); Cablevision Systems Development Co. v. Motion Picture Association of America, Inc., No. 83-1655 (D.D.C filed June 9, 1983).

determinations concerning the adjustment of copyright royalty rates for records, jukeboxes and certain cable television transmissions. After cable television and jukebox royalties have been deposited with the Copyright Office, the tribunal distributes the fees and, in cases of disputes among claimants, decides how the pool will be distributed. The tribunal also makes determinations concerning terms and rates of royalty payments for the use by public broadcasting stations of published nondramatic compositions and pictorial, graphic and sculptural works.

Significantly, though, the tribunal's functions are statutorily circumscribed, and its budget is so limited that it operated until recently without a general counsel and still employs no economist. Without subpoena power and at the mercy of the interested parties which vie for shares of compulsory royalties, its decisions have been lacking in coherence and have caused a seemingly endless chain of appeals.[8/]

8/ See, e.g., National Cable Television Association, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983); Christian Broadcasting Network, Inc., v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983); National Cable Television Association v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982); Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982); National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982); Amusement and Music Operators Association v. Copyright Royalty Tribunal, 636 F.2d 531 (D.C. Cir. 1980).

4. <u>Congress Is Shouldering An Impossible Burden When It Tries To Regulate Copyright Affairs Solely By Statute</u>.

In the absence of any other potent forum, industries affected by copyright law have had to turn more frequently to Congress. Following controversial decisions by the Copyright Office, the Copyright Royalty Tribunal or the courts, as most recently evidenced by decisions affecting cable television and home video recording, Congressional committees have been asked to create statutory solutions to problems associated with the competing demands for high technology products, all the while balancing the conflicting political demands of users and owners.

Inherent institutional limitations restrict Congress's effectiveness, however. It is unable to provide rules and regulations as they are needed in copyright and similar technical fields of law. "A legislative body," Professor Kenneth Culp Davis wrote in the first edition of his Administrative Law Treatise, "is at its best in determining the direction of major policy, and in checking and supervising administration." But it is, Professor Davis added, "ill-suited for handling masses of detail, or for applying to shifting and continuing problems the ideas supplied by scientists or other professional advisers."[9/]

9/ 1 K.C. Davis, Administrative Law Treatise 37 (1958).

The Supreme Court has echoed Professor Davis's sentiments. "The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation," the Court said in a 1946 case. "Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[10/]

The lack of an agency to administer copyright law has forced Congress to write statutes filled with an enormous array of detail, such as the 1976 statute, which went to the point of incorporating by reference principles outside its text. The section on compulsory licenses for secondary transmission by cable systems, the longest single section in the new statute, incorporated by reference now-repealed regulations of the Federal Communications Commission many times its length. Where Congress could not formulate specific language to draw a clear line between

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10/ American Power & Light Co. v. Securities & Exchange Commission, 329 U.S. 90, 105 (1946).

competing interests, extensive discussions in often differing subcommittee reports replaced precise statutory guidance.

Ironically, despite its unusual specificity, the 1976 act also illustrates the impossibility of modern attempts by Congress to provide effective administration of copyright. The impossibility has nothing to do with Congress's motives. The 1976 act is a wise law which skillfully accommodated many competing interests. The obsolescence of the 1976 act and the impossibility of doing much better in the future are due to the ever-expanding range of intellectual property rights covered by copyright and the inherent difficulty of providing, in a necessarily static ~~law~~, specific guidance to cover unpredictable changes in a broad spectrum of industries and technologies.

Hopes simply were not realized that the decades of effort culminating in the 1976 act would provide a flexible, workable accommodation of conflicting copyright interests. The statute achieved only patchwork repairs. For example, in 1981, just over two years after the cable secondary transmission provisions of the 1976 act took effect, broadcasting, cable, and film production trade associations -- together representing the major industries affected by the provisions -- lobbied Congress for massive

revisions. Compromise legislation,[11/] passed by the House only to die in the Senate, heaped proviso upon exception in attempts to deal with a long list of individual circumstances which general statutory terms could not accommodate. In the 98th Congress, legislation was enacted to regulate semiconductor chips,[12/] but attempts to deal with cable copyright, the "first sale" doctrine and the offspring of the Supreme Court's "Betamax" decision[13/] failed of passage. In just a few short years, the tenuous balance struck in the 1976 act has been largely upset by new communications services, the repeal of distant signal carriage restrictions by the Federal Communications Commission, the growth of "superstations," and the changing nature of the cable industry.

In copyright law, Congress is serving as both legislative body and administrative panel, which unnecessarily burdens Congress as well as those who need the copyright law. Legislators and their staffs are required to become expert to a degree which is not warranted by copyright's

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11/ H.R. 5949, 97th Cong., 2d Sess., 128 Cong. Rec. H1113 (1982).

12/ The Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901-914).

13/ Sony Corp. of America v. Universal City Studios, Inc., _____ U.S. _____, 104 S. Ct. 774 (1984). The Supreme Court, by a vote of five to four, held in *Sony* that the sale of video recorders is not a per se act of copyright infringment.

place among the vast number of important demands upon legislators' time. Furthermore, because the legislative process is too cumbersome to allow Congress actively to administer the law, the present system leaves both users and owners in the untenable position of either foregoing their rights or subjecting themselves to the crapshoot of federal litigation and the risk of substantial damages.

In the preface to the latest edition of his celebrated copyright treatise, Professor Melville B. Nimmer observed that the 1976 Copyright Act is "a body of detailed rules reminiscent of the Internal Revenue Code."[14/] Nimmer's analogy is apt, for copyright and taxation are among the few areas of law in which Congress has taken upon itself the responsibility of writing statutes that attempt to resolve the bulk of administrative issues arising from the federal codes. But, in federal tax matters, unlike copyright, Congress is able to rely on the Treasury Department and the Internal Revenue Service for administrative assistance.

The disfunctions of the present system are going to get worse. Instead of serving as the forum of first and last resort for every industry concern, Congress should take its more accustomed role of policy maker,

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14/ 1 M. Nimmer, Nimmer on Copyright vi (1985).

declaring general objectives that fulfill Article I, Section 8's broad principles. Faced with similar problems in other industries, Congress has chosen the instrumentality of agencies with administrative and adjudicative powers. The creation of a federal agency with sufficient power to administrate comprehensively is not a drastic measure; history shows that Congress has often conferred upon an agency the authority to handle the burdens of complex rule making and adjudication when the task unreasonably or impractically saps Congress's energies.

5. The Judicial System Also Is Ill-Suited To the Task Of Trying To Fill Gaps In the Statutory Copyright Scheme In the Absence Of An Independent Agency.

Traditionally, the enforcement and interpretation of copyright principles has been the province of the federal courts. U.S. district courts have authority to deal with actions arising under the 1976 act. Most district court judges, however, rarely see copyright cases, certainly not even one every year or two. When confronted with a copyright case, they often must stretch the statute to make a novel application of the law to cases of first impression. There is no guarantee that one district court judge will agree with another in similar cases, so consistent federal copyright policy emerges only slowly from appellate litigation.

The judiciary's need to rely on expert administrative agencies in technical areas is often acknowledged by the courts themselves. "[T]he ever expanding activities of government in dealing with the complexities of modern life. . . made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided," Justice Harlan F. Stone, who was later to become chief justice, told a Harvard Law School conference in 1936.[15/] Agencies, the Supreme Court said in the Universal Camera case, are "presumably equipped or informed by experience to deal with a specialized field of knowledge" and their "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."[16/]

Many parties whose livelihood or whose businesses depend on protecting or using copyrighted materials are unable to assert their rights adequately due to the uncertainties of litigation and the time and expense placed at risk in federal lawsuits. But, unfortunately, a binding interpretation of the copyright law cannot be obtained in

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15/ Address by Harlan F. Stone, Conference on the Future of the Common Law, Harvard Law School (Aug. 19-21, 1936), reprinted in Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 16 (Nov. 1936).

16/ Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951).

any other way. More so than in most areas of law, litigants must take their cases to the appellate courts to adjudicate their claims finally. Significantly, there were a dozen or so cases raising copyright issues on the U.S. Supreme Court's docket in the Court's just-ended 1984 term.

Politicians and scholars alike recognize that independent administrative agencies offer individuals and small businesses with limited resources a chance that they do not have in the judiciary system to seek protection under regulations. The courts are restrained by a "traditional passiveness," Professor Davis explained, in that they typically have no procedures for initiating proceedings or taking other action in the absence of a moving party. This characteristic, said Professor Davis, "has combined with the recognized need for public representation of large numbers of little people -- consumers, usually -- none of whom is sufficiently affected to assert his own interests in a judicial proceeding" to produce a need for administrative agencies.[17/] The point was made by President Franklin Roosevelt in a 1940 veto message in which the President said:

> Wherever a continuing series of controversies exist between a powerful and concentrated

17/ 1 K.C. Davis, Administrative Law Treatise 40 (1958).

> interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.18/

6. An Independent Copyright Agency Should Have Duties, Powers and Mechanisms Enabling It To Provide Administrative and Adjudicative Services Efficiently.

The new federal copyright agency should be constituted to permit Congress and the courts to retreat to more appropriate positions as, respectively, policy makers and reviewers of agency decisions. It would need to have plenary, original jurisdiction to resolve day-to-day problems as well as broader issues through the interpretation and enforcement of the underlying statute and the copyright rules based on it.

Modeled on other independent federal agencies with judicial and administrative functions, such as the Federal Communications Commission, a federal copyright agency could evolve consistent standards for applying copyright principles through rule making and litigation. It could clarify the law through policy statements and binding interpretations of a formal and informal nature.

18/ H.R. Doc. No. 986, 76th Cong., 3d Sess. 3 (1940).

Through the power to waive rules, which accompanies the power to make them, the copyright agency could promote an acceptable measure of uniformity while, at the same time, allowing for special circumstances. For example, as has been noted, the compulsory licensing provisions for cable systems' secondary transmissions specifically incorporate now-repealed regulations designed for the cable industry of the early 1970's by the Federal Communications Commission. Massive changes have taken place in the industry since that time. As a result, applying the incorporated rules often leads, in individual cases, to serious inequities which harm the industry and the public. But at present no authority exists to waive these incorporated rules, even though, under established doctrines of administrative law, the Federal Communications Commission itself could not legally have implemented them without acknowledging that they could be waived.[19/]

The functions of the present Copyright Royalty Tribunal should be absorbed into the new agency, along with the original jurisdiction now exercised by the federal district courts. Making the copyright agency, rather than the courts, the first resort for parties challenging a denial of

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19/ See WAIT Radio v. Federal Communications Commission, 418 F.2d 1153 (D.C. Cir. 1969).

registration would not only relieve the courts of that responsibility, but it would promote consistency in the law by avoiding the present difficulties flowing from the likelihood of conflicting court opinions among the various jurisdictions.

Obviously, the more streamlined administrative proceedings would also permit the prompt resolution of claims at reduced cost to litigants. For one thing, because a substantial number of copyright disputes center on interpretation of the copyright statute rather than disputes of fact, the agency could render a decision in many cases based upon documentary evidence and pleadings alone. Any judicial review would look at the agency's action within the limits of doctrines confining such review in acknowledgment of administrative expertise.

The Copyright Office should remain in place within the Library of Congress even after an independent copyright agency is set up. It is desirable for both practical and philosophical reasons that the Register of Copyright's ministerial functions -- principally the receiving of works for the Library of Congress, registering works under the copyright statute and securing the needs of Congress -- remain within the Library of Congress. On a practical level, it is obvious that the receipt of works is a natural library function. On a more philosophical level,

the long tradition of having the Library of Congress serve as the repository of the nation's intellectual treasury is a valuable one.

The creation of a copyright agency with both administrative and adjudicative powers would result, for the first time, in a staff of government officials truly expert in the intricacies of copyright law. In an unprecedented way, there would be lawyers, economists and others able to become experts on specific portions of copyright involved in overseeing development of the law. In very short order, these task forces would have the competence to respond quickly and effectively as new problems arise. Morever, because the agency would be in a position to monitor developments in the industries affected by copyright law, it could amass extensive data which would enable it to anticipate, before the crisis stage, demands for special treatment presented by new technologies.

The effective evolutionary application of many doctrines in the copyright field depends upon expertise in a number of subject areas -- one of which is the marketplace for copyrightable works. In "fair use" doctrine assessments, for example, a key factor to be considered is the effect of the use upon the market for the writing in question. An inadequate understanding of the economic forces at play in the market for copyrightable works risks either

unfairness to creators or unnecessary restrictions on the public benefits flowing from creative enterprises.

Expertise would not only be important in the agency's promulgation of its own regulations. It would also enable the agency to respond to changing developments by recommending legislation to Congress. Consider how Congress might benefit from having the agency's advice available in the lawmaking process. The records of comprehensive rule makings or hearings, economic analyses of copyright regulations or various uses, and predictions of the need to acknowledge new forms of intellectual property protection could assist Congress as it sets general policy and conducts oversight and enacts corrective legislation. Through the techniques of industry reports, incidents of "fair use" submitted for declaratory judgment and the like, an agency could in short order develop for Congress an enormous fund of data upon which to premise its statutes.

In the international arena, copyright issues are of ever greater economic consequence. Foreign piracy of works retransmitted by satellite is a billion dollar industry. The copyright conventions, the international trade in protected works and the treaties which govern such commerce mark great change every year. The international aspect of copyright is a shared responsibility of the Legislative and the Executive; both branches need access to

the preliminary determinations of U.S. policy that must anticipate negotiations, and in turn must have a body of specialized knowledge -- which would repose in the copyright agency -- to inform policy making. An expert agency informing the State Department and other entities or acting independently under its own authority is the best-equipped entity to formulate policy and represent U.S. interests abroad.

7. The Copyright Agency Would Be Capable Of Ensuring That the Potential Of the "Fair Use" Doctrine and Compulsory Licensing Is Fulfilled.

In a significant way, a new federal copyright agency would be in a position to invigorate two key substantive concepts of copyright law -- the "fair use" doctrine and compulsory licensing. Congress and the courts have not been able to restore to "fair use" the supple character that originally made it an enlightened doctrine, nor have they been able to fully utilize compulsory licensing as a balancing device.

In Section 106 of the 1976 Copyright Act, Congress delienates the specific rights of copyright owners. Sections 107 through 118 set forth limitations on those rights. The first, and one of the most prominent limitations, is that of "fair use," outlined in Section 107. The "fair use" provision is not a definitive explanation of the

law, but rather the codification of standards upon which particular facts may be evaluated. As a result, "fair use" analysis is not clear cut. By example, the two statements of the U.S. Supreme Court on "fair use,"[20/] reversed appellate court decisions.

As technological developments make possible new ways of exploiting creative works, compulsory licensing may offer the only solution to the problem of ensuring fair compensation to certain categories of authors. As experience shows, the fine-tuning of complex compulsory licensing compensation schemes is simply not a responsibility which ought to be placed on Congress.

The cable compulsory license created under the 1976 Copyright Act raises a multitude of questions which depended on the status quo for an equitable licensing system. Consider the problem of low power television stations, for example. Several years ago, the Federal Communications Commission created low power television (LPTV). For LPTV stations, cable carriage is often essential to reaching a sufficient segment of a local population. However, as

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20/ Harper & Row, Publishers, Inc. v. Nation Enterprises, _____ U.S. _____, 105 S. Ct. 2218 (1985); Sony Corp. of America v. Universal City Studios, Inc., _____ U.S. _____, 104 S. Ct. 774 (1984).

strictly interpreted by the Copyright Office, a LPTV station is deemed a "distant signal" wherever it is carried, and cable operators must pay high copyright royalty payments to carry it even in the LPTV's community of license.

When the Copyright Office issued this interpretation, it became the focal point of intense lobbying. It did not change its views, but instead issued a non-binding interpretation which would allow cable operators to file, and the Copyright Office to accept, compulsory license forms which did not identify the LPTV stations as distant signals. Nevertheless, copyright owners may still challenge the validity of the systems' compulsory license in court. This controversy illustrates the need for an agency with the authority to approve waivers of compulsory license schemes.

The "grandfathering" issue raises a similar need. The U.S. District Court in Tucson has pending before it a case involving another Copyright Office interpretation of compulsory licensing. In June 1984, the Copyright Office issued an interpretation of the scheme that requires payment when certain signals are substituted for "grandfathered" television signals. The Copyright Office ruling appears in conflict with the 1976 Copyright Act, but the office noted that it had no authority to waive the rule.

While the order was a non-binding interpretation of the statute, the cable system involved could only

obey the decision, lest it be the subject of a multi-million dollar damage action. It paid over $250,000 in contested royalties and brought a declaratory ruling action in federal court. Even that request is being challenged on grounds the issue is not ripe for judicial review. This is a situation in which the parties involved in compulsory licensing would have benefited from an agency that could have issued a definitive ruling or waived inequitable interpretations of the statute.

Tiering and proration of royalties are another area of concern. The two cases[21/] seeking an interpretation of the compulsory licensing scheme as it applies to "tiered revenues" have been in federal court since 1983. Rulings in them will have an immediate impact upon the manner in which thousands of cable operators account for royalties. The cases were briefed and argued over a year ago; yet they remain undecided. The inability of courts to provide prompt answers has dissuaded many involved in the compulsory license program from seeking answers to unresolved questions. This shows that resort to the judiciary on copyright

21/ Cablevision Systems Development Co. v. Motion Picture Association of America, Inc., No. 83-1655 (D.D.C. filed June 9, 1983); National Cable Television Association, Inc. v. Columbia Pictures Industries, Inc., No. 83-2785 (D.D.C. filed Sept. 21, 1983).

matters is better done via appellate review than by original jurisdiction.

8. A New Federal Agency and Its Impact On Copyright Law Would Benefit a Wide Range Of Persons and Organizations.

With technology outrunning Congress's ability to keep legislative pace with it, unanswered copyright problems multiply. The interests of many different parties are in limbo, ranging from industries on the forward edge of technology to scholars publishing research to the average citizen wanting to take advantage of new products. All would benefit from the creation of a new, accessible copyright agency, with jurisdiction over the substantive and procedural aspects of copyright law.

In industry, the risky "gray" areas of the copyright law may inhibit investors, especially in view of the strict penalty and damages provisions included in the 1976 Copyright Act.[22/] The slow processes of federal litigation can leave industries which deal in new technologies in suspended animation. The "Betamax" case took over six

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22/ The statute provides for recovery of damages and an accounting of profits, or, in lieu thereof, minimum damages of $250 to $10,000 per infringement and up to $50,000 in the case of a wilful act. Attorneys' fees may be secured by the prevailing party. 17 U.S.C. §§ 504, 505.

years to progress from trial court to decision in the U.S. Supreme Court.

The uncertainty resulting from the current state of copyright law has hit the campuses of American colleges and universities particularly hard. Administrators and professors are frequently making potentially far-reaching decisions on major copyright questions without dependable guidance from their government.

The extent of the problem on the campus has been expertly presented in a number of articles published in academic journals in recent years. An article in a 1982-83 volume of The Journal of College and University Law noted that the critical question of whether the "work made for hire" doctrine -- under which employers may be the "authors" for copyright purposes of their employees' works -- applies to the scholarly writings of professors has not been answered. Employees, the article observed, face serious administrative roadblocks when they try to protect themselves:

> [E]mployees can expect no advice from the Copyright Office when they wish to file copyrights in their own name. The Copyright Office is willing to accept applications for the same work from both employer and employee, issue registration certificates to each, then let the courts settle title. Copyright Office regulations focus on streamlining application, deposit, and registration procedures and

> defining works that may be copyrighted, rather than on determining ownership.[23]

Later, the Journal noted that despite the fact that there are more than 500 oral history programs in operation in the United States, there has yet to be definitive ruling on their copyright status:

> Over the last thirty years oral historians have produced well over ten million pages of interview transcripts. With both the number of interviewers and programs increasing, approximately a million pages of transcripts are currently being compiled each year. It has been the practice in. . . most major oral history programs to seek copyright protection for all interview transcripts that are completed. Whether such efforts have been worthwhile or in vain will ultimately be determined by the courts. Since many prominent interviewees like Henry Aaron, Walt Disney, Lyndon Baines Johnson, and Earl Warren may never have consented to be interviewed if their words were not able to receive copyright protection, affirmative resolution of this question is important to the future well-being of many oral history programs.[24]

More recently, the Journal published an article that focused on the lack of rules relating to the off-the-air taping for

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23/ Simon, Faculty Writings: Are They "Works Made For Hire" Under the 1976 Copyright Act?, 9 J. C. & U. L. 485, 491 (1982-83).

24/ Neuenschwander, Oral History and Copyright: An Uncertain Relationship, 10 J. C. & U. L. 147, 160 (Fall 1983-84).

non-profit classroom use of radio and television broadcasts. "Legislative inaction," the author of the article lamenated, "...continues to prevent achieving [the] delicate balance" needed to resolve the issues raised by such taping.[25/]

It must be remembered, too, that today, more than ever before, copyright law is populist law. Copyright affects not only large sectors of the economy, but the everyday lives of citizens. What we see on television, read in books and newspapers and program into our home and business computers comes within the ambit of the federal copyright system. Many of us have read and misunderstood the puzzling copyright notices posted above photocopying machines. Royalty rate increases ordered by the Copyright Royalty Tribunal have led to the deletion of some distant signals by cable systems, inspiring subscriber complaints. When we record television programs at home, some of us know that if one Supreme Court justice had changed his or her mind in the "Betamax" case, we would be infringing. Virtually everyone in the country would benefit from the clear and enlightened direction an independent copyright agency would provide.

25/ Off-the-Air Educational Videorecording and Fair Use: Achieving a Delicate Balance, 10 J. C. & U. L. 341, 378 (Winter 1983-84).

9. Conclusion

Achieving the objectives of the copyright law requires that Congress turn its attention from the minute, specific details of many discrete, individual industry problems and focus instead on establishing an effective, potent mechanism to achieve the constitutional objective of an equitable balance between the use and the protection of intellectual property. The establishment of an independent federal administrative agency for copyright offers the distinct advantage of permitting Congress to withdraw to a more general plane of responsibility as an overseer of policy, while assuring consistency and skill in the federal government's administration of the copyright law.

Mr. KASTENMEIER. Thank you, Mr. Toohey, for that brief but very much to-the-point testimony. You, of course, heard Professor Goldstein's reservations about the creation of such an agency.

As I recall, you do not suggest that the Patent Office and copyright function be somewhere merged into a sort of super-intellectual property regulatory agency. That is not your suggestion. You deal solely with copyright, is that correct?

Mr. TOOHEY. Yes, sir.

Mr. KASTENMEIER. Would it be possible, in your view, to mold the present CRT with all its current problems, into such an agency that you are recommending, or would we have to start from scratch literally?

Mr. TOOHEY. I don't think you would have to start from scratch. I think it could be done by a reformation of the Copyright Royalty Tribunal.

I would start by taking the word "royalty" out of its title, with the idea of putting everyone on notice that its jurisdiction had been considerably broadened, and its ability to carry out copyright law administration had been fully empowered.

May I make another comment about Professor Goldstein's testimony and his objections to my suggestion? I think that perhaps his principal objection was that you don't put property rights into a Federal agency.

In the *Nation* case, which the Supreme Court recently decided, Justice Brennan, writing his dissenting opinion, quoted this body in 1909, the 60th Congress, in enacting the 1909 statute. The House report said, "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writing, but upon the ground that the welfare of the public will be served and progress of science and

useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings."

While it is indeed a property right, it does not arise from the common law. It is not a land-based or personal property-based right that either State law or common law creates.

It has been created by this body, by the U.S. Congress, and therefore, it seems to me reasonable and consistent with any jurisprudence that the right to administer and to adjust that right to accommodate changing circumstances is a duty of Congress.

And then when that duty becomes too complex, and Congress considers delegating to an administrative agency the detailed functions of that administration, it is acting consistent with the historical delegations of power that have been made by Congress to existing Federal agencies.

Mr. KASTENMEIER. Let me ask you a couple of other questions, briefly, since we already have a vote on.

Doesn't this recommendation, in a sense, come at the wrong time? Granted, the Tribunal may be troubled somewhat, but we are in a period of deregulation, and to suddenly cast a new agency into existence with relatively enormous powers as pertains to huge economic interests and the rights of many in this society, isn't it really the wrong time?

Mr. TOOHEY. In my experience, both as a teacher and as a lawyer, and particularly in the last few years, I have run into many people from various walks of life, particularly in the academic community, but not there alone, who have many questions about copyright law.

Those are the people who would, I suspect, normally resist the idea of creating a new Federal agency.

But I think if they felt that their copyright law questions, which involve VCR's and Xerox machines and the ability to create course packets for courses where no textbooks exists, or their ability to make fair use of choreographic notations or to use a photograph for a public television program, if they knew that these kind of questions could be easily, efficiently answered in a legally binding fashion by an administrative agency, which is constituted to do just that by Congress, I think that their objections, their normal objections to the creation of a new Federal agency would dissolve.

Mr. KASTENMEIER. I have just two more questions. I would like to yield to my colleague, before I ask them.

Mr. MAZZOLI. I will not be able to come back, and I thank you, Mr. Toohey, and I intend to read your statement very carefully, but let me just say a couple of quick things.

With all respect to the idea that the day-to-day regulation, as you said, is not the job of Congress but that of an agency, Congress will constantly get back into the day-to-day regulations, as we have seen on the FTC and the funeral home regulation, the used car regulation.

If enough people are raising enough hell about something an agency does, they come to us and then we pull the string on that agency, if we feel that the complaint is correct. So, in a way, I like the idea of an agency to sort of divest us of this very burdensome responsibility.

And I shrink from the idea of what the professor has said, that we can competently set that first level. On the other hand, I think in realistic terms, we are always going to be involved in any administrative agency function.

Second, it is true that if we could have, for academic purposes or otherwise, an easily settled or an agency which will easily settle questions of photocopying course packets and so forth, that that would be advantageous. But you know the old story, "I gave at the office." Tell me an administrative agency that easily and efficiently settles anything. So, there is a question about how we could structure a new agency so it could yield that kind of activity.

I do intend to read your statement very carefully. There are some built-in reservations I have on, really, both sets.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. I just have two brief questions.

One relates to why we have faced certain problems? The other is a perspective that I have. I think it must be fairly established historically that both the Carter White House and the Reagan White House have not given high priority to nominations to the Tribunal.

One, why was this, in your view, if you agree? Two, why do you think if we created a copyright agency, we will get more attention from the White House in terms of the personnel recommended?

Mr. TOOHEY. I think the answer to your first question is that the jurisdiction of the Copyright Royalty Tribunal was too narrow-gauged to command a lot of attention. It is essentially intended or designed to address the needs of a few industries, as opposed to what I am talking about, which is the general purview of copyright law.

In answer to your second question, I think a broader constituency for the formation of an agency that can effectively address copyright law questions at any level would carry with it a mandate that would be stronger and would reach to the White House as well as this body, to staff the agency and to organize it well, and to create memberships and commissions composed of skillful people.

Congressman Mazzoli raised a couple of interesting questions I wanted to address, if I may, very briefly. One is that you normally conduct oversight by choice, for the most part. I think that you are conducting oversight by necessity in the copyright area at the present moment.

I would be surprised if your telephones aren't ringing fairly frequently with copyright questions of all kinds that come from members of the public. So Congress and its staff de facto acting as an administrative agency. I think it is simply a question of recognizing that that function in inappropriate for Congress.

If you look at what this subcommittee has to do, besides copyright, you add further emphasis, I think, to the idea of segregating that function and placing it into a separate agency.

Mr. KASTENMEIER. My last is more of a comment than a question. One reason your proposal, or something like it, is particularly intriguing is because we are beset with a series of technological questions. These questions relate to the application of copyright law, questions such as are new low power television stations distant signals, what should be the formula for tiering, in terms of compensation, and just scores of other questions which probably

ought to currently be resolved by statute. Because so many of them are contested, we cannot presume to easily resolve these questions by statute.

The Tribunal, and even as good as the Copyright Office has been over the years, resolving all these questions, do not create a competent policy forum to resolve problems created by a constantly changing society.

There would appear a new range of questions brought forward as a result of technological change and interaction of old entities that have gotten more sophisticated and, in some respects, even more contentious. These matters cannot be resolved readily by the Congress or administrative entities within the legislative branch.

So, for that reason, I think your idea has to be given some serious thought. I commend you for it, and I wish we could explore this at greater length. At this moment, we cannot.

I would hope that we can explore this with you and your colleague at some point in the future, and I compliment you.

Mr. TOOHEY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. This terminates our hearing for today on the question of the Copyright Royalty Tribunal.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

CRT REFORM AND COMPULSORY LICENSES

WEDNESDAY, SEPTEMBER 18, 1985

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

The subcommittee met at 2 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mazzoli, Frank, Moorhead, Schroeder, DeWine, and Hyde.

Staff present: Michael Remington, chief counsel; Deborah Leavy, assistant counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

Ms. SCHROEDER. Mr. Chairman?

Mr. KASTENMEIER. The gentlewoman from Colorado?

Ms. SCHROEDER. Mr. Chairman, I ask unanimous consent that this subcommittee permit this meeting to be covered either in whole or in part by television broadcast, radio broadcast, and/or still photography, pursuant to rule 5 of the committee rules.

Mr. KASTENMEIER. Always a friend of the media. Of course, without objection.

This afternoon, the subcommittee is having its third day of hearings on administration of the compulsory licenses that exist in the copyright law. The present four compulsory licenses affect cable television, jukeboxes, public television, and mechanical royalties. They are currently administered by two entities in the legislative branch of Government, primarily the Copyright Royalty Tribunal and also, to a certain extent, the Copyright Office. Members of the subcommittee will recall that we commenced our inquiry last May with an oversight hearing on both CRT and the Copyright Office. That initial hearing as followed by two legislative hearings, during which testimony was received from several practicing lawyers, a law professor, Chairmen of the CRT, and the Acting Register of Copyrights, and the Authors' League of America. Two bills, one to abolish the Copyright Royalty Tribunal and another to create a Copyright Royalty Court, have been introduced. Several other provocative ideas, such as creation of a Federal copyright agency, have been suggested by witnesses.

So proposals for reform abound. I'm not sure, however, that any political consensus exists about the form that curative relief should take. Hopefully the witnesses before us this afternoon, all of whom

represent great trade associations, will educate us on areas of their agreement and disagreement. I say that, even though I think the area of discussion may possibly go beyond precisely Copyright Royalty Tribunal reform, for example, and go to matters which are tangential, but perhaps important in the overall relationship of these industries and copyright and the administration of the law.

With these thoughts in mind, I would like to defer to the gentleman from California, if he has an opening statement.

Mr. MOORHEAD. I do, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. MOORHEAD. Thank you very much. I'd certainly like to welcome our friends, Jack Valenti of the Motion Picture Association, James Mooney of the National Cable Television Association, and Edward Fritts, president of the National Association of Broadcasters here today. We have an illustrious group of witnesses.

As we begin our third day of hearings on CRT reform, we have a third bill being prepared by our colleague from Massachusetts, Barney Frank. The more ideas we have to review, the better chance we have of coming up with a sound solution.

I don't believe it is possible to abolish immediately the compulsory license for cable, nor can we abolish immediately the 3.75 percent rate, nor can we reinstate immediately the "must carry" rules. But I believe, down the road, all of these ideas can be worked out. The most encouraging thing going on at this time is the informal discussions that are taking place between the MPAA and the NCTA.

I, personally, believe that a flat-rate charge for cable subscribers per month would greatly simplify the system. Such a system would do away with the hodge-podge we now call "tiering." It would also eliminate the problem of the larger markets being permitted to carry more distant signals than cable operators in the smaller markets. An it would also do away with the 3.75 rate. But more importantly, it would be a solution that the parties worked out, which would probably work better than anything we might force upon them.

Of course, this subcommittee would review any agreement that the parties would come up with, but I believe the history of this subcommittee is to encourage the private sector to work out their differences wherever possible.

In any case, Mr. Chairman, I think these hearings also help commend you for the hard work that is so important if we are to find meaningful solutions in this area.

Mr. KASTENMEIER. I thank my colleague.

If there are no further requests for statements on the part of members, I might add parenthetically that Mr. Moorhead, the gentleman from California, and I have, on a number of occasions, attempted to encourage parties who have disputes with respect to copyright to resolve these through mutual negotiations. I'm pleased to refer to one such negotiation in the field of jukebox and copyright royalties. I think we successfully encouraged several industries to come to an agreement which was in the public interest, and, hopefully, will solve the problems attendant to that particular industry which revolve around copyright.

I have asked the witnesses, notwithstanding the fact that I'm sure they could talk at great length, to try to keep their remarks to about 10 minutes so that we would be able to also take some time to explore with them, through question and answer and through colloquy, aspects of their presentation and their views about this matter.

Our first witness this afternoon is a good friend and a familiar face, Jack Valenti, president and chief executive officer of the Motion Picture Association of America, Inc. Mr. Valenti has appeared before us on numerous occasions. He's been very helpful to the committee and very intelligent and able in his presentations. I don't know whether Jack would like to offer to us for an insertion in the hearing record the printed version of his most creative work product, "Speak Up With Confidence," now on videocassette and retailing for an exorbitant amount of money! [Laughter.]

Mr. VALENTI. Is it subject to a compulsory license?

Mr. KASTENMEIER. Well, if we get it in the public domain we might not have to pay any royalties. [Laughter.]

In all seriousness, Mr. Valenti, you're always welcome and we greet you and ask you to come forward and proceed as you wish with confidence or otherwise. We are delighted to have you here.

TESTIMONY OF JACK VALENTI, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. VALENTI. Thank you, Mr. Chairman. I'd like to, for the record, show that these cassettes are freely negotiable in an open marketplace. I speak up with confidence because I've learned it all from Henry Hyde.

I want to offer my theme, which I take from a gentleman I admire very much. He lived in the 14th century. He was a Franciscan monk. His name was William of Ockham. He was a very pious man. He thought a lot about how the human spirit could mingle and survive in a world that was increasingly difficult to challenge. He was also a very wise man, and he thought a long time about this dilemma of the human spirit.

One day he found his answer. It's come down to us today as Ockham's Razor which essentially says that no entity is to be multiplied without necessity. In everyday language it says: "Keep it simple, keep it simple, don't get complicated." Now, it's my judgment that whatever I say here today, William of Ockham is really the author. I think what he has offered in Ockham's Razor is a reasonable way, or more effective way, to collect and distribute copyright royalties, and I think it's a formula for fairness. I also think that he would be mighty pleased to know that what he created in the 14th century is being usefully consulted in the 20th.

Let me begin by saying that I've often thought it is a piece of irony that the copyright royalty rates were formed without any marketplace decisions, without any economic connections at all. A fee schedule was arbitrarily plucked out of the air as a political compromise, as we all know. There was no economic nexus of any kind.

And so, Congress established this thing called a cable "compulsory license," which allowed cable systems to fetch off the air TV station distant signals, transmit them to the head ends of their cable systems, and sell them to their subscribers without authorization of or negotiation with copyright owners. I might add that is still the system we have to this day.

This hearing is on the question: Is the Copyright Royalty Tribunal broken? Is it beyond repair? The Tribunal has been criticized for almost everything. I think the main thing they've been criticized for is the so-called 3.75-percent rate adjustment for additional imported distant TV signals not permitted under FCC rules. Never have three such numbers caused so much consternation in an environment.

At the risk of repeating things that all of you are well aware of, let me review the Tribunal's decision and implant it in our memory with a little firmer impress:

First, this 3.75-percent rate adjustment decision was reached after 23 days of hearings, and thousands of pages of testimony. Sometimes we forget that. Second, it was applicable only to the TV signals, that cable systems were not permitted to carry under the FCC's distant signal rules. The adjustment did not apply to any signals that they were allowed to carry when the compulsory license was created. Keep that in mind.

Third, the CRT decision was a required response. The 1976 Copyright Act said, if the FCC ever changed its distant signal carriage rules, the CRT had to readjust the cable royalty rates, because the abolition of the FCC distant signal rule gave cable systems an unfettered right to carry a limitless number of distant signals. And so the CRT was required to make this adjustment.

Let me refresh your memory and make it conjoin with today. In 1976, there were about 3,700 cable systems, and they served 10 million subscribers. Today, there are 6,600 cable systems. They serve over 45 million subscribers. Moreover, if you take the top six multiple system operators [MSO's] today they control 35 percent of all subscribers. The top 20 MSO's control 65 percent of all subscribers. That's something you have to keep in context.

To give you a perspective on cable revenue growth, consider this: In 1976, cable system revenues were $445 million in 1976. Today, according to the cable industry's own commissioned survey by the A.D. Little Co., the revenues are about $8.4 billion, and by 1990 they will reach $16.5 billion. I'd add that the $8.4 billion today is bigger than the combined revenues of all the film and television industry.

So the Tribunal fulfilled its obligation when it made or exercised its best judgment in setting what it thought were reasonable rates.

My dear friend Jim Mooney's testimony says that all of the cable copyright royalties that the program owners receive are not peanuts. In other words, we are being fattened by all of this. Well it may not be peanuts, but it's less than a postage stamp. All these royalties amount to the average cable system paying 20 cents, according to Mr. Mooney's own figure, 20 cents per month per subscriber. Unless the Postal Service has done something in the last 3 hours, a postage stamp costs 22 cents. So it costs a cable operator more to send out his monthly invoice to a subscriber than it costs

him to bring in all his programming to serve that subscriber. I find that modestly bizarre.

The only cable systems in America which are subject to this 3.75-percent adjusted rate are the largest and most strongly financed companies in the business. There's no need to base some protectionism on those cable systems. Moreover, copyright owners ought not to be forced to subsidize cable owners.

Keep in mind, if you're a cable system operator, and you deal with a legion of suppliers, the only one that the Congress has forced to give its product to the cable system at lower than marketplace rates is the program owner. The paper clip suppliers, and the electrical works, and whomever else, get fair marketplace value, but not program owners.

Now my conclusion. Brickbats have been hurled at the Copyright Royalty Tribunal. You'll hear a lot more of them today, under the assumption that if, somehow, the Copyright Royalty Tribunal were demolished and could be reconstituted, all the thorny problems connected with cable copyright would be plucked. I respectfully disagree. It is not the Tribunal but the system that we ought to reform. There is the primordial need right now for a new, innovative approach for the whole cable copyright system that the cable industry, program owners, and subscribers should all embrace to be well served in the decade ahead.

There is no doubt in my mind that this Tribunal can function very effectively under the existing compulsory license. But I'm bound to repeat, Mr. Chairman, over and over again ad nauseum, that the compulsory license has outlived whatever meager value it may once have had to the cable industry. The compulsory license has now become a contradiction and a burden in the light of cable's emancipation from all Government restriction.

Keep in mind that all the bonds that once girded around the cable industry have now been snapped. They're free, except for the one restriction which they adore with a loving durability, a great fidelity, and that is the compulsory license.

Our interest and our anxiety is centered within the heart of section 111. I do not believe it is possible to construct a fair and reasonable process within an act that is so densely complicated, so thickly crowded with hard-to-understand rules, that I must say baffle access to any reasonable mind. And so to move toward this goal of simplicity and equity, and I stress those two words, the Motion Picture Association and Mr. Mooney's organization, NCTA, are now engaged in good faith negotiations. We're trying to see if we can summon up a new way that is lucid and fair and workable, but most of all, Mr. Chairman, one that is simple, to substitute for this awkward and impenetrable bulk of section 111. These meetings have begun. We just had one yesterday. Another is now scheduled. I'm bound to say that we are talking, if not cordially, in an understandable way. I think it's going to be more cordial as we go. I do believe it is good faith. I really do.

I will sum up by saying the MPAA continues to support the abolition of the compulsory license, after a reasonable transition period, as the fairest and most reasonable pathway to a free market judgment. I believe, in the span of time between today and the abolition of that license, NCTA and MPAA can really come up

with a plan which would get rid of all the disabling afflictions of section 111, and, I think, in the long run serve the public that we both care a great deal about. "Ockham's Razor" is going to be our guide. I think that everything that is complex and not necessary is going to be banished. In its place we'll substitute a plan that is simple and clean and understandable and fair.

I believe the Tribunal is well suited to play a role in this interim period while this plan is being worked on. Hopefully, if and when we reach agreement, we'll bring the fruits of our labor back to this subcommittee. You can place your own judgment and appraisal on it. From it, I hope, some final congressional decision can be drawn.

It is now, Mr. Chairman, 10½ minutes, and I take your leave.

[The statement of Mr. Valenti follows:]

STATEMENT OF JACK VALENTI, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. Chairman and Members of the Committee, my name is Jack Valenti. I am president and Chief Executive Officer of the Motion Picture Association of America, Inc., whose members are the principal producers and distributors of theatrical and television programs in the United States. I am also the chairman of the Alliance of Motion Picture and Television Producers, Inc. in Hollywood, which has a large membership of companies who are primarily originators, producers and syndicators of television programs as well as producers of theatrical films. Attached is a list of the MPAA and AMPTP members.

I commend you and the committee for holding these hearings so that I and others can discuss the functioning of the Copyright Royalty Tribunal as well as make some observations about the cable provisions of the Copyright Act of 1976.

In the fourteenth century there lived in England a Franciscan monk whose name was William of Ockham. He was a pious man much given to thinking about how the human spirit could mingle and survive in a world increasingly difficult to challenge. He was a wise man who thought a long time about his dilemma of the human condition. One day he found his answer. What he created in his mind comes to us today as "Ockham's Razor," which essentially says that an entity is not to be multiplied without necessity. Or in everyday language, "Keep it simple, don't complicate things."

William Ockham, then, is the true author of what follows. He shows us the way to a more effective process for the collection and distribution of cable copyright royalties. It is truly a formula for fairness. I daresay it would please him to know that what he created in the fourteenth century is usefully consulted in the twentieth.

HOW THE CABLE COMPULSORY LICENSE WAS BORN

Permit me a brief history of how the Copyright Act of 1976 was constructed, how we got to where we are today, and where we should go from here. Congress designed the cable provisions of the 1976 Copyright Act at a time when cable television was in swaddling clothes, before satellites began to transmit television programs, and before a multitude of "cable network" services became available to cable television systems.

Efforts to revise the infirmities of the 1909 Copyright Act began in the late 1950's. But it was not until 1976 that the cable provisions were finalized and the new Copyright Act was adopted and signed into law by President Ford.

It is a piece of irony that the cable provisions were formed without any marketplace analysis of the initial rate provisions of the Act. A fee schedule was arbitrarily plucked out of the air and placed in the statute. It was a political compromise, not an economic decision. Congress established a "compulsory license" so that cable systems could take television programs broadcast by television stations off the air and sell them as part of "basic services" to their subscribers without negotiating with the copyright owners of these programs. All this was enclosed within Section 111 of the Act.

Congress determined in the 1976 Copyright Act that cable retransmission of broadcast signals should be subject to a "compulsory license" primarily because "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner . . ." It was said that the infant cable television industry required the protection of a "compulsory license" to compete against the

market power of broadcast stations, networks, and program producers. The cable industry was given low statutory rates and a "compulsory license" to insure its growth.

Congress also created a five member Copyright Royalty Tribunal to distribute the royalties remitted by cable systems to the Copyright Office. It gave the Tribunal limited authority to adjust cable royalty rates for retransmitted TV signals to (a) conform to changes in the value of the dollar, (b) and deal with changes, if any, in the Federal Communications Commission's distant signal and exclusivity rules. Its principal task was to settle disputes among copyright owners over the distribution of royalties.

The cable copyright provision of the 1976 Act went into effect on January 1, 1978. The Tribunal conducted the first distribution proceedings in 1980 for the 1978 Cable Royalty "pool."

In 1980, the first rate adjustment proceeding relating to inflation was held in accordance with the statutory requirement.

In 1981, the Federal Communications Commission rescinded its distant signal and syndicated exclusivity rules which triggered a major rate adjustment proceeding by the Tribunal. The Tribunal decided to impose a rate of 3.75% of basic gross receipts per distant independent TV station signal carried by large cable systems, applicable only to additional signals which were over and above the number and type permitted under the Commission's rules. The Tribunal also decided to establish a surcharge for the additional programs that large cable systems within the "top 100" TV markets could carry following the rescission of the Commission's "syndicated exclusivity rule."

The "syndicated exclusivity rule" barred cable systems from carrying a program in a community where the local television station had been granted an exclusive television broadcast license for that program for a limited period of time. This rule gave protection to the copyright owner so that he could control the marketing of his program and not have the value of that program eroded by cable system importations.

IS THE COPYRIGHT ROYALTY TRIBUNAL "BROKEN?"

Some have said that the Copyright Royalty Tribunal is "broken" and "can't be fixed." The Tribunal has been criticized for (1) increasing the royalty rates for the additional distant signals imported by cable to levels above those contemplated by Congress in the 1976 Act, and (2) its decisions which have been challenged on numerous occasions by various claimants and submitted for review by appellate courts.

I will try to furnish our answer to this question.

THE 3.75 PERCENT ADJUSTED RATE

The Tribunal's establishment in 1982 of a 3.75% adjusted rate for certain additional distant independent TV station signals imported by large cable systems was in response to its congressional mandate. (Sec. 801(b)(2) of the 1976 Copyright Act.) That mandate required the Tribunal to adjust cable's rates in the event that the FCC repealed its distant signal carriage rule to make certain that the rates for the additional distant signals imported by cable was "reasonable."

It is important to note that the 3.75% adjusted rate was: based upon a very extensive evidentiary record built upon 23 days of hearings and thousands of pages of testimony before the Tribunal; applicable only to distant TV signals that cable systems were NOT permitted to carry under the Commission's distant signal rule. The adjustment did NOT apply to the rates cable systems pay for any of the signals they were allowed to carry when the compulsory license was enacted; and a necessary response to the FCC's deregulation actions that gave cable systems an unfettered right to carry an unlimited number of off-air retransmitted signals embodying copyrighted works.

In 1976, fewer than 3,700 cable systems served about 10 million subscribers. Today, over 6,600 cable systems serve 35 million subscribers.

Once a struggling "mom and pop" industry, cable is today dominated by giant multiple system operators (MSOs). The six largest (Tele-Communications Inc., American Television and Communications, Inc., Group W Cable, Cox Cable Communications, Storer Cable Communications and Warner Amex Cable Communications) together serve approximately 12.5 million subscribers or over 35% of all cable subscribers. That is substantially more subscribers than were served by all cable systems when Congress passed the 1976 Act.

Below is a listing of the Top 20 Multiple System Owners:

TOP 20 MULTIPLE SYSTEM OPERATORS

MSO	Number of subscribers	Date	Percentage of 35,000,000 subscribers
Tele-Communications Inc.	3,660,938	March 1985	10.5
American Television and Communications Corp. (Time, Inc.).	2,500,000	February 1985	7.1
Group W Cable (Westinghouse Broadcasting and Cable Corp.).	2,093,794	March 1985	6.0
Cox Cable Communications (Cox Communications, Inc.).	1,521,667	do	4.3
Storer Cable Communications (Storer Communications, Inc.).	1,500,000	do	4.3
Warner Amex Cable Communications (Warner Communications, Inc. and American Express Co.).	1,204,000	do	3.4
Continental Cablevision (Dow Jones, Inc. et al.).	1,033,000	April 1985	3.0
Times Mirror Cable Television (Times Mirror Co.).	978,340	March 1985	2.8
Newhouse Broadcasting (Newhouse Broadcasting Corp. et al.).	910,190	April 1985	2.6
United Cable Television	806,000	March 1985	2.3
Viacom Cablevision	800,000	April 1985	2.3
UA Cablesystems Corp. (United Artists Communications, Inc.).	713,000	do	2.0
Sammons Communications (Sammons Enterprises, Inc.).	659,716	do	1.9
Cablevision Systems Development	596,799	March 1985	1.7
Rogers Cablesystems	589,357	April 1985	1.7
Jones Intercable	511,842	July 1985	1.5
Comcast Cable Communications (Publicly held—Sammons Enterprises Inc., principal).	481,000	March 1985	1.4
Telecable Corp. (Landmark Communications, Inc.).	453,094	do	1.3
Heritage Communications	447,192	do	1.3
McCaw Communications	382,000	do	1.1
Total	21,841,929		62.4

Note—Parentheses indicate Parent Company or company with substantial ownership interest.

Sources: CableVision, September 2, 1985, p. 49.

To give a perspective on cable revenue growth, consider these facts.

In 1976, total cable system revenues were about $445 million. Today, according to the National Cable Television Association's own commissioned study released by Arthur D. Little, Inc., cable industry revenues in 1984 totalled $8.4 billion and will reach $16.5 billion by 1990, an increase of 96.5%.

The Tribunal fulfilled its statutory obligations when it exercised its best judgment based upon a substantial evidentiary showing and established "reasonable" rates for the additional distant signals retransmitted by cable systems to their subscribers.

It is significant that the cable royalty rate adjustment had the equitable purpose of providing a reasonable fee so that the cable industry would be required to more nearly pay its fair share of the cost of providing the American public with the creative works of copyright owners.

The Tribunal found that: cable industry growth was nourished by the "compulsory copyright license" it enjoys; the only cable systems subject to the adjusted rates are the largest and the strongest financially in the industry, and that there was no public need to base rates on protectionism of the cable industry; and copyright owners should not be forced to subsidize the cable industry when none of cable's other suppliers are required to take less than fair value for their goods and services.

Indeed, Commissioner Edward W. Ray in his testimony to this Committee on July 11, 1985 explained the 3.75% rate decision in this statement that goes to the core of the fairness of that decision.

He told this Committee in his prepared remarks: "The use of copyrighted material by commercial enterprises is a cost of doing business, no more, no less. It must be paid for. To deny it must be paid for would be to deny an owner of property just compensation solely because the property he or she owns is intellectual property."

The Tribunal's decision was upheld by the United States Court of Appeals for the District of Columbia on December 30, 1983 "in all respects." The Court found that the Tribunal had acted well within the discretion granted to it by the Congress in the Copyright Act of 1976 and that the rates adopted in the decision were not "unreasonable."

Under the 1976 Act, the 3.75% rate is subject to review and reconsideration this year. If such review is sought, all of the parties will have an opportunity to present their arguments and statistical data to the Tribunal in support of their contentions. The Tribunal can then determine if the 3.75% rate is still "reasonable" under all of the current circumstances affecting cable, program owners, and the public.

THE TRIBUNAL'S DECISIONS HAVE BEEN CONSISTENTLY UPHELD BY THE COURT

Critics have declared that the Tribunal's record in the Court of Appeals is poor. Such statements are untrue.

The Tribunal has been upheld in the Court of Appeals for the District of Columbia in all of its rate-making decisions for which a party has instituted an appeal, except for relatively minor technicalities, such as mathematical errors.

Moreover, all of the Tribunal's distribution decisions have been upheld by the Courts in all but relatively minor respects.

Most recently, on August 30, 1985, the D.C. Court of Appeals upheld in all respects the Tribunal's decisions on cable royalty distributions for the 1979, 1980, and 1982 calendar years. In a prior opinion, the Court upheld the 1978 cable distribution. (The 1981 decision was based upon a negotiated settlement among the parties and was not appealed). Thus all of the cable royalty distributions have been upheld by the Court as a proper exercise of the discretion given to the Tribunal in 1976. In its recent holding, the Court in *NAB* v. *CRT*, the panel concluded:

"We emerge from our analysis of these inherently subjective judgment calls and rough balancing of hotly competing claims with one overriding conclusion: it is the Tribunal which Congress, for better or worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders. Given the potential monetary stakes, the claimants' studied tack to date of "boundless litigiousness" . . . directed at the various nooks and crannies of the Tribunal's decisions is perhaps understandable. But with today's decision joining the ranks of our two prior exercises of review, the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions is emphatically clear."

MPAA has appeared before the Tribunal many times since it began to function in 1978. Although we have frequently disagreed with the results, on each occasion we have been given a fair and impartial hearing under the existing rules in the 1976 Copyright Act. Individual members of the Tribunal have carefully weighed the evidence. They have wrestled with the most difficult task of determining what copyright rates and distributions should be. They have made reasonable decisions. Had the Tribunal been composed of the most illustrious copyright scholars disciplined in copyright law, I doubt that in the aggregate their decisions would have come out greatly different from those rendered by the Tribunal.

So long as there is a compulsory license for cable systems, whoever attempts to set cable rates or make cable royalty distributions will be criticized and there will be winners and losers in the perpetual battle over royalty fees.

IS IT NOT TIME FOR THE CABLE COPYRIGHT SYSTEM TO BE SIMPLIFIED?

Brickbats have been hurled at the Copyright Royalty Tribunal in the belief that if somehow the Tribunal were reconstituted in another form most of the problems relating to cable copyright royalties and distributions would vanish.

Respectfully, I disagree.

It is not the Tribunal but the system that we should reform.

There is a primordial need for a new, innovative approach in the copyright law we can all embrace so that cable systems, copyright owners of programs, and subscribers to cable systems will be well served in the decade ahead.

There is no doubt in my mind that the Tribunal can function effectively under the existing "compulsory license" structure. But I am bound to repeat, again and again, the compulsory license has outlived whatever meager value it may have had in the birth-year of the Copyright Act. The "compulsory license" has now become a

contradiction, as well as a burden, in light of the cable industry's recent emancipation from government regulation.

With the addition of a general counsel a short time ago, there has been a visible upward curve in the efficiency of the Tribunal. I am joined with others in recommending to the Congress that the Tribunal be permitted to obtain expert advice and staff assistance.

Our interest, and anxiety, in the current debate over cable copyright is centered within the heart of Section 111 in the Copyright Act. How is it possible to construct a fair and understandable process for the collection and distribution of cable copyright royalties under a Section of the Act so thickly crowded with complexity and hard-to-understand rules which baffle access to reasonable minds?

To move toward a goal of simplicity—and equity—the Motion Picture Association of America and the National Cable Television Association are currently engaged in good faith negotiations to try with all the ingenuity we can summon to bring to this Subcommittee and the Congress a lucid, workable, fair, but most of all, simple plan to substitute for the awkward, impenetrable bulk of Section 111 as it is now written.

Meetings have begun between NCTA and MPAA to try to produce such a design for the future. If and when agreement has been confirmed, the fruit of our efforts will be brought to this Subcommittee for its appraisal and judgment.

OCKHAM'S RAZOR WILL BE OUR GUIDE

MPAA continues to support the abolition of the compulsory license, after a transition period, as the fairest, most reasonable pathway to a free market judgment.

In the span of time between today and the abolition of the license, NCTA and MPAA can together construct a plan which will cure the disabling afflictions of Section 111, in the long term best interests of the public we both serve.

Ockham's Razor is our guide.

All that is unnecessary and complex will be banished. What we will insert in its place will be simple, lean, understandable and fair.

The Tribunal is well suited to play a role in this new process, until that comforting and welcome moment when the compulsory license will be abolished and the marketplace will itself decide.

This Subcommittee will put its own value on what is proffered, from which a final congressional decision can be drawn.

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The nine principal producers and distributors of theatrical and television programs in the United States comprising the membership of the Motion Picture Association of America, Inc. are: Columbia Pictures Industries, Inc.; Walt Disney Productions; Embassy Communications; MGM/UA Entertainment Co.; Orion Pictures Company; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; and Warner Bros. Inc.

ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

The members of the Alliance of Motion Picture and Television Producers, Inc. are: Aaron Spelling Productions; CPT Holdings, Inc.; Stephen J. Cannel Productions; Columbia Pictures; Comworld Productions; Walt Disney Pictures; Embassy Communications; Hanna-Barbera Productions, Inc.; The Ladd Company; Lorimar Productions; MGM/UA; MTM Enterprises; Metromedia Producers Corporation; Orion TV Productions, Inc.; Paramount Pictures Corporation; Ray Stark Productions, Inc.; Sunrise Productions, Inc.; Twentieth Century-Fox Film Corporation; Universal City Studios, Inc.; Viacom Productions, Inc.; and Warner Bros.

Mr. KASTENMEIER. Thank you, Mr. Valenti. You can continue to respond to questions standing or sitting, entirely at your pleasure.

Your use of "Ockham's Razor" for simplicity as your guide is a helpful analogy, but I should note for the record that William of Ockham was charged with heresy, and, as you know, ultimately excommunicated. [Laughter.]

Mr. VALENTI. I have to add, Mr. Chairman, so was Galileo. And they were both vindicated later.

Mr. KASTENMEIER. We won't be deterred from that in any event.

What you seek, in one means or another, is less reliance, or no reliance, on the Copyright Royalty Tribunal.

Mr. VALENTI. Yes, sir. That's correct.

Mr. KASTENMEIER. Therefore, I don't know whether a defense of the Tribunal, however, is really that necessary since you really seek to change the law accordingly.

I will concede that 3.75-percent royalty really has been perhaps overemphasized as an idea. It is probably more debated in recent years than anything, at least in my State, since they determined the alcoholic content of beer.

Is it contemplated or maybe you're not able to say, that you will negotiate with cable interests an end to the compulsory license?

Mr. VALENTI. That is our aim, Mr. Chairman. Our aim is very simple, and it's not secret. We're trying to negotiate—and have so stated to the cable industry, and they understand where we come from—a simple plan, flat fee per signal, which would jettison all the cumbersome apparatus of section 111 during a transitional period of the next 5 years; and at the end of 5 years, after the enactment of the act with the abolition of the license, then for the free marketplace to work its will. That is our aim and our objective and we've made no secret of it.

Mr. KASTENMEIER. One area I probably would differ in terms of historical interpretation with you—while I agree with your assessment that the cable industry is today indeed very successful—is that the purpose in the arrangement of 1976 was to aid a struggling industry. My understanding was that it was an accommodation between two industries, one of which had, by virtue of a somewhat earlier Supreme Court decision, achieved a very favorable result. And so that 1976 negotiated result, in which you participated, and in which I participated in terms of a legislative process in affirming, was really meant to seek an accommodation between the two industries. In fact, in your case, it achieved the principle of liability, even if conditioned by a compulsory license. It wasn't conditioned on the fact that, "well, one day cable will be very successful and therefore we'll throw off these shackles," so to speak, or "dispose of these advantages." At least that's the way I remember it.

Mr. VALENTI. Well, your memory is accepted. I read it only a touch differently because I was looking at it with a different prism.

I recall, historically, this bill was first lofted by the late Senator McClellan in the Senate, where he had a series of escalating levels of 1 percent to 5 percent of gross revenues. That set the tenor, that became the absolute ceiling. Everything else then began to recede, and once, you know, you put a number on the table in a committee room, that's as high as it goes and people come down off of it.

By the time it got into your very capable hands, Mr. Chairman, and I do agree that without your leadership we wouldn't have had anything, we began to negotiate with the cable industry at that time. I was in the thick of it. But I was negotiating under two stark realities. No. 1 was that I was trying to save the percentage from going from 2 percent down to zero percent, and No. 2, frankly, Mr. Chairman, we didn't have the votes to approve what we wanted. I don't have to tell you the last bastion of one's credibility is this: do you have the votes or don't you? So, not having the votes, we negotiated the best we could, and we were trying to figure out how we

could get $8 million a year in royalties. That's what kind of the level we were looking at. All these numbers were predicated on that.

The final step was, how do you look at the future? At that time, Mr. Chairman, you know the word "satellites" was never mentioned, and the word "VCR" was never mentioned. No one ever thought that there would be the kind of explosive cable market place. So we had to deal with the mechanism in place called the Copyright Royalty Tribunal, to seek whatever redress we had. The only redress we have, the only way the Tribunal could adjust rates, was if the FCC ever changed—that's what the law says—not abolish, but changed the distant signal and the syndicate exclusivity rules.

To our consternation, Mr. Ferris' Commission abolished, not changed, the distant signal and syndicated exclusivity rules. Once the CRT put its imprimatur on that change, it lost all ability to make changes except to go back and look at the 3.75 and to make inflationary changes. Other than that, there is no force now in any CRT decision that has to do with rates.

Mr. KASTENMEIER. I gather your annual royalty revenue derived currently is between $75 million and $100 million, or at least prospectively.

Mr. VALENTI. I think that the 1984 collection was $85 million.

Mr. KASTENMEIER. Thank you.

I yield to my colleague from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

One of the things that we have to consider is that even if we simplify the way in which money is paid in to the Tribunal or to whichever the collecting agency might be, we still have the problem of distribution of funds. And I understand that's been somewhat of a debate through the years also, and the Tribunal has been a little slow, on occasion, to hand out the funds that have been collected to the right people.

Mr. VALENTI. Do you want me to respond to that?

Mr. MOORHEAD. Yes.

Mr. VALENTI. Mr. Moorhead, on two levels. One, unfortunately, every time there's a distribution there's a lawsuit. Someone goes stampering through the courts, and, as a result, the funds are in dispute. The Tribunal can't distribute them until the funds have been cleared by the courts. And two, one reason why I think the Tribunal ought to be kept in place, is simply because it now has a historical perspective on the distribution apparatus. They've had several years now in which to learn how to make these distribution percentages to the various claimants. There's a nexus with the historical background. There's a linear connection to the very first 1978 distribution.

So, I think it's getting less and less troublesome as each new distribution year comes up as a result of this experience.

Mr. MOORHEAD. Assuming we will keep, at least for the time being, the Tribunal, pending the agreement we all hope will be forthcoming between the people involved in the industry, are there any structural reforms or changes that you would advise so far as the Tribunal is concerned?

Mr. VALENTI. Yes, I would join with others in recommending to this subcommittee and to the Congress that the Tribunal be given the opportunity to obtain expert advice, that is, staff assistance. Indeed, I think that with the addition of a general counsel a short time ago, you see now a visible curve in the efficiency of the CRT. This very bright, young counsel who's on board gives them the kind of knowledge that was vacant in past years.

Mr. MOORHEAD. What about the number of Commissioners on the Tribunal?

That number seems to have gone up and down. Many people have recommended it be reduced to three, which it seems to have been at for some time anyway.

Mr. VALENTI. Mr. Moorhead, I really wouldn't fall on my sword if it were three or five or seven. It used to be seven on the FCC, now there are five. I think that to have three with a quorum of two, you could have five with a quorum of three. I would fasten my attention on other things other than the number of Tribunal commissioners. I'll go along with whatever you want. I don't think it's relevant to the supreme issue about which I'm talking.

Mr. MOORHEAD. In other words, the form of the body that's collecting the money.

Mr. VALENTI. The number of Commissioners I don't think is relevant.

Mr. MOORHEAD. Well, we appreciate your being here. We know how busy the three of you are, and we appreciate your coming and giving us your expertise.

Mr. VALENTI. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. I appreciate people coming to testify, but looking at this roomful of very busy people confirms my view that we ought to abolish the thing and let you all go off and do your fighting with each other without us. I don't feel terribly necessary.

I had a chance to note Mr. Mooney's statement; he'll testify later. He said that "the broadcast industry, after 'must carry' was abolished, has renewed its fight to abolish the compulsory license." And that may very well be true of the broadcast industry. I would just like to make it clear for myself, the abolition of the "must carry" rule was not the reason that I decided to be for abolition of the compulsive license; because a former member of this committee on the other side, Mr. Sawyer and I have held that position for some time, and I still do. I was also prepared to abolish "must carry." I am convinced, the more I listen to this, that what was appropriate 10 years ago for a new industry is no longer necessary or appropriate.

I think about difficult decisions the Government is supposed to make. I have a lot of sympathy with the Copyright Royalty Tribunal, because I have never seen anyone come forward in today's market with guidelines that make sense for them. I don't know how much you should charge for those programs. I don't think that is a decision the Government can make, and we're now in a situation where the Copyright Royalty Tribunal makes it, and people don't like that and they ask the courts to change it, and they come

here and they ask us to change it. And we often have to make decisions that we are not terribly expert about.

I do not think there is a decision we are less competent to make than whether or not we should be altering the rates of the Copyright Royalty Tribunal. So I continue to think that this is one whole area of regulation which is a mistake.

But I want to ask you if we don't have a compulsory license, there would be a problem: one, of organization. And we have been told that with all of the cable companies out there and all of the owners of programs, it would be chaotic and impossible and we couldn't possibly make that work.

What would your response be to that? Is it possible to have something workable if we had to go out here and negotiate it all?

Mr. VALENTI. Let me respond to one thing that you said, though you didn't put it in the form of a question. That's about the CRT and its disputatious kind of decision. Keep in mind that every decision of the CRT is taken to court. All parties can seek a review of the CRT's decision, but consistently upheld the CRT in everything. And, as a matter of fact, in the last case which was just decided a few weeks ago, the court of appeals said, "Quit bothering us with this litigation, it's becoming frivolous." Again it upheld the CRT.

Mr. FRANK. Let me tell you, I'm not surprised at that, because the general judicial doctrine is that you defer to administrative decisions unless they are arbitrary and capricious. And when no one knows where anything ought to be, it's kind of hard to say what is arbitrary and capricious. When the CRT pulls something out of the air, that's as good as if some judge has pulled it out of the air. And I think that's the basic problem. There isn't any basic standard against which to judge it, so naturally it's not judged arbitrary and capricious.

Mr. VALENTI. Now, your question, Mr. Frank, was?

Mr. FRANK. What about the transactional problems of organizing a sale. If we did get to this—and I think you're right, it had to be a transition—if we did get to the point where there's no further compulsory license, what about the problem of sale?

Mr. VALENTI. I'd just point out, Mr. Frank, that of the 35 million subscribers today, 65 percent are controlled by 20 companies. You go to 20 buyers. There are almost 2,000 television stations, how many, about 2,000. Our syndication companies deal with 2,000 television stations every day, programming 24 hours a day everything that's on those television stations. There's no compulsory license. I think it would be easier to program cable companies than it would be to program television stations, because there are so many cable networks, over 35 operating today, that are also supplying today. There's no compulsory license, they deal with individual cable systems and they are programming—USA, and CNN, and ESPN, and Lifeline. And all of those are programmed and sold, not under a compulsory license, Mr. Frank, but in the marketplace negotiations. So it would be a piece of cake.

Mr. FRANK. I agree with that I have one further question here. Another argument is, people who don't like cable and feel threatened by it might, absent a compulsory license, refuse to sell or act not as people trying to maximize the economic benefit of a particular transaction, but might try to use the control over a program to

damage cable, injure it, drive it out of business. That wouldn't be the people you represent so much as the broadcasters, the over-the-air broadcasters. And there is a fear expressed that the over-the-air broadcasters, which regard cable as a competitor, would find and use what leverage they had to keep things from being sold to them and try to stop the supply of programming to cable.

Mr. VALENTI. Ever since the Phoenicians invented money, I don't believe that's going to happen. I just don't. I know this, that I think the VCR may or may not be doing severe damage to the movie industry. Moviemakers market their product to the VCR. They market their product to every market where there is a market, that's the business that they're in. I don't see cable as a harsh competitor to television. Indeed, cable carries television stations in its system. If you're on cable and you want to watch Kirk Douglas' movie on CBS, you turn on your cable and there it is. I think that if anybody is parading that through the marketplace, it's a red herring. I just don't think it has any heft at all.

Mr. FRANK. I just would say it seems to me I understand cable's feeling. They have, I think, accomplished the goal of every business person for right now. With what the recent legislation that went through, which essentially gave them a lot more freedom from local control over rates, they have a situation where there is a Government price-fix in their dealings with suppliers and complete freedom to do as they want in their relationship with their customers. And I understand why that is attractive. But I don't understand why we should continue it, and I would hope we could work to find some ways, not right away because I think there'll be some problems, but gradually to phase this out.

I would just reiterate that I agree in substance with the "must carry" decision. I think "must carry" was a mistake and I would rather see us just get rid of both.

Let me just ask you this final question. If you had to choose, and people have talked about this as a package—I don't know anyone who is offering, and I would oppose it—but if the question was a restoration of "must carry" somehow, and somebody found a way to make it constitutional, which I think is dubious but, if there was some way to restore "must carry" and the compulsory license or do away with both, which would you prefer?

Mr. VALENTI. I think you'd better ask that question to Mr. Fritz. It's a broadcasting problem mainly, and, frankly, I am trying to negotiate in very good faith with the cable industry today. I'm going to keep Mr. Fritz totally advised of every step of the way of the cable negotiation. Also I will keep sports interests advised and the independent television stations, so they'll know exactly where those negotiations are going.

But we're not negotiating "must carry" in those negotiations. We're negotiating a simple flat fee.

Mr. FRANK. You're not trying to get "must carry" put back in?

Mr. VALENTI. No. That's not our aim in this. I think you've got to take these things one at a time. I have suggested that the cable industry and the broadcasting industry really sit down together, and just not leave that room until they come up with some kind of a modus vivendi for the future. We're in a very boggy ground right now in trying to negotiate a new renovation of section 111 and the

eventual abolition of the compulsory license, over what I call a reasonable transition period.

Mr. FRANK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Thank you, Mr. Chairman.

Jack, in light of the chairman's comments about your new production and your home video work, and he also mentioned the price of that, my first question is, When do you think we'll be able to go down to Errol's and rent it for $2? Do you think that's coming soon?

Mr. VALENTI. Well, I think there are a lot of places where one can rent very cheaply. I think, though, the marketplace is terribly abused right now. It's in a distended state. If I am a producer of a film, and I sell my prerecorded cassette of "Gone With the Wind" to a video store, he rents it, he doesn't sell it, I do not share in those rentals, ergo, if I'm going to stay in business, I have to put an artificially high surcharge in the wholesale price of that prerecorded cassette, so that I can get some of my rental money up front, because he's not going to share it with me.

If the "first sale doctrine" was also renovated to allow producers to share in sales and rentals, I warrant you tomorrow 90 percent of all the movies in this country would be slashed to about $14, to $16, to $17.95 or $21.95 for purchase, because there is a sales market out there and the consumer is being denied the choice because of the "first sale doctrine" standing athwart an open marketplace.

Mr. DEWINE. Jack, let me move on. I gave you that opening in which you ran through the line very well. [Laughter.]

Let me move on to follow up just for a moment on Mr. Frank's comments, and Barney and I agree as to our philosophy on this item as well. I think, as far as doing away with the Government's whole involvement in this, one nagging question that always comes up, and you did address it a little bit, is the little old lady who is in my district and just loves to watch Ted Turner's superstation. Every time I bring my point up and say, "Gee, the Government ought to get out of this, we shouldn't be doing this, let the marketplace work," the answer always comes back, she won't be able to watch that, that'll go black. They simply cannot negotiate with all the various copyright holders involved. And I didn't quite understand your answer to Mr. Frank's question. I got the impression there's a limited number of people that would have to be negotiated with, and what I am wondering is who are these limited number of people? Why not every copyholder that might be involved?

Mr. VALENTI. What will happen simply in my judgment, Congressman DeWine—and I'm not a seer, but I've been in this business long enough to know how it operates—if, today, we said the compulsory license will be abolished 5 years hence, entrepreneurs would spring up all over this country, and you would have WTBS in the sky being programmed. You might have 20 or 30 program menus, Chicago Cubs, and "Leave It to Beaver," "Magnum P.I." and WTBS has the Braves and "Little House on the Prairie." Each one of these program menu purveyors would license material from copyright owners, just as individual television stations can do today. Then they would have access to a transponder and they

would be sending down to cable systems. Instead of 35 cable networks you might have 45 or 55, all available to cable systems to use. Ed Taylor's satellite service company now sends down WTBS from one of the transponders. Taylor would, or Ted Turner would, organize with copyright owners to program his own station, just as channel 5 programs 24 hours a day here, just as channel 20 does here. They'd do the same thing and make that available to cable systems.

I know that Ted Turner would do that. I look at him with newfound affection now since he's going to be on my board of directors shortly. [Laughter]

Entrepreneurs will be able to move into every breach and be able to serve cable systems with the same alacrity and durability and efficiency they now serve television stations. When I said there were 20 people to deal with, I mean 20 MSO's control 65 percent of the systems. You could sit with one man in each MSO, pay 20 different people, and program for 65 percent of all the cable operators in America.

Mr. DEWINE. One last question. With regard to the negotiations that are now ongoing between you and cable, I know it's always impossible to make any predictions about how negotiations are going, but is there any timetable that you could share with this committee?

Mr. VALENTI. Well, I think Jim Mooney and I have to decide all this together. But I have to say that Mr. Mooney and his people have been forthcoming. I have no fault with our last meeting. I can't complain about it at all. I hope that they would find that same affectionate response toward me and my people. I think that before November has gone, we can come to a conclusion. That's my judgment.

I have not consulted Mr. Mooney on that timetable at all. If he he finds fault with it, I would be willing to back away and find a new deadline. But I'm saying I don't see this lasting longer than the revolution of 1848. I just think that we can do it faster.

Mr. DEWINE. Thank you.

Mr. KASTENMEIER. The gentleman from Oklahoma, Mr. Synar.

Mr. SYNAR. Thank you Mr. Chairman.

And Jack, I started you at 9 o'clock this morning, with Kirk Douglas, and let me tell you, he has nothing on you. [Laughter.]

I don't really have any questions. You did an excellent job; and, as I've told Pat as we were sitting here, "There's just none better, there really isn't."

Let me just express to you what I think is the feeling that Pat and I, and Jim Sensenbrenner, and others have, and Chairman Kastenmeier, with respect to the CRT. As Congressmen, setting aside what you, and Jim, and Eddie want to do with the CRT, we have a responsibility much higher to the American people, that when a Government agency has proved to be ineffective, inefficient and cannot do the job, and when sworn testimony tells us that the commissioners don't show up for work, that they don't keep files, and that the possibility of them making legitimately credible decisions is very remote, that we have to step above the fray which is presently being negotiated with you three and look at, really, what

our responsibility is to the American public, to make Government work. And that's where we're really coming from on this.

And your testimony, which speaks very highly of the CRT, I think, really ignores what I think we're trying to do. Even in the court decision which you quote in your testimony, the court said—and I thought it was very interesting—it says it is the Tribunal which Congress, quote, "for better or worse has entrusted the inevitable mission in dividing up the booty among copyright holders." I think what Pat and I are trying to do is that Congress made the decision for the worst, and now it's time to correct that by moving forward. So I hope you'll appreciate what we're trying to do, because we're not really trying to interfere with what you all are doing. As I think Barney said, maybe we'd be doing you a great service to make all of you sit down and finally work these things out. But it's really our responsibility as representatives to look beyond the individual issues and do our job for the taxpayers, which is to make Government work.

Thank you, Mr. Chairman.

Mr. VALENTI. I want to say I appreciate that. I am a political animal, and I don't think there's any higher responsibility than someone elected to office. I've never been elected to office. I have great respect, really great respect, for that because you do have a higher responsibility than anybody in this room. I appreciate that as well as anybody. I understand where you're coming from.

Our dealings with the CRT have to do with how we're treated at the hearing, how we see the evidence being presented, how we see the decision being written. It's a very tough job because I think of the dense, impenetrable underbrush of the contract and warrant given to them by the Congress.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I have no statement. I join you in expressing appreciation to Mr. Valenti and the others who will appear before us today. Thank you.

Mr. KASTENMEIER. The gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman. I just want to join with the gentleman from Oklahoma in saying that our view of the CRT is a bit different, and that's why we really do feel we must reform it or do something about it. But let me just ask a question, because I don't quite understand.

Intellectual property owners, when they deal with, say, independent television stations, how much different is that royalty than, say, with the networks or with cable? I mean, how does this all compare in the market, where you do have a free market? Are they paying much more?

Mr. VALENTI. I think that you'll find that most television stations will pay about 25 to 35 percent of their gross revenues for programming, whereas the cable industry, on the average, pays about 2 percent of its basic revenues. That isn't gross, it's base. If you took gross, it would be much, much less.

Mrs. SCHROEDER. And what would you say about broadcast? Does broadcast have a percentage——

Mr. VALENTI. Well, I'm saying that television stations.

Mrs. SCHROEDER. You're saying all, individual and——

Mr. VALENTI. Individual television stations will pay about 25 to 35 percent of their gross revenues to buy the programming they then sell to advertisers to draw viewers. Cable pays about 2 percent for the copyrighted programs that come in from distant television signals which they import and on which they pay a compulsory license.

Mrs. SCHROEDER. I think that's an interesting analogy to make, because what I hear you saying, and I think we have to be very sensitive to it, for what I can hear our customers saying of cable is, "The people who are the intellectual property holders are trying to break a deal, they made a deal, that's the deal, and so what the cable's making more money. They are making more money because they're better businessmen. You lost." You know, we shouldn't come in and undo the deal.

Mr. VALENTI. I must say, Congresswoman Schroeder, I've never found anybody in America who was unhappy with receiving for nothing what somebody else has paid for. I don't think anybody ever gets mad at that, and there are lots of people in America today who don't have a place to live. Why don't we provide them with homes at, say, 2 percent what that home costs? Nobody does that. Why? Oh, my God, it would cost taxpayer dollars. Well——

Mrs. SCHROEDER. Do you want us to do that with Jim Mooney?

Mr. VALENTI. I don't think that Agnan Kashoggi should be subsidized if he's a cable system operator. He's got a lot of money. Why do we have to subsidize him?

Remember, the average cable system gets $10 a month, say, from its subscribers for basic service. It pays 20 cents a month per subscriber for its programming. That leaves $9.80, which is the reason why cable companies today have about a 30 or 40 percent return on equity because it's a great cash flow business. Because the principal ingredient in your business is the one you're getting so cheap it's below marketplace value. And that's why cable is doing so marvelously today and, if my contract didn't prohibit it, I'd like to have some stock in cable companies. I think I would have done very well.

Mrs. SCHROEDER. No; I hear you. But as I say, that's one of the problems we're going to have to deal with, is, they're going to say, "But you made the deal."

Mr. VALENTI. Well, I think Congressman Frank said it: "Times change." We had no income tax until 1913. We didn't have Social Security until in the 1930's. We didn't have Medicare until, I'm proud to say, Lyndon Johnson became President. So things change. As President Kennedy used to say, "It is necessary to change when change is necessary," I'm not sure what that means except that it sounded good coming out of his voice, I know that. [Laughter.]

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Well, Mr. Chairman, my only contribution to this dialogue is another quote from President Kennedy: "When you're walking on eggshells, don't hop around." [Laughter.]

I don't know what that means, either.

Having been the beneficiary of the focus of so much of Mr. Valenti's remarks, it would be very ungracious of me to ask any questions of an adversarial nature. And a question isn't worth asking if

it isn't adversarial, so I will yield back my time, commending this witness on his usual illuminating performance.

Mr. FRANK. A lot of people may start being nice to you now, Henry. [Laughter.]

Mr. HYDE. I'm trying to nurture that.

Mr. VALENTI. I embrace you immensely, Congressman Hyde.

Mr. KASTENMEIER. I thank our colleague.

The gentleman from California, Mr. Berman.

Mr. BERMAN. I have no questions.

Mr. KASTENMEIER. No questions?

The gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. No questions.

Mr. KASTENMEIER. Well, that concludes questioning of you, Mr. Valenti, and we thank you very much for your presentation.

Mr. VALENTI. Thank you.

Mr. KASTENMEIER. Next, the Chair would like to call on Mr. James P. Mooney, president of the National Cable Television Association. NCTA is the cable television industry's principal trade association. There is at least one other, but NCTA does represent more than 2,000 cable television systems in existence throughout the United States. It may or may not be Mr. Mooney's first formal appearance before the subcommittee, but I certainly attest he's well known to us.

Prior to his going to work for the NCTA, Jim served with the House of Representatives for 4 years as chief of staff to the majority whip. And as vice president, now president, of NCTA, Jim Mooney has maintained a very close and open working relationship with the subcommittee, which we appreciate.

Mr. Mooney, we're pleased to have you here.

TESTIMONY OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. MOONEY. We appreciate the opportunity to appear before you and discuss not only the proposed reforms of the CRT but also the operation of the entire system created by Congress in 1976. Mr. Chairman, we applaud you in particular for the efforts you and other members of the subcommittee, including Mr. Synar and Mrs. Schroeder for their bill, have made to try to sort out this rather difficult issue. It seems that every several years the same cast of characters comes before you to make roughly the same set of claims, and the fact that you persist in attempting to find a solution to this now familiar tangle of problems is testimony not only to your persistence but also to your patience.

Let me begin, therefore, with only a brief nod to history. As you know—as, Mr. Chairman, you, yourself, alluded—the Supreme Court had made it clear, prior to 1976, that cable television systems could retransmit broadcast signals without any copyright liability. Copyright owners then persuaded Congress, as part of the Copyright Reform Act, to establish copyright liability for retransmission of broadcast signals in tandem with the compulsory license granted by Congress to cable operators for such retransmissions.

This compulsory license was, and, I believe, continues, to be necessary as a practical matter, because broadcasters, typically, do not

own the retransmission rights to the programming they carry and the prospect of thousands of cable systems having to negotiate with thousands of copyright owners over retransmission rights, to all the programming carried in a broadcast day, never mind a broadcast week, or month or year, was correctly perceived as impossible. In return, of course, Congress also prescribed that cable operators should pay statutory royalty fees for the use of such programming.

These cable royalty fees are now approaching $100 million per year, or an average of $2.50 for each cable household. It is a substantial sum of money, and despite frequent assertions that cable royalties amount to peanuts, I think Hollywood has lately come to regard its cable royalties as something more than that.

Mr. Valenti has done me the courtesy of referring to my statement in his own testimony, and I think that it is incumbent upon me to respond; and, indeed, I'm happy to, because it gives me the opportunity to respond to a canard which has pervaded this discussion for the past several years.

Now, Jack said, "It costs them less than a postage stamp to send a bill to their subscriber than it costs them for all of their programming to serve that subscriber." If you look at the appendix to Mr. Fritts' testimony, you find much the same statement. From table 1:

> It is clear that broadcast stations are spending a much greater amount for programming per television household than cable systems are spending per subscriber.

It's only when you look at the next sentence, where you see what is being talked about here: "Nationally, the average broadcast station is spending $8.73 per television household for programming production and news. Cable systems, on the average, spend only $1 rate per subscriber for carriage of a broadcast station's signal." I would amend that, what they mean is "distant signal."

Mr. Valenti's statement and the statement which had been made so many times by others attempts to compare the total cost to a broadcast station for all of its programming to cable copyright royalties, as if cable copyright royalties were the only payments that cable systems make for their programming; and that, of course, is not true. On average, I'd say—I'd guess—that distant signals represent only somewhere between 10 and 15 percent of the amount of total programming carried on the average cable system, and, therefore, it should not be surprising that distant signals represent only a relatively small fraction of the cost of the cable operator for programming to carry on that system—to borrow Mr. Valenti's words, for all their programming to serve that subscriber.

Mr. KASTENMEIER. If I may interrupt on that point.

Mr. MOONEY. Yes, sir.

Mr. KASTENMEIER. It is correct that more or less 2 percent is being paid for distant signals under compulsory license for copyright?

Mr. MOONEY. That is correct.

Mr. KASTENMEIER. You have alluded to all the rest of the programming for which there is our program costs——

Mr. MOONEY. We pay for that——

Mr. KASTENMEIER [continuing]. Which may or may not be copyright cost, per se.

Mr. MOONEY. Sure.

Mr. KASTENMEIER. But much of that would be imputed copyright. They're not necessarily charged as copyright, I take it.

Mr. MOONEY. That is correct. There are a great many things that go into those costs, but what I'm addressing is the statement that "than it costs them, for all their programming" in one place, and "than cable systems are spending per subscriber." I mean, you've got an apples-and-oranges comparison here, which are customarily contained in statements that, my friends, Messers Valenti and Fritts, make on this subject and I find that modestly bizarre.

But to continue, Mr. Chairman, what do we think is the problem, then, with the current system?

Well, to begin with, basic principles—and I'm almost sorry that Mr. Butler of Virginia is no longer on this subcommittee, because I remember him putting this question several years ago, when I was not the witness and I was dying to answer it—the purpose of copyright is not merely to reward the creators of intellectual property but also, indeed especially, to safeguard the interest of the public in widespread dissemination of artistic and intellectual works.

Following from that the Supreme Court held as long ago as 1834, in a case involving the reporting of its own proceedings, that there is no common law right of an author to retain sole control over distribution of a work once it is published; to the contrary, the exclusive rights to a copyright or patent are customarily granted by Congress subject to such qualifications and limitations as Congress sees fit to impose.

As Mr. Justice Stewart put it more recently, the limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.

Now, in this instance the public has a demonstrable interest in having a multitude of television viewing alternatives. That's why Congress enacted the compulsory license in the first place. Yet, the CRT, as well as the Copyright Office, have customarily taken the view that their only mandate is to use every exercise of discretion as an opportunity to raise the cost of distant-signal carriage, and, therefore, to discourage—Mr. Chairman, do you want me to suspend this while you go vote?

Mr. KASTENMEIER. Following your text, you are about to give us some examples. I think, before you start that, Mr. Mooney, it would be best for us to recess for about ten minutes, to make a recorded vote on the House floor, after which time we will return and resume.

The subcommittee stands in recess.

[Recess.]

Mr. KASTENMEIER. The committee will come to order. We will resume. Other members will be arriving soon.

I regret that the 10-minute recess was for 1 hour. I apologize to witnesses and to others in attendance for the long break.

I will ask Mr. Mooney if he will continue with his statement where he left off. Others will be here, but in view of the lateness of the hour, we will not want to hold off any further. We had four

consecutive votes, which, as the witness well knows, can take an hour away from us. But we have now concluded the day, so we won't be bothered further.

Mr. Mooney.

Mr. MOONEY. Mr. Chairman, I was just saying that the CRT and the Copyright Office have customarily taken the view that their only mandate is to use every exercise of discretion as an opportunity to raise the cost of distant-signal carriage, and, therefore, to discourage it.

Since I know that you and counsel are at least as familiar with the examples I'm about to cite as I am, I think that, in the interest of time, I may skip reading them and go directly to the point I'm trying to make here, which is that while I certainly don't attribute malevolence or ill will to any individual who has held appointed or staff office in either the CRT or the Copyright Office, I think that the constant tendency of these agencies to come down uniformly on the side of the copyright owners are merely symptoms of what apparently is a law of physics operating in these agencies: whenever given an opportunity, they come down in favor of the copyright owners, no matter how peculiar looking the result, and with little or no regard for the interests of the viewing public. And while a great deal of attention has been paid in recent months to the quality of appointments made to these agencies, particularly to the CRT, I don't think anyone can say with certainty that the appointment only of copyright experts, either to sit on the Tribunal or to run the Copyright Office, would significantly change the result. One reason for this is perhaps that most people with professional expertise in the copyright area tend to see copyright only as a device to protect copyright owners and to lose sight of the public interest of promoting broad public dissemination. To the degree that there is public interest oriented expertise on copyright in the Government, it tends to exist only in the Congress and in the judiciary.

I am here opposing a weakness in the system which goes somewhat beyond the specifics of the cable-copyright issues with which the committee has been bedeviled for the last 9 years, yet I believe that the tendency of copyright professionals to reach too far in protecting the interests of the copyright owners is, in fact, the underlying cause of most of this continuing argument. I can't say that I have any precise solution to recommend to you today, but as your committee considers these issues, I would urge you to give top priority to solutions which, to the greatest degree possible, minimize the opportunities for administrative exercise of discretion. In some areas the regulatory approach works well. In this one it merely serves to make endless the controversy.

Mr. Chairman, I should not stop before noting that which everyone knows, which is that the broadcasting industry has mounted a major effort to have the compulsory license repealed in the wake of the action of the U.S. Court of Appeals here in the District, striking down the must-carry rules as unconstitutional. The broadcasters, of course, don't have much in the way of a copyright interest, per se, as they tend not to be major copyright owners. What they do want, however, is leverage to force the cable industry to accept a deal to reimpose a must-carry requirement which the court said

was unconstitutional, and they're seeking to employ the processes of the Congress to achieve that end.

And I would interject, at this point, that I have always found it a little surprising, and, indeed, incongruous, that broadcasters can be much vehement champions of the first amendment when it comes to intrusions on their own editorial freedom, when, for example, it comes to things like the fairness-in-equal-time doctorines, but to be so cavalier in their demand that other first amendment players should have their channel capacity expropriated when it suits the broadcasters' interest.

Now, the must-carry rules have been around for 20 years, and I can understand how concerned the broadcasters are about losing this protection, but for a long time must-carry has been an open scandal. Cable systems have been forced to use up limited channel capacity to carry the same broadcast network two, and, in some places, even three times. We've been forced to carry signals nobody in the cable franchise area wants to watch; even in one instance a channel that had to be brought in by microwave from 100 miles away.

All of this has had a chilling effect on the ability of cable operators to satisfy the viewing interests of their subscribers. It has had a chilling effect, also, on the development of made-for-cable programming. All of this has taken place, too, as the broadcasting industry gradually freed itself from any obligation to originate local programming or demonstrate in any significant way that they program their signals with an eye to the public interest. As Judge Bork pointed out in the oral argument in the Quincey-Turner cases, must-carry turned out to have as its objective the protection of local broadcasters rather than local broadcasting.

Mr. Chairman, I'd be less than candid if I didn't say that a negotiated settlement of this problem once might have been possible. Over the past several years, we both publicly and privately implored the broadcasters to join in working this problem out, suggesting to them that the court might, otherwise, take it out of the control of either of us. The broadcasters did not take up these invitations. And if they're now upset and surprised that the court had finally acted, that, by itself, isn't a reason to give them what they want. Like the courts, the FCC, and, we hope, the Congress are likely to respond only to arguments that action is needed to protect the public's interest.

I would, therefore, respectfully suggest to the committee that the appropriate congressional response to the latest must-carry developments ought to depend not so much on the shock and outrage of the broadcasters but on whether there really is a problem. Cable systems remain very much in the business of retransmitting local broadcast signals and other programming that people want to see. It does us no good to make our subscribers unhappy, and I know of no cable operator anywhere who intends to drop former must-carry signals on a wholesale basis. That would be extremely foolish and contrary to our own business interests.

Mr. Chairman, that concludes my oral presentation. We have a somewhat longer document we're going to offer you for your record. And let me say that we stand ready to help you in any way that you require as you undertake this somewhat difficult task.

Mr. KASTENMEIER. Without objection your longer statement will be received for the record and made part of it.

[The complete statement of Mr. Mooney follows:]

STATEMENT OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. Chairman, members of the Subcommittee, my name is James P. Mooney, and I am President of the National Cable Television Association. NCTA is the principal trade association of the cable television industry. Its members include more than 2,000 cable television systems operating throughout the United States, serving approximately 29 million homes.

NCTA appreciates the opportunity to appear before you today to discuss not only the proposed reforms of the Copyright Royalty Tribunal, but also the operation of the entire cable copyright system created by Congress in 1976.

Mr. Chairman, we applaud you for the efforts you and other members of the subcommittee, particularly Mr. Synar and Mrs. Schroeder, have made to try and sort out this rather difficult issue. It seems that every several years the same cast of characters appears before you to make roughly the same set of claims, and the fact that you persist in attempting to find a solution to this now familiar tangle of problems is testimony not only to your persistence, but to your patience. Let me begin, therefore, with only a brief nod to history.

As you know, the Supreme Court had made it clear prior to 1976 that cable television systems could retransmit broadcast signals without any copyright liability. Copyright owners then persuaded Congress as a part of the Copyright Reform Act to establish copyright liability for retransmission of broadcast signals in tandem with a compulsory license granted by Congress to cable operators for such retransmissions. This compulsory license was necessary as a practical matter because broadcasters typically do not own the retransmission rights to the programming they carry, and the prospect of thousands of cable systems having to negotiate with thousands of copyright owners over retransmission rights to all the programming carried in a broadcast day—never mind a broadcast year—was correctly perceived as impossible. In return, of course, Congress also prescribed that cable operators should pay statutory royalty fees for the use of such programming.

These cable royalty fees are now approaching $100 million per year, or an average of $2.50 for each cable household. It is a substantial sum of money and despite frequent assertions that cable royalties amount to "peanuts", I think Hollywood has lately come to regard its cable royalties as something more than that.

What is the problem, then, with the current system? Well, to begin with basic principles, the purpose of copyright is not merely to reward the creators of intellectual property, but also—indeed, especially—to safeguard the interest of the public in widespread dissemination of artistic and intellectual works. Following from that, the Supreme Court held as long ago as 1834 that there is no common law right of an author to retain sole control over distribution of a work once it is published. To the contrary, the exclusive rights to a copyright or patent are customarily granted by Congress subject to such qualifications and limitations as it sees fit to impose in furtherance of the public interest.[1] As Mr. Justice Stewart put it more recently, "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[2]

In this instance, the public has a demonstrable interest in having a multitude of television viewing alternatives. That is why Congress enacted the compulsory license in the first place. Yet the CRT as well as the Copyright Office have customarily and chronically taken the view that their only mandate is to use every exercise of discretion as an opportunity to raise the cost of distant signal carriage, and therefore to discourage it.

Let me give you some examples:

In 1980, the FCC rescinded its distant signal limitation rule as contrary to the public interest.

The CRT, which in its proceedings follows no discernable procedural rules, then decided that the rate for each new distant signal allowed by the FCC action ought to

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[1] *Wheaton* v. *Peters*, 33 U.S. 591 (1834).

[2] *Twentieth Century Music Corporation* v. *Aiken*, 422 U.S. 151, 156 (1974).

be 3.75% of gross basic revenues. That single action, raising the cost of some distant signals by over 1,500%, forced cable systems serving 10 million homes across the country to drop signals temporarily enjoyed by their subscribers. The then Chairman of the Tribunal subsequently was quoted in the trade press as having said the CRT didn't agree with the FCC's action in dropping the distant signal rules, and that the CRT was acting to reimpose them via the copyright pricing mechanism.

The Copyright Office, which is supposed to have merely a ministerial role in collecting cable royalties, has repeatedly structured its payment forms to require cable consumers to pay for signals they don't even receive.

The Copyright Office currently treats contiguous systems under common ownership as a single cable system for copyright royalty purposes, regardless of the programming carried by each system. Yet these systems are generally programmed independently of each other and frequently do not provide all of the same programming. Under Copyright Office rules, consumers are charged copyright royalties for distant signals imported into a neighboring system, even if their system does not carry those signals.

A dramatic illustration of this inequity recently occurred in Pittsburgh. A cable company, which owns systems in several suburbs of Pittsburgh, acquired the franchise for the city itself. A total of six distant signals were provided over all the systems; but the most any single system carried was two, and which two varied from system to system. With the acquisition of the franchise for the city of Pittsburgh, these independent systems became one single, contiguous system for copyright royalty purposes. Under the Copyright Office's rules, royalty would be charged against the revenues for all cable subscribers for all six different signals, even though the total number of distant signals received by any individual cable subscriber was only two, forcing consumers to pay more than $2,000,000 a year extra in copyright royalties without receiving any additional programming. The cable systems dropped four distant signals in order to prevent this excessive burden on consumers.

The impact of these rules is also felt in smaller markets. For example, the cable systems in Newton, Sedgwick, Holstead, and Valley Center, Kansas are all owned by the same company, even though they are franchised separately. Their copyright expenses are twenty-five to thirty-five times higher than they would be if each system filed by itself. Worse yet, their combined gross revenues cross the threshold of form 3 systems, subjecting them to the highest cable copyright rates, even though none of the systems brings in sufficient revenue to count as a form 3 system by itself.

In addition to the contiguous system problem, consumers are required in another way to pay for programming they don't receive. Because of the accounting mechanisms established by the Copyright Office under the Act, consumers must pay copyright royalties on distant signals based on the system's subscriber revenues for a six-month period, even if the signals were not provided throughout that six-month period. The result: Consumers either pay for programming they do not receive, or else they are deprived of the programming against their wishes.

Situations such as Kernersville, N.C., are not uncommon. There the cable systems was forced to drop WCCB from Charlotte, a popular distant signal, because a new UHF station qualified for carriage under the old must-carry rules. Even though the new station was not scheduled to come on the air until September, the cable system was forced to drop WCCB in June. Otherwise, copyright royalties would have to have been paid through the end of the year for WCCB. Faced with paying for a service it could not deliver, the system was forced to drop WCCB, leaving consumers with a channel with no programming at all.

It should be noted that the Copyright Act itself requires payment of a minimum copyright fee by consumers through their cable systems, even if their system carries no distant signals at all.

This situation exists today in Newhall, California. The cable subscribers there have repeatedly requested WTBS and WGN. There is no room on the inexpensive basic tier; the distant signals could be offered only on higher priced tiers. Because of Copyright Office rules, the placement of these services on a higher tier would more than double the copyright bill of the system, pricing WGN and WTBS out of the market. Nevertheless, even though no distant signals are provided in Newhall, consumers there still are forced to pay $16,000–$20,000 per year under the minimum payment provision of the Act.

Another major problem is that the Copyright Office takes the position that if distant signals are only offered on a tier which is taken only by a portion of the subscribers within a given cable system, all of the subscribers on the system must nonetheless pay copyright royalties. This so-called "tiering" policy of the Copyright Office is currently one of the subjects of a lawsuit NCTA has brought in the U.S.

District Court here in Washington, but so far the case has been stalled in discovery and I can't say any relief is in sight.

Meanwhile, consumers suffer. In Chamblee, Georgia, for example, the cable system offers WOR and WGN on an expanded second basic tier. Under the Copyright Office rules, royalties are computed on both the basic tier and the expanded basic tier. In effect, then, consumers who purchases only the first tier are paying royalties for WGN and WOR, programming they do not receive.

Mr. Chairman, the above are merely symptoms of what apparently is a law of physics operating in the copyright bureaucracies. Whenever given an opportunity they come down in favor of the copyright owners, no matter how peculiar looking the result, and with little or no regard for the interests of the viewing public.

And while a great deal of attention has been paid in recent months to the quality of appointments made to these agencies, particularly the CRT, I don't think anyone can say with certainty that the appointment only of copyright experts either to sit on the Tribunal or to run the Copyright Office would significantly change the result. One reason for this is perhaps that most people with professional expertise in the copyright area tend to see copyright only as a device to protect copyright owners, and to lose sight of the public interest of promoting broad public dissemination. To the degree that there is public interest oriented expertise on copyright in the government, it tends to exist only in the Congress and the judiciary.

Mr. Chairman, I am here posing a weakness in the system which goes somewhat beyond the specifics of the cable copyright issues with which this committee has been bedeviled for the last nine years. Yet I believe that the tendency of copyright professionals to reach too far in protecting the interests of the copyright owners is in fact the underlying cause of most of this continuing argument. I can't say I have any precise solution to recommend to you today, but as your committee considers these issues I would urge you to give top priority to solutions which to the greatest degree possible minimize the opportunities for administrative exercise of discretion. In some areas the regulatory agency approach works well; in this one, it merely makes endless the controversy.

Mr. Chairman, I should not stop before noting that which everybody knows, which is that the broadcasting industry has mounted a major effort to have the compulsory license repealed in the wake of the action of the U.S. Court of Appeals for the District of Columbia in striking down the must carry rules as unconstitutional. The broadcasters, of course, don't have much in the way of a copyright interest, per se, as they tend not to be major copyright owners. What they do want, however, is leverage to force the cable industry to accept a "deal" to reimpose a must carry requirement that the court said was unconstitutional, and they are seeking to employ the processes of the Congress to achieve that end.

NCTA does not believe that there will be sweeping changes in carriage of local broadcast signals. Most local broadcasters provide programming that consumers want to watch, so cable operators will continue to deliver these signals.

Local broadcasters receive significant economic benefit from carriage on cable systems. This is a major reason behind why they fought so hard to retain the must-carry rules and why they are now so upset that the Court of Appeals has held these rules unconstitutional. This Subcommittee is well aware that it is also a major reason why there is no copyright liability for retransmission of local signals.

Broadcasters sell advertising during their programming based on the market share that show achieves. The more people that watch, the more expensive the advertising time and the more profit for local broadcasters. Cable increases market share by supplying a picture frequently superior in quality to that which can be received over the air. By providing this picture and guaranteed access into homes, cable increases the viewership of local TV programming, allowing broadcasters to charge more for advertising time.

Broadcasters have engaged in some death-defying leaps of logic in an attempt to create some policy link between mandatory carriage of cable signals and the copyright compulsory license. This issue is not new to this Subcommittee. As Congress fully recognized in 1976, the only connection between must-carry and compulsory license is that must-carry rules have been used as one convenient yardstick by which to determine whether a broadcast signal is local or distant to a cable system.

The compulsory license was specifically designed to continue to function in the absence of must-carry rules. For the purpose of distinguishing between local and distant signals, the 1976 Act locked in the rules as they existed then and further provided that subsequent changes in the FCC's must-carry rules would be irrelevant to this use. This lack of connection is also seen in your bill H.R. 3108, Mr. Chairman, which clarifies the local status of low power television stations, even though these stations never qualified for must-carry status.

Mr. Chairman, the must carry rules have been around for twenty years and I can understand how concerned the broadcasters are about losing this protection. But for a long time, must carry has been an open scandal. Cable systems have been forced to use up limited channel capacity to carry the same broadcast network two, and in some places even three times. We've been forced to carry signals nobody in the cable franchise area wants to watch, even in one instance a channel that had to be brought in by microwave from a hundred miles away.

All of this has had a chilling effect on the ability of cable operators to satisfy the viewing interests of their subscribers, and has had a chilling effect also on the development of made for cable programming. All of this has taken place, too, as the broadcasting industry gradually freed itself from any obligation to originate local programming or demonstrate in any significant way that they program their signals with an eye to the public interest. As Judge Bork pointed out in the oral argument on the *Quincy-Turner* cases, must carry turned out to have as its objective the protection of local broadcasters rather than local broadcasting.

A negotiated settlement of this problem once might have been possible. Over the past several years we both publicly and privately implored the broadcasters to join in working this problem out, suggesting to them that the courts might otherwise take it out of the control of either of us. The broadcasters did not take up these invitations. If they now are upset and surprised that the courts have finally acted, that by itself isn't a reason to help them out. Like the courts, the FCC and we hope, the Congress, are likely to respond only to arguments that action is needed to protect the public's interest.

I would therefore respectfully suggest to the Subcommittee that the appropriate Congressional response to the latest must carry developments ought to depend not so much on the shock and outrage of the broadcasters, but on whether there really is a problem. Cable systems remain very much in the business of retransmitting local broadcast signals and other programming that people want to see. It does us no good to make our subscribers unhappy, and I know of no cable operator anywhere who intends to drop former must carry signals on a wholesale basis. That would be extremely foolish and contrary to our own business interests.

Mr. Chairman, we stand ready to help you in any way that you require as you address yourselves to this rather difficult set of problems.

Mr. KASTENMEIER. I'll take this opportunity to say, without objection, that we will insert into the hearing record written statements provided to the subcommittee by the Public Broadcasting Service, Lewis L. Christianson, president, and major league baseball, Edwin M. Burson, executive vice president. These will follow the presentations of our last witnesses for the day.

Thank you for that statement, Mr. Mooney. I think we all appreciate that some of the issues that are discussed here today appear to be tangential to the question of administration of the copyright system, but, nonetheless, seem to play a real role in terms of, if nothing else, balancing the equities among parties or between industries. And, of course, I am pleased by the report, as the gentleman from California, Mr. Moorhead, indicated, and Jack Valenti in response to him indicated, that there are discussions going on which might prove out to be better solutions for certain problems between cable and program owners.

One of the—and I ask for your comment—difficulties with the CRT has been alluded to by a couple of my colleagues, Mrs. Schroeder and Mr. Synar, but also generally in the litigation that has ensued. In fact, the most recent court decision was highly critical of the boundless litigiousness, or, in fact, went on to talk about litigation to the hilt, and talked about a highly litigious copyright owner subculture.

I don't know whether that can be cured, do you?

Mr. MOONEY. That is one of the points.

Mr. KASTENMEIER. Does this have anything to do with the Copyright Royalty Tribunal?

Mr. MOONEY. That's one of the points I'm trying to get to in my testimony today. And, indeed, I think you know that our usual presentation in this biennial exercise is to recite horror stories. But I think that the current system has, as its major problem, too many irritants and too many opportunities for controversy built into it. And I know that both MPAA and NCTA are very interested in trying to jointly present to the committee and to the Congress recommendations that would have the effect not only of resolving many of the differences which have separated these two industries on these issues, but also in attempting to take out of the system some of the built-in burrs that have kept these controversies going for the last 9 years.

Now, in order to do that, I think that you probably have to come up with a concept that is relatively novel to the debate, and would have the effect of significantly changing the theory of the system. And, in that respect, I think the various flat-fee ideas which have been talked about may have some promise.

Mr. KASTENMEIER. As I was indicating, there are a number of questions which have been raised. I would observe that I think the cable industry—and perhaps you should be complimented—has done well recently, both with respect to deregulation, and also in terms of a Supreme Court decision on "must carry" as well. While one can count, perhaps, 3.75-percent rate decision as a setback, nonetheless the deregulation by the FCC which preceded that decision has to be considered a significant boost for cable. Therefore, viewed in its totality, cable has done quite well, not only in the marketplace but in terms of the rules that govern it.

In that regard, and since you are also in the process of talking to others including MPAA, isn't it possible for you to discuss the question of "must carry"?

Now, "must carry," we know, is basically a communications policy issue, but it is interfaced with copyright. The parties, very clearly can't be ignored. In your statement, you seem to foreclose the possibility of negotiations much as Mr. Reagan does when discussing star wars in terms of negotiability with Gorbachev. I hope you're not going that far, however.

Mr. MOONEY. I hope we shall not be called upon, also, to defend star wars, Mr. Chairman.

Mr. KASTENMEIER. With respect to "must carry," there have been several instances reported—how accurately I'm not in a position to debate the question—which suggest that certain cable operators have taken the initiative, now that "must carry" is no longer in force, to presume to charge local broadcasters or broadcasters who would otherwise be covered under "must carry," for carrying their signal. While this is not frequent, nonetheless it has occurred. Several cases suggest that this possibility at least exists and that part of the triad—that is the broadcast industry versus the cable industry versus the motion picture industry, that are represented here today—is implicated. And I'm wondering whether that is negotiable, whether that is a practice which we're going to see more of.

I'd like to also ask you whether it might be possible to write a statutory provision which, if "must carry" isn't resumed in any sense, either through the appeal process or through other litigation or through FCC rules revision, and there doesn't seem to be an

awful lot of chances for it at this point which would forbide a cable operator for charging local broadcasters for carrying a signal.

If you're free to carry the signal or not free to carry the signal, that is one thing; but obviously, if you can also charge for the signal, that puts the parties in a different environment as far as, not just dollars, but relationship.

What is your response to all of that?

Mr. MOONEY. I think you've asked an important series of questions there. Let me respond both to your observation about the cable industry's fortunes and to the questions you've asked about "must carry."

You are quite right, that we have been extremely fortunate in recent years in the sympathetic ear which has been lent to our policy arguments by the FCC, by the Congress, and by the courts. And I can report to you that, notwithstanding the fact that we have had what many people regard as a rather successful experience in public policy recently, we are, nonetheless, extremely conscious as an industry as to our public interest obligations. And I think that, just in the conversations I've had for the past several months, with not only the heads of major cable companies but also with small cable operators as well, that this consciousness that we do, in fact, have public interest obligations and an obligation to our subscribers, is something that will continue to guide us, not only because it is good social practice, but it's also good business.

Now, as to "must carry," I suggested to you in my prepared statement that we'd spent a couple of years imploring the broadcasters to try and work this out. And I can remember, just as an example, a day last winter when, at my request, I was granted an audience with several of the heads of the largest, and, therefore, probably the most politically consequential, group of broadcast owners in this country, and made to them the case that "must carry" was being applied in a way that was not only outrageously burdensome on the cable operator but irrational, and that they could not expect this condition would be allowed to prevail forever, that sooner or later it was going to catch up and that the likelihood was that it would catch up in the not-too-distant future in the judiciary, as part of first amendment litigation. And the only answer I got was the statement, "That's not what our lawyers tell us," and they shrugged.

It was not until after oral argument in the *Turner-Quincy* case that I heard from them again. It is one thing to work out a compromise when the constitutional issue is merely theoretical and something else to do it after a court that speaks with the authority of the U.S. Court of Appeals for the District of Columbia has come down squarely on one side of that issue. And I, frankly, have some difficulty, notwithstanding the obvious political exigencies that attend this issue, in figuring out how it is that I'm to go to the table and immediately start bargaining away the cable industries first amendment rights. But with respect to signal carriage of broadcast stations, I don't believe, as I said in my prepared statement, that you're going to see wholesale dropping of broadcast signals from systems simply because it's not in our interest to do so. People want to see these signals. It's been part of the reason, in fact a good part of the reason that people sign up for cable service.

Cable retransmission significantly improves the quality of your picture; which is something that we like about it, that subscribers like about it, and, indeed, the broadcasters like about it, too.

As to cable operators charging broadcasters for carriage of their signals, I do not think there will be a significant incidence of that. Our experience in this last week, in chasing down the anecdotal horror stories that have been spread around this institution and the other body, has been uniformly that these anecdotal horror stories are imaginary.

I have a document, which I'm happy to submit for your record, which addresses the experiences of the now very famous gentleman from South Carolina and his experiences on Hilton Head. But I would add to that that if the committees of the Congress believe that there is some extant difficulty in a balancing way with respect to cable operators charging for the carriage of local signals, for which cable operators also hold a compulsory license, we would respond sympathetically to those concerns and I'd be willing to talk about that.

Mr. KASTENMEIER. Well, I think so long as the theoretical possibility exists, that it is an issue.

Mr. MOONEY. And I do not incidentally regard that, lest others take the position that that, is some kind of major shift in our position. I would say that I do not regard that as a big deal, because I don't think there is any significant attempt on the part of the cable industry to charge for carriage.

Mr. KASTENMEIER. I would not quarrel with that analysis, I think that analysis is correct. But as long as the possibility exists, as long as there may be some cases, as long as the test is as indefinite as what you believe your subscribers want, then I would suspect that broadcasters still are in a position in their market of being literally subject to sufferance in terms of cable operators, usually a single operator in the community. I understand the implications of the decision. The circuit court made the decision in good faith, and, as you point out, on a high ground that it's on a constitutional issue which certainly, causes the parties, and maybe the FCC, and certainly the Congress, to regard that issue as more difficult to tend to. We certainly have to take note of the fact that the decision was on constitutional grounds and may not be easily tampered with by statute.

The other option that some members of this committee discuss is, of course, terminating the compulsory license. While on the face of it termination does not necessarily seem a quid pro quo, since only a small percentage of compulsory license revenues, 5 percent or less, go to television broadcasters. Broadcasters are not the primary interface here. Nonetheless, elimination of the compulsory license has been a continuing issue of many interested and out of the wake a "must carry" decision tends to reappear.

I would ask you what relationship, if any, do you see between the "must carry" decision and the compulsory license? Do you see any relationship from your perspective as a cable representative?

Mr. MOONEY. No, I really don't. "Must carry" was premised on a policy originally promulgated by the FCC and now rejected by the FCC, which attempted to regulate the competitive relationship between cable and broadcasting. Broadcasting had been selected quite

openly and avowedly by the Commission as God's chosen instrument for the delivery of television into the American home, and anything that tended to interfere with that, even in the sense of offering significant competition, was to be discouraged. And I think that the point that the court of appeals made here in its opinion announced in July was right on that point. For 20 years the rule had been in effect, and for 20 years the Commission, or, for that matter, anybody else, had failed to come up with a rationale which justified the continuance of the rule in the face of the first amendment.

The Copyright Act, on the other hand, is founded on different premises. It is founded on the proper relationship between owners and users of copyright programming. It is true that broadcasters buy the rights directly from copyright owners to broadcast programming within their own license areas, but all they buy are the broadcast rights. They don't buy the programming outright, they don't then, therefore, own it. They certainly don't own the sublet rights. And the premise of the cable provisions of the Copyright Act are that cable operators who pick up those signals, transport them to distant points and use them, should provide some reasonable form of compensation to the owners, thus the royalty. And I think that the fact that broadcasting interests only, normally, manage to acquire about 4 percent of that pot is eloquent testimony to the limited interest they actually have in copyright per se. So, in one area I think you've got a compensation interest, in the other area you have discontinued rationale having to do with competition between industries. And, you know, this is not something that's unique. This is not a unique event in the American regulatory landscape. As the Government, under both Democratic and Republican administrations, for the past 10 years has moved to deregulate various industries, so those industries have been less protected from competition by others offering similar or substitutable services. And, you know, we're running into this right now, with backyard dishes. Pretty soon we'll have KU-band satellites and there is the enthusiasm of the FCC for multichannel MDS, and so forth. And sure, it's a hard world out there, but I don't think that the award of a broadcast license ought to carry with it the right to expropriate somebody else's property free of charge, without even a royalty. And that's really what has been going on here.

Mr. KASTENMEIER. I'm perfectly willing to accept your point of view that at the present time it is not contemplated by cable, as an industry, that the elimination of "must carry" will result in the charging of fees by cable operators of television broadcasters. I think it should be observed that the industries and the technology, if anything can be said about them, are very fast moving. What is today's view and policy, 2, or 3, or 5 years hence may need be something else.

I remember, for example, Mr. Wheeler, your predecessor, or someone else, expressing the point of view that cable television would never be in a position of moving against another emerging technology. Cable television didn't want to place itself in that position, even as it had been placed at a disadvantage with respect to—or at least ought to be put in that position—perhaps by program owners or by broadcasters. And yet, as time goes on, we see new

technologies that are literally exploding in this country; such Earth stations and even videocasette recorders it is perceived by cable operators that these new technologies may, in fact, pose a problem for the industry. So, it is in that sense that what is perhaps accepted today, 2 or 3 years down the line may not be the case, and we may get into a practice of, if nothing is done, cable operators deciding to charge broadcasters locally.

Mr. MOONEY. Well, Mr. Chairman, I understand your point. And believe me, we have taken it much to heart. And there is a very strong consciousness in the cable industry that what the Congress and the FCC give, they can take away, and that it is not as we have achieved a state of nirvana.

I would just make the comment, though, with respect to other technologies, that during the history of the cable industry's involvement in regulatory matters, we have deliberately and consistently sought to avoid achieving our objectives through the suppression of other media and other technologies. And this is not just, you know, a bland statement on my part, this is demonstrable through the record; because there have been plenty of opportunities to do it, and, indeed, there are still some opportunities to do it today. And the reason we have done that has been because we understand, indeed, in some respects, we have good reason to understand, the unfairness of regulatory devices being used to suppress one technology or one interest in the interests of another. And, from time to time, I won't say that this doesn't cause us internal problems, but I think it has been a good policy, and, so long as I'm around, it's the one we will continue to pursue.

Mr. KASTENMEIER. Well, I appreciate your excellent testimony today. I thank you for your appearance. And, as I said before, we will also be pleased to receive related materials. Thank you.

Mr. MOONEY. Thank you.

Mr. KASTENMEIER. Next, I would like to call our last witness. He is, indeed, Edward O. Fritts, who is president of the National Association of Broadcasters. He has been president for almost 3 years, since October 1982. Before that he was president and owner of the Fritts Broadcasting Group which operates in Mississippi, Arkansas, and Louisiana.

The NAB, I guess I need not say much about that organization. It represents 4,500 radio stations and 700 television stations and all the major networks. Mr. Fritts and the association have testified before this committee on numerous occasions, and they've always been very helpful. So, we are very pleased to welcome Mr. Fritts today.

TESTIMONY OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman. I have a rather voluminous statement with appendices, which I would like to enter into the record, if possible, and summarize that statement in roughly 5 minutes or so.

Mr. KASTENMEIER. Without objection, the rest will be inserted in the record.

Mr. FRITTS. The hour is late, and I beg your indulgence and thank you for your interest in this subject, certainly, as late as it is, and those who are also in the audience.

First, let me address the question of the CRT's ability to perform its present functions, adjusting the royalty rates periodically and determining proper allocation of royalties among owners of copyright programs in retransmitted distant systems. This is a highly technical and complex area, as you well know, Mr. Chairman. It is our position that the tribunal should have whatever additional staff and financing as necessary to permit it to operate smoothly, efficiently and fairly with respect to all concerned. Furthermore, we believe the Tribunal should be brought up to its full complement of five members as soon as possible. We also favor specification of guidelines for tribunal decisions, but defer further comment on the point except to suggest that the process utilized developed such guidelines that they be open to public participation.

Having made these recommendations, I'm compelled to turn to the question that transcends all other matters relative to the Tribunal, and that question is, very simply, is there any basis for continuing the cable compulsory license in today's communications environment?

Virtually the entire workload of the Tribunal flows from the cable compulsory license. If it did not exist, there would be no need for a CRT, our previous recommendations would be academic. In 1976, when the present Copyright Act was enacted, cable was a fledgling industry, struggling to make its way in the new communications world. It was highly regulated at the State, Federal and local levels. It argued persuasively that without a compulsory license and low statutory fees, it could not survive.

In fact, in hearings at that time Rex Bradley, then chairman of the NCTA, put it very bluntly: "I do not wish to plead economic hardship to this subcommittee, but plead I must."

Congress responded to cable's pleas and the compulsory license, in fact, became a reality. Now, 10 years later, cable is barely recognizable. The number of systems has almost doubled to 6,400. Subscribers have tripled to 38.7 million. In fact, almost half of the country's TV homes now subscribe to cable. But it is in the important financial category where cable's expansive growth is most evident. The charts you see here, on the right and have been looking at today, speak for themselves. Revenues have risen steadily and significantly upward, and will double between now and 1990 to $16.5 billion. Net income after tax parallels this growth. And revenue components for 1984 and 1990 demonstrate that revenue from the basic services, that which is covered in the red portions of the charts there, basic services covered by the compulsory license, will become an even bigger slice of cable's revenue pie.

But what about all the regulation? As you know, Mr. Chairman—it has been alluded to today—it is no more. Distant signal, program exclusivity, and most recently, the "must carry" regulations, have been erased from the books. Last year's Telecommunications Act freed cable from the rate regulation and franchise fee problems it encountered at the local level. So, here we see cable in its present status, realistically a monopoly communications system. By Mr. Mooney's own assertion, a full competitor with broadcast-

ing, no longer rate regulated, no longer subject to exorbitant franchise fees, no longer required to carry distant signals, free to pick and choose which local stations will be received by its subscribers; in fact, the ultimate gatekeeper. And yet, it still enjoys a compulsory license for all its retransmissions.

Why? Why doesn't its competition enjoy a compulsory license as well? Why not broadcasters, MDS, DBS? Why not even the motion picture theaters, should they not have a compulsory license? What sets apart present day cable television?

Cable will argue that dropping the compulsory license will raise the cost of its service to its customers, but higher operating costs do not necessarily mean that they have to be passed on to the customers, if the cable operator operates like any other entrepreneur in the marketplace by balancing his costs, profits and revenues.

Cable will argue it is not a monopoly; but show me more than a handful of locations with competition, in fact with competing systems. Cable will argue that it is not a gatekeeper, that a simple little A–B switch will allow the subscriber to get all the local signals directly off the air. But how many people in this country have ever heard of an A–B switch, much less ever seen one or would know what to do if given one? And wait, you'll still have to have an outside roof-top antenna, even with the A–B switch. Practically, it is meaningless.

Cable will argue that without the compulsory license, it could not purchase the rights to retransmit television programs. But the same mechanisms that would provide blanket licensing for broadcast use of music can easily be employed with respect to the retransmission of video programming.

Essentially, the present functions of the CRT would be transferred to the private sector. Mr. Chairman, we have tolerated the compulsory license in the broadcast industry as long as cable was obliged to carry local TV signals. There was a certain balance, if you will, a three-legged stool at the very beginning. That balance has been tilted, one of the legs has been sawed completely off at the stool.

With the vacating of the "must carry" rules, a tremendous imbalance now prevails. New and struggling TV stations, both commercial and public, are being dropped from cable systems with the loss of substantial segments of their potential audiences. Others are being asked to pay, and, in fact, have contracted to pay, for $2,000 a month, and have, some, even been asked to $27,000 per month for carriage. And yet, cable continues to enjoy its compulsory license.

A solution to this situation will exist in a bill that was introduced today by Congressman Frank of your subcommittee. His bill would do away with the compulsory license, but it would recognize that small systems of 2,500 or fewer subscribers should have no copyright liability. Furthermore, systems of 12 or fewer channels would be exempt from copyright liability for carriage of local signals.

Systems with more than 12 channels would also be exempt for carriage of local signals, provided they carried all local signals. We believe that the legislation introduced today by Congressman Frank is a thoughtful and equitable approach to copyright liability

in today's communications environment. Moreover, it would eleviate most of the Tribunal's burdens. It would either obviate the need for retention of the Tribunal or enable it to administer the three other compulsory licenses it now oversees with appropriate staff and other support.

Mr. Chairman, we would urge that you would schedule hearings on this bill and include this bill in your next round of hearings, as we feel very strongly that there is linkage between the compulsory license and in the issue of "must carry." Thank you.

Mr. KASTENMEIER. Thank you, Mr. Fritts, for that brief statement.

I might say, on the latter point, the bill has not yet been referred to this committee, and he has just introduced it this morning, so it will be some time before we see the bill.

I'd like to ask about one other thing. You indicate if there's not a compulsory license for cable, that there would be no need for the CRT. There are three other compulsory licenses: mechanical royalties, public broadcasting and jukeboxes. Indeed, there are pieces of legislation which would create certain other copyright or intellectual property, by creating yet a new compulsory license for other types of work.

Who would administer those compulsory licenses if we did away with the CRT?

Mr. FRITTS. Well, as I mentioned, that 90—I didn't mention a figure, but it is my understanding that 90 to 98 percent of the work of the CRT is involved with the cable compulsory license. Certainly, their administrative workload would be substantially reduced, and perhaps the requirement, and the issue, and the litigious society which surrounds it at this point would be somewhat reduced if, in fact, the Congress chose to leave those other licenses at the CRT.

Mr. KASTENMEIER. In other words, you're saying that the work requiring such a Tribunal would greatly diminish, but you would not necessarily abolish the tribunal?

Mr. FRITTS. I think what I would like to say is that 90 to 98 percent of the Tribunal workload would be eliminated with the blanket licensing approach that we are proposing.

As you know, Mr. Chairman, and as part of our testimony, there is a letter from the Broadcast Music, Inc., which indicates that they deal with over 40,000 or 45,000 license holders and negotiate in the open market with the broadcasters through various music societies. We see no reason why that same formula or that same theory could not operate effectively with respect to cable copyright issues.

Mr. KASTENMEIER. In other words, you think that these other compulsory licenses might also be eliminated?

Mr. FRITTS. I haven't really given a great deal of thought to the other licenses, Mr. Chairman.

Mr. KASTENMEIER. Does the judicial finding that "must carry" is unconstitutional alter or change your view in any respect about the elimination of the compulsory license?

Mr. FRITTS. Well, as I mentioned in my testimony, broadcasters have never really attacked the compulsory license; we thought that it was, perhaps, inequitable, but we never challenged, on the basis that "must carry" had not received a challenge from the cable side

and it was more or less, if you will, an arm's length or gentleman's agreement that both of us had concerns about both of those areas, "must carry" for cable and compulsory license for broadcasters.

We think that they go hand in hand, because of the great imbalance that you alluded to, the possibility that a cable company could easily have a compulsory license and basically be paying de minimus fees for the use of our broadcast signals, and then turn around and charge the broadcasters. In fact, that's happening. We had one example of three ABC affiliates were called to a cable company's office and told that it was going to be up for bids and that there would only be one ABC channel left on the cable system, and it was up for the highest bidder. The two smaller stations, who were in outlying areas, were obviously overshadowed by the large city station which had far more resources to bid on a situation like that.

Mr. KASTENMEIER. With respect to the latter case, would it be possible to amend the Copyright Act to prevent cable operators, in your view, from charging broadcasters for retransmission of their signals?

Mr. FRITTS. I would check with counsel on that.

Certainly it, in our opinion, could be amended to include that, but our concerns are greater than that. Certainly, that is a major concern of ours, but we would like to address other issues than the proposed amendments to the contract.

Mr. KASTENMEIER. I understand. I take it, as far as you are concerned, the "must carry" matter hasn't been absolutely resolved, has it?

Mr. FRITTS. We don't think it has, because while it's generally conceded that the court determined unconstitutionality of the "must carry" rules, it also invited the Federal Communications Commission, if you will, to rewrite those rules to come back with a different set of standards, and said that it was entirely possible that rules could be crafted to meet the constitutional concerns of the court and still allow for some degree of limit in "must carry."

We recognize "must carry," as it once was, will never be. We would not propose to return to that same formula. We would propose to return to a we will be the first to acknowledge that cable operated under some egregious circumstances in isolated situations, and, as such, we can understand their concerns and their emotional attachment to saturated systems. But we have done a lot of research, and we find that in systems of 35 channels or more, or above 12 channels, that roughly—and I'm just speaking from memory now, but we can submit the data to your committee—that roughly 25 to 30 percent of the systems are devoting their 25 to 30 percent of their channel capacity to "must carry" stations, which includes all of the local stations.

We have a great concern, because of the imbalance of a local station which is licensed by the Federal Communications Commission, to serve a specific area. And as a cable system is the ultimate monopoly gatekeeper, there is only one per community, as you well know. The broadcaster, for instance—let's just use an example, let's say that in Madison you were up for reelection next year, and you placed a $50,000 schedule on one of the local television stations. If, under the present system, the local cable system which

carries—I don't know what the penetration rate is in Madison, but let's say it's 50 percent—if——

Mr. KASTENMEIER. That's an unlikely eventuality, I must say.

Mr. FRITTS. Let's just follow it through. But the fact would remain that that cable operator could delete that station from its service area, and that would mean that it ultimately could not reach 50 percent of the homes in its market. And we think that a lot of talk has been concerned around the public here today. We think the public needs to have a rational public policy, whether it is formulated by this committee or whether it's formulated by another committee, which allows for the carriage of local broadcast television stations on cable systems, and that it could be crafted so that it would not interfere with the constitutional concerns of the court relative to their cable decision.

Mr. KASTENMEIER. It might be difficult to achieve statutorially. Don't you think, assuming for the purpose of argument that the circuit decision is not overturned, that it would be difficult to constrain or compel a cable operator to carry local signals he might not wish to carry?

Mr. FRITTS. We have had a number of attorneys look at this, as you can appreciate, attorneys who represent companies who have both cable interests and broadcast interests. And it is their considered opinion that rules, in fact, could be crafted even though they might be rather narrowly defined, but they could be crafted. And they have taken the opportunity to give some thoughts on that, and we think that, based on what they are telling us, combined with the fact that the court asked, in fact, the FCC to rewrite the rules and bring them back to them in some form, that certainly it's worth exploring as a matter of public policy.

Mr. KASTENMEIER. Let's discuss for the moment the compulsory license. What I want to really explore is the difficulty that some may have seeing the connection between the compulsory license and "must carry." It is presumed that the value of the copyrighted works that broadcasters carry and are ultimately retransmitted by cable is relatively low. You currently share, I think, 4.5 percent of the market. The primary interactor is really the program producers, motion picture companies and others. Their view should be the basis of the test of the compulsory license that exists between proprietors', and, in this case, users' cable.

Therefore, do not the television broadcasters carry a considerable burden in terms of now saying, at this point in time, that we should end the compulsory license when it would appear that the primary thrust for this derives from the recent circuit decision on "must carry"?

Mr. FRITTS. Well, the circuit decision certainly prompted action, because as I mentioned earlier, the balance factor; if you go back to 1976, and you're well familiar with the reason that cable received a compulsory license at that time, I think, from a matter of public policy, your committee has to look at the question of whether or not it is still appropriate that cable be granted a compulsory license, in light of today's growth, in light of today's competitive factors, in light of today's finances. And we think that, certainly, that is an area that should receive an open and thorough airing by your committee.

Mr. KASTENMEIER. Doubtless we will be looking at that bill, and a number of bills before us. I think, obviously, the Frank bill and others are worthy of consideration. I am, of course, raising these questions in advance of that for obvious reasons.

My last question may be difficult. You may not be able to help me too much. I still view it in terms of "must carry," but if nothing is done on "must carry," the circuit's decision remains the law and neither by statute nor by agency decision is it changed. That may not be what happens, but let's just assume that. Let's also assume that the compulsory license is, in fact, repealed.

Now the question is, what would be the relationship among or between all of these parties? Where is the local telecaster versus the cable operator? What must he clear and with whom? Will, in fact, the local cable operator choose not to retransmit any local stations rather than pay market fees for carriage? Will they be able to deal exclusively, then, with satellites?

Feasibly, the whole communications interface may be, in that respect, changed. The elimination of "must carry" may, standing alone cause some changes.

My problem is, at this moment, just seeing what the nature of the relationship of carriage of programs and copyright liability, marketing practices would be if you did not have the cable compulsory license and if you did not have a "must carry" rule. If you had neither, I just wonder what the structure would look like in terms of the market and the practices of all the parties involved.

Mr. FRITTS. That is a broad question, Mr. Chairman, I don't know that I can you an accurate or——

Mr. KASTENMEIER. I apologize for asking you such a broad question. But in conclusion—and the hour is very late, and you have been very patient—I would like to say that that is a question I think we ought to look at carefully. One of the alternatives is a postcompulsory license and post-"must carry" society. What does it look like in terms of the motion picture industry, the producers, in terms of the new technology, in terms of cable operators, in terms of television broadcasters? I really don't know. I think we all, and I'm talking about the committee in particular, have an obligation to foresee models, likely eventual models, of what would happen.

Mr. FRITTS. I would say this, Mr. Chairman, that we would be glad to try to develop models, our best estimates of what might take place in the society, as you say, post-"must carry," postcompulsory license, and would be glad to present that to you at a later time.

Mr. KASTENMEIER. Thank you. And I thank you very much for your presentation at this late hour. I'm more sorry my colleagues could not be here to participate, but we'll try our best to enlighten them.

Mr. FRITTS. Thank you very much.

[The prepared statement of Mr. Fritts follows:]

STATEMENT OF EDWARD O. FRITTS, NATIONAL ASSOCIATION OF BROADCASTERS

Chairman Kastenmeier and members of the Subcommittee, I appreciate this opportunity to discuss with you the future of the Copyright Royalty Tribunal and the several proposals introduced to reform or abolish it.

INTRODUCTION

Today's hearing continues the Subcommittee's inquiry into the future of the copyright Royalty Tribunal ("Tribunal" or "CRT"). Since the earlier hearings in May and June of this year, the context of your inquiry has been redefined by two recent and important developments, both of them decisions of the U.S. Court of Appeals for the District of Columbia Circuit.

The more recent of these decisions was issued less than three weeks ago.[1] It affirmed the Tribunal's cable copyright royalty allocation decisions for 1979, 1980 and 1982. The other decision,[2] issued July 19 and effective only last week, eliminated the FCC's must-carry rules, which required cable operators to include local television broadcast signals among their offerings to subscribers.

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1 NAB v. CRT, No. 84-1230 (D.C. Cir. Aug. 30, 1985).

2 Quincy Cable TV, Inc. V. FCC, No. 83-1283 (D.C. Cir. July 19, 1985); Turner Broadcasting v. FCC, No. 83-2050 (D.C. Cir. July 19, 1985).

These two decisions cast new light on the question of CRT reform. To discuss that subject without taking the judicial developments into account would disserve the Subcommittee's aims and divert its inquiry into a theoretical exercise untied to reality. In my remarks I will therefore first address the narrower issue of CRT reform, and will then focus upon the larger and even more important question of the now urgent need for repeal of the compulsory license which the CRT administers for cable retransmission of broadcast signals.

CRT REFORM

The 1976 Copyright Act gives the Tribunal two complex and unprecedented tasks regarding the royalties which cable operators pay in lieu of rates negotiated in the marketplace for the right to make commercial use of copyrighted broadcast material. These two tasks are adjusting from time to time the royalty rates, and deciding how each year's collected royalties should be allocated among competing groups who own copyrights in portions of retransmitted distant broadcast signals.

As to both these functions, the Court has made it clear that it does not want to decide these important and complicated matters, and that it is the Tribunal and the Tribunal alone which

must do the jobs Congress assigned it. Despite an all-out challenge by the cable industry to the Tribunal's adjustment of the rate for certain distant signals to 3.75 percent of gross basic tier revenues, the Court affirmed the Tribunal's rate adjustment result. And in affirming on August 30, three of the Tribunal's distribution decisions despite challenges by numerous parties, the Court said that "a royalty determination is scarcely a typical agency adjudication," and concluded that "it is the Tribunal which Congress, for better or worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders." In effect, the Court said that it is not really in a position to judge whether the Tribunal is carrying out its mission properly, given the unique nature of its functions and the lack of guidance provided by Congress for their performance.

The result is that, unless Congress changes things, the Tribunal is essentially on its own. If it is to continue its tasks, it must be equipped by the Congress to do them. In its August 30 and earlier decisions, the Court has noted that the Tribunal has been made to limp through its difficult obstacle course hobbled by factors such as the "inadequacy of the Commission's resources and its limited staff." A bogged down appointments process has exacerbated this situation, and made it enormously difficult for the Tribunal to function.

If the Tribunal is to continue, it seems elementary that these problems should be corrected. Congressional approval of funds for, and the recent hiring of CRT General Counsel Robert Cassler, are important steps in the right direction. But more needs to be done. As an administrative agency performing a complex series of tasks involving increasingly large amounts of private capital, the Tribunal should have whatever additional staff and financing is necessary to permit it to operate smoothly, efficiently and fairly with respect to all parties with a stake in the outcome.

If it is to continue its cable copyright functions, the Tribunal should be brought up to full complement with qualified appointments as soon as possible. Notwithstanding the recent trend toward reducing the size of administrative bodies, in this instance the complexity of the work seems to warrant a full five-member Tribunal rather than scaling it back to three.

Specifying guidelines for Tribunal decisions is another reform worthy of consideration. NAB defers further comment on this point for the time being, except to suggest that whatever process might be adopted to develop the guidelines should be open to public participation.

THE COMPULSORY LICENSE

Though these considerations are important, they pale in comparison to the larger and crucial question of what to do about the compulsory license for cable retransmissions, without which there would be no need to explore reform of the Tribunal.

Though reasonable people may disagree about many aspects of these complex issues, I submit that in light of recent developments no fair-minded person could say that the situation created only this summer is just, logical or appropriate. With broadcasters having no carriage rights and cable operators continuing to enjoy the special protectionist privilege of the compulsory license, broadcasters (and other owners of copyrights in broadcast programming) have no control over the use of their property for commercial gain by cable operators. They have no right to negotiate over the use of what is theirs, nor can they receive payment. Since September 10 when the Court's mandate issued in the Quincy Cable and Turner Broadcasting cases, broadcasters have had no assurance of their continued ability even to reach the local marketplace in which they compete, and consumers have lost the assurance of being able to choose to watch local signals. It can no longer be assumed that the local, public service program-

ming upon which the public relies as its primary source of news and information will continue to get past the cable gatekeeper into American homes. And broadcasters must (and will as they have always done) continue to provide that programming at great expense as a condition of their FCC licenses, with no assurance that the programming will be receivable by the audience for which it is intended by Congress, the FCC and local stations.

In stark contrast, cable operators, who are self-declared full competitors of television broadcasters, may act almost as anti-competitively as they please. They can carry or not carry any local or distant signal in the land at their whim or caprice, and never have to pay (except for the relative pittance of royalties). They alone among all media and players in the television programming arena are held harmless from the rough and tumble of the marketplace. All others must negotiate for rights, while cable remains the sacred cow of copyrights.

This intolerable situation abrogates the principles of copyright, one of the most fundamental in our system of laws; the Constitution itself, in Article 1 clause 8 provides for control of one's copyrighted property. Massive exceptions to this principle should not be continued lightly.

Yet that is precisely what the compulsory license under present circumstances does. The reasons for its adoption have

all gone. It was intended to protect a fledgling cable industry which, by its own description, has become a highly profitable giant--a full competitor with handicapped competition.

To retain the protectionist compulsory license privilege under these circumstances is completely at odds with the prevailing regulatory guideposts of the day: deregulation and deference to the marketplace. Though legal scholars may debate whether Congress conditioned the compulsory license expressly upon mandatory carriage for local signals, there is no question that the license was the product of political compromise, and an attempt to balance the competing interests of the broadcast, cable and motion picture industries. Nor is there any question that a key feature of the landscape observed by Congress a decade ago when it struck this balance was the must-carry rules and the expectation that they would continue in force. Now that that expectation has been thwarted, and now that cable has long ago shed its "fledgling" status, there simply is no justification for continuing the compulsory license, and it should be repealed.

THE COMPULSORY LICENSE IS UNWARRANTED WITHOUT THE FRAMEWORK OF FCC RULES IN WHICH IT WAS ENACTED

The compulsory license that Congress enacted bore a direct

relationship to the framework of FCC rules then in effect that regulated cable's use of local and distant television signals. The FCC regulations that restricted cable's use of distant signals, exclusivity for syndicated programs, and required carriage of local broadcast stations, provided a certain measure of balance and fairness to cable's enjoyment of the compulsory license. Those rules no longer exist. Therefore, the compulsory license tips the competitive scale unfairly toward the cable industry.

The Committee, in its 1976 report on S. 22, took note of "the intricate and complicated rules designed by the FCC to govern the cable industry" and cautioned the FCC "not to rely upon any action of the Committee for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue" (emphasis added). (H. Rpt, p. 89)

Nevertheless, since that time the FCC has rescinded its rules governing cable use of distant signals and the rules providing exclusivity for syndicated programming. And on July 19 of this year the U.S. Court of Appeals for the District of Columbia struck down the FCC's must-carry rules.[3] Cable is now in the catbird's seat, able to pick and choose which local broadcast stations it will carry. Many local stations will be replaced

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[3] See footnote 2 on page 1.

with distant signals most of which are grandfathered at below market rates.

Congress anticipated the possibility that the FCC could revise its distant signal and program exclusivity rules by providing the CRT authority to adjust the distant signal royalty rates. However, Congress never anticipated that the must-carry rules would be eliminated and no specific adjustment provision was established in the compulsory license for that possibility. With the deletion of the last rules designed to ensure that the compulsory license did not undermine the nation's policy of localized broadcast service, the compulsory license rests on no apparent regulatory footing and should also be eliminated.

Under the compulsory license, program owners are compelled to make their works available for the commercial use of the cable industry--at the expense of copyright owners and broadcasters who compete with cable. For example, a local station may contract to purchase the local broadcast rights to the program ("MASH"). No other local station may air that program during the life of the contract. Yet cable may bring in ("MASH") from one, two, three or more distant TV markets and fragment the local station's audience for ("MASH"). Cable can engage in this kind of unfair competition by virtue of its compulsory license. The owners of ("MASH") simply can not control the cable use of their

product.

NAB believes that the extraordinary economic growth which has occurred in the cable industry since 1976 and the wholesale elimination of the regulations that governed cable's use of signals obtained under the compulsory license have undermined whatever policy justification remained for the compulsory license. With Congressional attention devoted to the inadequacies of the CRT, it is time to do away with the compulsory license and acknowledge today's regulatory, economic and technological realities.

CABLE HAS LONG SINCE OUTGROWN THE NEED FOR A SUBSIDY AND CAN ABSORB FULL COPYRIGHT LIABILITY

Congress granted the cable industry a compulsory license and specified the very low initial rates in the statute out of concern that the "infant" cable industry simply could not afford even limited copyright liability. At that time cable originated almost none of its own programming and existed largely by retransmitting the signals of broadcast stations. The industry was heavily regulated, both locally and federally, and basic subscriber rates were frozen in many cities. The cable industry testified that in some of the larger cities where cable encounters more competition with traditional broadcasting, cable

systems would not be able to pass along copyright royalty payments to the consumer without losing subscribers.

Cable leaders painted a bleak picture of their industry in the 1975 Judiciary Subcommittee hearings and pleaded poverty in urging establishment of a compulsory license and extremely low statutory royalty rate. In the June 11, 1975, hearing Rex Bradley, Chairman of the National Cable Television Association (NCTA) stressed that even periodic adjustment of the below-market royalty rates specified in the legislation (much less full copyright liability) would burden cable's ability to obtain short-term capital financing. In decrying the impact of copyright liability on cable, Mr. Bradley stated, "I do not think I exaggerate when I say that virtually any significant copyright payment by this industry represents a financial burden." (p.486). He further stated, "I do not wish to plead economic hardship to this subcommittee but plead I must" (p.491).

To support its claim of inability to shoulder significant copyright liabilities, NCTA submitted an economic study which concluded that the schedule of rates originally proposed in the Senate legislation (S. 22) would have a severe impact upon construction of new cable systems and the upgrading of existing systems. As a result of that study the House and Senate reduced by one half the rates originally proposed.

Cable based its strong pitch for the compulsory license on its struggle to survive in the mid-1970's and its near complete dependence upon broadcast retransmissions. This Subcommittee saw fit to accommodate cable's economic straits with a broad compulsory license covering all distant signals and very low initial royalty rates set in the statute. It is important now to see how cable has flourished since receiving the compulsory license in order to determine whether cable should continue to enjoy such copyright largesse.

Today the compulsory license serves to provide the cable industry with a multi-billion dollar subsidy for which there is no policy justification. Simply compare cable of 1976 with cable today:

- **Number of systems.** In 1975 there were only **3,651** cable systems in operation. Today the number of systems has almost **doubled** to **6,395.**

- **Number of subscribers.** Only **15.3%,** or approximately **10.7 million** television households, subscribed to cable. Today, **38.7 million,** or **45.3%** of TV households subscribe to cable.

- **Industry revenues.** According to a Paul Kagan Associates estimate, gross revenues for cable in 1975 were only **$804 million.** In 1984, cable revenues topped **$8.4 billion** and by 1990 cable revenues are expected to double once more to **$16.5 billion.**

- **Channel capacity.** In 1975 only **20.5%** of all cable subscribers were served by systems with more than 12 channels of programming. By 1985 over **77%** of all cable subscribers could view more than 12 channels of programming on their cable systems.

CABLE'S BRIGHT FUTURE

The financial problems of cable in the mid-1970's have changed radically by the mid-1980's. Today, cable is healthy, profitable and growing like a weed. The industry is dominated by telecommunications giants owning multiple cable systems totaling millions of subscribers. No longer is cable dependent entirely upon revenues from basic service retransmissions, but now has a rapidly diversifying revenue base. Table 1 shows some of the top MSO's with subscribers and revenues. Table 2 shows the sources of cable revenues and how they are expected to grow over the next five years. (See Appendix A)

Nearly seventy-five percent of television households now have access to cable. By the end of the decade eighty-five percent will have access. Cable's future is assured. No longer should this Subcommittee be concerned that assumption of full copyright liability would endanger this industry.

THE COST OF PROGRAMMING OBTAINED VIA THE COMPULSORY LICENSE IS BUT A FRACTION OF ITS MARKETPLACE VALUE

In 1984, average television station expenses including programming, production and news totaled $3,645,300. These expenses accounted for 47.4% of total station expenses. Program related expenses for independent stations for 1984 averaged $5,391,000 million and accounted for 53.6% of total station expenses.[4]

The compulsory license price for retransmitted cable programming is only a small fraction of what that price would be in the open market. It is not possible to know directly how much cable would pay in the absence of the compulsory license, but some comparisons can be made with what broadcasters, cable's closest competitors, pay.

The NAB study in Appendix B compared cable royalty payments

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[4] NAB 1985 Financial Survey. The data were drawn from nearly 69% of all commercial stations.

per subscriber with television program payments per TV household in the same markets. The comparison shows that cable systems pay an average of $1.08 per subscriber for each distant signal received while TV stations pay $8.73 per TV household for programming, production and news (in 1983). The large difference illustrates both the value of the programs and the competitive advantage cable enjoys in those markets.

BLANKET LICENSING ARRANGEMENTS WILL ENABLE CABLE TO NEGOTIATE FOR RETRANSMISSION

In the absence of the compulsory license cable systems will be able to negotiate in the open market for the rights to retransmit television programs. This has been accomplished in copyrighted music for more than forty years through the mechanism of **blanket or per program copyright licensing**, administered by music licensing societies.

Upon elimination of the compulsory license, such organizations can easily extend their licensing procedure to include television programs, as the attached letter from BMI demonstrates (see Appendix C).

In setting copyright fees in the marketplace, such private copyright societies would serve a dual purpose. First, they

would act as negotiators for the individual copyright holders meeting with a representative delegation of cable operators. As with blanket music licenses, these two groups would negotiate rates for a blanket license on programs. In the music negotiations, the payment per station generally reflects the size of the stations and other considerations that result in a "sliding scale" of fees paid by the radio station. It would be our expectation the same consideration would apply to cable systems.

The second role of the copyright societies would be the collection and distribution of copyright royalties to copyright holders as reflected in the negotiations that I have outlined to you.

This process affords two large entities, with knowledge and experience in the field, to negotiate a price that correctly reflects the value of the works in the marketplace. There is no disproportionate size or wealth advantage that one side possesses over the other; quite to the contrary there is equality of bargaining positions. By comparison, this appears to have significant advantages over the current system of accessing copyright liability. While any process will have problems, the ability of the parties to confront and negotiate gives the greatest promise of an equitable and fair arrangement. We would no longer be dependent on the decisions of political appointees

working in an area where they may have little experience, under a statute that has failed to progress with technological and economic reality.

COST TO THE CONSUMER

Cable television alleges that elimination of the compulsory license will increase costs to the consumer.

This is an interesting analysis. One of cable's arguments for elimination of must-carry was that it prevented cable operators from providing premium selections such as HBO, Showtime or The Movie Channel. The question is; who would have paid for these premium channels? Clearly, HBO would cost more to the consumer than the statutory rate paid for a local signal that is must-carried.

However, cost to the consumer is a concern that requires special attention. As stated earlier in our testimony, programming costs without the compulsory license are almost impossible to estimate. It is not our position that cable should match broadcast dollar for dollar.

While it is possible that a cable operator's operating costs will increase, it does not follow that these costs will be passed on to the consumer.

The Subcommittee should be aware that the Cable Telecommuni-

cations Act of 1984 increased cable's revenue flow while at the same time reducing its cost of doing business (see Appendix D). Specifically this Act will do the following:

- All cable services are or will be shortly rate deregulated. Where regulation continues for a period of time, cable operators received an immediate 5 percent rate increase. It is estimated by the Arthur D. Little & Co. study for NCTA that rate deregulation will realize $1.8 billion more in basic service revenues from 1985-1990. Basic service revenues will be 114.4 percent higher in 1990 than in 1984.

- Cable receives a high expectancy of franchise renewal.

- Cable franchise fees are capped. Any increase in franchise fees is to be passed on to consumers and specifically identified in the bill to the consumer. If existing cable contracts do not provide for an increase in fees, there is no automatic increase.

- Cable operators have less regulation and more flexibility in the provision of services, specific programming requirements and contract modifications.

These provisions allow a cable operator significant flexibility and ease in providing services and in pricing those services. The elimination of the compulsory license does not necessarily mean higher charges to the consumer if the cable operator operates as any other entrepenuer in the marketplace by balancing his costs, profits and revenues.

Evidence exists that cable operators are already doing so. While local advertising only accounted for 1 percent of a cable operator's revenues in 1984, it is expected to grow to 3.4 percent in 1990. Please see Table 2 (Appendix A).

The maintenance of the compulsory license and the loss of must-carry has created a significant imbalance between two competitors--cable and broadcast. The Federal Communications Commission acknowledged as much in a statement released by a majority of the Commissioners on August 2, 1985.

> "...we believe that the mass media marketplace will not be set entirely right until cable's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties."

Please note that smaller, less developed delivery technolo-

gies such as Low-Power Television, MDS and STV do not enjoy the competitive advantage of a compulsory license.[5] The same is true for commercial broadcasters.

THE COMPULSORY LICENSE AND COMPETITION BETWEEN CABLE & BROADCAST

Cable is the only technology physically capable of impeding delivery of 2 competing services. The cable operator in the community is the "gatekeeper." He decides what will go to the viewer after all signals are received at the head-end of the system.

Home installation of a cable system means disconnecting and perhaps dismantling over-the-air antennas. In some cases local governments demand removal of home antennas for aesthetic reasons. Other situations just allow the antenna to fall into disrepair and therefore serve no useful purpose. Just flash back in your mind to those old pictures of mazes of rooftop antennas crowning the skylines of our major cities. Today you have to

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[5] In 1984, Low Power Television (LPTV) had 252 Stations; Subscription Television (STV) had 20 stations and 1,203,000 subscribers; and Multipoint Distribution (MDS) had 105 systems and 485,000 subscribers.

In comparison, by 1984, cable had 6,200 systems and 34,114,000 subscribers.

look long and hard for such a skyline.

Attached to our testimony are affidavits submitted to the Court of Appeals when we sought a stay of the decision on must-carry (see Appendix E). No example better describes cable's "gatekeeper" role than in Hartford, Connecticut. A new independent station about to come on the air was assured of reaching over 600,000 cable homes. Today, due in large part to the Quincy decision, it will reach only about 130,000 of these homes.

Cable operators given the choice of what signals will reach the consumer will have little or no incentive to carry the signals of new or struggling TV competitors. This is especially true when there is the ready availability of distant signals which, due to the compulsory license, can be employed by many cable systems for very little cost.

In 1985, the video marketplace is bursting with such competitors as commercial and public broadcasting, cable only basic services, pay cable services, subscription television, multipoint distribution systems, VCR rentals and sales, and the possibility of direct broadcasting from satellites. The ultimate arbiter of the video marketplace is the public. Their weapons are the channel selector and the on/off switch. The broadcaster is happy to be a part of this competition; he will submit to the marketplace test which will determine whether he survives or

prospers. What is unfair and unreasonable is that, for millions of households, the cable operator is able to thrust himself and his own interests between the broadcaster and the ultimate consumer--denying to the consumer his opportunity to make a complete and free choice.

Not only does the scenario frustrate competition between two mature providers of communications services. It also frustrates intra-broadcast competition. Over the past several years broadcasting has witnessed dynamic and constant growth in independent stations coming on air. Ten years ago (12/31/75), there were 80 independent stations and today (7/1/85), there are 230. More of these stations are in operation in the second 50 markets than ever before. The FCC has recognized the importance of independent station growth as strong and viable competition of network programming. The Congress has endorsed the concept of independents as competitors to network programming. The ultimate goal of this policy is to provide the consumer with more localized choices.

While growth of independent stations is a recognized goal of broadcasting policy, it can well be frustrated under the current state of cable copyright law. The anti-competitive effect of the compulsory license, allowing for importation of more distant signals coupled with the loss of must-carry will, in all proba-

bility chill or cease independent station growth. Without a reasonable assurance of carriage and with a local market fractured by increased distant signal importation, it is unlikely an individual will commit the millions of dollars necessary to begin station operation. This picture does not improve for the independent who has recently gone on the air.

PROPOSED SOLUTION

In light of these twin problems of CRT reform and the anti-competitive effects of the compulsory license, there is a legislative solution.

Recently, Congressman Barney Frank introduced a bill to eliminate cable's compulsory license. Enactment of this legislation would eliminate the need for the CRT. The remaining compulsory licenses can be administered by other existing governmental agencies. The overwhelming amount of time and effort expended by the CRT has been due to cable's compulsory license. That pattern is only likely to continue.

The Frank bill balances the competing needs of broadcast and cable. It provides a financial incentive to cable operators to carry all local signals. It also provides to cable operators a measure of relief for saturated systems and allows greater latitude to small operators in deciding on carriage of local

signals.

By restoring balance between two competing technologies the viewer will determine the successes and failures of the programming provided by cable and broadcasters.

CONCLUSION

In today's atmosphere of burgeoning cable growth and deregulation, the compulsory license is an anti-competitive device that serves no sound policy. It has given cable television an overwhelming advantage over its chief competition--over--the-air broadcasting-- and it frustrates more than 50 years of sound communication policy.

Further, it has created significant dissatisfaction with the Copyright Tribunal.

However, legislation introduced by Congressman Barney Frank solves this problem by repeal of the compulsory license. It restores balance between two delivery systems and allows the consumer to seek the programming of his or her choice. It puts both technologies on an equal footing.

The N.A.B. supports immediate passage of the Frank bill.

APPENDICIES TO

TESTIMONY

OF

EDWARD O. FRITTS

TABLE 1

Subscribers and Annual Revenues for
Top 10 Multiple Systems Operators[1]

Company	# of Subscribers	Annual Revenues[2]
1. Tele-Communications	3,578,000	$742,272,000
2. Time Inc. (ATC)	2,500,000	603,072,000
3. Westinghouse (Group W)	2,009,000	472,392,000
4. Cox Cable	1,558,000	393,000,000
5. Storer Communications	1,503,000	341,160,000
6. Warner Amex	1,196,000	243,252,000
7. Times Mirror	1,002,000	255,840,000
8. Continental	965,000	234,096,000
9. Newhouse	902,000	213,540,000
10. Viacom	792,000	177,048,000

[1]Source: Top 70 Cable Systems Operators as of December 31, 1984, The Cable Financial Databook, pp.20-21, Paul Kagan Associates, June 1985.

[2]Annualized monthly revenues reported in Cable TV Operator Revenue Rankings, The Cable TV Financial Databook, pp.20-21, Paul Kagan Associates, June 1985.

APPENDIX A
2 of 2

TABLE 2

Sources of Cable Revenue[1]
($ billions)

	1984	% of Total	1990	% of Total
Basic	3.61	43.1	7.74	47.1
Expanded Basic	0.28	3.3	0.47	2.8
Pay (per channel)	3.35	40.0	5.07	30.8
Pay (per view)	0.04	0.4	1.09	6.6
Local Advertising	0.08	1.0	0.55	3.4
Other Sources	1.02	12.2	1.54	9.3
Total	**8.4**		**16.5**	

[1]Source: Report to National Cable Television Association, May 1985, Arthur D. Little, Inc., p.7.

APPENDIX B

BROADCASTING AND CABLE PROGRAMMING COST COMPARISONS

MARK R. FRATRIK
Director of Financial and
Economic Research
Research and Planning Department
National Association of Broadcasters
September 16, 1985

BROADCASTING AND CABLE PROGRAMMING COST COMPARISONS

Mark R. Fratrik
Director of Financial and Economic Research
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Introduction

An important area of competition among local television stations is in programming. Local stations spend considerable sums to acquire and to produce programs. An indication of the magnitude of these programming costs can be seen from the 1984 NAB Financial Survey of all commercial stations. From that survey, it was found that in 1983 the average (including affiliated and independent stations) amount spent on programming, production and news was $3,444,600, or 46.8% of the total expenses for the average station. For independent stations (both UHF and VHF stations), the average amount spent for these programming-related categories was $5,876,300, or 55.2% of total expenses.

Cable systems also incur costs associated with providing the programming of some television stations. In particular, cable systems must pay a percentage of their revenues to the copyright pool for retransmitting the signals of television stations outside their local area.

In this paper we compare the programming costs of broadcasters and cable operators. Specifically, we will compare the amount that cable systems spend for the carriage of distant broadcast

signals with the amount that television stations spend for their programming. To make a justifiable comparison, we will compare the amount spent by cable systems per subscribing household with the amount spent by local television stations per television household. In addition to comparing the national average of these two amounts, we will also compare those amounts across different market sizes and for both affiliated and independent stations.

From that analysis it will be shown that television stations spend a significantly larger amount for providing this programming than cable systems. Nationally, on average, local stations (affiliates and independents) spend $8.73 per television household. This compares with the average of $1.08 per subscriber spent by cable systems for carriage of a broadcast station's signal.

Method of Analysis

To obtain the amounts spent by cable systems on distant signal carriage, 209 systems were randomly selected from the 1983 Statement of Accounts filed at the Copyright Royalty Tribunal. For each system, the Statement of Accounts includes information on the location of the system, the number of subscribers, the local and distant signals carried, and the amount spent for six months of 1983 for carriage of each of those distant signals. With the location of the systems, we could then assign each

system to a particular Arbitron Area of Dominant Influence (ADI) to compare with stations in similar sized areas.

For each cable system, we multiplied the six month payments by two and then calculated the amount spent per subscriber for carrying each network and independent station. These values are reported in Appendix I. To make the comparison with the available television data, we derived the average amounts spent per subscriber for groups of systems classified by market size.[1] Those averages are reported in Table I.

For the amounts spent by local stations for programming, production and news, we used information obtained in the 1984 NAB Television Financial Survey of 1983 revenues and expenses. That survey included responses from 59.1% of all commercial television stations. Average amounts were obtained for the various categories of markets. Those values are reported in Appendix II. Each value was then divided by the average number of television households for each grouping of markets. The figure obtained is the amount spent per television household in the average market in that category. These results are reported in Table I for comparison with the cable system values.

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[1]If a system only carried distant independent stations' signals, it was not included in the averaging of distant affiliated stations' signals payments. Likewise, if a system only carried distant affiliated stations' signals, it was not inlcuded in the averaging of distant independent stations' signals payments.

Results

From Table I, it is clear that broadcast stations are spending a much greater amount for programming per television household than cable systems are spending per subscriber. Nationally, the average broadcast station is spending $8.73 per television household for programming, production and news. Cable systems, on average, spend only $1.08 per subscriber for carriage of a broadcast station's signal.

The large difference in programming costs is present across different sizes of markets. In the largest markets, ADI 1-10, an average station spends $5.16 per television household for these programming-related expenses. A cable system in those markets spends, on average, only $1.44 for carriage of a distant broadcast signal.

There are similar large differences when affiliated or independent stations are separately examined. Nationally, an affiliated station spends $7.56 on programming, production and news per television household while cable systems spend only $0.24 per subscriber for carriage of the affiliated station's signal. As for independents, the difference is narrower but it is still significant. The average independent station spends $6.97 per television household while the cable system spends only $1.28 per subscriber for carrying an independent station's signal.

TABLE 1

Average Annual Programming Costs
By Market Size Categories

		BROADCASTING				CABLE		
		Average Station Annual Cost($) per TV Household				Average Annual Cost($) Per Subscriber		
ADI Market Size	Average # of TV Households	All Stations	Affiliates	Independents	Average # of Subscribers	All Stations	Affiliates	Independents
1 - 10	2,622,400	5.16	5.24	5.13	17,991	1.44	.26	1.64
11 - 20	1,108,900	6.13	7.39	4.24	10,371	1.18	.20	1.44
21 - 30	752,100	6.90	7.45	5.31	17,996	1.26	.24	1.60
31 - 40	600,300	5.49	6.48	3.73	11,362	1.44	.40	1.72
41 - 50	508,300	5.79	6.04	2.92	9,044	.74	.20	1.02
51 - 60	439,200	4.91	5.37	2.83	14,356	1.22	.16	1.46
61 - 75	357,300	6.69	6.22	N/A	18,594	1.10	.18	1.22
76 - 100	258,200	5.53	5.42	N/A	13,538	1.06	.26	1.30
101 - 125	193,600	6.44	6.14	N/A	9,537	.92	.28	1.14
126 - 150	144,900	5.82	5.56	N/A	8,060	.44	.18	.72
151 - 175	90,600	6.52	6.76	N/A	17,324	.76	.26	1.20
176 +	40,300	12.81	12.81	N/A	7,812	.66	.28	.98
Nationwide	401,800	8.73	7.56	6.97*	13,401	1.08	.24	1.34

*Since there are few, and in some cases no, independent stations in the smaller markets (ADI 60 and larger), average data for independents is only available for the top six market sizes. Therefore, the reported nationwide average only represents markets ADI 1-60. The average number of TV households in those markets is 1,005,200.

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CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
CONTEC INC	SOUTH HILO	HI	212	10539	.76	.00	.76
CRAWFORDSVILLE COMM CAB	CRAWFORDSVILLE	IN	25	5772	.50	.00	.50
SUMMIT CABLE SERV-IREDE	IREDELL COUNTY	NC	32	6896	.92	.00	.92
KING VIDEOCABLE COMPANY	LODI	CA	20	7868	.50	.18	.70
SOUTHLAND COMMUNICATION	COCOA BEACH	FL	14	5270	2.44	.00	2.44
SPACE CABLE INC	STRONGSVILLE	OH	11	7639	.52	.00	.52
BEEVILLE CABLE TV SERVICE	BEEVILLE	TX	125	4511	.58	.00	.72
STORER CABLE TV-FLORIDA	VENICE CITY	FL	16	13010	.44	.22	.86
LEBANON VALLEN CABLE TV	LEBANON CITY	PA	48	17901	.16	.06	.24
CALVERT TELECOMMUNI	TOWSON	MD	21	98772	2.00	.00	2.00
CABLE TELEVISION OF EAG	EAGLE PASS	TX	199	6245	.30	.16	.64
SOUTH FLORIDA CABLE TEL	FORT MYERS BEACH	FL	112	23060	.38	.18	.70
STORER CABLE COMMUNICAT	PRATTVILLE	AL	120	4041	3.02	.92	3.72
COMCAST CABLE INVESTORS	CORINTH	MS	41	6307	.44	.18	.68
COMCAST CBV-CLINTON	CLINTON	MI	7	11695	1.52	.00	1.52
COMCAST MANAGEMENT CORP	WARREN	MI	7	26017	1.46	.00	1.46
NEWCHANNELS CORP	OGDENSBURG	NY	67	3843	.44	.16	.62
TELEVENTS	MARTINEZ	CA	5	24657	1.88	.00	1.88
NEWCHANNELS CORP	CORNING	NY	133	8054	.48	.00	.58
NEWCHANNELS CORP	MALONE	NY	101	1470	.50	.16	.62
SANLANDO CABLEVISION IN	ALTAMONT SPRING	FL	30	10447	1.02	.00	1.14
EASTERN CONNETICUT TEL	NEW LONDON	CT	22	22265	.28	.12	.52
CABLEVISION OF CONNETI	NORWALK	CT	22	34014	1.12	.00	1.32
STOKES CABLE CO INC	ROUND ROCK	TX	81	4323	3.32	.00	3.32
AMERICAN CABLE INVESTORS	GAINESVILLE	GA	15	6916	.88	.00	.88
UA-COLUMBIA CABLEVISION	NORTH ATTLEBORO	MA	39	4227	2.94	.00	2.94
PINE BLUFF CABLE TELIVI	PINE BLUFF	AR	56	10832	.52	.16	.62
MOUNTAIN BROOK CABLEVISION	MOUNTAIN BROOK	AL	47	7775	.58	.00	.58
KINGWOOD CABLEVISION INC	KINGWOOD	TX	10	8179	2.46	.00	2.46
DONREY INC	ROGERS	AR	82	6555	.82	.00	.82
GREATER MEDIA INC	WORCESTER	MA	6	27792	.76	.30	1.20
TELEVENTS OF FLORIDA IN	HOMOSASSA	FL	18	2616	.44	.14	.60
MULTIVISION LTD	ELMENDORF	AK	212	13243	1.64	.00	1.64
KANAWHA CABLE TELEVISION	ST ALBANS	WV	43	11896	.58	.18	.72
FALCON COMMUNICATIONS	TEMPLE CITY	CA	3	5087	1.32	.00	1.32
UA COL CABLEVISION-WEST	NEW ROCHELLE	NY	1	47683	1.70	.00	1.70
KING VIDEOCABLE CO	LAKE ELSINORE	CA	2	5705	.00	.00	.00
TELEPHONE AND DATA SYST	BARNWELL	SC	104	3068	1.24	.00	1.24
TRIBUNE CABLE COMMUNICATIONS	ONEIDA	NY	52	7686	2.18	.00	2.18
HARRON COMMUNICATIONS CORP	PORT HURON	MI	7	12144	.70	.00	.70

CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
BUCKEYECABLEVISION INC	TOLEDO	OH	60	85317	.46	.20	.78
MULTIVISION NORTHWEST INC	DALTON	GA	80	11632	.52	.20	.82
GR NEW ENGLAND CABLEVISION INC	LUDLOW	MA	94	7940	1.96	.00	1.96
NEW ENGLAND CABLEVISION INC	ROCHESTER	NH	6	7935	.64	.00	.64
TELESERVICE CORP OF AMERICA	MOUNTAIN HOME	AR	82	4893	.36	.18	.72
CLEARVIEW CBV	MURRELS	SC	106	6756	.48	.24	.96
CABLE TV FUND VI	SHELBYVILLE	IN	25	3398	.84	.00	.84
ADAMS RUSSELL CO SERV-N Y INC	MOUNT KISCO	NY	1	713	3.18	.00	3.18
CENTEL CABLE TELEVISION	WINTERHAVEN	FL	16	12454	.58	.00	.82
ADAMS RUSSELL CABLE SERV-MASS	PEABODY	MA	6	11176	1.04	.42	1.68
STORER METRO COMMUNICATION INC	WASHINGTON	OR	24	7627	1.82	.00	1.82
JOSEPH S. GANS INC	DUNMORE	PA	50	8908	.46	.00	.46
STORER RIVERFRONT CABLE	RIVERSIDE	NJ	4	6498	1.38	.00	1.38
ROGERS CABLESYSTEMS INC	ALAMOGORDO	NM	97	1078	.90	.00	.90
JONES TRI-CITY INTERCAB	BROOMFIELD	CO	19	5218	1.84	.00	1.84
CABLE TV FUND IX-A	PANAMA CITY BEACH	FL	61	3547	1.06	.00	1.70
CENTEL CABLE TELEVISION	AURORA	IL	2	22599	.80	.22	1.36
HOWARD CABLE TELEVISION	HOWARD COUNTY	MD	9	14402	2.42	.00	2.42
GENERAL TELEVISION OF MINN	SAINT CLOUD	MN	13	9307	.92	.00	.92
CLEAR TV CABLE SOUTHERN	STAFFORD	NJ	4	16422	.82	.00	.00
AREA COMMUNICATIONS INC	JACKSONVILLE	FL	63	90878	1.26	.00	1.26
FUTUREVISION CABLE ENTERPRISES	EATONTOWN	NJ	1	17353	.50	.18	.70
RAYSTAY CO	WAYNESBORO	PA	48	4975	.50	.16	.62
STATE TV CABLE	CHICO	CA	140	20087	.46	.16	.66
TOTAL TV INC	JANESVILLE	WI	107	14123	.78	.28	1.28
CABLE TV JOINT FUND	BEAVER DAM	WI	29	1560	3.66	.00	5.84
CONT CABLEVISION ON NEW HAMP	LAWRENCE	MA	6	30263	.92	.26	1.58
WESTERN CABLEVISION SER	PHOENIX	AR	23	5039	3.00	.00	3.00
COMMONWEALTH CABLEVISION-MA	HOLYOKE	MA	94	13518	1.62	.24	2.30
MCCAW COMMUNICATIONS OF S ORE	GRANTS PASS	OR	155	9175	.28	.12	.64
MICRO CABLE COMMUNICATION CORP	VERO BEACH	FL	14	21683	.30	.16	.60
TKR CABLE CO	SPRING VALLEY	NY	1	22455	1.66	.00	1.66
PEOPLE'S CABLE COMPANY	PERINGTON	NY	1	67409	.66	.28	1.20
CAPITAL CABLE COMPANY	AUSTIN	TX	81	65228	.24	.24	.00
AMERICAN CABLESYSTEMS-FLORIDA	POMPANO BEACH	FL	14	57388	2.02	.00	2.02
CAROLINA'S CABLE INC	HIGH POINT	NC	51	2007	3.88	.00	3.88
NEW MILFORD CABLE VISION CO	NEW MILFORD	CT	22	12281	.52	.00	.70
GENESEE COUNTY VIDEO CORP	BATAVIA	NY	35	1601	2.00	.66	3.34
LYNCHBURG CABLEVISION INC	LYNCHBURG	VA	69	12998	1.34	.00	1.34
SHOWS INC	NORTH VERSAILLES	PA	12	10475	1.26	.32	1.72

CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
CENTURY VIRGINIA CORP	NORTON	VA	86	8529	.32	.18	.74
LAUREL CABLEVISION INC	TORRINGTON	CT	22	10652	1.30	.00	2.06
CABLEVISION INDUSTRIES	FAYETTE	NY	67	4880	1.06	.00	1.06
MOUNT LEBANON CABLEVISION	MOUNT LEBANON	PA	12	7220	1.60	.00	1.60
CABLEVISION MANAGEMENT CORP	ATHENS	PA	50	7936	.42	.12	.52
KAYS INC	HAYS	KS	57	4992	.36	.16	.82
LAKESIDE CABLEVISION	FOND DU LAC	WI	68	11845	.42	.16	.62
COMMUNICABLE OF TEXAS INC	PECOS	TX	146	3606	.46	.20	.82
OXFORD VALLEY CABLEVISION INC	BENSALEM	PA	4	15948	1.32	.00	1.32
SIOUX FALLS CABLE TELEVISION	MITCHELL	SD	93	3083	.80	.00	.80
SAMMONS COM INC	BRISTOL	TN	86	13320	1.60	.54	2.12
TELECABLE OF KOKOMO	KOKOMO	IN	25	21094	.52	.00	.60
TELECABLE OF BLOOMINGTON	BLOOMINGTON	IL	98	22739	1.30	.00	1.30
AMVIDEO CABLE CORP	NORTH BERGEN	NJ	1	19544	1.76	.00	1.76
AUBURN TELECABLE CORP	AUBURN	AL	115	9380	.64	.26	1.38
ARMSTRONG UTILITIES INC	ELLWOOD CITY	PA	12	7781	1.10	.00	1.10
SYLVAN VALLEY CATV CO	BREVARD	NC	37	4464	1.46	.48	1.94
CABLENTERTAINMENT	POINT PLEASANT	WV	43	8619	.56	.32	1.26
SELKIRK COMMUNICATIONS INC	HALLENDALE	FL	14	9115	1.36	.00	1.36
AMERICAN CABLESYSTEMS	MARIAN	MA	6	4800	1.82	.00	1.82
CONTINENTAL CABLEVISION	TIFFIN CITY	OH	60	102	.32	.16	.64
CONTINENTAL CABLEVISION	GALION CITY	OH	11	6416	.60	.00	.60
TELE MEDIA CO OF LAKE ERIE	GENEVA	OH	11	8162	.52	.00	.52
MULTIMEDIA CABLEVISION	OAK FOREST	IL	2	10237	.94	.24	1.30
ESSEX 1982-1 OPEN PARTNERSHIP	GULF BREEZE	FL	60	4309	1.62	.00	1.62
PERRY CABLE COMPANIES INC	TEQUESTA	FL	62	3887	1.26	.00	1.26
CONTINENTAL CABLEVISION-OH INC	XENIA CITY	OH	49	7955	.36	.16	.62
CONTINENTAL CABLEVISION	HUBER HEIGHTS	OH	49	13780	1.42	.00	1.74
MONROE CABLEVISION INC	MONROE	MI	7	5398	1.48	.00	1.48
BAYOU CABLEVISION CORP	THEODORE	AL	61	3750	1.44	.00	1.44
WATERFORD CABLEVISION INC	WATERFORD TWP	MI	7	10905	.36	.00	.36
CONTINENTAL CABLEVIS	KEOKUK	IA	77	5271	1.18	.54	2.14
SIMMONS COMMUNICATIONS-D	MILLSBORO	DE	167	6250	.64	.00	.64
AMERICAN CABLESYSTEMS	GREENVILLE	TN	86	4110	.70	.28	1.12
SAMMONS COMMUNICATIONS	NATCHEZ	MS	84	8111	.32	.16	.66
TEXAS COMMUNITY ANTENNA	NACODOCHES	TX	53	9080	.22	.14	.58
STORER CABLE TV	SONOMA	CA	5	3299	.50	.14	.58
RIVERLANDS CABLEVISION INC	LA PLACE	LA	33	5845	1.76	.00	1.76
TV TRANSMISSION INC	LINCOLN	NE	90	24594	1.94	.00	1.94
GENERAL ELECTRIC CABLEV	HATTIESBURG	MS	168	15758	1.52	.42	2.62

CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
SERVICE ELECTRIC CABLE	ALLENTOWN	PA	4	1282	.34	.16	.68
GREATER BOSTON CABLE CORP	WOBURN	MA	6	13026	1.32	.52	2.14
AMERICAN TELEVISION & COM	FRANKLIN	PA	12	5236	.76	.00	.76
AMERICAN TELEVISION & COM	MANKATO	MN	207	12626	1.40	.56	2.24
AMERICAN TELEVISION & COM	MADISONVILLE	KY	87	8997	.46	.16	.62
AMERICAN TELEVISION & COM	KENNETT	MO	73	4413	.56	.00	.74
AMERICAN TELEVISION & COM	CANON CITY	CO	105	4797	.96	.00	.96
AMERICAN TELEVISION COM	LUMBERTON	NC	99	4705	.90	.00	.90
CAPITAL CITIES CABLE INC	ROSWELL	NM	183	10913	.54	.18	.68
CAPITAL CITIES CABLE INC	ALTUS	OK	126	7628	.32	.14	.48
CAPITAL CITIES CABLE INC	NORFOLK	NE	139	348	.40	.16	.62
OMNICOM OF MICHIGAN INC	NORTHVILLE	MI	7	15680	1.60	.00	1.60
LONG BEACH CABLEVISION CO	LONG BEACH	CA	3	24347	2.18	.00	2.18
LONG ISLAND CABLEVISION	RIVERHEAD	NY	1	26311	.90	.00	.00
TIMES MIRROR CATV-SPRINGFIELD	SPRINGFIELD	IL	70	36967	2.18	.00	2.18
TIMES MIRROR CATV CAMBRIDGE	CAMBRIDGE	OH	123	5692	.32	.20	.80
TIMES MIRROR CATV OHIO	WEIRTON	WV	123	7459	1.80	.00	1.80
TIMES MIRROR CATV SAN DIEGO	SAN DIEGUITO	CA	26	6564	.84	.34	1.34
BELLEVUE CABLE TV CO LTD	BELLEVUE	NE	72	10013	1.30	.00	1.30
TELEVISION CABLE SVCS	ABILENE	TX	156	24001	.54	.22	.84
UNITED CABLE TELEV CORP	NEW BRITIAN	CT	22	50624	1.46	.00	1.46
ALERT CABLE TV OF GOLDS	GOLDSBORO	NC	38	13123	1.38	.00	1.38
WOMETCO CABLE TV OF ALA	NEWTON	AL	120	2301	.96	.00	.96
AUSABLE COMMUNICATIONS	PLATTSBURGH	NY	101	10178	.76	.00	.76
WARNER AMEX CABLE	MEDFORD	MA	6	54332	.68	.26	1.54
WARNER AMEX CABLE COM	YOUNGSTOWN	OH	92	16227	1.48	.00	1.48
WARNER AMEX CABLE COM	WARREN	PA	135	693	.42	.12	.48
WARNER AMEX CABLE COMM	MARIETTA	PA	48	7095	1.14	.46	1.82
WARNER AMEX CABLE COM	MESQUITE	TX	9	1606	1.68	.00	1.68
WARNER AMEX CABLE	DANVILLE	IL	127	13899	.50	.20	.80
WARNER AMEX CABLE	HARRIS	VA	197	7410	.28	.28	.00
WARNER AMEX CABLE COMM	ST MARY'S	OH	49	6357	.30	.16	.66
WARNER AMEX CABLE	BARSTOW	CA	3	8436	1.06	.00	.00
WARNER AMEX CABLE	CANTON	OH	11	4797	4.12	.32	7.92
WARNER AMEX CABLE	HOUSTON	TX	10	82360	1.88	.00	1.88
CALLAIS CABLEVISION INC	BOURG	LA	33	9288	.70	.32	1.32
HERITAGE CABLEVISION AS	SOUTH BEND	IN	85	39775	1.70	.00	1.70
CABLEVISION ASSOCIATES	HARLINGEN	TX	117	10272	.64	.00	.64
COX CABLEVISION CORP	GAINESVILLE	FL	174	24778	.90	.00	.90
TELESYSTEMS CORP	OWOSSO	MI	58	3918	.00	.00	.00

CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
COX CABLEVISION CORP	SEBRING	FL	18	8228	.56	.18	.74
COX CABLEVISION CORP	THE DALLES	OR	24	856	.26	.26	.00
COX CABLE COMMUNICATION	WARNER ROBINS	GA	142	9840	.54	.22	.86
BAKERSFIELD CABLE TV INC	BAKERSFIELD	CA	150	9294	.46	.20	.82
COX CABLE COMMUNICATION	CRANSTON	RI	39	13503	1.44	.00	1.44
GOLDEN TRIANGLE COMM	DENTON	TX	8	5782	2.50	.00	2.50
CEDAR RAPIDS CABLE COMM	CEDAR RAPIDS	IA	77	29506	1.26	.00	1.26
TRANSVIDEO CORP	SANTA BARBARA	CA	114	14587	.84	.00	1.34
VIACOM INTERNATIONAL	NASHVILLE	TN	31	49225	1.54	.00	1.54
TELE-VUE SYSTEMS INC	NAPA	CA	5	12420	1.04	.26	1.42
TELE-VUE SYSTEMS INC	LIVERMORE	CA	5	12317	5.18	.00	5.18
GROUP W CABLE	SANTA CRUZ	CA	5	34433	.00	.00	.00
GROUP W CABLE INC	GALVESTON	TX	10	14803	.46	.16	.62
GROUP W CABLE INC	RAWLINS	WY	190	3747	.42	.28	1.10
GROUPW CABLE INC	DELAND	FL	30	5705	2.28	.00	2.28
GROUP W CABLE INC	MANATEE COUNTY	FL	18	14891	3.24	.00	3.24
GROUP W CABLE INC	ISLIP	NY	1	9444	1.96	.00	1.96
GROUP W CABLE INC	LOVINGTON	NM	183	3375	.66	.22	.88
GROUP W CABLE INC	CARIBOU	ME	201	2440	.24	.10	.38
WESTINGHOUSE BROADCASTING	THOMASVILLE	GA	132	6674	.32	.18	.72
TELEPROMPTER OF CLARKSBURG	CLARKSBURG	WV	165	14642	1.00	.50	1.98
GROUP W CABLE INC	MOBILE	AL	61	36107	.90	.24	1.24
GROUP W CABLE INC	IRONWOOD	MI	131	6761	.46	.18	.72
GROUP W CABLE INC	WINONA	MN	130	10866	.68	.26	1.34
GROUP W CABLE INC	PORTSMOUTH	OH	43	16221	.64	.24	1.42
COMMUNITY TELEVISION OF UTAH	WEST VALLEY CITY	UT	42	6616	1.58	.00	1.58
DODGE CITY CATV INC	DODGE CITY	KS	57	4885	1.58	.00	2.12
TV PIX INC	SOUTH LAKE TAHOE	CA	123	7825	.40	.18	.68
TELE SCRIPPS CABLE CO	ELIZABETHTOWN	KY	45	5853	.70	.26	1.56
TCI GROWTH INC	WHEELING	WV	124	16692	.70	.18	.88
TCI-TAFT CABLEVISION AS	ALPENA	MI	138	7035	.42	.16	.66
HORIZON TELE COMMUNICATIONS	HASTING	NE	90	4241	1.14	.00	1.14
LIBERTY TV CABLE INC	VIDALIA	GA	108	3340	.52	.20	.84
LIBERTY CABLE TV INC	ARLINGTON	WA	16	2116	.70	.00	.70
CENTRE VIDEO CORP	STATE COLLEGE	PA	79	10414	.62	.18	.76
COMMUNITY TELE COMMUNICATIONS	STERLING	CO	19	4571	.26	.16	.64
COMMUNITY TELE COMMUNICATIONS	CARLSBAD	NM	183	7588	.50	.16	.66
MOUNT VERNON CABLEVISION	MOUNT VERNON	OH	34	5454	.28	.18	.74
NATIONWIDE CABLEVISION	SAN CARLOS	CA	5	15452	2.04	.00	2.04
ALABAMA TV CABLE INC	FAIRFIELD	AL	47	6517	2.06	.00	2.06

CABLE SYSTEM NAME	CABLE COMMUNITY	ST	ADI	NUMBER OF SUBSCRIBERS	AVERAGE COST PER SUBSCRIBER ($) ALL STATIONS	AFFILIATES	INDEPENDENTS
PENINSULA CABLE TELEV CORP	SAN MATEO	CA	5	7013	2.44	.00	2.44
ATHENA CABLEVISION CORP	CORPUS CHRISTI	TX	125	31692	1.66	.00	1.66
MOHONING VALLEY CABLEVISION	WARREN OH	OH	11	10278	2.42	.00	2.42
COLUMBUS CABLEVISION INC	COLUMBUS	GA	115	11552	1.34	.00	1.34
ROY H GREENE	PHENIX	AL	115	7486	1.00	.00	1.00
ORACABLE LTD	ORANGE COUNTY	FL	30	9268	.26	.00	.26
VISION CABLE COMM	ALEXANDRIA	LA	163	26666	.52	.20	.84
VISION CABLE COMM	SUMTER	SC	88	7596	.60	.34	1.34
CNA CABLEVISION ASSOC	DERRY	PA	12	10617	.30	.16	.68
SHENANGO & VARIETY CATV	SHARON	PA	92	12079	.62	.00	.62

Appendix II

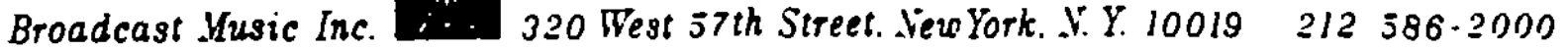
1983 Average Programming, Production and News Expenses

ADI Market Size	All Stations	Affiliates	Independents
1 - 10	$13,532,100	$13,743,100	$13,456,700
11 - 20	6,798,200	8,197,500	4,696,500
21 - 30	5,187,600	5,604,000	3,990,600
31 - 40	3,292,400	3,886,700	2,236,700
41 - 50	2,943,000	3,068,200	1,483,100
51 - 60	2,157,200	2,359,600	1,241,000
61 - 75	2,222,000	2,389,300	N/A
76 - 100	1,400,100	1,427,300	N/A
101 - 125	1,127,500	1,183,200	N/A
126 - 150	806,000	843,300	N/A
151 - 175	690,600	612,000	N/A
176 +	516,300	516,300	N/A
Nationwide	**$ 3,444,600**	**$ 3,037,700**	**$ 6,999,800**

APPENDIX C

BMI

Broadcast Music Inc. 320 West 57th Street. New York. N.Y. 10019 212 586-2000



July 31, 1985

EDWARD M. CRAMER
PRESIDENT

Mr. John P. Summers
Executive Vice President
National Association of Broadcasters
1771 N Street N.W.
Washington, D.C. 20036

Dear John:

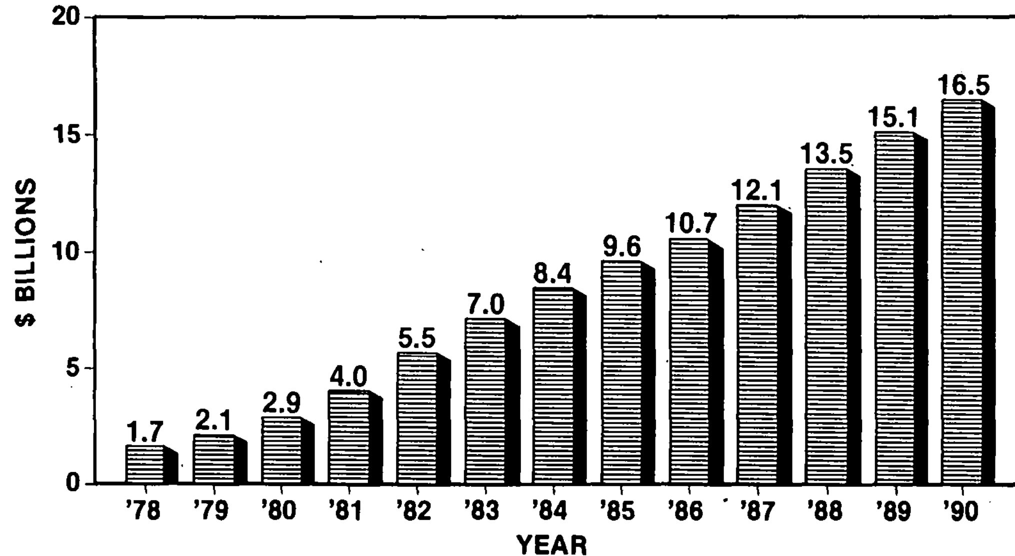
BMI licenses approximately 40,000 organizations including TV and radio stations, hotels, nightclubs, amusement parks, concert halls. etc. We have been doing this for nearly 45 years.

Considering our experience and our staff, there would not be great difficulty if we were to extend our licenses to include those cable systems that re-transmit TV signals. In fact, we are now in the process of negotiating with representatives of the cable industry a license agreement for those systems that originate programs.

If you have any additional questions or wish further details, please let me know

Sincerely,

CABLE INDUSTRY REVENUES
1978-1990

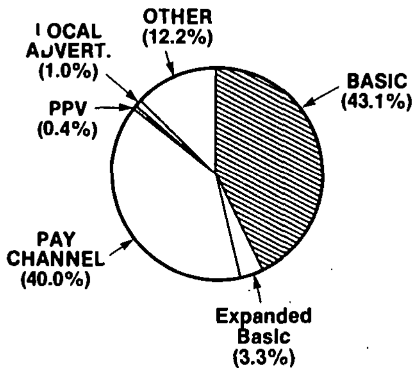


Source: Report to National Cable Television Association, May 1985, *Prosperity for Cable TV: Outlook 1985-1990.*

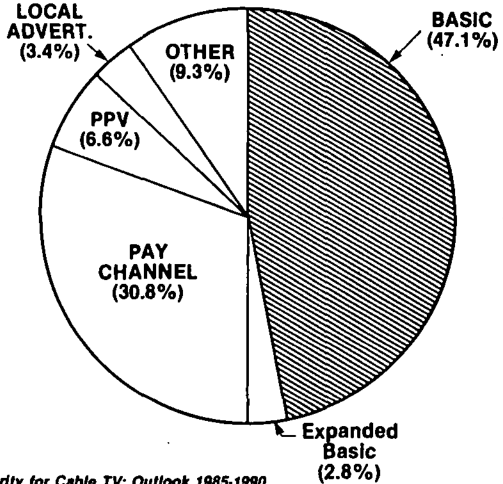
Arthur D. Little, Inc.

REVENUE COMPONENTS
1984 & 1990

1984:
$8.4 Billion Total Revenues



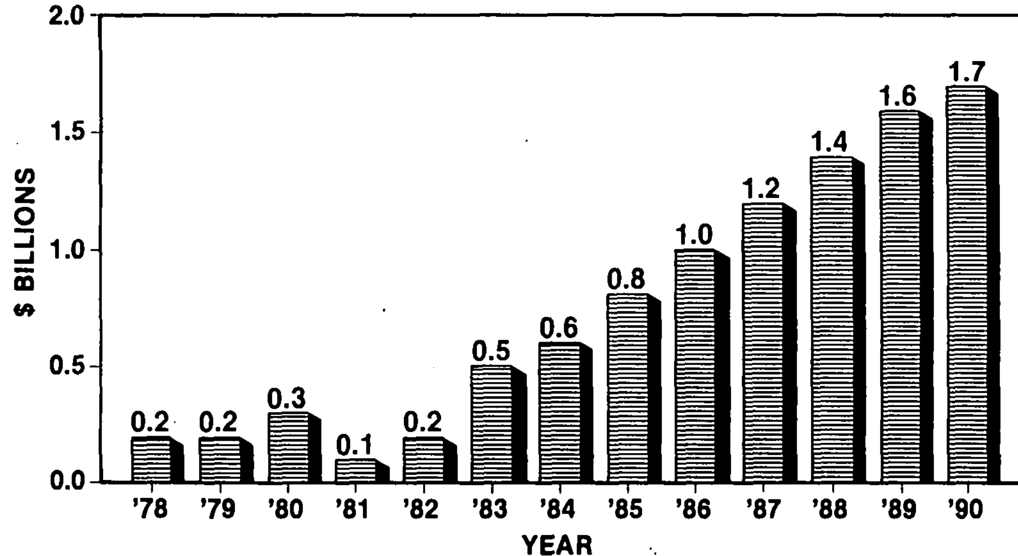
1990:
$16.5 Billion Total Revenues



Source: Report to National Cable Television Association, May 1985, *Prosperity for Cable TV: Outlook 1985-1990.*

Arthur D. Little, Inc.

NET INCOME AFTER TAX
1978-1990



Source: Report to National Cable Television Association, May 1985, *Prosperity for Cable TV: Outlook 1985-1990.*

Arthur D. Little, Inc.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUINCY CABLE TV, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents, KHQ, INCORPORATED, *et al.*, Intervenors.	)	No. 83-1283
TURNER BROADCASTING SYSTEM, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents, METROMEDIA, INC., *et al.*, Intervenors.	)	No. 83-2050

EXHIBITS TO
MOTION FOR STAY OF ISSUANCE OF MANDATE PENDING
PETITION FOR WRIT OF CERTIORARI

INDEX TO EXHIBITS

Exhibit	No.
Report of 125 Television Stations' Responses to NAB Inquiry on Must-Carry	1
Affidavit of Donald Sterling Station KTIE-TV, Oxnard, California	2
Affidavit of John W. Miller Station WCVX-TV, Vineyard Haven, Massachusetts	3
Affidavit of Arnold D. Wallace Station WHMM-TV, Washington, D.C.	4
Affidavit of Reynold V. Anselmo Stations WXTV, Paterson, New Jersey KMEX-TV, Los Angeles, California KDTV, San Francisco, California	5
Affidavit of Mary Perot Nichols Station WNYC(TV), New York, New York	6
Affidavit of James U. Lavenstein Station KOKI-TV, Tulsa, Oklahoma	7
Affidavit of John Conte Station KMIR-TV, Palm Springs, California	8
Affidavit of Richard Ramirez Station WHCT-TV, Hartford, Connecticut	9
Affidavit of Brian H. Eckert Station WSJT(TV), Vineland, New Jersey	10
Affidavit of Gary M. Kaye Station WVUW(TV), Pittsfield, Massachusetts	11
Affidavit of Forest Drake Station WLJC-TV, Beattyville, Kentucky	12
Affidavit of George Plenderleith Station WFAT-TV, Johnstown, Pennsylvania	13
Affidavit of Julian S. Smith Station WPTT-TV, Pittsburgh, Pennsylvania	14

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TAB 1

EXHIBIT NO. 1

AN ANALYSIS OF RESPONSES TO NAB'S SPECIAL "MUST-CARRY" INQUIRY TO TELEVISION STATIONS

On Wednesday, July 31, 1985, a mailgram was sent to all television broadcasters (licensees and holders of construction permits) on the subject of the Court of Appeals decision regarding the FCC "must-carry" rules. The mailgram contained a series of questions regarding the extent to which stations may be harmed if the decision is allowed to stand.

Stations were invited to telephone in to a consulting company which provided the National Association of Broadcasters (NAB) with written records regarding each call. A statement of Robert La Rose, Senior Vice President, Research, ELRA Group, attesting to the procedures followed by this firm, is attached hereto. As he states, by August 9, 1985, 127 calls had been received. Information from two of these broadcasters is not included in this analysis because of special requests from the persons making these calls. Five more calls were received after the deadline and are not included in this report.

The mailgram contained several specific questions. Broadcasters were asked to have their answers to the questions ready before calling. The following basic questions were asked:

1. Have any cable systems in your market filed (or been granted) petitions for special relief to avoid carrying your station as a must-carry signal? If yes, how many?

2. If the Court of Appeals decision that the must-carry rules are unconstitutional stands, will this hurt your station? If yes, how?

   2a. What proportion of your audience would you expect to lose if the must-carry rules were dropped?

   2b. What corresponding decline in your station revenues would you expect if the must-carry rules were dropped?

   2c. What impact wil this have upon your programming, particularly local news, public affairs and other public service programs? What other sources of local public service programming are available in your market?

3. Before or since the Court's decision, has any cable system operator indicated to you, verbally or in writing, that your signal will no longer be carried on the system or that there will be a charge to carry your station's signal on the cable system? If yes, please give details. If you have received something in writing, please send a copy to address below.

In additionn to these basic questions, several more questions were asked to obtain the caller's name, station and market identification. Responses to questions are summarized following Mr. La Rose's statement. Summaries were compiled by NAB's Research and Planning Department and are presented on a question-by-question basis. A copy of the mailgram text is attached as Appendix A.

STATEMENT OF ROBERT LA ROSE
Senior Vice President, Research
ELRA Group
725 Greenwich Street
San Francisco, CA 94133

On July 31, 1985 the National Association of Broadcasters (NAB) sent a mailgram to television stations to solicit their reactions to a Court of Appeals decision regarding cable television "must-carry" requirements. A telephone number and contact person's name at ELRA's East Lansing, Michigan office were provided in the mailgram. On August 1, the ELRA Group established a system for tabulating the telephone responses at the request of the NAB.

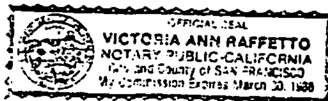
The text of the mailgram was embodied in a response form which the ELRA operator used to take down answers to the questions in the mailgram and to gather background information from the respondent. The operator was briefed by me and by NAB staff regarding the scope and purpose of the project.

One hundred twenty-seven responses were received between August 1 and August 9. All calls were received by two operators, one of whom obtained answers to the questions in the mailgram, while the other took down names of respondents to be called back when two calls were received at the same time. The calls were received between 9 a.m. and 6 p.m., EDT. Many respondents provided extensive additional comments so that the length of calls ranged anywhere from five to thirty minutes. All completed response forms were forwarded directly to the NAB for tabulation.

Robert La Rose
Senior Vice President
Research ELRA Group

Sworn to and subscribed before me, a notary public, this 14 day of August, 1985.

Notary Public



SUMMARY OF RESPONSES TO "MUST-CARRY" INQUIRY

Question 1: Have any cable systems in your market filed (or been granted) petitions for special relief to avoid carrying your station as a must carry signal?

Thirty-one of 125 callers (24.8%) indicate that special relief has been sought by cable systems in their market to avoid carrying their signal as a must carry. Most of these callers note that only one or two cable systems are involved, although two callers indicate that 30 systems in one market and 45 systems in another market sought relief. Table 1 presents a list of markets in which cable systems have indicated that at least one broadcast television station will be dropped.

Table 1. Markets In Which Cable Systems Will Drop At Least One Broadcast Television Signal.

Market	No. Cable Systems
Charleston, WV	45
Los Angeles, CA	30
Mt. Vernon, IL	10
Fairfax, VA	8
Reading, PA	5
Andersen, SC	4
Prescott, AZ	3
Garden City, NY	2
Cotati, CA	2
Besten, MA	2
Medford, OR	2
San Bernadine, CA	2
Wilmington, NC	2
Bridgeport, CT	2
San Jose, CA	2
Longview, TX	2
St. Petersburg, FL	2

[continued on next page]

Table 1. Cable Special Relief Filings to Drop Must Carry Signals [continued]

Market	No. Cable Systems
Lake Charles, LA	2
Orlando, FL	1
Philadelphia, PA	1
Hartford, CT	1
Duluth, MN	1
Oxnard, CA	1
Durango, CO	1
San Francisco, CA	1
Washington, DC	1
San Bernadino, CA	1
Kingsport, TN	1
Anaheim, CA	1
Ann Arbor, MI	1
Ashland, KY	1

Of the 31 stations in Table 1, 23 are UHF, 18 are independents, 6 are PBS and 6 are network affiliates. Affiliation information is unavailable for one station. Table 2 breaks out station affiliation by frequency band.

Table 2. Crosstabulation of Station Affiliation and Frequency

Affiliation	No. UHF Stations	No. VHF Stations
Independent	14	4
Public/educational	5	1
Network affiliate	3	3
TOTAL	22	8

Question 2. If this Court of Appeals decision that the must carry rules are unconstitutional stands, will this hurt your station? If yes, how?

Of the 125 broadcasters calling in to the Inquiry, 108 (86.4%) said that the Court's decision, if allowed to stand, would hurt their station. Thirty-eight broadcasters provided further details of the potential injuries. These responses are summarized in Table 3.

Table 3. How Must Carry Decision Will Hurt Stations

Response (Volunteered by Respondent)	No. of Stations
Will be finished/gone/close doors/ out of business/off-air/won't build (CP)	14
Will probably be dropped [from cable systems]	8
Off-air reception problem	9
Will lose majority of audience	6
Will drop to lower market ranking [due to loss of viewing households]	5
Own religious station which will be probably be dropped by cable systems	4
Loss of advertising revenue	3
Local ordinance restricts outside antennas	2
Cannot afford cable system charge for carrying my station	2
Loss of program sponsors	2

[continued on next page]

Table 3. How Must Carry Decision Will Hurt Stations [continued]

Response (Volunteered by Respondent)	No. of Stations
Viewers use box -- not [VHF/UHF] tuner	1
Will lose network "protection"	1
Local programming cutbacks	1
Minority-owned, faces possible discrimination	1
Competing stations will be added to cable systems	1

*Thirty-eight broadcasters volunteered answers to this question. Because of multiple responses, there are 61 responses.

Question 2a. What proportion of your audience would you expect to lose if the must carry rules were dropped?

Question 2b. What corresponding decline in your station revenues would you expect if the must carry rules were dropped?

The callers were specifically asked to estimate "what proportion of your audience would you expect to lose" and "what corresponding decline in station revenues would you expect" if the must carry rules were dropped? Table 4 summarizes these responses.

Table 4. Effect of Must Carry Decision on Audiences and Revenues.

Item	Average %	(n)*
Decline in audience	39%	(90)
Decline in revenues	47	(65)

*(n) Refers to the number of callers answering question whose responses are used in these computations.

<u>Question 2c</u>. What impact will this have upon your programming, particularly local news, public affairs and other public service programs? What other sources of local public service programming are available in your market?

Table 5 summarizes callers' responses regarding the impact of the Court's decision on station programming. Table 6 summarizes what other sources of local public service programming are available in the callers' markets.

Table 5. Impact of Court Decision on Station Programming.

Cutbacks/Impact (Volunteered by Respondent)	No. of Stations
Reductions in local programming	9
Public affairs programming	8
Programming/service cuts [nonspecific]	8
News	5
Decline in program quality	4
Sports	3
Minority programming	2
Weather	2
Religious cuts	1

Forty-one broadcasters volunteered responses to this question. There are 42 responses due to multiple responses coded from one broadcaster.

Table 6. Other Sources of Local Public Service Programming.

Source	No. of Stations
Other television stations [affiliation unspecified]	17
Network affiliates	14
NO OTHER SOURCES OF LOCAL INFORMATION	12
Public television stations	9
Radio stations	9
Independent television stations	4
Newspapers	4

Sixty-three broadcasters responded to this question. There are a total of 69 responses since multiple responses are coded.

Question 3. Before or since the Court's decision, has any cable system operator indicated to you, verbally or in writing, that your signal will no longer be carried on the system or that there will be a charge to carry your station's signal on the cable system? If yes, please give details.

Twenty-seven stations indicate that they have received notice from at least one cable system, verbally or in writing, that they will either be dropped (11 cases) from the system or must pay (4 cases). Two broadcasters were informed that they would need to purchase cable headend equipment in order to be carried on the systems. Finally, one broadcaster was informed that his station would be moved from a basic cable tier to a pay tier.

Description of Inquiry Callers

Table 7 provides an overview of the types of stations calling to respond to the Inquiry.

Table 7. Description of Respondent Stations.

Description	No. of Stations (%)*
FREQUENCY BAND	
UHF	75 (68%)
VHF	36 (32)
	123
AFFILIATION	
Network	45 (42%)
Independent	49 (45)
Public/Educational	14 (13)
	110
MARKET SIZE	
Top 50	57 (50%)
51-100	32 (28)
101+	25 (22)
	116
CABLE PENETRATION OF MARKET	
50% or less	72 (61%)
51% or more	46 (39)
	120

*Not including stations with missing responses

APPENDIX A

NAB
1771 N STREET NW
WASHINGTON, DC 20036 01AM

Western Union Mailgram

1-081101U213 08/01/85 ICS WA16614 WSHA
00010 MLTN VA 07/31/85

NAT'L ASSOC. OF BROADCASTERS
RICK DUCEY
1771 N STREET NW
WASHINGTON DC 20036

DEAR TV BROADCASTER:

AS YOU KNOW, A U.S. COURT OF APPEALS RECENTLY FOUND THE "MUST CARRY" RULES TO BE UNCONSTITUTIONAL ON FIRST AMENDMENT GROUNDS. A "STAY" WILL BE SOUGHT TO PREVENT THIS DECISION FROM TAKING EFFECT UNTIL AFTER APPEALS IN THE CASE ARE COMPLETED. IN SUPPORT OF FURTHER MOTIONS TO BE FILED IN THE COURT, NAB AND ALLIED GROUPS MUST DEVELOP SPECIFIC CASE STUDIES TO ILLUSTRATE THE HARM THAT THIS DECISION COULD CAUSE TO PARTICULAR TELEVISION STATIONS.

WE URGENTLY NEED INFORMATION FROM TELEVISION BROADCASTERS WHO CAN HELP US SPECIFICALLY DOCUMENT CASES WHERE BROADCASTERS WILL BE SEVERELY HARMED IF THIS RULING IS ALLOWED TO STAND AND MUST CARRY IS ELIMINATED. THIS NEEDS TO BE DONE AS QUICKLY AS POSSIBLE. IF YOU THINK YOUR STATION WILL SUFFER GREAT HARM IF THE MUST CARRY RULES ARE DROPPED, PLEASE LET US KNOW! CALL OUR "MUST CARRY HOTLINE" WHICH IS BEING STAFFED BY OUR SPECIAL CONSULTANT, THE ELRA GROUP AND ASK FOR JANE AT (517) 337-2090. YOUR CALLS MUST BE RECEIVED BY AUGUST 6, 1985.

YOUR COOPERATION IS ESSENTIAL TO THIS EFFORT. IF THE "MUST CARRY HOTLINE" IS BUSY WHEN YOU CALL, PLEASE BE PATIENT AND CALL AGAIN. THE OPERATOR WILL TAKE YOUR NAME AND NUMBER AND SOMEONE WILL CALL YOU BACK TO COMPLETE THE INTERVIEW.

PLEASE HAVE AS MUCH AS POSSIBLE OF THE FOLLOWING INFORMATION AVAILABLE BEFORE CALLING THE "MUST CARRY HOTLINE":

1. HAVE ANY CABLE SYSTEMS IN YOUR MARKET FILED (OR BEEN GRANTED) PETITIONS FOR SPECIAL RELIEF TO AVOID CARRYING YOUR STATION AS A MUST CARRY SIGNAL? IF YES, HOW MANY?

PAGE 2

Western Union Mailgram

2. IF THE COURT OF APPEALS DECISION THAT THE MUST CARRY RULES ARE UNCONSTITUTIONAL STANDS, WILL THIS HURT STATION? IF YES, HOW?

A. WHAT PROPORTION OF YOUR AUDIENCE WOULD YOU EXPECT TO LOSE IF THE MUST CARRY RULES WERE DROPPED?
B. WHAT CORRESPONDING DECLINE IN YOUR STATION REVENUES WOULD YOU EXPECT IF THE MUST CARRY RULES WERE DROPPED?
C. WHAT IMPACT WILL THIS HAVE UPON YOUR PROGRAMMING, PARTICULARLY LOCAL NEWS, PUBLIC AFFAIRS AND OTHER PUBLIC SERVICE PROGRAMS? WHAT OTHER SOURCES OF LOCAL PUBLIC SERVICE PROGRAMMING ARE AVAILABLE IN YOUR MARKET?

3. BEFORE OR SINCE THE COURT'S DECISION, HAS ANY CABLE SYSTEM OPERATOR INDICATED TO YOU, VERBALLY OR IN WRITING, THAT YOUR SIGNAL WILL NO LONGER BE CARRIED ON THE SYSTEM OR THAT THERE WILL BE A CHARGE TO CARRY YOUR STATION'S SIGNAL ON THE CABLE SYSTEM? IF YES, PLEASE GIVE DETAILS. IF YOU HAVE RECEIVED SOMETHING IN WRITING, PLEASE SEND A COPY TO:

MICHAEL BERG
NAB LEGAL DEPARTMENT
1771 N STREET, NW
WASHINGTON, DC 20036

THANK YOU FOR YOUR SUPPORT IN THIS CRITICAL INDUSTRY EFFORT.

SINCERELY,

EDWARD O. FRITTS
PRESIDENT AND CEO
NATIONAL ASSOCIATION OF BROADCASTERS

06:01 EST

MGMCOMP

TAB 2

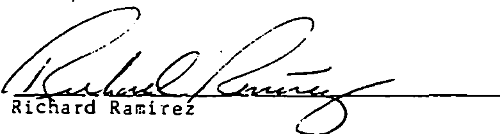
d. Any significant loss of advertising dollars would force us to curtail local production - thereby eliminating any possibility for public service, community affairs, news, information, and children's programming of significance.

e. Loss of parity with other local broadcasters will make it difficult, if not impossible, for WHCT to survive - potentially jeopardizing more than 40 jobs and $18,000,000 of private sector investment capital.

8. Since the Quincy-Turner decision was handed down in the midst of this transition, some Connecticut cable owners have chosen to "wait and see" what finally evolves in the courts before deciding whether or not they will carry WHCT-TV. Loss, or even delay, of carriage would seriously imperil this station and its viewers, since existing, local (and competitive) stations are already accepted by these same cable operators.

9. Failure to stay the Circuit Court's action can and will severely jeopardize WHCT TV's ability to re-enter its own market and compete on an equal footing with other broadcasters, local as well as imported signals.

10. I strongly urge the courts to stay this decision without delay, in order to protect the right of local broadcasters to serve their viewers and express the views of the minority communities.



Richard Ramirez

MANAGING GENERAL PARTNER

STATEMENT OF DONALD STERLING

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald Sterling, being first duly sworn, deposes and says:

1. My name is Donald Sterling and I am President of KTIE-TV, Inc. ("KTIE"), which holds a permit from the Federal Communications Commission ("FCC") to construct KTIE-TV, a UHF television station assigned to channel 63, allocated to the City of Oxnard, California, which is located in Ventura County, approximately 60 miles north of Los Angeles and 35 miles south of Santa Barbara. KTIE-TV will be the first local station in Ventura County when it begins broadcasting on August 17, 1985, after a construction period of over two years and an expenditure of just under $5 million. KTIE has built a state-of-the-art facility from the ground up with stereo and second language capabilities. It is our intention to broadcast our news simultaneously in English and Spanish to serve the approximately 30% of our potential viewers who speak Spanish. We have invested heavily in equipment and personnel to provide a professional news operation with live remote broadcast capabilities via our ENG (electronic news gathering) truck and a system of microwave relays throughout Ventura County.

2. Prior to the start-up of KTIE-TV there has been no television station allocated to and with a specific mandate to serve Ventura County. The residents have primarily viewed Los Angeles television stations, although some cable systems carry

the ABC affiliate in Santa Barbara as well. We will be the only television station broadcasting from Ventura County and concentrating on issues of interest and importance to the residents of the county. We naturally assumed, therefore, that the cable systems in and about the county would be willing to grant our requests to carry KTIE-TV on their systems.

3. The importance of cable carriage to the survival of KTIE-TV cannot be over-emphasized. Ventura County is bounded on three sides by mountain ranges and the balance by the Pacific Ocean. Therefore, the county is heavily cabled. In an area of just over 275,000 TV households, there are fourteen cable systems with a total of over 200,000 subscribers -- a penetration of over 72.5%. Virtually all of the households that subscribe to cable do not have antennas, as they became unnecessary as long as local stations are carried on cable, as well as unsightly. Consequently, all cable households must be able to receive station KTIE-TV on cable or they will probably not receive it at all.

4. In anticipation of going on the air, we sent our "must-carry" requests to all of the cable systems within a 35 mile radius of Oxnard. Only two cable systems in this group were outside Ventura County -- Malibu and Santa Barbara. The only cable system to protest must-carry was the Group W cable system in Simi Valley, which filed a request for waiver with the FCC. The FCC denied Group W's petition in a decision adopted July 11, 1985 and released July 17, 1985. It ordered Group W to prepare to carry the KTIE-TV signal within 30 days

of our air date. A meeting between management of KTIE and Group W was set to work out the details of carriage. Unfortunately, the Court of Appeals decision in the must-carry case intervened, and the meeting was canceled by Group W, which then used the Court decision as the basis for seeking reconsideration of the recent FCC decision. Simi Valley is the fastest growing city in Ventura County, farthest from our transmitter, and partially obscured by terrain. Its population exceeds 7% of the total population of Ventura County today, and this percentage will increase as the city continues its rapid growth.

5. It is difficult for me to understand the real reasons for Group W's reluctance to carry KTIE-TV. The attached August 12, 1985, editorial from the Simi Valley Enterprise newspaper also expresses strong disagreement with Group W's behavior. The station will be the only local TV station in Ventura County -- the county in which Simi Valley is located. KTIE-TV will be the only source of Ventura County local news, weather, sports, traffic, etc., on TV. KTIE has made a substantial commitment, backed by a very large financial investment, in and to Ventura County and its television viewers. The station does not duplicate any other signal received by Group W Cable. And yet Group W would prefer to offer its subscribers transmissions from distant cities, cable channels with no pertinence to the community, pay channels, etc., in preference to KTIE-TV.

6. Cox Cable of Santa Barbara ("Cox") is the cable system serving our neighboring city to the north, approximately 34 miles distant, but within our must-carry area. It has only three must-carry stations, all network affiliates, on a system of 35 channels. We would have been the 4th must-carry station on the system. Until immediately prior to the recent Court decision, Cox had indicated that they intended to carry KTIE-TV pursuant to the must-carry rules. Almost immediately after the Court decision became public, Cox stated to us that they did not have any available channels and would thus not be carrying KTIE-TV on their system. It is apparent that the Court decision motivated Cox's decision not to carry KTIE-TV. It is not because the station duplicates any of their other programming, as KTIE-TV would have been their only local independent station. There is, in fact, considerable duplication on their system since they carry two affiliated stations of each of the three networks. They also carry the four independent VHF stations out of Los Angeles (which is located over 90 miles south of Santa Barbara), as well as a myriad of cable channels, both free and pay. Due to extreme terrain problems, the Santa Barbara cable market has a household penetration factor of 90%. Since, without cable, KTIE-TV cannot be seen in Santa Barbara, we will lose its 61,000 subscriber households, which represents 22% of the total potential television households in our market.

7. Thus, just since the release of the Court's decision in the must-carry case, two systems representing approximately 30% of our total potential market have specifically refused to

carry KTIE-TV -- Group W and Cox. It is almost impossible for a small, local TV station to become a viable, profitable operation with such a major portion of its market denied to it -- at a time after we had made such a major investment in reliance on existing law. I am extremely concerned about our ability to survive under the decision, and I strongly doubt that any new stations will be started unless the decision is overturned. There is no question that I would not have undertaken the construction of an Oxnard station and committed my personal finances to it if I had anticipated that cable must-carry protection might be withdrawn.

8. The situation could be even more serious than I have stated. Jones Intercable is the cable system for Oxnard, KTIE-TV's city of license. In fact, its facility is located right next to ours. In the period immediately following the issuance of our must-carry letters, Jones management made it clear that we would be unwelcome on their system and that they would do all in their power either not to carry us or to carry us on a premium tier. Jones recently initiated its own local programming operation, consisting of selling advertising time on a program of locally-produced news, sports and weather, and we are looked upon as prospective competitors. This may not be the way the relationship between broadcasters and cable systems has been perceived by the FCC, Congress or the Courts, but this is the way it really is today. Jones' local originations do not include a Spanish-language offering.

9. In summary, I expect that the effects on KTIE-TV of deleting the must-carry rules will be devastating. Ventura County and many other communities will face the loss of their independent, local television stations, which depend on cable carriage.

Donald Sterling

Subscribed and sworn to before me this 14 day of August, 1985.

Barbara Mittler
Notary Public

My Commission expires: May 4, 1987

8/12/85 THE ENTERPRISE S. V

Opinion

Editorials

Carry new station

Given a choice, would it be more important for the people of Simi Valley to watch a television station devoted to news and public affairs broadcasting from Ventura County, or one from Santa Barbara?

The answer is obvious, but at this point the question is moot. Simi Valley residents aren't going to be offered the choice.

Group W Cable, which services Simi Valley through a franchise granted by the city council, has thumbed its nose at KTIE-TV, which will go on the air later this month as Ventura County's only television station.

In order to carry KTIE, Group W would have to bump KEYT-TV of Santa Barbara because it has no open channels. The Federal Communications Commission has already ruled that such a bump is no big deal – probably wondering why Group W would think it so when a "hometown" station is going to be on the air.

Until a federal judge recently ruled otherwise, the FCC demanded that cable systems give local stations top priority. It's a good rule, that may win back its rightful place, because local stations are more concerned with local issues and local people than the giants (or in the case of Santa Barbara, even the also-rans) from another clime.

Group W is the only county cable system that won't carry KTIE, which makes it appear to be more concerned about Santa Barbara than Ventura County. Group W also opts to carry a Los Angeles radio station, instead of the local radio station, as its background noise on its public affairs channel.

Simi Valley is now the leading city in Ventura County in a number of categories, yet most folk from Santa Barbara and Los Angeles don't know Simi Valley or its people from beans, and could generally care less.

We hope Group W reconsiders its decision to ignore this county's only television station.

TAB 3

STATEMENT OF JOHN W. MILLER

WCVX-TV
Channel 58
Vineyard Haven (Cape Cod), Massachusetts
Cape Video Network, LP

My name is John W. Miller. I am Manager of Special Projects for WCVX-TV, Channel 58, Vineyard Haven (Cape Cod), Massachusetts. I am providing this statement to describe the real and potential impact on WCVX of the recent decision invalidating the FCC's "must carry" rules.

WCVX is unique for two reasons. It had previously operated on the same channel (58) for 18 months as a Low Power Television (LPTV) station. Secondly, it commenced operation as a full power UHF station (1.2 million watts) on July 19 concurrent with the announcement of the ruling by the U.S. Court of Appeals. Should the must carry rules ultimately fall, the effect on WCVX will be profound for reasons we will set forth in this statement. While most TV broadcasters are concerned about their signals being dropped from cable systems, ours is a matter of first getting on the eleven systems within our specified zone (35 miles from our main studio location). The market we serve is small by television standards, and cable penetration is unusually high. The refusal of cable systems to carry WCVX effectively barricades their subscribers from receiving our programming and in a very real sense jeopardizes the viability of our operation.

BACKGROUND

Cape Video Network, owned by Donald P. Moore, began operating LPTV station W58AO (Dennis, MA) with full local origination in January 1984. The station was built and equipped with objectives much larger than would benefit its low power status. It provided viewers with an impressive mix of syndicated and local programming produced by staff. . . including a high quality nightly news program and other forms of community-responsive programming.

In October 1985, Cape Video received a construction permit (CP) to operate on the same Channel 58 as a full power facility . We began operation with 1.2 million watts on July 19, 1985. The station operates between 7 a.m and 11 p.m. daily, and some 18 percent of its content is produced by the station itself with a staff of some 36 persons. It has announced intentions of substantially increasing local content starting this fall. We offer localism in programming in its fullest and best context.

As an LPTV, the station was not a must-carry. Nonetheless, we had sought carriage on local cable systems as a means of delivering a significant and relevant package of otherwise unavailable local programming to cabled homes. Furthermore, we viewed our product as being attractive to cable operators since it would give non-subscribers an incentive to subscribe. The efforts with cable operators were not successful.

On July 19, with the advent of full power, WCVX met the Commission's criteria for must carriage. Concurrent with filing our license to cover the CP, we wrote to eleven cable systems which fall within the 35 mile specified zone requesting carriage.

As this statement is being prepared, the fifteen day period during which cable systems may file a waiver request has not elapesed. However, all systems which have responded to our carriage request letter thus far have elected to seek a waiver. They include the following, and copies of their letters and/or filings are attached:

- ° Adelphia Communications Corporation (d/b/a Mass. Cablevision Inc.)
- ° Greater Fall River Cable TV, Inc.
- ° Nantucket Cablevision
- ° Cablevision of Fairhaven/Acushnet
- ° Whaling City Cable TV, Inc.

In the case of TCI/Taft-owned Cape Cod Cablevision, we also attach a copy of a written agreement made with them in February 1985 wherein they agreed not to seek a waiver. While we have not heard directly from Cape Cod Cablevision on our carriage request (pursuant to the February agreement), the system's management has publicly stated they will not carry WCVX. (See related and other pertinent newspaper clippings, also attached). The consensus is clearly emerging: cable systems that would otherwise be required to carry WCVX under the must carry rules are electing not to do so for the apparent singular reason that the Appeals Court decision arrived at an opportune time for the cable operators.

THE PROBLEM

According to trade sources, the systems subject to carrying WCVX collectively have more than 115,000 subscribers spread over a large geographic area. Potentially without carriage of WCVX, these subscribers may effectively be denied access to our signal if only because of the inherent limitations of the A/B switch reality. (That is, cabled homeowners may not understand the process or be willing to pay the cost of installing a switch to select between cable and over-the-air).

Of this number of subs, more than 60,000 reside within WCVX's primary coverage/service area. Furthermore, Cape Cod offers two additional unique problems from our standpoint. First, we cater to a substantial community of senior citizens . . . persons not only unwilling to assume the cost of acquiring the mechanisms necessary to receive both cable and over-the-air signals, but disinclined to manipulate unfamiliar devices in order to receive both cable and over-the-air services. Secondly, this is a tourist/vacation area. Many of the hotels and motels derive their televison services only from cable. Without access to WCVX via cable, this important potential audience is deprived of the area's only broadcast TV station. In turn, our advertisers are denied access to this group of senior citizens and visitors alike.

By far, the largest cable operator in our market is Cape Cod Cablevision, owned by TCI-Taft, with more than 32,000 subs in five towns. TCI-Taft also owns Nantucket Cablevision (3,300 subs), and we assume both systems are managed with the same criteria.

Our problem is further enhanced because TCI-Taft uses the franchise designated public access channel for its own local origination. This occurs in the absence of much demand for public access which is probably coincidental with the system's obscure efforts to promote its access channel. When this channel does not contain their own origination, it clears USA Network during the remainder of the day.

TCI-Taft sells commercial time with its own origination, and uses this customer base as a springboard to motivate clients to insert paid commercials in several other satellite-fed channels offered by the system including MTV, CNN, and USA.

Cape Cod Cablevision is rate regulated under the grandfathered provisions of Massachusetts statutes to the extent of base service. However, as with rates they charge for premium and tiered services, their locally sold commercial content is not regulated. In a very real sense, TCI-Taft must view the presence of WCVX as competition not only for viewers but for local advertising dollars.

Conversely, we view the availability of WCVX's programming to local cable viewers as an incentive for non-cabled homes to easily view this area's only TV station. As such, we expect that cable's subscriber base would be enhanced measureably with the addition of WCVX.

The management of the TCI-Taft outlet here, like the management of several other cable systems in the area, had told local franchise authorities some months ago that their systems would carry WCVX. However, now, even before the must carry rules are off the books, the same cable operators are backing off their previously promised commitment. In fact, TCI-Taft was sufficiently prepared to carry WCVX last February that it entered into a written agreement with us that they would not file for a waiver of the must carry rules when we solicited carriage subsequent to commencing full power operation. (copy attached).

Cape Video Network has invested in excess of $3 million in plant, equipment, and personnel and is providing a first class local product, fully compatable with what many viewers would expect only to find in a major market. It is now verging on being deprived of an important means of distributing its product through cable. Meanwhile, the resistent cable operators are emerging as having total control over the content of their many channels to the exclusion of diversity of choice that its subscribers could otherwise make.

The reason TCI-Taft and other cable operators in our service area remain rate regulated is because over-the-air reception of distant signals is marginal given the topography of this region and the relative proximity of other stations. This same topography renders even WCVX's 1.2 million watts signal marginal in many portions of our service area.

While the cable operators state that our enhanced power (from low power status) makes cable carriage unnecessary, the reality is that cabled viewers are unlikely to go to the trouble and expense of equiping their sets with dual reception modes.

In terms of economics, our service area is small . . . perhaps too small to support unaided the level of community commitment and programming offered by WCVX. Due to the generally poor over-the-air reception of broadcast TV stations in this region, cable enjoys a higher than average level of penetration.

Without mandatory carriage of WCVX, many, if not most of these cabled homes, may never be able to sample WCVX. In the fullest scope of the FCC's intent to "maximize the use of the spectrum", we have sought to offer an unprecedented level of service to the market to which we cater. This was origniallly made with the knowledge and expectation that cable carriage would facilitate our penetration into the high number of cabled households in this area. If the "rules" now change, we will suffer significant harm due to circumstances and conditions beyond our control.

Conversely, the cable operators will continue to enjoy virtual monopoly control over video viewers in this area by simultaneously controlling what viewers in this area by simultaneously controlling what viewers see on each channel and by deriving unregulated income through advertiser support.

The following is in specific response to the questions asked by the National Association of Broadcasters in its August 1 Mailgram.

1. **Have any cable systems in your market filed petitions . . . to avoid carrying your station?**

   WCVX began operating on July 19, the same day the Appeals Court decision on must carry was announced. As a LPTV for 18 months prior to that date, we had not been granted carriage by any cable system though the request was made. Our must carry letters were mailed to the eleven cable community units within our 35 mile specified zone. As indicated previously in this testimony, since the fifteen day waiver request period has not yet elapsed, we have not heard from all eleven systems as yet (August 16 is the outside date). Other than those responses already in hand, we cannot conclusively state whether all eleven cable systems will seek special relief. However, it is our expectation from what we hear and read in the local press that most if not all of the systems will either file for a waiver (thereby delaying any carriage requirement until the FCC acts on the waiver request), or will simply choose to ignore the matter in violation of the must carry rules.

We are particulary agrieved by the Commission's Public Notice of August 2 wherein it states " . . . pending the effective date of the Court's order . . . the Commission will maintain the status quo of cable systems. That is, no new signal carriage will be required . . .' Furthermore, two days prior to this Public Notice, FCC Cable Branch Chief Steve Ross responded to my phone inquiry that the Commission would not enforce the must carry rules pending further developments. We cannot comprehend the Commission's posture of openly and willfully electing to take such a casual stance on such a compelling matter. Furthermore, we were shocked at the personal statement of Commissioners Fowler, Dawson, and Patrick of August 2, and its hypocratic content. The statement was one of agreement with the Court's decision, lacking any effort or pledge of effort to address a "retooling" of the must carry rules so that both the First Amendment and the nation's cabled households are satisfied . . . at least to the extent of local stations.

2. **If the Court decision stands, will this hurt your station? If so how?** Several of the cable systems in our specified zone represent in excess of 50 percent of the households, not to mention a high percentage of hotel and motel rooms. (This being a tourist area, access to accomodations is a key factor in reaching a TV audience). Furthermore, nearly half the population in our market area is comprised of senior citizens to whom the process of installing an A/B switch in cabled households in univiting. As a practical matter, we maintain that <u>any</u> cabled household is not likely to fiddle with cables, antennas,

and switches in order to select between cable and WCVX.

Even with WCVX operating at 1.2 million watts on Channel 58, over-the-air reception in many homes without substantial antennas is not competitive with the clear pictures offered by cable systems.

As for the effect of non-carriage on WCVX revenues, it is difficult to assess at this juncture, if only because we have no advertising billing history as a new full power station. However, many potential advertisers are cable subscribers. As they encounter the difficulty or impossibility of clearly receiving WCVX by virtue of its not being on cable, it will surely impact their buying habits as they speculate on how other households will be impacted.

In general, we calculate that it will be roughly 50 percent more difficult to market WCVX to advertisers absent cable carriage. And, the diminished "circulation" of WCVX by not being on cable will have a correspondingly negative effect on our rate card structure. Since ours is not a rated market, a quantitative approach to pricing our product would not be scientific or feasible.

The scenario described above may have a devastating impact on our ability to sustain meaningful, locally produced, quality programming. At present, 18 percent of our broadcast week is comprised of self-produced

non-entertainment programming. This includes a nightly news program with distinct news, weather, and sports segments, a weekly senior citizen program, and a morning and evening 'magazine' featuring a variety of local issues and people.

We had expected to expand this type of programming rapidly. However, the revenue loss resulting from non-carriage on cable systems may delay or eliminate this objective. It may also force a review of even that programming already in place . . . all of which is by nature cost and labor intensive.

Our original concept was (and is) to provide relevant, local programming . . . an objective rebuffed by many television operators whose signals reach this area. It would be ironic if the elimination of the must carry rules economically forces WCVX to become no more inspired than ordinary television. Free enterprise and the marketplace will be the ultimate losers in that case.

As the only broadcast TV station in this market, there is no other public service or public affairs programming offered by television broadcasters of direct interest to Cape Cod and the Islands.

3. Has any cable system indicated that your signal will no longer be be carried . . . or that there will be a charge to carry your signal?

We have previously described the status of cable systems with regard to carriage of WCVX's signal. In addition, the general manager of TCI/Taft's Cape Cod Cablevision told a public meeting of the Town of Barnstable Cable Commission on July 24 that his system will NOT carry WCVX, even though his statement contradicted a public promise made prior to the Appeals Court decision. Other operators have been quoted in the press as stating they will not carry WCVX, or will maintain status quo for the time being.

As for the cable systems seeking a fee to carry WCVX, there has thus far been no direct or indirect mention of this possibility by the area cable operators. However, since revenues derived from such fees would not be subject to regulation by the local licensing authority or the Massachusetts Cable Commission, we have to assume it has or will cross the minds of cable operators as they identify means to subsidize their regulated base rates with other sources of income.

Since some of the systems within our specified zone consist of less than 36 channels, the leased channel mandate of the Cable Communications Policy Act of 1984 does not apply. If systems voluntarily provide for leased access, the criteria for determining what a "reasonable" fee, as required, is certainly wide open for interpretation.

In the case of the TCI-Taft systems here, they would surely weigh any income from leased access against any self-conceived potential erosion of their own existing revenues from selling local advertising time on their own channels. For this reason, we are not optimistic as of this writing that the offer of leased access will come easily . . . let alone being reasonably priced.

We have certainly considered the prospects of seeking to motivate a grass roots effort among cable subscribers and cable committees in the various towns to lobby their cable operators for the purpose of gaining carriage of this area's only TV station. However, it would not be an easy or cost-effective process to cause people to encourage carriage of a product they've not yet had an opportunity to sample. Such a campaign, however, is testiment to the additional economic hardship that would fall to WCVX at a time when it could least afford the expense.

IN SUMMARY

WCVX is profoundly impacted by the Appeals Court decision, and joins with those seeking to facilitate an appeal or re-hearing of the matter. The unique circumstances of our market area and our level of community-based operations merge around the absolute necessity of being carried on local cable systems. We speak from experience. As a LPTV for 13 months (and quite apart from the relative signal strength of the station), the resistance of cabled households to install antennas and switches coupled with the

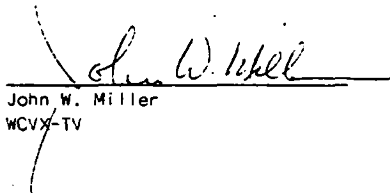
skepticism of potential advertisers contrived to paint a bleak picture for an over-the-air venture of the quality of this station. In point of fact, WCVX owner Donald Moore is on record as stating: "Had we any reason to anticipate that the must carry rules would be deleted, it's highly unlikely I would have made the costly commitment to develop a full service television operation for this market . . . even in the absence of direct over-the-air competition from other TV broadcast facilities". (Moore was forced to sell his WQRC-FM radio station as a condition of being granted a construction permit to build WCVX. WQRC is an immensely successful station by every measure.)

In a very real sense, the future of WCVX is in doubt lacking cable access. Apart from the financial risk exposure, the public interest may also be at risk inasmuch as the diversity of a quality broadcast product would be denied them.

In conclusion, the must carry rules cannot be recklessly discarded. As for First Amendment rights, the free speech rights of over-the-air broadcasters are, as a practical matter, abridged where cable exists. Where there is no cable, those who wish to view television have antennas and the resulting ease of reception. But in cabled markets . . . especially where penetration is high . . . cabled viewers are effectively pre-empted from viewing what the cable operator elects not to carry. Neither the public interest nor the First Amendment nor the concept of a free marketplace are served under such a condition. Instead, the cable operators are

unilaterally afforded an exclusive franchise to program their multiple channels by their own criteria and without regard for the public interest.

We therefore urge a review and reversal of the Appeals Court decision and recommend that any revision of the must carry rules be sensitive to at least those broadcasters who are ready, willing, and able to fulfill their mandate to be responsive to the public interest.

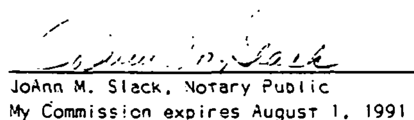


John W. Miller
WCVX-TV

On August 13, 1985, before me personally came JOHN W. MILLER to be known to be the individual described in and who executed the foregoing statement and acknowledged that he executed same.

Notary:

Subscribed and sworn before me on this the Thirteenth day of August, 1985.



JoAnn M. Slack, Notary Public
My Commission expires August 1, 1991

[Attachments to Mr. Miller's Statement have been omitted because of their volume.]

TAB 4

IN THE DISTRICT OF COLUMBIA) ss:

AFFIDAVIT

I, Arnold D. Wallace, having been duly sworn, hereby depose and state that:

I am the General Manager of Station WHMM-TV, Washington, D.C. WHMM-TV is a UHF non-commercial, educational television station licensed to Howard University. The Station began broadcasting a little more than four years ago. WHMM-TV is the nation's only television station owned by a predominantly black institution of higher learning. The station, unlike most others, presents a significant amount of programming geared to the special needs and interests of minorities.

WHMM-TV is entitled to carriage under the FCC's "must-carry" rules on cable television systems operated in Charles County, Maryland by two cable companies, St. Charles CATV, Inc. ("St. Charles") and Chasco Cablevision, Ltd. ("CHASCO"). Charles County is located about 30 miles from Washington, D.C., and it is considered part of the Washington, D.C. television market by the FCC and the major television ratings services.

WHMM-TV requested carriage on the St. Charles system in January 1981, shortly after WHMM-TV began operation, and on the Chasco system in March 1983, shortly after the Chasco system commenced operation.

Even though both cable systems carry all of the operational television stations currently licensed to Washington, D.C. with which WHMM-TV competes for viewers,*/ neither system ever bothered to respond to WHMM-TV's request for carriage. Instead, both immediately filed petitions for "special relief" with the FCC. Howard University opposed both petitions.

In January 1984, the FCC's staff rejected St. Charles' petition as meritless. It did the same with respect to Chasco's petition in May 1984. Both systems sought review of the denial from the full Commission. The Commission denied the systems' special relief requests and their related Motions for Stay. The Commission also denied their subsequent Motion for Stay Pendente Lite. Nevertheless, neither system has ever commenced carriage of WHMM-TV. Instead, both have sought review of the FCC's decision from the United States Court of Appeals for the District of Columbia Circuit. That proceeding was held in abeyance pending the Court's disposition of the Quincy and Turner cases, and is still pending.

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*/ The sole exception is WCQR-TV, which is on the air about 16 hours per day. Until recently, the station was one of the few minority-owned commercial television stations in the United States. Half of its broadcast day is a subscription pay television operation. The FCC's rules do not require cable television carriage of the subscription pay television portion of a local station's operations. The remaining few hours of WCQR-TV's operations are devoted solely to financial news programming.

The St. Charles and Chasco cable systems collectively serve about 10,000 subscribers, or about 25,000 people. The systems presently carry a number of television signals which are not entitled to mandatory carriage under the FCC's rules, including several which were added to the systems <u>after</u> WHMM-TV had tendered its carriage requests. None of the programming services carried by the St. Charles and Chasco systems is geared to minority audiences, although blacks account for over 20 percent of Charles County's population according to U.S. Census data.

WHMM-TV is satisfactorily available off-the-air only to households which have installed an outdoor UHF antenna aimed in the direction of Washington, D.C. Anyone who pays for cable service in Charles County is highly unlikely to incur the additional expense of installing such a UHF antenna when virtually all of the other Washington television stations except WHMM-TV are available to the subscriber via cable. Subscribers with a pre-existing antenna will similarly and for the same reasons choose not to incur the expense necessary to maintain their UHF antenna. In any event, even if the cable subscriber owns <u>and</u> maintains its UHF antenna, because signal delivery by cable is superior to over-the-air reception, the WHMM-TV signal received in these homes will be far inferior to reception of the other

D.C. stations with which WHMM-TV competes for viewers and which are carried by the systems.

Moreover, it is an accepted fact of life in the broadcast industry that viewers equipped with remote control channel selection devices who have available to them a wide panoply of cable services are not likely to foresake the comfort of their armchairs in order to turn the television set dial so as to receive a single additional over-the-air station. It is therefore highly unlikely that a Charles County cable subscriber, who has available to it six Washington, D.C. stations on cable, would even take the trouble to tune in to WHMM-TV, even if he or she does own and maintain a UHF antenna.

WHMM-TV believes that, where it is effectively the only Washington, D.C. television station not carried on cable in Charles County, it is put at a serious disadvantage vis a vis its competitors. The Charles County cable systems themselves recognize that when they chose to carry every Washington, D.C. television station except WHMM-TV, they were effectively dealing WHMM-TV a significant competitive blow. For example, in prosecuting its waiver request, St. Charles attempted to justify its failure to carry WHMM-TV in favor of certain non-mandatory Baltimore signals precisely because the Baltimore signals were

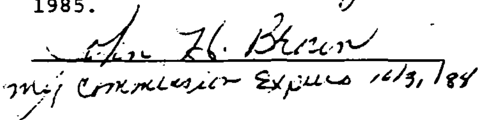
available over-the-air in Charles County. St. Charles argued: "[A]ny cable television system which does not carry them faces extreme marketing problems since it offers the public less than it can receive without cable television." As St. Charles implicitly acknowledged, cable subscribers clearly distinguish between those signals on cable and those that are not on cable; it is the case that, to the cable subscriber, not providing a particular signal such as WHMM-TV via cable is effectively tantamount to precluding access to that signal.

For these reasons, the carriage of the WHMM-TV signal on systems such as those in Charles County plays an integral part in determining the station's competitive posture in its television market.

I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

Arnold D. Wallace

Subscribed and sworn to before me this 16th day of August, 1985.



My Commission Expires 12/3, 88

TAB 5

STATEMENT OF REYNOLD V. ANSELMO

City of Washington)
) ss:
District of Columbia)

Reynold V. Anselmo, being first duly sworn, deposes and says:

I am the President of Spanish International Communications Corporation ("SICC"), Bahia de San Francisco Television Company ("Bahia") and The Seven Hills Television Company ("Seven Hills"). These companies are the licensees of seven UHF television stations affiliated with the SIN Television Network which broadcast entirely in the Spanish language: WXTV/Channel 41, Paterson, New Jersey; WLTV/Channel 23, Miami, Florida; KWEX-TV/Channel 41, San Antonio, Texas; KMEX-TV/Channel 34, Los Angeles, California; KFTV/Channel 21, Hanford, California (all licensed to SICC); KDTV/Channel 14, San Francisco (licensed to Bahia); and KTVW-TV/Channel 33, Phoenix (licensed to Seven Hills). Each of these stations is licensed to a community heavily populated with Spanish-speaking residents; each provides its community with a complete television programming service in the Spanish language, including local public affairs and local, national and international news programming.

In each of their communities, these licensees are pioneers of Spanish television and helped to establish the Spanish market, thereby fulfilling a critical need for residents who speak Spanish only, as well as making available to all residents -- Hispanic or not -- the oppportunity to see Latin cultures reflected in this mass medium.

While continued carriage on local community cable systems is more essential to the survival of certain of these stations than to others, the health of each station is to some degree dependent on such carriage. Carriage by a local cable system provides a broadcaster an inherent advantage over the broadcaster in the same community who is not carried. In each of the communities served by these licensees, there is a portion of the community which is penetrated by cable but which the SICC, Bahia or Seven Hills station cannot reach over the air due to obstruction from buildings and terrain, weather conditions or signal strength.

For example, over 26% of the audience of SICC's New Jersey station WXTV resides in Manhattan, where the density of skyscrapers thwarts the reception of an acceptable over-the-air signal from all UHF and most VHF broadcasters in the New York metropolitan area, even though they all transmit from atop the 110-story World Trade Center.

The mountains, hills and valleys in the Los Angeles metropolitan area serviced by SICC's KMEX-TV pose similar

problems to over-the-air reception of that station by a large portion of its potential audience. The weather in Los Angeles also can militate against over-the-air reception of an acceptable television signal: at least one cable operator who picked up KMEX-TV's signal by microwave complained that he had to cease carriage for this reason. This same condition affects the quality of the signals received by viewers over the air.

Even if an acceptable signal is available over the air, once a viewer has subscribed to cable and is connected to the system, the cable operator typically removes the antenna necessary to receive the over-the-air signals of stations it does not carry. Even where this is not the case, the station which can only be received over the air is at a disadvantage: rather than exert the added effort to switch from cable service to over-the-air service, viewers find it preferable to stay seated and limit their selections to the menu offered by the cable system.

Moreover, advertisers invariably ask whether the SICC, Bahia or Seven Hills station is carried on cable, to ensure that the station does in fact reach the audience represented. In fact, all three licensees now include in all sales materials a listing of the cable systems on which their stations are carried. While the existence of a Spanish market has been substantiated, advertisers are still tentative about "buying

Spanish," and the possibility that a station may not be received over the air by the entire community it claims to serve -- whether due to interference from buildings and terrain or to viewer disinclination to switch to its programming -- often provides more than enough reason to forego this purchase.

Consequently, if cable systems are not obligated to carry local television stations, SICC, Bahia and Seven Hills believe that all of their stations will be affected to some degree, but that certain of the stations and their viewers will be in serious jeopardy. WXTV and KDTV fall in the latter category. In 1984 alone, SICC litigated -- at great expense -- four separate proceedings in which cable operators had petitioned the Federal Communications Commission for relief from having to carry WXTV. Of these four proceedings, two resulted in orders to carry WXTV, and decisions on the other petitions were still pending when the Court of Appeals' Quincy decision was issued.

Typical of our experience with those cable systems which nevertheless carry our stations was an incident with Manhattan Cable TV. At the time, Manhattan Cable provided basic cable service to more than 25,000 Hispanic subscriber households and had carried WXTV on Channel 12 of its system for more than ten years. On February 1, 1983, with absolutely no notice to the public, to WXTV, or to its subscribers, Manhattan

Cable dropped WXTV from Channel 12, substituted the Satellite News Channel, and moved WXTV to Channel W on its mid-band tier, where a converter is required for reception. Thousands of Hispanic viewers suddenly found themselves unable to view WXTV, with no idea why or how to remedy the situation.

Not only did Manhattan Cable violate the Commission's rules in the way it handled this move, but, apart from demonstrating total insensitivity to its Spanish-speaking subscribers, it had directly contravened a requirement of the franchise agreement between it and the Borough of Manhattan that WXTV be carried on Channel 12. Pressure from the press, the public and SICC's FCC filing succeeded in returning WXTV to Channel 12, but Manhattan Cable has made it clear that, given the opportunity, it will not maintain this status quo.

WXTV's experiences are not unique. SICC's Los Angeles Station, KMEX-TV, in addition to litigating multiple petitions from local cable operators for special relief from the must-carry rules, also was forced to do battle in 1983 with a cable system operator who had carried the station on his system for over a dozen years, but then without notice moved the station from the basic tier to a mid-band location where it could be received only with a converter.

In response to phone inquiries from its subscribers, the cable operator informed them that they could only receive

KMEX-TV with a converter, that a $15 deposit was required, and that they would have to continue payments of $5 per month for this privilege. This was a prohibitive expense for a large number of the system's subscribers, many of whom worked on and resided near the farms in the San Fernando Valley. Ironically, even if the subscribers could have afforded it, the cable operator had few converters readily available and did not know when his supply would be replenished. Moreover, despite the fact that up to 15% of the communities he serviced were Hispanic, the cable operator, when discussing the matter with KMEX-TV's Station Manager, made the unsubstantiated claim that no one watched the station, and that he would drop KMEX-TV entirely at the earliest opportunity.

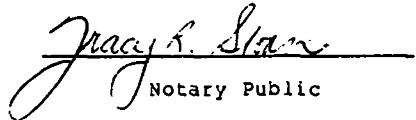
While public pressure ultimately succeeded in returning KMEX-TV to a basic tier on this system, soon after the Court of Appeals decision in Quincy last month, Storer, another large cable operator in the San Fernando Valley, relegated KMEX-TV to a mid-band tier requiring a converter for reception. We expect such "creeping displacement" to escalate in the absence of the must-carry rules.

In summary, SICC, Bahia and Seven Hills believe that despite the large and growing Hispanic population, if cable operators are no longer required to carry local television signals, many will either drop Spanish-language television

stations from their systems entirely, or carry them in such a manner as to make it difficult or cost-prohibitive for subscribers to receive them. As a consequence, these stations will lose significant portions of their audiences, while audiences will lose a valuable and unique programming service.

Reynold V. Anselmo

Subscribed and sworn to before me this 19 day of August, 1985.



Notary Public

My Commission Expires May 14, 1990

TAB 6

AFFIDAVIT OF MARY PEROT NICHOLS

STATE OF NEW YORK)
) ss.:
COUNTY OF MANHATTAN)

Mary Perot Nichols, being first duly sworn, deposes and says:

My name is Mary Perot Nichols and I am the Director of WNYC, a public television station assigned to commercial Channel 31, which is allocated to the city of New York, New York.

WNYC Track Record

WNYC is not a new station. Its FM station is the largest National Public Radio affiliate; its AM station recently celebrated its sixty-first anniversary. It has been notably successful in terms of audience and finances, particularly with its FM outlet, but also with its AM service.

New in TV

Recently, the decision was made to broaden and strengthen TV programming as well. WNYC serves the number one metropolitan market: the tri-state areas of New York, New Jersey and Connecticut. While it is the second PBS affiliate here, it is the only PBS station licensed to New York City. However, its mandate as a municipally owned station, plus its smaller size and budget, dictate a different program mix and PBS options, and a greater local emphasis than is offered by WNET.

WNYC is disadvantaged by the following factors:

1. The newness of its television effort precludes an established or large viewership.

2. A UHF signal results in poorer off-air reception than other stations in the market.

3. The presence of a stronger PBS station in the market suggests that if only one is to be chosen, it may not be WNYC.

Financing Public Service Programming

If cable carriage is threatened in Manhattan, the boroughs (although cable is not yet widely available there) and in the Long Island, New Jersey and Connecticut metropolitan area, WNYC faces a serious dilemma.

In order to raise the money for its public/community programming services, WNYC recently took advantage of its commercial license and leased portions of its non-prime time air to commercial programmers.

Cable is essential for a UHF outlet in a city of high buildings and uneven terrain. If cable access is denied or charged for in all or parts of the market, the value of WNYC's non-prime time air will diminish. Consequently, the goal of generating dollars through leased-time sales will be defeated. Alternative fund raising also will be crippled by the resulting smaller audiences (probably a 50-75% loss) and poorer reception.

"No Worse Off"

Cable operators argue that to return to over-the-air transmission/reception makes broadcasters no worse off than before cable. This argument does not take into account the viewers whose non-cable reception may be worse to non-existent. It is additionally spurious because of the practical difficulty of switching a set from cable to off-air capability, if both are available. The higher the cable penetration in a community, the more the off-air broadcaster is disadvantage by these facts.

	Cable Penetration* (% Households)
New York City (Manhattan and Bronx)	56%
Long Island	60%
New Jersey	50%
Connecticut	54%

*Source - A.C. Nielsen: by county (L.I.) - Jan, 1985; by state - July, 1984; N.Y.C. - May, 1985.

An Informal Survey

In an effort to assess the likelihood of being removed or being charged by the cable systems presently carrying WNYC, an informal telephone survey was conducted. The selection was random. A mix of channel capacity and location was spread over 15 systems. While no one spoke for attribution, cable representatives expressed satisfaction with the competitive advantage attendant to unrestricted program choice and pricing options.

Most expressed a wait-and-see attitude. They reported that no decisions had been made as yet, although three system managers referred WNYC to corporate decision-makers. Time-related words were common: "No change yet"; "Not at this time"; "Not yet"; "No immediate plans to change programming." They indicated they were awaiting legal developments before taking action.

A CableVision corporate programmer said he didn't know the future. He said, "Cash flow is a problem for cable."

Vision Cable, New Jersey, owned by Cable Group, said it would probably drop Long Island and New Jersey public TV before it dropped WNYC. A spokesman didn't indicate how many channels he wished to clear or whether he would respond to protests from those removed by charging a fee for continued carriage.

A group of cable corporate officers indicated that a "marketplace" or "auction" in channels could develop at some point where pressure for space is great.

The Sammons cable system of New Jersey said PBS was attractive to remove because Sammons wanted channels for satellite services.

A New Jersey public utilities cable officer indicated that Suburban Cable, New Jersey's largest system, was already out of compliance by not carrying WNYE, local Channel 25. He felt there was a possibility they would drop WNYC when permitted to do so because of other negotiations. Suburban was not contacted directly.

Although at the time of the survey no one spoke specifically of removing or charging WNYC, the implications of what they said about other services and stations indicate that WNYC and stations like it would be the first to be excluded, and that charging for channel space was likely where it could be done to the advantage of the cable system.

Conclusion

Like broadcasting, cable is a scarce commodity in any situation where there are too few channels to accommodate the broadcasters who wish to be carried. When there is no viable alternative available or likely to become available in the community, an inaccessible monopoly exists in the cable system.

Under such conditions, protection for non-commercial, weak, new or unpopular voices is a First Amendment question of merit.

Our information suggests the possibility that WNYC could be seriously harmed if the decision taken in the Quincy and Turner cases is permitted to stand and the FCC is unwilling to restructure the "Must Carry" rules.

Mary Perot Nichols

Subscribed and sworn to before me this 14th day of August, 1985.

Evelyn Hilliard
Notary Public

My commission expires:

EVELYN HILLIARD
NOTARY PUBLIC, State of New York
No. 41-4730254
Qualified in Queens County
Commission Expires March 30, 1986

TAB 7

County of Tulsa)
) ss:
State of Oklahoma)

AFFIDAVIT

James U. Lavenstein, being first duly sworn, deposes and states as follows:

My name is James U. Lavenstein. I am a general partner and general manager of Tulsa 23, an Oklahoma limited partnership. I have occupied these positions in Tulsa 23 since its inception in 1978. Tulsa 23 is the licensee of Television Station KOKI-TV, Ultra High Frequency (UHF) Channel 23, in Tulsa, Oklahoma. The station is on the air 18 hours daily and actively competes with three network-affiliated Very High Frequency (VHF) stations, utilizing entertainment, sports, news and public affairs programs.

KOKI-TV began operation on October 26, 1980, as the first independent television station in the Tulsa market and remains the only real over-the-air alternative to network programming. At the outset, the station's transmission facilities (tower location, antenna height and power) were planned so that cable systems throughout its coverage area and beyond could receive the station and thereby make the station's programs available to cable subscribers. When the station went on the air in 1980, about 30% of the homes in the Tulsa market were cable subscribers. With that percentage of cable subscribers, it was obvious to Tulsa 23 management that cable would grow and that KOKI-TV could

not be economically viable without carriage on cable systems. The fact is that the station would never have been built had it been known at the time that cable systems might not be obligated to carry local television stations.

In light of the importance of cable systems to the station's viability, the management of KOKI-TV has pursued a vigorous policy in enlisting cable systems to carry the station's programs. When the station went on the air, a full-time field service representative was engaged to approach each and every cable system operating in the coverage area. In addition, the station subsidized cable systems when they required additional equipment and technical expertise to receive the station. Indeed, the station exercised its rights under Federal Communications Commission (FCC) rules to compel some cable systems to carry the station in a number of instances where cable system operators refused to do so. This resulted in litigation before the FCC in approximately eight matters over the last five years in an attempt to obtain the carriage on cable systems to which KOKI-TV was entitled under the FCC's so called "must carry" rules. The station has been successful in each of these matters, which have been resolved either by favorable FCC rulings or by settlements to the effect that KOKI-TV has obtained the requested carriage on the subject cable systems. As a result, KOKI-TV is now carried on cable systems throughout its service area in some 20 counties in the northeast portion of the State of Oklahoma.

Today, as a direct result of our labors and expenses, KOKI-TV is carried by about 100 cable systems with almost 300,000 subscribers. Attached hereto is a detailed breakdown of the systems carrying the station. [*]

Today, also, more than 50% of the homes in the Tulsa market are cable subscribers. Obviously, cable subscribers are vital to the station's success, and without carriage KOKI-TV would surely fail, simply because so many homes no longer need or have outside receiving antennas, which were necessary for television reception before the advent of cable. Absent cable carriage, KOKI-TV's signal simply cannot be received off-the-air in thousands of households throughout its service area which do not have outside receiving antennas because of subscription to cable television services.

Tulsa 23 would not want anyone to believe that the station could perform without cable carriage. It is a well-known fact that UHF reception is far inferior to VHF reception. It is cable carriage pure and simple that has enabled UHF stations to compete with VHF stations by virtue of picture and sound equality which cable provides to all television stations. While the cost of transmission for UHF is many times higher than for VHF, that cost is affordable only because cable system carriage provides for the viewer to receive both types of transmission equally well.

In view of our experience with the necessity of substantial litigation before the FCC to obtain cable carriage under the "must-carry" rules, we have every reason to believe that the

*[Note: Attachment omitted in this filing because of its volume.]

systems which refused to carry KOKI-TV voluntarily in compliance with the rules will not do so if the rules are no longer in effect. As indicated above, any appreciable deletion of KOKI-TV's signal from the cable systems throughout the station's service area could spell disaster for the station's economic viability. We would simply fail to attract national, regional and local advertising in those areas where our reception is essentially nonexistent (and certainly noncompetitive vis-a-vis our VHF competitors) without the availability of cable carriage.

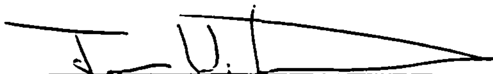
Even if cable systems continue to carry local stations, there must not be the danger that cable systems may charge the stations for such carriage. KOKI-TV has been on the air only five years and is hardly profitable. To place a further burden on the station so that the cable system operators may profit from such carriage would at the very least forestall the station's profitability and may well doom the station's very survival. Additionally, the requirement of payment for cable carriage would be the height of unfairness from the standpoint of copyright protection, since cable systems now obtain and retransmit the programming of television stations under compulsory licensing authority at a small fraction of the cost or value of the programming.

Demands for payment by cable systems would also place local stations at a great disadvantage in competing for local advertising. Independent stations, such as KOKI-TV, rely much

more heavily on local advertising revenues for their financial viability than do stations affiliated with the national television networks. In addition to competition from local network affiliates, local independent stations face competition for the local advertising dollar from cable systems operating in the market. For example, in the city of Tulsa itself, the cable system serves well over 100,000 subscribers which constitutes more than 50% of the households in Tulsa. The cable system competes actively with KOKI-TV for local advertising. Termination of the "must-carry" rules will place the cable system in the position of either refusing to carry KOKI-TV or demanding payment for carriage, when it presently has no legal obligation to reimburse the station for the fair value of its programming, and while at the same time it competes with KOKI-TV for local advertising in the Tulsa marketplace. The statement of the situation itself suggests the perilous position in which KOKI-TV will be placed by the termination of its current "must carry" status on the major cable system operating in its service area.

In summary, this licensee maintains that the must-carrv rules for local station carriage on cable systems is a life-or-death issue. It would be beyond belief that viewers who are cable subscribers must accept the loss of local stations to which they turn for the vast majority of the programs they wish to watch. Precisely such a result will take place, however, if the "must carry" rules are abrogated and/or are allowed to

terminate before appropriate counterbalancing measures can be put in place as a result of judicial or Congressional action.



James U. Lavenstein
General Partner and
General Manager
Tulsa 23 (KOKI-TV,
Tulsa, Oklahoma)

Sworn and subscribed before me this
12th day of August, 1985.

Notary Public

My Commission Expires: 7/19/89

TAB 8

Affidavit of John Conte

I am President and General Manager of Desert Empire Television Corporation, licensee of KMIR-TV, Channel 36, Palm Springs, California, an NBC affiliate. I am also one of the two stockholders in Desert Empire, the other being my wife, Mrs. Sirpuhe Conte. This affidavit is furnished in support of the Petition For Stay of Mandate to be filed in the United States Court of Appeals for the D.C. Circuit by the National Association of Broadcasters, et al. in Quincy Cable TV, Inc. v. FCC et al.

The Palm Springs ADI is comprised of the Riverside County Central portion of Riverside County, California, as defined by Arbitron. The Palm Springs ADI has approximately 52,400 television households and is ranked 187th out of a total 209 ADI's in terms of the number of television households per ADI. (1985 Broadcasting Yearbook, pp. C-183, C-214-216). According to the May, 1985 Arbitron County Coverage data for the Palm Springs ADI, 82.4% of its television households are connected to cable television systems. Very few persons in the Palm Springs ADI have outdoor television antennas.

Currently, there are two television stations licensed to Palm Springs, KMIR and KESQ-TV, Channel 42, an ABC affiliate. Both stations are now carried, pursuant to the FCC's must carry rules, on all cable systems in the Palm Springs ADI.

All local cable systems also carry seven Los Angeles television stations.

Between 1978 and 1982, KMIR was engaged in litigation before the FCC with Palm Springs ADI cable systems concerning whether those systems should have been required to delete NBC network programming carried on KNBC when such programming was simultaneously being carried on KMIR. In November, 1982, the FCC issued an Order temporarily requiring such non-duplication protection and then in April, 1984, KMIR and KESO reached agreement with the Palm Springs ADI cable systems concerning continuing non-duplication protection and such protection is currently being received.

During one period of this litigation, however, which included the rating period July 7, 1982 - August 3, 1982, KMIR did not receive network non-duplication protection from local cable systems, that is, the cable systems carried duplicative NBC network programming on cable channels carrying both KMIR and KNBC.

During that period, as a direct result of the loss of non-duplication protection, on a sign-on to sign-off basis, KMIR's share of the Palm Springs ADI viewing audience dropped from 15% in the May, 1982 survey (a figure substantially the same as that shown for KMIR for the three prior surveys conducted in February, 1982, and November and July, 1981) to a 6% viewing share, a loss of 60% of its viewing audience.

Conversely, the sign-on to sign-off audience share of KNBC rose from 7% to 15%.

During network prime time evening hours (8:00 p.m. - 11 p.m., Monday - Saturday and 7:00 p.m. - 11:00 p.m., Sunday), KMIR's Palm Springs ADI viewing share dropped from 23% in the May, 1982 report to 7% in the July - August report, an audience share reduction of almost 70%. At the same time, KNBC's Palm Springs prime time audience share rose from 2% to 14%, a 600% increase.

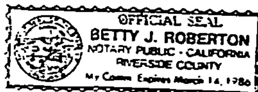
These huge audience losses resulted from a loss of cable network nonduplication protection only. KMIR still continued to be carried on the cable systems. If, as a consequence of the Court's decision in the Quincy case, the must-carry rules were to cease to exist, and if KMIR were to be dropped altogether by the Palm Springs ADI cable systems in favor of carrying KNBC only, then there is no question, given the degree of cable penetration in the Palm Springs ADI, that KMIR's audience losses would vastly exceed those reported above, and would approximate the percentage of cable penetration in the ADI. In that event, our station, which barely survives even with its present level of viewership, would without doubt be forced to discontinue operations.

/s/ John Conte
John Conte

Subscribed and sworn to before me
this 12th day of August, 1985

Betty J. Roberton
Notary

My Commission expires: March 14, 1986



TAB 9

AFFIDAVIT OF RICHARD RAMIREZ

STATE OF CONNECTICUT:)
) SS.:
COUNTY OF HARTFORD   )

RICHARD RAMIREZ, being duly sworn, deposes and says:

1. I am over eighteen years of age and believe in the moral obligations of an oath.

2. I am the managing general partner of WHCT-TV, Channel 18 in Hartford, Connecticut, a new, minority-owned, minority-managed independent station.

3. Neither I nor my station has any interest, direct or indirect, with any party to the Quincy Cable TV, Inc. v. FCC / Turner Broadcasting System, Inc. v. FCC litigation, although my station will be greatly and adversely affected by the precedent.

4. On January 23, 1985, Astroline Communications Company Limited Partnership ("Astroline") purchased Hartford Connecticut's WHCT-TV from a religious broadcaster to become the only minority-owned broadcaster in the area. In this market, the hilly and mountainous terrain obstructs all existing TV facilities in the state - making it impossible to provide equal signal distribution for all stations. As a result, cable carriage is especially important.

5. Minority attitudes are tremendously underrepresented in the broadcasting business in general, and specifically in community programs, news and editorial content. Minority stations such as WHCT attempt to provide access for points of view of minorities and other less powerful groups whose voices would otherwise go unheard. This sometimes results in less than maximum advertising revenues to the cable operators who carry our signal. Accordingly, the Quincy-Turner decision threatens the fulfillment of established national policy to improve the diversity of programming by handicapping the one minority station in a highly competitive market.

6. Even in Connecticut, most cable services are operating at near capacity. Therefore, if the Quincy-Turner decision stands, the cable operators will have to choose between carrying a minority-owned, minority-managed station such as WHCT and other commercial stations.

7. Loss of carriage would adversely affect our station in the following ways:

a. Loss of carriage would severely deter our ability to to achieve reception parity with existing broadcast facilities.

b. Loss of carriage would severely reduce the total number of homes able to receive our signal because of the terrain.

c. Since our station would be reaching fewer households than competing stations already accepted by cable operators. WHCT-TV would be at a disadvantage in reaching viewers.

TAB 10

AFFIDAVIT

STATE OF NEW JERSEY)) SS
COUNTY OF CUMBERLAND)

I, Brian H. Eckert, do hereby depose and state:

1. I am program director of Station WSJT (TV) Channel 65, Vineland, New Jersey.

2. I have been requested by the National Association of Broadcasters to set forth my observations regarding the operation of the FCC's "must carry rules," and how their deletion has and will affect WSJT.

3. WSJT (TV) Channel 65 is licensed to Vineland, New Jersey, and is located 35 miles southeast of Philadelphia, Pa. The station operates on UHF channel 65. It was the first station in New Jersey (and remains the only one in the state) to provide commercial television broadcast service to a significant portion of New Jersey.

4. The Federal Communications Commission has recognized the importance of viable commercial television broadcasting to New Jersey. WSJT performs public service programs and announcements for residents of the New Jersey portion of its broadcast area. Expansion of that commitment to include daily news is in the planning stages. Residents of the region have heretofore viewed Philadelphia and New York broadcast stations.

5. Carriage of WSJT by cable systems within its broadcast area is absolutely essential to the solvency of the station. In most communities, cable penetration averages 45 per cent, while in some it ranges as high as 95 per cent. Without cable carriage, approximately one-half of the station's

potential audience would be unable to see WSJT. In nearby areas of Delaware (also defined by the FCC as an under-served area) and Pennsylvania, hilly terrain degrades reception of about one-half the households; WSJT provides public service broadcasts for these areas, also. Furthermore, cable systems within WSJT's viewing area are selling advertising as regional groups in direct competition with WSJT, yet they control the delivery of signals to cabled homes. During the period when the "must carry rules" were in effect, WSJT (then WRBV) was forced to petition the FCC for forfeiture penalties to be imposed on some systems which simply ignored the station's requests for carriage (for example, Community Cable, Turnersville, N.J., and C&S Trenching Co., Philadelphia Naval Base). Absent the legal requirement to carry WSJT, these systems could again deny the station carriage arbitrarily. Established stations, such as the network affiliates and established Philadelphia independents, would likely to continue to receive carriage, putting WSJT at a tremendous competitive disadvantage with not only the cable systems but also other stations in the market.

6. WSJT first came on the air in July 1981, as WRBV (licensed to Renaissance Broadcasting Corp.). At that time, most cable systems within the station's viewing area refused requests to carry under the "must carry rules." The station's financial resources were depleted by the costs of construction delays and normal start-up expenses; it had no resources to initiate and follow through on litigation to enforce its cable carriage rights. The station entered receivership (and eventually bankruptcy) on December 4, 1981. The bankruptcy trustee, seeking to preserve the station's operation for the benefit of New Jersey and the City of

Vineland, expended large sums of money to litigate with the cable systems. Such large systems as NYT Cable (100,000+ subscribers), Atlantic Coast TV Cable (15,000+ subscribers) and Crosswicks Industries (12,000 subscribers) were required to add then-WRBV's signal, and remaining cable systems not specifically mentioned in that proceeding quickly followed with carriage. The increased cable penetration gained the station the necessary audience to permit it to run at an operating profit during the bankruptcy period. It also made the station a saleable enterprise for the continued operation under a new licensee. It is now potentially profitable and operating full time. The new licensee and owner, Press Broadcasting Company, has invested heavily, and made great progress toward the Commission's goal of viable New Jersey-based television broadcast service for all households, both cabled and antenna-using.

7. In the wake of the station's litigation with many of the cable systems operating in WSJT's broadcast area, and given the advertising competition between us, there several factors to encourage cable systems to delete WSJT's signal. They include the pressure on cable channel space from multiple cable-only program sources; pressure on cable channel space from new broadcast stations to begin operating in the market during the next few months (Channel 61-Wilmington, Del.; Channel 57-Philadelphia, Pa.); the demonstrated reluctance of the larger systems to carry WSJT, even during a period when such carriage was mandated by FCC rule.

8. If WSJT loses its current status of full carriage within its specified zone, as defined by the "must carry" rules, I estimate an immediate loss of 50 per cent of WSJT's advertising revenue. Such a loss

would be a fatal blow to New Jersey's largest broadcast television service, and the only one serving the entire southern half of the state.

Brian H. Ecker
Affiant

Subscribed and sworn to before me
this 13th day of August, 1985.

Sharon A. Lorenzini
Notary Public

My commission expires ______________.
SHARON A. LORENZINI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 26, 1987

TAB 11

HBC WVUW TV51

HOUSATONIC BROADCASTING COMPANY, INC.
SUITE 331
184 NORTH STREET
PITTSFIELD, MA 01201
P.O. BOX 1591
PITTSFIELD, MA 01202
(413) 442-5115

STATEMENT OF GARY M. KAYE, PRESIDENT OF HOUSATONIC BROADCASTING CO., INC

HISTORY

Housatonic Broadcasting Company, Inc. ("HBC") was founded in November, 1980 to apply for a Construction Permit (CP) to build and operate Channel 51 in Pittsfield, Massachusetts. At present there is no station licensed to Pittsfield, and while there are translators and satellites for several Albany stations, there are no stations licensed solely within Berkshire County. In December, 1981, HBC applied for the CP, as did two other parties. In March of 1985, after proceedings at three levels of the Federal Communications Commission, HBC was awarded the CP for Channel 51 and granted the call letters WVUW. HBC currently intends to have WVUW on the air in April of 1986.

In 1957, a station which had been operating on Channel 51 went dark, after an ice storm knocked down its tower. The station had not been profitable, in large part because the mountainous terrain of Berkshire County made reception difficult, and because in 1957 UHF was not normally available on most manufactured television receivers without use of a special converter.

When HBC examined the feasibility of re-establishing local service on Channel 51, we found that the county had cable penetration of more than 60% in 1980, a figure which is now closer to 70%. This meant that a new effort on Channel 51, because of cable "must carriage" and high cable penetration, would immediately be able to get a "city grade" signal into almost 70% of the county's homes, despite the difficulties produced by the line of sight nature of UHF and the mountainous terrain of Berkshire County.

HBC also found that Berkshire county retailers were not advertising on television because the spot rates charged by Albany and Springfield stations were prohibitively high for the target audience of Berkshire county retailers. And after analyzing comparable markets, we felt, that with the underutilization of television by local advertisers, the economic strength of the market, and the existence of a combination of high cable penetration and "must carriage", that a television station serving Pittsfield, Berkshire County, and nearby areas, could be financially successful.

Without this combination of high cable penetration and "must carriage" HBC did not consider Channel 51 would be economically viable, and would fail for many of the same reasons as did its predecessor in 1957, specifically the problems of a frequency which essentially operates on line of sight in a mountainous terrain.

SERVICE AREA & PROGRAMMING

Channel 51 is licensed to Pittsfield, Massachusetts, a community of some 50,000 persons which currently has cable penetration of approximately 90%, and no local television station. HBC considers it most unlikely, if those cable households cannot receive channel 51 as part of basic service, that viewers are likely to disconnect their cables to pick up Channel 51 over the air. Because of the lack of a local station, the mountainous terrain, and poor over-the-air reception, Pittsfield currently receives almost all of its television on the cable, primarily from Albany, Springfield, Hartford, Boston, and New York. None of the stations currently received either in Pittsfield or on the cable systems elsewhere in Berkshire County provide any regular news, community affairs programming, or weather forecasts, aimed at Berkshire County. HBC currently intends to provide at least one half hour local news program each weekday evening, as well as a one hour locally originated interview and talk show each weekday morning.

Channel 51 also intends to service the local news and community affairs needs of the remainder of Berkshire County, and nearby areas of eastern New York, Southern Vermont, northwestern Connecticut, and adjoining counties in western Massachusetts.

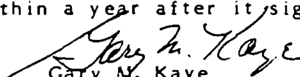
IMPACT OF LOSS OF MUST CARRY

Berkshire County has somewhat more than 50,000 television households, almost 70% of which are on one of three major cable services. The thirty-five mile circle which represented "must carriage" under the rules now in question could bring Channel 51 into cable systems serving 178,000 households (Exhibits A & B). It was never HBC's intention to press for must carriage on cable systems serving Albany or Troy, largely because of potential problems with regard to syndicated programming.

If there is no "must carriage", Channel 51 would lose potential audience of almost 120,000 households outside of Berkshire County. While obviously this is a situation HBC would like to avoid, we believe that since our major target audience is within Berkshire County, we could survive this loss. However, if Channel 51 cannot obtain carriage as part of basic service on the systems within Berkshire County, we believe our potential audience may well be reduced to fewer than 15,000 households overall, and probably no more than 4,000 households in Pittsfield, our city of license. In short, if "must carriage" is retained WVUW will have a potential audience of between 178,000 households, and 100,000 households, depending on whether WVUW presses for "must carriage" in the Albany area. If there is no "must carriage", WVUW may well have a real audience of fewer than 15,000 households, a level which is incapable of sustaining a commercial television station.

An article in the Berkshire Eagle, the major daily newspaper in the county, on August 13, stated with regard to the three major cable carriers, " all three companies said they would not change their current programming lineups in light of the court's must-carry decision until the anticipated appeal is resolved." Representatives of two of the three cable systems were non-committal about carrying Channel 51. If Channel 51 cannot reach the majority of Berkshire county viewers because of exclusion from cable carriage, it cannot be economically viable. Had the founders of HBC known when we first explored the viability of a new television station in Berkshire County that Channel 51 might be excluded from cable carriage within the county, we would have abandoned the project then. At

this point we have already invested tens of thousands of dollars, thousands of man hours, and are on the verge of investing several million dollars to put this television station on the air. If we are excluded from basic cable service within the county, the station cannot survive, and most likely will fail within a year after it signs on.

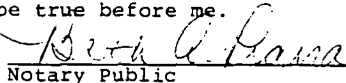


Gary M. Kaye
President
Housatonic Broadcasting Co, Inc.

COMMONWEALTH OF MASSACHUSETTS

Berkshire, ss. August 14, 1985

Then personally appeared the above named GARY M. KAYE and, upon oath, stated the above to be true before me.



Notary Public

My commission expires 2/3/89

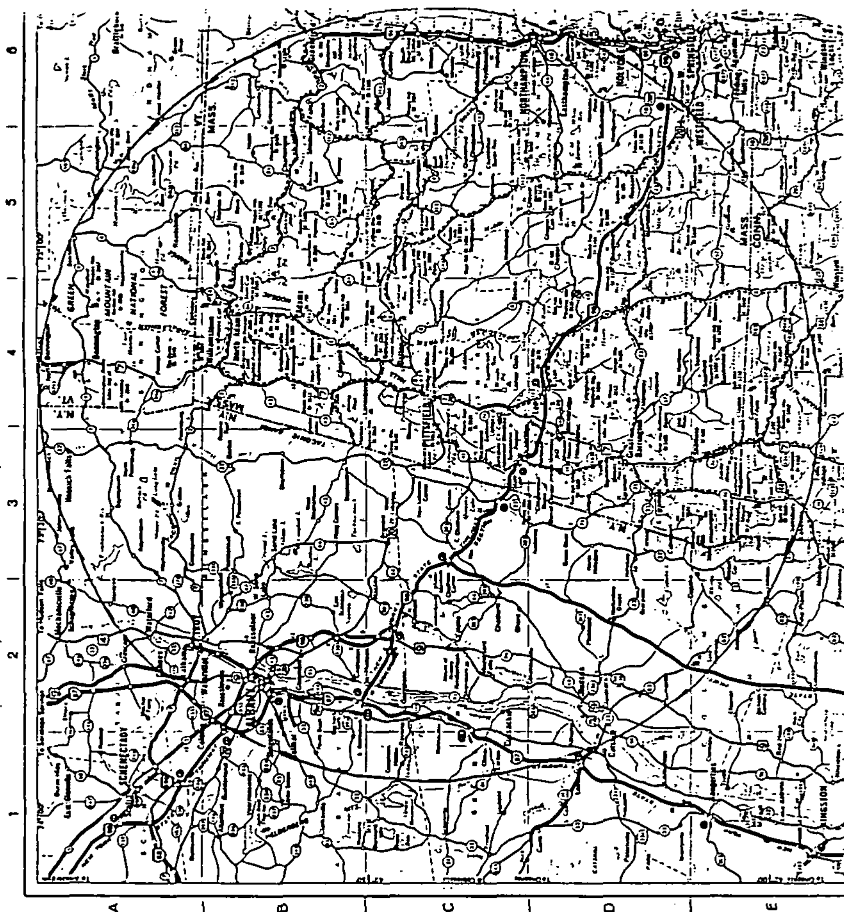


EXHIBIT "A"

EXHIBIT "B"

Cable System	# of Homes Subcribing
Canaan-Lakeville-Salisbury, CT	1,640
Charlemont, MA	115
Conway, MA	Not available
Deerfield, MA	345
Great Barrington, MA (incl. Lee & Lenox)	5,749
Holyoke, MA	12,984
North Adams, MA (incl. Williamstown)	12,946
Northampton, MA	6,500
Northfield, MA	Not available
Pittsfield, MA (incl. Dalton)	16,989
Shelburne Falls, MA	941
Sunderland, MA	629
Westfield, MA	13,604
Albany, NY	46,700
Bethlehem, NY	4,331
Catskill - Hudson, NY	4,665
Rensselaer, NY	8,394
Troy, NY	37,133
Bennington, VT	4,446
Readsboro, VT	155
Total Homes	178,266

TAB 12

COUNTY OF LEE)
) SS
COMMONWEALTH OF KENTUCKY)

AFFIDAVIT

I, Forest Drake, having first been duly sworn, hereby depose and state as follows:

1. I am President and General Manager of Station WLJC-TV, Channel 65, Beattyville, Kentucky. WLJC-TV is an independent commercial television station which commenced operations on October 18, 1982. The station now operates within the Beattyville "smaller" television market as defined by the rules of the Federal Communications Commission. Pursuant to Section 75.59 of the Commission's rules, cable television systems in our market are required, upon request, to carry WLJC-TV's signal.

2. During October 1982 I sent requests to various cable systems within our specified 35-mile zone requesting carriage of WLJC-TV. The principal systems in our market area refused to carry WLJC-TV and filed special relief requests with the FCC. Through counsel, and at great expense, we responded to each challenge. In a decision issued on September 14, 1984, the FCC agreed that WLJC-TV was entitled to carriage and ordered the local cable systems to cease and desist from violating the Commission's must-carry rules. Since the Commission's decision, our signal has been carried on most of the important cable systems in our service area.

3. WLJC-TV is the only television station licensed to a community in Lee, Jackson, Wolfe, Estill, Powell Owsley or Breathitt Counties, Kentucky, which counties are located in the Appalachian Mountains between Lexington and Hazard. Due to mountainous terrain, cable television systems are relied upon by a large portion of the population to assure reception of a full complement of television services. Thus, WLJC-TV's continued existence is largely dependent upon its ability to reach local viewers via cable TV.

4. Based on our bad experience with local cable operators, who forced us to seek FCC orders requiring carriage of WLJC-TV's signal, I am certain that WLJC-TV would be deleted from the signal complement of most of the cable systems in our area if the must-carry rules are rescinded. This will cause not only a loss of audience and revenue to WLJC-TV but also the loss to cable TV subscribers in our region of the only local signal available to them. For these reasons, WLJC-TV urges that the FCC's current must-carry rules be retained.

The foregoing is based upon my personal knowledge and/or belief and is true and correct.

Forest L. Drake

FOREST DRAKE

Subscribed and sworn to before me this day of August, 1985.

Margaret Drake

Notary Public

My commission expires 10-25-86

TAB 13

County of Cambria)
) ss
Commonwealth of Pennsylvania)

AFFIDAVIT

I, George Plenderleith, being duly sworn, hereby state and depose as follows:

1. I am the Station Manager of WFAT-TV, Johnstown, Pennsylvania, owned by WFAT, Incorporated (collectively referred to as WFAT). WFAT operates on Channel 19 (an Ultra High Frequency, or UHF, channel) as an independent (i.e. not affiliated with a network) station. As Station Manager I have direct responsibility for station sales, and relations with cable television systems in the station's service area. I have personal knowledge of the matters attested to below.

2. The terrain in Western Pennsylvania is extremely irregular, characterized by series of mountain ridges and valleys. Virtually all of the region's population is located in the valleys. In these valleys over-the-air reception of broadcast television signals is very difficult, because the intervening mountains block transmission of the broadcast signal. Terrain blocking of television signals is particularly severe with respect to the signals from UHF television stations, such as WFAT. UHF signals have inferior propagation characteristics, and therefore, are even less likely to be received in valleys separated by mountains from the signals' sources.

3. Because of the difficulty with over-the-air reception, cable television started very early in Western Pennsylvania. When it was started, in the late 1950's and early 1960's, cable television served exclusively as a medium for the retransmission of broadcast signals to homes that could otherwise receive those signals only poorly, if at all.

4. Cable television is by far the predominant medium through which WFAT's signal is received. I estimate that approximately 75% of the homes in our service area receive their television signals through cable.

5. Because cable television has been long established, homes in WFAT's service area depend on it for reception of WFAT's signal. Very few cable connected homes have receive antennas at all, and fewer still have such antennas capable of pulling in WFAT's signal off-the-air.

6. Virtually no homes -- certainly fewer than one percent -- have A/B switches that would enable them to use off-the-air receive antennas, if they had them. I believe that very few of WFAT's listners have even heard of A/B switches, and, based on information and belief, I do not believe that the cable television companies make them aware that such devices exist. Even if cable subscribers were

aware of A/B switches, relatively few would use them. A/B switches are difficult for laymen to install, they won't do any good in most cases unless expensive receive antennas are also purchased and installed, and in many, perhaps most, cases they still will do no good because of terrain blocking of over-the-air broadcast signals.

7. As an independent UHF station in mountainous Western Pennsylvania, WFAT has faced a difficult struggle to survive. The present owner of the station has invested or committed more than four million dollars to station acquisition, facilities improvements and new programming. The station has recently moved to a new, fully-equipped, studio. It installed, and recently began service on, powerful new transmission facilities. Finally, the station recently began transmitting its programming on a 24-hour per day basis.

8. Yet, the station still is significantly unprofitable. In the last several months it has still lost approximately $50,000 per month. As explained below, there are good prospects to improve this performance, but based only on cable carriage.

9. Cable carriage is vital not only to improvement of WFAT's economic performance, but to maintenance even of the status quo. Without cable carriage, WFAT would almost

automatically lose the great majority of its viewers, even in Johnstown itself. This is true because, as explained above, the great majority of viewers depend on cable for reception of WFAT's signal. They do not have the means to receive the signal without reception through their cable television systems.

10. WFAT has had few problems obtaining carriage of its signal on most cable television systems within its service area. However, the cooperation of many such systems has been against the background of the FCC's mandatory carriage rules. Moreover, the existence of those rules has been essential for WFAT to obtain carriage on at least some such systems. In the last year and one half, I have engaged in a strong effort to obtain cable carriage on all systems in the area. This effort has been successful with respect to systems not previously carrying the signal in large part because of the existence of the FCC's must-carry rules.

11. In particular, WFAT has only very recently obtained carriage on the cable television system at Greensburg, Pennsylvania. Apart from Johnstown itself, Greensburg is the largest community in WFAT's Johnstown 35-mile zone, as defined by the FCC's rules. The cable system there, and its associated systems, have more than 40,000 subscribers. This compares to the approximately

176,000 total subscribers of systems now carrying WFAT. Because of Greensburg's separation from all television markets, including Johnstown, by high mountain ranges, cable penetration in Greensburg is extremely high. Very few persons in Greensburg watch television over-the-air. Thus, carriage of WFAT on the Greensburg cable system is of extreme importance to WFAT.

12. WFAT obtained that carriage beginning on July 1, 1985, based on a May 31, 1985, order from the FCC enforcing the FCC's mandatory carriage rules. WFAT had originally requested carriage on the Greensburg system in September, 1984. The cable system filed numerous petitions at the FCC seeking protection from the rules, each of which was answered by WFAT. Finally, the FCC ordered the system to begin carriage.

13. Based on carriage of our signal on the Greensburg cable system, the station now has a real prospect of breaking even. Since carriage began on July 1, WFAT has received advertising commitments of over $32,000 from Greensburg area advertisers. Many of these advertisers have expressed gratitude that we provide them a medium they can afford. Yet WFAT would not have secured these advertisers without carriage on the Greensburg system.

14. Elimination of the FCC's mandatory carriage rules will probably result in deletion of WFAT's signal from the Greensburg cable system. We obtained carriage only through an FCC order enforcing those rules. The manager of the cable system has been quoted in the Greensburg newspaper to the effect that he plans "major changes" once the rules are no longer in effect. In addition, our Greensburg account executive reported that the manager of the Greensburg system told one of her (the account executive's) new clients that he would drop WFAT as soon as possible.

15. If WFAT is dropped from carriage on the Greensburg cable system, I doubt that WFAT can ever break even. Elimination of the mandatory carriage rules will also almost certainly cause loss of WFAT's carriage on other systems. Overall, I estimate that if the rules are eliminated WFAT will lose somewhere between twenty and fifty percent of its audience.

16. These losses would be catastrophic to WFAT. With no prospect of breaking even, and with substantial losses even of the station's existing audience, continued operation of the station would be fundamentally irrational. Loss of the WFAT signal would be a loss not only to the owner of the station, but to the public. WFAT now provides

Johnstown, and the station's service area, a truly local, independent, voice. That voice may well be lost forever if the mandatory carriage rules are eliminated.

17. Even if the rules were ultimately reinstated, WFAT will still have sustained injury that cannot be repaired. Most importantly, its owner may well be unable to sustain the kinds of losses that can be foreseen even during a temporary absence of the rules. During that temporary period, the station's already significant losses would become larger, because of the foreseeable loss of audience. If those losses cannot be sustained, the station would have no choice but to go off the air, unless it could be sold. Even the station's sale would be difficult, however, given the magnitude of the predictable losses. Even if the station does manage to continue operations during a temporary absence of the mandatory carriage rules, the revenue lost in that period could not be replaced. That lost revenue would detrimentally affect the station's operations and programming. Finally, once WFAT has been dropped by cable systems in favor of national, satellite-carried cable programming, even during a temporary absence of the rules, it will be very difficult for the station to get back on the systems. The cable systems will be very reluctant to introduce that kind of signal turmoil to their subscribers, and the FCC's enforcement mechanisms are exceedingly slow and expensive to use.

I hereby declare that the foregoing statements are true and correct of my personal knowledge, except where otherwise stated, and then they are true and correct to the best of my knowledge and belief.

George Plenderleith

Subscribed and sworn to before me, a notary public of the Commonwealth of Pennsylvania, this ___ day of August, 1985.

Notary Public

SEAL:

Sworn to and subscribed before me this 14 day of ___ 19__

GLENDA K. CLEMENTSON, NOTARY PUBLIC
RICHLAND TOWNSHIP, CAMBRIA COUNTY
MY COMMISSION EXPIRES OCT. 17, 1988
Member, Pennsylvania Association of Notaries

My commission expires

TAB 14

WPTT-TELEVISION 22/500 SECO ROAD/P.O. BOX 2809/PITTSBURGH, PA. 15230/412-856-9010

State of Maryland)
) ss:
County of Baltimore)

AFFIDAVIT

I, Julian S. Smith, having been duly sworn, hereby depose and state as follows:

1. I am President of Commercial Radio Institute, Inc., licensee of UHF television station WPTT-TV, Channel 22, Pittsburgh, Pennsylvania.

2. I am providing this Affidavit in support of a Petition for Stay of the Decision of the U.S.Court of Appeals for the D.C. Circuit, in Quincy Cable TV v. FCC, No. 83-1283 (D.C. Cir., released July 19, 1985).

3. WPTT-TV's city of license is Pittsburgh, Pennsylvania, which is characterized by extremely mountainous terrain. The station's transmitter is located in Monroeville, Pennsylvania, approximately 13 miles from Pittsburgh. Because of the nature of the terrain, the majority of the residents of Pittsburgh are unable to receive WPTT-TV's signal unless they have cable service. Cable television helps UHF stations to overcome some of the handicap suffered vis a vis VHF stations. On cable television there is greater equality in tuning between VHF and UHF stations in addition to more equality in reception. The significance of the help cable provides UHF stations is related to the degree of cable penetration within the market. The Pittsburgh market has 62% cable penetration in the Metro area and 59% cable penetration in the Area of Dominant Influence (ADI).

4. There are approximately 459,000 cable subscribers in the Pittsburgh Metro Area and 594,000 cable subscribers in the Pittsburgh ADI. Approximately 272,000 of these subscribers are served by Centre Video cable system and companies associated with Centre Video. WPTT-TV reaches an average of 400,000 to 500,000 households in the Pittsburgh Metro area. If the Centre Video system and its associated companies decide that they will no longer carry WPTT-TV as a result of the Quincy cable decision, WPTT-TV will lose over half of its audience. These viewers will not be able to receive WPTT-TV over the air. The loss would be further aggravated if any of the remaining smaller cable systems serving Pittsburgh were to refuse carriage to WPTT-TV.

5. The loss of carriage on the Centre Video system alone would devastate WPTT-TV since the station would lose over half of its audience in the Metro area. WPTT-TV's ratings are a function of the number of households it reaches. If the station cannot reach a sizable number of households in its Metro area, its ratings will plummet. Any decline in ratings directly affects advertising revenues from national, regional and local advertisers. Losses in revenues affect the types and amounts of programming which WPTT-TV can afford to provide or produce. Deletion of WPTT-TV's signal by Centre Video and/or other Metro area cable systems, with a resulting loss of over half of the station's audience, will force WPTT-TV off the air due to economic hardship within six to nine months of such deletion.

6. WPTT-TV is one of only a few independent stations serving the Pittsburgh market. The station strives to bring a significant amount of children's programming to Pittsburgh. WPTT-TV's fall 1985 schedule includes children's programming from 6:30 A.M. to 9:00 A.M. and from 3:00 P.M. to 5:30 P.M. Monday through Friday. On Sundays the station will air children's programming from 8:00 A.M. to 11:30 A.M.

7. I am deeply concerned about the impact of the Quincy Cable Decision on UHF television stations like WPTT-TV, Pittsburgh, Pennsylvania. WPTT-TV's financial viability is dependent upon continued carriage by the local cable television companies.

Julian S. Smith

Julian S. Smith, President

Dated: August 14, 1985

Subscribed and sworn to before me in my presence, this 14th day of August, 1985, a Notary Public in and for the County of Baltimore.

[illegible]

Notary Public

My commission expires July 1986.

TAB 15

County of Kanawha)
) ss.
State of West Virginia)

AFFIDAVIT

Gary Dreispul, being duly sworn, deposes and says:

1. I am General Manager of WVAH-TV, Channel 23, Charleston, West Virginia, serving the major television market of Charleston-Huntington, West Virginia. Channel 23 commenced operations as the first UHF commercial independent serving the state of West Virginia in September, 1982. It is still the only commercial independent serving the state.

2. West Virginia is one of the most highly cabled states in the nation. Because of the hilly terrain, it is virtually impossible for West Virginia residents to receive broadcasts over-the-air. Cable television not only provides television to remote locations otherwise lacking television service but also corrects the inferior reception suffered by UHF stations, such as WVAH-TV, and establishes a technical parity between UHF and VHF transmissions. The most recent figures available indicate 62% cable penetration state-wide, while certain parts of the Channel 23 service area have cable penetration exceeding 90%. *See* 1985 Cable & Station Coverage Atlas at 8. Cable carriage is, therefore, necessary for WVAH-TV to reach the audience it is licensed to serve.

3. Since WVAH-TV went on the air, we have aggressively sought cable carriage in order to reach viewers in our ser-

vice area. From our start-up, we have achieved carriage on cable systems throughout our service area. This achievement has, however, entailed repeated requests for relief from the FCC. Indeed, over the last three years, WVAH-TV has opposed numerous special relief petitions and expended thousands of dollars to obtain cable carriage. Given the mountainous terrain and general difficulty of receiving broadcast signals over the air, a prerequisite to broadcast existence in West Virginia is access to cable systems. Had the must-carry rules not existed in early 1980, I doubt sincerely that we would have attempted to put WVAH-TV on the air.

4. In light of the Quincy decision striking down the must-carry rules, however, WVAH-TV risks losing access to its audience base, and the revenues based on those viewing households. Should we lose even a portion of our audience, we are likely to lose our current market rating (in February, 1985, we ranked no. 3 in our ADI exceeding the ABC affiliate) and find ourselves at a severe competitive disadvantage against our cable and network competitors.

5. Moreover, since A/B switches or other devices are not universally available, cable subscribers themselves will have no way to obtain our signal, even if they want to, since most television antennas are removed when cable service is hooked up to a home.

6. WVAH-TV also risks being placed on the upper tiers of cable systems serving the Charleston-Huntington extended

market. While placement on an upper tier would not deprive us of all our audience, it would severely reduce WVAH-TV's audience base (we believe upwards of 25% percent) and threaten our continued viability as a first-class UHF independent.

7. Even before the Quincy decision was released, cable systems serving the Charleston area began to carry WVAH-TV on an upper tier for which a converter is required rather than putting us in their lower-priced basic service.

8. As a case in point, on November 19, 1984, the Mass Media Bureau of the FCC ruled that WVAH-TV is "significantly viewed" in Raleigh County, West Virginia, for purposes of its signal carriage rules, Section 76.61.

9. WVAH-TV, thereafter, requested carriage on the Beckley Telecable system pursuant to the Commission's "must-carry" rules. Beckley operates on cable television systems serving incorporated and unincorporated areas of Raleigh County, West Virginia.

10. After receiving these requests, Beckley placed Channel 23 on Tier 1, a pay tier for which a converter is required. According to Cable Update, published by Television Digest, only approximately a fourth of Beckley's subscribers receive the pay tier. See Television Digest, Cable Update 3:13 at 2 (April 1, 1985).

11. In so positioning our station, the cable operator made it clear to us, months before the Quincy decision, that

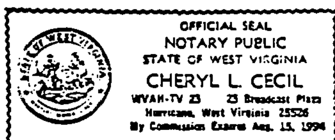
it would not carry WVAH-TV on its basic tier because viewers would then have no incentive to purchase its "pay tier" satellite services (e.g., ESPN and HBO) which offered similar programs but at an extra cost.

12. Because the upper tier is not available to or purchased by all viewers, WVAH-TV is thus able to reach only that segment of cable subscribership willing to pay extra for the upper tier.

13. Accordingly, if the cable operator refuses to place WVAH-TV on the basic tier and offers us only for an extra charge, the cable system will have effectively had the "monopoly power" to keep us from reaching our market, regardless of viewer choice.

14. Moreover, WVAH-TV will still be paying programmers for the license to telecast exclusive syndicated programming in the entire marketplace even though it may not reach all of its market area.

15. In sum, the Quincy decision threatens our ability to reach the audience we are licensed to serve and poses a major obstacle to our continued viability and success as West Virginia's only commercial independent.



Gary Dreispul

Subscribed and sworn to before me this 16th day of August, 1985.

Notary Public

My Commission Expires: August 15, 1994

TAB 16

County of Jefferson)
) ss.
State of Illinois)

AFFIDAVIT

William R. Varecha, being duly sworn, deposes and says:

1. I am President of Sunshine Broadcasting Corporation, general partner of TV 56, Ltd., permittee of WSCT(TV), Channel 56, in Melbourne, Florida.

2. Approximately one year ago, TV 56, Ltd. acquired the construction permit for WSCT(TV) in order to provide the first local service to Melbourne and the surrounding area.

3. Since that time, TV 56, Ltd. has expended hundreds of hours and has obligated itself to the extent of more than $2 million to acquire equipment necessary to put the station on the air.

4. Because of the recent D.C. Circuit court decision striking down the "must-carry" rules, however, TV 56, Ltd. is confronted with a serious threat to its viability as a unique local commercial independent television station. See Quincy Cable TV, Inc. v. FCC, No. 83-1283, Slip. Op. (D.C. Cir. July 19, 1985). Due to the interaction of the D.C. Court decision and existing FCC rules, WSCT now finds itself unable to obtain programming or to reach the bulk of the audience it is licensed to serve.

5. In February of this year, the FCC modified its Orlando-Daytona Beach major market designation (Section

76.51) to add the Melbourne and Cocoa markets. Under this rule, television stations licensed to any one of the four cities are entitled to obtain cable carriage in all of the remaining hyphenated cities. Sections 76.57 - .61 of the Rules. At the same time, stations servicing those markets are entitled to invoke the program exclusivity protection set forth in Section 658(m) of the Rules.

6. Prior to issuance of the Quincy decision, start-up stations such as WSCT could, at a minimum, look forward to carriage rights throughout this hyphenated market.

7. In the wake of the Quincy decision, however, stations like WSCT now have no right to reach audiences in their hyphenated market, yet they are still subject to major market program prices and application of the program exclusivity rule. As a consequence, WSCT has found it impossible to obtain affordable programming for its start-up independent or to achieve cable carriage in a market which is 51% cabled.

8. With one exception, cable systems contacted by WSCT since the Quincy decision have not returned repetitive phone messages. It seems they have no interest in carrying WSCT, even though they have no idea of what it will offer or whether it will appeal to their viewers. Because more than half the households in the Orlando-Daytona Beach-Melbourne ADI subscribe to cable, WSCT's failure to obtain cable carriage will automatically reduce its reach by 50% and severly hinder its capacity to earn revenues sufficient to stay on the air.

9. TV 56, Ltd. entered the Melbourne market in order to provide a unique community-oriented service not otherwise offered by existing television stations. Up to this time, stations licensed to Melbourne and Cocoa have primarily focused on Orlando and Daytona Beach, and have neglected local interests and concerns of communities along the coastal corridor from Cocoa to Ft. Pierce. WSCT has plans to answer the unmet need for community-oriented programming.

10. Because the Quincy decision ignores the circumstances faced by struggling start-up UHF stations such as WSCT, however, WSCT may not be able to provide television service and thus enhance the diversity of program offerings to the public.

William R. Varecha

Subscribed and sworn to before me
this 16 day of August, 1985.

Notary Public

My Commission Expires: 11/30/88

TAB 17

County of Ulster)
) ss.
State of New York)

AFFIDAVIT

Edmund A. Duffy, being duly sworn, deposes and says:

1. I am business manager of WTZA-TV Associates, permittee of WTZA(TV), Channel 62, Kingston, New York.

2. WTZA(TV) is scheduled to go on the air later this fall as the first independent serving the smaller television market of Kingston, New York, and surrounding communities of Cornwall, Newburgh, Marlborough, and New Windsor. We are a UHF commercial station and have invested heavily in equipment and personnel totalling some $5 million in order to provide a state-of-the art and professional broadcast service to viewers in the extended Kingston area. We are the only station broadcasting from Ulster County with our particular attention focused on the needs and interests of our city of license and the mid Hudson River Valley.

3. On June 5, 1985, WTZA(TV) advised Group W that it would soon begin full-time operations and requested mandatory carriage pursuant to the Commission's "must-carry" rules.

4. Subsequently, the D.C. Circuit Court of Appeals struck down the "must-carry" rules as unconstitutional. Quincy Cable TV, Inc. v. FCC, No. 83-1283, slip op. (D.C. Cir. July 19, 1985).

5. In light of this decision, WTZA is confronted with a situation which seriously impedes its ability to reach the audience it is licensed to serve.

6. WTZA's immediate service area is part of the New York ADI. That ADI is the largest in the United States and includes 28 different counties and some twenty different stations. Understandably, it is a crowded and highly competitive market.

7. The most recent figures available for the WTZA service area indicate a cable penetration ranging from 50-70%. Accordingly, to reach the market WTZA is licensed to serve, cable carriage is of critical importance.

8. In the wake of the recent D.C. Circuit decision, however, WTZA will find it extremely difficult to obtain cable carriage on cable systems in parts of its market. As just one case in point, even before Quincy was decided, Group W Cable, Inc. petitioned for waiver of the must-carry rules so that it would not have to carry WTZA even though it is not aware of our program offerings, our unique community orientation, or its viewers desires. See Group W Petition for Special Relief, CSR-2922 (filed June 25, 1985), attached hereto as Exhibit A.

9. Although Group W has refused to carry WTZA, it is not because it is a 12-channel saturated system. To the contrary, Group W is a major system operator with a 26-channel capacity which is not yet full. In its recent peti-

tion for special relief, Group W indeed conceded that it currently has empty channel space reserved for "future offerings" and not earmarked for any service at this time. See Exhibit A hereto.

10. Nor is this the case of a system filled with local must-carry broadcast signals. To the contrary, more than half of the current signals on the Group W system are devoted to discretionary satellite services and the remaining broadcast signals carried are primarily network stations attuned to the greater Hartford and New York ADI's which have no interest in community-oriented concerns in the towns which the Group W system serves.

11. By contrast, WTZA will offer a unique mixture of local and regional news and non-entertainment programming specifically designed to address the needs and interests of Kingston and its surrounding area. As the attached program schedule attests, WTZA's proposed program line-up includes a half hour of news every weekday from 6:30 - 7:00 p.m., and from 10:00-10:30 p.m. and two hours each weekday morning from 6:00-8:00 a.m. See Exhibit B hereto. In addition, we plan to air local interest items in brief 3-9 minute segments throughout the day.

12. To facilitate comprehensive news coverage, WTZA(TV) has established auxiliary news and sales offices in Middletown, Newburgh, and Goshen, New York so that it can provide its viewers up-to-date information on events of interest hap-

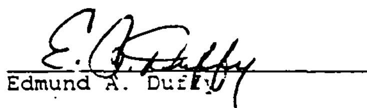
pening in their local communities. WTZA(TV) also has a mobile unit from which it will be able to transmit live news events as they occur.

13. Carriage of WTZA on the Group W system would thus provide "local television" programming that viewers would not otherwise receive and would do so in a fashion that enhances subscribers' choices and only minimally circumscribes Group W's editorial discretion. Indeed, WTZA has already received various requests from local viewers who wish to see our proposed local programming. See Exhibit C hereto.

14. Despite this unique free community-oriented program offering, not to mention the considerable expense incurred to make it possible, WTZA will have no guaranteed access to the audience it is licensed to serve and will be impeded from serving its market unless the *Quincy* decision is modified or overturned.

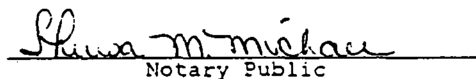
15. In the absence of any A/B switches, other mechanisms designed to facilitate WTZA's reception over the air, or assurance that such mechanisms would, in fact be used, cable viewers themselves will lose the opportunity to receive WTZA -- even if they want to -- since most television antennas are removed when cable service is attached to the subscriber's home. WTZA's signal transmission is further hampered by the inherent technological disadvantage of UHF transmission.

16. Cable companies such as Group W will, in turn, be able generally to enjoy exclusive franchises, raise their rates, avoid diverse local programming, and operate as bottlenecks to viewer choice in the mid Hudson River Valley, to the real detriment of localized television broadcasting and subscriber choice.



Edmund A. Duffy

Sworn to and subscribed before me
this 16 day of August, 1985.



Notary Public

My Commission expires: 3/30/87

THERESA M. MICHAEL
Notary Public, State of New York
County of Ulster
Commission Expires March 30, 87
Notary Registration No. 4799995

[Attachments to Mr. Duffy's
Affidavit have been omitted
because of their volume.]

TAB 18

COUNTY OF INGHAM)SS

STATE OF MICHIGAN)SS

AFFIDAVIT OF DALE G. PARKER

I, Dale G. Parker having first been duly sworn hereby depose and state as follows:

1. I am Vice President/General Manager of station WSYM-TV Channel 47 Lansing, Michigan. WSYM-TV is a commercial independent station serving the Lansing area.

2. Since December 1982 when station went on the air we have sought access on cable. Channel 47 is carried on ten (10) cable systems within the Lansing ADI (list attached). Back in 1982 when the station signed on, two of these systems did not want to carry our signal. "Summit/Leonia Cable T.V." finally agreed to after some discussion, but it took six months, much discussion, personal visits and letters to "Triad Cablevision" serving the town of Charlotte before they finally agreed to carry us. Due to the Must Carry rule in effect at that time these systems recognized they had to carry us and finally agreed to.

3. As an independent UHF station, cable carriage is critically important. This is especially important due to the high cable penetration in this market. According to Nielson, cable has a 50% penetration, or fully half of all the homes in the Lansing market. Further, 53% of the viewing of all over-the-air free T.V. stations in Ingham County is done via cable, with 57% of this station's viewing via cable.

4. I have no doubt that with the loss of Must Carry some cable systems would drop us and the others would charge us. For example: We have been told by Continental Cable, representing some 60,321 homes that they would at least charge us to carry our signal.

AFFIDAVIT OF DALE G. PARKER

Page 2

5. Without cable carriage, subscribers in the Lansing market would not have access to the unique local public affairs programming that WSYM-TV provides. For example:

   1. We carry a one hour "Outreach Mass" program on Sundays. Done in conjunction with the Diocese of Lansing, over three hundred volunteer Eucharistic ministers go out each Sunday and give communion, pass out literature and create a "service" atmosphere in nursing homes, hospitals and homes for the elderly. Literally thousands of elderly, infirm, homebound persons are served each week with this program. To try to duplicate this effort on cable would be an impossible job of cable system co-ordination.

   2. Our weekly half-hour of legal issues oriented towards the minority community could be duplicated by any system with a studio, cameras, tape equipment etc., but would never have the same reach.

   3. Our weekly half-hour of health concerns with local health professionals and a viewer telephone hook-up would be lost. A cable system with a studio, etc. could do it if they would pay the additional phone cost but the reach would be gone.

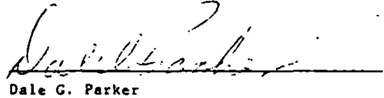
   4. What cable system would bring the viewers several <u>thousand</u> public service announcements every quarter? These announcements range over the entire gamut of legitimate social issues and concerns and air in all our programs, including heavy concentration in prime and prime access. What cable system could tag a PSA done by a nationally recognized service organization with a local name and phone for local assistance? What cable company would go out into the community and shoot a local PSA for the local food bank or one on teen pregnancy, or teen suicide, or even Toys For Tots, all with local tie-ins for help and assistance as we are doing?

AFFIDAVIT OF DALE G. PARKER

Page 3

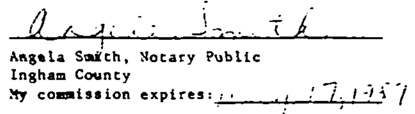
5. What cable system would purchase a syndicated half-hour on alcoholism and then create a live half-hour following with a viewer phone hook-up and a panel of local professionals who deal with this problem? The ability to have professionals refer anguished people to local support and treatment centers at all levels of ability-to-pay would be lost to this community. (See attached)
6. What cable system would produce and air a two day telethon in support of a local children's hospital (C.S. Mott) and raise $50,000.00 for the hospital?
7. What cable system would field-shoot and produce a local special on Dr. Martin Luther King's dream featuring local people who were involved in his movement?
8. What cable system would air over 150 classy, well-produced announcements intended to help curb teenage drunk driving during the late May through June period when all the proms and graduations and parties occur? And what cable system would initiate a campaign all year long against impaired driving?

The foregoing is based upon my personal knowledge and is true and correct.



Dale G. Parker

Subscribed and sworn to before me this 15 day of August, 1985.



Angela Smith, Notary Public
Ingham County
My commission expires:

Lansing

ADI Cable Systems

OWNER OF SYSTEM/CITIES COVERED IN ADI.	SUBCRIBER HOMES	# OF CH.
1) Continental Cable Of Mich. (Lansing) -- Lansing, Eaton Rapids, Grand Ledge, Holt, DeWitt..................................	48,721	35
2) United Cable T.V. Of Mid-Mich. -- East Lansing, Okemos, Haslett................	14,000	33
3) Horizon Cablevision -- Mason, Williamston, Webberville, Potterville, Dimondale.........................	5,000	20-30
4) VCA Telecable --		
Bath.......................................	387	20
Olivet, Bellevue............................	495	21
Leslie, Stockbridge, Pleasant Lake, Munith.......................................	765	19
Concord, Concord Twp., Parma, Parma Twp., Pulaski Twp., Sandstone Twp., Spring Arbor Twp. Hanover, Hanover Twp., Horton................	617	21
5) Continental Cable Of Mich. (Jackson) -- Jackson..	11,600	currently 1 expanding 3
6) Summit/Leoni Cable T.V. (Jackson) -- Summit, Leoni, Spring Arbor, Napoleon...................................	10,000	12
7) Cable Vision Inc. -- St. Johns..................................	1,374	27
8) SMG Cable Vision --		
Ovid..	264	21
Elsie.......................................	193	21
9) Triad Cablevision (Marshall) -- Charlotte..................................	1,377	18
10) Columbia Cable -- Brooklyn, Clark Lake.........................	871	29
TOTAL SUBCRIBER HOMES.......................	95,664	

Hospital

August 8, 1985

Howard Lancour
WSYM-TV
600 W. St. Joseph
Lansing, MI 48933

Dear Howard,

I'm writing to express my appreciation and admiration for the way your staff organized our local portion of "The National Alcoholism Test." I was impressed by your efforts to obtain and to utilize input from our local professional and recovering communities. I believe that the manner in which channel 47 organized this presentation provides a standard for public service programming in the Lansing area and I feel proud to have been involved.

Sincerely,

P.H. Engstrom III
Outpatient Therapist
Horizon House

PE/re
8/8/85

The Mid-Michigan Center for Alcohol and Drug Treatment

ACUTE CARE SERVICES
Lansing General Hospital
2727 S. Pennsylvania Ave
Lansing, MI 48910-3490
(517) 332-1144

RESIDENTIAL & SUB-ACUTE CARE SERVICES
Horizon House
610 Abbott Road
East Lansing, MI 48823
(517) 332-1144

OUTPATIENT SERVICES
Horizon House
630 Abbott Road
East Lansing, MI 48823
(517) 332-2180

presented in cooperation with insight

TAB 19

JUL 24 1985

Jefferson County Cable Corporation

July 23, 1985

General Manager
KSHB
4720 Oak St
Kansas City, MO 64112

Dear Sir:

We are the owner-operators of 10 cable systems in Jefferson and Leavenworth counties, in Kansas. Your stations' signal is currently part of our signal carriage line-up on our 36 channel-capacity systems (see enclosed channel card list).

As you are well aware, there has been a massive proliferation of new program sources (off-air and satellite delivered) in the last 5 years, and there is every indication that this trend will continue.

Naturally, we seek to provide our customers with the most diverse and desireable channel selection possible. However, due to the past demands placed upon us by the "must carry" rules, we have had to dedicate a disproportionate amount of our frequency spectrum (300 Mhz) to the carriage of many duplicative and/or marginally desireable signals. Therefore, we find that we are not able to offer all of the new programs our subscribers desire due to the past need to dedicate our capital for the purchase of equipment needed to fulfil these same "must carry" rules. Thus we are faced with two equally obvious choices:

1) Drop certain signals from our channel line-up in order to make room for more desireable signals, or

2) Invest even more money to expand the bandwidth of our systems to carry all present and new signals.

However, we feel that there is the possibility of a third choice being available, if only our industries' can forget their past differences, and begin to co-operate in the business of serving our subscribers (and your viewers).

This third alternative, we feel, holds the opportunity of allowing us to continue to carry your stations signal, <u>and</u> to expand our bandwidth as needed.

Box 128 • Centralia, Kansas 66415 • 913 - 857-3381

Page Two

Simply put, we are proposing that your station be allowed to lease, on a long term basis (10 years minimum), your current channel allocation on our systems, for $1.00 per year per channel (6 Mhz). In return, we would expect you to purchase the equipment we were forced to buy under the now-defunct "must carry" rules in order to carry your signal. This equipment cost is approximately $800 per head-end. It is minuscule in comparison to your current capital outlay, but a very large part of our capital outlay.

In this manner, you would be assured of the long-term placement of your programs on our system, and we would have the beginnings of the capital base needed to expand our bandwidth as new program sources arise.

I have enclosed a seperate list of the main points that we feel should be incorporated into such an agreement.

We hope that you will agree with us that this solution offers the best opportunity of reconciling the past differences between our two industries, and allowing us to go forward, in pursuit of the goal of better service to our mutual customers, in an environment of equality.

Please note that this offer is contingent upon your agreement, in principle, to the conditions contained herein, on or before such time as the "must carry" rules are reformulated (or appealed to the Supreme Court) by the Federal Communications Commission.

The reason for this is simple. We desire, as we are sure you do, that all of our decisions, both economic programming ones, be made in the free-market place. We feel that this period between the recent abortion of the must carry rules, and any possible reformulation or appeal of these rules has afforded all of us a small window of opportunity to lay to rest, once and for all, this issue that has so divided us in years past. Your willingness to take this opportunity is all that is needed to allow us all to concentrate on the business opportunities of tomorrow instead of trying to enrich the lawyers of today.

Please let me hear from you, as soon as possible.

Sincerely yours,

John V. Watkins

Encl. Channel card sheet

AGREEMENT

1) Your station will be allowed to buy the transmission rights to 6 Mhz of spectrum on our cable systems, for $1 dollar per year per channel (6 Mhz), for a period of at least 10 years.

2) Your station will provide all the necessary reception equipment (antennas, downleads, pre-amps, processors, etc) to deliver your signal to our distribution system. In the case of those systems currently carrying your signal (see enclosed channel card sheet), you will purchase the existing equipment currently in use, at a price of $800 per channel per head-end.

3) Your station will have the full rights to broadcast any and all legally-originated programming, including but not limited to, stereo audio, second audio programs, teletext, etc., provided however, that no services maybe offered, or equipment used, that would render useless or obsolete any other equipment currently in use in that system in question.

4) Your station will be financially responsible for the maintenance of the equipment used to receive and process your signal, including the cost of insurance.

5) Our system will provide building and rack space necessary to house said station furnished equipment, and the electricity and air-conditioning needed to operate and maintain said equipment.

6) Our system technician will provide normal adjustment and measurement maintenance, and will provide you of notice should any repair or other work be required of you equipment.

7) Your station will provide at least, 12 times per year, a broadcast advertisement to its viewers in the cities served by us both, of the improved availibility of your signal in such town, via cable reception.

HEARST BROADCASTING

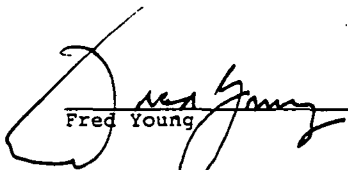
AUG 14 1985

AFFIDAVIT OF FRED YOUNG

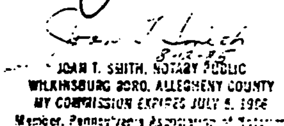
Fred Young, being duly sworn, deposes and says:

I am Director of Broadcast Operations of The Hearst Corporation, licensee of television station KMBC in Kansas City, Missouri.

KMBC received the attached letter from Jefferson County Cable Corporation, the owner and operator of a cable television system in ten counties near Kansas City. If Hearst were to purchase the equipment located at each head-end, as outlined in the first paragraph of Page 2 of the attached letter, the total outlay, exclusive of the $1.00 per year per channel charge, would total $8,000.00.



Fred Young



JOAN T. SMITH, NOTARY PUBLIC
WILKINSBURG BORO, ALLEGHENY COUNTY
MY COMMISSION EXPIRES JULY 5, 19[illegible]
Member, Pennsylvania Association of Notaries

Wasting no time

In the absence of must-carry rules, will cable operators charge broadcasters for carriage? At least one is trying. Jefferson County Cable Corp., a Centralia, Kan.-based operator serving 2,000 homes, sent letters last week to its 12 "must-carry" stations in Kansas City and St. Joseph, both Missouri, and Topeka, Kan., asking that each pick up the cost of receiving and processing its signals at the JCC's 10 headends, which amounts to at least $8,000. In exchange, JCC said it will lease each station a channel on its systems for at least 10 years for $1 a year.

JCC President John Watkins said he felt the offer was reasonable. By building cable systems, JCC pays for carrying the broadcast signals from the headend to the cable subscribers, he said. All he is asking the broadcasters to do, he said, is to pay for picking the signals out of the air and putting them on the systems. Watkins said he will not immediately drop the signals of stations that reject his offer, but, he warned, he may drop some of them if other, more attractive cable or broadcast signals come along. "If the stations want some stability, they are going to have to pay for it," he said.

Watkins was unconcerned about the broadcasters' assault on the compulsory license, which could result in broadcasters being able to charge cable systems for picking up their signals. If broadcasters are successful in eliminating the license, Watkins said, cable operators will go to court and seek freedom from all copyright liability stemming from carriage of broadcast signals. Prior to the Copyright Act of 1976, which imposed copyright liability on cable operators and created the compulsory license, he said, the Supreme Court "told us time and time again that we don't ... e to pay copyright" for broadcast signals.

... d, according to Watkins, some operators are preparing another response to ... the compulsory license. "I know some guys who are ready to bypass the local ... ns and pull the [broadcast] networks off the satellite."

Broadcasting Magazine, July 29, 1985, p. 28

TAB 20

STATEMENT OF JAMES HEDLUND

My name is James Hedlund. I am the Vice President, Government Relations, of the Association of Independent Television Stations, Inc. (INTV).

At my direction and under my supervision, staff personnel of the law firm of Pierson, Ball & Dowd, INTV's communications counsel, conducted a research survey of petitions on file with the Federal Communications Commission (FCC) seeking waivers of the FCC "must-carry" rules. The study listed all such petitions which were pending in November, 1984, by name of cable operator, date of filing, number of cable systems affected, numbers of subscribers (if available), and system channel capacity. I have reviewed that survey to provide this statement regarding some of its principal findings. The results of this survey may be summarized in pertinent part as follows:

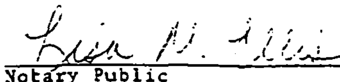
1. As of November, 1984 there were 208 petitions for waiver of the must-carry rules pending at the FCC, the oldest of which dated back to 1977.

2. Subscriber data was available for 83 of the 208 petitioners. These cable systems reported a cumulative total of 1,482,015 subscribers (in each case computed as of the time of the filing of the respective waiver petitions).

3. The total number of television stations whose signals would have been deleted or denied coverage upon grant of the aforesaid petitions was 248.

James Hedlund

Sworn to and subscribed before me, a notary public, this 14th day of August, 1985.



Notary Public

My Commission Expires January 14, 1988

TAB 21

STATEMENT OF MARK R. FRATRIK, PH.D.

My name is Mark R. Fratrik. I am Director of Financial and Economic Research for the National Association of Broadcasters (NAB).

My office has recently completed a study of the financial health of independent UHF television stations, based upon a 1984 NAB financial survey of revenue and expense data (reported for the year 1983).*/ Survey data was provided by 471 responding television stations (independents and network affiliates). I will state below some of the principal findings of this study insofar as independent television stations are concerned:

1. From the most recent financial report, one can see clearly the precarious position of many responding UHF stations. A greater percentage of UHF independent respondents lost money in 1983 than other station types. Of sixty UHF independent stations responding to the 1984 NAB financial surveys, twenty-three (38.33%) lost money. This number is much higher than the 14.38% (58 of 377) of all responding network affiliated stations that lost money.

2. When stations from smaller markets are considered separately, the percentage of unprofitable UHF independents

*/ Since the FCC has discontinued its financial data collection, NAB's survey is the only comprehensive examination of the financial performance of commercial television stations.

increases. In market sizes of ADI 11-125, 44.68% of responding UHF independents (21 of 47 stations) lost money in 1983. The amount of these losses was not trivial, with some UHF independents in these markets losing over $800 thousand.

3. Comparison of recent profit performances of different station types in market sizes ADI 1-10 also demonstrates that UHF independent stations have lost ground to other stations. In those markets the median profits for responding UHF independent stations were 19.59% of the median profits for all responding affiliated stations in 1979; in 1983, however, the reported median UHF station earned 12.81% of the median profits earned by affiliated stations. This reduction in the profits earned indicates that UHF independent stations have not enjoyed the growth that network affiliated stations have realized.

Many previous studies have provided similar evidence regarding the difficult financial position of UHF stations relative to other station types. One such study conducted in 1982 by Brown, Bortz and Coddington (BBC) on The Economics of Television Station Operation in 100-Plus Markets found similar results. In a regression analysis of stations' audiences, revenues and profits, BBC obtained statistically significant estimates of the relative positions of UHF stations in these smaller sized markets.

They found that a UHF station in a market with two VHF stations will have a 25.8% smaller audience, generally 17.4% less in advertising revenues, and earn 69.7% less in profits that the VHF stations.

The FCC's Network Inquiry staff also conducted a study on this issue which produced similar results. That analysis found that UHF stations are "significantly less profitable than VHF stations, other things equal." (Network Inquiry Special Staff, "The Determinants of Television Station Profitability," Preliminary Report, June 1980, Chapter IV, p. 97)

Mark R. Fratrik

Sworn to and subscribed, before me, a notary public, this 16th day of August, 1985.

Notary Public

GWENDOLYN B. CHASE, Notary Public
My Commission Expires July 31, 1988

TAB 22

AFFIDAVIT OF EDMUND A. WILLIAMS

August 15, 1985

1. I am a telecommunications engineer employed by the Science and Technology Department of the National Association of Broadcasters ("NAB"). In this capacity I have prepared the following statement in support of a Motion for Stay of Issuance of Mandate pending the filing of a Petition for Writ of Certiorari to the United States Supreme Court to be filed by NAB and other parties in Case Nos. 83-1283 and 83-7050 in the U.S. Court of Appeals for the D.C. Circuit.

2. Based upon recent observations and telephone contacts with the technical staffs of television receiver manufacturers,[1] it is clear that there is no systematic approach to characterizing how a particular television receiver accommodates off-air signals and Cable TV provided signals.

3. There is a pronounced trend toward the use of a combined coaxial UHF/VHF antenna input on the television receiver. At least one major U.S. manufacturer and several popular foreign manufacturers provide the common UHF/VHF antenna input on most models which have electronic tuners. Most TV receivers have the new electronic tuners with a digital channel display. Virtually all receivers with remote control have electronics tuners. Because there is also a growing trend toward the use of coaxial lead-ins for outdoor TV antennas and the fact that all CATV connections are coaxial, it is easy to

[1]Observations and telephone contacts were conducted during the week of August 12-16, 1985.

understand why more receiver manufacturers are employing the common UHF/VHF coaxial input.

4. Television receivers which are "cable ready" or "cable compatible" are capable of tuning channels that are not included in the over-the-air frequency allocations the FCC has made available for broadcasting. According to NAB's Department of Research and Planning, the number of cable ready color television receivers with coaxial inputs sold in the U.S. rose from 45.6% in 1982 to 56.8% (9.6 million units) in 1984. In addition to tuning the VHF channels 2 through 13, these receivers also tune a series of channels in between the over-the-air VHF and UHF frequencies. These frequencies are called Cable TV "midband" or "superband". There are 23 extra channels in the midband and 41 extra channels in the superband. When added to the conventional over-the-air VHF channels (12), a "cable ready" television receiver may tune a total of 53 channels. Some receiver manufacturers prefer to add the extra 41 channels to the current 82 channel capacity of a conventional receiver as a means to further promote their "cable-ready" sales, claiming a 123 channel receiving capacity.

5. In order for the receiver to tune this wide range of channels, "cable ready" receivers employ a special switch (the "cable/normal" switch) to direct the tuner to receive either the off-air mode (to receive only the off-air frequency allocations) or the Cable TV mode (to receive the off-air allocations and the cable allocations of midband and superband). The switch is normally set only once, at the time the receiver is installed. It is not one of the ordinary consumer operating controls such as those that govern the receiver volume, channel selection or power. Instead, this switch generally is located

on the back of the receiver or inside a door which contains seldom-used color adjustment or set-up controls. In some cases, a special tool is required to operate the switch to prevent the switch from being accidentally activated.

6. The cable/normal switch reconfigures the receiver circuitry to allow the special Cable TV channels to be fed into the usual VHF or coaxial input of the receiver. In the cable mode the UHF antenna input is rendered useless. The channel designations, other than 2 through 13, are not related to the off-air broadcast channels. For example, when the channel selector displays Channel 14, and the receiver is in the cable receiving mode, the tuner is not receiving over-the-air Channel 14. The Cable channel designations above channel 13 do not necessarily have a relationship to the channel number of the signal from the CATV system. It is necessary to refer to a conversion table provided by the cable TV company in order to identify precisely which over-the-air channel or other program service is being received at a particular receiver channel setting. The cable/normal switch must be activated for a viewer to select between the off-air and cable TV modes of reception.

7. In addition to the need to activate the cable/normal switch, some receivers are unable to reliably adjust to the variant channel plans employed by cable companies and, therefore, a separate automatic frequency control ("AFC") switch must be employed as well. While this is not the case for all receivers, the AFC switch must still be considered when selecting cable or normal receiver operation.

8. The viewer who wishes to employ a switch to select the input to the

television receiver between Cable TV and an external antenna may employ a simple switch: the "A/B switch". This switch permits the viewer to change between viewing cable TV channels, receivable from the cable system, to those receivable directly off the air. There are several reasons for having such a switch. The principal reason is to permit a video cassette machine ("VCR's") to record from one channel while, simultaneously, the viewer watches another channel. One program could be received from the cable system and the other received over-the air. Most cable systems which employ "converter boxes" do not permit this simultaneous record/view operation.

9. When using the A/B switch, the viewer must, in addition to activating the A/B switch, also activate the cable/normal switch and, in some cases, the AFC switch as well.

10. Some of the most recent and top-of-the-line receiver models employ a built-in A/B switch. In other cases the A/B switch may be added as an option. Some optional A/B switches may be remotely controlled. Cable/normal switches, on the other hand, are not available with a remote control feature.

11. VCR's have become increasingly popular in the United States.[2] Nearly all the new models incorporate electronic tuners and are "cable ready".[3] The tuning configurations for VCR's, however, defy catagorizing into specific styles. Each manufacturer offers its own channel arrangement scheme. Some

[2]The current sales rate for VCR's in the U.S. is over 10 million units per year. See Television Digest, Vol. 25, No. 32, (August 12, 1985) at 9.

[3]See Consumer Reports, September, 1985, at pp. 529-532.

VCR's have only 12-14 "preset" channels that limit the total cable or off-air channels that can be received or recorded, regardless of the VCR tuner's capabilities. Still other VCR's select channels 2 through 83, like a conventional VHF/UHF non-cable ready receiver, but use "look-up" charts and cable/normal switches to determine precisely which channel is being viewed.

12. The confusion generated by adding a VCR to a cable system can only be described as growing and frustrating for the consumer. The connection arrangements between cable, VCR and television receivers is complex enough without the addition of an external antenna. Add to this the need to operate several different controls (channel selector, A/B switch, cable/normal, and, perhaps, AFC). While it is feasible to make the change from cable reception to off-air reception, it is far from convenient to do so and in some cases rewiring is actually required. A statement by Mr. Geoff Gates (Vice President for Engineering, Cox Cable Enterprises -- a large cable operating company) during the recent 1985 convention of the National Cable Television Association ("NCTA"), described cable's technology development:

> "We have confused our customer with the variety and complexity of interconnections with our interface equipment. We have introduced incompatibilities between our systems.... In short, we have let our technology get in the way of our customer's enjoyment and our success"[4]

13. In summary, (1) a systematic approach to mating cable TV with television receivers combined with the ability to receive off-air signals is exceedingly difficult to characterize; (2) there is a growing trend toward using a common

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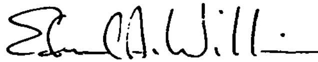
[4]Quoted from Cable Television Business, July 1, 1985, at 39.

coaxial VHF/UHF receiver input; (3) the need for the consumer to activate selector switches (often hard to locate) increases the difficulty of combining off-air reception with cable hook-ups; (4) alternate input or built-in A/B switches are available only on special or top-of-the-line receivers; and (5) considerable confusion exists not only with VCR tuning systems but also with their hook-up arrangements with cable TV systems and off-air antennas.

14. Upon information and belief, the technical facts, conclusions and representations contained herein are true and correct to the best of my knowledge.



Edmund A. Williams

Sworn and subscribed
before me this 15th
day of August, 1985

Notary Public
[illegible]
Notary [illegible] of Columbia
My [illegible] Oct. 31, 19[illegible]

TAB 23

RENCK, LEVY & CO., INC.
850 THIRD AVENUE, NEW YORK CITY, NEW YORK 10022 • (212) 832-0210

RECEIVED
AUG 9 1985
INTV

August 6, 1985

Mr. Preston Padden
INTV
1200 18th Street, N.W.
Washington, DC 20036

Dear Mr. Padden:

Renck, Levy & Co., Inc. is a Broker/Dealer which over the past two years has been involved in the raising of capital for television stations. We were co-underwriters in an $8,000,000 Limited Partnership offering for Channel 38 Associates which resulted in a 1984 sign on of WNOL-TV in New Orleans, LA.

During this time period we have been approached in over 60 instances by business people seeking financing for television stations. More than one-third of these situations involved the sign on of new Independent stations. Historically, in reviewing the economic forecasts of new television stations, we have assumed that a new sign on station would achieve both full Cable TV carriage within 35 miles of its city license during the first full year of operation and full parity with the existing commercial stations during the stations' second year of operation with regard to Cable TV carriage.

In my opinion, if television stations should lose their rights to be carried on local Cable-TV systems, it would have a disastrous effect on the economics of financing on a new Independent Station. Making the assumptions that a station would have less than full carriage, and that in some instances Cable TV systems would extract significant carriage fees from local Independent television stations, both a decrease in revenues and an increase in expenses could result.

The elimination of the "must carry" rules would cause substantial difficulty in the raising of capital for new television stations which would, in fact, result in fewer new television stations being built.

Sincerely,

Robert L. Renck, Jr.
Managing Director

RLR:ck

Mr. KASTENMEIER. That concludes today's hearing. The committee stands adjourned.

[Whereupon, at 6:12 p.m., the hearing was adjourned.]

CRT REFORM AND COMPULSORY LICENSES

THURSDAY, OCTOBER 3, 1985

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

The subcommittee met, pursuant to call, at 9:45 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Moorhead, Swindall, and Coble.

Staff present: Michael J. Remington, chief counsel; Deborah Leavy, assistant counsel; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

Without objection, the meeting this morning may be covered in whole or in part by TV broadcast, radio broadcast, and/or still photography, pursuant to rule 5 of the committee rules.

This morning the subcommittee is holding its fourth and presumably final hearing on the issue of compulsory licenses and copyright law. Previously, the subcommittee had emphasized the role that two Government entities, the Copyright Royalty Tribunal and the Copyright Office, play in administering the compulsory licenses. The debate has been somewhat broadened by proposals, including that by Mr. Frank, to eliminate the compulsory license entirely for transmission of broadcast signals by cable television. These proposals would effectuate governmental structural reform essentially through reform of the substantive law.

It is fair to say that the subcommittee will ultimately have to decide whether structural reform can be achieved absent changes in substantive law. We should provide for good government and effective administration of existing laws. But it is a question of whether we ought to do that or engage in a more omnibus type of reform package. These are key questions which will confront us later when proposals may go to markup.

At the end of the last hearing, I asked what the legal and economic landscape would resemble absent both the compulsory license and the must-carry rules with respect to cable. In order to better understand answers to that question, I have asked the two witnesses this morning to also respond.

Last, I should state that the subcommittee announced 2 days ago, but possibly others have not heard, that one of the three witnesses originally scheduled, Mr. Ted Turner, is not able to appear before

us this morning. He will submit a written statement to the committee at a later date, which we will welcome. Mr. Turner is perhaps preoccupied with the MGM/UA question and such matters.

There are two witnesses this morning. I would like them to come forward. They represent entirely different points of view. They represent different industries, of course. But I think responses can be given to some of the questions by the witnesses sitting next to each other, and the interaction perhaps would be helpful to us, more so than if they appeared separately. They have both been agreeable to appearing jointly.

Our first witness this morning is Stephen R. Effros, president of the Community Antenna Television Association [CATA]. CATA represents cable operators throughout the United States but mainly represents the interests of the smaller or rural markets. Mr. Effros has worked for CATA for a long time in the history of this business, it seems, since 1976 when the organization was, in fact, created. He has appeared before this committee on a number of occasions. He has always been very articulate and very helpful. We are, of course, pleased to greet CATA.

I might say that we will ask Mr. Effros to go forward, and then I will introduce Mr. Padden second. Mr. Effros.

TESTIMONY OF STEPHEN R. EFFROS, PRESIDENT, COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.; AND PRESTON R. PADDEN, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS

Mr. EFFROS. Mr. Chairman and members of the subcommittee, I am Steve Effros, president of CATA. As you noted, CATA represents cable operators throughout the United States. We do focus primarily on the interests and perspective of the managers and owners of systems outside the major urban markets. Systems serving more than 14 million American homes are presently CATA members.

I appreciate this opportunity to appear before you today and to discuss the vexatious problems surrounding the mechanism for copyright payments by cable television operators. It is unnecessary, I believe, to repeat the historical background of this topic since that was so thoroughly and excellently handled by both Mr. Mooney of the NCTA and Mr. Valenti of the MPAA at your last public hearing on this subject 2 weeks ago.

I think it is important to point out that major changes have indeed taken place in the so-called copyright debate over the past several years. The broadcasters and copyright holders are fond of emphasizing that cable is no longer a mom-and-pop industry, or an infant industry as they say it was characterized during the discussions leading up to the Copyright Act of 1976. We would certainly agree. Cable is a sucessful, prosperous, and growing industry. We are very proud of that. However, that has nothing whatever to do with copyright. As you yourself mentioned, Mr. Chairman, in the recent hearings, there was no justification for copyright based on infant industries. It had a far different genesis.

Somehow there has come to be an association in the minds, or at least the rhetoric, of some that the compulsory license designed

into the Copyright Act of 1976 was directly related to the age or the size of the cable industry. That is simply not support by the facts. Indeed, Mr. Valenti's testimony of 2 weeks ago spelled out, and quoted the reason for the compulsory license in its most concise form, when he said: "It would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner." This is particularly true, as pointed out by Mr. Mooney, because of the thousands of television programs we are dealing with every day on a steadily increasing number of broadcast stations and cable systems.

The consolidation of ownership in the cable industry bears no relationship to the fact that there are well over 6,000 individual cable systems in operation today carrying an increasingly diversified mix of programming from widely varying sources. Thus, whether we are an infant or mature, mom and pop, or a multimedia conglomerate has nothing to do with the universally recognized impossibility of individual negotiations for the rights to retransmit programming directly from the copyright owners. Congress recognized the need for a mechanism to deal with this problem in 1976, and that need has only increased since then.

Another change that should be noted is that the cable industry, and particularly the segment of the industry that I represent, has grudgingly succumbed to the premise that we should be required to pay copyright at all. Let us remember that, prior to 1976, the Supreme Court made it doubly clear that we did not have that obligation under the then-existing copyright law. But we are beyond that. We pay our fees, and they are by no means meager. The copyright payment pool this year is estimated to be in the $100 million range. That is enough money that we hear the copyright owners are no longer arguing that hard about why it shouldn't be more but, rather, why they can't get their checks any faster.

In sum, while the present system is beset by many problems, it represents the outlines of a mechanism that works. CATA totally supports the legislative initiatives of you, Mr. Chairman, as well as Mr. Synar and Mrs. Schroeder to deal with the obvious structural problems we face. Those problems stem, we believe, from two definable sources: first, as Jim Mooney pointed out, the somewhat stilted perspective of some so-called copyright experts that copyright is meant solely for the benefit of the owner of the intellectual property. This is simply not so, as was amply pointed out by Professor David Lange of Duke University in his testimony before you in 1983. Copyright is intended to ultimately inure to the benefit of the public.

The second problem stems from the fact that the structure created in the 1976 law was devoid of substantive guidelines and restraints. This in turn allowed those in charge of the structure to change it into a policymaking body rather than a ministerial one. Mr. Chairman, your own comments and dissertations on this subject are far more eloquent than I could ever be.

So what, then, is needed? A mechanism to accomplish the distribution to the public of programming distributed by television stations and retransmitted by cable systems with fair and equitable payment for the intellectual property owners. Whether it is called a compulsory license administered under law, or a blanket licens-

ing fee administered by an ASCAP/BMI type of group as suggested by Eddie Fritts, the recognition of the need for the mechanism is the same. Such a mechanism already exists. It is called the compulsory license, and it is administered by the CRT and the Copyright Office. Some of the details of that administration have become so contentious and so cumbersome that there is general agreement that a simplified process would benefit all parties, and an effort is now under way to accomplish that.

The cable industry, with both the NCTA and CATA participating, is holding discussions with the principal copyright holders, represented by the MPAA, regarding the possibility of simplifying the process of collection of payments from cable operators. That process, ideally, would eliminate most of the discretionary debates now sparked by decisions of the CRT and the Copyright Office. I think it is significant to note that all parties now involved in the discussions—and we do anticipate that others will be joining us shortly—see the initial efforts positively and believe that there is room for agreement.

The point here is that a mechanism to accomplish the goal already exists. To eliminate the compulsory license would simply force a new mechanism to be created that would do the same thing. The fights and debates, the court suits and delays would be rerun for no particular benefit. All one needs to do is look at the litigious history surrounding ASCAP and BMI to recognize that, while there are definite improvements needed, those improvements can be accomplished without a wholesale abandonment of the system.

However haltingly, and in some cases unfairly, it does work; and a mechanism like it is necessary. There never has been such a thing as a free marketplace when it comes to the use of copyrighted works by broadcasters. Broadcasting by its very nature is not a part of the free marketplace. It is a governmentally granted monopoly of spectrum space for no charge, a free distribution system with few public obligations on the lucky winner of that resource. To suggest that elimination of the compulsory license would allow for the negotiation of prices and product distribution in the free marketplace is a fanciful flight from reality.

I have been specifically asked to address the question that has been raised throughout any recent discussion of cable copyright: the impact of our recent court victory regarding the must-carry rules. What would happen, it is asked, if both must-carry and the compulsory license were eliminated? What would the future look like? Well, I dare say the answer is that it would look remarkably similar to what it is today.

As I have already noted, the compulsory license by any other name would still be the same thing: a blanket fee for the right to carry all programming distributed by television stations. This already benefits the copyright holders to the tune of almost $100 million a year, and they have no intention of giving that up. The only threat to that money under the current system is several legal challenges already brought by the cable industry regarding the interpretation of our obligations under the law. Mr. Mooney spelled those out for you, including the tiering question, the pro rata question, and the like. Should cable win those suits as well, the copyright royalty pool could be cut by one-third to one-half of its

present size. Thus the great interest on the part of the copyright owners to simplify the process using the current numbers.

Cable, I suspect, is willing to do that if only to end the constant battles we have had to endure over this issue since our birth. We would prefer a definable, stable business atmosphere to the one presently created by the unpredictability of the CRT, the Copyright Office, and the endless court appeals. Eliminating the compulsory license would simply plunge us all into more of the same chaos only to ultimately structure a similar mechanism to the one we are now working to perfect. Those who urge this course, we suspect, have motives other than dealing with the issue of the compulsory license.

But what about must carry. Hasn't the symmetry of the rules been destroyed by the court decision? Does that not argue in favor of elimination of the compulsory license they say? CATA believes that such an argument is devoid of logic. There was never a linkage, other than in the broadcaster's rhetoric, between the compulsory license and must carry. Just look at the record. There was never a suggestion in Congress that cable should pay for local signals, whether we were required to carry them or not. If there is any symmetry, it is between the compulsory license and the grant of exclusive broadcast licenses, especially when those licenses are free.

The broadcaster is supposed to serve all portions of his broadcast area. Cable assists him in meeting his license obligation. The compulsory license is a mechanism, as explained already, that one way or the other is a necessary ingredient. Each cable system carries a different mix of programming from different broadcast outlets. That programming is owned in large part not by broadcasters. So, they are not the party we could or should negotiate with in any event. The programming is not theirs to sell. Yet, it is logistically impossible to deal with each individual copyright holder since the values of the programming would have to be individually negotiated based on system size, market size, station location, and the like. Were there to be an elimination of the compulsory license, we would all have to go out and recreate it. While that might please those who would define that as a marketplace solution rather than a governmentally imposed solution, that would not be accurate. Just as with BMI and ASCAP, the Government would still, ultimately create the structure. It would just be done through the Justice Department and the courts rather than through Congress.

As to what it will be like in the future without the must-carry rules, again I say, not much different than today. One of the bedrock reasons for the existence of cable television is that the broadcast system has never really done a very good job of reaching all the people it committed to serve when accepting the government largesse of a broadcast license. Cable went the last mile, providing the broadcasters with yet another benefit. They got so used to that benefit under the must carry rules that they thought it was part of their birthright. Some are now arguing that cable has won too much because of this recent court decision. CATA would argue that we have simply stopped losing our rights, we have not won anything.

But rules or no, we will continue to be the last mile for most broadcasters, because that is what our subscribers want. We are, after all, a business. If our subscribers want to continue to receive duplicating network or PBS signals, then we will continue to carry them. If they want something else instead, however, we will not hesitate to supply that which our subscribers have contracted with us to deliver.

The local broadcaster, after all, has a primary, free, bypass technology in relation to cable. It is absolutely silly to describe cable as a monopoly gatekeeper regarding broadcast television. Not all broadcasters deserve carriage simply by dint of the fact that they have been given a broadcast license by the Federal Government. The most popular recent format for new UHF broadcast stations is to become music video channels. Does anyone really believe it is a necessary public policy of the government to require that cable operators must carry that particular type of programming into every home? Most, however, are responsible. We have no argument with that. And they will be carried, in any event. Those that are not have a preexisting right under Federal law to lease channel capacity on cable systems if they so desire. Those carried voluntarily, under a compulsory license, I believe, should not and will not be charged for that carriage by most cable systems.

Mr. Chairman, we have all been through these wars for a long time. The debates have gone around and around, and your good will and good humor, along with your colleagues', is remarkable under the circumstances. It would appear, from the latest activities of a segment of the broadcast industry that now the compulsory license will be challenged once again, not on the basis of copyright, however, but for the purposes of attempting to achieve political leverage.

I would urge you to continue on the course you have chosen, to try to deal with the structural and substantive problems of the system that is already in place rather than succumb to Machiavellian intrigue. You and Mr. Synar, as well as some of your counterparts in the Senate, specifically suggested to us several months ago to see if we could come up with a substantive plan that would satisfy your public policy requirements as well as deal with the structural faults we all see in the present system. We have followed your advice, and we will report any progress to you as soon as it comes about.

Thank you again for this opportunity to appear before you. I would welcome any questions.

[Statement of Stephen Effros follows:]

STATEMENT OF STEPHEN R. EFFROS, PRESIDENT, COMMUNITY ANTENNA TELEVISION, ASSOCIATION, INC.

Mr. Chairman, members of the Subcommittee, I am Steve Effros, President of the Community Antenna Television Association (CATA). CATA represents cable operators throughout the United States. We focus primarily on the interests and perspective of the managers and owners of systems outside the major urban markets. Systems serving more than 14 million American homes are presently CATA members.

I appreciate this opportunity to appear before you today to discuss the vexatious problems surrounding the mechanism for copyright payments by cable television operators. It is unnecessary, I believe, to repeat the historical background of this topic since that was so thoroughly and excellently handled by both Mr. Mooney of the NCTA and Mr. Valenti of the MPAA at your last public hearing on this subject two weeks ago.

I think it is important to point out that major changes have indeed taken place in the so-called "copyright debate" over the past several years. The broadcasters and copyright holders are fond of emphasizing that cable is no longer a "mom and pop" industry, or an "infant" industry as they say it was characterized during the discussions leading up to the Copyright Act of 1976. We would certainly agree. Cable is a successful, prosperous, and growing industry. We are very proud of that. However that has nothing whatever to do with copyright!

Somehow there has come to be an association in the minds, or at least the rhetoric of some, that the compulsory license designed into the Copyright Act of 1976 was directly related to

the age or size of the cable industry. That is simply not supported by the facts. Indeed, Mr. Valenti's testimony of two weeks ago spelled out, and quoted the reason for the compulsory license in its most concise form: "...it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner..." . This is particularly true, as pointed out by Mr. Mooney, because of the thousands of television programs we are dealing with every day on a steadily increasing number of broadcast stations and cable systems. The consolidation of ownership in the cable industry bears no relationship to the fact that there are well over 6000 individual cable sytems in operation today carrying an increasingly diversified mix of programming from widely varying sources. Thus, whether we are an "infant" or "mature", "mom and pop" or a "multimedia conglomerate" has nothing to do with the universally recognized impossibility of individual negotiations for the rights to retransmit programming directly from the copyright owners. Congress recognized the need for a mechanism to deal with this problem in 1976, and that need has only increased since then.

Another change that should be noted is that the cable industry, and particularly the segment of the industry that I represent, has grudgingly succumbed to the premise that we should be required to pay copyright at all! Let us remember that prior to 1976 the Supreme Court made it doubly clear that we did not

have that obligation under the copyright law. But we are beyond that. We pay our fees -- and they are by no means meager. The copyright payment pool this year is estimated to be in the $100 million dollar range. That is enough money that we hear the copyright owners are no longer arguing that hard about why it shouldn't be more, but rather why they can't get their checks any faster.

In sum, while the present system is beset by many problems, it represents the outlines of a mechanism that works. CATA totally supports the legislative initiatives of you, Mr. Chairman, as well as Mr. Synar and Mrs. Schroeder to deal with the obvious structural problems we face. Those problems stem, we believe, from two definable sources: first, as Jim Mooney pointed out, the somewhat stilted perspective of "copyright experts" that copyright is meant solely for the benefit of the owner of the intellectual property. This is simply not so. And second, that the structure created in the 1976 law was devoid of substantive guidelines and restraints. This in turn allowed those in charge of the structure to change it in to a policy making body rather than a ministerial one. Mr. Chairman, your own comments and dissertations on this subject are far more eloquent than I could ever be.

So what, then, is needed? A mechanism to accomplish the distribution to the public of programming distributed by television stations and retransmitted by cable systems with fair and equitable payment for the intellectual property owners.

Whether it is called a "compulsory license" administered under law, or a "blanket licensing fee" administered by an ASCAP/BMI-type group as suggested by Eddie Fritts, the recognition of the need for the mechanism is the same. Such a mechanism already exists. It is called the compulsory license and it is administered by the CRT and the Copyright office. Some of the details of that administration have become so contentious and so cumbersome that there is general agreement that a simplified process would benefit all parties, and an effort is now under way to accomplish that.

The cable industry, with both the NCTA and CATA participating, is holding discussions with the principal copyright holders, represented by the MPAA, regarding the possibility of simplifying the process of collection payments from cable operators. That process, ideally, would eliminate most of the "discretionary" debates now sparked by decisions of the CRT and the Copyright office. I think it is significant to note that all parties now involved in the discussions, and we anticipate that others will be joining us shortly, see the initial efforts positively, and believe that there is room for agreement.

The point here is that a mechanism to accomplish the goal already exists. To eliminate the compulsory license would simply force a new mechanism to be created that would do the same thing. The fights and debates, the court suits and delays would be rerun

for no particular benefit. All one needs to do is look at the litigious history surrounding ASCAP and BMI to recognize that while there are definite improvements needed, those improvements can be accomplished without a wholesale abandonment of the system. However haltingly, and in cases unfairly -- it does work, and a mechanism like it is necessary. There never has been such a thing as a "free marketplace" when it comes to the use of copyrighted works by broadcasters. Broadcasting, by its very nature, is not a part of the "free marketplace". It is a governmentally granted monopoly of spectrum space for no charge. A free distribution system with few public obligations on the lucky winner of that resource. To suggest that elimination of the compulsory license would allow for the negotiation of prices and product distribution in the "free marketplace" is a fanciful flight from reality.

I have been specifically asked to address the question that has been raised throughout any recent discussion of cable copyright: the impact of our recent court victory regarding the "must carry" rules. What would happen, it is asked, if both "must carry" AND the compulsory license were eliminated? What would the future look like? Well, I daresay the answer is that it would look remarkably similar to what it is today.

As I have already noted, the compulsory license by any other name would still be the same thing -- a blanket fee for the right to carry all programming distributed by television stations. This already benefits the copyright holders to the tune of almost

$100 million dollars a year, and they have no intention of giving that up! The only threat to that money under the current system is several legal challenges already brought by the cable industry regarding the interpretation of our obligations under the law. Mr. Mooney spelled those out for you, including the "tiering" question, the "pro rata" question, and the like. Should cable win those suits as well, the copyright royalty pool could be cut by one-third to one-half its present size. Thus the great interest on the part of the copyright owners to "simplify" the process using the current numbers. Cable, I suspect, is willing to do that if only to end the constant battles we have had to endure over this issue since our birth. We would prefer a definable, stable business atmosphere to the one presently created by the unpredictability of the CRT, the Copyright Office, and the endless court appeals. Eliminating the compulsory license would simply plunge us all into more of the same chaos only to ultimately structure a similar mechanism to the one we are now working to perfect. Those who urge this course, we suspect, have motives other than dealing with the issue of the compulsory license.

But what about "must carry" -- hasn't the symmetry of the rules been destroyed by the Court decision -- does that not argue in favor of elimination of the compulsory license they say? CATA believes that such an argument is devoid of logic. There was never a linkage, other than in the broadcaster's rhetoric,

between the compulsory license and must carry. Just look at the record! There was never a suggestion in Congress that cable should pay for local signals -- whether we were required to carry them or not. If there is any symmetry, it is between the compulsory license and the grant of exclusive broadcast licenses -- especially when those licenses are free. The broadcaster is supposed to serve all portions of his broadcast area. Cable assists him in meeting his license obligation. The compulsory license is a mechanism, as explained already, that one way or the other is a necessary ingredient. Each cable system carries a different mix of programming from different broadcast outlets. That programming is owned, in large part, not by broadcasters. So they are not the party we could or should negotiate with in any event. The programming is not theirs to sell! Yet it is logistically impossible to deal with each individual copyright holder since the values of the programming would have to be individually negotiated based on system size, market size, station location, and the like. Were there to be an elimination of the compulsory license we would all have to go out and recreate it. While that might please those who would define that as a "marketplace" solution, rather than a "governmentally imposed" solution that would be inaccurate. Just as with BMI and ASCAP, the government would still, ultimately create the structure -- it would just be done through the Justice Department and the Courts rather than Congress.

As to what it will be like in the future without the "must

carry" rules, again, I say, not much different than today. One of the bedrock reasons for the existence of cable television is that the broadcast system has never really done a very good job of reaching all the people it committed to serve when accepting the government largess of a broadcast license. Cable went the last mile -- providing the broadcasters with yet another benefit. They got so used to that benefit under the "must carry" rules, that they thought it was part of their birthright! Some are now arguing that cable has "won" too much because of this recent court decision. CATA would argue that we have simply stopped losing our rights -- we have not "won" anything!

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anyone really believe it is a necessary public policy of the government to require that cable operators "must carry" that type of programming into every home? Most, however, are responsible, and will be carried in any event. Those that are not have a preexisting right, under federal law, to lease channel capacity on cable systems if they so desire. Those carried voluntarily, under a compulsory license, I believe, should not, and will not be charged for that carriage by most cable systems.

Mr. Chairman, we have all been through these wars for a long time. The debates have gone around and around, and your good will and good humor, along with your colleagues, is remarkable under the circumstances. It would appear, from the latest activities of a segment of the broadcast industry that now the compulsory license will be challenged once again -- not on the basis of copyright, but for the purpose of attempting to achieve political leverage. I would urge you to continue on the course you have chosen -- to try to deal with the structural and substantive problems of the system that is already in place, rather than succumb to Machiavellian intrigue. You and Mr. Synar, as well as some of your counterparts in the Senate, specifically suggested to us several months ago to see if we could come up with a substantive plan that would satisfy your public policy requirements as well as deal with the structural faults we all see in the present system. We have followed your advice, and will report any progress to you as soon as it comes about.

Thank you, again, for this opportunity to appear before you. I would welcome the opportunity of answering any questions you might have.

Mr. KASTENMEIER. Thank you, Mr. Effros, for a very clear, lucid statement. It is a real contribution. I appreciate it.

We will have a number of questions, particularly after Mr. Padden has given his testimony. I note you said that, should cable win some current suits relating to tiering and pro rationing, the copyright royalty pool could be cut by one-third to one-half its present size. I am quite surprised that it could have that great a swing. Do you think that a pretty accurate forecast?

Mr. EFFROS. Well, Mr. Chairman, we haven't done any mathematic studies of it, but it is a very simple logic here. I don't claim those number are immutable. If the pro rata suit is won, the basis of the pro rata suit is that, if I have a basic channel capacity, if I am offering a basic service of, let's say, 10 channels, and only 5 of those channels are broadcast signals and the other 5 of them are ESPN, CNN, USA, C-Span, or whatever, that I am paying, and my subscribers are paying $10 for that basic service, the pro rata argument in court goes: Wait a minute, I'm already paying copyright for CNN, ESPN, USA, and so on. I should only be paying copyright for that basic package on the basis of the number, the pro rata share of the broadcast signals.

So, if you assume that most cable systems have, let us say, one-half to two-thirds of their channel capacity on basic taken up by broadcast signals and the rest taken up by something else, then you could say, if the court says you're correct on the pro rata argument, that one-third to one-half of that revenue would be cut off.

Mr. KASTENMEIER. Well, all right.

Does Mr. Swindall, my colleague, have a question at this point?

Mr. SWINDALL. I have one quick question.

Mr. KASTENMEIER. I will recognize him then. We will, after that, recess because there is a vote on the House floor.

Mr. SWINDALL. I have seen printed that the average cable operator pays about 22 cents per subscriber per month for the copyrighted programming that they receive. My question to you is, given how much the broadcasters pay the comparable programming, is there in your opinion an inequity, especially with cable now becoming really more and more a competitor to those various stations and local programming, between that obvious disparity in bottom-line dollars and cents?

Mr. EFFROS. No, sir; first of all, I don't think the numbers are correct. I know Jack Valenti uses that number all the time, but I don't think it is quite accurate. The fact is that the cable industry pays for a great deal of programming other than just broadcast signals. And to try to compare the broadcast television stations' cost for programming with the cable operators' cost of programming is not comparable.

For instance, if the cable operator did not have to pay for his distribution system, then the percentage of the revenues that were paid for programming would naturally jump. But we do have to pay for our distribution system. In New York it costs $150,000 to $200,000 a mile just to run the cable. The broadcaster doesn't pay anything to distribute the programming. That right has been given to him by the Federal Government for free. Interestingly enough, when they sell the stations, they sell them for $500 million, but the Government doesn't get any of that money.

So, if you take the broadcaster's costs, of course, their cost ratio is going to be higher for programming because they don't have to pay for their distribution system. Our cost ratio is going to be lower because we do have to pay for our distribution system. If you wanted to—I mean, I am perfectly willing to suggest a deal where the broadcasters should pay for the distribution system of the cable, and then we could start comparing the price of product. They haven't offered.

Mr. SWINDALL. Thank you. I suspect we will hear a rebuttal on that from the next witness. Thank you.

Mr. KASTENMEIER. I would like to comment. I think that whether 22 cents is precisely accurate or not, it's within the ballpark. That's $2.64 a year. If there is about $100 million annual pool, and there are, let's say, 33 million people who receive cable, or something like that, that's $3 a year. That's in the ballpark of $2.64. So whether it's 22 cents or 26 cents or 25 cents, the ballpark figure of around $3 per year per subscriber is likely to be accurate.

Mr. EFFROS. I don't know that we want to get into the economics of it now. I certainly can——

Mr. KASTENMEIER. I am not going to your other explanation.

Mr. EFFROS. Even accepting the number——

Mr. KASTENMEIER. Yes.

Mr. EFFROS [continuing]. It's not relevant so far as we can see in comparisons. You can't compare the two.

Mr. SWINDALL. If the gentleman will yield. Have you prepared any type of analysis that includes those figures so that you can do an apples to apples comparison?

Mr. EFFROS. I don't know of one, sir. I don't think it would be capable of being done, since each cable system carries a different number.

You have so many variables here. We carry a great many broadcast signals, in part because we are required to carry them. So, to say, well, you're only paying *x* amount of money divided by *x* number of signals, and then tell us we've got to carry the signals, what happens when we stop carrying the signals? Well, of course, Mr. Padden is going to be arguing vociferously here that we shouldn't be allowed to stop carrying the signals. So, when you keep dividing those numbers by false indicators, you are not going to get very much of an accurate projection.

The real projection for the purposes of copyright—and again I would go back to Mr. Lange's testimony—is, is anybody being hurt other than the public domain? And the burden would be to show that you are being hurt, prior to any effort to create more copyright protections. And we don't——

Mr. SWINDALL. So, the answer is no, you have not prepared those figures.

Mr. EFFROS. I don't think they can be prepared.

Mr. SWINDALL. Thank you.

Mr. KASTENMEIER. The committee will recess for about 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

Our other witness today is Mr. Preston Padden, president of the Association of Independent Television Stations [INTV]. As its name

indicates, the association represents more than 200 independent television stations that serve local communities across the country; that is to say, I guess, essentially they are not network affiliates.

Mr. Padden recently assumed the mantle of INTA leadership from our old friend Herman Land, who has become the Lionel Van Deerland professor of communications, San Diego State University, a totally different endeavor. We heard from Mr. Padden's predecessor, Mr. Land, on a number of occasions. We certainly look forward to working with Mr. Padden. You may proceed as you wish, sir.

Mr. PADDEN. Thank you, Mr. Chairman.

I have a written statement. With your permission I would like to submit for the record.

Mr. KASTENMEIER. Without objection, your statement will be received and made part of the record after your oral presentation. You may proceed as you wish.

Mr. PADDEN. Thank you.

In a recent speech to cable operators, NCTA Chairman Ed Allen quoted what he called a Haitian proverb, to the effect: "A wise man doesn't insult the alligators until he's across the river." In other words, it's too soon to start dropping or charging broadcasters. His remarks were part of a conscientious effort by the leadership of the cable industry to forestall temporarily the inevitable consequences of today's badly distorted and patently unfair television marketplace.

Mr. Allen's proverb suggested the theme for our testimony here today, namely, the fate awaiting independent broadcast stations after cable is safely across the river. It is clear to us that, after the uproar over the appeals court decision striking down the must-carry rules has diminished, independent stations will face a bleak future of discrimination at the hands of cable operators. Some independents will be flatly excluded from cable systems on which their network affiliate rivals are carried. Other independent stations will be required to pay for carriage. And, to add insult to injury, all of this anticompetitive conduct by cable will be subsidized and facilitated by a governmentally conferred compulsory license.

INTV supports H.R. 3339, introduced by Mr. Frank, which would require cable to negotiate in the marketplace for the right to use nonlocal broadcast signals and would prohibit discrimination in the use of cable's free compulsory license for local signals.

As outlined in greater detail in my written statement, enactment of H.R. 3339 would greatly simplify the subcommittee's efforts to improve the functioning of or to replace the Copyright Royalty Tribunal. It would free the Tribunal and this subcommittee from the most contentious of the four compulsory licenses embedded in the 1976 act. The three remaining licenses could be administered through one of several attractive alternatives outlined in Bruce Lehman's thoughtful testimony before this subcommittee on June 19, 1985.

Whatever the fate of these other compulsory licenses, it is clear that cable should not be permitted to retain its compulsory license, if the effect will be to frustrate longstanding public policy objectives. Cable no longer needs a compulsory license. I think Mr. Effros acknowledged as much here this morning.

In 1975 cable stood before this subcommittee as a mendicant, an improverished industry of passive antennas seeking alms. Today, cable has become a multibillion dollar industry of video publishers, insisting on the tyrannical right to exclude broadcasters or to charge them for carriage. If put to the test, we find it inconceivable that today's cable industry could shoulder the affirmative burden of proving a continuing need for the subsidy of a compulsory license.

There is no question that the marketplace will work if cable's compulsory license is modified as outlined in H.R. 3339. Cable operators willing to carry all local broadcasters on a nondiscriminatory basis would continue to enjoy a free compulsory license to do so. Program rights for distant signals could be cleared through a private licensing society such as ASCAP or BMI. Alternatively, distant superstations could clear national rights for all of the programming which they broadcast. The cable operator would then be required to deal with only one party, the superstation.

I would note in some respects WTBS in Atlanta seems to be moving in this direction by acquiring national programming rights for a number of the programs which it broadcasts.

Under H.R. 3339, if a cable operator wished to discriminate in the carriage of local stations, it would negotiate rights agreements for those stations which it did choose to carry. Marketplace forces would dictate who paid whom and how much. In any event, it is not necessary to continue the current structure of cable's compulsory license to ensure the continued flow of program product to the public via cable.

The main point we wish to emphasize today is that continuation of the cable compusory license in its present form will facilitate and subsidize anticompetitive behavior against independent stations, contrary to established communications policy.

Cable's compulsory license was adopted against a backdrop of FCC rules regulating both distant and local signal carriage. Of course, those rules are now all gone. In light of their demise, we urge the subcommittee to consider and examine the types of behavior that the compulsory license will facilitate and subsidize. We ask you to consider especially the fate awaiting independent stations after cable is safely across Mr. Allen's river.

It is not our position before you today that cable should be required to carry any broadcast signal. Although many of our members face the dual obstacles of being both independent and UHF, we are perfectly willing to compete over the air with our network rivals so long as we have an equal opportunity to reach the viewer. The truly insurmountable difficulty arises when cable wades into the competition between local stations. By carrying the affiliates, the cable operator makes cable carriage for the independent a matter of competitive survival.

Cable is a de facto monopoly. Subscribers and local broadcasters are subject to the suffrance of a single cable operator in each community. Currently, a cable operator may deny carriage to a station but the station may not withhold its consent or carriage. In a business sense, all of the leverage goes in one direction. Assuming the continuation of this condition, it is inevitable that eventually cable operators will begin to deny carriage or demand payment for car-

riage on a selective and discriminatory basis. Unfortunately, this process has already begun.

On September 10, 1985, WFAT in Johnstown, PA, was dropped by a major cable television system within the station's former must-carry zone. With a simple flick of the cable operator's switch, the station lost access to nearly one-fourth of the cable homes it had been licensed to serve by the FCC. On September 30, 1985, Mr. Richard Ramirez returned channel 18 to the air in Hartford, CT. Mr. Ramirez acquired the station pursuant to the FCC's distress sale policy, designed to help minorities gain a foothold in broadcast station ownership.

I would note Mr. Ramirez was to be with us this morning but, for a variety of reasons, was unable to make it. He just signed his station on on Monday night at 8 o'clock, and he just couldn't get down here. But I had hoped to introduce him to you.

Prior to the court of appeals decision, Mr. Ramirez had commitments for cable carriage in more than 600,000 homes in the Hartford market. Today Mr. Ramirez has lost more than one-half of this cable carriage. On many of the cable systems there is a black hole where channel 18 was carried under its former ownership.

All across the country, in Oxnard and Chico-Redding, CA; in Shreveport, LA; in Davenport, IA; in Wichita, KS; in Scranton and Wilkes-Barre, PA; in Cleveland, OH; and in Kingston, NY; new stations are being forced to battle cable resistance in their efforts to compete with established network stations.

Many of the new stations have been reluctant to disclose their difficulties with cable for fear of alarming advertisers, investers, and perhaps most importantly their lenders. But their difficulties are not imaginary. John C. Bailie, operator and 20 percent owner of the first independent station in the Savannah, GA market, has given us a copy of this contract, which he signed with the cable television subsidiary of Time, Inc. Mr. Chairman, I would like to submit this contract as part of the record.

Mr. KASTENMEIER. Without objection, that paper will be received.

[The information follows:]

CHANNEL USE AGREEMENT

This Agreement is dated as of Aug. 16, 1985, 1985 by and between Hilton Head Television, Inc., a South Carolina corporation ("Hilton Head") and American Cablevision of Carolina, Inc., d/b/a Cablevision of Savannah, a North Carolina corporation ("Cablevision").

WHEREAS, Cablevision is the holder of franchises granted by local governments in and around Savannah, Georgia (collectively, the "Franchise") for the installation, operation and maintenance of cable television ("CATV") systems; and

WHEREAS, Hilton Head operates broadcast station WTGS Channel 28, which broadcast station is licensed to Hardeeville, South Carolina; and

WHEREAS, Cablevision desires to provide to Hilton Head, and Hilton Head desires to obtain from Cablevision, pursuant to the terms and conditions contained in this Agreement, channel space on Channel 10 (the "Channel") for the CATV distribution of the WTGS television broadcast signal over Cablevision's transmission facilities to Cablevision's subscriber network;

NOW, THEREFORE, in consideration of the above, the mutual covenants contained herein and for other good and valuable consideration, the parties agree as follows:

1. Channel Use; Term

Subject to continuing compliance by Hilton Head, its employees, agents, contractors or licensees with all of the terms and conditions of this Agreement, Cablevision hereby grants to Hilton Head, and Hilton Head hereby accepts from Cablevision, the exclusive right to provide Programs, as defined in Paragraph 2 below, for CATV distribution on the Channel seven days per week during the hours from 3:00 A.M. to 2:30 A.M. which hours may be later expanded upon the agreement of Cablevision and Hilton Head, only on Cablevision's CATV system located in the geographic areas covered by the Franchise, and not to CATV systems with which Cablevision's system may be interconnected, or CATV systems under joint management with Cablevision's system from time to time. Cablevision shall have the right to substitute another cable channel for the Channel, and shall, at Cablevision's expense, transfer Hilton Head's Programs to such substitute Channel. The term of this Agreement shall commence on September 1, 1985 and shall continue until August 31, 1986.

2. Programs; Cost

a. Pursuant to Paragraph 4 below, Hilton Head shall supply broadcast quality programs to Cablevision for CATV distribution on the Channel during the term hereof (the "Programs"). The format for the Programs shall be determined solely by Hilton Head. Upon receipt of Programs, Cablevision's personnel shall operate all equipment belonging to Cablevision and perform all duties required to be performed on Cablevision's premises, so that Hilton Head's Programs shall be cablecast without affecting the integrity of Cablevision's CATV system or headend.

b. All costs and expenses of procuring, producing and supplying the Programs, including, without limitation, copyright fees, shall be the sole responsibility of Hilton Head.

3. Fees/Payments

Each month during the term of this Agreement, Hilton Head shall pay Cablevision $2,000 per month, payable monthly within ten days after the end of the month for which payment is due. Any amounts not timely paid pursuant to this Paragraph 3 shall bear interest at the rate of 1.5 percent per month compounded monthly. In addition to the payment described above, Hilton Head shall provide Cablevision, free of charge, $10,000 of advertising on the Channel, the value of which advertising shall be determined by Hilton Head's advertising rate card current at the time that such advertising is aired. The dates and times that Cablevision's advertising shall be broadcast by Hilton Head shall be determined by the mutual agreement of the parties.

4. Broadcast of Programs

The Programs shall be broadcast by Hilton Head, seven days per week, during the hours between 6:00 A.M. and 2:30 A.M., or as otherwise agreed to by the parties as provided in Paragraph 1 above. Hilton Head represents that all of the Programs shall be of good quality, and that Hilton Head shall maintain technical standards in compliance with the rules and regulations of the Federal Communications Commission (the "FCC"), including, without limitation, the transmission standards provided in Section 73.682 of the FCC's rules and regulations. Hilton Head also represents that the Programs shall be broadcast, at a minimum, on a predicted Grade B signal over all portions of the area served by Cablevision's cable television systems. Hilton Head shall not engage in the business of subscription television, or otherwise charge viewers of the Channel, in connection with its use of the Channel.

5. Advertising; Publicity; Promotion

Cablevision and its agents shall have the right to advertise, promote or publicize the Programs by any means or media, and shall have the right to use (i) the name, sobriquet, biography, photograph or other likeness and recorded voice of any person connected with the production of or appearing in any Programs, but not as an endorsement of any person, product or service; and (ii) any portion or portions of the Programs not exceeding an aggregate of ten minutes in length in a presentation consisting of highlights of Cablevision programming, and upon request by Cablevision, in connection therewith, Hilton Head shall furnish Cablevision with appropriate written consents, releases and permissions.

6. Compliance with Applicable Laws, Rules, Regulations and Guidelines

Hilton Head shall comply with all applicable laws, rules, regulations and guidelines duly promulgated by the United States government, the State of Georgia, any federal, state or local agency or regulatory authority or under the Franchise; provided, however, that the foregoing is without prejudice to the right of Hilton Head to challenge in court or otherwise the legality or constitutionality of any such law, rule, regulation or guideline or the particular application thereof.

7. Termination

This Agreement shall continue in force until the August 31, 1986 date unless earlier terminated pursuant to this Paragraph 7.

a. Breach

Each party reserves the right to terminate this Agreement at any time upon a breach by the other party of the terms hereof, provided that the non-breaching party has first given the other party written notice specifying the purported breach and said breach has not been corrected within five days following receipt of such written notice, except that this proviso shall not apply to any breach which by its nature cannot be corrected.

b. Bankruptcy

If any party hereto should file a petition in bankruptcy, or shall become subject to any involuntary bankruptcy proceeding, or become insolvent, reorganize, or make any assignment for the benefit of creditors, or make any arrangement or be subject to any other proceedings under the bankruptcy laws of the United States or the bankruptcy or insolvency laws of any state, the other party shall, at its option, have the right immediately to terminate this Agreement by sending written notice of such termination.

c. Loss of Franchise

If Cablevision's Franchise is forfeited, surrendered, terminated or otherwise ceases to be effective and binding upon Cablevision, this Agreement shall terminate as of the date of termination of the Franchise.

8. Limitation of Liability

a. Cablevision shall not be liable to Hilton Head or to any customer or client of Hilton Head for any interruption of or disturbance in a Program, if such interruption or disturbance is caused by any act or situation beyond the direct control of Cablevision, including, without limitation, vandalism, acts of God, failure of electrical utilities to deliver power to the System, or any other mechanical or electrical failure which is not the result of the negligence or intentional act of Cablevision. In its agreements with persons or entities to whom Hilton Head sells advertising, or from whom Hilton Head obtains programming to be included in the Programs, Hilton Head shall inform such individuals or entities that their only remedy upon failure of Cablevision to cablecast their advertisement or programming is the rescheduling of the advertisement or programming, and Hilton Head shall have the sole responsibility for the implementation of such rescheduling.

b. If Cablevision fails to cablecast any Program or series of Programs by reason of Cablevision's good faith exercise of its rights under this Agreement, Hilton Head hereby waives any claim for damages against Cablevision hereunder, and also any incidental, indirect, consequential or special damages, whether in contract or tort.

9. Release

Hilton Head hereby waives, and forever releases Cablevision from any and all claims and demands for consequential or punitive damages, including any claim which arises as a result of Hilton Head's use of the Channel or the production of any material in connection with this Agreement, that Hilton Head ever had, has or may have against Cablevision.

10. Duties of Hilton Head

a. Hilton Head shall be responsible for securing and shall secure all rights, licenses, permissions, releases, and consents (including, without limitation, all those pertaining to copyright, performance and synchronization rights) necessary and appropriate for the carriage by Cablevision pursuant to this Agreement of the audio-visual materials contained in any of the Programs or in advertising, promotion, or publicity materials prepared or supplied in connection therewith.

b. Hilton Head shall not (and shall not suffer any other person to) use the name of Cablevision or make any statements with respect to Cablevision in the course of a Program or in any media or at any other time or place so as to state or imply (i) that Cablevision is in any way responsible for the production of, or content of, any Programs; (ii) that Cablevision endorses, or is responsible for, any goods, services, or other benefits sold or advertised in connection therewith; or (iii) that Hilton Head is employed by, the agent of, or in any way under the control or direction of Cablevision.

c. Upon request of Cablevision, Hilton Head shall insert in any Program, or in any advertising or promotional materials in connection therewith the following statement: "Presented by Station WTGS through the facilities of Cablevision of Savannah. Cablevision of Savannah is not in any way responsible for program content, nor for any goods, services, or benefits advertised or sold in the course of, or in connection with, this Program".

d. Hilton Head, its agent or employees, shall not abuse, annoy, harass, or alarm any employees of Cablevision. Violation of this provision shall be cause for immediate cancellation of this Agreement.

11. Duties of Cablevision.

Cablevision shall receive Hilton Head's over the air broadcast of the Programs using antennas and other equipment owned by Cablevision, and shall cablecast the Programs over Cablevision's transmission facilities to Cablevision's subscriber network. All equipment used by Cablevision in the cablecast of the Programs on the Channel shall be maintained by Cablevision as deemed appropriate by Cablevision.

12. Representations, Warranties and Covenants of Cablevision

Cablevision represents and warrants to Hilton Head that:

a. Cablevision has the power and authority to enter into this Agreement, and the provisions of this Agreement do not violate the Franchise or any rules or regulations promulgated thereunder.

b. Cablevision has the expertise in cablecasting and operation of cable systems to perform its duties hereunder.

13. Representations, Warranties and Covenants of Hilton Head

Hilton Head represents, warrants, and covenants to Cablevision that:

a. Hilton Head owns or has the right to distribute, exploit, exhibit, broadcast, cablecast, publicize, reproduce, and otherwise derive revenues from each Program in the manner and form provided in this Agreement and has the full right, power, and authority to enter into and fulfill its obligations under this Agreement without adverse claims by any person, firm or corporation.

b. The Programs, and any advertising, publicity, promotional and other materials in connection therewith shall not contain any material which is libelous, slanderous, defamatory, obscene, or indecent and shall not, when transmitted, distributed, exhibited, exploited, projected, or performed by Cablevision pursuant to this Agreement, subject Cablevision to liability for violation of any applicable law, rule, regulation, or guideline or violate, infringe upon or give rise to any adverse claim with respect to any common law or other right (including, without limitation, any copyright, trade name, trademark, contractual, dramatic, motion picture, or literary right or right of privacy) of any person, firm or corporation.

c. With respect to the nondramatic performing rights to musical compositions distributed in connection with or contained in any of the Programs, such rights are either (i) controlled by ASCAP, BMI, or SESAC, in which event, Hilton Head is solely responsible for obtaining and paying any such performing rights and licenses which may be required; (ii) controlled by Hilton Head; or (iii) in the public domain.

d. The Programs and any advertising, promotion, or other materials in connection therewith shall not contain any elements constituting a game of chance as such games are defined under applicable laws, rules, and regulations.

e. All ideas, creations, and literary, musical, dramatic, artistic and intellectual properties furnished by Hilton Head are fully owned and originally created by Hilton Head (except for such of the foregoing materials as are in the public domain or are fully licensed for use by Hilton Head) and the materials and the use thereof shall not infringe upon or violate any rights of any kind or nature whatsoever of any person, firm or corporation.

f. In connection with the Programs, Cablevision shall have no responsibility or liability for any services, elements, or products performed or provided by any person, firm or corporation and Cablevision shall in no way be responsible or liable for the making of any payments to any person (including, without limitation, any union, guild, actor, director, performer or craftsman).

g. Hilton Head has discharged, and shall faithfully discharge, all of its obligations as an employer under applicable laws, rules and regulations.

h. Hilton Head, and its permitted successors, assigns and sublessees, shall not, without Cablevision's permission, offer any service or usage of the Channel which Cablevision can demonstrate would substantially reduce the current revenues of Cablevision.

14. Indemnification

a. Hilton Head shall indemnify, defend, and forever hold harmless Cablevision, its officers, directors, employees, agents, or licensees (and any entity with which Cablevision may be merged or consolidated or which acquires all or substantially all of Cablevision's assets or any corporation with which Cablevision is affiliated by common ownership and control) from and against any and all claims, judgments, costs, liabilities, damages, and expenses (including reasonable attorney's fees) arising out of (i) the use of any materials furnished by Hilton Head hereunder; (ii) any acts done or words spoken by Hilton Head, its agents, employees, licensees, or contractors in connection with the production, rehearsal or CATV distribution of any Program unless such acts or words spoken by Hilton Head shall have been requested or supplied by Cablevision; (iii) any actual or alleged breach by Hilton Head of any provision of this Agreement; (iv) any misrepresentation made by Hilton Head herein; and (v) any violation of the protected rights of any third party, including, without limitation, any claim or cause of action in slander, libel, privacy, defamation of character, copyright, literary or dramatic rights or music performance rights.

b. Hilton Head, as soon as it learns of a claim or legal action concerning any matter relating to this Agreement, shall immediately notify Cablevision of this claim or action. Cablevision shall promptly notify Hilton Head of any claim or litigation to which the indemnification described in subparagraph a of this Paragraph 14 applies. In connection therewith, Cablevision shall have the right to participate in this defense with its own attorney at Hilton Head's expense and Hilton Head shall direct its attorney to cooperate with Cablevision and Cablevision's attorney.

15. Bond or Other Undertaking

Upon written request by Cablevision, Hilton Head shall obtain a bond, insurance or other surety acceptable to Cablevision that fully protects Cablevision against any losses, damages, liabilities, claims, costs, or expenses incurred as a result of Hilton Head's breach or alleged breach of the representations and warranties, indemnification or any other provision of this Agreement.

16. Final Determination

The parties acknowledge that payments made by Hilton Head pursuant to Paragraph 3 of the Agreement constitute payment for Cablevision's carriage of the Programs despite Cablevision's filing with the FCC of a Petition for Waiver of its mandatory carriage obligation with respect to such Programs. Hilton Head acknowledges that such payments are nonrefundable by Cablevision.

17. Notice.

Any notices pursuant to this Agreement shall be validly given or served if in writing and delivered personally or sent by registered or certified mail to the following addresses:

(a) If to Cablevision:

Cablevision of Savannah
5515 Abercorn Street
Savannah, Georgia 31405
Attention: Division President

With a copy to:

American Television and Communications Corporation
160 Inverness Drive West
Englewood, Colorado 80112
Attention: Law Department

(b) If to Hilton Head:

Hilton Head Television, Inc.
WTGS TV 28
P.O. Box 2010
Hilton Head Island, South Carolina
Attention: President

or to such other addresses as either party may hereinafter designate to the other in writing. Delivery of any notice shall be deemed to be effective on the date set forth on the receipt of registered or certified mail.

18. Computation of Time.

In computing any period of time under this Agreement, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday.

19. Waiver.

The waiver by either party of a breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach or violation thereof.

20. Integration.

This writing represents the entire agreement and understanding of the parties with respect to the subject matter hereof; it may not be altered or amended except by an agreement in writing signed by both parties.

21. Choice of Law.

This Agreement has been made in, and its validity, performance and effect

shall be determined in accordance with the internal laws of, the State of Colorado.

22. Headings.

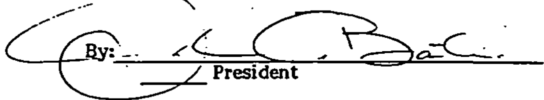
The headings of paragraphs in this Agreement are for convenience only; they form no part of this Agreement and shall not affect its interpretation.

23. Assignment; Binding Effect.

No party may assign this Agreement without the prior written consent of the other; provided that if Cablevision shall sell substantially all of the assets of any of its cable television systems covered by this Agreement, Cablevision may, at its sole option, and without Hilton Head's consent, assign this Agreement to the purchaser of such assets. Notwithstanding the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the assignees of either party.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

HILTON HEAD TELEVISION, INC.



By: ____________
President

AMERICAN CABLEVISION OF CAROLINA, INC.
d/b/a Cablevision of Savannah

By: ____________
VICE President

Mr. PADDEN. This contract requires Mr. Bailie to pay 5 cents per subscriber per month to be carried on the Savannah cable system, a sum of approximately $24,000 a year. All three established affilites in the Savannah market are carried by the same cable system for free.

Mr. Chairman, with your permission, I would like to introduce Mr. Bailie, who is with us this morning. John, would you stand up please? Mr. Chairman, if it's your pleasure, to direct any questions to Mr. Bailie at the conclusion of our testimony, he will be available to answer them.

In our judgment, it is indefensible for a monopoly cable operator who is enjoying the benefit and subsidy of a governmentally conferred compulsory license to carry broadcast programming to turn around and charge a local broadcaster to be carried on the cable system. Charging for carriage is the antithesis of the compulsory license. The mendicant of 1975 has become the tyrant of 1985. If Mr. Bailie had to pay 5 cents per subscriber per month to all the cable systems in his market, his station would go dark.

For at least 20 years Congress and the FCC have followed a consistent policy of encouraging the development of diverse, local, over-the-air broadcast outlets. Congress passed the All-Channel Receiver Act to make sure the consumers would have access to emerging UHF stations because they wanted to see competition in

the marketplace for consumers. And the FCC developed a detailed table of allocations to maximize free over-the-air service. Today, the realization of these policy goals is threatened by discriminatory cable carriage practices which are subsidized by the compulsory license.

It is inevitable that the cable industry will eventually find itself safely across Mr. Allen's river, free to insult the broadcasters unless Congress takes action.

Thank you.

[Statement of Preston Padden follows:]

Statement of Preston R. Padden, President, Association of Independent Television Stations

Thank you Mr. Chairman:

On September 18, 1985, NCTA Chairman Ed Allen spoke to the Washington Cable Club. Quoting what he called a Haitian proverb, Mr. Allen admonished the cable industry that "A wise man doesn't insult the alligators until he's across the river"--in other words, it's too soon to start dropping or charging broadcasters. Mr. Allen's remarks were part of a conscientious effort by the leadership of the cable industry to forestall, temporarily, the inevitable consequences of today's badly distorted and patently unfair television marketplace.

While I wasn't thrilled with the alligator analogy, Mr. Allen's proverb suggested the theme for my testimony here today--the fate awaiting independent broadcast stations after cable is safely across the river. It is clear to us that after the uproar over the Appeals Court decision striking down the must-carry rules has subsided, independent stations face a bleak future of discrimination at the hands of cable operators. Some Independents will be flatly excluded from cable systems on which their affiliate rivals are carried. Others will be forced to pay for carriage. And, to add insult to the injury, this anti-competitive conduct by cable will be subsidized and facilitated by a governmentally--conferred compulsory license.

For more than 20 years, the Congress and the FCC have followed a consistent policy of encouraging the development of diverse local television outlets. The growth of independent television represents the fulfillment of this long standing public policy goal. Our stations provide significant viewing alternatives to consumers--free of charge.

In 1975, when cable's compulsory license was being debated, there were only 80 independent stations, our Association was in its infancy, and we did not take an active part in the legislative process. In the intervening years, more than 150 additional independent stations have signed-on the air to serve local communities all across the country. Since long before the must-carry decision, we have been concerned about the anti-competitive effects upon our members of cable's compulsory copyright license. Events in the short period of time since the decision have only served to heighten that concern.

Modification of Cable's Compulsory License Would Facilitate Efforts to Reform the Copyright Royalty Tribunal

INTV supports H.R. 3339, introduced by Mr. Frank, which would require cable to negotiate in the marketplace for the right to use non-local broadcast signals and would prohibit discrimination in the use of cable's free compulsory license for local signals.

Enactment of H.R. 3339 would greatly simplify the subcommittee's efforts to improve the functioning of, or to

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replace, the Copyright Royalty Tribunal. The great bulk of the Tribunal's time has been spent resolving controversies over cable compulsory license rates and the distribution of cable royalties. Neither of these functions would be required in the future. The rates for cable's use of distant signals, and for discriminatory use of local signals, would be set in the marketplace. Non-discriminatory use of local signals would be free.

In short, H.R. 3339 would free the Tribunal and this Subcommittee from the most contentious of the four compulsory licenses embedded in the 1976 Act. The three remaining licenses--mechanical, jukeboxes and public television--could be administered through one of several attractive alternatives which have been advanced by others in these hearings. For example, Congress could implement the 1981 GAO report which recommended that the Registrar of Copyrights be empowered to convene meetings of part-time Presidentially-appointed Tribunal members whenever controversies arise. This alternative, and others, are outlined in Bruce Lehman's thoughtful testimony before this Subcommittee on June 19, 1985.

Independent Television Stations Have A Legitimate Interest In Cable's Compulsory Copyright License

Whatever the fate of these other compulsory licenses, it is clear that the cable compulsory license in Section 111 of the Act should be revised as set forth in H.R. 3339. Cable

should not be permitted to use its compulsory license to frustrate long-standing communications policy objectives.

In his testimony on September 18, NCTA President Jim Mooney suggested that broadcasters do not have a legitimate interest in the subject of the cable compulsory license. In fact, from time to time, both the cable and Hollywood interests have acted as if the compulsory license were their private domain. However, independent television is what cable distant signal carriage is all about. When cable and Hollywood sit down to have private discussions about the rates for cable carriage of distant signals, what they are discussing are the rates for cable carriage of our members' signals. After all, the compulsory license applies only to programs which were either created or purchased by broadcasters. The compulsory license does not empower cable to order film and tape directly from Hollywood. Moreover, the number of independent stations has nearly tripled since 1976. Thus, it is increasingly a problem for us when cable, armed with its government license, wades into our marketplace, takes our signals and hurls them around the country without regard to locally negotiated program licenses. In short, to suggest that independent broadcasters have no legitimate interest in the cable compulsory license is like suggesting that the turkey has no interest in the Thanksgiving feast.

A second basis for our interest in the compulsory license is that of a competitor. In a speech before the Washington

Cable Club on April 17, 1985, NCTA President Jim Mooney declared that cable has become a direct competitor to broadcasting. If that is the case, we must ask the question, "What are the implications of this new competitive status for cable's compulsory license?" Surely, Congress did not intend to provide one competitor with a compulsory license to use the product of another. An example utilizing two newspaper competitors may help illustrate our predicament. Imagine a government license which granted the _New York Post_ the right to re-publish all syndicated features purchased and published by the _New York Times_. Such an arrangement would clearly discriminate against the _Times_. And, it would certainly add insult to the injury to then tell the _Times_ that it had no legitimate interest in negotiations between the feature syndicators and the _Post_ over a new rate structure for that government license. A revised rate structure which facilitated the re-publication of an increasing number of features would be of obvious and legitimate concern to the _Times_.

In sum, INTV's interest in the issue of cable's compulsory license is not simply a matter of attempted retribution for the loss of must-carry rights. Independent stations are the object of the compulsory license and, according to NCTA, a competitor to the beneficiary of that license. Accordingly, our interests in this matter are as substantial and legitimate as those of any other party.

Cable Should Have The Affirmative Obligation To Prove The Continued Necessity For The Subsidy Of A Compulsory License

Over the past few years, often at the initiation of the cable industry, broadcasters repeatedly have faced the burden of attempting to demonstrate a continuing justification for the protection of various government regulations. For example, broadcasters were asked to prove, with financial precision, that they could not continue to exist without the FCC's distant signals limitations and syndicated exclusivity rules. In our judgment, it should now be the cable industry's turn to shoulder the affirmative obligation of proving that it cannot exist without the continuing subsidy of the compulsory copyright license.

In 1975 cable stood before this subcommittee as a mendicant--an impoverished industry of passive antennas--seeking alms. Today, cable has become a multi-billion dollar industry of video publishers, insisting on the tyrannical right to exclude broadcasters or to charge them for carriage. Through an ingenious and well executed combination of federal pre-emption, exemption and de-regulation cable is now restrained only by its own whim. With cool confidence the cable industry proudly declares that it holds "all the cards". If put to the test, we find it inconceivable that today's cable industry could shoulder the affirmative burden of proving a continuing need for the subsidy and protection of the compulsory license.

According to A.D. Little, the rate deregulation in the 1984 Cable Act alone will add 1.8 billion dollars in basic revenues to the cable industry by 1990. It's hard to believe that cable could not use a little of that money to purchase the rights to the broadcast programming which it sells to subscribers. It takes only one example to illustrate vividly the unfairness of the current situation. According to Copyright Office records, in 1984 Manhattan Cable in New York City paid 1.4% of its gross revenues for the use of all of the programming on 15 different television broadcast stations. By contrast, just one of those stations, WNEW-TV in New York City, spends more than 30% of its revenues for programming.

Cable argues that its compulsory license is necessary to provide the public with widespread and low-cost access to artistic and intellectual works. However, cable's embrace of consumer welfare has a hollow ring. If cable were or is really concerned about consumer costs, it would not have pushed for the deregulation of cable subscriber rates. Likewise, if cable were or is really concerned about ensuring widespread consumer access to artistic and intellectual works, it would not be engaged in a mad race to scramble its own program services--including those which are advertiser supported. Apparently it's a crime for a rancher with a dish to "steal" cable programming, but it's a virtue for cable to have a compulsory license for broadcast programming.

If Congress wishes to maximize low-cost consumer access

to programming, it should grant a compulsory license to broadcasting, and not to cable. Broadcasting is available to a far greater percentage of the public, and is free. The growth of independent television stations has provided more free access to more alternative programming than has ever been provided by granting a government compulsory license to the cable television industry.

The Marketplace Will Work If H.R. 3339 Is Enacted

There is no question that the marketplace will work if cable's compulsory license is modified as outlined in H.R. 3339. Cable operators willing to carry all local broadcasters on a non-discriminatory basis would enjoy a free compulsory license to do so. These local signals could be supplemented by distant signals or national cable program services without the need for government compulsory licensing. Program rights for distant signals could be cleared through a private licensing society such as ASCAP or BMI. Alternatively, distant "super-stations" could clear national rights for all of the programming which they broadcast. The cable operator would then be required to deal with only one party--the "super-station". WTBS-TV in Atlanta appears to have moved in this direction by purchasing the national rights to a growing number of the programs it broadcasts. Finally, cable would be free to continue to use national cable program

services--several of which are the functional equivalent of distant independent stations--since these cable services have obtained national rights for their programming.

Please remember that cable is no longer the "Mom and Pop" industry that might have once justified compulsory licensing. It is dominated by large corporations, many of which also operate program services for which they secure product by negotiations in the open market. Indeed, many cable systems are operated by companies which also own television stations, and are thus quite accustomed to negotiating program licenses. In short, many of the major players in the cable industry routinely do for their related businesses what H.R. 3339 would require them to do for their cable businesses.

Under H.R. 3339, if a cable operator wished to discriminate in the carriage of local stations, it would be required to negotiate rights agreements for those stations it did choose to carry. Whether the local station alone could grant all the necessary rights would be a function of the terms of the station's license agreements with its network or syndicated program suppliers. Marketplace forces would then dictate who paid whom, and how much. In any event, it is clear that it is not necessary to continue the current structure of cable's compulsory license in order to assure the continued survival of the industry and the continued flow of program service to the public.

Continuation Of The Cable Compulsory License In Its Present Form Will Facilitate And Subsidize Anti-Competitive Behavior Against Independent Television Stations Contrary To Established Communications Policy

Cable's compulsory license was adopted against the backdrop of FCC Rules regulating both distant and local signal carriage. In fact, the House Report on the 1976 Copyright Revision Act specifically refers to the "delicate balance" between cable's compulsory license and those FCC rules. Of course, those rules are now gone. In light of their demise, we urge the subcommittee to consider and examine the types of behavior which will be facilitated and subsidized by the continuation of cable's compulsory license. Specifically, we ask you to consider the fate awaiting independent broadcast stations after cable is safely across Mr. Allen's river.

INTV strongly supported the FCC's must-carry Rules. However, it is not our position before you today that cable should be required to carry <u>any</u> broadcast signals. Although many of our members face the dual obstacles of being both independent and UHF, we are fully prepared to compete over-the-air with our network affiliate rivals so long as we have an equal opportunity to reach the viewer. The truly insurmountable difficulty arises when cable, armed with its government compulsory license, wades into the competition among local stations. By carrying the affiliates, the local cable operator makes cable carriage for the independent a matter of competitive survival. To the best of our

understanding, cable's compulsory license was never intended as a device for discriminating among local broadcast stations.

It has only been a short time since the repeal of the must-carry rules. And, as noted earlier, cable industry leaders have made a conscientious effort to prevent local operators from insulting the alligators until the industry is safely across the river. Cable wants the members of this subcommittee to believe that there is no cause for concern, that there will be no "wholesale dropping"--that's NCTA's term--of broadcast signals. However, we are concerned about the "retail" dropping of signals--that is, selective and discriminatory carriage. And, we are concerned about the outright refusal to carry brand new stations in the first place. Despite the best efforts of cable leaders to temporarily "keep the lid on", we are already seeing signs of the inevitable anti-competitive consequences of today's badly distorted and patently unfair television marketplace.

Cable is a de facto monopoly service. Subscribers do not have the option of choosing between competing cable services. Like the consumer, the local broadcaster is also subject to the sufferance of a single cable operator in the community. In the current situation, a cable operator may deny carriage to a station, but the station may not withhold consent for carriage. All of the leverage goes in one direction. Assuming the continuation of this condition, it is inevitable that cable operators will begin to deny carriage, or demand payment for carriage, on a selective and discriminatory basis.

The process has already begun. George Plenderleith operates station WFAT-TV, the only independent station in the Johnstown, Pa., market. On September 10, 1985, WFAT was dropped by a major cable television system within the station's former must-carry zone. With the flick of the cable operator's switch, Mr. Plenderleith lost access to nearly one-fourth of the cable homes he was licensed to serve by the FCC.

On September 30, 1985, Mr Richard Ramirez returned channel 18 to the air in Hartford, Ct. Mr. Ramirez acquired the station pursuant to the FCC's distress sale policy designed to help minorities gain a foothold in broadcast station ownership. Prior to the Court of Appeals' decision, Mr. Ramirez had commitments for cable carriage for more than 600,000 homes in the Hartford market he was licensed to serve. By September 30, Mr. Ramirez had lost more than half of this cable carriage in his home market. On many of the cable systems refusing to carry Mr. Ramirez, there is a black hole where channel 18 was carried under its former ownership. Apparently Congressional and FCC policies favoring the establishment of diverse local broadcast outlets and encouraging minority ownership, must take a back seat to the financial interests of cable operators.

All across the country, in Oxnard and Chico-Redding, California, in Shreveport, Louisiana, in Davenport, Iowa, in Wichita, Kansas, in Scranton and Wilkes Barre, Pennsylvania, in Cleveland, Ohio, and in Kingston, New York, new stations

are being forced to battle cable resistance in their efforts to compete with established network stations.

Some cable operators have heeded the warnings of their industry leaders and have added--for the moment--the new stations to their systems. However, many other cable operators have flatly refused carriage. Still other operators have demanded compensation from the new station for the "privilege" of being carried in their local communities. Most frequently, this compensation takes the form of equipment purchases or free advertising time. In any event, it's the equivalent of paying for carriage.

Many new stations have been reluctant to disclose their difficulties with cable for fear of alarming advertisers, investors, and lenders. However, John C. Bailie, operator and 20% owner of the first independent station in the Savannah, Georgia, market has advised us of the contract which he signed with the cable television subsidiary of Time, Inc. This contract requires Mr. Bailie to pay five cents per subscriber, per month to be carried on the Savannah cable system--a sum of approximately $24,000 per year. All three established affiliates are carried by this cable system--free of charge.

In our judgment it is indefensible for a monopoly cable operator, who is enjoying the benefit and subsidy of a governmentally conferred compulsory license to carry broadcast programming, to turn around and charge a local broadcaster to be carried on the cable system. Charging for carriage is the antithesis of the compulsory license. The mendicant of 1975

has become the tyrant of 1985. If Mr. Bailie had to pay 5¢ per subscriber per month to all the cable systems in the market, his station would go dark.

Mr. Bailie's difficulties with the Savannah cable system pale by comparison to his experience with other systems. At least the Savannah system put him on. Approximately one-half of the local cable systems have flatly refused to carry Mr. Bailie's station. Perhaps his most celebrated encounter was with Plantation Cable on Hilton Head Island. Cable penetration on Hilton Head is near 90% and outside antennas are forbidden by local zoning. Contrary to earlier representations to this subcommittee, Hilton Head is approximately 17 miles from Mr. Bailie's transmitter and approximately 23 miles from his city of license. In short, Hilton Head is clearly a part of the station's local service area. Although Mr. Bailie and Plantation Cable differ as to the details of their conversations, it is clear that carriage was requested, carriage was denied, and money was discussed. In the August 30 edition of the Island Packett, Mr. Charles Renwick of Plantation Cable cited judicial uncertainty as a reason for refusing to carry Mr. Bailie's station. He also added the following additional explanation:

> "Of course, as an advertising medium, we are competitors with WTGS. And, as a business, it doesn't make sense to subsidize a competitor if you don't have to."

It is imperative that some mechanism be found to insulate cable's antenna function, for which it enjoys a compulsory

license, from the influences of its competitive function. As the sale of local advertising availabilities in cable program services becomes a more important revenue source, new independent stations will increasingly come to be viewed as competition by the cable operator. For example, Mr. Ramirez learned that the cable system serving his city of license -- Hartford and its suburbs -- would not be carrying his station from the cable system's advertising salesmen. The salesmen were telling clients that it made more sense to buy ad time on cable since channel 18 would not be carried on the 115,000 subscriber system (the largest in Channel 18's market). Similarly, a new station's program schedule, whether it consists of music videos, sports, or motion pictures can be viewed as competition for cable program services.

For at least 20 years, Congress and the FCC have followed a consistent policy of encouraging the development of diverse, local, television services. In fact, Congress put the entire nation to the cost and expense of the All-channel Receiver Act to make sure that consumers would have access to emerging new UHF stations. And, the FCC developed a detailed table of allocations to maximize over-the-air service. Today, the realization of those policy goals is threatened by discriminatory, cable carriage practices which are subsidized by the compulsory license. It is inevitable that the cable industry will eventually find itself safely across Mr. Allen's river, free to insult the broadcast alligators--unless the Congress takes action.

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Mr. KASTENMEIER. Thank you, Mr. Padden, for an excellent statement.

While must carry is not the primary jurisdictional area of this committee, nonetheless its interface with the compulsory license and copyright is self evident.

Mr. Effros, what is your comment as to whether or not the mendicant of 1975 has become the tyrant of 1985 in terms of what has happened anecdotally, as stated by Mr. Padden?

Mr. EFFROS. Well, I didn't perceive us as a mendicant and a seeker of alms in 1976, and as you well know, Mr. Chairman, we were fighting tooth and nail not to receive assistance but to stop somebody from charging us for something that we had not had to pay for in the past; and it was legal not to pay for it, according to Supreme Court decisions. So, the entire image that was brought up is a bit of revisionist history, so far as I am concerned.

The cable industry was not required to pay for copyright. It was legal, and it was part of the copyright law. The broadcast industry and the owners of the programming spent 11 years in negotiations, as you will well remember, before that bill finally came out, seeking some way of dealing with the issue of copyright and cable television. We all came to various and sundry bargaining tables over a long period of time, and it was not on the basis that we were a poor, young industry. It was on the basis that the law didn't require us to pay copyright, and someone was trying to get us to pay a new right.

We were required to pay that new right under the 1976 law. It was a newly created copyright. And by the way, that newly created copyright included within it as a necessary ingredient the compulsory license. Now we see some parties coming back to you for reasons that are not related to copyright—must carry is not related to copyright in that way—and saying: All right, now you should give the broadcast industry and the copyright owners an additional copyright.

We would simply say that, again consistent with Professor Lange's testimony and proposals on burdens of proof if you're seeking new and additional copyrights, that the burden is on the broadcast and the copyright owner to show why that is needed in order to protect the public interest and the public domain.

We are not speaking here of any poor mendicants. You know, yes, certainly there are some new, young UHF stations trying to get on the air. But figures that were just released this week indicate that advertising in the broadcast industry is expected to grow 9 to 11 percent in 1986, local spot sales up 13 percent, national and regional up 8 to 10 percent, network up 7 to 9 percent. The TV advertising this year is expected to increase to $20.8 billion. Local spots up 12 percent, to $5.66 billion.

We are not dealing with folks who cannot handle their own business. They seem to be doing extremely well, and so are we. And there's no apology for that. So, the burden under the concept of copyright is, where does the public benefit, if you create a new copyright? And that new copyright, of course, would be the elimination of the compulsory license. I don't think anybody benefits from that.

It's interesting that Mr. Padden noted WFAT in Johnstown and the elimination—and this was the "horrendous" elimination of a "local" broadcaster. Well, the fact in that case is that WFAT was eliminated in that market so that the cable operator could put on a local access channel. And that is what is on to replace WFAT. The local people in that local community wanted the local access channel, and they made that very clear to the local cable operator. In response, he removed WFAT.

This is a decision for local people. This is a decision in each marketplace as to what programming the local community wants to see. It is not a condition for compulsory licenses. The two are not related.

Mr. KASTENMEIER. You mentioned that before. How do you determine conclusively what it is that your local subscribers want to see? Is that not a decision made fairly arbitrarily by the cable operator rather than his or her subscribers?

Mr. EFFROS. It is made the same way any business decision is made, just as the decision is made by a broadcaster as to what programming to put on his channel. You put it on to attract the highest number of people you can or to satisfy the needs of a given segment of your audience.

We are a business, just as the broadcasters are a business, and we do this in the same way. We seek information and input from our communities. We make gut decisions. I mean, all of those things come into play naturally. But he who does not make these decisions correctly is in big trouble, goes out of business, except if there is a must-carry rule, when you've got to carry them no matter what decisions they make.

Mr. KASTENMEIER. Without must carry then, it being a business, do you contemplate in the future that your cable operator members will be negotiating and charging local television stations to carry their signals generally?

Mr. EFFROS. No, not generally.

I would in no way suggest to you that it would never happen. Of course, it's going to happen. The structure and mechanism of charging for channel space was created by this body in S. 66, the Cable Communications Act of 1984. The Congress specifically said to us we had to make available leased channel capacity to make available space for those who wanted to get on the cable system but that the cable operator was not interested in putting on him or herself. So, it was Congress that created the structure for the charging for channel capacity. Indeed, as far back as 1972 the FCC required leased-channel capacity, so that there was an ability for others to get on the sytem.

The question now simply is, Who gets on the system? The broadcasters by dint of having a broadcast license seems to say they have an absolute right to this. However, since there are loads of other programmers now, many of them distributing via satellite, if I'm in a community, for instance, that has a heavy minority population of, let's say, Hispanics and there is no Spanish-speaking television station in my town, then I as a cable operator have the option of taking a Spanish-speaking channel off the satellite. Why should anybody in Government—and this goes, of course, back to the basis of our argument against the must-carry rules—why

should anybody in Government say, no, you must take that new UHF channel because he or she is a new UHF channel, and carry that channel regardless of the fact that that will result in your not being able to carry something else?

The courts have finally agreed with us and said it's a violation of the first amendment. But I don't think the cable operators in the main are going to charge. I think that most systems are going to be carrying a full complement of broadcast stations, and we will continue the relationship that we presently have. There will be a segment of the industry that will charge. There will be a segment of the industry that says no, I do not want to carry that particular broadcast station. And that's the ebb and flow of editorial discretion.

Mr. KASTENMEIER. Mr. Padden, on a different question, isn't it difficult for you to argue that must-carry or the cable compulsory license be repealed, when at the same time the motion picture industry—concededly the owner of the lion's share of the copyrighted works to be transmitted by cable systems—is negotiating with the cable industry as to a simpler formula under which compulsory license fees might be paid? The implicit assumption is that the compulsory license system is accepted by the major copyright holders in the country, if not particularly broadcasters disadvantaged by the must-carry decision.

Mr. PADDEN. First of all, we support Mr. Frank's bill, which would repeal the compulsory license for distant signals but continue a compulsory license for local stations if the cable operator is willing to carry all the local stations.

I was here on the 18th, when Mr. Valenti testified. I believe his testimony was that he, too, supported the repeal of the compulsory license. Apparently he has accepted the notion that that is not going to happen right away, that there has to be a 5-year transition, as I understand his proposal. And that is what he is attempting to negotiate with the cable people.

I would note that we differ with Mr. Valenti on the notion of whether we have a legitimate interest in those talks that are ongoing. And this is a point that is developed in my written testimony. When they sit down to talk about a compulsory license for distant signals, what they are talking about is our stations. People by and large don't import distant networks stations; they import distant independent stations. When the compulsory license was adopted, as you well know, in 1976, the FCC had a rule called the syndicated exclusivity rule, which they openly admitted was a substitute for an appropriate copyright mechanism, and the House report adopting the compulsory license references those rules. The syndicated exclusivity rule allowed a broadcaster who didn't ask for a subsidy from the Government but went out in the marketplace and bought a program for his market and paid top dollar and got an exclusive contract, the syndicated exclusivity rule permitted him to effectuate the contract he had entered into. It established a marketplace that recognized the rights the local broadcaster had purchased.

We have a great deal of difficulty with the concept of negotiating a new distant signal compulsory license in the absence of any provision that will allow the broadcaster to effectuate the exclusive li-

cense he has purchased, if in fact he purchased an exclusive license.

We would ask you, in considering any new proposal which those parties bring to you, to address the question of, in the event of a conflict between the governmentally conferred compulsory license on the one hand, and an actual exclusive negotiated license for the same product in the same market on the other hand, which of those two is going to yield to the other. It is a question you did not have to address in 1976 because the FCC rule was in place. The FCC rule made it clear that the compulsory license would not run roughshod over actual negotiated licenses.

Our position obviously is, we are not asking for compulsory license. You've given one to our competitor. At the very least, we would like it to not override the licenses that we go out in the marketplace and negotiate.

Mr. KASTENMEIER. I understand your point.

Although I think at this time Mr. Valenti and others who are having discussions are in touch with the broadcast industry, I am not sure whether they are in touch with your organization. Are they not?

Mr. PADDEN. We asked to be a part of those discussions, and they told us not to worry, that after they made their deal, they would come and tell us about it.

Mr. KASTENMEIER. Is that true for the NAB?

Mr. PADDEN. I really can't speak to that. I don't believe that they are having any more imput than we are.

Mr. KASTENMEIER. I have other questions, but I am going to defer them. I want to yield to my colleague from Georgia.

Mr. SWINDALL. Mr. Padden, in the final analysis, isn't it true that in a true marketplace environment like the local market, that the consumers will ultimately dictate to the cable industry what programming they want to see, including local broadcasters?

Mr. PADDEN. Well, I wish that was the case, and maybe if we had competing cable systems in different communities so that the cable operator had to be more sensitive to the program preferences of the public, that would be the case. But the fact of the matter is, in every community that I am aware of people don't have a choice of cable systems. They only have one.

Now, Mr. Bailie's station in Savannah-Hilton Head is the first independent in the market. It is not a dog station. By virtue of being the first independent, he had available to him really all of the best syndicated programming that supports three, four, and five independent stations in other markets. And I find it inconceivable that the people in that market would not like to have the option of tuning in his station on their cable system.

I think there is another problem at work here. Cable started out with primarily an antenna function. They have evolved to the point where they continue to serve that antenna function as to the broadcasters, but they also now have a competitive function, where they program a number of pay channels which they try to sell to people. Mr. Effros referred to a station that was carrying just music videos, and he didn't think much of that as a public service, even though music videos are one of the primary successful program services of the cable industry. There was an independent sta-

tion in the New York market that switched to music videos in its prime-time programming. The cable operators rushed to take it off their system.

They weren't rushing to take it off their system because they thought their subscribers would be offended, that a broadcaster would do nothing more useful than music videos. They were quite frank in the papers they filed at the FCC. They wanted that station off their system because it was competition for their music video channel.

When concerns us is, what if we get a schedule of movies on an independent station that is so good that the cable operator decides it's competition for his pay movie channel? What if our sports lineup is so good that it's competition for his pay sports channel? He's going to yank those stations right off of there, and it won't be because the consumers don't want to see them. It's going to be because he perceives that station as competition for some of his pay services.

I really think that someone should give some thought to building a cinderblock wall between cable's antenna function and their competitive function. Let them serve both, but don't let the decisions on the antenna side be dictated by the needs of their competitive side.

Mr. SWINDALL. I suspect that wall would be about as elusive as the wall between church and state.

My question would be, you say it's inconceivable that the public doesn't want that station, for example in Savannah, not to be aired. Well, is it equally inconceivable that the local station cannot mount a grass-roots campaign?

Mr. PADDEN. Well, Mr. Bailie is very resourceful. He has attempted to do just that. He has even gotten the local paper to editorialize. In fact, our association has produced some announcements which we provided to our members which ask the public—we assumed the worst when we produced these announcements, that we were not going to be able to resurrect any kind of must-carry or local carriage rights—asked the consumers to call the cable operator and let him know what they think about local stations.

But we still have the problem of cable being a monopoly and so far, despite really a very impressive campaign Mr. Bailie has launched in the Hilton Head area, the only response from the cable operator is he thinks Mr. Bailie is not going about this in a way that is calculated to lead to further discussions. And I have got to tell you, we've got a lot of members out there who are scared to death of alienating the monopoly cable operator in their market, because they know that those guys can put them out of business overnight.

Mr. SWINDALL. What about the fact that the newer cable systems are carrying, what, up to 100 stations?

Mr. PADDEN. There are some, I think there may be one system around the country that size.

Mr. SWINDALL. I mean, it's a very quickly evolving system. I think that the evolutionary process will, just as we saw UHF explode. I think that you're going to see an explosion of the number