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# DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

Public Law 104-39

November 1, 1995

109 Stat. 336

## *HEARINGS*

*96th Congress*

7. *Copyright Issues: Cable Television and Performance Rights,* Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, November 15, 26, 27, 1979.

*95th Congress*

8. *Performance Rights in Sound Recordings,* Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 95th Congress, March 29, 20; May 24,25, 1978.

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# COPYRIGHT ISSUES: CABLE TELEVISION AND PERFORMANCE RIGHTS

## HEARINGS

BEFORE THE

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

OF THE

## COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

COPYRIGHT ISSUES: CABLE TELEVISION AND THE COMPULSORY LICENSE; AND PERFORMANCE RIGHTS IN SOUND RECORDINGS

NOVEMBER 15, 26 AND 27, 1979

**Serial No. 28**



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# COPYRIGHT ISSUES: CABLE TELEVISION AND PERFORMANCE RIGHTS

THURSDAY, NOVEMBER 15, 1979

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

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

Members present: Representatives Kastenmeier, Danielson, Gudger, and Railsback.

Staff present: Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

Three years ago last month the Congress enacted the fruit of a 23-year effort to rewrite the copyright law of the United States. That 1976 act, which became fully effective on January 1 last year, attempted to create a new legal order to guide individuals and industries as to the applicability of copyright to the many uses of intangible intellectual creations. These uses which could not have been foreseen by our predecessors in the 60th Congress, who drafted the now archaic 1909 statute.

By and large I believe that the nearly 2 years of experience we have had with the 1976 act have demonstrated it to be a sound legislative work product. However, there are some loose ends which require further consideration, and it is for that reason that we have convened this morning.

Specifically, we will hear testimony on two separate issues: performance rights in sound recordings and the compulsory license for cable retransmission of copyrighted broadcast programing. The issue of performance rights in sound recordings is reflected in pending legislation, H.R. 997, sponsored by Congressman George Danielson and 48 colleagues. An identical Senate bill, S. 1552, has been introduced by Senator Pete Williams and five cosponsors.

There is presently no legislation on the question of copyright liability for cable retransmission. Therefore, the hearings will simply focus on the two primary areas of controversy surrounding cable television—the adequacy of the royalty revenue generated by the 1976 copyright law and the possible impact of deregulation by the Federal Communications Commission on the existing compulsory copyright license.



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Only two witnesses are scheduled for this morning: The Honorable Henry Geller, Assistant Secretary of Commerce for Communications and Information, and the Honorable Barbara Ringer, U.S. Register of Copyrights. Ms. Ringer will address both issues and Mr. Geller will address only the cable television issue.

The need for future consideration of the performance rights issues was recognized in the 1976 act itself which mandated the Register of Copyrights to submit a report and recommendations on the issue to the Congress. It was in recognition of this promise of future consideration that proponents of a performance right in sound recordings receded from their request that such a right be recognized in the 1976 act.

On January 3 of last year a 1,300-page report on performance rights was submitted to us by the Register of Copyrights. Following submission of the report we held 4 days of hearings on the issue, but because of lack of time, and because there were certain elements of the issue still unresolved, we were unable to further consider legislation. In view of the extensive record already developed, these hearings will be somewhat brief in their review of the issue.

With respect to cable television, the 1976 act has been rapidly overtaken by changing business practices brought about by satellite technology and by the new emphasis in Washington on deregulation of the broadcast industry. Earlier this year our sister House subcommittee, chaired by our colleague Lionel Van Deerlin, considered legislation which would have deregulated the cable industry but at the same time imposed the equivalent of full copyright liability—retransmission consent—on cable systems. The future of that legislation is in doubt.

However, the announced intention of the Federal Communications Commission to consider removing the exclusivity and signal carriage limitations now encumbering cable have brought into sharp focus the copyright problems which continue to plague the program producer-broadaster-cable system relationship. While we have no specific legislative proposal at this time, our hearings will attempt to identify the problems and possible solutions in the difficult area of public policy.

At this time, I am pleased to welcome as a witness an individual with a national reputation in the field but who is new to this subcommittee, the Honorable Henry Geller.

## TESTIMONY OF HENRY GELLER, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, U.S. DEPARTMENT OF COMMERCE, ACCOMPANIED BY RUTH REEL

Mr. GELLER. Thank you, Mr. Chairman, I am pleased to be here.

As you say, I will address just cable. I would like to go to the issue of deregulation, and not so much the adequacy of the present fee schedule. I would have no views on that at all.

If I may, I would like to have my statement introduced in the record, and also the filings that we made with the FCC and the main filings of the other executive branch agencies, the Council on Wage and Price Stabilization, and the Department of Justice. As you will see, the views of NTIA are different from the others. It is

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a lot of paper, but if those could be submitted, I believe they would be helpful in your consideration of this issue.

Mr. KASTENMEIER. Without objection, your 11-page statement will be received and will be printed in the record in its entirety, and the other material will be received and be reprinted in the appendix. (See app. 1A at p. 316.)

[The information follows:]

STATEMENT OF HENRY GELLER, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman, I welcome this opportunity to testify before the Subcommittee on the subject of cable television copyright legislation. The views I am presenting today are my own and do not necessarily represent those of the Administration.

We believe that contracts and bargaining among the parties with full copyright liability of all users rather than a government administered pricing system for commercial cable's future in major urban area should be the paramount objective of public policy. The core problem of cable has been the fact that it has always stood outside the competitive TV programming market, although it is clearly another means for distributing TV programming. As a result, the Commission initially adopted complex and restrictive regulations to compensate for cable's exclusion from the market. Congress, when it dealt with the copyright issues in 1976, took into account the industry structure which had grown up around the Commission's rules and adapted a copyright scheme to that structure—compulsory license, legislated fee schedule, Copyright Royalty Tribunal.

We have no quarrel with that scheme as a means for dealing with the existing cable industry. Disruptive action is neither desirable nor feasible. But we strongly believe that this is a most unsual way to deal with cable's future development in the large markets. Cable is moving in directions that Congress did not full address in 1976—nationwide satellite distribution of "superstations" like WTBS, Atlanta, and cable operations in the largest cities. The Commission is now proposing to do away with it distant signal and syndicated exclusivity rules, which served as the background for the copyright compromise. All this poses a most important policy dilemma.

The circular development between copyright and FCC cable regulations has led to the flawed present arrangement. We call it flawed because it relies so heavily on direct government intervention rather than a market with full copyright liability for all commercial users. Until urban cable is brought into this marketplace, we believe that any administrative or legislative attempt to remedy the present situation will continue to be fundamentally unsound. Our basic position can be simply stated:

The copyright owner should be fairly compensated when a non-network program sold for broadcast distribution in one major market is retransmitted by cable in another major market or nationwide. The marketplace—not Government fiat—should determine that compensation.

Elimination of the present complex set of FCC rules will not bring the marketplace into play. The power of the Copyright Royalty Tribunal to change the statutory fees in light of FCC rule changes is not a marketplace solution but only another Government agency adjusting a Government ordained schedule.

Indeed, elimination of the Commission's syndicated exclusivity rules results in more Government intervention—not less. Under the rules, a broadcaster or cable system obtains exclusivity only by bidding for it in the marketplace. With the rules' elimination, a Government entity will be called upon to fix the compensation for this lost marketplace opportunity to afford reasonable exclusivity.

Because of the compulsory license copyright scheme, affirmative Government action is needed to bring the marketplace into operation. This affirmative action could appropriately take either of the two forms:

FCC or Congressional action to bring urban cable within Section 325(a) of the Communications Act on communictions policy grounds, so that consent of the originating broadcast station would be necessary for cable's retransmission of a distant broadcast signal in a major market; or

Amendment of the Copyright Act to make cable fully liable for secondary transmissions of non-network programs on distant broadcast signals in major television markets.

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NTIA has pursued the communications policy alternative—retransmission consent by the originating broadcaster—before the FCC, most recently in its proceeding to delete the distant signal and program exclusivity rules. We offer copies of these filings for the record in the belief that much of that discussion is pertinent here also. We recognize that there are differing views on this subject within the Federal government and also offer copies of the filings of the Council on Wage and Price Stability and the Department of Justice.

Under either approach we believe that the existing service of existing cable systems should be grandfathered in order not to disrupt the exisiting industry structure. Present systems were built upon the basis of either no copyright payment, a right twice judicially confirmed, or of compulsory licensing under the 1976 Copyright Act. It would be inequitable now to change the rules of the game for them. Nor should either approach be applied to network or local signals in any market. Network programs are sold for nationwide distribution and programs on local signals are sold for local distribution, so that cable retransmission does not skew the operation of the marketplace or deprive the copyright owner of fair compensation in the marketplace.

The crucial issue is how cable will develop in the major markets, rather than how it will develop in small towns. After several decades of progress in "small town America", we doubt if there is substantial growth potential for new systems in these smaller areas. The reality of cable development today rests on its expansion into major urban markets.

In pay cable there is already a model (and bell weather) as to how cable can develop within an urban market in which full copyright liability applies. Pay cable entrepreneurs deal within the competitive market to obtain product for distribution on cable systems. All parties to the transaction must respond to market forces; there is no advantage given to any party. Transactional costs have been minimized by consolidated purchasing arrangements. This system has worked well, with the help of these "middlemen" like Home Box Office and Showtime and the use of the satellite. The Congress would do well to look to pay cable as a model in its consideration of how to deal with future urban cable growth.

Now another avenue of major market growth—national advertiser-based distribution of broadcast signals via satellite—recently has begun to emerge. NTIA views this, and other future distribution arrangements, as welcome developments with the potential for enhancing diversity, enlarging the supply of non-network programs, and providing a base for other services to the home.

We believe that if a market exists for advertiser-based programming on distant signals in major markets, it will be brought to cable systems under full copyright liability or under a requirement for broadcaster retransmission consent. It may be argued that full copyright liability for secondary transmission of non-network programs in major markets is not practicable for cable because it would be difficult for individual systems to bargain program by program. But there is a great difference between the situation today and the sixties and early seventies. The satellite has come into the picture. Interested broadcasters, like WTBS, have emerged. Cable, particularly the multiple system owner, can put its own stations on the air as "flagship" stations which can purchase urban cable distribution rights. Common carriers are interested in obtaining broadcast signals for distribution by satellite; middlemen are eager to enter the picture; and program suppliers, as always, are aiming for increased sales of their products. Cable now has abundant means of aggregating for negotiations with the copyright owners.

But if the market gives a negative answer, if the market is not there for rebroadcast TV signals, it should be accepted rather than having the Government seek to affect the market in this competition between multi-million dollar enterprises in major markets. Stated differently, why should the Government intervene for example, on the side of Cox Cable or Teleprompter against Taft Broadcasting in Philadelphia or Washington (or vice versa)? In these large cities cable must seek to provide services people will pay for, and if that proves not to be distant signals, then cable should supply whatever alternative services consumers may demand (e.g., pay, Qube, etc.).

The important point is that with a retransmission consent requirement or full copyright liability for distant signals in major markets, cable would be brought into the marketplace, free and fair competition would apply to all, and its application would be clearly understood. Under such a structure, Government need not control or supervise the distribution of non-network programs except for judicial enforcement of the copyright laws and FCC policing of abusive practices, such as "warehousing".

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Consider the situation if we do not turn to this type of open marketplace. If the FCC distant signal and syndicated exclusivity rules are abolished, as it has proposed, and if no retransmission consent requirement or copyright liability amendment accompanies this action, a number of real and serious anomalies will occur. As illustrations, we cite the following examples:

A sports entrepreneur of a Madison Square Garden price fight determines to televise the fight throughout the nation, with the exception of New York City. Clearly, the promoter, who is risking much, has the right to make such a business judgment, and to protect gate receipts. Yet the promoter could find that decision frustrated by cable's importation of a distant signal carrying the fight, in the absence of Section 76.67 of the Commissions rules (which the Commission is proposing to retain). The result may be a decision to put the fight into theaters, thus depriving the viewing audience outside of New York City. Note that the only way to prevent this (absent a retransmission consent requirement or copyright liability amendment) is by Commission rule—by intrusive government intervention.[1]

UHF Station 20 in Washington, D.C., might buy the exclusive right to a film package for Washington. It can obtain such an exclusive rights against the other stations under both the Communications Act and antitrust laws (assuming the terms of acquisition are reasonable both in duration and geographical extent). But even if it were willing to pay any sum, it could not prevent the film from being seen on the Washington area TV sets via cable carrying distant signals, if the Commission eliminates its non-network exclusivity rules. Such a government policy, we submit, makes little sense. Note also that in light of the Commission's proposed retention of Section 76.67, the Commission will have intervened to repair a market deficiency as to the Madison Square Garden sports entrepreneur but not as to the UHF independent-film syndicator. Why this difference?

Sports entrepreneurs are concerned over telecasts that affect the home territories of their own team or other teams in the league, since the overall health of the league is crucial and can be affected by the indiscriminate carriage of the currently "strong" teams. As a result of either league agreements, permitted by Congressional policy (see 15 U.S.C. 1291), or individual decisions motivated by the same policy, these entreprenuers specify what games may be presented in particular regions. This means that a commercial or an STV broadcaster would not be given the right to present, say, a Los Angeles Dodgers-Atlanta Braves games in a particular city because it comes within the TV territory of the Oakland and San Francisco teams; nevertheless, the game could be presented in that same city on a cable system carrying the signal of WTBS, the Atlanta superstation. What sense is there in a policy facilitating cable presentation of a sporting event that the marketplace (and government policy) denies to STV or commercial broadcasting?

Some copyright owners refuse to sell a product to stations like WTBS, because it is a "superstation" distributed by satellite to cable.[2] The owners do not believe that they are receiving fair compensation through the compulsory license scheme, and they fear that if they sell and the Commission abandons its non-network exclusivity rules, as it has proposed, they will be left without protection. The result of government policy is that the copyright owner does not make a sale, an area like Atlanta may not receive the program, and cable viewers may not get the program.

An independent station in Chicago (WGN-TV) seeks to obtain the rights to air the NCAA basketball finals. Although the station offers the NCAA a fair sum of money (indeed, the highest among the Chicago stations) for these rights, the sale is refused since that station is picked up by satellite and is distributed nationwide to cable systems. Thus, a sale in Chicago becomes, in effect, a national sale, and the copyright owner's bargaining position is undermined. Since the station has no control over its signal, it also is impaired in arranging a deal. The bargain is not controlled by the market; rather, it is governed by the extraneous factor of cable reception that is beyond the control of the bargaining parties.

In seeking to preserve the exclusivity bargains for exhibition rights for non-network programs in the major markets through copyright protection or retransmission consent, we recognize the contention that non-network exclusivity is not economically needed. In our view, if urban cable grows very substantially, common

[1] The Commission's rule, section 76.67, permits the cable importation of a local sporting event only if it were available on a local TV station. This means that if the Philadelphia Flyers sell an exclusive package of home games to a Philadelphia station, a Philadelphia cable system could important the same game (with different announcers, commercials, etc.) being carried on an Atlanta station, when the Flyers are playing the Atlanta team, thus violating the reasonable exclusivity that has been bargained for. We recognize that the Commission might take action to repair such "glitches." Our point is that the marketplace, not government patches, should govern.

[2] Television/Radio Age, Jan. 1, 1979, at 78.

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sense compels the conclusion that it is bound to affect the viewing of television stations in these urban areas, exemplified by the Canadian experience, and thus payments to copyright owners. However, our request for copyright protection of the major market non-network exclusivity bargains does not turn on potential impact. Rather it turns on a reasonable accommodation of the public interest in a properly functioning, economically efficient television programming marketplace.

Broadcasters and program suppliers have operated under exclusivity bargains for a half a century, and these exclusive exhibition rights are the bedrock of the orderly market process for program distributions. A UHF station like Channel 20 in Washington will bargain and obtain exclusive rights to a film package that it hopes will assist it in the competition with its VHF rivals. It may heavily promote the film package, on the basis of its bargained-for exclusivity. Commission policy and the antitrust laws permit such exclusivity as a reasonable operation of the market process.

A broadcast station that has bargained and paid for exclusivity is thus entitled to have that bargain respected, not only by the program supplier and other broadcast stations but also by cable. For it makes no sense to say that Channel 20 can pay and obtain exclusivity against Channels 4, 5, 7 and 9 but not against cable's importation of WPIX-TV. Full copyright liability for secondary transmission of distant non-network signals in major markets would reasonably require cable to compete for distribution rights and honor the exclusivity bargains of the broadcasters and copyright owners.

It is argued by some that the solution is to remove Commission restrictions and leave matters of copyright to the Copyright Royalty Tribunal, a government agency that manages the legislated fee schedule set forth in section III of the 1976 Copyright Act. The CRT can adjust the fee payments upward to help compensate the copyright owner whose product is being carried on cable via a "superstation." But the CRT does not represent a solution that relies on private contracting. It is only another government agency adjusting a government-ordained schedule. And, most importantly, no CRT action could solve the anomalies that would be created by the lifting of the existing rules without the imposition of a retransmission consent requirement or full copyright liability for secondary transmission of distant non-network programs in urban areas.

We believe, as in other important areas, that it would be most desirable for Congress to lay down the basic policy in this area. With the imposition of full copyright liability for secondary transmission of non-network programs in major TV markets, the anomalies would end. There would be no need for any direct government intrusion. The marketplace with full copyright liability for commercial broadcasting and cable could work its will, just as effectively as in pay cable. Bringing cable into this competitive syndicated market would, in turn, help preserve the flow of syndicated programs to the public. The continued healthy supply of programming by the copyright owner is an objective of both copyright and communications policy. We have taken the legal position before the FCC that failure to bring cable under a retransmission consent requirement in the present circumstances would be arbitrary and unlawful under the Communications Act. A Congressional amendment on copyright liability could obviate the need for lengthy litigation and establish a certain and secure basis for the future growth of all these industries-copyright, cable, broadcast.

In conclusion, Mr. Chairman, I commend the Subcommittee for opening this public dialogue on the cable copyright problem. NTIA is pleased to provide whatever assistance is desired.

Mr. GELLER. I will go on briefly and state the essence of my views and then be available to answer your questions.

As the committee knows from your statement, Mr. Chairman, this has been a long controversy. It was settled with compulsory licensing, the statutory fee and the establishment of the Copyright Royalty Tribunal. As I understand it, the Communications Act policy aspects were left to the Commerce Committees and to the FCC.

Cable, as you know, is now on the move. It is in one of five TV households. It is predicted that by the late eighties or early nineties it will be in one of two television households in the United States. The administration strongly supports that. We believe in diversity. We believe in a marketplace of ideas and entertainment.

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However, it does raise the issue, that you focused on, and that is what the appropriate policy is in those circumstances. I would like to stress at the beginning that what we are talking about is the future growth of cable, and its growth in these large markets to equal what has been accomplished so far in the smaller markets where it is in 19 percent and 14 million homes. We think that these older systems should be grandfathered under the present system. We think it would be unrealistic to disrupt them. They have grown up over decades in that fashion, and won two court cases.

The entire compromise, as we understand it to have been worked out, was to take into account where it was, how it has developed, and where it was under FCC. We think it is not realistic to disrupt that at this point. It may change over time, but it ought to change voluntarily. Therefore, what we are saying to you is to apply the present compulsory license Copyright Royalty Tribunal system to the existing cable system.

As you grow and try to take over the major markets, where 80 percent of the population is, the questions what the governing policy should be? And on that, we think there is a very easy answer. It gets quite controversial, but nevertheless, we think the answer is plainly the marketplace. These are very large industries dealing with one another. The broadcast industry represents billions of dollars. The cable industry, we are very pleased to say, is now also close to $1 billion in revenue.

As I say, they are very large industries. The cable industry, with its $1 billion in revenue, has very large entrants, such as Cox Cable, ATC, owned by Time-Life and Teleprompter. Copyright is also a very large industry represented by companies such as MCA.

What we say is, why skew the competition among these large industries? We think there is a model to be followed, and the model we suggest is to note what has happened in pay cable. That industry was left entirely to the marketplace and it has worked out. Here is an example that sounds silly, but it does point up the problem: Suppose the cable industry had come before you and had said, we can't deal in paid services unless you give us some assistance. There are too many people out there to deal with—too many film people, too many sports entrepreneurs, the transmission costs are too large and we are dealing with a bunch of set monopolies and we need your assistance. What we propose to do is pick up and show the TV signal over the air, pay signal, in Los Angeles, decode it, and carry it to all of our cable homes. That will bring diversity, and don't worry, we will pay for it through compulsory license.

Now, as I say, that sounds silly. It wasn't done that way. The middlemen came in, like HBO and Showtime, and pay cable is now flourishing. It reaches close to 4 million homes and is a very healthy development, again bringing diversity.

It is that model that we think you ought to follow. When you talk about cable in these major markets you are dealing with, large enterprises, you are dealing with the same films, the same sports, the same ability of people to bargain in the marketplace.

The situation has changed markedly since this was tried as an experiment in the late sixties, having broadcasters who would like to be originating stations for cable systems. The cable industry

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itself can put its own station on the air and serve as a bargaining point. You have cable systems that are very interested. They might even support it by paying. They now pay between 2 cents a subscriber a month to as high as 15 cents a subscriber a month for services to come to them.

You have middlemen. If you don't want the broadcaster to do it for you, then just as HBO came into the pay area, you now have Southern Satellite and others coming forward to be the middlemen. You also have the satellite, which is a change, and it is available for distribution.

So we don't see any reason why it can't be worked out. We don't know how it will be worked out; we are not market people. The Federal Government and the Congress should not deal with the marketing—just leave it to the marketplace.

But suppose it doesn't work out? Suppose you can't get advertiser-based programing onto cable systems in major markets for some reason we are unaware of in the market. Well, then, this market would have indicated that cable growth in these major areas depends upon other services, upon pay services, such as the Qube services in Columbus or the 20 satellite services that are being offered. We think that is the answer.

The Government shouldn't step in and say, "If the marketplace gave a wrong answer, we had better skew the marketplace." If you do not proceed in expanding the marketplace, we see nothing but greater and greater Government involvement. As an example of that, take channel 20 here in Washington, D.C. Channel 20 is an independent station. It now buys and gets exclusive rights to programs, film programs, and that is considered fine. It gets them against all the other stations in town. That is permissible under the Communications Act policy and antitrust policy.

If the FCC wipes out all its syndicate exclusivity rules, this would mean that even if channel 20 paid $1 billion, or any amount of money, it could not get an exclusive against a cable system bringing that film in from New York or Philadephia or somewhere else. It could get an exclusive against the TV stations here, but not against the cable systems. I don't think that makes any sense at all.

Furthermore, it makes no sense because you are going against the established method of distribution. You would then have a Government even more involved. Previously, this copyright owner could sell that exclusivity and receive money for it in the marketplace. But now, he could no longer do that, so your Copyright Royalty Tribunal would have to step in to figure out how they will compensate the copyright owner for the lost exclusivity, and of course, the Copyright Royalty Tribunal is just another Government agency.

We don't want the FCC doing it and we don't think the CRT should do it. We don't think the Government should do it at all. We think the marketplace is a much better way of doing this than the Government and, therefore, when the Commission speaks about deregulation—and you are right in using that term, Mr. Chairman, the winds of deregulation are now blowing and we favor that, we are working for it very hard in the Communications Act rewrite.

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When you talk about deregulation, we don't regard that as deregulation at all. At least before there was such a thing as exclusivity, the broadcaster got it in the marketplace. If he didn't get it, then the copyright owner might give it to a cable system, but it had to be fought for and obtained in the marketplace.

When you wipe out the rules from deregulation you are involving the Government more and putting the copyright tribunal in the system to a greater extent, so we claim it is kind of Orwellian to say this is deregulation.

There are more of the same problems. I gave you an example in film; the same problems would exist in the sports area, perhaps even greater, and we have given in our testimony a number of examples of how the marketplace gets skewed when you proceed in this fashion.

In the materials we have given you, we have also shown why we think it is within the FCC authority to act. I won't go into that here, although I will be glad to answer questions.

In any event, since this is a hearing before you, we think this is not a matter of FCC authority, but is a matter of what is proper policy. We couldn't agree more, that policy in this important area should be set by the Congress, not by an administrative agency. It is for that reason, therefore, that we welcome these hearings.

We think that the sound policy for cable future growth, not for its past but for its future, is either retransmission consent as part of Communciations Act policy, or full copyright liability, if it is a matter to be considered by this committee.

We believe that any other way of proceeding is not deregulation; it skews the marketplace and makes the Government become involved in decisions in which it has no business being.

That, very succinctly, is the position of NTIA. I would be glad to amplify on that or to answer your questions.

Mr. KASTENMEIER. Thank you, Mr. Geller.

Your main recommendation appears to be that we should subject all future growth of cable to full copyright liability or the equivalent thereof while grandfathering existing service?

Mr. GELLER. Yes, sir. The only qualification I put on that is if the cable system just began in a major market, such as Pittsburgh, and had very few subscribers, I would not grandfather that service. I would require a cable system beginning in a major market to come within the new policy. But with respect to existing systems—and they have largely developed outside the top 100 markets—I think it ought to be grandfathered if they added new signals. That would be a new matter.

I should point out also that what we are talking about here is nonnetwork programing. We are not talking about cable carrying local signals. There is no question there as to the copyright owner having been fully compensated. When he sells a program to a local station he expects every local viewer to get it, therefore, there is no issue as to copyright owner and cable ought to be able to carry the local signal.

The same thing is true with regard to network programing. Network programing is sold for dissemination to the entire Nation. Once again, therefore, we are not talking about payment for carriage of network signals but we are saying that when you do deal

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with nonnetwork programing, which is not sold on a simultaneous basis, it is sold to particular markets, and on an exclusive basis. If the broadcaster obtains that exclusivity in the marketplace, it is there we would go to the full copyright liability or retransmission consent. They are equivalent.

Mr. KASTENMEIER. Wouldn't you really have two classes of cable systems: Those operating under a grandfather and those not grandfathered. Those not grandfathered would then have to evolve into something else, like Home Box Office. They would tend to generate their own programing and assume the characteristics of a television station, with added technological advantages in terms of scope of materials generated.

You are then looking to a different class of system which could be differentiated, technologically and otherwise, from existing cable system. Is that correct?

Mr. GELLER. That is correct. When cable moves into a major market it can't go out of distant signal. It can and has in the past, but when cable goes into Pittsburgh, or into the Washington area or the other places, there is so much-over-the air broadcasting there already that for cable to succeed it must offer new services. That is why it is offering pay cable. That is why it has 20 services. That is why you are getting a black network and why you will be getting cable news, as Ted Turner is proposing. It needs to do that.

Another thing it can do, we believe, is to provide a place for advertiser-based programing and the assurances that they can get it. Some of the pay programs have advertising support. You could take the same film, but it might be a little later. However, the middleman or the broadcaster would go out and get advertisers who would pay not only for the showing in that area but for the showing in cable homes. It would be engineered to do that. We don't see why it can't be done.

But we agree with you that if it cannot be done, if the marketplace has reasons that won't work out, then we believe the answer is just what you said: Cable in major markets will turn to the new services.

Mr. KASTENMEIER. With respect to long distance retransmissions, in your view, who should bear the copyright liability; the cable system or the satellite company that makes such retransmission possible?

Mr. GELLER. I think that the copyright owner should be fully compensated. I think a consortium will work out how to do it. I believe the broadcaster will come to who ever owns the copyright, and say, "I would like to put it in Atlanta. I would also like to send it to 5 million cable homes. What will you charge me to do that?" He will then turn to advertisers to see how much money he can get for Atlanta and for those 5 million homes.

He might also turn to the cable systems and say to them, "I need help; I am not getting enough money to buy the product I want and, therefore, I want you to contribute $x$ pennies per subscriber a month." It may be that the middleman will do this.

Just as you said, the satellite carrier, you have quotes around "carrier," but the satellite system such as Southern Satellite might be the one who works all this out and chips in money.

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I repeat to you, I don't know how the market should work and we don't have any blueprint; all we know is that it works out in the pay area, that middlemen came forward and did it, and we think it will work out here. I don't know whether it will work out by cable being paid or cable having to pay so much, but we would leave that to the marketplace to figure out.

Mr. KASTENMEIER. You tend to differentiate between existing cable systems and new cable systems. Might not another basis for differentiation be to treat satellite signals differently than conventionally retransmitted signals?

Mr. GELLER. I don't believe so because it means, therefore, that in Philadelphia, which is close to New York, you can operate one way and bring in signals, but if you are further away you could not. We think it is a function of what is going on. With parabolic antennas you can pick up signals as much as 250 miles away. In Canada they do not allow microwave of signals. As a result, signals are brought in by very high, very peculiar antennas. We think that is a foolish way to proceed and that it ought not to be done.

Mr. KASTENMEIER. This is, of course, a policy question. Nonetheless, in terms of trying to assess the possibility of change and given the importance of syndicated exclusivity to the broadcast industry, do you think a partial exclusion might be to mandate, by statute, a continuation of the exclusivity rules?

Mr. GELLER. Yes, and I agree fully with your characterization of it as a partial exclusion. We think that the syndicated exclusivity rules are desirable because you don't get it unless you go out and bid for it in the marketplace. The broadcaster doesn't pay enough, he doesn't get exclusivity, and that is a way of doing it.

There are a number of other possible compromises such as just divide the top 100 markets and say that within the top 100 markets, within a 35-mile zone, you must come within the new policy of retransmission of full copyright liability. Outside of it, you are instead within the compulsory license. It is messy, this two system thing that you speak about, but we think that you have to deal with the system as it is.

Justice Holmes said "The life of the law is not logic; it is experience," and here you have something that grown up people become accustomed to—getting services, that is what makes for the messiness. If you don't do anything about it, it means that we will skew the system for the future development in favor of a very large industry.

Mr. KASTENMEIER. I would recognize the gentleman from California.

Mr. DANIELSON. I don't have any answers for the problems which are giving rise to these hearings. The problems are very complex, as I see them, and what amazes me is that it is only 3 years since we passed the copyright revision law and yet we are considering problems that at least I had never dreamed of at the time, and no one brought into focus, no one at all, which causes me to take one other step of caution and that is that perhaps what we are talking about here and now won't mean a thing 2 or 3 years from now. The fact we have got, I think you said, 20 satellite services available.

Mr. GELLER. About to be available, since they are about to begin.

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Mr. DANIELSON. Let's call it in being or gestation, one or the other.

Mr. GELLER. Yes sir.

Mr. DANIELSON. I don't believe there were any 3 years ago and I am pretty much of the opinion that 3 years from now the situation is going to be entirely different.

Some person told me not too long ago that there is on the drawing boards some kind of a supersatellite system, which I called a celestial jukebox. In other words, you didn't have to wait until the program was ready, you just sort of punched the right button and you got whatever program you wanted out of something up there.

Mr. GELLER. I hope it is far off.

Mr. DANIELSON. I beg your pardon?

Mr. GELLER. I hope that is not coming tomorrow.

Mr. DANIELSON. I think it may be in your office before you get back to it.

In your statement, which I will chide you about briefly, I didn't receive it until this morning—I don't know how on earth I can be expected to have studied something I haven't seen. Maybe that is part of the new technology also.

Mr. GELLER. I apologize.

Mr. DANIELSON. You don't have to apologize. Almost all witnesses do it except in my subcommittee. I don't know how you would ever appear before a court of appeals without having filed your brief at least 10 days in advance. So I can't respond frankly to your questions and your suggestions and you will be gone when I am able to.

My thrust of what I am saying is, I don't really know where we are at the present time. I appreciate the contribution that you have made and I will read your brief, but I think we had better go rather slowly in changing anything because I am afraid by the time we get it changed our change will be obsolete, and we may be better off with what we have than to fly to others we know not of.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. Mr. Chairman, I appreciate the opportunity to question Secretary Geller, but I will refrain from doing so at this time in view of the time limitation, except to ask one question.

It is my understanding that the 1976 act really was implemented only about 18 months ago. There was about a 1½ year delay in implementation, was there not?

Mr. GELLER. As a matter of fact, the first division of revenues under it has not yet occurred. It is now being considered by the Copyright Tribunal because there is a dispute and——

Mr. GUDGER. Royalties have been collected but not yet dispersed. They have been collected, they have not been distributed.

May we write you or communicate with you further should your brief and testimony here prompt us to have questions of you?

Mr. GELLER. I would be delighted to come to your office individually or to come back for further testimony.

I would just say one thing. While normally I appreciate the need to go slowly, we have discovered it is best to be evolutionary in most fields and not try to turn things upside down. I would say that this field is moving so fast and cable penetration is moving so

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fast, that the reason I argue for grandfathering is because you can't take a lollipop away once the public has it and becomes accustomed to a certain way of operating.

So what I am saying to you, if you allow it to continue along the path it is continuing, then that is a decision and that decision, I think, will be almost foreclosed some years in the future. It is a very dynamic, a very fast moving field, and not acting may be a sound decision but it is a decision——

Mr. DANIELSON. I agree with you. I have one concern. You spoke of the lollipop. The people in the areas served do have this benefit and do not wish to have it taken from them.

Mr. GELLER. That is true.

Mr. DANIELSON. There are some areas which are not yet served and I am sure human nature being what it is, they also will want a lollipop and they will say why should the people in Denver, for example, have this benefit while we in Butte do not have the benefit.

Mr. GELLER. I would answer you that the people in Denver have much more service over the air now than the people in Butte.

Mr. DANIELSON. Let's reverse the cities. Butte now has it and Denver doesn't?

Mr. GELLER. What I am saying, is that when you go into major markets there is a great deal of over air service. We would like all the additional service that is possible and, therefore, we favor cable development in those markets. We are only saying as cable comes, let it come within the marketplace, with all these new services paid for by standing and bidding for them, rather than getting the Government to step in and say here, you can have it and here is what you have to pay and here is how we are going to adjust for exclusivity lost in the marketplace. That is all.

We are saying that major markets are different and it would be helpful if the Government got out of the business of refereeing this and let it go to the marketplace.

Mr. GUDGER. I am going to yield back the balance of my time with this observation. Being a Congressman representing the Appalachian Mountains district, I, of course, have some long acquaintance with cable TV because we do not pick up even close signals due to the mountain interference. As early as the fifties we had to get into it. So I am interested and I did not want the fact that I was not questioning to be interpreted as a lack of interest or concern.

I thank you.

Mr. KASTENMEIER. I thank the gentleman.

This concludes, I think, questions for Mr. Geller. But, as has been suggested, we may want to continue further dialog with you on this question, which is an interesting one, and something the committee has to entertain prospectively in terms of being able to anticipate what the future will bring.

Thank you very much for your contribution this morning.

Mr. GELLER. I appreciate the opportunity to initiate the dialog at this time. Thank you.

Mr. KASTENMEIER. The committee will recess for approximately 15 minutes after which time we will hear from Ms. Ringer.

[A short recess was taken.]

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Mr. KASTENMEIER. We will reconvene. The committee will come to order.

Our second witness today is one who very, very often appears before this committee. If she were to count the hours and we were to count the hours she has appeared before this committee, it would indeed be impressive, but not as impressive as the quality of the service she has rendered to the country in her capacity as Register of Copyrights and in her prior capacity in that office. She has been, I think, one of the most outstanding public servants, civil servants, our system has produced. I would like to greet the Register of Copyrights, Ms. Barbara Ringer.

## TESTIMONY OF BARBARA RINGER, U.S. REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, HARRIET OLER, AND DAVID LEIBOWITZ

Ms. RINGER. Thank you very much, Mr. Chairman. I appreciate your words more than I can say.

I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian of Congress for Copyright Services. I would like to thank you and the subcommittee staff for giving me the opportunity to appear here today. I would also like to introduce my colleagues.

To my right, Dorothy Schrader, General Counsel of the Copyright Office. To her right is Harriet Oler, attorney-adviser in the Copyright Office, and to my left, David Leibowitz, attorney-adviser in the Copyright Office. They each have their areas of expertise.

I am here to talk primarily about two things today. In my prepared statement I have included some comments on four areas that I think are of rather urgent concern to the Copyright Office, but with your permission I don't plan to discuss them in my oral remarks, at least my introductory remarks. I will be more than happy to answer questions on them, however.

I am here primarily to talk about performance royalties for sound recordings and the problems of cable television and copyright, a subject Mr. Geller introduced this morning. I will only summarize the main points of my rather long preliminary statement, Mr. Chairman, and will be more than happy to answer any questions that you have.

Mr. KASTENMEIER. Without objection, your 30-page statement will be received and made part of the record.

[The above referred to statement follows:]

### STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyrights Office of the Library of Congress and Assistant Librarian of Congress for Copyright Services. I should like to thank you and the Subcommittee staff for giving me the opportunity to appear before you today. My purpose is threefold: first, to comment directly on proposals to establish performance rights in sound recordings, including two bills sponsored by Mr. Danielson and pending before your Committee, H.R. 237 and H.R. 997; second, to comment generally on the question of uses of copyrighted works by cable systems, including the practical problems that have arisen under section 111 and chapter 8 of the Copyright Act and the proposals for changes in communications law and FCC regulations that would have a direct impact on those copyright provisions; and, third, to call to your attention certain other points of concern with respect to the Copyright Office arising from the Copyright Act of 1976.

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## I. PERFORMANCE RIGHTS IN SOUND RECORDINGS

*Background of the problem*

Section 114 of the Copyright Act of 1976 presently limits the exclusive rights of the owner of copyright in a sound recording to the rights to reproduce phonorecords of the sound recording, to prepare derivative works, and to distribute publicly phonorecords of the sound recording. Paragraph (a) of that section affirms that the owner's rights "do not include any right of performance under section 106(4)." Thus, the current Copyright Code does not contain a performance right for sound recordings.

During the extensive debates and hearings preceding revision of the copyright law in 1976, Congress considered proposed amendments to the copyright law to create a performance royalty in copyrighted sound recordings (S. 1111, H.R. 5345, 94th Cong., 1st Sess. 1975). Hearings were held on those companion bills in the House Judiciary Subcommittee on July 23, 1975, and in the Senate Judiciary Subcommittee on July 24, 1975. Representatives of performers, performers' unions and other affiliated union organizations joined the record industry to support the proposals, while broadcasters, jukebox operators, and wired music services opposed it on economic and policy grounds. On behalf of the Copyright Office, I stated full agreement with the fundamental aim of the proposal.

Congress concluded that the issue required further study and, in subsection (d) of section 114 of the revised copyright law, directed the Register of Copyrights to prepare a full and objective report reviewing the views of major interested parties and the status of performance rights in foreign countries, and offering legislative recommendations, if any.

The Copyright Office responded with a very extensive study, which we submitted to Congress in 1978, "Performance Rights in Sound Recordings," (95th Cong., 2d Sess. Comm. Print No. 15 (1978)). This report included analyses of legal issues, testimony received in hearings sponsored by the Copyright Office, an independent economic analysis of the effect of creating performance rights, a bibliography and a statement by the Register of Copyrights summarizing the views of the Copyright Office on the issues raised in the report. We supported the principle of a performance right in sound recordings, and offered draft legislation to provide, within the copyright law, a compulsory license to perform a sound recording publicly once phonorecords of that recording have been distributed to the public under the authority of the copyright owner. My statement and the draft legislation reflected the study's conclusion that all relevant constitutional, economic, and policy considerations fully supported the creation of such a right as part of the bundle of rights enjoyed by a copyright owner.

During this time, H.R. 6063 (95th Cong., 1st Sess. (1977)), a bill to create a performance right in copyrighted sound recordings, was under consideration by the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives. That Subcommittee held further hearings on the issue on March 29, 30, May 24 and 25, 1978. Representatives of interested industries, including record manufacturers, broadcasters, unions and jukebox operators, and various Government agencies offered testimony. *(See, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representative,* 95th Cong., 2d Sess. Serial No. 83, 1978.)

In the present Congress, H.R. 237 (96th Cong., 1st Sess. (1979)), a bill duplicating the earlier H.R. 6063, and H.R. 997 (96th Cong., 1st Sess. (1979)) were introduced in the House of Representatives and referred to the Judiciary Committee. The latter bill, H.R. 997, and its Senate companion, S. 1552, essentially follow the draft legislation proposed by the Copyright Office in 1978 and incorporate changes suggested by the Record Industry Association of America and agreed to by the Copyright Office.

*Analysis of H.R. 997*

The proposed amendment would add to the existing copyright law a separate limited performance right in the form of a compulsory license for copyrighted sound recordings fixed on or after February 15, 1972. The license would automatically permit the licensee to perform an authorized and publicly distributed sound recording upon filing timely notices of intention, annual Statements of Account, and annual royalty fees with the Copyright Office. The Register of Copyrights is directed to issue regulations governing these filings.

Royalty fees may be computed on either a prorated basis or a blanket basis, as the licensee chooses. Subsection (c)(8) enumerates annual royalty rates for Federal Communications Commission (FCC) licensed radio and television broadcast stations, based on their annual receipts from advertising sponsors. Radio stations whose gross

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annual advertising receipts are less than $25,000 and television stations whose gross annual advertising receipts are less than $1,000,000 are exempted from liability for infringement and from the section's compulsory licensing requirements for that year. The blanket rate for other transmitters of performances of copyrighted sound recordings, including background music services, is two percent of gross receipts from subscribers during the year. The blanket rate for commercial establishments such as discotheques, nightclubs, and cafes whose principal entertainment is dancing to the accompaniment of sound recordings is $100 per location per calendar year. Other users, not otherwise exempted, will pay a blanket royalty of $25 per year for each location at which copyrighted sound recordings are performed. Those transmitters grossing less than $10,000 from subscriber receipts in any given year are exempt from liability for infringement and from the bill's compulsory licensing requirements for that year. Educational users exempted by section 110 of the copyright law retain that exemption. Royalty rates for jukebox performances and for cable performances of copyrighted sound recordings are governed by the compulsory licensing provisions of sections 116 and 111 respectively, but the annual license fee for jukeboxes under section 116 is raised from $8 to $9 per box.

Finally, subsection (c)(7) sets forth guidelines for the Copyright Royalty Tribunal to apply in computing prorated license fees for licensees who choose not to use the blanket rates. These fees are to be based upon the proportion of commercial time devoted to the use of copyrighted sound recordings by the licensee, and, in the case of licensed radio and television stations, equal a fraction of one percent of the station's net receipts from advertising sponsors during the year, and for other transmitters equal a fraction of two percent of the licensee's gross subscriber receipts for the year. Other non-exempted users will pay a prorated fee not to exceed $5 per day of use.

The Copyright Royalty Tribunal will distribute royalties annually to claimants who have filed a claim. Claimants may agree on the division of fees notwithstanding the antitrust laws. Royalties distributed under the bill are split, with one-half paid to the copyright owners and the other half shared equally among the performers, without regard to the value or length of their respective contributions. Further, the bill prohibits assignment of these royalties to other royalty recipients under the provision, thus protecting the right to share in the royalties in spite of possible unequal bargaining power. Finally, the bill permits the Copyright Royalty Tribunal to retain the services of one or more private, nongovernmental entities to monitor the performance of sound recordings, to value these performances and to distribute royalty funds to recipients.

Proceedings may be instituted to adjust the royalty rates five years after the effective date of enactment and in each subsequent fifth calendar year. The Act would become effective on January 1, 1981.

*Comments on the bill*

I reiterate my strong support for the principle of performance rights for sound recordings, and now add to it my unqualified endorsement of the amendment proposed in H.R. 997. The following comments summarize statements I have made on this subject in earlier reports and testimony.

The Copyright Office believes that the lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed, not only by the commercial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

We do not believe that arguments to the effect that sound recordings are not "writings" and that performers and record producers are not "authors" can be considered tenable. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976. If sound recordings are "the writings of an author" for purposes of protection against unauthorized duplication, they

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must be considered "the writings of an author" for purposes of protection against unauthorized performance.

Broadcasters and other users have argued that the benefits accruing to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists. While this argument may be valid in the case of some "hit records," we do not believe that these unpredictable benefits in certain cases justify the outright denial of performing rights to all records. That denial is inconsistent with the underlying philosophy of the copyright law: that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain (*Mazer* v. *Stein*, 347 U.S. 201 (1954)).

## II. SECONDARY TRANSMISSIONS BY CABLE SYSTEMS OF COPYRIGHTED WORKS

Throughout the 23-year process leading to enactment of the new copyright law of the United States, the single most difficult issue was the question of the copyright liability of cable television systems for their retransmission of copyrighted broadcast programming. Congress was called upon to chart an entirely unexplored course through a complex maze of controversial, complex, and volatile copyright and communications issues. To have enacted any legislation that has proved to be coherent and workable was an achievement of historic proportions.

Taken as a whole, the cable provisions of the new law represent an amalgamation of untested compromises; as such, they fall a great deal short of perfection. Considering the changes that have taken place in communications and the economy in the three years since enactment, it is not surprising that the cable provisions are now being subjected to challenges of various kinds. Some of these challenges may have merit, and your Subcommittee should consider them all carefully. At the same time, in any legislative reconsideration of this issue, it is vital to recognize three fundamental points:

1. Any legislative solution to the problem of cable television must involve a carefully balanced combination of copyright and communications provisions. The full implications of any changes must be judged from both a copyright and a communications viewpoint. Your Subcommittee, with its jurisdiction over the U.S. copyright system, therefore, has an essential role to fulfill in the development of legislation on this subject.

2. Any legislative solution to the cable problem must be based on some knowledge of the background and history of the two legal foundations on which the cable industry rests: the communications law (with FCC regulations) and the copyright law (with regulations of both the Copyright Office and the Copyright Royalty Tribunal).

3. Many of the cable provisions in the copyright statute represent a delicate balance resting on existing FCC regulations, current communications technology, and prevailing industry practices. However, recognizing that these circumstances are all certain to change, Congress provided some flexibility by authorizing the Copyright Royalty Tribunal (CRT) to make adjustments under certain conditions. Where a particular provision of the copyright law now is under attack on the ground that circumstances have changed, it is important to determine whether the change is great enough to require new legislation rather than CRT regulation. And, if the CRT's regulatory authority is not broad enough to make justified changes, a corollary question is whether, instead of revising the substantive provisions of the law, Congress should expand the CRT's authority.

To help your Subcommittee approach this problem as systematically as possible, this part of my statement is divided into five parts:

(1) A brief review of the history and contents of the cable provisions of the Copyright Act of 1976;

(2) A brief review of the experience of the Copyright Office and the CRT under the new law;

(3) A summary of certain proposals for revisions in the Communications Act of 1934 as they would effect the copyright law (particularly the "retransmission consent" proposal);

(4) A summary of certain proposals for changes in the FCC rules affecting cable, including proposals for deregulating cable (through changes in the distant signal and exclusivity rules) and for adopting a "retransmission consent" requirement by regulation.

(5) A summary of conclusions from a copyright viewpoint, with proposals for possible amendments of the copyright statute.

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*History and contents of cable provisions of Copyright Act*

The question of copyright liability of cable television systems for their retransmission services emerged as a major legislative issue in the mid-1960's. Before that question could be resolved for the future—indeed, before any copyright revision bill could be enacted—it was essential to determine the copyright liability of cable under the 1909 Copyright Act. The battle over this question was fought in the courts, beginning in 1964, and was finally settled by the Supreme Court in its landmark rulings, *Fortnightly Corp.* v. *United Artists* 392 U.S. 390 (1968) and *Teleprompter Corp.* v. *CBS* 415 U.S. 394 (1974). These decisions held cable systems free of any copyright liability for their retransmission services—that is, for the simultaneous retransmission of over-the-air broadcasts of copyrighted television programs. They resolved the question under the old law, but they left completely unanswered the larger and more troublesome problem of balancing the interests of copyright owners, broadcasters, and cable operators under a new copyright statute. The Supreme Court expressly and pointedly left this responsibility with Congress.

The period between 1964 and 1976 was marked with great uncertainty as to how best to fit the burgeoning cable industry into well-established communications law and regulation and into the fabric of the copyright marketplace. To summarize the history of this period very briefly:

(1) In 1967 a copyright revision bill containing cable provisions came before the House of Representatives. The bill was passed, but not before the cable provisions had been deleted entirely.

(2) Before the House action in 1967 and the *Fortnightly* decision in 1968, the Federal Communications Commission had looked to the copyright law as the best way to provide a comprehensive solution to both the copyright and the communications issues of policy presented by cable.

(3) After the legislative and judicial failure of efforts to control cable through copyright, the FCC approached the problem directly through a regulatory device that was, in reality, the exact equivalent of a copyright. Immediately after the Supreme Court decision in *Fortnightly,* the FCC imposed upon CATV the requirement of "retransmission consent" for its service of providing simultaneous distribution of broadcast programs. Since only a few "retransmission consents" (i.e., copyright licenses) were granted under these rules, their practical effect was the same as an outright regulatory prohibition.

(4) The years between 1969 and 1974 were marked by intense activity on the cable issue aimed at producing some agreement among the major interests involved, and a combination of FCC rules and copyright legislation, that would somehow provide a coherent and balanced national communications and copyright policy for CATV. Some basic principles emerged from this effort; stated in their simplest form they can be summarized thus:

The FCC would control signal distribution by cable systems as part of a national allocations policy and would protect some "exclusive rights" (i.e. copyrights) as part of this policy;

The copyright law would prescribe the degree and nature of cable operators' liability for the use of copyrighted programming that the FCC rules permitted them to retransmit; and

Since it would be a practical impossibility for cable operators to obtain negotiated licenses from all of the copyright owners of programming they could retransmit under FCC rules, the copyright law would provide a compulsory license to cover this situation. Cable operators would be required to pay copyright royalties that would be fair to copyright owners but not prohibitive to the operators themselves.

(5) The FCC rules of 1972 and the various copyright revision bills between 1974 and 1976 were based upon these principles, but they remained highly controversial. The statutory formula for determining how much the CATV operators would have to pay was probably the most contentious of the remaining issues. A breakthrough occurred on April 13, 1976, when the "two industries most directly affected by the establishment of copyright royalties for cable television systems" (H. Rept. 94-1476, p. 90), the National Cable Television Association and the Motion Picture Association of America, reached a signed agreement recommending copyright legislation. The cable provisions of the Copyright Act of 1976 are based directly on this compromise agreement.

Sections 111, 501, 510, and Chapter 8 (particularly section 801) of the Copyright Act govern copyright liability for the retransmission of copyrighted television and radio programs by cable systems. A fundamental principle adopted in this legislation is that this retransmission activity should be subject to compulsory licensing with statutorily prescribed royalties. The CATV compulsory license in section 111 is a statutory device which permits the cable retransmission of a copyrighted work

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without the consent of the copyright owner, provided that certain conditions in the law are met and prescribed statutory royalties are paid by the user. Programming originating from a cable system and not received from a television or radio broadcast station is not subject to compulsory licensing; licensing for program originations must be negotiated directly between cable system operators and copyright owners.

Briefly stated, in order for a cable system to be eligible to exercise a compulsory license, it must comply with certain requirements set forth in section 111 of the copyright statute:

"1. The compulsory license is limited to simultaneous (that is, non-taped) retransmission, with exceptions for certain cable systems located outside of the continental United States;

"2. Cable systems are prohibited from intentionally altering the content of, or the commercial advertising or station announcements accompanying, a retransmitted program, except in specific limited situations pertaining to television commercial advertising research;

"3. Cable systems may retransmit only those signals that they are authorized to carry under the signal carriage and program exclusively rules of the Federal Communications Commissions;

"4. Cable systems are prohibited from importing foreign television and radio signals pursuant to the compulsory license, with some exceptions for cable systems located within limited zones of the United States bordering Canada and Mexico and "grandfathered" cable systems; and

"5. Cable systems must file their notices of identity and signal carriage complement and Statements of Account with, and their statutory royalty fees to, and the Copyright Office."

Failure to comply with any of these conditions could invalidate the compulsory license and render a cable system's retransmission activity subject to full copyright liability.

Under the compulsory license, cable systems do not pay royalties directly to any copyright owner. Instead, the statutory royalties are paid to the Copyright Office. The statute authorizes the Copyright Office to deduct reasonable administrative expenses under section 111 from the collected royalties. These royalties are then deposited with the U.S. Treasury for investment in interest bearing U.S. securities. The collected royalties and accumulated interest are to be distributed at annual intervals among those eligible copyright owners who have filed claims with the Copyright Royalty Tribunal (CRT), a new legal entity created by the copyright law to oversee distribution of royalties and, under statutory standards, to review the prescribed royalty rates at periodic intervals.

The Copyright Royalty Tribunal is called upon to play two pivotal roles in the operation of this compulsory licensing system:

1. *Distribution.*—Under section 111(d)(5), copyright owners claiming royalties from secondary transmissions by cable systems are required to file annual claims with the CRT. The CRT then determines whether "there exists a controversy concerning the distribution of royalty fees." If there is no controversy, it proceeds to make distribution. If a controversy does exist, however, the CRT initiates proceedings "to determine the distribution of royalty fees"; under section 804, these proceedings must be concluded within one year.

2. *Rate adjustment.*—The CRT is given authority to adjust the cable royalty rates provied in section 111 in three situations:

(a) *Five-year review.*—Section 801 provides for a regular cyclical review of rates, beginning in 1980 and taking place every fifth year thereafter. Adjustments resulting from this review can be made only to reflect monetary changes from inflation or deflation, or changes in average rates charged by cable systems, and are subject to other constraints.

(b) *Increase by FCC in number of distant signals permitted.*—If the FCC changes it rules to permit the importation of more distant signals than those allowed on April 15, 1976, any party can petition the CRT requesting a rate adjustment proceeding and, subject to certain constraints, the CRT can adjust the rates applicable to those additional signals.

(c) *Change in FCC exclusivity rules.*—Similarly, if the FCC rules concerning syndicated and sports program exclusivity are changed after April 15, 1976, a rate adjustment proceeding can be triggered. The statute provides that "any such adjustment shall apply only to the affected broadcast signals carried on those systems affected by the change."

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*Experience of the Copyright Office and the Copyright Royalty Tribunal under the new law*

In the months following January 1, 1978, the date when the CATV compulsory licensing provisions of the new Act went into effect, the Copyright Office issued final regulations relating to the procedures for the submission of notices of identify and signal carriage complement and Statements of Account by cable systems. In addition, we issued Statement of Account forms to assist cable system operators in submitting the required information and calculating their royalty fee payments. In the Copyright Office, a Licensing Division was formed to review the documents and royalty fees submitted by the cable systems.

We have now been through three semiannual accounting periods since the new law came into effect. The following table is a generalized summary of our experience through September 30, 1979:

| Accounting period | Total statements of account recorded | Royalties deposited | Total royalties available for distribution[1] |
|---|---|---|---|
| January to June 1978 | 3,787 | $6,127,000 | $6,451,000 |
| July to December 1978 | 3,765 | 6,542,000 | 6,672,000 |
| January to June 1979 | 3,724 | 7,118,000 | 6,991,000 |

[1] These figures take account of: (1) interest income paid through August 31, 1979; (2) deduction of operation costs; (3) refunds for overpayments; (4) face value of securities purchased; and (5) balance on hand.

These figures indicate that there is very nearly complete statutory compliance by the CATV industry, and that more royalty fees are being generated than were originally estimated. Based on figures provided at the time the law was enacted, Congress estimated annual receipts of $8,700,000; the total figure of royalty fees deposited in 1978—$12,700,000—is roughly 46 percent more than the estimate.

The Copyright Royalty Tribunal has issued regulations governing the filing of claims to cable royalty fees. Following a public meeting at which claimants were given the opportunity to present arguments, the CRT determined that a controversy exists with respect to the distribution of cable royalty fees for both of the 1978 semiannual periods. The effective date of this determination was September 12, 1979, and the distribution proceedings (which must be completed by September 12, 1980), are now underway. The CRT has asked for briefs on several threshold legal questions which are crucial to settlement of the distribution dispute. These include:

(1) The extent to which broadcasters are entitled to claim royalties on the basis of authorship involved in bringing together a "compilation" in the form of a "broadcast day";

(2) The extent to which broadcasters are entitled to claim royalties as exclusive licensees of programs; and

(3) The standing of "certain or all sports claimants" to claim cable royalties.

On January 1, 1980, the CRT will begin its first cyclical review of compulsory licensing rates, including those for cable. If, as seems likely, the FCC should alter its distant signal or exclusivity rules, a broader CRT review of cable rates could also take place within the near future. All proceedings for rate adjustments must be completed within one year from the date they are announced.

*Proposals for amendment of Communications Act to establish a "retransmission consent" requirement*

Earlier this year the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce held hearings on H.R. 3333, a Bill to Establish Certain Requirements Relating to Interstate and Foreign Telecommunications (sometimes known as the "Communications Act rewrite"). Section 453(a)(2) of that bill would have made it illegal for any person within the jurisdiction of the United States to "rebroadcast or otherwise retransmit any program or portion of a program originated by a broadcast station without the express authority of such station or of the person who owns or controls the exclusive rights to the program involved."

To the Copyright Office this sweeping provision seemed wholly inconsistent with the Congressional intentions and goals incorporated in the 1976 Copyright Act. I therefore testified in opposition to the provision on June 28, 1979, taking the view that the provision would not work as intended, that the need for it had not been shown, and that in any case it would go too far and would, as proposed, undermine the existing copyright law. As I said in my prepared statement:

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"The testimony . . . on this provision makes clear that its purpose is to substitute complete copyright exclusivity for the compulsory licensing provisions of the Copyright Act. The proponents of the provision argue that this would permit competitive market forces to operate, that there would be one-on-one negotiations between cable operators and rights holders in programs, that free competition would produce fair compensation to copyright owners and would protect broadcasters' markets without freezing cable operators out of their retransmission activities.

"Had it been possible to enact legislation in the early or mid-1960's establishing complete copyright liability, or had the Supreme Court decisions gone the other way, the arguments by the proponents of section 453(a)(2) could well have been valid. But the growth of the cable industry, the responses to it by broadcasters and copyright owners, and the impact of FCC regulations and copyright legislation in the last ten years make the optimistic predictions of the proponents hard to accept. The Copyright Office has never been opposed to the principle of exclusivity as a starting point in any context; but at this stage in the game, its substitution for compulsory licensing of cable retransmissions would, we think, produce massive retransmission denials rather than consents."

*FCC rulemaking on cable television*

At about the same time the "Communications Act Rewrite" was being considered in Congressional Subcommittees, the Federal Communications Commission undertook a formal reexamination of its cable television rules. For the past two years, the FCC has conducted an economic inquiry into the relationship between television broadcasting and cable television. This inquiry, which is now complete, suggests that the elimination of the FCC's distant signal rules would have little significant impact on television service, and would provide an opportunity for greater diversity and competition both in the economic marketplace and in the marketplace of ideas. Similarly, the Commission's study found little evidence that elimination of its syndicated program exclusivity rules would threaten the supply of television programming.

Based on these conclusions, the FCC instituted a rulemaking proceedings to consider the elimination of both the distant signal and exclusivity rules. In its *Notice of Proposed Rulemaking in the Matter of Syndicated Program Exclusivity Rules and Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television,*[1] the FCC also asked for comments on a proposal by the National Telecommunications and Information Administration of the U.S. Department of Commerce (the NTIA) that the FCC adopt "retransmission consent" requirements in its amended rules.

The Copyright Office has taken essentially the same position before the FCC with respect to the retransmission consent regulations as it took with respect to the equivalent legislative proposal in H.R. 3333. While we have not challenged the fundamental constitutional and statutory authority of the FCC to promulgate regulations of the sort proposed, we have expressed serious doubts as to the appropriateness and wisdom of doing so—especially in the face of recent Congressional action that appears inconsistent, if not directly in conflict, with the proposal.

In its recent comments before the FCC, the NTIA has substantially clarified and qualified its earlier proposal. As we understand it, the NTIA is now suggesting that the "retransmission consent" regulations be superimposed upon, instead of superseding, the compulsory licensing provisions of the Copyright Act. All existing cable operations would continue to be subject to the copyright law, and the retransmission consent requirement would apply only to new operations and only to carriage of distant, non-work signals. For the future, cable systems would have to obtain retransmission consent form broadcasters, who could grant consent only if they had obtained the right to do so from the copyright owner; copyright owners could charge broadcasters for the retransmission right, and broadcasters could in turn charge cable operators for "consent." As a fall-back position, the NTIA comments suggest that "at the least, the Commission should afford non-network duplication protection in the top 100 markets":

"Retransmission consent with grandfathering is NTIA's preferred position. If this approach is not adopted, we request the Commission, to retain most of the top 50 market exclusivity provisions, those requiring cable to respect exclusive broadcast exhibition rights for non-network programs and to afford one year preclearance exclusivity for first run syndicated programs, and extend these provisions to the rest of the top 100 markets. . . ."

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[1] FCC 79-243 (released May 7, 1979).

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*Conclusions with respect to copyright law*

From the viewpoint of the Copyright Office, the present rather confused situation leads to several conclusions:

1. *Retransmission consent should not be adopted in any form.*—For the reasons already suggested, we do not believe that a "retransmission consent" requirement—whether in the form of communications legislation, copyright legislation, or FCC regulations—should be adopted. We do not believe that the scheme would work fairly and effectively in any form. In enactng the CATV compulsory licensing provisions of the Copyright Act, Congress feared that the marketplace would not be able to function adequately in this area, and concluded "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." [2] Based on previous experience and present contractual agreements, it is hard to imagine what has changed to justify qualifying or reversing this considered judgment on an industrywide basis. Even if it were possible to reconcile a retransmission consent requirement with compulsory licensing provisions of the copyright law, we doubt that the need for such a radical change in the legal framework of the cable industry can be shown at the present time.

2. *Changes in FCC Rules should be carefully considered.*—The 1972 cable rules were adopted by the FCC as part of a broad scheme that presupposed coordinated copyright provisions. The Commission's rules were intended to operate in conjunction with the cable television provisions of the copyright legislation then under consideration by Congress. Under this bifurcation of responsibilities, it was understood that the Commission would control signal distribution by cable systems as part of a national allocations policy and would protect some "exclusive rights" (i.e., copyrights), while the copyright law would prescribe the degree and nature of cable operators' liability for the use of copyrighted programming that the FCC rules permitted them to retransmit.

Although the details of the copyright law adopted in 1976 were changed considerably form those envisioned in 1972, this fundamental division of responsiblities still underlies the provisions of section 111 of the Copyright Act. These provisions recognized the need for flexibility in FCC regulation of cable, but they did not anticipate that the Commission would eliminate entirely either the distant signal or the syndicated exclusivity rules. Piecemeal revision of the regulations, rather than outright repeal, was clearly what Congress had in mind.

Congress entrusted to the Copyright Royalty Tribunal the task of adjusting royalty rates if the FCC rules were changed, but it did not expect the CRT to have to cope with the rates in a completely deregulated situation. On this assumption, it placed certain constraints on the authority of the Tribunal to adjust rates to meet a changed regulatory environment. Had Congress anticipated complete deregulation, it is doubtful whether those constraints would have been imposed.

3. *Changing industry practices and technology should be carefully studied.*—One of the strongest arguments put forward in favor of a retransmission consent requirement involves the changes now taking place in mass communications patterns and technology; the emergence of the so-called "superstations," the growth of pay-cable, the expanding use of satellites, the increasing concentration of cable systems in large urban areas, etc. There is no question that television broadcasting and cable services are undergoing vast changes, and that communications in the 1980's and 1990's is going to be substantially different from what have been accustomed to in the 1960's and 1970's. Eventually—and perhaps sooner than some might expect—these changes will necessitate fundamental revisions in the compulsory licensing provisions of the 1976 Copyright Act.

The Copyright Office does not believe that it is yet possible to make an accurate enough evaluation of these changes and their impact on copyright owner's rights to propose any broad revisions in section 111. We do believe, however, that studies should be undertaken without delay to evaluate these changes and report upon their implications to our Subcommittee. In our testimony before the Communications Subcommittee, we recommended that Congress expressly mandate the Copyright Royalty Tribunal to undertake an inquiry into "all aspects of the operation of section 111 and chapter 8 title 17 with respect to secondary transmissions made to, by means of, or from communications satellite systems." We repeat this recommendation here.

4. *The authority of the Copyright Royalty Tribunal should be broadened and strengthened.*—The Copyright Royalty Tribunal was the mechanism invented and directed by Congress to make the compulsory licensing provisions of the copyright statute work. The text of the Tribunal's effectiveness will come next year, and we

[2] H. Rept. No. 94-1476, p. 89.

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believe it is unfair to make any negative judgments until that testing period has passed and the Tribunal's accomplishments can be evaluated.

The difficulties of the task that Congress has given to the Tribunal cannot be overestimated. We believe that Congress should recognize the importance of a strong and effective CRT in the over-all scheme of compulsory licensing underlying the 1976 Copyright Act, and should do everything it can to support the Tribunal as an institution. Specifically:

(a) A modest but important step would be to enact legislation giving the CRT subpoena powers in both its royalty distribution and rate adjusting functions. The failure to provide this authority was probably an oversight in the final legislation adopted in 1976.

(b) The Subcommittee also should consider whether to remove the constraints now imposed on the CRT's authority to adjust rates in response to changes in FCC rules. The Copyright Office would favor broader rate-making authority than that now provided in section 801(b)(2) (B) and (C).

5. *The copyright status of satellite relays.*—When the new copyright law was enacted, most cable systems received their distant signals through over-the-air reception by means of a large central antenna or via microwave relay. Because of the natural limitations inherent in over-the-air reception and the high transmission costs accompanying the use of microwave, distant signal carriage was limited to those distant stations within close proximity to the cable system. These factors assured against the oversaturation of any particular signal's programming on a nationwide basis.

Recent technological developments and a relaxation of FCC common carrier rules have resulted in the greater use of space satellites in the transmission to cable systems of distant signals. By this method, television and radio broadcast signals are intercepted near their point of origination and then transmitted via common carrier to a space satellite. These signals are beamed back to Earth and are then available to those cable systems that operate earth stations.

Because of the nationwide dissemination potential of space satellite transmissions, a cable system's transmission expenses are the same whether the signal originates from a nearby distant community or from across the nation. This economic fact underlies the growth of superstations. These superstations are generally independent stations serving one of the major U.S. markets; a superstation's program schedule generally is comprised of syndicated programs, sporting events, and movies. These superstations are particularly attractive to cable system subscribers and have resulted in the centralization of distant signal carriage. Although some superstations are unwilling participants, others welcome their new status and have sought advertising revenue on a nationwide basis in response to their expanded audience.

Section 111(a)(3) of the copyright statute exempts from copyright liability secondary transmissions "by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others. . . ."

In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of superstations and satellite relay services when it exempted traditional common carriers from copyright liability. In fact, the underlying policy reasons for compulsory licensing may well be inapplicable here, since the carrier may be in the position to act as a central agent in obtaining retransmission rights in the relayed programming. For this reason, your Subcommittee may wish to consider an amendment limiting the scope of section 111(a)(3) to exclude transmissions made to, by means of, or from a communications satellite system.

6. *The adequacy of the fee schedule.*—No one can argue that the fee structure of section 111 was based on any scientific analysis of market value, comparable rates, or potential damage. It was the result of a series of compromises and nothing more. The copyright owners now complain bitterly that their revenue is too low, to which the cable systems reply that a deal is a deal. Neither argument quite answers the problem.

The Copyright Office believes that your Subcommittee should appropriately consider the adequacy of the rates in section 111, but that any revisions in the schedule now would be premature. We are convinced that the real answer to this problem lies with a strong, experienced, well-informed Copyright Royalty Tribunal. We believe that the CRT should be free to set the rates on the basis of an objective determination of what is a fair return to the copyright owner without placing an undue burden on the cable system.

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III. OTHER ISSUES

While recognizing that this hearing is directed solely to the issues of performance rights in sound recordings and cable retransmissions, I should like in my prepared statement, to call to the attention of your Subcommittee four other specific issues that have arisen with respect to the new law and that are of concern to the Copyright Office.

*Compliance with the jukebox provisions*

The Copyright Office is seriously troubled by the apparent lack of compliance with the requirements of section 116—the compulsory license for performances of music on coin-operated phonorecord players—on the part of many jukebox operators. The provisions of section 116 reflected a compromise that was agreed to by the jukebox industry and that involved very simple procedural requirements and a very modest royalty fee. Although the leaders of the industry have been very cooperative in seeking to obtain compliance, it appears that less than half, and perhaps as few as one-fourth, of the jukeboxes in the Unites States have been licensed in accordance with the copyright law. It seems to us that this is a matter that should be of concern not only to law enforcement officials but to the Subcommittee responsible for the legislation.

*Works made for hire*

Ever since enactment of the new law, the Copyright Office has been receiving complaints about the policies adopted by certain publishers and producers in their dealings with independent authors, artists, and photographers. Under the definition of "works made for hire" a person preparing a work on special order or commission can be considered an "employee for hire" only if the work falls into certain categories, and then only if the parties expressly agree in writing that the work shall be considered a "work made for hire". This provision, like others in the new statute, was intended to give authors and artists greater protection than they had enjoyed under previous laws. Apparently, however, some publishers (probably a limited number, mainly in the periodical field), in their zeal to tie down all rights, including reversionary rights, have insisted that authors sign employment for hire agreements where the authors felt this was not justified either legally or ethically. This has led to strong representations that, at least in some fields, authors are in a worse position than they were under the previous law, and that the "work made for hire" provision should be drastically revised. The Copyright Office is convinced that a problem does exist here, and that it is serious enough for the Subcommittee to look into.

*Design protection*

Part of the unfinished business of copyright law revision is the protection of ornamental designs for useful articles. As stated in the House Report on the 1976 Act, the deletion of Title II (the portion of the revision bill dealing with designs) did not resolve the issue. "Therefore, the Committee believes that it will be necessary to reconsider the question of design protection in new legislation during the 95th Congress. At that time more complete hearings on the subject may be held and, without the encumbrance of a general copyright revision bill, the issues raised in Title II of S. 22 may be resolved."

Earlier this year, Mr. Railsback introduced H.R. 4530, which incorporates the provisions of Title II. The Copyright Office strongly supports this legislation, and urges that the Subcommittee schedule hearings on it as soon as possible. If hearings are held, we hope that they will also include consideration of the related questions of protection for typeface designs and "book designs", both of which remain issues of concern to the Copyright Office.

*CONTU recommendations*

Finally, I should like to endorse the recommendation of the National Commission on New Technological Uses of Copyrighted Works (CONTU) that "Congress should immediately enact legislation to repeal section 117 of the 1976 Act. . . ." The Copyright Office believes that all of the Commission's recommendations are worthy of consideration, but we are particularly concerned about the constraining affect of section 117, which basically freezes the protection of copyrighted works in computer systems to whatever the law was before 1978. Because of this provision, the entire area of computer uses of copyrighted material is clouded with uncertainty. We agree with CONTU's conclusion that, within the limitations of fair use, the use of any copyrighted work in a computer system should be subject to the copyright owner's control, and that section 117 should be repealed as soon as possible.

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Ms. RINGER. Thank you, Mr. Chairman.

First, as to the question of performance royalties in sound recordings, I will take seriously your admonition. Since this is an area that has been thoroughly explored by the subcommittee in the past, I will not go into a lot of detail; at least not in my introductory remarks. This is also true of cable, a long history, but the history in this area goes back to the beginnings of this century.

As you well know, Mr. Chairman, there have been many bills introduced to provide a performane right in sound recordings. In 1972, this subcommittee took a historic step which led to legislation; it brought sound recordings into the copyright law and gave them, for the first time in our history, a Federal copyright, but it deliberately confined its protection to what is known as antipiracy legislation, and left for future consideration the question of performance rights in sound recordings.

This decision was continued in the 1976 act with the thought that the Copyright Office would make an extensive study of this subject that would prepare the way for further consideration by your subcommittee and, as you said in your introductory statement, this is what happened. We did prepare a 1,300-page study which I think probably gives you enough basis for considering further legislation on this subject.

I would call your attention particularly to the patterns of foreign laws that have been evolved in this field. We are in fact one of the very few industrialized countries that does not give some sort of protection in this field.

My prepared statements includes a summary of Mr. Danielson's bill, H.R. 997, which I will omit but I will be happy to answer questions, if you have them on that, Mr. Danielson. For present purposes, I would simply like to reiterate my very strong support for the principle of performance rights in sound recordings and now add to it, I think, for the first time, my unqualified support for your legislative proposal. I have no qualification in supporting H.R. 997.

The Copyright Office believes that the lack of copyright protection for performance since the commercial development of phonograph records has had a dramatic and destructive effect on both the performing and the recording arts. Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of what they call a tax.

But we believe that any economic burden on the users of recordings for public performance is heavily outweighed not only by the commercial benefits accruing directly from the use of copyrighted sound recordings but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performance.

In all other areas, the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits for the user. Sound recordings are creative works and their unauthorized performance results in both damage and profits. To leave the creator of sound recordings with-

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out any protection or compensation for their widespread commercial use can, in our opinion, no longer be justified.

We do not believe that the argument that sound recordings are not writings in the constitutional sense and that performers and record producers are not authors in the constitutional sense, can any longer be considered tenable. The courts have consistently upheld the constitutional element of sound recordings for protection under the copyright law. Your passage in 1971 of the sound recording amendment was a legislative declaration of this principle and it was reaffirmed, of course in the Copyright Act of 1976.

If sound recordings are the writings of an author for purposes of protection against unauthorized duplication, they also must be considered the writings of an author for purposes of protection against unauthorized performance. The strongest argument that broadcasters and other users have, lies in the so-called promotion area. They have argued that the benefits accruing to performers and record producers from the free air play of sound recordings represent adequate compensation in the form of increased record sales and other benefits such as increased attendance at live performances and increased popularity of individual artists.

I think this argument has some merit, Mr. Chairman, but it doesn't seem to me that it answers the larger problem. It may be valid to argue that air promotion can benefit hit records and star performers but it does not seem to me that this is enough justification for the outright denial of protection to the entire range of sound recordings and individual performers. That denial, in my opinion, is inconsistent with the underlying philosophy of the copyright law; that of security, the benefit of creativity to the public, as the Supreme Court has said, by the encouragement of individual efforts through private gain.

I do believe that the Danielson bill is good legislation and that it should be favorably considered by your subcommittee.

Turning now to the question that occupied us earlier this morning, that of cable television. I hardly need to remind you, Mr. Chairman, of the immense problems that this question raised throughout the more or less 25-year history of the revision effort that led to the 1976 act. I believe the cable was the single most important and difficult issue and its solution was the key to passage of the 1976 act. There is no question about that in my mind either.

I can't really understate or overstate the importance of what you did in section 111 and chapter 8. It was one of the most remarkable accomplishments that I have ever seen. Congress was called upon to chart a course through a legislatively unexplored area, and to have enacted any legislation on this subject was a remarkable accomplishment, and to have enacted something that is working, and that is, in my opinion, coherent and viable, is a stupendous accomplishment. I can't really over-praise it.

Taken as a whole, however, the cable provisions of the new law, which represented an amalgamation of deals, is far from perfect. I think that no one at the time the law was enacted could claim perfection for it, and I am certainly not here to do that now.

I believe there have been changes in communications and in the economy, in the 3 years since enactment. I am not sure that they

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are quite as sweeping as they have been represented to be. I am not sure that they were all that unanticipated. But be that as it may, there have been changes, there is no question about it, and the result is that, as I think was probably predictable, section 111 is being subjected to some challenges. Some of these challenges have merit, I am not going to argue that they don't, and I feel your subcommittee should consider them all carefully.

But it does seem to me that there are three points which I do outline in my paper, Mr. Chairman, that you should use as a guide in considering what is probably the most difficult problem you have before you.

First of all, what I am really saying is that your subcommittee should assert jurisdiction here. I think that this is certainly at least half, and maybe even more than half in some respect, a copyright problem, and that it is entirely appropriate for your subcommittee to put your hands on this problem and come to grips with it. I believe that is important.

There are communications aspects and there are copyright aspects and I think your subcommittee should consider it an essential role to come to grips with the copyright aspects.

Second, as I said, this problem did not come from the blue. This subcommittee has wrestled with this problem since 1964. I remember very well—I know the chairman does, too—and I suggest that it is important before wading into the depths of this that you look deeply at the background and history of this problem. It is complicated but it is not that complicated.

I assume you can see the main theme. It is important that you realize where this came from. I believe, as a matter of fact, that many people wrestling with the communications law last summer didn't realize that the Supreme Court had held in two major decisions that cable was free of copyright liability and that we have to come from that point and from some other points. This has a long and difficult history, Mr. Chairman. I do feel that it is important for you to know that.

There are now two major underpinnings of the legal framework of cable, the communications law and FCC regulations under the communications law and the copyright law and the regulations of the Copyright Royalty Tribunal and the Copyright Office under the copyright law, and you have to know how these interact and where they came from.

Finally, and perhaps most important, and I know I am telling this to people that know it very well—many of the cable provisions in the copyright statute represent an extraordinarily delicate balance, resting on existing FCC regulations, current communications technology, and prevailing industry practices.

So when those change, the mission changes. But recognizing that these circumstances were going to change, the committee did provide some flexibility by authorizing the Copyright Royalty Tribunal to make adjustments under certain conditions. This was, I think, quite intentional.

Recognizing that cable was going to grow, first of all, you wrote into section 111 a formula—it by no means is perfect, it is very complicated, it was a formula that was intended to provide more revenue as cable grew. It was based on distant signal equivalents

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which would increase as cable grew both in terms of subscriber revenue and in terms of carriage.

But also, where the situation changed at the Federal Communications Commission or generally, the Copyright Royalty Tribunal was intended to be a device whereby adjustment could be made to keep the situation from being skewed too much, to use Mr. Geller's phrase.

Where a particular provision of the copyright law now is under attack, for one reason or another, on the grounds that circumstances have changed, I think it is important for you to determine whether that change is great enough to require new legislation rather than allowing CRT, the Copyright Royalty Tribunal, to try to come to grips with the problem.

Now, there may well be areas, Mr. Chairman, where the CRT's regulatory authority is not great enough. It is not broad enough to make changes that you as Congress recognize are justified, and in that case I think the corollary question is whether or not you should try to legislate or try to expand the CRT's authority to make the adjustments on a case-by-case or situation-by-situation basis.

Those are my three basic points and let me expound on them a little bit more. In my paper I do try to review the history and contents of the present copyright law in a very general way, but in a way that is comprehensible and if I may urge those who aren't already familiar with this to study this, you will have some better idea of where we came from.

Deal after deal after deal, which resulted in a kind of consensus understanding, reached around 1970, well in the late sixties and early seventies fundamentally, based on the premise that the FCC would regulate to a certain extent, and would provide exclusivity by one means or another, plus an understanding that there would be copyright legislation that would not create exclusive rights but would in effect create a compulsory license with a body to collect license fees and distribute them and perhaps to make adjustments.

This was the consensus that emerged then before the Supreme Court had decided its second case. At the point that the second case was decided, which was in early 1974—this was the famous *Teleprompter* decision—I think there was literally no feeling that exclusivity could be sought through the copyright channel, that the Supreme Court had held there were no copyrights at all, and what began to emerge after that decision was a pretty clearcut consensus that the FCC would give a certain degree of exclusivity, protect market geographic rights within markets, and that on top of that, the copyright law would provide a compulsory licensing system to assure some fair payments with a Copyright Royalty Tribunal, as it emerged, that would adjust the payments, sooner or later.

I think that is enough to say now about the history and contents of the law, although I will be more than happy to answer questions on this.

I think you might be a little bit interested in what our experience has been under this law. As you know, the law sets up semiannual accounting periods, and we have been through three of them in the Copyright Office. Under the scheme that emerged in the law, the Copyright Office acts as a conduit for license fees. We

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have provided statement of account forms, they are submitted with the fees on a semiannual basis, and then we pay them into the U.S. Treasury where they gain interest, while the CRT is deciding how to distribute them.

The CRT has in fact gone through a proceeding and is now, as was mentioned earlier today, in the process of going through its first proceeding to distribute fees. There is a dispute and I think a lot of us hope that there wouldn't be, that there could be agreement as to the distribution of the fees, but it seemed apparent, and I think the rulemaking proceedings that have been published from the CRT make this clear, there were at least three legal issues that were not settled in the law that would have to be settled before they could really distribute the fees.

Perhaps I am overly optimistic, Mr. Chairman. I do feel that once those issues are settled, if they can be, then they will be able to distribute the fees.

I have a table on page 17 of my statement, for whatever it is worth—I think it demonstrates two things which I think are significant. One is that the cable industry is complying with the law. There are between 3,500 and 4,000 cable systems in existance in the United States and we are receiving around 3,700 to 3,800 statements of accounts, which I think is about right. I would say maybe not 100 percent but close to it. And I would say that it certainly includes all of the systems that are of large or medium size.

The other point I want to make here is that your subcommittee in its report, projected, based on figures that the industry has given you, receipts during the first annual period, the first two semiannual periods, of $8.7 million, and we did in fact receive $12.7 million, which indicates some growth in the cable industry, but it certainly was 46 percent more than they anticipated, and that is significant in itself.

I have covered the Copyright Royalty Tribunal and I won't go into that anymore. There have been two developments in the last year that are, I guess why we are here really. The first is the communications law rewrite, this massive, very praiseworthy endeavor by the Communications Subcommittee, to attempt to rewrite the 1934 Communications Act. As you well know, Mr. Chairman, in the House version, H.R. 3333, there was a rather unrefined provision, for retransmission consent, that as you said in your introductory statement, would have been the equivalent of completely exclusive copyrights.

It would have covered all local signals, it would have no grandfathering, it would have been straight across the board retransmission consent, and I think you can understand why I opposed that. It wasn't from any question of principle.

Let me say in passing here, that I know of no finer public servant in the executive branch than Henry Geller. He is a superb statesman and I hate to disagree with him, I really do. He frequently has enormous vision with respect to communications matters.

I do disagree with him on this issue, with some regret. Henry and I go back a long way on this, in fact to the first cable case in the Supreme Court where the Copyright Office, and he was then

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with the FCC, worked together on a brief that the Government might provide. And I believe that by and large we agreed at that time that exclusivity was desirable, this was fine—this is not exactly what the Government brief said—but the Justice Department had slightly different views then as now.

But we have been over several mountains and valleys since then, Mr. Chairman. The Supreme Court has acted not only in the communications but in the copyright field, and I just don't feel that we can go back to 1964 or to 1968 or whenever and think now in terms of complete exclusivity in this field. It is apparent from Mr. Geller's testimony that he is now making qualifications on what was being appropriated in H.R. 3333.

The other aspect which is of more immediate concern to you, are the proposals for revision of the FCC regulations, the deregulation proposals, and I would say that there are three that are of concern to you. Three proposals—one is to abandon the distant signal restrictions, and I am not in any way opposed to this in principle or otherwise—although I think when you consider that we have satellites now, and obviously the physical, restrictions on transmissions, are breaking down, you have to allow a certain amount of freedom in importing distant signals. The consequences of that, of course, are something else.

The second proposal is to do away with the syndicated program exclusivity rules. Without going into the technicalities of this, Mr. Chairman, these are an underpinnning of your legislation of section 111 of the copyright law. If they were done away with completely, I think that you would have to take account of this.

I am not sure what the response would be, but it would seem to me that, as I say in my statement, you contemplated changes in the FCC rules. I feel that they were contemplated on a piecemeal basis and not complete abandonment, and I am not at all sure that the premises on which section 111 rests can still be sustained without some sort of syndicated exclusivity rules by the FCC. That is something you would have to consider very, very carefully.

The third is the proposal by Mr. Geller, by the NTIA, to the FCC to adopt by regulation the retransmission consent, which they had a form of in experimental regulation back in the sixties, requiring a cable system to get permission, consent, from a broadcaster before being able to pick up the broadcaster's signal.

When you probe into it, it goes beyond that. It isn't just consent from the broadcaster; the broadcaster can't give consent unless it has authority to do so from the copyright owners. It has to have a contractual right to give that consent. So in effect you are creating a copyright. If you do, however you call it, whoever does it, it is still a copyright, and this we have opposed in the FCC as well for more or less the same reasons that we did in the Commerce Committee.

Now, Mr. Geller has refined his proposal, and he did so this morning. First of all, it only applies to distant nonnetwork signals. He would not apply exclusivity to local signals or to network programing.

Second, as he made clear, he would grandfather everything now. Of course, this would go a long way toward answering one of the arguments that I have made, that you can't really just do the two

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without undermining the copyright law completely. I do think that this answers some of my problems but by no means all of them.

He also didn't bring this out this morning but it did seem clear from his reply statement to the FCC, which is in your record—he has a fallback position which he hinted at this morning—to allow the exclusivity rules to stay in effect and perhaps change them a little bit as an alternative to retransmission consent.

He makes it clear, and he did this morning, too, that this is one alternative; that if FCC doesn't change the exclusivity rules, then his urging of the retransmission consent requirement in the FCC context is not quite as urgent.

Let me come to my conclusions, and just run them down for you. I do have a few suggestions to make for your consideration. They start on pages 21 and 22.

My own feeling, and I must say that I share some of the observations that were made in the questioning this morning—is that retransmission consent is just too radical and that we don't have enough experience simply to throw away all of our work that is reflected in section 111 and chapter 8 of the copyright law and institute in effect a completely exclusive right.

Second, as I have already indicated, I do feel that you should look very closely at what the FCC does or does not do in this area. I think section 111 rests on the FCC regulations. If the FCC regulations change, then the underpinnings of section 111 are certainly effected.

I think that you should also take account very carefully of changes in the communications patterns, in the economy, of broadcasting and cable television and the various technological miracles that are taking place all around us. I am not sure we can gage these now. There is a great deal of talk about superstations, which I will mention again in a moment. I can't really gage myself from where I sit on how important they are. They may be important or they may just be another factor in the mix. I can't really conceive of them becoming a dominant form of broadcasting, but they certainly will be significant. They are now.

I do think that sooner or later you are going to have to change section 111, but I am not sure that time has come.

I guess my fourth point is my strongest one, at least as far as I feel, and that is that you created the Copyright Royalty Tribunal to deal with this problem, to some extent and they haven't had a chance to work yet. Their crunch is coming next year. Everything comes together in 1980. We will know a great deal more by the end of 1980 about whether or not the CRT can function, whether or not it is able to function, under the constraints it is now given.

I don't know. I was asked whether I was optimistic or pessimistic in the Communications Subcommittee, and I said I was neither, we just didn't know what their possibilities are going to be. But I don't think that we should do anything to weaken it. It does seem to me you created this body with the thought of trying to make the adjustments, the fine tuning that was necessary under the cable provisions you adopted and the CRT should be given an opportunity to function and my guess is that up to a point it will function all right.

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I do think there are two things you could do. One, I think is modest, and could be important to them, and that is to give them a subpena power, and I just don't remember, Mr. Chairman, but my guess is that it was just an oversight that they were not given a subpena power. I believe that is probably correct, and they should have a subpena power.

Mr. KASTENMEIER. Why, if I may interrupt, would they need a subpena power?

Ms. RINGER. They are called upon to make very, very searching investigations, and they are met now with "we can't tell you because of antitrust laws, or because we just don't want to give out our business secrets," and I can't speak for them, but my impression is that they feel that they are groping a bit in the dark and that at least if they had that as a potential weapon that they would get a good deal more. I think it was really just an oversight that they weren't given it.

The other thing is, of course, much more sweeping. There were parts of the overall final compromise that resulted in section 111 and chapter 8, constraints that were written into the statute on what the Copyright Royalty Tribunal can do when the FCC changes its rules. And in another case, in their regular cyclical review there are constraints. I would be inclined to urge that you take a look at those constraints, which were sort of a dicker; they were dickered out and agreed upon among the parties. But especially if the FCC is going to make changes of the sweeping kind that they have talked about, you should take a very careful look at what power the CRT has to respond to those changes. There are some constraints in there that are probably unnecessary and this is something the subcommittee could certainly look at.

Now, the question of satellite relays has come up time and again. This of course, concerns superstations in one context, but clearly the future of cable itself rests to some extent with the satellite technology. I am troubled, Mr. Chairman, by the wording of section 111(a)(3) of the statute which was intended to insulate the telephone company only—that was really the only thought that anybody had in mind at that time—from any liability under the statute. They were sending signals over telephone lines and they didn't want to be liable and people were not urgently wanting them to be liable, so we wrote an exemption into the statute that covers this. Common carrier is not used in this subsection but that was the intention.

I am troubled that that might be applied to cable relay, satellite relay services and it does seem to me that certainly at the least they should be liable for something. They should come under the compulsory license and it does seem to me that you could consider the possibility of making them fully liable. They do have a certain point of control, and it seems to me that this is something that you could very well look at.

Finally, Mr. Chairman, just to comment on the adequacies of the fee schedule.

Mr. Geller ducked on that, and I guess I should, too. No one really knows what a fair fee is here. No one can argue that the fee structure in section 111 was based on any scientific analysis. No

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one made any market study or tried to compare what fair value was in this field or anything like that.

No one could really prove what damage, real or potential there was. The percentage amounts, the whole scheme, and the amounts in the scheme, were all the result of a dicker, a deal. The copyright owners now complain, and I can't really disagree with them, that they are not getting enough, that their revenue is too low. It may well be. The cable systems say that a deal is a deal, that you came in and made a deal and you can't complain now. I don't think that really answers the question either.

We do believe that you should consider the adequacies of the rates that are being generated under section 111, but I do come back to the point that any revision in that schedule, which was very hard fought and hard won, is premature. And this is the basic position of the Copyright Office, which I will come back to—that the real answer to this problem lies in a strong, well informed effective Copyright Royalty Tribunal.

I just can't agree with Mr. Geller that this is the heavy hand of Government. This was intended to function in a way that I think should be the ultimate goal of this legislation. The CRT should be free to set rates on the basis of an objective determination of what is a fair return to the copyright owner without placing an undue burden on the cable system.

We should cling to that, Mr. Chairman, as our basic goal.

Thank you very much.

Mr. KASTENMEIER. Thank you very much, Ms. Ringer, for that illuminating discussion of these issues. I know that in the interest of time you did not get into two or three other issues which you commented on in your statement. One of them is compliance. Compliance seems to be going very well with cable and the fees generated, at least as far as proceeding as well as was anticipated.

However, I gather that is not true in some areas, such as juke boxes. I wonder if you would very briefly discuss that?

Ms. RINGER. Yes, I did bring it up, Mr. Chairman, on page 28 of my statement. This is a matter of considerable concern to us.

Mr. KASTENMEIER. It certainly is to us and we wrote the law. We have to assume compliance with it, and if it isn't being complied with we are concerned.

Ms. RINGER. Yes. The estimates—no one can really say with any degree of assurance how many juke boxes there are out there—but the estimates that were consistently made through the hearings were for between 400,000 and 500,000, and at an $8 per box per year fee, that would presumably be generating $3.2 to $4 million. Our experience has been otherwise.

Let me say first of all, as I do in my statement, that we have gotten an awful lot of cooperation in trying to get the word out and get the forms out and so forth, from the AMOA. I have absolutely no complaint about the AMOA and there are a lot of juke box operators out there who are complying. But the fact is that in 1978 we only licensed 138,500 juke boxes.

Mr. KASTENMEIER. For the record, AMOA stands for Amusement and Music Operators Association.

Ms. RINGER. I am sorry. This is the trade association of the juke box industry.

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In 1979 the number actually went down. It was roughly a decrease between 6 and 10 percent and I think part of the reason for that, Mr. Chairman, what comes back to you as comments from the people that deal with us, is why should I pay when Joe Blow down the street is not paying? My competitor, the other juke box operator in town. And, the statute leaves compliance, as far as the civil matter is concerned, to the copyright owners. But I believe that the figures just can't be read any other way; that there is a great deal of willful infringement for profit going on which is a crime under the statute, and it does seem to me that this is something, it bothers me a great deal that after all these years of effort we have finally got a statute and there is a certain amount of scofflaw attitude out there, that your subcommittee should take account of, the Copyright Office should take account of, and perhaps law enforcement officials.

Mr. KASTENMEIER. May I recommend, I don't want to burden these proceedings with elaborate inquiry into this particular point, but may I recommend that the Copyright Office be in further touch with us in terms of analyzing the problem with respect to this particular section—section 116 compliance—and to see whether there are any initiatives we or you should take which might improve that situation.

Ms. RINGER. We will be very happy to do that, Mr. Chairman.

Mr. KASTENMEIER. I have a number of questions, but I am going to just ask one or two and yield to my colleagues. If there is time at the end, we can pursue some of the others.

What happens legally if the FCC would impose, or enact a regulation relating to the retransmission consent which conflicts with the copyright statute regarding compulsory license? Where are the parties left legally as you see it?

Ms. RINGER. Well, initially, before the proposal that Mr. Geller and NTIA were making was refined, I had the same completely foggy reaction that your question implies. I just couldn't imagine where they would be left.

But, as I understand it now, from what he is now proposing, the copyright law would be left alone and would continue to operate; how effectively is another matter. But it would still be left in place.

That would certainly be true with the grandfathered system and it would also be true, I guess, with respect to all systems that would still have to pay because your legislation does not distinguish between local and distant or network and nonnetwork signals as far as basic liability is concerned. It does with respect to the amount you pay, but every system in the United States is subject to the compulsory license and I assume that would still be the case. What you would do, as I understand his proposal, would be to superimpose a retransmission consent on new systems starting up. I gather his main targets are the big urban systems, which are given rather good treatment in your legislation because they mostly now carry local signals, and they would have to stand and bargain, but they would also have to pay compulsory licensing fees under the copyright statute, as far as I can see.

Mr. KASTENMEIER. Incidentally, I do want to say I concur absolutely with your characterization of the changes that have taken place. They were not entirely unanticipated. That possibly some

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changes would take place was known even if the degree was not precisely forecast. Nonetheless, at the time we wrote this we agreed on the formula and wrote the act, with the awareness that the satellites did exist and we certainly contemplated change or growth in cable. I don't think anybody disagreed with that. So whether the changes have been so radical as to suggest that they were well beyond our scope of our view, I think is not entirely true.

I thought your characterization of that was right on point.

One of the questions you addressed yourself to was whether, in terms of the Copyright Royalty Tribunal review of the rate structure for cable, we had—as I say—alluded to the point that we did perhaps deliberately intend to confine the guideline language, and the scope of how freely the Tribunal could act to make a change in these situations. I am wondering whether you have considered either any language changes to free up that section or whether some reinterpretation of the section in terms of legislative history at this point might be useful to respond to whatever claims of inequity there may be?

Ms. RINGER. You are really asking two questions and I will try to answer them separately.

Yes, we have considered some language, Mr. Chairman, and it would be fair to say that the Copyright Office would support a complete freeing of the Tribunal from any restraints, although there undoubtedly would be considerable objection on the part of some sections of the cable industry, because the restraints were thought through and were intentional by all means.

The other aspect is whether or not you could do something through a legislative expression that might help the Tribunal or reinforce it. I guess the one thing is the possibility that the FCC would do away with rather than merely change, its rules. This is not a very strong argument, but it can be argued that that does not allow the Tribunal to be triggered, and I think that that should be made clear, that if the FCC did anything that drastic, to simply abolish its distant signal and/or exclusivity rules, that the Tribunal would certainly be triggered in that situation and would be free to act within the constraints that the statute provides.

Mr. KASTENMEIER. Thank you.

I would like to yield to my colleague from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, Ms. Ringer. As usual, you have been a great deal of help to us. You have loaded us down with some more problems.

Ms. RINGER. As usual.

Mr. DANIELSON. Which is why it is our privilege to work with you.

I would like to ask you a couple of questions which come to my mind, just for my information, on page 17 of your table. In looking at it, I note that the number of statements of account recorded has diminished slightly in each of the three time spans. Can you give some explanation for that?

Ms. RINGER. Yes. I am not sure I can give you any definitive answer.

Mr. DANIELSON. It occurred to me there might be some of the systems consolidated.

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Ms. RINGER. That is the answer I would give you; they are becoming what are known as MSOs, multisystems.

Mr. DANIELSON. I thought that might be it. This is the first time I have seen anything like this and I was interested.

On royalties deposited and royalties available for distribution, it looks like our deposits make money before they are distributed. Your footnote explains that is interest, I gather?

Ms. RINGER. Yes, it is substantial too.

Mr. DANIELSON. Quite substantial?

Ms. RINGER. Yes, sir. The first semiannual royalty fees deposited amounted to $6,127,000 and we have been paid interest. They have been paid interest on that twice, to the tune of close to $400,000.

Mr. DANIELSON. That is quite an item. Well, it is of interest. I don't think we anticipated that, nor did we anticipate, of course, that the amount of deposits would be 50 percent greater than the projections. No way. But this is why I think it is important that we live with the system for a little while and find out how it works, what the facts are rather than guesses, and then I think we can do a little more intelligent job of making any necessary changes.

I would like to ask one other little thing or two others on this point.

What is the time span, approximately, between the receipt of payments and distribution?

Ms. RINGER. Well, the first year, the first phase of this got off to a kind of rocky start because of some ambiguity in the statute. I think that, as best I can describe what is going on in the tribunal now, they are having a distribution proceeding based on the first two filings.

Mr. DANIELSON. Does that mean that nothing has yet been distributed?

Ms. RINGER. That is right. We have reinvested all that money and it is still gaining interest.

Mr. DANIELSON. You anticipate that there will be a distribution roughly how soon? I am not holding——

Ms. RINGER. They have to distribute by September 12, 1980. That is 1 year under the statute from the date they declare a controversy and the controversy was declared on September 12, 1979.

Mr. DANIELSON. Now, do you have any data as to the overhead costs, the operational costs of the CRT?

Ms. RINGER. Not of the CRT. That is not my department. The operating costs of the Copyright Office, which we have also taken off the top, have been running around $108,000——

Mr. DANIELSON. One eighty?

Ms. RINGER. $108,000 for 6 months. It is about 220,000 per year.

Mr. DANIELSON. Per year?

Ms. RINGER. Per year.

Mr. DANIELSON. Roughly?

Ms. RINGER. Roughly.

Mr. DANIELSON. And that has already been——

Ms. RINGER. That is right.

Mr. DANIELSON. I presume that the operating costs for the tribunal have also been taken from these deposits?

Ms. RINGER. I don't think that anything has been deducted yet. I guess they will have to be.

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Mr. DANIELSON. Maybe the growth factor then will be reduced somewhat by the time we get to it. Your costs have been removed?

Ms. RINGER. Yes, that is right.

Mr. DANIELSON. Thank you.

You said that the CRT crunch will come in 1980. Partly that is due to the time for payout?

Ms. RINGER. Partly.

Mr. DANIELSON. What other factors?

Ms. RINGER. The royalty fee rates for all of the compulsory licenses under the statute, that is, cable, juke box, mechanical royalty and public broadcasting are to be reviewed by the tribunal in 1980.

Mr. DANIELSON. Which is an added chore then?

Ms. RINGER. Very definitely.

Mr. DANIELSON. And they will be done with that by or supposedly by September 30, 1980?

Ms. RINGER. That is the distribution.

The royalty rate adjustment proceedings, as best I recall, they have 1 year—so that would be the end of 1980.

Mr. DANIELSON. Just about 14 months from now then?

Ms. RINGER. Yes, sir.

Mr. DANIELSON. That is what you are talking about?

Ms. RINGER. Yes, sir.

Mr. DANIELSON. You mentioned subpena power for CRT.

You cannot speak for them.

Do you know of any type situation where subpena power is really called for?

Ms. RINGER. Really, Mr. Danielson, I don't think I should comment because I don't know enough about their immediate problems. I know they have a problem, but I don't know any detail.

Mr. DANIELSON. I understand that and I respect your reluctance to comment where it really isn't your ball game.

We are going through, in the Congress, a period in which there is a tremendous resistance to expanding regulatory authority. In fact it has almost become antiregulatory. If you read today's Post, you will get a glimmer of it.

Strengthening a regulatory agency, giving it broader powers, giving it subpena powers, calls for sort of an uphill pull and I am sure before we get anything like that we are going to have to get quite a bit of testimony.

When we put together this CRT, one of the many reasons was that there didn't seem to be any option. ASCAP has played a role in certain types of property and BMI, and so forth, and they provided a nongovernmental office through which royalties could be collected and distributed. We couldn't do that.

I think we all kind of wished that we could, but there didn't seem to be anything.

Do you know whether ASCAP or BMI or any such agency has any kind of a power which would be analogous to a subpena power? Do they ever have to make an investigation?

Ms. RINGER. They obviously have to police the performances. They are in the performing rights area. They have to police the performance of works that they hold nonexclusive licenses for or the licensing power for, and they have no legal authority.

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On the other hand, when they are able to find—I think this bears on the chairman's question earlier—when they are able to find criminal activity, in other words, where what is going on is criminal, then they can and sometimes do ask for help from the U.S. attorney's office or the local law enforcement officials.

This is the only power they have though. They are completely private organizations.

Mr. DANIELSON. I asked the question for what is probably obvious reasons.

If we get around to that subject matter at the right time, somebody is going to say if ASCAP doesn't need it why does the Government or CRT need it, and these questions have a way of getting back to people who are concerned, so maybe they will have an answer at that time.

How about the independence of the CRT? Does it have sufficient independence so far as you can observe?

Ms. RINGER. Yes, sir, it is somewhat vulnerable because it is so independent, but I do think this decision that your subcommittee made, to make it completely self-sustaining, not put it under any executive branch or other agency, was probably a wise one.

Mr. DANIELSON. And, lastly, I gather from your statement that when we add it all together, your recommendation would be that we resist any temptation to tinker with the setup at this immediate time and wait a little longer for a little bit more experience before we start performing any kind of surgery on the Copyright Act?

Ms. RINGER. That is a fair statement with the qualifications that I mentioned; the possibility of giving the CRT somewhat broader authority or at least taking some of the constraints that are now on it off.

This might be a good idea.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. Thank you, Mr. Chairman. My questions will be relatively limited and brief.

My understanding is that the reason there has not been distribution of the roughly 50-percent-higher amount than had been anticipated, which has been collected, is because there has been some controversy between the copyright claimants and that this has not yet been resolved?

Ms. RINGER. That is right.

Mr. GUDGER. But it is required to be resolved by that September date which you mentioned earlier?

Ms. RINGER. That is right.

Actually, if I may amplify a little bit, it may be of interest to you. I believe that the parties did make a genuine effort to try to resolve their differences, and if I can remember them, the issues that emerged, that couldn't be resolved, were whether or not the broadcasters have an independent copyright in their putting together what they call a broadcast day, and making this into a compilation which would give them basis for claiming a part of the pot, part of the distribution.

Then the question of whether or not also the broadcasters, as exclusive licensees of the copyright owners, are in themselves copy-

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right owners and are therefore entitled to a share or conceivably all of the moneys coming from the use of copyrighted materials for which they have exclusive licenses within their broadcast area, and finally the status of sports, the extent to which sports could be a part of this and the difference, if I may, the difference between the sports entrepreneur and the broadcaster who does the actual presentation of the program, which one is entitled to claim, or whether both are entitled to claim, and so forth.

These were just three difficult nuts to crack and, as it turned out, the tribunal has asked for briefs on that.

Mr. GUDGER. I want to thank you for your analysis on pages 15 and 16 of the circumstances under which the CRT is and has authority to adjust royalties, particularly for the comment on this 5-year rule. That is a cyclical rule?

Ms. RINGER. Yes, sir.

Mr. GUDGER. That each 5 years, if the act were unchanged, each 5 years there would be a reassessment, as I understand it?

Ms. RINGER. Not a complete one, Mr. Gudger. The cyclical review must be limited to the effects of national monetary inflation or deflation, or shifts in the amounts that cable systems are charging for retransmission services as against other services.

Those are the two areas that the Tribunal is limited to looking at. It can't make a complete reevaluation and that is a definite constraint that it is subject to.

Mr. GUDGER. I notice that you do point out that if the FCC changes its rules to permit implementation of more distant signals, than those allowed on April 15, 1976, anybody can petition the CRT requesting a rate adjustment proceeding to take that into consideration, and there are some other exceptions?

Ms. RINGER. Yes; and it is very likely that the FCC will change its rules now, so that I would answer Mr. Danielson's earlier question that conceivably they would have that on top of their regular cyclical review and their distribution. The CRT is going to be very busy in 1980.

Mr. GUDGER. What you really are saying, that in 1980 there is going to be a fulfillment time in which we are able to really measure where we stand under the existing authorities and whether or not there needs then to be further authority beyond the subpena powers and the investigative powers which you mentioned earlier; whether or not there are really going to need to be substantial changes.

Ms. RINGER. Certainly we will know a great deal more by the end of 1980 than we do now.

Mr. GUDGER. Let me ask you this: I like this experience of serving on this committee and in this particular range of effort because I am learning an entirely new vocabulary, and I have become reasonably well acquainted with many of these terms, but you used a new one today that I really enjoyed. You said that the 1976 act represented a comprehensive amalgamation of deals. I thought that was really very, very useful.

May I ask one question for my general enlightenment?

Was it the basic concept of the burden to be borne by the cable TV units under the licensing system, the compulsory licensing system, that they would bear an apportionment based pretty much

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on the total number of households using cable, as against the total number of households being served without cable?

Ms. RINGER. I am not sure it was ever really broken down in that way, Mr. Gudger.

Certainly there were a lot of statistics being discussed at the time these final provisions were written into law, and part of the $7 million target figure that emerged was based on a house-by-house basis.

But I honestly believe that the hope was, certainly on the part of the motion picture industry, it was that cable would grow and that it would continue to increase its percentage of viewing homes and that in fact the motion picture industry would benefit from this because there would be added subscriber revenue and the larger cable grew the larger the pot would grow.

Mr. GUDGER. One final question.

Have you observed as to whether or not the cable TV companies have been able to comply with the reporting requirements and have, in fact, obviously complied in payment of all schedules and fees that are exacted; otherwise we would not see this overage. Would you comment on that, as to whether or not the method of getting reports is simple and effective and whether or not it is relatively effective and whether or not you think that there has been a compliance? There has been a suggestion earlier that in juke boxes we certainly don't see compliance.

Ms. RINGER. The statutory requirements for reporting in the cable area are so much more complicated than those for juke boxes that there is no comparison. But, we did get out some forms that seem to be working well and with your permission I would like to make them a part of the record. They might be of some interest to you.

Mr. GUDGER. I would personally like to see a copy of those forms just for my own enlightenment.

Mr. KASTENMEIER. Without obejction, the forms will be received by the committee and we will evaluate them and if they should be part of the record, we will include them.

[See app. 1B at p. 452.]

Mr. GUDGER. I will yield back the balance of my time.

Mr. KASTENMEIER. In fact, it is well into the noon hour. I think we will terminate the proceedings, but we would like to, on behalf of the subcommittee, thank you for your presentation and informative discussion of the problems confronting us and we will be back to you, no doubt before the next couple of months are out, on this question.

Ms. RINGER. Thank you very much.

Mr. KASTENMEIER. This concludes today's hearings on copyright matters. I also wish to announce that we will have another hearing on November 26 with a long series of witnesses principally on the same two issues regarding cable and performance rights.

Until November 26, the committee stands adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

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# COPYRIGHT ISSUES: CABLE TELEVISION AND THE COMPULSORY LICENSE

MONDAY, NOVEMBER 26, 1979

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

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

Present: Representatives Kastenmeier, Danielson, Gudger, Railsback, Moorhead, and Sawyer.

Also present: Bruce H. Lehman, chief counsel; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order this morning for the second day of hearings on copyright legislation and copyright issues. The two most prominent issues that appear to remain as a result of the 1976 copyright law are: The effective operation of the existing compulsory list concerning the statutory provisions for cable television, and whether or not the performer's royalty ought to be created.

Today we will address the first question. We are very pleased to have a distinguished panel of people who have firsthand experience with the operation of the cable television provisions in the new law. I would like to greet them and have them come forward as a panel. Incidentally, we will be joined shortly by a couple of our other colleagues.

They are Mr. Jack Valenti, president, Motion Picture Association of America; Mr. Vince Wasilewski, president, National Association of Broadcasters; Mr. Herman Land, president, Independent Television Association; and Mr. Bowie Kuhn, who is the commissioner of baseball, representing all major professional sports in connection with this hearing this morning.

Gentlemen, I greet you on behalf of the committee, and ask you to come forward, please.

With the exception of Mr. Land, I think the witnesses have been before the committee before, so we greet you Mr. Land. We are very happy to have you here.

I think I will call on Mr. Valenti, if that is agreeable, to start off the proceedings this morning and testify first. Mr. Valenti.



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## TESTIMONY OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA; VINCENT WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; HERMAN LAND, PRESIDENT, INDEPENDENT TELEVISION ASSOCIATION (IN-TV); AND BOWIE KUHN, COMMISSIONER OF BASEBALL—REPRESENTING ALL MAJOR SPORTS LEAGUES

Mr. VALENTI. Mr. Chairman, I have presented this committee with a formal statement. What I am going to say this morning, I will be extracting from that, points that I think should be made so I tell you I am not speaking from that formal statement.

Mr. KASTENMEIER. Your statement will be received and made a part of the record.

Mr. VALENTI. Thank you, Mr. Chairman, thank you very much. That is an absolutely propitiously timed entrance, Mr. Gudger. I am just about to start with some modest eloquence, I hope.

The theme of what I really want to talk about briefly today is very simple. It has nothing to do with the battle between the so-called broadcasters and cable. It has to do with program suppliers, the people who create TV programs in America who want to be treated fairly. That is all we are asking. We do not want any special privileges. We do not want to have anything not shared by others in a competitive marketplace. We ask of this committee and this Congress one simple thing, we want to be paid fairly for what we create and what we sell, and we want to be able to compete fairly in the marketplace. Nothing more, nothing less.

Now, I would like to begin with an essential fact. Whenever a cable system brings in a distant signal, not local signal, but distant signal, that cable signal is competing with local television stations in the community for the eyes and ears of the audience. One person can only watch one channel at a time. Therefore, when anybody brings in a distant signal, that system then becomes a direct competitor of the TV station in the market. I make that clear, because that forms a competitive marketplace.

But cable has been given an unfair advantage by Congress in this marketplace. By law, cable is bringing in distant signals and is paying on the average rate of 1 percent of its gross revenues for all the programing it uses from those distant signals. The value and the worth of each individual program has absolutely no bearing on what they pay. The compulsory list completely disregards what we call marketplace value.

Now on the other hand, TV stations directly competitive with those distant-signal cables are paying 25 to 40 percent of their gross revenues for programing.

Consider another point, basic cable produces nothing, creates nothing original, makes no investment in creative programing. They simply take off the air what they choose, what they want, they duplicate what already exists, they live and exist on what other people have invested in, what other people have created, and what other people have paid for.

But I think the thing that is really racking and malignant to us is the artificial pricing of a product in the competitive marketplace. In the future, I am convinced this will have the most injurious effect on program suppliers to be able to continue to operate in that marketplace. Ultimately, gentlemen, it will claim its final

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victim, that is, the families in your districts who watch free TV. As surely as the law of economics exists, the program suppliers will in time do whatever puts a spike in the heart by artificially setting prices for a product which prices have no relationship to the worth and value and cost of that product.

What will happen, the businessman will vacate the marketplace.

Now why is that so? You have to understand that the several hundred or so independent TV programers do not, I repeat, Mr. Chairman, do not make money on prime-time network shows. They hope and pray that their prime-time network shows will exist long enough on prime time, 3 to 4 years, to accumulate enough segments so that they can go into what we call syndication, that is, taking their program off network, or a new program that has never been on the network, and take it literally, can under your arm, one station at a time, to sell it individually to those stations. That is called syndication.

Annually that market is anywhere from $450 million to $500 million. It is from that reservoir of sales that each independent TV programer hopes to extract the cost and investment in his program and maybe make profit.

However, there have occurred two events which are catastrophic to the future program suppliers and to the future of a free competitive marketplace as we engage in that marketplace. First, the Congress passed the Copyright Act, and by jingoes I know a lot about that, Mr. Chairman, you know better than anybody about that Copyright Act. What it did was give basic cable an extraordinary privilege not granted to others in the competitive marketplace. They got an artificial low price for that which they sell to their subscribers, a price for programing far below the true worth of that product.

Let me tell you why I say that. On the average and throughout this country, cable systems receive about $8 a month from their suppliers. A few minutes later I will tell you about some who charge more. This cable system is receiving some $96 a year per subscriber in revenues. But almost half the cable systems in this country are paying 6 cents per year per subscriber for programing. You heard me correctly, 6 cents per subscriber for programing. A third of the cable systems in this country are paying up to 72 cents per year per subscriber, while they are receiving $96 per year per subscriber. Is it any wonder that the giant corporations in this country, grandly profitable, are moving into the cable area and buying up everything they can get their hands on? The Los Angeles Times, American Express, Teleprompter, they are all getting into it.

I brought with me a recent headline, "Canadian Cable TV Enters U.S." They quote a number of those companies and they say it is explosive. (See app. 1H at p. 676.)

I talked the other day to a Canadian cable executive and I said, "Why are you coming down here?"

He said, "The guys in cable have a license to steal, and I want to get into it."

That is why they are coming in big numbers and buying in great numbers. This so-called license to steal—not my words—has warped the marketplace.

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Suppose a Government agency determined the Oscar Mayer Co. had to sell half its product at one twenty-fifth the amount it sells to other customers? Mr. Danielson, suppose the aerospace companies in your area were forced to sell half their products at one twenty-fifth the amount it sells to others? Suppose, Mr. Gudger, the American Enka Co. had to sell half its product at one twenty-fifth the amount it sells to other customers. I think you would say it is an unwarranted and unfair situation.

I sit on the board of an airline. Were the CAB to deregulate TWA by requiring it to offer its product at one twenty-fifth the amount all other airlines are selling their product for, that would not be a fair situation.

What we have is a marketplace which is out of kilter.

The second event that promises catastrophe is a recent preliminary decision by the FCC to repeal the so-called exclusivity rule, whereby an independent programer can license his program to an independent television station who has exclusive use of that program in his marketplace for a limited amount of time. That rule has been in effect over 7 years. How on earth that rule has harmed cable is simply beyond my comprehension. The program supplier, on the other hand, depends for his very life on that syndication market. Without it, he is going to die.

Suppose there is no syndicated exclusivity rule, Mr. Lear wants to sell "All in the Family" to a station in Los Angeles, Nashville, and Madison, but the cable system in that area can pick up "All in the Family" from Ted Turner's satellite. So the TV station in Madison, Nashville, or Los Angeles says to Norman Lear:

> I think your price of $1,000 a segment is fair, but I am not going to buy the program. This guy is going to bring it in on cable, the number of viewers goes down, the same program I am showing, so I am sorry, I do not want the program.

Or he might say, "It is not worth $1,000, but I will give you $150, but because you are fractionalizing my audience, that is about all I think it is worth."

I bring that up because that is the real world, Mr. Chairman, Norman Lear, Grant Tinker will come out here and spell in bloody detail what that spells out for them, because of the artificial low pricing of a product which has no relationship to its worth and second, the FCC avowed intent to ban an exclusivity rule.

What will be the reaction? The same as that of Oscar Mayer, the aerospace industry, or the Enka Co. when they have lost the control over how they market their product. When the risks of investment far outweigh their promise of reward, they will do what every prudent businessman in America will do, they will get out of the market or find some new way to market their product. In the case of TV programers they will probably go to the pay route, to pay TV, videocasettes, et cetera, and all this technology will multiply. In a few years, I promise you, and I do not feel I am a Cassandra—but I am giving you what the Lears and Tinkers expect when cable is extended to more than half the homes in America. The political crime in this independent TV field, you can be sure that a majority of your constituents will inevitably have to pay for what they are now getting to see free. It is a marketplace reaction brought about solely because the law of economics is far more powerful than any rule of a parliament. Businessmen will not long

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sell what they make at prices far below what is the worth of that which they have created.

But you say, can't the copyright law tribunals do something about this? Let them fix it up. The answer is, they cannot. First, the amount of the copyright pool in 1979 is going to be maybe $14 million plus. The syndicated market is about $450 to $500 million plus. If you double or triple the copyright fees, it would not begin to compensate for the loss. If fees were doubled, losses in syndication would be about $200 million or more. There is no way increases in the copyright fee will stop the hemorrhaging loss.

By the way, Mr. Danielson, you were interested in Ms. Ringer's statement that revenues had gone to some $15 million, and Ms. Ringer thought that was good. Some people might have the idea that was because the fees had been raised. What happened is very simple: the percentage of fees paid remained the same. It is just that the estimate of the number seizing on cable went beyond the estimates. It is an increase of people hooked on cable—if that is the right term to use—but the percentages paid by cable remains unmoved, unjarred.

Second, the copyright tribunal does not have the power to make the necessary increase in fees even if it wanted to. I have gone into considerable detail, Mr. Chairman, in my formal statement to commend that fact. It is technical, but it is instructive. For the copyright tribunal today is almost powerless to deal with the marketplace adjustment that has to be made.

You will hear from the cable people later. They will tell you how the adjustment can be made. They do not tell you that 15 million people who are on cable today will never be affected by any change in cable royalties. No cable system in America will pay 1 penny more for all perpetuity as long as that cable system never carries more than the complement he is allowed to carry, no matter what the tribunal does.

I should point out an instance of economic lunacy that has all of us shaking our heads. Today, Mr. Chairman, anybody can organize a common carrier company, pick up stations it wants to, get it up on the satellite, hurl them with the speed of light to systems all over the country, and the common carrier company gets 10 cents from Mr. Customer per month, while the people who put in exhaustive hours of labor get practically nothing.

In short, someone, and I use the word grudgingly, someone who merely parasites makes 10 to 15 times in revenue from merely delivering the signal, than the people without whose capital investment and labors there would be no new programing. If one wants to paint a picture of lunacy, consider in short they are pilfering our property rights, and we are doggone unhappy about it.

How long can a marketplace survive when those whose money and creative industry have been treated shabbily, when outsiders can come in and do better than you. Where is the programer's reward? This is what happens when a Government agency is given authority to set prices with no relationship to anything in the marketplace.

Henry Geller sounded the theme, and the one echo has to be listened to, because to turn a deaf ear to this is to turn a deaf ear to the real world of economics.

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One final point, you will hear later from Mr. Russell Karp, one of the most intelligent and able businessmen. He runs Teleprompter well and profitably. He will no doubt tell you, if you listen to the pleas of the suppliers, he will have to raise the rates. Ask him the following question: Mr. Karp, have you raised your rates in 1978? If you have, have you done this merely to keep pace with inflation? I will tell you the answer. In 1978, Mr. Karp raised his average subscriber rate to $10.44. In 1976, the rate was $6.66; in 1977, $7.72. This means he raised rates in 1978, 49.36 percent over what he charged in 1976. During that same period of time, inflation only went up 16.4 percent. This means he raised rates in 1978 some 35 percent over 1977; 35 percent over 1977, but in that same period of time, the inflation rate was 9 percent. In other words, Teleprompter raised its rates four times the rate of inflation.

They used to have a political administration in this town which said do not watch what we say, watch what we do. Apply that to Teleprompter and others in the cable industry, when they say they have to raise their rates. They have already raised their rates, and they will raise them higher no matter what you do.

I leave you with three points: please give proper power to the copyright tribunal so it can make adjustments. I have gone into some suggestions in my formal document to you. If you do not do that, I promise you in time you will drive most of the independent free programers out of the market.

No. 2, mandate in the law the right of a program supplier to have the right of exclusivity, licensing his program to a TV station for a limited period of time in that local community. Do not force him to give up control over how he markets his product.

No. 3, amend the law so that whenever a common carrier sitting up on one of those satellite delivery systems to cable stations in America, put it in the law that common carriers must be paid full copyright liability for all the programs he lifts up off the station and hurls to stations all over America.

Gentlemen, all we are asking is a free competitive marketplace. Give us a chance to compete.

Thank you.

[The prepared statement of Mr. Valenti follows:]

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

MPAA POSITION

ON

CABLE RETRANSMISSION

OF COPYRIGHTED PROGRAMMING

SUMMARY AND TABLE OF CONTENTS

The Copyright Act of 1976 grants cable operators a compulsory license to carry local and distant television signals "where the carriage of the signals ... is permissible under the rules, regulations, or authorization of the Federal Communications Commission."

That Act's cable provisions were premised upon the assumption that the FCC's syndicated exclusivity rules would maintain the rights of television stations and program suppliers to enter into exclusive agreements for the licensing of programs for a limited period of time in local television markets.

This delicate balance is now endangered at the FCC which is being urged to abolish its syndicated exclusivity rule. In addition, new technologies, such as satellite transmission of programs to cable systems have now challenged some of the basic concepts of the 1976 Act. And there is need to grant the Copyright Royalty Tribunal increased flexibility and authority to provide for more equitable cable royalty rates and for the administration and distribution of copyright funds.

MPAA, therefore, strongly supports amendments to the Copyright Act to:

(1) require cable systems to respect agreements between program owners and television stations for the exclusive use of programs.
.....pages 3-10

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(2) grant the Copyright Royalty Tribunal increased flexibility to establish cable royalty rates and to administer the provisions of Section 111 of the 1976 Act. MPAA favors the abolition of the arbitrary cable rate structure to be replaced by negotiated cable fees for retransmissions of broadcasts with cable retaining its compulsory license.
.....pages 10-16

(3) require satellite carriers to obtain permission from copyright owners for retransmission of superstation broadcasts.
.....pages 17-18

MPAA implores the Congress to review its copyright policies and enact such legislation as may be necessary to maintain a viable television marketplace to insure that the viewing public will enjoy quality programming in the decades ahead.

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Mr. Chairman, Members of the Committee. My name is Jack J. Valenti. I am president of the Motion Picture Association of America, Inc., whose members are the major producers and distributors of theatrical and television programs in the United States. I am also the president of the Association of Motion Picture and Television Producers, Inc., in Hollywood, which has a membership of more than 80 companies that are primarily originators, producers and syndicators of television programming as well as producers of theatrical films. Attached to my statement is a list of both MPAA and AMPTP members.

May I, first, commend you and the committee for holding these hearings and giving me the opportunity to discuss certain provisions of the Copyright Act of 1976, over which you, Mr. Chairman, labored for so many years.

Today we are living with developments that I confess I did not foresee four years ago when I dealt with some of the provisions of Section 111 of the 1976 Act.

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So I ask this committee's consideration of certain issues that in large part flow from rapidly changing and sometimes unexpected events. I want to discuss three proposals that are of great importance to the program producing and distributing industry. These would

- -- mandate in the Copyright Act syndicated exclusivity rights which are necessary to maintain the delicate balance now existing between cable systems, television stations, and copyright owners.
- -- abolish the statutory cable royalty fee schedule, revise the functioning and the authority of the Copyright Royalty Tribunal to permit flexibility in establishing royalty rates, and make other improvements in the Act; and
- -- provide an effective method of protecting property rights which are being usurped by satellite carriers who retransmit superstation broadcasts.

These proposals are of equal concern, in my judgment, to television broadcast stations, particularly independent stations, and to millions of television viewers.

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SYNDICATED EXCLUSIVITY

MUST BE MANDATED IN THE ACT

First, I want to talk about syndicated exclusivity; what it is, how it relates to the Copyright Act, and why it is important to the program supply industry, to broadcast stations and to the public generally.

A syndicated program is a program licensed directly to individual television stations for exhibition in their own local markets. Syndicated programs do not include shows presented by the national television networks or live presentations. They may be shows that were previously on a national network or new, "first-run" syndicated programs never before shown on television. They generally consist of series and individual special programs produced for television, and feature films that have played in theaters.

Programs are the bricks used to build the syndication market structure, and exclusivity is the mortar. Exclusivity is what holds it all together. A broadcast station does not want to license a show that is being exhibited by a competing station or local cable systems. The value of a program is determined in large part by whether the exhibitor can obtain exclusive rights. This is particularly important to the broadcaster who must identify his channel in the minds of viewers with particular programs and keep them tuning to his station for his programs.

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When the Federal Communications Commission first began to deal with the emerging cable television industry, it recognized that the syndication market is crucial to the program supply industry and that exclusivity is an essential element of this market. The FCC therefore issued regulations which maintain the exclusive value of syndicated shows and prevent cable systems from robbing local stations of the exclusive rights they purchase from syndicated program distributors. These regulations are exceedingly, and, in my judgment, unnecessarily, complex. Their application depends on the size of the television market in which they are exercised, and in some cases on the type of program to which they are applied. In very simplified, but generally accurate language, they operate as follows:

(1) Cable systems may not import a syndicated program from a distant station for one year after the date on which the show was first licensed to a station anywhere in the United States. This provision prevents cable systems from destroying the value of a program by importing it into a market before the supplier has had an opportunity to license the show to a local station.

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(2) Cable systems may not import a syndicated program from a distant station during the term of a local station's exclusive license. This provision prevents cable systems from destroying the exclusive rights of local stations and enables program suppliers to assure their licensees that the value of the programs they license will not be diminished.

These provisions are generally referred to collectively as the FCC syndicated exclusivity rule.

Section 111 of the 1976 Copyright Act in effect incorporates the FCC syndicated exclusivity rule within the compulsory licensing structure established for cable television systems. The House Report on the 1976 copyright bill stated that "any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry," and went on to "caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue."

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Despite the clear and unambiguous message from Congress that the FCC should not upset the "delicate balance" established by the new Copyright Act, the FCC set out to "deregulate" the cable industry, and proposed to delete its syndicated exclusivity rule almost before the ink on the new Copyright Act was dry. This action prompted another stern warning from the Copyright Office which filed comments with the FCC on September 17, 1979, stating: "When this provision [the cable compulsory license] was enacted, it was not anticipated that the Commission would totally eliminate either the distant signal carriage or syndicated program exclusivity rules....Thus, we respectfully but strongly suggest that the Commission exercise caution in determining the extent of any rule changes which may result from these proceedings."

Whether or not the FCC ultimately eliminates the syndicated exclusivity rule, this FCC experience demonstrates that it was unwise to incorporate within the Copyright Law regulations of an administrative agency not directly responsible for the execution of copyright policies. The delicate balance created by Congress in the Copyright Act should not be dependent upon the shifting policies of an agency charged with carrying out the objectives of a wholly different statute.

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I submit to you that maintenance of the balance struck by the Copyright Act can be assured only by writing syndicated exclusivity provisions, which are essential to that balance, into the Copyright Act itself.

It is a truism that when the Government suspends the self-regulating dynamics of the marketplace and substitutes planning and compulsion, it assumes some obligation to create a regulatory structure that is fair to those affected. An unrestricted compulsory license granted to cable operators to pick up and use broadcast programs would deprive program owners of the right to determine the priority of program exhibition between competing media in a market.

As I stated earlier, exclusivity is an integral and essential element in the marketing of television programs to the nation's television stations. Without exclusivity, the entire syndicated program market will be jeopardized. Cable royalty payments into the copyright fund will amount to about $15 million in 1979. But that will certainly not be enough to take up the revenue slack from the syndication market which will produce more than $500 million in revenues to copyright owners this year.

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Program production is at best a high risk industry. Only about one in four motion pictures is a box office winner and television series have an even higher risk - - about one in forty "pilots" makes it to the domestic syndication market as a full series.

Keep in mind that the syndication market is not dominated by "Hollywood Giants," but is the route taken by hundreds of small independent production companies who seek a share of the $500 million syndication market in order to recoup their capital investment in programming, and possibly make a profit to reinvest in future programs.

The A. C. Nielsen Company reported that in November 1978, there were 307 syndicated series each being transmitted by five or more television stations. These programs were being offered by 150 different syndicators, or an average of two series per syndicator. This "Report on Syndicated Programs" indicates that 98 of the 150 syndicators were distributing only one series. Among the single programs syndicated by these 98 entities are: Big Blue Marble, Wild Kingdom, Lawrence Welk, The Gong Show, Nashville Music, Soul Train, Sanford and Son, Hee Haw, Carol Burnett & Friends and Last of the Wild.

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It is from the syndication market that funds are created to make more programs. Program producers generally invest their own or borrowed money to develop their creative ideas hoping to license their program to a network. But, unless a series runs a minimum of three years on a network, and accumulates at least ninety episodes, it will probably have little value in the domestic syndication market. The fees paid by networks rarely pay back the initial investments.

It is in the syndication market that creative production talent is rewarded. For example, the compensation of creative talent depends to a large extent on payments under collective bargaining agreements for each showing of the program subsequent to its original telecast. To the extent that any such showing on a television station which must purchase a free-market license from the copyright owner is replaced by an importation of the same program by cable, which must pay only a token compulsory license fee, the talents of the creative segment of the motion picture industry will go unrewarded.

The Motion Picture Association strongly supports legislation to bring about a free and competitive marketplace, but the political reality is that there is no great prospect that this committee will deregulate cable and require it to obtain the consent of program owners or broadcasters to retransmit broadcasts. That being

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so, we have no choice but to urge that the syndicated exclusivity rule be mandated into law to maintain some balance, some equity in the marketplace.

My plea is simple. It is that this Committee in its future consideration of the Copyright Act of 1976 should take note of the probable deletion of the syndicated exclusivity rule by the FCC; recognize that the provisions of Section 111 of that Act did not contemplate the abolition of that rule; and determine that a syndicated exclusivity provision be written into permanent law as part of the Copyright Act. I urge this because the syndicated exclusivity rule undergirds and maintains a vital market - - although not a completely free and fair market - - for television program material.

## THE STATUTORY FEE SCHEDULE SHOULD BE ABOLISHED AND THE TRIBUNAL'S AUTHORITY EXPANDED

It must be recognized that the present authority of the Copyright Royalty Tribunal to review rates is exceedingly limited.

Under the Copyright Act the Tribunal cannot adjust the statutory rates for any signal now permitted by the FCC's regulations. The existing rates for presently allowable signals are frozen in stone for all time.

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In other words, the percentage fee rate now in the Copyright Act for each distant signal carried by a cable system today cannot be raised. If a cable system carries no more distant signals than are presently authorized under the FCC rules as of April 15, 1976, then the Tribunal simply can't raise that percentage fee - - from now until the end of time.

New cable systems will receive exactly the same benefits from the low statutory rates that existing systems now enjoy. This means that if the present 14 million cable homes increase to 50 million - - even if the Tribunal were to determine the rates are inequitable and excessively low - - the Tribunal cannot do one thing about the rates so long as the cable systems never carry more than the signal complement allowed today by the FCC.

If the FCC decides to relax its distant signal regulations, copyright royalty fees can be raised only if the cable system decides to carry more distant signals than were allowable under the April 15, 1976 rules. Any increase in the royalty rate would be applicable to extra signals carried, not to those signals currently allowed.

Cable systems can now import distant independent signals, according to markets, as follows:

Markets 1-100----------2 distant signals

Markets below 100--------1 distant signal

Outside of all markets---Unlimited distant signals

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The fact that the FCC does not now place signal carriage restrictions upon cable systems located outside all television markets means that royalty rates for those systems, which make up 40% of all cable systems operating today, can never be changed, no matter how many distant signals they import. The rates for these systems are frozen in perpetuity. Also, any additional distant signals that the FCC has permitted by way of individual waiver are excluded from the Tribunal's rate review authority. This waiver exclusion has proved to be an unintended loophole of major proportions through which cable systems, having importuned the FCC to substantially relax its waiver standards, are now able to import additional distant signals without triggering a royalty rate review as Congress clearly intended.

What happens to cable royalty payments to copyright owners if the FCC abolishes the syndicated exclusivity rule?

If the FCC abolishes the syndicated exclusivity rule, cable systems will pay new rates only for programming that would not have been allowed under the FCC rules now in effect. Most cable systems are located outside the television markets where the exclusivity rules apply, or are grandfathered, so their royalty rates cannot be increased. For cable systems whose royalty

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rates may be increased, how does this Tribunal or any other agency really decide what is a fair price for a program? There are no real guidelines for that. If the Tribunal does not then require the cable system to pay the local TV station's going rate for that program, the loser is the program owner.

I do not want to belabor this. I would point out one other fact. Under the Copyright Act, the Tribunal's authority to adjust the royalty rates to reflect inflation and maintain the constant dollar level of royalty payments protect only against a lowering of the constant dollar rates now paid by cable systems. So long as subscriber rates keep pace with inflation, as is now the case, the practical effect of this authority is nil.

Our plea is that program owners receive fair and adequate compensation for the program material they are compelled by law to make available to cable systems. As long as television broadcast stations and their program suppliers must live with the Copyright Act of 1976 and its compulsory license for cable, we believe that the Copyright Act should be amended to eliminate the royalty rate fixed by statute.

Let me explain. The program market can never be free so long as compulsory program licenses for cable are mandated by law. A compulsory license is an abomination

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to the free market concept. I am, however, not so naive as to assume that we can wish the compulsory license away. But we can live with it only if the artificial, unrelated-to-fact, arbitrary, statutory royalty rate schedule in the Copyright Act is abolished. It had no economic basis in fact, but was a compromise reached under political duress. It amounts to a subsidy for cable that the government has imposed on program suppliers.

Cable has now reached the point that it does not require a subsidy. Lest you think that cable is mainly a struggling small business, consider these facts revealed in the 1979 Cable Television Industry Financial Survey (prepared by Warburg Paribas Becker):

1. The compound average growth rate of cable systems, with respect to the number of subscribers, is nearly 20% per annum for the past 27 years.

2. The ten largest CATV companies now own and operate systems which, in the aggregate, have over 5.7 million subscribers, or about 44% of the total. The twenty largest operators account for over 50% of the industry's current total subscriber base.

3. The historical sales value of CATV systems based on the strength of basic cable services was $300 per subscriber. CATV systems are now selling for $325 to $500 per subscriber.

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4. Based on financial data for 13 publicly-held CATV companies, WPB reports that the companies as a whole have continued to strengthen their overall financial position through steady growth. Increased revenues (26% on average), greater bottom line profitability (70% on average) and improved cash flow (24% on average) have been used to increase their base equity (17% on average).

Does Time Inc., which owns huge cable interests, need a subsidy? Are Teleprompter, Cox Cable, the Los Angeles Times-Mirror, or a dozen other multi-million dollar cable corporations in need of a subsidy? Indeed, one would be hard put to name a cable company in the United States that is not flourishing with the highest cash flow of any commercial enterprise in the country. Financial houses now seek them out, asking for the opportunity to lend them money. Wall Street experts describe cable as the safest and most profitable investment today. The New York Times recently reported that the U.S. cable industry is attracting large Canadian investors who are anxious to cash in on fat cable profits.

I see no reason why the program production industry should be compelled to subsidize a dynamic, growing, and profitable cable industry.

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Absent artificially imposed price restraints, but subject to a compulsory license to assure program availability, cable program buyers and sellers could bargain for the price of product. In the initial stages, of course, there would be differences of opinion and very likely there would be need for arbitration. An impartial arbitrator could be named in the statutory revision to settle such disputes. Perhaps the Copyright Royalty Tribunal could perform that function as it now does under Section 118 of the Copyright Act. But, in a year or two, in my judgment, market forces would prevail just as they do now with ASCAP and BMI, both of whom negotiate industry-wide prices for their program material.

This leads me to my third proposal. It would also be useful for this Committee to examine those provisions of the Copyright law under which the Copyright Royalty Tribunal must perform its duties. To what extent the Tribunal should be given specific authority to supervise registration and royalty payments by copyright users deserves your thorough consideration. It is a fact that there is widespread non-registration, underpayment and nonpayment of royalties by cable systems. Through no fault of the Tribunal itself, copyright payment and distribution of the royalty fund is a snare and a delusion. To this very date, no copyright owner has received one penny.

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SUPERSTATION RETRANSMISSION MUST
BE SUBJECT TO COPYRIGHT LIABILITY

Finally, I want to address a problem that is truly a development of the technological advances to which I referred in the beginning of my statement. It is certainly something that I did not foresee only a few years ago when we were discussing and considering the shape of what became the Copyright Act of 1976. I refer to the advent of superstations and the delivery of their broadcasts by satellite to cable systems throughout the country. That delivery is carried out by a so-called "common carrier" that picks up the superstation's signal and flings it to the satellite from whence it is beamed to cable systems.

Satellite carriers contend that they have no copyright liability under the Copyright Act and are free to pick up any television station's signal, whether the station is willing or unwilling. Mr. Ted Turner's Atlanta station, WTBS, is an example, perhaps the only one in the United States now, of a "willing" superstation. Mr. Turner licenses programs for distribution solely in the Atlanta market. Another instrumentality, Southern Satellite Systems (founded by Mr. Turner and turned over to an associate) is the carrier that transmits WTBS programs to the satellite. It is somewhat ironic to note that

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the cable systems pay Southern Satellite Systems 10¢ per subscriber per month for its satellite program service, a sum far in excess of what those same cable systems pay copyright owners for all the programs they use under their compulsory license.

Most superstations, of course, are unwilling victims. They include WGN in Chicago, WOR in New York, and KTTV in Los Angeles. Each is opposed to satellite pickup of its signal. The Los Angeles station has filed a formal opposition with the FCC. Each fears what will happen to its business when it can no longer control its own programming. There is something terribly wrong when a so-called common carrier is allowed to appropriate the programming paid for by a television station, make huge profits by selling that programming to cable systems throughout the country, and be excused from any obligation to obtain permission from either the station or the program owner and to share with them a portion of its profits.

The superstation-satellite situation, Mr. Chairman, can be met only by placing explicit copyright restrictions on the satellite carrier. The Copyright Act should make it clear that the satellite carrier is required to obtain permission rights and liable for copyright infringement. Other approaches might be equally effective. The program cannot be left unattended. I leave in this committee's capable hands the methodology.

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## CONCLUSION

We seek no special favors of this Committee.

We strongly oppose the cable compulsory license but we are prepared to accept it and live with it as best we can. We ask only that our rights to license our programs on an exclusive basis be maintained, as originally contemplated in the 1976 Act, and that we receive fair compensation for cable's use of our programs.

The syndicated television market is the crucial arena for program suppliers to recoup their financial investments. If that is lost, independent program producers and distributors at some point will have to withdraw from the market because the risks will become too large for the diminishing prospects of reward.

Remember, cable has grown healthily over the last seven years while operating under the FCC's syndicated exclusivity rule.

Program suppliers cannot look to the Copyright Royalty Tribunal for meaningful relief under the Tribunal's limited authority.

Mandating syndicated exclusivity in the Copyright Act is the very least that ought to be done to maintain the delicate balance in the television marketplace.

We also urge the Committee to undertake a general review of cable retransmissions of broadcast programs, particularly by satellite, to permit program suppliers to receive fair compensation for the programs which cable now uses under a compulsory license.

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Appendix I

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

Avco Embassy Pictures Corp.

Columbia Pictures Industries, Inc.

Walt Disney Productions

Metro-Goldwyn-Mayer Inc.

Paramount Pictures Corporation

Twentieth Century-Fox Film Corporation

United Artists Corporation

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

Warner Bros. Inc.

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Appendix II

MEMBERS OF THE

ASSOCIATION OF MOTION PICTURE &

TELEVISION PRODUCERS, INC.

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

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

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Mr. KASTENMEIER. Thank you, Mr. Valenti, for a very eloquent statement.

I think we might entertain a question or two of Mr. Valenti so we do not lose the thread of his presentation, and then proceed with the next witness.

For a moment there I thought you were giving an eloquent plea for deregulation of copyright completely. But in view of the recommendations you made at the end, that was not the case. Historically, though, at the outset, in the interest of assessing the rules equitably, it is the case that those parties who are interested, namely the television industry and the motion picture association and others, were not unwilling victims. The Copyright Act was not placed on them. Those of you who participated know that very well. I say this does not suggest that the present situation is acceptable or unacceptable to you, but it is to say that Congress did not impose that act on unwilling parties, including programers.

Mr. VALENTI. May I respond to that, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. VALENTI. Mr. Chairman, I have been in politics most of my adult life. I understand the realisms and abrasions; you win a few and lose a few.

What I did in an agreement was to save my political life bcause in my judgment, that copyright fee was going even lower. Remember we started out with Senator McClellan's bill which gave 5 percent of gross revenues as the copyright fee. We all know now, as certified by Mr. Brennan, it was plucked out of the air, not based on any data, but simply an arbitrary figure. We opposed the 5 percent, though it was much too low and we fought in every corridor in this Congress, the cable industry. But I commend the cable industry, they blew our heads off, they had far more political clout than we did, and they beat the hell out of us. As an old political pro, I always admire those who can handle themselves in Congress. If I had not applied a political tourniquet to a congressional artery, we might have gone down to 1 percent. It was a political maneuver.

Mr. Chairman, I took George Ball's advice, cut my losses and got the hell out, hoping at some future point, when maybe facts and sanity had reappeared, we could reestablish this issue and make it clear that what was put in this was patently wrong. I had to do something in keeping that fee from going lower, and that is the genesis of that agreement, sir.

Mr. KASTENMEIER. I would not want you to suggest that Congress imposed something on people who were unwilling to accept it. In fact, I give you credit for that agreement you made with the cable industry. You brought it in, and almost precisely we enacted the new law as you presented it to us. The people who seemed to be most reluctant to accept it were certain networks, particularly ABC. They seemed to be the ones with the greatest opposition. But finally, not even ABC opposed the copyright bill in its final form.

Also, you might have added that whatever the merits, cable television started from a no-liability standpoint as a result of a couple of Supreme Court decisions. So you move them into a royalty situation, and obviously some negotiations were indicated. That is how we happened to arrive at what we presently have, whether

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or not people anticipated precisely what has transpired in the last 3 years in terms of the market.

I am going to reserve my questions and yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman, and Mr. Valenti, as usual you have presented your case extremely well, so extremely well I am always reluctant to come to a decision after hearing your persuasive arguments.

I am only going to touch on a couple of points. One you mentioned, as I recall it, the cost of programing for the TV stations which buy the syndicated programs, the networks, is around $400 million.

Mr. VALENTI. The syndicated market, total sales are from $450 million to $500 million a year.

Mr. DANIELSON. That syndicated market I assume is what many of us refer to as reruns.

Mr. VALENTI. Yes, sir, that is the usual generic term.

Mr. DANIELSON. I realize some programs are created for syndication. I was home over Thanksgiving in Los Angeles and I noticed that channel 11 is running the "All in the Family" reruns. Frankly, if you have forgotten them, they are just as good the second time as they are the first. In fact, even if you have not forgotten them, they are just as welcome as they were at first.

What you are saying as I see it is that the syndication market is being truly jeopardized by the importation of distant signals through cable. So although channel 11 may be showing "All in the Family" and paying a fee for doing so, they really have no exclusivity in the Los Angeles market, because a superstation for a long-line cable can bring the same program in from elsewhere.

Mr. VALENTI. That is not quite true. Right now, the syndicated exclusivity rule is in force. What I said is by preliminary vote, the FCC has expressed its intention to abolish that rule.

Mr. DANIELSON. You mentioned the McClellan bill had a 5-percent royalty or compulsory license fee. If the current 1 percent produced $14 million, even 5 would only produce $70 million.

Mr. VALENTI. That is why I was opposed to the 5 percent in the beginning. If I was opposed to 5 percent of gross revenues, I am surely opposed to 1 percent of gross revenues.

Mr. DANIELSON. But the 5 percent is nowhere near the $450 level.

Mr. VALENTI. That is true.

Mr. DANIELSON. I do not know the solution. I have not read your statement. I just came back into town and just received it this morning. I am going to make, respectfully, a suggestion. If you have a suggested remedy, let us consider it.

Mr. VALENTI. Yes, sir, it is in that statement.

Mr. DANIELSON. That is why I was careful to say I had not read it as yet. But it seems we have a real genuine problem, and the only way to handle that is to work out a real general solution to the problem. I will rely upon you and your colleagues and those similarly situated as to what we can do about this. I do not think you will find Congress unresponsive, if the issue was clearly defined and some reasonable solutions are proposed.

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With that, I will say thank you very much and pass to my chairman.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. I want to express my regret that I was not here to hear the distinguished witness introduced, but I feel I am well acquainted with his qualifications to address this committee, Mr. Chairman, and I am very appreciative of an opportunity to hear all his testimony. I agree with him, that I arrived at a propitious time.

Mr. Valenti, I come from a mountainous area, as you know. In that area, there are pockets in which virtually no television can be received from conventional stations, literally, because of the line-of-sight dilemma.

Do you propose, or do you contemplate there would be any area or any number or any factor that would determine that some users of cable TV would not have to pay retransmission consent royalties or any particular contributions under a new scheme or any concept that you might produce?

Mr. VALENTI. That is a very good question, Mr. Gudger. We recognize there are many people in America where programs are made unavailable to them because of geographical location. I can speak for the program suppliers, I think, by saying the system providing a service to 2,500 listeners or less, we would be glad to make them immune from any changes.

Mr. GUDGER. Do you believe a system with 2,500 listeners or less would be scarcely able to support a system?

Mr. VALENTI. No, there is recognition of legitimacy of a lot of Americans who live in an area where they cannot receive TV reception. No. 2, there are areas where we think the competition or the eye and ear of the audience is real and there ought to be real competition. That means in the urban cities, where these pockets of reception do not exist, then the marketplace should be adjusted and all competitors should seek the same audience.

Mr. GUDGER. The chairman has referred to two decisions of the Supreme Court which in effect have held that cable TV except by contract may not be subject to——

Mr. VALENTI. Copyright liability.

Mr. GUDGER. Copyright liability. I perceive that in a situation where the cable TV function is that of a group erecting a tower to bring in a signal which is otherwise unavailable to it. I certainly see a different circumstance now in the presence of a satellite facility, and I see a different form of communication where the satellite is involved.

Do you see the satellite as creating a new type of problem from the problem that was addressed by the Supreme Court on the occasion of those two decisions?

Mr. VALENTI. Mr. Gudger, the satellite is only one of an avalanche of technologies which will change the visual reception in this bill. There has intruded in the marketplace the new magic of technology which has absolutely astounded everyone, so the satellite is indeed one difference. Indeed, when the Supreme Court was discussing the *Teleprompter* case, they were looking at a 1909 law. They said rightly that under that law, nobody had to pay copyright liability. But the Supreme Court was very careful to point out you were dealing with a piece of antique legislative furniture. You have

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to refurbish your house to meet the new demands of the 20th century. They urged the Congress to deal with this issue, because they can only deal with what the law is, not with what it ought to be. So I am saying to you, change is endemic, and to lock in a large portion of what will be the future of communications in this business into an artificially low price is really to put a barrier against the future insofar as TV programers are concerned.

Mr. GUDGER. Do you see the retransmission consent liability as going to the network producer, or do you see it as going beyond the producer and back to the program originator?

Mr. VALENTI. I think in any kind of copyright liability, the linkage is between the one who owns the program and he who uses it. The user and the owner, between them, there should be a compact.

Mr. GUDGER. But the superstation retransmission, as you call it, would the process go back through the network as it goes back to the copyright holder?

Mr. VALENTI. We think it ought to be back to the copyright owner.

Mr. GUDGER. Directly and without any accountability through the channel through which it is emanating to the ultimate cable station?

Mr. VALENTI. Whatever cost is to be paid for delivery of the signal as to the use, contract ought to be made with the program owner.

Mr. GUDGER. Do you see any sharing in this in the personnel which produced the program, the actors?

Mr. VALENTI. Yes, sir. As a matter of fact, the whole so-called residual concept is very much embedded in this. Whenever you have a rerun of a program, all the people without whom the program cannot be made, the performers, share in the income received from that program.

Mr. GUDGER. Do you see this as applicable to the original run, as well as the rerun?

Mr. VALENTI. Yes, whatever the contracts are, they should be abided by, Mr. Gudger; that is all I am suggesting.

Mr. GUDGER. Do you see the Royalty Tribunal as continuing to function in all these relationships?

Mr. VALENTI. We have made a suggestion in our paper, Mr. Chairman, again bowing to political realities, actually. If you are going to have a marketplace which by any definition is to be called competitive, then you cannot have some outside authority setting prices in American Enka, Aerospace, or Oscar Mayer. But right now, the political realities tell me to repeal the rights would be a difficult political achievement. We are making suggestions in our paper that the tribunal might serve as an arbitrator, and we would set values on our programs and work out the final pricing of the program with the cable people.

For example, when you go into sell a program to Tulsa, or anybody, the independent programer knows about how much that program is worth. He knows how many TV homes are there, what the rates are, and he knows, essentially, what that program is worth in a particular area. There is some bargaining back and forth, but not as much as you might think, because each has

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assessed beforehand what they think is the marketplace worth. The tribunal can be the arbitrator on differences of opinions. That is all I know, short of removal of the compulsory fee, appraisal of what a program or a product is worth. The marketplace determines that.

Under the copyright bill, you have lifted that out. You have extracted that negotiation and made it fixed in stone. As a result, it is now misshapen and distorted and bears no relationship to what we call real marketplace value.

Mr. GUDGER. Thank you very much.

Mr. KASTENMEIER. Next we might hear from Mr. Wasilewski.

## TESTIMONY OF VINCENT WASILEWSKI

Mr. WASILEWSKI. Thank you, Mr. Chairman.

Mr. Chairman, if you don't mind, I find when I try to summarize a statement I usually take longer than when I go through it. It is rather short. Just as a personal background, I have been associated with this problem in one way or another since about 1950. I used to be a lawyer with the National Association of Broadcasters and the general counsel and have been involved in negotiations involving the cable television relationship for those many years, and so against that background I would just like to say that many of the members of our association have a continuing interest in this committee's consideration of the copyright issues that have evolved out of the Congress decision in 1976 to give the cable industry a compulsory license for the commercial use of all broadcast programing.

During the deliberations in the House on the bill, our asssociation suggested to the committee that the only fair answer to the copyright question was traditional copyright liability for all programing imported into a community on distant broadcast signals. In fact, we strongly believe that there is little legal justification for any denial of historical copyright liability in this situation. Our suggestion was rejected once the major copyright owners and representatives of cable systems "agreed" on a formula that was to be the price for the compulsory license.

Now, in 1979, we believe it is even more apparent that the solution agreed upon in 1976, by some of the parties involved, is inadequate and is not an appropriate substitute for traditional copyright liability. We do not believe that the Congress intended to favor one industry in such a dramatic way but understandably found the issue to be so difficult that the agreement between the cable industry and the major copyright holders seemed at that time a reasonable solution to the dilemma.

Not only is the 1976 copyright bill inadequate in our opinion, but since that time the problem has been made even worse by several significant events. First, the Federal Communications Commission has eroded the signal carriage rules that this committee obviously believed were the foundation of a compulsory license. Therefore, cable's competitors are caught in this dilemma: Cable is entitled to a compulsory license because of signal carriage restrictions and as soon as they receive it—at a ridiculously low price—as Mr. Valenti has pointed out—another arm of the Federal Government moves to do away with the heart of the restrictions which were a major reason for the compulsory license in the first place.

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Also, since 1976 we have seen the emergence of a new phenomenon, the so-called superstation. This, of course, is a broadcast station which may find that its signal is being received off the air, in many cases without its permission, and beamed to a satellite for distribution throughout the country on cable systems as a distant signal. This problem will become much more serious in the future and it will mean increasing difficulties for what was once an efficient and fair program distribution system—based on traditional copyright liability.

Finally, the cable industry has moved even further from its previous character of retransmission and distribution service to a newly expanded role in video and audio service. So be it. But if we are to continue competing with this fast growing industry—and we believe it continues to be in the public's interest for broadcasters to be able to compete—we believe the Congress must realize that the 1976 copyright bill not only did not solve a problem, but instead, created serious new ones.

It will not be easy for this committee and this Congress to overcome the well intentioned but mistaken approach of the 1976 Copyright Act.

To do so, you will have to cut through the competing claims of all the economic interests involved.

You will have to believe that the decision to allow a program distribution system to evolve in the marketplace will not condemn cable systems to the scrap heap but will instead place them squarely in the marketplace where today they are quite able to compete with other competitors.

The committee will have to assure itself that this is an appropriate matter for your jurisdiction and that the answer is one that is compelled by copyright law, not by economic interests and not to be confused with regulatory issues.

We strongly believe that many of the broadcasters that we represent will be tremendously affected by how this situation is handled. We are not telling you that everyone will be out of business if a solution is not found, but we are telling you that broadcast service in some areas, at some stations under the present law, will not be able to continue as it does today. And, of course, the outlook for expanded broadcast service would be quite clouded. It is hard to see how UHF television could continue to grow under these circumstances.

The cable industry is no longer just a group of small entrepreneurs struggling to make ends meet, if it ever was. It is big business. It is Teleprompter, it is Warner Communications, it is Time, Inc. Its revenues are now over $1 billion a year.

We are not here to complain about broadcast profits nor do we think cable has a reason to complain about cable profits. And like cable, we would like to have less Federal regulation.

Mr. Chairman, we believe that our industry provides a great amount of service to the public of this Nation.

We would acknowledge that cable, by bringing broadcast signals and other programing to many areas of this Nation, likewise has provided a needed and valuable service.

We believe that both services can expand and be even better in the future, if we are allowed to compete on the same footing in the

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marketplace. But we still don't believe that there is any justification for the Congress to step in and tell the parties involved how much their products are worth.

Traditional copyright principles can be used to solve the cable copyright problem. A compulsory license, for anything beyond local programing, was wrong in the 1976 act and it is wrong today.

It ruins the principle of exclusivity on which program production and distribution is based and it puts government into the business of making those value judgments that we have traditionally left to the parties themselves.

We know it will be difficult to change the concept of a compulsory license by new legislation. However, some change is needed. And to keep the situation from being even more imbalanced and inequitable than it is at present, we suggest the following for the immediate future.

First, the committee should indicate to the FTC its concern over the problems that are magnified by the compulsory license and suggest to the commission that there be no further changes in the regulatory balance between cable and broadcasting until this subject can be completely explored by the Congress. We ask this because we believe that this committee had an expectation in 1976 that the distant signal and exclusivity rules would be ended but instead based the concept of a compulsory license on the premise of continued regulation in these areas. That continued regulation is extremely doubtful at this point and it is very likely that the FCC may well end it altogether in early 1980.

Second, we believe the Congress should take a strong look at the continued advisability of a compulsory license for all broadcast programing. We do not believe it is an appropriate way to deal with these copyright issues and instead continue to believe that traditional principles of copyright should apply and can be used to arrive at negotiated agreements between the parties, through the use of licensing agents or some other contractual device. Of course, we would not oppose the use of a compulsory license for local signals and in fact, believe that all cable systems should continue to be required to carry local broadcast signals.

Third, if the committee believes that it cannot discard the compulsory license concept, it must reexamine the payment for that license and provide some mechanism for adjusting the license fee so that it will still be possible to arrange an orderly national program distribution process. The fees paid under the present act are little more than a token, in no way relating to true copyright payments.

Finally, if the compulsory license is retained and additional distant signals are allowed to be imported by cable systems in the future, then we believe each such signal should be licensed under traditional copyright liability.

Mr. Chairman, I know the complexities of this situation and these issues, and I can only assure you that we will continue to work with the committee toward a solution to what we believe is a serious and growing problem. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Wasilewski. Unless there is objection, I think we will proceed to our next witness, so we can

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conclude the panel's work, and then Members can reserve questions for all. Mr. Herman Land.

TESTIMONY OF HERMAN LAND

Mr. LAND. Thank you. I have submitted a statement for the record, and I would like to just summarize it here, if I may.

Listening to Jack Valenti talk about the history of this proceeding, I cannot help thinking that it is really a great pleasure for me to be here, because for the first time the most concerned party or one of the most concerned parties in the broadcast system will be heard. We had nothing to do with that arrangement in any way. As a matter of fact, we were born as an organization only very recently, in 1972, and didn't arrive at a clearly determined or defined cable position until about 1975–76.

Mr. KASTENMEIER. Mr. Land, in that regard, and for the benefit of the panel, so they can visualize who you represent, for example, in this area channel 5 and channel 20 are independents. Do you happen to represent them?

Mr. LAND. Yes, they are both members of my organization.

Mr. KASTENMEIER. You mentioned there are 52 that you represent.

Mr. LAND. Yes.

Mr. KASTENMEIER. 52 VHF and UHF commercial television stations. Out of how many in the United States?

Mr. LAND. Using FCC definitions, there are approximately 100 stations that could be considered independent stations. The last figures I saw in the spring showed approximately 76, as I recall, which we would regard as true independent stations. The others would have to be classified as foreign language and specialty, such as religious stations, but the defintion sometimes gets a little fuzzy, but that is about the universe. By the way, we represent about 39 markets in this country, from the very largest to the very smallest.

Why did we come into existence? I think that is important for this discussion. Because as you know, historically the broadcast system has been dominated by five networks. They are divided into three network corporate families, and as these nonaffiliated stations, as we call them, were growing there was no way for them to be heard within the system very strongly, because it was dominated by what we call network affiliates, and in the halls of Congress you did not hear much from them, and at the FCC you did not hear much from them.

In the business world where we have to go scratch out a living, we had a lot of difficulties too, since there existed a set of biases or prejudices against the use of stations for advertising purposes that were not affiliated with the great networks, so we are really a two-headed organization. On the one hand we try to voice our opinions in this capital, and on the other hand we spend most of our money and energies pursuing business through offices in New York, Chicago and Los Angeles.

At the very beginning of the 1972 rules, which shortly preceded us, many of the savings that I represent welcomed those rules. They felt that cable was going to be of great help, particularly in the UHF situations, simply by extending the reach to other mar-

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kets and so on, but a couple of years later that euphoria kind of ended when certain things became clear.

In the first place, it proved to be very difficult if not impossible in most cases to earn revenue by selling the circulation out of your home market, a very important consideration. Our stations still try to sell them, naturally, but with very little reward.

Second, it began to be realized that for every station, every time you went out of your own market another station might be brought in and compete with you in your home market and take away audience, and it is that home market which counts finally. In other words, a very small diminution of audience in what we call the area of dominant influence, which is a rating term to define spot markets, could mean a significant loss in revenues, so those considerations were very important. We finally defined what an independent station's role was. It wasn't too easy. We said we are primarily a local institution functioning in a local market. Extended reach is secondary, and I would like you to remember that as we go on with this.

A very important consideration here is that the independent station is in the forefront of all the changes Mr. Valenti was talking about. Within the broadcast system we are the ones who have pioneered the use of a satellite, for example, satellite earth stations through cooperative news organizations and the like and interchange of programming and supports. We represent the principal diversity within the broadcast system, and there is a difference between our kind of diversity and diversity brought by cable, because cable gives you partial coverage of a community while this gives you total coverage of the same community.

Let's define independent station as we talk about it. We are talking about stations that do not affiliate themselves with ABC, CBS, or NBC. They stand alone. They have to make their way in the face of heavy network domination of the broadcast system.

Today although there aren't very many of these stations we are significant in the number of people we reach, almost 60 percent of the television households in the country. There is a drive on toward full national circulation. There are hundreds of applications in at the FCC, and we hope within the next few years to extend that reach considerably to the point where we get true full national coverage, and that can provide the possibility of a fourth network and a flourishing fourth market which I think is terribly important in this country, but we see two developments looming on the horizon, which have already been referred to, which may make that very difficult to achieve.

To begin with, at the FCC we see a determined move, as has been already pointed out, to remove the cable television syndicated program as to specific rules and restrictions on the importation of distant signals. Barbara Ringer I think stated in her testimony which I saw 10 days ago this is an event that Congress did not really foresee in adopting the Copyright Revision Act of 1976. As I understand it, the history of that act makes it clear that the Congress did not intend to have the cable provisions of the act replace the commission rules. Indeed, it adopted the legislation with the clear knowledge of the existence of those rules, and rather

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than eliminate them, Congress tried to maintain a very delicate balance.

Just a few years later that balance looks as though it is going to be upset. The important consideration from our point of view is that the impact within the broadcast system would fall most heavily on the independent stations. That is important to remember, because we are the most volatile. We are outside this network affiliate system, and this separateness confers upon the stations a very fateful economic distinction. Here is the fundamental difference. The network station, such as the three in this city, derive most of their programing from the networks. The network supplies the programing for most of the day, and pays the station to carry it. True, there is news and some local syndicated material, and sometimes a locally produced program, but the bulk of it, particularly in prime time, comes from the network. It is not so in the case of the independent station. The independent station is responsible fully for its total schedule from sign-on to sign-off. No matter what program it carries, it has not paid for that program. It has to buy the program or generate it, produce it, et cetera.

In other words, for every minute of the day, that station has to go into the marketplace. Now, that creates very serious problems, obviously. I am not going to go into detail on that, but there is a particular objective that an independent station must achieve. He must distinguish, the operator must distinguish that station in the market, must provide something unique for that audience to fine tune to. In other words, it must offer the viewers a potentially unique service.

Simply by virtue of the networks, the network affiliates don't have that problem, because you are defined as ABC station, the NBC station, et cetera, and cable systems can offer unique programs, and they are already doing so. They are buying children's projects, developing pay cable and so on, but the independent station has only one thing protecting it in terms of its own identity, and that is the exclusivity rules, and that is why the exclusivity rules are so important to us.

We have gone through a very long process in developing a program character for a station, and it is a very difficult one in defining an audience. Without some form of exclusivity, this possibility is washed out, and you can consider for yourself how difficult it would be to distinguish a station when there is a multiplicity of signals available. You can take this city, WTTG, for example, has bought "MASH," which is a program I am sure many of you are familiar with, that paid—Mr. Valenti is a member—a fee for exclusive rights to the Washington market. It bought the rights to distinguish that program for itself against the five other stations in the market or four other stations in the market, and it is somewhat anomalous here if it could not do the same with regard to cable. It could find itself under the new conditions of having to compete with itself against several other additions of MASH coming in from other markets.

It makes no sense to eliminate the exclusivity rule in this instance for cable. What I am talking about is really the second profound development that is affecting this industry, and it is causing so much of the chaos. That is the emergence of a satellite.

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It really is a profoundly disturbing thing, though it has enormous exciting and wonderful possibilities.

Under an unlimited system, without exclusivity, a satellite would have an increasingly negative effect on the independent stations, its ability to program, survive or grow, because as the number of independent stations brought into the market increases, so will the number of duplicative programs. Remember the irony here is that we are not talking about networks. They are really unimportant in this discussion. We are talking about independent stations. The independent station is the institution whose signal is brought into the local market, and that is all we are talking about.

When Congress adopted the Copyright Revision Act of 1976, I know there must have been some discussion of satellite. I recall some of it, but it was never really to the best of my recollection discussed as a brand new development which would change the environment so completely and so thoroughly, and open the door to unlimited importation. That impact I don't think was clearly foreseen, but I don't presume to really know.

There are two ways in which this distribution affects the industry and will continue to affect it. The first is its unlimited signal opportunities to cable. That is a brand new consideration that has already been referred to and as I recall Ms. Ringer referred to that. That was unforeseen. We have already submitted to the FCC and will be glad to submit to you studies which demonstrate the impact of importation of distant stations on local independent stations.

Again, the important thing we found was that where network programing audiences are not profoundly affected local audiences are. There the loss can be most significant, and local audiences are all that the independent station has. They have a smaller amount based on network competition. That means economically there is a disproportionate economic impact when you lose audience. When you have a small loss of audience, what we call a couple of rating points, it can wipe out your profit.

I might incidentally throw in this observation, that in 1978 while we showed enormous progress over preceding years, still about 25 percent of the UHF independents, as I recall, were in the red, so we are not dealing with that many monumentally successful and rich employers.

There is a consequence that is often forgotten here. This disparity between the network station and the independent means that if the independent station's share of audience drops and share of revenues drops, the network station and ultimately the network position in the market is reinforced.

The other thing is a superstation about which we have heard so much. We represent most of the superstations, all except one as a matter of fact. I might point out there are two types. The first, which you are all familiar with, actively seeks audience out in the rest of the country, and the second is the so-called passive superstation. Sometimes they are vehemently opposed to becoming superstations, and they become so against their will. Whether they wish it or not, that often happens.

Mr. KASTENMEIER. That would depend on whether they were in control of the satellite system?

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Mr. LAND. That is right. They don't have any control over it themselves, and that is the problem. What really happens, they have nothing to say about whether they are carried on the satellite or not. They have no say as to whether their programing is distributed, and they receive no remuneration for it either. Now who does? It is what we call the resale common carrier. It is the carrier who determines what station's programing is available or salable to cable systems, which will be attractive if that is the one that determines what stations will be carried on the satellite. So in effect, this satellite carrier has become a program distributor.

Now this is a very unusual role for a common carrier. As a layman, I find it difficult to comprehend. As I recall, Congress did not foresee it when it adopted the common carrier exemption contained in section 3 of the Copyright Act. This provision exempts traditional common carriers, those acting as a passive conduit for programing, not exercising any editorial discretion. And as you have seen, the present group of satellite carriers is far from that. They actively package and promote superstations across the country.

I would like to submit for the record, if I may, several ads placed by satellite carriers in various trade publications, to give you a flavor of the extent to which these carriers attempt to sell their products. Mind you, these ads weren't placed by the stations, although the station call letters like WGN, No. 1, during an average week it is seen in Chicago in so many more homes, and so on. It sells a wonderful program. There are several ads about WGN Chicago. Movies, unsurpassed quality programs, you would swear this is a station ad. When I first saw it I thought so. I wondered what they were doing in this publication.

It isn't. It is United Video Corp. Is that a common carrier? Here is WOR, New York, the great sports system, great sports station. It is a great sell for WOR. I am sure they are very pleased in lowering themselves placed this way, but Eastern Microwave is placing the ad and so on.

Mr. KASTENMEIER. Without objection, those several exhibits will be received with your statement.

Mr. LAND. And because this was all unforeseen, I think we are very sympathetic to Ms. Ringer's suggestion that this committee at least consider an amendment limiting the scope of the common carrier provision of section 3 to exclude this.

Now there is another very strange and ironic impact that superstation carriage can have. Stations may actually lose the right to add programing in their local markets because they are being distributed nationally by satellite. For example, independent station KTTV in Los Angeles which has already been referred to, channel 11, has been told by a major program supplier that certain of the station's program licenses will be terminated in the event the station is selected for satellite distribution, even if such distribution is accomplished against the station's will.

Now, in my statement I have the language of that contract, and it says, "with or without licensee's authorization." In other words, if you have a station and you have now bought "MASH," or whatever it is, and distributed it, and now Mr. Valenti's member finds it is going into markets that he wants to protect, he reserves the

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right to cancel your program in Chicago or Washington, and there is something peculiar here that it is an interference in the market system that is very hard for me to grapple with, and I think it needs addressing.

From all that I have said, I think that it should be clear from this point of view that if Congress eliminates the present rules it would be up to the Congress to provide some alternative form of market protection. The ideal marketplace I suppose would be the adoption of the retransmission consent proposal in some form or such as suggested by Henry Geller, but as an absolute minimum I would urge you to consider adoption of protection for stations, coupled with some kind of imposition of a retransmission consent requirement for signals transmitted by satellite, at least that.

There is nothing mysterious or remote about what we are talking about when we talk about exclusivity. It is a commonplace of American industry. The independent station should at the very least have the opportunity to bargain for and obtain exclusivity when it thinks it is important. The absence of such protection would impair an independent station's ability to be unique and cause economic injury.

It is a particularly important factor when it comes to first-run production. We have been talking about syndication. The independent stations are growing and developing, putting great moneys cooperatively into things like Operation Prime Time. Metromedia has a new Golden Circle series of features at $3 million apiece, and so on, and they have made very serious efforts in this direction to develop this for the market. If you eliminate the exclusivity rules, these programs will not be protected. It will mean that the station in Washington which pours a fortune into building and promoting a program cannot protect itself against importation by cable systems from outside, and that is very unfair because the network with its original production is protected.

We contend that the short-term consequences of unrestricted satellite transmission will be a reinforcement of the network position in the market and a weakening of that of the independent.

The long-term consequences will be a weakening of the potential for a truly fourth national market. Allowed to develop indiscriminately a new system based on elimination of exclusivity and unlimited importation of distant signals would create enormous obstacles for the realization of the potential of independent television. That is why we are concerned.

In summary, it is particularly ironic that the cable provisions of the act were adopted as a result of an agreement in which independent TV, and I suppose no other broadcaster was really a part, hammered out by two other organizations and yet we as independent stations who are the broadcasters are most affected. We therefore urge you to consider the situation, the condition of the independent, and the potential damage and amend the cable provisions of the Copyright Act in a manner that would permit us to grow and continue our contribution to the American system.

[Statement and additional material submitted by Mr. Herman Land follow:]

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STATEMENT OF

HERMAN W. LAND

PRESIDENT

ASSOCIATION OF INDEPENDENT TELEVISION

STATIONS, INC.

My name is Herman W. Land. I am President of the Association of Independent Television Stations, Inc. (INTV). INTV is an organization of 52 VHF and UHF commercial television stations which are not affiliated with any of the national television networks. INTV represents a vast cross-section of independent stations located in 39 different markets, ranging in size from the three largest to one of the smallest. INTV's membership includes all but one of the so-called "superstations," as well as many not-so-super stations -- marginal UHF independents which are struggling to attain parity within their markets against stronger, established network affiliates.

At the outset, I would like to describe the position of independent television stations in the national communications complex. This country has entered a new stage of communications development, symbolized primarily by cable television and satellites. Cable has finally reached a substantial penetration, approaching 20% of the total television households, and appears to be moving ahead rapidly. With an increasing number of satellites being launched, more and more channels of programming are becoming available. There has been a virtual explosion in the number of receive-only earth stations utilized to pick up this programming, licensed to both cable systems and broadcasters. In sum, we live in revolutionary times from a communications standpoint.

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Independent television stations are in the forefront of these changes. They represent the principle of diversity and change within the broadcast community. Independent stations, after all, are not connected with ABC, CBS or NBC. They are the upstarts. They stand alone, having to make their way in the face of the heavy network domination of the broadcast system. They have demonstrated, however, that independent operation is possible, given imagination and hard work. In their determination to build a viable network alternative, independent stations have made very serious and successful efforts to develop exciting, first-run programming. Such ambitious undertakings as Operation Prime Time, the nighttime productions of the Program Development Group, and the specials of Metromedia and other group owners, indicate that a national fourth market is possible.

Today, independent stations reach almost 60% of the television households in the country. Their drive toward full national coverage, which will make additional networks possible, can be halted only by some development that makes it difficult for new stations to go on the air and severely limits the opportunities of independent stations to rise from marginal existence. We see two such developments looming on the horizon.

First, at the FCC, we see a determined effort to remove the cable television syndicated program exclusivity rules and restrictions on the importation of distant independent signals. As Barbara Ringer stated in her testimony to you ten days ago,

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this was an event that Congress did not foresee in adopting the Copyright Revision Act of 1976. The legislative history of that Act makes it clear that Congress did not intend to have the cable provisions of the Act replace the Commission's rules. Indeed, Congress adopted the legislation with the clear knowledge of the existence of the Commission's rules. Rather than eliminating them, Congress attempted to strike a balance. Now, just three short years later, the Commission appears to be on the verge of upsetting the delicate balance established by Congress. This would impact most heavily upon independent television stations.

Independent stations operate outside the network and affiliate system. This separateness confers upon them a fateful economic distinction. While the network affiliate can turn over the bulk of its broadcast time to the network, which pays the affiliate to carry its programming, the independent station is responsible for its total program schedule, from sign-on to sign-off every day. An independent station operator must go into the marketplace for programming. Unlike his network and cable competitors, he must either generate programming himself, go out and buy it from someone, or contract for someone to produce it for him. It doesn't matter whether he's making or losing money. He must still go into the marketplace.

In order to survive, an independent station must also distinguish itself in the market. It must offer potential viewers a unique service. Simply by virtue of their network

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affiliations, network stations distinguish themselves in the market. Similarly, cable systems may offer pay or other unique origination programming. But independent stations, particularly in cable television homes, where they must compete with distant independent stations, have problems creating a distinctive character for themselves. The present FCC rules ensure an independent station some uniqueness, since they preclude the importation of duplicative programming.

The independent station has to go through a long and difficult process of developing its program character and finding its audience. Under conventional conditions, this is a difficult enough task. Without some form of exclusivity, it would be even more difficult, if not impossible. Consider, if you will, this example. When WTTG-TV, the independent station in Washington, D.C., purchased the program "M*A*S*H", it paid for the right to be the exclusive outlet for that program in the Washington market. That is, during the run of WTTG's contract, the program distributor agreed not to sell "M*A*S*H" to any other television station or cable system in the market. With such exclusivity rights, WTTG can, under the present FCC rules, preclude any local cable operators from importing a distant signal carrying "M*A*S*H". In the absence of those rules, however, WTTG could not prevent such importation and could find itself competing with its own program on cable several times a day, despite the fact that it paid a premium to be the exclusive outlet for that program in its market. Henry Geller mentioned to you in his testimony that

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a broadcast station that has bargained and paid for exclusivity is entitled to have that bargain respected. We agree. It makes no sense to us to say that WTTG can pay for and obtain exclusivity against the other broadcast stations in its market, but not against cable importation of distant stations.

This brings me to the second development of concern to INTV, satellite transmission of signals. Satellite is having an increasing effect on independent stations. As the number of independent stations brought into a market increases, so do the number of duplicated programs. The bulk of an independent station's syndicated program schedule can be duplicated in this fashion. With such duplication, the identity of the local independent becomes more difficult to maintain.

When Congress adopted the Copyright Revision Act of 1976, satellite distribution of television signals was not a reality. Congress did not consider, or even foresee, the impact that satellite distribution would have on cable and broadcast television. Nonetheless, satellite distribution has and will continue to profoundly affect the television industry in two ways.

First, the ability to receive signals from a satellite has opened unlimited distant signal carriage opportunities for cable operators. In turn, this has created more competition for local independent stations. INTV has submitted to the FCC various studies demonstrating that additional distant signal

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importation into a market leaves the local network audience relatively unaffected. Thus, it is the local independent station audience that is fractionalized by this signal importation. Because they have a smaller audience base than the network competition, independent stations, and particularly UHF independents, are disproportionately sensitive to audience loss. In the absence of exclusivity protection, the local independent loses its uniqueness and its ability to compete. This, of course, reenforces the network position in the market. But it also affects the overall supply of syndicated programming. A reduced number of independent stations would reduce the number of outlets for syndicated product. This would curtail program development. It would also reduce the potential for a national fourth market.

Second, satellite distribution has created the so-called "superstation" -- stations, usually independent, carried by satellite beyond their local markets and distributed to cable systems in distant markets. In this context, there is a need to distinguish between two types of superstations. The first seeks aggressively to build its national audience. The outstanding example of this is WTBS, Atlanta, Georgia. The second is the passive superstation -- those stations which are having superstation status pressed upon them, whether they wish it or not. In this category are stations such as WGN-TV, Chicago, Illinois; KTVU, Oakland, California; WOR-TV, New York, New York,

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and others. These passive superstations are concerned, as is INTV, over their status for one simple reason: they have nothing to say about whether they are carried on satellite or not. They have no say over whether or where their programming is distributed and receive no remuneration for it. Who does? The resale common carrier, authorized by the Commission. It is the carrier who determines what station's programming is salable to cable systems. It is the carrier who determines what stations are carried on satellite. In effect, the satellite carrier has become a program distributor.

This is indeed an unusual role for a common carrier. So unusual, in fact, that Congress did not foresee it when it adopted the common carrier exemption contained in Section 111 of the Copyright Act. That provision exempts traditional common carriers -- those acting as a passive conduit for programming, not exercising any editorial discretion. As we have described, the present group of satellite carriers is far from that. They actively package and promote superstations across the country. I would like to submit for the record several advertisements placed by satellite carriers in various trade publications to give you a flavor of the extent to which these carriers attempt to sell their products. Mind you, these ads were not placed by the stations. They were placed by the carriers themselves.
Because of this unforeseen development, we would endorse Barbara Ringer's suggestion that this subcommittee consider an amendment

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limiting the scope of the common carrier provision of Section 111 to exclude transmissions made to, by means of, or from a communications satellite system.

We have already discussed how satellite distribution of superstations impacts adversely on local independent stations, particularly UHF independent stations attempting to establish themselves in the face of competition from stronger VHF network affiliates in their markets. However, satellite carriage often impacts to the superstation's detriment as well. Stations may actually lose the rights to air programming in their local markets because they are being distributed nationally by satellite. For example, independent station KTTV, Los Angeles, California, has been told by a major program supplier that certain of the station's program licenses will be terminated in the event the station is selected for satellite distribution -- even if such distribution is accomplished against the station's will. This threat stems from a program contract clause that reads as follows:

> "Licensee will not transmit or broadcast or authorize the transmission or broadcast of any of the programs or films by means of cable television systems, microwave systems, boosters, transmitters or satellites or other similar devices. In the event a telecast of any program or film licensed hereunder is, with or without licensee's authorization, amplified, retransmitted or relayed on the same or any other frequency by any satellite, transmitter or booster station, community antenna or any other device or method not authorized herein for the reception outside the specific zone of the community to which the station is licensed, the distributor shall have the

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> right in its absolute discretion to terminate this agreement, and said event shall constitute a termination event in accordance with the provisions of this contract." (Emphasis added.)

Moreover, most superstations receive little or no compensation for distant carriage. Satellite carriers do not pay them for the right to retransmit their signals. Under the Copyright Act, there is some question as to whether the stations are the owners of the syndicated product they air. Thus, they may not be entitled to claim against the cable television copyright royalty pool when their signals are carried on cable in distant markets. And most stations cannot raise their advertising rates to reflect distant audience. Local advertisers do not care to pay for distant market coverage. Regional and national advertisers, who budget for advertising on a market-by-market basis, often feel they must purchase time on stations in the distant market anyway, and, therefore, are not willing to pay for distant market coverage by a superstation.

From all that has been said to this point, it is clear to INTV that, if the FCC eliminates its present rules, it would be up to Congress to provide some alternative form of market protection. The ideal "marketplace" solution would be the adoption of the retransmission consent proposal suggested by Henry Geller. As an absolute minimum, INTV would urge you to consider the adoption of mandatory exclusivity protection for stations,

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coupled with the imposition of a retransmission consent requirement on non-passive satellite carriers.

There is nothing remote or mysterious about exclusivity. It is the commonplace of American industry. The independent station should, at the very least, have the opportunity to bargain for and obtain exclusivity when it thinks it important. The absenc eof such protection would impair an independent station's ability to be unique and would cause economic injury.

Exclusivity is a particularly important factor with respect to new, first-run productions. As we mentioned earlier, in the past few years, the independents have made very serious and successful efforts to develop exciting, first-run programming. Independent stations have invested very heavily in these productions. Now, through satellite transmission, these unique projects, of which the stations are very proud, and which they promote extensively, can be brought into the market through cable systems, which do not have to mount the same investment. Why shouldn't these programming efforts enjoy protection? This is a particularly sensitive area, since much of the future vitality of the independent broadcasting industry depends on the ability to generate such new programming.

INTV contends that the short term consequence of unrestricted satellite retransmission will be a reenforcement of the network position in the market and a weakening of that of the independent. The long term consequence will be a weakening

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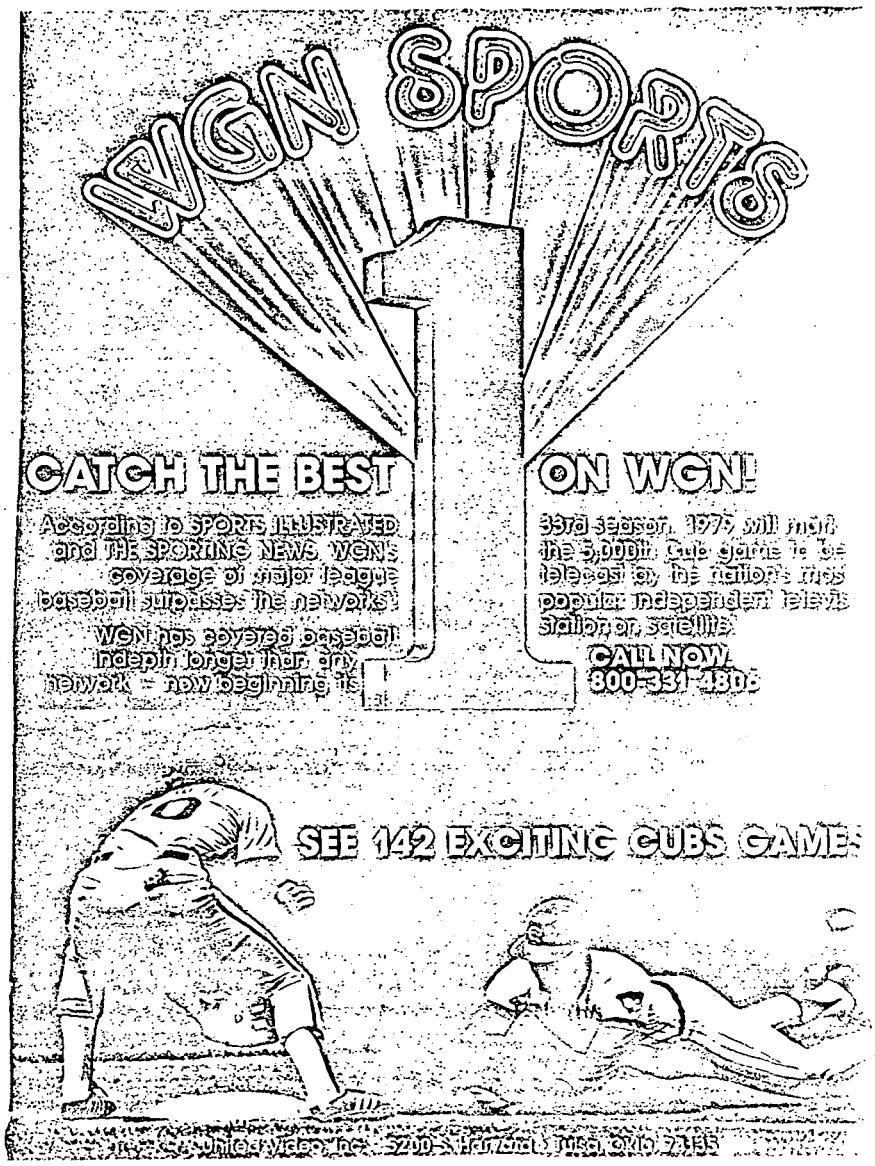
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of the potential for a truly national fourth market. Allowed to develop indiscriminately, a new system based on elimination of exclusivity and unlimited importation of distant signals would create enormous obstacles for the realization of the potential of independent television.

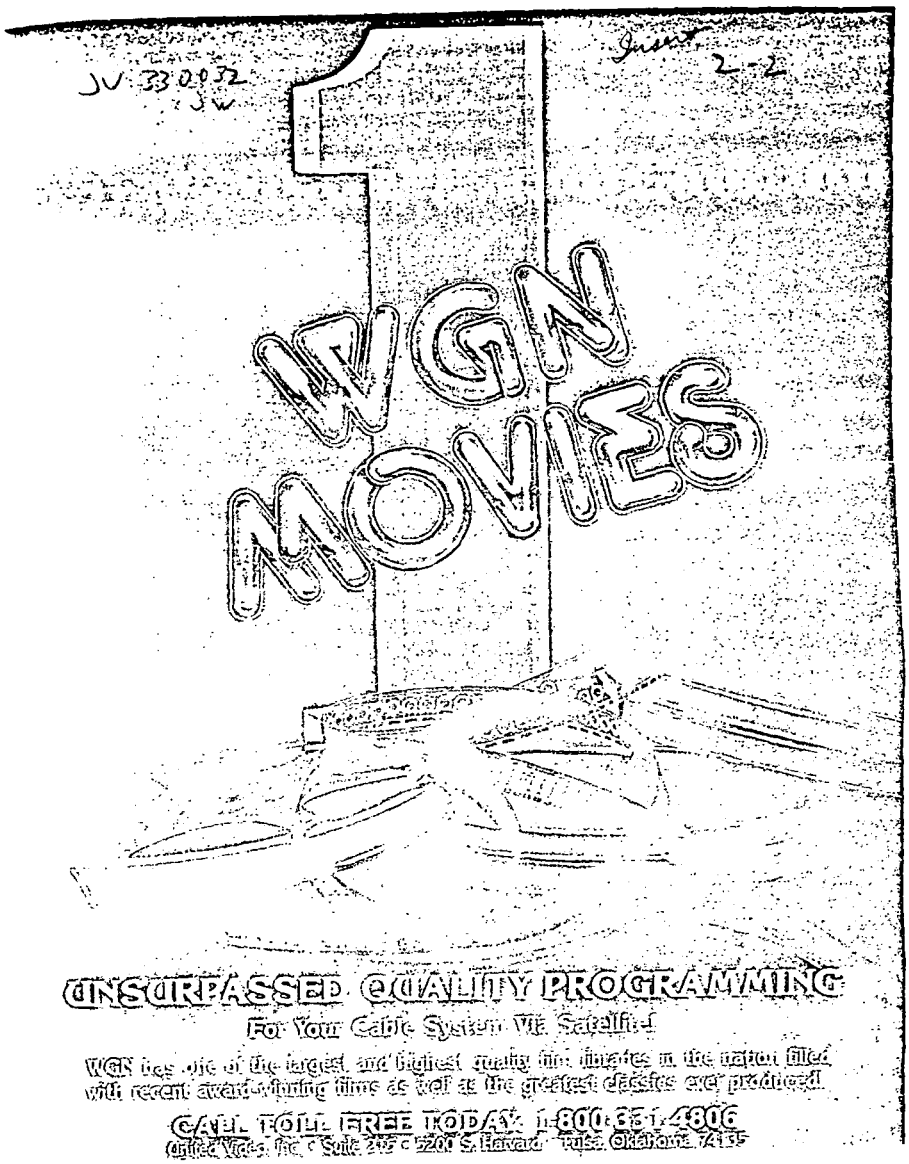
It is particularly ironic that the cable provisions of the present Copyright Act, which so disproportionately affect independent television stations, were adopted as the result of an agreement to which neither INTV nor any broadcaster was a party. The basic cable provisions were hammered out in an agreement between MPAA and NCTA. Yet, independent television stations are the ones most affected by those provisions. We, therefore, urge you to consider the plight of the independent station and amend the cable provisions of the Copyright Act in a manner that would permit these stations to grow and provide additional diversity to the American television industry.

Thank you.

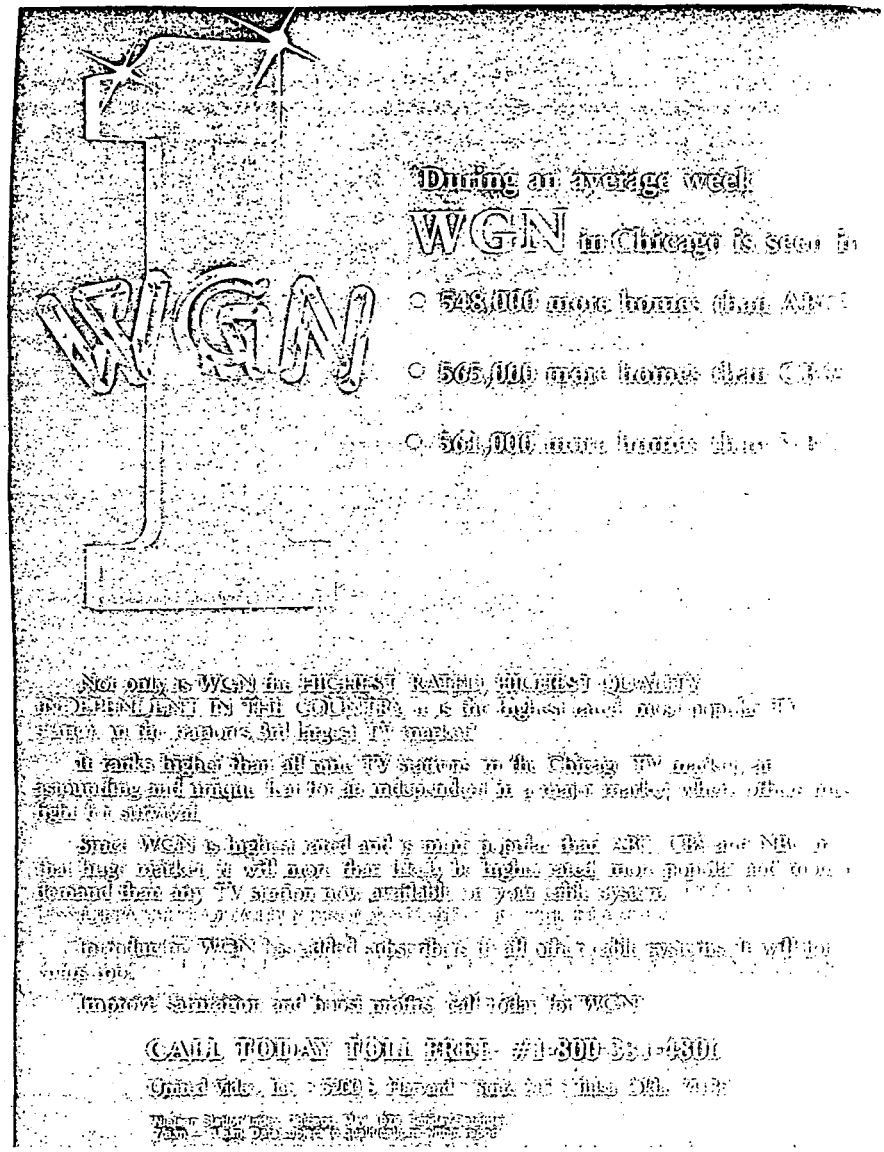
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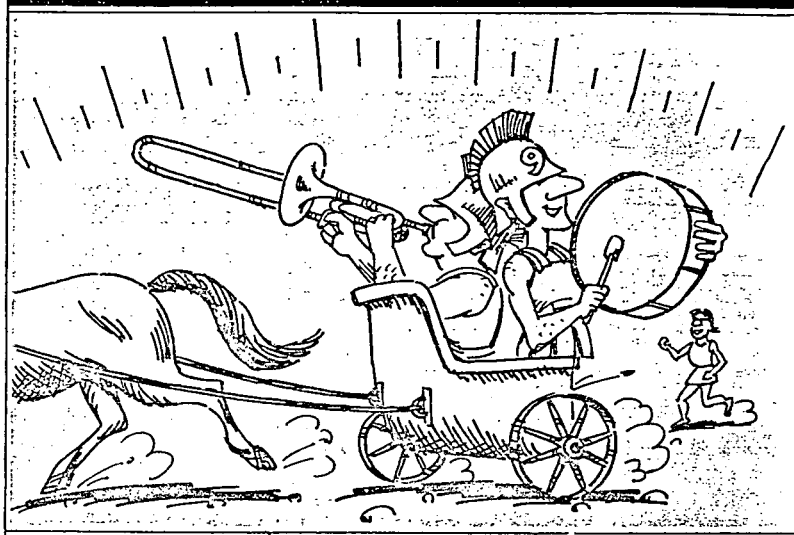

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## A BULLETIN FROM EASTERN MICROWAVE...

# WOR BANDWAGON ROLLS ON



### *Cable Systems Rally to Join Eastern Microwave's Winning Force*

WOR-TV is fast becoming a force that is making cable people sit up and take notice.

In the two short months after WOR "went satellite" more than 30 cable systems of all sizes contracted for service. They include systems from the Atlantic seaboard to Hawaii. Eastern Microwave is now sending the WOR-TV signal to 18 states, including 3 million homes on its terrestrial system in the Northeast United States.

Why have so many cable systems decided that WOR is the winning independent?

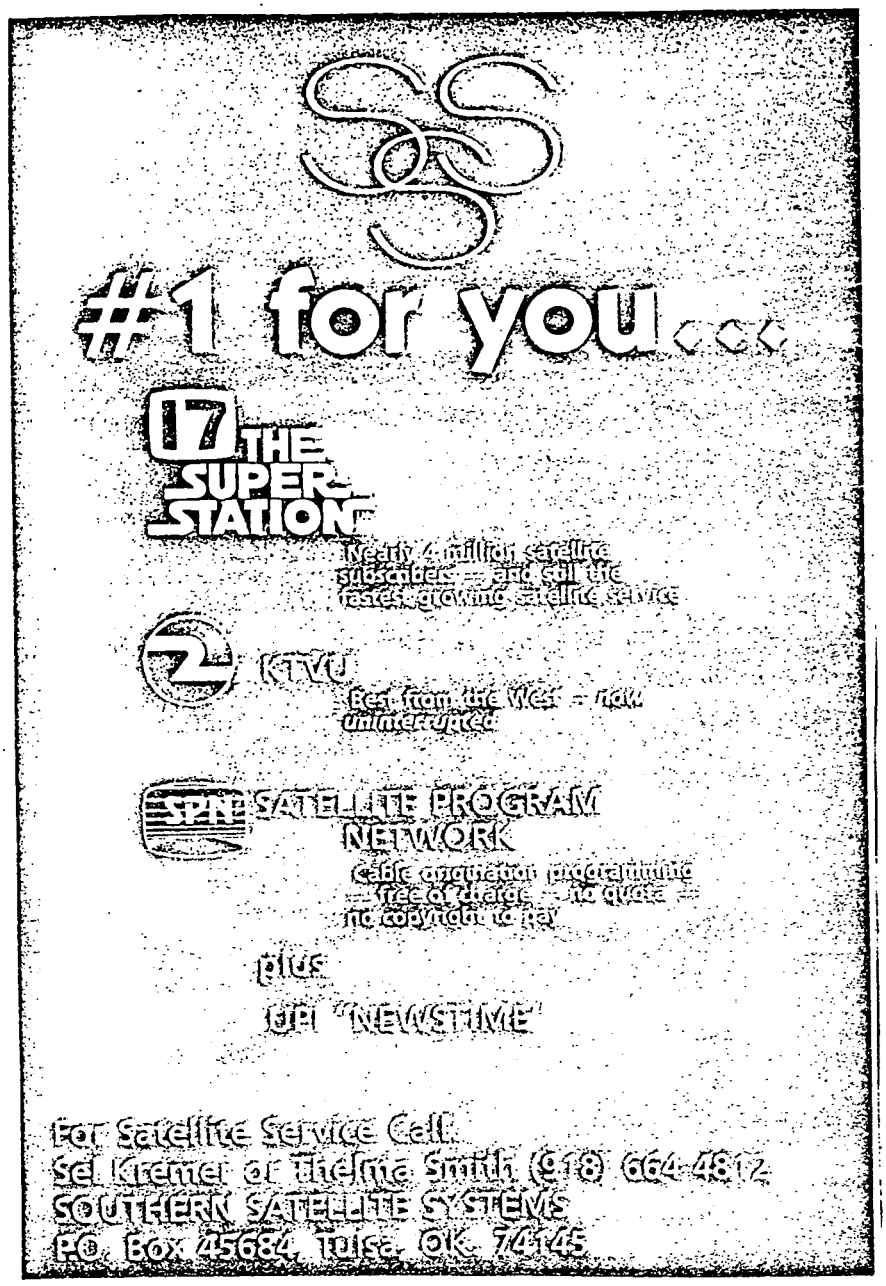
WOR offers top alternative programming. This variety has valuable appeal. Viewers choose from unduplicated daytime shows, recently-released movies and first-run series. An extensive National League Baseball schedule, as well as professional basketball, hockey and soccer from the metropolitan New York area make WOR one of the top satellite sports stations. And now WOR is on 24 hours.

And, cable system operators have confidence in Eastern Microwave. As a cable veteran of nearly 20 years, it is a strong link in the Newhouse Communications chain. Join the bandwagon and be a winner with WOR.

**Enlist in Eastern Microwave's WOR. Call Sam Morse or Charlie Mills at: (315) 455-5955.**

**EASTERN MICROWAVE, INC.**
DIVISION NEWHOUSE BROADCASTING CORP.
3 Northern Concourse
P.O. Box 4872
Syracuse, NY 13221


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Mr. KASTENMEIER. Thank you very much, Mr. Land, for very interesting testimony.

I would like to welcome the distinguished commissioner of baseball, Mr. Bowie Kuhn.

## TESTIMONY OF BOWIE KUHN

Mr. KUHN. I appreciate the opportunity to appear here on behalf of my sport and the other professional sports and address the important subject that you have under consideration. I do appear here not only representing baseball but also as the sports spokesman, so that I am speaking for the National Hockey League, the National Basketball Association, National Football League, National Soccer League, and I would surmise that the amateur sports would be very much in the same mood as we are with regard to the copyright problem.

I got in practice for this appearance yesterday by attending the Redskins-Giant game in the Meadowlands, where I am afraid my rooting for the Redskins did very poor service for the Redskins.

We have a number of problems here that we would like to bring to your attention. I would like to open up by saying that we have submitted a statement, Mr. Chairman, and I would ask that that be part of the record. I am not going to read from it here today.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be received as part of the record.

[The information follows:]

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STATEMENT OF BOWIE K. KUHN
COMMISSIONER OF BASEBALL

Before the House Subcommittee on Courts,
Civil Liberties and the Administration of Justice
96th Congress, First Session
November 26, 1979

Mr. Chairman, I am Bowie K. Kuhn, Commissioner of Baseball. I appreciate the opportunity to appear before you and your Subcommittee to discuss the cable television compulsory licensing provisions of the Copyright Revision Act of 1976. While I am here today specifically representing the 26 clubs of Major League Baseball, all of the professional sports share our conviction that the scope of these provisions is, even at this early date, in serious need of reappraisal -- particularly in view of the recent and dramatic technological, regulatory and economic changes which, we feel, were not contemplated when Congress enacted the copyright legislation.

Indeed, in your opening statement, Mr. Chairman, you correctly observe that: "With respect to cable television the 1976 Act has been rapidly overtaken by changing business practices brought about by satellite technology and by the new emphasis in Washington on deregulation of the broadcast

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industry." You further note that the "two primary areas of controversy surrounding cable television [are] the adequacy of the royalty revenue generated by the 1976 Copyright Law and the possible impact of deregulation by the Federal Communications Commission on the existing compulsory copyright license."

We firmly believe that the very factors which you have underscored, Mr. Chairman, and others necessitate the reappraisal of the scope of the compulsory licensing scheme at this time. Cable is only now making a major push into those large urban markets upon which professional sports depend so critically for their broadcast revenues, home gate and fan loyalty. Once these systems are in place, it will be virtually impossible to take the necessary corrective action.

Before discussing our specific recommendations with respect to the scope of compulsory licensing, we believe it important to emphasize three matters. The first is that the professional sports leagues have consistently believed that compulsory licensing is inappropriate for sports programming. Thus, the professional sports leagues opposed and were never a party to the agreement concerning compulsory

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licensing, which the Motion Picture Association of America and the National Cable Television Association brought before Congress. Second, the existing compulsory licensing scheme which permits the uncontrolled importation of distant signal sports programming into our clubs' home territories can have a potentially devastating effect on the professional sports clubs' established marketing practices and sources of revenue. Finally, the situation for sports has become even more urgent today because of the recent development and proliferation of satellite delivered "super stations" with their extensive amounts of sports programming; the Federal Communications Commission's (FCC) virtually total deregulation of the cable industry; and the explosive growth and transformation of the cable industry. These matters are discussed in detail below.

I. Congress Enacted A Compulsory Licensing Scheme Which, From The Outset, The Professional Sports Leagues Considered Inappropriate For Sports Programming. Accordingly, The Professional Sports Leagues Were Not A Party To The MPAA-NCTA Agreement Approving This Scheme.

As you are aware, Mr. Chairman, Baseball and the other professional sports leagues first testified during the 1965 House hearings on the copyright legislation to urge that live sports programming be afforded full copyright protection.

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During the following 12 years we appeared repeatedly before Congress, stressing that this protection was necessary to prevent cable television from depriving our clubs of all control over the distribution of their own product. Congress responded by providing in the legislation for a copyright in live sports telecasts. And at one point it excluded sports programming from the cable television compulsory licensing provisions, correctly reasoning that sports programming deserved "special consideration" because of its unique ephemeral nature and because:

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

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

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*/ Subcomm. on Patents, Trademarks & Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., "Draft Report to Accompany S.543" at 29 (1969).

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It was ultimately decided that the FCC should be allowed, in the first instance, to deal with the significant concerns of the sports leagues through regulation. Thus, the copyright revision legislation, as enacted, did not exclude sports programming from compulsory licensing by CATV.

The compulsory licensing scheme adopted by Congress, including the current royalty fee schedule, was largely the product of a negotiated agreement between the National Cable Television Association and the Motion Picture Association of America. Because of its constant belief that compulsory licensing is inappropriate for sports programming, the professional sports interests were never a party to this agreement and in fact consistently opposed it.

II. The Existing Compulsory Licensing Scheme, Which Permits The Uncontrolled Importation Of Sports Programming Into The Professional Sports Clubs' Home Territories, Will Have A Potentially Disastrous Effect On The Clubs' Established Marketing Practices And Sources Of Revenue.

As a result of the current compulsory licensing scheme, we have now found ourselves embroiled in a most complicated and costly controversy with other copyright owners before the newly-created Copyright Royalty Tribunal. The Tribunal, of course, is charged under the Act with the extremely difficult

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task of distributing the CATV royalties, without the benefit of any legislative guidance as to the appropriate distribution criteria, to the over 400 parties which have filed claims to some portion of the royalty pool. Certainly a most disturbing aspect of this new episode is the assertion by the broadcasters that they -- rather than the sports clubs -- are the copyright owners of sports telecasts and are thus entitled to all of the CATV royalties attributable to sports programming. We have strenuously resisted the broadcasters' attempts to subvert obvious Congressional intent by expropriating these royalties.

Regardless of how this matter is resolved, the professional sports clubs will be left with the very serious problem of having to contend with the existing compulsory licensing scheme. It is this scheme which permits CATV systems without our consent and over our objections to saturate our home territories with distant signal sports telecasts; which has deprived our clubs of all semblance of control over the distribution of their <u>own</u> product; and which threatens both the economic determinants of our clubs' success -- their broadcast revenues, home gate and hometown fan loyalty -- and their established marketing practices.

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We have discussed the potentially devastating impact of the current scheme in a recent pleading filed with the FCC. We request, Mr. Chairman, that this pleading, copies of which have been provided to your staff, be made a part of the record. Let me, however, highlight some of the more telling facts --

-- The Pittsburgh Pirates, which in 1978 finished only one game out of first place in the National League's Eastern Division and which this year became the World Champions of Baseball, possess the characteristics of a team which has traditionally attracted a large home gate. Nevertheless, in 1978 the Pirates were the second worst drawing team in the National League and 21st (out of 26) in the major leagues. Last season, even with the World Championship, the Pirates still had the third worst attendance record in the National League and were 18th in the major leagues. While no one factor is likely to be determinative of poor attendance, it is surely no coincidence that the Pirates have been subjected to more CATV importation of competing distant signal baseball telecasts than any other Major League Baseball team.

-- Some 37 percent of the TV households in the San Diego area are hooked up to cable; this is the highest degree of CATV penetration in any city with a Major League Baseball team. Virtually all of the San Diego CATV systems import the telecasts of the Los Angeles Dodgers and California Angels, thereby preventing the San Diego Padres from licensing any meaningful exclusivity to television stations. For a number of years, the Padres had no television contract.

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Presently, the only television station with which the Padres have been able to negotiate a contract is a station licensed in Tijuana, Mexico. Based upon the net dollars received by the Padres, this contract has ranked as one of the worst in Major League Baseball.

-- Prior to WTCG's (WTBS) becoming a super station, the telecasts of the Atlanta Braves were carried over a regional network of some 30 conventional television stations throughout the Southeast United States to millions of fans. Today, the Braves have no regional network and their telecasts are seen outside of Atlanta only by those individuals who can afford, and have access to, cable television.

In short, Mr. Chairman, the professional sports interests have had over 30 years of experience dealing with conventional television. It is this experience which convinces us of the harm posed by the importation of large numbers of competing telecasts. If the leagues could successfully function with the clubs invading each others' home markets with their telecasts, the clubs would have long since changed their telecasting patterns to take advantage of the additional revenues which this extraterritorial telecasting would provide. Indeed, if the leagues could successfully function under these circumstances, Congress would not have enacted Section 2 of the Sports Broadcast Act of 1961, 15 U.S.C. § 1292, which permits certain restrictions on such extraterritorial telecasting. However,

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as we have long understood, the introduction of substantial amounts of competing telecasts over either conventional television or cable television poses a serious threat to the very determinants of a club's success -- the size of its gate, the value of its broadcast rights and the following of its hometown fans -- and thus to the competitive stability of the entire league.

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

III. Recent And Dramatic Technological, Regulatory And Economic Changes Necessitate The Reappraisal Of The Scope Of The Current Compulsory Licensing Scheme.

The potentially devastating impact of CATV's uncontrolled importation of distant signal sports programming, pursuant to the existing compulsory licensing scheme, is of even greater concern now than ever before. The several recent and dramatic technological, regulatory and economic changes affecting the cable industry underscore the urgent need for the reassessment of the scope of this scheme.

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A. The Development and Proliferation of "Super Stations," With Their Extensive Amounts of Sports Programming

When your Subcommittee last conducted hearings on the CATV aspects of the copyright legislation in 1975, technological and regulatory limitations permitted cable systems to import television signals from only the closest geographical markets. Over one year after you completed your comprehensive hearings, Mr. Chairman, the television signal of Station WTCG (Atlanta, Georgia) (now WTBS) was first placed on satellite by a "resale common carrier" and made available to cable systems throughout the country. The WTBS signal now reaches over 5 million CATV subscribers on over 1,000 CATV systems in virtually every state in the Union.

During the past year several carriers have commenced the satellite distribution of stations KTVU (San Francisco, California); WGN (Chicago, Illinois); and WOR (New York, New York). The FCC has approved similar proposals by other carriers to place the signals of WSBK (Boston, Massachusetts) and KTTV (Los Angeles, California) on satellite. And the FCC has indicated that it will grant the application of another

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carrier to do the same with WPIX (New York, New York). Estimates are that by January 1, 1980, eighty percent of the some 15-16 million CATV subscribers in this country will be served by satellite. Television Digest, August 20, 1979, at 3. It is important to note that the Commission has permitted the resale common carriers to exploit these signals without their obtaining the consent of the broadcasters or program suppliers involved and, indeed, has done so notwithstanding the strenuous objections of stations KTTV, WGN, WPIX and certain of their program suppliers, including the professional sports leagues.

Certainly it is not by chance that a prime characteristic of each of the existing or potential super stations is its heavy concentration of sports programming. Each of these stations is, in fact, the flagship station of one of the major league baseball clubs and has televised a significant number of baseball games:

| Station | Club | Regular Season Games Telecast -- 1979 |
|---|---|---|
| WTBS | Atlanta Braves | 97 |
| WSBK | Boston Red Sox | 97 |
| WGN | Chicago Cubs | 144 |
| KTTV | Los Angeles Dodgers | 22 |
| WOR | New York Mets | 100 |
| WPIX | New York Yankees | 95 |
| KTVU | San Francisco Giants | 30 |
| | | 585 |

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When the number of professional basketball, hockey and soccer games televised by these super stations is included, the total number of sports telecasts swells to over 900 per year -- which, of course, amounts to nearly 3 telecasts each and every day.

Congress may have intended that, for example, the San Diego Padres baseball team must contend with the handful of Los Angeles Dodgers telecasts imported by CATV. However, we believe it was never Congress' intent to permit cable to deluge our clubs -- particularly our weaker clubs -- with this absolute glut of telecasts involving some of the perennial champions and teams with nationally recognized stars. While the uncontrolled importation of sports programming into any of our clubs' areas must necessarily undercut their broadcast rights, home gate and fan loyalty, such over-saturation will be disastrous.

FCC Commissioner James Quello, in his testimony concerning the proposed revamping of the 1934 Communications Act, very eloquently observed that "the advent of satellite distribution of TV signals has added a cataclysmic new dimension to copyright and to cable carriage of TV signals." Commissioner Quello further noted: "There is a threat of

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gross basic inequities in program property rights and also to an orderly system of TV allocations if satellite carriers continue to transmit broadcast signals to thousands of cable systems without retransmission consent."*/ These observations are certainly most appropos of the plight which the super stations and compulsory licensing have now thrust upon the professional sports clubs.

B. The FCC's Deregulation of the Cable Industry

As the Register of Copyrights and director of the National Telecommunications and Information Administration observed during their recent testimony before your Subcommittee, Mr. Chairman, the CATV compulsory licensing system was specifically tied to the FCC's extensive regulation of the cable industry. Indeed, in its report accompanying the copyright legislation, the House Judiciary Committee explained: "[A]ny statutory scheme that imposes copyright

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

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

Again, the situation has changed drastically. During the approximately four years since your Subcommittee last considered compulsory licensing, Mr. Chairman, the FCC has, for example --

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

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

-- eliminated the process by which it certified CATV operations, thereby allowing cable systems to alternate carriage of stations (such as sports stations) on a seasonal, monthly and even daily basis.

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

-- eliminated virtually all restrictions on the licensing of earth stations, which are

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now used by CATV systems for the reception of television signals from satellites.

-- had its rules restricting the amount of programming available to pay cable struck down.

-- had its rules requiring CATV systems to afford the public access to their facilities struck down.

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

As if this were not enough, the FCC has now proposed an end to virtually the last vestige of CATV regulation -- the signal carriage and syndicated exclusivity rules. The result will be that CATV systems may carry any syndicated programming they desire without regard to the exclusivity arrangements for which syndicators and broadcasters have bargained in the marketplace. Even more significant from our standpoint, CATV systems will be allowed to import as many distant signals as they desire. There will, in short, be no regulatory inhibition to cable's flooding the markets upon which our clubs depend for broadcast revenues and fan support with that staggering amount of sports programming presented by all of the super stations.

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In proposing elimination of the signal carriage and syndicated exclusivity rules, the FCC has relied upon certain studies which purportedly gauge the impact of this action on various parties. Significantly and quite disturbingly, however, the studies fail even to mention, let alone discuss, the effect of eliminating these rules on sports and the supply of sports programming.

Equally disturbing has been the FCC's utter failure to provide any meaningful restrictions on CATV's importation of distant signal sports programming. As noted above, sports programming was at one point properly excluded from the compulsory licensing provisions of the copyright bill. However, it was later determined that because the FCC had initiated a rulemaking proceeding with respect to CATV carriage of sports programming, such an exclusion would be premature. As one leading proponent of this approach suggested: "[I]f the FCC's rules appear to reflect an improper balance between the concerns of sports and CATV, the Congress could investigate and hold full hearings for remedial legislation."*/

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

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We submit, Mr. Chairman, that the FCC's "sports rule," 47 C.F.R. § 76.67, reflects precisely such an improper balance -- particularly since the FCC has either eliminated or is about to eliminate other integrally related rules. Under the sports rule, a professional sports club can be protected only against cable importation of the distant signal telecasts of its home games when those games are not telecast locally; it applies only to certain CATV systems within a 35-mile radius of the home team's city, notwithstanding that the drawing area for fans generally extends well beyond 35 miles, out 50 to 75 miles. The FCC has also carved out a number of exceptions which seriously vitiate the effect of the sports rule. But even when the rule does apply, it fails to afford even that measure of protection which Congress considered necessary, in connection with conventional television, when it enacted the Sports Broadcast Act of 1961, 15 U.S.C. § 1292. Under the 1961 Act the clubs may be protected against any competing telecasts in their home territories on any day when they are playing at home. Significantly, the FCC's refusal to provide adequate protection to sports programming stemmed in part from the FCC's belief that it did not have jurisdiction

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under the Communications Act to consider the full impact of CATV on sports. */

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

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*/ The Commission concluded:

> "Our responsibilities under the Communications Act to foster an efficient nation-wide communications service, compelled us to issue cable television signal carriage, program exclusivity and anti-siphoning rules which we have determined will adequately protect the ability of television broadcast stations to serve the public. We can find no public interest rationale in terms of our national communications policies for affording sports programming additional protection against audience fragmentation." Report and Order in Doc. No. 19417, 54 F.C.C.2d 265, 277 (1975).

It should be noted that the various rules to which the Commission referred in this passage either have been or soon will be eliminated, as discussed above.

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C. The Cable Industry's Explosive Growth and Transformation

Cable is no longer an enterprise struggling under heavy FCC regulation to bring improved reception of local television signals to a limited number of subscribers in the nation's rural and mountainous regions. To the contrary, cable systems currently serve over 40 million viewers in some 14 million homes; the Department of Commerce has estimated that by 1983, cable will reach some 20 million subscribers, or over 70 million viewers. The focus of this explosive growth will come in the nation's largest urban markets, upon which the professional sports teams depend so heavily. As one CATV observer has noted:

> "The final frontier of cable TV franchising -- the major market -- is about to fall . . . [F]ranchises [in urban markets] are falling like leaves from an autumn tree. . . .
>
> None of the old fears -- financial, technical, marketing, regulatory -- have daunted the new urban interest. Indeed, urban cable-builders feel satellites, pay TV, higher cable rates and less regulation have changed the game. Now they have set their sights on Baltimore, Boston, Chicago, Cincinnati, Cleveland, Dallas, Detroit, Houston, Philadelphia, Pittsburgh, etc." Cable TV Regulation No. 82 at 1 (Jan. 2, 1979).

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Indeed, a recent survey illustrates that 15 of the 20 metropolitan areas with a Major League Baseball team are currently in various stages of negotiating for cable franchises. See Cable Television Information Center, Cable Reports 6 (October 1979).

Moreover, cable has become a billion dollar plus industry which includes some of the nation's largest and most profitable corporations. For example, the nation's largest cable operator, Teleprompter Corporation, last year earned $14.2 million -- up 58 percent from 1977. The second largest operator, American Television and Communications, increased its revenue by 34 percent (to $71 million) and its profits by 65 percent (to $10 million). At the end of 1978 Time, Inc. completed its purchase of ATC for $179.6 million. The Los Angeles Times recently purchased Communications Properties, Inc., for $128 million and has become the nation's sixth largest multiple system operator. And General Electric Cable, a subsidiary of General Electric, has sought to acquire Cox Broadcasting, which is the nation's third largest cable operator. See TIME, May 7, 1979 at 86-87.

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By way of contrast, consider the situation of Professional Baseball. There should be no doubt as to the great popularity of Baseball. But "popularity" does not always translate to "profitability." As an example, the 1978 Chicago Cubs fell just 2,000 fans short of a team attendance record, yet went into the red by some $60,000.

The Cubs are not unique. Because of the very high costs of providing the public with baseball entertainment, more than half of the Major League Baseball clubs operate below or very near the economic breakeven level; this has been a consistent pattern over at least the past 14 years. Overall, Baseball clubs are, in fact, marginal businesses. Indeed, in 1978, the most recent year for which economic statistics have been compiled, the eight least profitable clubs lost some $2 million each. A few clubs -- not always the same ones -- have been profitable, but the majority have lost money or just about broken even. Clearly, under these circumstances, there is no economic justification for requiring the sports clubs and their fans to continue subsidizing the explosive growth of the cable industry.

Finally, compulsory licensing was thought necessary because it would be "impractical" for cable operators to

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deal with program suppliers. The experiences derived over the past few years demonstrates that this too is simply not the case.

In his recent testimony before your Subcommittee, Mr. Chairman, the director of the National Telecommunications and Information Administration detailed how pay cable middlemen, super station owners, resale common carriers and multiple CATV system operators have facilitated negotiations between CATV systems and program suppliers. Cable's experiences with the sports teams and leagues also confirm that dealings between cable and program suppliers are entirely practical. Last Spring, for example, Baseball negotiated a contract with UA Columbia Cablevision, a large cable entrepreneur, to distribute a game-of-the-week to CATV systems across the country. The cost of this package to CATV systems, which have the added advantage of being able to sell commercial time, is one cent per subscriber per game. The National Basketball Association and National Hockey League have also entered into cable game-of-the-week packages. Furthermore, individual baseball clubs, such as the Yankees, Mets, Dodgers, Angels and Phillies, have successfully negotiated with basic

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and pay cable systems and subscription television operations to provide the public with telecasts which would not have otherwise been available. And other sports entrepreneurs have been able to offer cable and STV originated sports programming packages -- for example, Madison Square Garden (offering cablecasts of New York Knicks and Rangers games and other athletic events played in the Garden); Prism (cablecasts of Philadelphia Flyers hockey games and 76ers basketball games); Entertainment and Sports Programming Network (NCAA and other athletic events).

The sports leagues are in business to do business; they cannot afford to ignore obvious and valuable business opportunities. Thus, when the marketplace has been left to function, there have not been any practical barriers to dealings between cable and the sports interests.

RECOMMENDATIONS

In sum, Mr. Chairman, we commend the Subcommittee's decision to hold these hearings and its apparent willingness to evaluate the impact of the recent technological, regulatory and economic changes in the cable industry. We firmly believe that, in view of these changes, it would be a serious

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mistake to remain content with the existing compulsory licensing provisions of the copyright revision legislation. Indeed, as we noted above, the inevitable and unfortunate result of such complacency is that the sports clubs will be forced to alter their established telecasting practices by reducing the significant number of local over-the-air telecasts which the public has come to expect.

We have reviewed the statements presented to you by the Register of Copyright, Ms. Barbara Ringer, and the Director of the National Telecommunications and Information Administration, Assistant Secretary of Commerce Henry Geller. There are a number of recommended actions in these statements which we strongly endorse.

First, Mr. Geller has forcefully argued that Congress should exclude from the scope of compulsory licensing, and thereby impose full copyright liability on, CATV's retransmission of distant non-national network programming in major markets. We have consistently supported this concept of program consent in our testimony before other Congressional committees and before the FCC. We continue to believe that this true marketplace solution is fair to all parties concerned.

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The most critical concern of professional sports, however, is simply one of ensuring control over the importation of distant signal sports programming into the home territories of their clubs; this concern can be satisfied without any substantial revamping of the current compulsory licensing scheme. We urge that, unless the Subcommittee adopts full program consent as we and Mr. Geller have advocated, the Subcommittee at least exclude from the scope of compulsory licensing CATV retransmission of distant non-national network sports programming into the professional sports clubs' home territories. We would be pleased to work with the Subcommittee in developing the necessary language to accomplish this limited purpose which, of course, is consistent with the Congressional intent of the 1961 Sports Broadcast Act.

Second, insofar as CATV systems continue to have a compulsory license to import any distant non-national network sports programming, we support the Register's recommendation that the authority of the Copyright Royalty Tribunal should be broadened and strengthened. Specifically, we believe that the Tribunal should be freed of any restraints on: (a) its periodic five-year review of the basic CATV royalty rate

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structure; and (b) its review of rates in response to FCC deregulation.

Under the Act as currently written, adjustment resulting from the first of these reviews can be made only to reflect monetary changes from inflation or deflation, or changes in average rates charged by cable systems, and are subject to other constraints. We believe that any formula which results in the cable industry's paying only 1 percent of its total revenues for programming, when independent television stations pay some 25 percent of their revenues for essentially the same programming, is grossly unrealistic, and certainly does not reflect the significant value of this programming to the CATV systems. The Tribunal should, as the Register has recommended, "be free to set the rates on the basis of an objective determination of what is a fair return to the copyright owner without placing an undue burden on the cable system."

With respect to the second of these reviews, the Register has concluded that

> "Congress entrusted to the Copyright Royalty Tribunal the task of adjusting royalty rates if the FCC rules were changed, but it did not expect the CRT to have to cope with the rates in a completely deregulated situation. On this assumption, it placed certain constraints

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> on the authority of the Tribunal to adjust rates to meet a changed regulatory environment. Had Congress anticipated complete deregulation, it is doubtful whether those constraints would have been imposed."

The extent of the constraints upon the Tribunal are not entirely clear. However, Congress should eliminate any possible confusion by declaring that the Tribunal has complete freedom to adjust the rates.

Third, the Register has suggested that Section 111(a)(3) of the Copyright Act might be amended by excluding from its scope "transmissions made to, by means of, or from a communications satellite." This section exempts from copyright liability transmissions made by typical common carriers and, as the Register explained, was never intended to permit the current distribution of signals via satellite by resale common carriers:

> "In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of super stations and satellites to relay services when it exempted traditional common carriers from copyright liability. In fact, the underlying policy reasons for compulsory licensing may well be inapplicable here, since the carrier may be in the position to act as a central agent in obtaining retransmission rights in the relayed programming."

We agree with the Register that Section 111(a)(3) was never intended to cover the current super station situation, and any confusion in this regard should be eliminated.

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Mr. KUHN. Also, Mr. Chairman, we did submit a very related memorandum to the Federal Communications Commission in September. We have also submitted that.

Mr. KASTENMEIER. Without objection, that too will be received. [See app. 1C at p. 506.]

Mr. KUHN. I think I can say on behalf of baseball and other sports that from the beginning of the copyright revision question, we have opposed, as strenuously as we have known how to oppose it, the concept of compulsory licensing. At no time have we been party to any agreement which would have become part of the law. We have felt throughout that our product was very special, different from others, and that compulsory licensing simply under no circumstances could serve our purposes. We feel very strongly that is so, and I mention to you in this regard that sports, unlike other programs which can be shown over and over, is largely ephemeral. It is good today when it is live, and it is virtually valueless tomorrow. This is particularly true of baseball, but it is largely true of other sports as well.

It simply has very little residual value. It is not like "All in the Family" that can be shown many times over, even after you have seen it once. I have the same reaction even after I watch it once, I watch it again and I enjoy it. But as much as I like baseball, I really don't want to see a baseball game played for me the next day. I have known very few exceptions to that. I have to watch some of it in the course of my work to see what is going on in those telecasts. It simply has no real value once it has been shown. It is ephemeral, it is gone, and we are distinct in that regard, and indeed if one goes back to the beginnings of these debates in 1965 about copyright revision, in the early going and coming up into the 1970's it was recognized that sports were different, and the early draft did not provide for a compulsory licensing as to sports.

Later on as the debate waged on, that changed, and we were included, but plainly we were included because the feeling of the Congress was that the Federal Communications Commission could provide the necessary regulation to protect the interests of sports. Of course, the Congress never had in mind that they would provide not the necessary regulation by the surprising deregulation, and so we have a very difficult bowl of fish of anything that was contemplated by the Congress, or certainly by the people in sports who were addressing themselves to the subject.

Second, let me say this. We are embroiled in a very difficult argument in the copyright royalty tribunal as to what should be done with the royalties that are there. We find ourselves before that very able tribunal arguing against 400 other claimants, sometimes against, sometimes with, all depending on who they are and what they represent, and to our surprise we find that my friend Vince Wasilewski's organization, the National Association of Broadcasters, contends to our surprise that we had no rights whatsoever with regard to those funds in the tribunal, that those were our broadcaster's funds, and we are really without any right in claiming them at all.

We don't agree with that, but it comes from a responsible organization, and it gives you some idea what a Pandora's box of prob-

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lems we have gotten into here in this copyright world in the last 3 years since the revision act was adopted.

Let me say, thirdly, that we are greatly disturbed with the developments in cable television. On the one hand, we see cable as a supplement to what we do in bringing our product to our fans. But on the other hand we see cable as highly disruptive of the local broadcasting practices that have grown up in professional sports, and this is certainly not limited to baseball. It could be applied to all sports.

We have situations where traditionally a professional sport team has simply not thought it was in its best interests when it sold its local rights to sell those into the national drawing territory of another baseball team, unless they happen to occupy the same market like the New York teams or the Los Angeles teams. They avoided that because it made no sense in a partnership arrangement, which is what a sports league is.

It made no sense to sell your product in competition with theirs, because the strength and vitality of the other members of the league are as critical or nearly as critical to you as your own strength and vitality. It is the balance of the league that creates competition and makes the sports league an attractive thing, and if the strong teams sell their broadcasting rights to the territories of the weak teams, they will undermine those weak teams, they will undermine their ability to compete successfully in the sports league, and they will destroy or certainly greatly erode the quality of competition in the sports league, so historically our clubs have not done that.

The only time we do sell programing that goes into all territories is when we sell nationally to the networks, and there we do something that we feel we can limit it in a way that will do service to the game, and bring back revenues which will justify the broad carriage of these games into all sports territories.

So we see in this regard a very, very troublesome disruption as cable which has no regard, of course, for our traditional self-restraint in this area as cable moves into our territories, and carries the host of baseball games, and other sports games that can be carried now, as a result of the exploding technology of cable.

I think it is fair to say, and these gentlemen here have all touched on it, and I feel a little bit like an echo, and I hope you will forgive me if I seem somewhat like an echo, but we all see many of these things the same way. I think we all have seen dramatic changes since 1976 which were not fairly anticipated. Superstations have been mentioned and it is certainly one. I want to come back to that later. The deregulation of cable, which is undergoing, underway at the present time, is certainly another. Cable's explosive growth, and its potential for vast further growth, is surely another.

One of the things that we see in this particular regard that is very troublesome to us, particularly troublesome to us, is that this new growth is right in the heartland of professional sports. This is no longer the growth in the mountains and the valleys, the outlying sparsely populated regions. It is right in the major urban centers, and it is therefore designed, if not designed will surely have a great impact on the very kinds of historical broadcasting

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patterns which have emerged in the professional sports in the United States.

We think this is an urgent problem for professional sports, because as these developments occur in the major urban centers, surely there is going to be the argument made that whatever the Congress should do, or the Federal Communications Commission should do, it should grandfather in all developments up to that point, and this is reaching a point now where even grandfathering, so great is the growth, is not going to protect against the damage being done to professional sports in the United States.

Let me talk about superstations for just a second. They are independents, as Mr. Land was saying, but they have another characteristic which is very striking. Of all the seven superstations which are either up now or are approved or are indicated to be approved by the Communications Commission, all seven have one thing in common. Every one is the flagship station of a major league baseball team. Atlanta is the Atlanta Braves, Boston the Red Sox, the Cubs in Chicago, the Los Angeles Dodgers in Los Angeles, the New York Mets, the New York Yankees and the San Francisco Giants. These haven't gone up by chance. These have not been selected for carriage by chance. Look at the number of baseball games these are carrying, Atlanta Braves 97, the Boston Red Sox 97, Chicago Cubs 144, the Los Angeles Dodgers—the lightest, 22—New York Mets 100, New York Yankees 95, the San Francisco Giants, 30—585 baseball games. Had they all been up in 1979, they would have been put out over cable through the superstations.

Mr. KASTENMEIER. I take it from that analysis we need not expect that Washington will be the flagship of a superstation?

Mr. KUHN. It is not on this list yet, Congressman, but you know my long-dreamed hope that it might be. If you look at not only the numbers, 585 games in 1979, but if you look at the quality of these clubs, these are some of our best and most attractive clubs—the Yankees, Red Sox, the Cubs, the Dodgers, and so forth—and to think that these games will be put across the country pellmell without any control by professional baseball into the market areas of these other clubs, and imagine what the damage is going to be done by that to traditional patterns of fan loyalty, I find it a perfect horror to look at, and I really ask your serious attention to this problem, because that is the heart of it, right there.

Let me take an example of where we see some particular harm being done. Superstations certainly suggest serious harm. Let us take a look at the situation of our world champion Pittsburgh Pirate team. Over the years, certainly in the last decade, the Pirates have turned out one of the most exciting teams in baseball, always competitive, frequently a division champion, this year a world champion, two times world champion in the last decade. Look at the entire Pirate attendance in the last 2 years. Now this happens to be the most heavily penetrated major league market in terms of distant signal bringing in cable of other baseball games.

In 1978 the Pirates ended up one game behind Philadelphia in a great race in the National League East. They were 21st out of 26 major league teams in attendance. In other words, they were the 21st worst attendance draw in the major leagues. Last year, this current season just completed, when they were the champion, and

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again of course had a very exciting team, they moved all the way up to being the 18th worst attendance team in the major leagues.

Now I would not say that cable is the only reason for those facts I have just given you, but I would suggest to you that it is almost impossible to say that cable can be ignored as a contributing factor to the problems of the Pirates, an extremely well run baseball club, have had.

Let me take a look at the San Diego Padres. The Padres probably have as much cable generally in their territory as any major league club, in fact I would think they have more than anybody. They do not have as much distant signal to baseball, but they have a lot. The systems there, virtually all of them, carry all of the televised games of the California Angels, and the Los Angeles Dodgers, two extremely strong and attractive major league baseball teams. The Padres until very recently have not even been able to get a local television contract, so great has the cable competition been in their market. It just is not attractive enough for anybody to have wanted to pay over a period of years. Currently they have been able to make an agreement with one station, and that ironically is a station in Mexico, which is their local station, and they probably have been as bad, in terms of dollar productivity, a local broadcasting contract as any team in the major league baseball.

Now let me come to some of Mr. Land's members. You must realize that baseball is heavily committed to independent stations. While there are some network stations, basically we are heavily committed to independent stations as our flagship stations and on our little local networks that carry locally from their flagship stations. Five years ago there were 170 of the local network stations that carried games of major league teams. There might be 4 here or 1 there, 30 someplace else, but totally they added up to 170. In 5 years' time we have seen that number diminish from 170 to 110. Again, I cannot tell you that cable is the only reason for that, but certainly cable is a contributing reason for the inability of these stations to feel that baseball is attractive to carry, and why we have lost—that is why we have lost, in my judgment, these local network stations. Let me take one example which I think will make my point.

Until channel 11 in Atlanta became a superstation, the Braves' games were not only carried on channel 11 in Atlanta, but were carried on 30 regional stations that virtually blanketed the Southeast of the United States. Once it became a superstation, all of the network stations that had been affiliated were dropped, and the people who had been long-served by this splendid Braves network were left to buy cable if they wanted to see the Braves. To me this is a dramatic example of how the development of cable and the superstation has adversely affected the interests not only of baseball but the interests of broadcasters.

There are some questions of basic economics that I think need to be urged here by me, because I think they are important. Baseball in the face of the probably greatest popularity it has ever had is experiencing anything but a dramatic growth in its profitability. In our statement, and I think this is worth reading because it makes the point very effectively, we say that overall, baseball clubs are in fact marginal businesses. Indeed, in 1978, the most recent year for

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which economic statistics have been compiled, the eight least profitable clubs lost some $2 million each on average. A few clubs, not always the same ones, have been profitable, but the majority have lost money or just about broken even. Clearly under these circumstances there is no quick justification for requiring the sports clubs and their fans to continue subsidizing the explosive growth of the cable industry.

Those kinds of numbers could just as easily in my judgment represent the operating picture in the National Hockey League and the National Basketball Association, and in the North American Soccer League, all of whom have franchises in very deep financial trouble, so that you are not looking at a professional sports industry of fat cats. These are not fat cats. These are largely relatively small businesses, many of whom are struggling to break even.

Compare with that the kinds of big profitable enterprises you find in the billion-dollar-plus cable industry. Mr. Valenti mentioned their names, some of them, and they were good examples, like Teleprompter, Time Inc., the Los Angeles Times, and General Electric. These are major corporations, extremely profitable, moving in on a great economic opportunity that has been provided to them by the current state of the law.

Now it is sometimes said by our friends in the cable business that the difficulty with our argument as regards program consent is that they would simply not get program consent from professional sports, that we would exercise the prerogative given simply to say no, you will not carry our games, we will not have it.

Now I think the record of our commercial activity is dramatically opposite to that. If one looks at baseball, you will find that last year we entered into a national cable contract with U.A.-Columbia for a weekly carriage of our games. We have a number of our clubs which have local cable deals for supplemental carriage of their games on cable, the New York Yankees, New York Mets, Philadelphia Phillies, the Los Angeles Dodgers, and the Angels. The others have national contracts with U.A.-Columbia, and both have clubs which have local deals with cable entrepreneurs, so that I think it is very plain that professional sports have been more than willing and are indeed more than willing to sit down and cut deals that make sense with the cable industry. I think it is also clear that amateur sports are prepared to do that very thing. The example of that which is most striking is the deal made by the North Carolina AA with ESPN, Entertainment Sports Programing Network, which is financed by Getty Oil, another national operation, which the NCAA has sold extensive program rights to.

It is also argued by the cable people that the whole marketplace is going to be too awkward. If you have program consent or anything like that there will not be a way to bring together the cable people with the sports people that create the programs.

Well, obviously that is disproven by the very fact that we have as much out there as we have already sold, what kind of programing I have just mentioned with U.A.-Columbia and so forth. I think it is also quite clear and Mr. Geller effectively points it out in his statement that middlemen do come forward to facilitate the functioning of the marketplace. The marketplace will function. You will see the Showtimes and the HBO's moving in to provide the

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linkage needed between the cable systems locally and these sports entrepreneurs.

There is another economic fact which I think needs to be mentioned and mentioned as strongly as I can. That is this. It is unreasonable to think that these sports clubs are going to continue to sit still and watch their programing taken for a fee which is so minimal as we see in the copyright tribunal. It is unreasonable to think that they will not, precisely as Mr. Valenti suggests, be resourceful enough to find some other way to market their product which will make more sense and which will not provide the opportunity to disrupt the classic historic patterns which we have developed for broadcasting, in the interest of the growth and strength of these sports leagues.

Now let me conclude by saying that we have put in our statement some suggestions which we think are constructive. First, while we have long supported the idea of program consent as the only fair and decent way to handle this program as far as sports is concerned, we too have to be realistic. Are the votes there to get that kind of approach across the boards? We think not. I think that is unfortunate, but realistically I think not, so that we have urged in our statement that you consider the protection as far as sports are concerned of the home territories where the key drawing operation of the sports clubs is.

We feel that if we had program consent as regards those territories, we could at least blunt a great deal of the negative impact of what is developing in the marketplace over which we have no control under the present state of the law. Beyond the home territories, we would be prepared to see the law continue to operate as it has operated so far as sports is concerned.

Second, we agree with the Register of Copyrights that the tribunal should be free to set rates on the basis of the tribunal's objective determination of what is really fair. To the extent there is to be ratesetting as regards sports programs, we think that they should have more flexibility in the tribunal than they have under the law.

Third, we also agree with the Register that section 111(a)(3) of the Revision Act was not intended to cover superstations.

Let me say finally that we think the hour is very late, because of the explosive growth of cable, and because of the impact it is having even now and will have even more dramatically tomorrow and next year on professional and amateur sports. We think the need is urgent for action by the Congress as regards this subject, and we urge your most favorable consideration of the problems which I have tried to bring forward to you here today.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Mr. Kuhn, for that very interesting statement. I will just have a couple of questions to address, and then I will yield to my colleagues. I am wondering whether the experience of major league baseball is shared by other sports in connection with the diminishing of numbers of television stations carrying the sport. You mentioned 170 being reduced to 110. Is that peculiar to major league baseball, or is that shared by the NFL and hockey and basketball?

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Mr. KUHN. Mr. Chairman, I think I am going to have to get that information supplied to you, because I am not really sure of the answer. It may be a little more typical of us than it is of other sports.

[The information follows:]

ARNOLD & PORTER,
*Washington, D.C., February 14, 1980.*

Hon. ROBERT W. KASTENMEIER,
*U.S. House of Representatives,*
*Rayburn House Office Building, Washington, D.C.*

DEAR REPRESENTATIVE KASTENMEIER: During his November 26, 1979 testimony before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Bowie Kuhn, the Commissioner of Baseball noted that the number of team regional network television stations broadcasting Major League Baseball games had declined significantly during the past few years. Commissioner Kuhn explained that this decline was in part attributable to the recent proliferation of cable television systems importing distant signal baseball telecasts. In response to your question as to whether Baseball's experience had been shared by professional football, hockey and basketball, Commissioner Kuhn stated that he would have that information supplied for the record.

The National Football League has advised us that it will submit a separate response to your inquiry. We have been advised by the National Basketball Association and the National Hockey League, however, that their member clubs in the past have been unable to develop regional networks; moreover, in light of the increasing penetration of various distant signal sports programming on CATV, it is felt that these networks are now unlikely to develop.

We trust that this information is responsive to the question you raised at the November 29, 1979 hearing. If you have any further questions, please let us know.

Sincerely,

JAMES F. FITZPATRICK.

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THE NATIONAL FOOTBALL LEAGUE,
*New York, N.Y., February 14, 1980.*

Hon. ROBERT W. KASTENMEIER,
*Chairman, House of Representatives,*
*Rayburn House Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: The following is in response to your question to Baseball Commissioner Bowie Kuhn at hearings before your subcommittee on November 26, 1979, relating to professional team sports and cable television. You inquired of Mr. Kuhn if the other professional team sports had suffered a loss in the number of television stations carrying their games as a result of cable systems importation of distant signal telecasts.

The importing of distant signal NFL football game telecasts by cable television systems has not at this time resulted in a reduction in the number of television stations carrying NFL games. Unlike the other professional team sports all NFL regular and post-season games are carried on the national television networks as well as some of the NFL pre-season games. Other pre-season games are generally broadcast on television stations in the home territory of the visiting NFL member clubs.

NFL broadcast patterns are designed to provide the fans with those games which are of the greatest interest to them. The NFL generally broadcasts 12 regional telecasts on Sunday afternoons. Usually one Sunday NFL game telecast is distributed nationwide as are the games played on Monday nights and Thanksgiving Day as well as post-season games. On these Sunday afternoons via the regional networks the NFL offers its fans a minimum of two game telecasts in every city within the United States. As many as three NFL game telecasts are shown in its franchise cities when the home team is playing away. One of the three games shown is the home team's away game. In those television markets which do not have local NFL franchises, three NFL game telecasts are shown each Sunday afternoon.

In addition, the regional telecasts are designed to stabilize and advance the interests of all 28 NFL member clubs. The introduction into those markets of other NFL regional games by cable television will result in oversaturation and a consequent loss of network and sponsorship interest resulting from a fragmentation of

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NFL audiences. Furthermore, the unrestricted telecasting of other NFL games into the home territories of NFL member teams would have a serious effect on stadium attendance.

Unlike the other professional team sports, football cannot be played often. NFL clubs play only eight home games during the regular season as contrasted with more than 80 home games for baseball and approximately 40 home games for basketball. NFL member teams receive approximately 50 percent of their total revenue from the sale of game tickets. The importance to the teams of having the greatest number of fans in attendance for each game is evident. The NFL broadcast patterns seek to build fan interest and generate attendance at the games.

The growth of cable television into the major markets together with improved technology, the changing FCC regulations on signal carriage all cause concern to professional sports. It is for these reasons we are appreciative of your willingness to examine the compulsory license provisions of the Copyright Revision Act of 1976.

Respectfully,

VAL PINCHBECK, JR.,
*Director of Broadcasting.*

Mr. KASTENMEIER. In the formula I take it we are distinguishing between cable and what may be known as pay cable or pay TV. Indeed it is obvious that many who have a problem with respect to cable generally have reached independent agreements with pay TV with respect to sports programing, motion picture programing and the like, so that is a distinction there, I take it, in terms of what the problem is. You certainly, I take it, want to be free to contract with cable insofar as it is sort of a pay cable situation, where they originate programing; is that correct?

Mr. KUHN. That is correct, and that is why I spelled out that we had made various numbers of contracts with pay television people.

Mr. KASTENMEIER. You are limited in the sense, and I only have a vague recollection, but there is some rule, is there not, an FCC rule, which prohibits pay television or pay cable from transmitting traditional sports programing as far as grandfathering in typically certain types of sports programing?

Mr. KUHN. There is a sports rule in the FCC, Mr. Chairman, that has some very limited impact as far as we are concerned. Taking my Pittsburgh—New York Mets example, if the Mets are playing in Pittsburgh, and the Mets are telecasting back to New York over WOR, under the sports rule now in effect in the Federal Communications Commission, cable systems in Pittsburgh would be prohibited from picking that signal up and carrying it within the 35-mile area of the Pirates' stadium, so long as the Pirates themselves were not telecasting that game locally, but that is very limited protection. It only protects you against your very own game, and it only protects you for 35 miles. Typically a baseball club will draw, and really must draw if it is going to succeed, a good bit beyond 35 miles. Also, there have been some violations of that which we have found very hard to get any answer for.

Mr. KASTENMEIER. I had in mind particularly whether either by network or by local television an NFL game had been traditionally telecast over normal television, that organized sports would be able literally to recontract with say pay TV or pay cable for that same programing.

Mr. KUHN. Yes, I think there is the possibility that they could recontract for that same type of programing that is now over the air, and I think Mr. Valenti correctly suggests that if driven far enough you will see more people moving toward that goal—that is, not just looking to supplemental use of program rights, as they do

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today, but going back to their basic over-the-air programing, and saying should this now go to some kind of a pay arrangement so as to protect our interests here? We would be very reluctant to see that development, because we happen to think the over-the-air arrangements that we make are beneficial to the game, but I assume there comes a point economically where you would have to anticipate that the people in this business would say wait a minute, we just cannot continue to do that; we have got to find some other avenue that makes some economic sense to us.

Today of the 2,100 major league baseball games that are played a year, some 1,370 are telecast locally. That is wholly apart from what we do on network; 1,370 are telecast locally, so we are providing a tremendous amount of baseball locally, and you would hate to see and I would hate to see any pullback from that commitment or that pattern of the past, but certainly this is jeopardized by what is developing in the cable marketplace.

Mr. KASTENMEIER. At the outset you mentioned, I thought very correctly, that most live game programing is ephemeral, and has by and large little economic afteruse. However, you also mentioned that the differences with broadcasters, and presumably in terms of ownership, entitlement, and royalty fees. There is a fair amount of adjacent programing produced for later viewing in connection with some professional sports. I think NFL–CBS produces quite a bit of not only in terms of Super Bowl but every Sunday. Is the ownership for copyright purposes of that well established, do you know? Is that network programing?

Mr. KUHN. I think that is in the main network programing, Mr. Chairman.

Mr. KASTENMEIER. Thank you.

Mr. KUHN. Incidentally, football would be the best example of some nonephemeral effect. You do see no tremendous game telecast the same evening, NFL games telecast the same evening. There is some audience for that, obviously, but much less for baseball, hockey, and soccer that you would see exist into a second day.

Mr. KASTENMEIER. I yield to my colleague from California.

Mr. DANIELSON. Thank you all very much for your presentations. Maybe Mr. Land could tell me this. When did the satellite superstation first become a major factor in the market, about how long ago?

Mr. LAND. The first superstation, as I recall, was scheduled to go on sometime in 1976.

Mr. KUHN. That is right.

Mr. LAND. And I do not think it was until 1977 or 1978 that the carriers began to talk about putting up more, so that it is very recent. As I recall, 1977 is when the talk began. The proposals began in 1978 and 1979. They have gone up.

Mr. DANIELSON. When did you find the impact? When did you first feel the impact?

Mr. LAND. We were concerned with it, I suppose because we are closest to it, several years ago.

Mr. DANIELSON. Did it impact economically prior to 1978?

Mr. LAND. No.

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Mr. DANIELSON. And now you say there are seven either in being——

Mr. LAND. That is correct.

Mr. DANIELSON [continuing]. Or almost in being.

Mr. LAND. That was Mr. Kuhn's figure, and I think he is correct, and there could be more.

Mr. DANIELSON. This panel contains a broad spectrum of interest. Mr. Valenti, you represent the Motion Picture Association, the manufacturers and producers of what I might call film entertainment.

Mr. VALENTI. I would much rather say, creators. The answer is yes, Mr. Congressman.

Mr. DANIELSON. And Mr. Land, the independent TV, you are probably the biggest customer of Mr. Valenti's organization.

Mr. LAND. That is correct. I do not know what the figures are, but they would be substantial.

Mr. DANIELSON. You generally buy programs; you may create some of your own, but the bulk of your programing is syndicated?

Mr. LAND. Yes.

Mr. DANIELSON. And you, Mr. Wasilewski, you straddle the fence here; you have audio as well as video, I think.

Mr. WASILEWSKI. Yes, and most of his stations would be customers of ours, too.

Mr. DANIELSON. On the audio side, you are not worried about this thing, are you?

Mr. WASILEWSKI. There are a lot of stations concerned about it because of the FM situation. There it is not the same problem, for example, in the major metropolitan areas. It would be in a very small market, where you would have maybe one or two stations and a cable could bring in from a major market numerous FM signals that would have an impact on the local stations.

Mr. DANIELSON. I assume the same entity in many instances owns a TV.

Mr. WASILEWSKI. Numerous radio stations have television ownership; yes, sir.

Mr. DANIELSON. And your interest, Mr. Kuhn, is not so much in syndication, I imagine. People do not really care about watching the baseball game played last June 13.

Mr. KUHN. That is correct.

Mr. DANIELSON. It is today's market that you are talking about.

Mr. KUHN. That is correct.

Mr. DANIELSON. And your interest is in today's program. Your concern is the impact, you mentioned the Mets playing in Pittsburgh. If that were relayed by satellite or otherwise and distributed in New York City, it may be that somebody would rather watch the Mets on cable then go to the Yanks and watch the Yanks play in the lot.

Mr. KUHN. That is reasonable; the other way would be more probable.

Mr. DANIELSON. I cast no aspersions on any team; I am just setting up a hypothetical situation. Is that basically your problem?

Mr. KUHN. Yes.

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Mr. DANIELSON. You share one thing in common, and that is the territorial exclusivity. I want to ask Mr. Valenti one question, and he will have to draw on his imagination.

On the syndicated program, assuming traditional limitation on territory, about how many times could a good program—how many opportunities are there to sell that program?

Mr. VALENTI. Several, Mr. Congressman. When you sell a syndicated program to a local station for its local territory, you give the repeat run rights, so that it may—say you might have "All in the Family," 120 segments, and they will do what they call stripping, that is, play one segment each day, so that at the end of a year you would have shown maybe one segment three times.

Mr. DANIELSON. But you can sell it in the same manner to a station in San Francisco, Seattle, or Tallahassee or wherever?

Mr. VALENTI. Absolutely.

Mr. DANIELSON. Your big concern is if it is sold once and distributed forever——

Mr. VALENTI. Part of the worth of that program, Mr. Congressman, is its exclusivity, as Mr. Land pointed out, because ratings are so important. Remember that advertising is the key to the fiscal health of a television station. Within 2 or 3 weeks, if its ratings fall off, its advertising rates fall off. On the other hand, cable is a contract subscriber on a monopoly basis. No one need watch a cable system for an entire month, and he would receive the same revenues. Not so with the television station.

Mr. DANIELSON. My point is, if you sold a program under syndication to a station in Los Angeles, and as a result of this sale it were shown through the secondary means in all the cities—San Francisco, Seattle, and Tallahassee—the salability of that program in Seattle, San Francisco, or Tallahassee would be eroded?

Mr. VALENTI. Certainly.

Mr. DANIELSON. And for that reason, it is your plea that something be done to protect the territorial exclusivity so the sale of a product can be maximized in one market area and others?

Mr. VALENTI. Yes, it gives the distributor the opportunity to sell his product in an orderly fashion. Indeed, it becomes very, very important.

Mr. DANIELSON. And that, sir, would tie into your, Mr. Land, your concept also, since your people buy most of your programs, and when you get them you want them to have enough novelty so the advertisers will pay a good rate for the advertising?

Mr. LAND. That is right.

Mr. DANIELSON. And Mr. Wasilewski, you are all over. You sort of straddle the fence.

Mr. WASILEWSKI. No, sir, I am not all over the fence.

Mr. DANIELSON. It is pretty hard to lay hands on; you are like Billy Sims with a football; nobody can touch you.

Mr. WASILEWSKI. The principal base grew up because of two parts of the law, the Communication Act, granted rebroadcast rights. That is exclusivity under the regulatory fee. Also, there is exclusivity in the copyright phase, one station could not broadcast a program without getting consent of the copyright proprietor. In the relationship between television and cable, neither of those rights are extended. The court system, through the regulatory

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systems of the FCC and the Congress, has fostered the superstation as a result.

Mr. DANIELSON. Sir, I understand that, but your pure audio stations, and the FM's, that does not bother you too much. It is when you get into visual.

You, Mr. Kuhn, are in the daily program, give us this day our daily baseball, and that does not entail too much.

Mr. KUHN. That is right.

Mr. KASTENMEIER. Mr. Moorhead.

Mr. MOORHEAD. Most people, Mr. Valenti, have an idea when a program appears on the networks it will get enough money to pay for the total cost of this programing, so there really is not any additional money that they need to take in to make it pay for themselves. Is that true?

Mr. VALENTI. No, it is not, Mr. Moorhead. It is a fact of life that practically all the programs on prime time networks barely recoup their costs or do not recoup their costs. They have to go to the syndication market to retrieve any kind of cost recoupment and rewards of profit. Today, with the cost of an hour program, the networks will purchase that at or below cost; and then you hope it stays on the networks 3 or 4 years. You need about 80-plus segments in order to syndicate profitably.

Mr. MOORHEAD. If you are not able to syndicate a program, because of its quality, the program will go out of business?

Mr. VALENTI. If you do not have a program that can be syndicated, you will go out of business.

Mr. MOORHEAD. We had members of the FCC testifying at another committee, and it was their feeling that under the copyright legislation which was adopted a few years ago, they really had no alternative but to end exclusivity rules as far as they were concerned. At least they were exploring the avenue that they did not have any other choice. Is new legislation necessary in this area, or do you feel the Commission has the power to act itself?

Mr. VALENTI. Well, up until recently, I did not think we were playing such a hazardous game. But it has become increasingly clear that the future of marketing policy, indeed of the whole marketing program in television, is undergoing a crisis. It is very clear there might be a majority of the FCC today willing to abandon all the rule of exclusivity and distant-signal importation. Therefore, we in TV supply business now feel we do not have a lifenet. Unless we go to the Congress and say build us some kind of protection against the bottom dropping out of our market, because now we are subject to a whimsical Commission which may or may not change its mind, depending on the personnel on that Commission. It bothers us whose lives depend on program exclusivity and a competitive marketplace where you compete for an audience.

Mr. MOORHEAD. In the long run, from what you have said and from what other witnesses have said, it would seem it would be in the best interest of the cable industry also to have that quality of production kept up and have at least rules for people we are dealing with, between the producer and distributor, or the organization broadcasting cable, for instance. They would prosper better if there was to be an agreement worked out between those parties

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rather than pulling something out of the air from these extremely powerful stations.

Mr. VALENTI. I cannot speak for the people in the cable industry, obviously. There are certain givens in this arena, Mr. Moorhead. One is property rights; people ought to have the privilege of marketing their product in the most intelligent fashion in some orderly procedure. No. 2, there is an artificial price mechanism which is unwieldy and a Frankenstein monster alien to the marketplace. How those are remedied—we talk about deregulating cable. It becomes almost comical when you say, because you cannot deregulate just part of something, until you abolish the compulsory list you can never deregulate cable. So that is one remedy, and there are others, and we need to examine them all. But what needs to be established in this subcommittee is the severity of the problem, which is tearing at the vitality of the program supply business. The rest of them can speak for themselves.

Mr. MOORHEAD. Mr. Kuhn, how much does television or radio affect attendance at your games?

Mr. KUHN. I think it is quite probable, though not all that easy to demonstrate, that television can have an adverse effect on attendance. Radio, I do not think so. Radio has by and large been viewed as an excellent promotional device for baseball, but I think television clearly has an adverse effect on attendance. There are two levels. One, you televise your own game; or if somebody else televises the games in your market.

Some of our teams televise a lot of their games. Some televise none at all. So it is always their conviction it would hurt their attendance severely. Televising of games other than your own can unquestionably hurt, so it is hard to provide, Congressman, precise figures to demonstrate the fact. I do not think there is any question that people in our profession have the slightest doubt that the harm is there.

Mr. MOORHEAD. I know there is one other area that concerns people, and I know you may disagree with me, but they felt the more money the major league teams took in from radio, television, and whatever, it just boosts the salary scale higher. The teams will not be making more money, they will just be paying higher and higher amounts for the players, and it is really the general public that has to pay the costs.

Mr. KUHN. I do not think that is the way it is going to work, Congressman. I should say we are in collective bargaining in professional baseball. The results of that may be quite significant as regards the observation you have made. We may see some things coming out there which might be beneficial as to improvident costs of services. What we face there is something which an arbitrator elected to wipe out the reserve system by a stroke of his pen, and the clubs put back some kind of a reserve system which has not been as adequate as it might be. It has made clever agents, skillfully playing off one club against another and seeing the improvident agents being paid for services. But notwithstanding the higher prices paid for salaries, ticket prices have indeed been somewhat behind inflationary pace in the United States. Up to now, the fans have not borne the costs.

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What concerns me is, sooner or later the fans will begin to bear some of that burden.

Mr. MOORHEAD. I know Members of Congress are concerned that cable be allowed to grow because they are a real part of the future. Perhaps most people will be on cable within a few years. But at the same time we want to protect the rights of the producer and the people who put money into the entertainment to begin with, so they can continue to produce a high-quality product, try to go reach some kind of ground that protects everybody and gives everyone a chance to grow, I am sure will be the goal of this committee and of the Congress.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

Just one thing that I was kind of interested in, I happened to be looking at a Neiman-Marcus catalog which unfortunately, my wife gets. I noticed in it you could have your own dish antenna in your backyard. Seeing as how those things develop, does that not pose an overall threat to television broadcasters in particular?

Mr. VALENTI. Yes, sir, it is my feeling that at some point we are going to have to get engineers to work out ways to unscramble signals from satellites.

For instance, out of pay cable, those signals can be pilfered. It is called piracy. It is not a big problem right now, but it can be. Then you will have to have an electronic device to scramble antennas.

Mr. SAWYER. If they ever get the price of those antennas down to $500——

Mr. LAND. The news is that the price is already well beyond $500. The Japanese have been working on small dishes and there are applications to FCC for direct home broadcasting. This era has come fast. We are already in it, and it will be possible probably in the next few years to put a little dish in your front room or the attic to pick up birds in the sky.

Mr. VALENTI. That is why what we have all been saying takes on added meaning. That is, when you look at a dimly lit future that no one with accuracy can predict—if you allow Government agencies to make these decisions you will have chaos. Things are moving so fast you cannot wait for a year or 2 years for a decision to come down. You have to free up the marketplace forces. Otherwise you will have an avalanche of confusion and all kinds of tangles which none of us is capable of charting. You have to free up the marketplace, let it be competitive, so when things happen overnight, people adjust to it and it has a self-regulating mechanism.

Mr. SAWYER. That is all, Mr. Chairman.

Mr. KASTENMEIER. On behalf of the members of this subcommittee I want to thank the witnesses of this particular panel. I think they have set out very eloquently, very explicitly, the problems that cause the need for this hearing. Technology is happening so fast, and all the other forces have such a complex interaction, it is not easy for this subcommittee or anybody else to make a wise decision about changes which might reflect a more equitable or more appropriate adjustment in the statute or in any other rules governing the businesses and the enterprises which you all so well represent.

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Thank you, and I would like to now call our next panel.

Mr. KASTENMEIER. The next panel, Mrs. Kay Peters, Screen Actors Guild; Sanford Wolff, executive secretary, American Federation of Television and Radio Artists and Edward Chapin, general counsel, Broadcast Music, Inc.

I would like to call briefly on Mr. Jack Golodner.

## PANEL II: JACK GOLODNER, DIRECTOR, DEPARTMENT OF PROFESSIONAL EMPLOYEES, AFL-CIO; KAY PETERS, SCREEN ACTORS GUILD; AND SANFORD WOLFF, EXECUTIVE SECRETARY, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFTRA)

### TESTIMONY OF JACK GOLODNER

Mr. GOLODNER. Thank you, Mr. Chairman, I appreciate the opportunity to appear before your committee. I am aware of the time restraints, and I will be very brief.

Mr. KASTENMEIER. We have your statement. It will be made a part of the record.

[The information follows:]

STATEMENT OF JACK GOLODNER, DIRECTOR, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

I am Jack Golodner, Director of the Department for Professional Employees, AFL-CIO. The Department comprises 26 national and international labor organizations (list attached), which include in their membership over one and a half million professional and technical workers who are engaged in every major professional and countless technical occupations. Prominent among these organizations are the so-called "talent" unions—the Actors Equity Association, American Federation of Musicians, American Federation of Television and Radio Artists, American Guild of Musicial Artists, and the Screen Actors Guild. Collectively, members of these organizations create most of the programming which provides America with television fare. Understandably these organizations and their membership expect to be fully and fairly reimbursed for their professional work. However, with the advent of the television "superstation" what had been a trickle of unreimbursed use of their work product by cable television systems has suddenly become a roaring river.

At its Second Biennial Convention held earlier this month here in Washington, D.C., the Department for Professional Employees adopted a resolution calling on the Congress to adopt a system of retransmission consent or other means (which would include copyright liability) to insure that fair compensation is received by artists, performers, and copyright holders for their performances and creations which are retransmitted by cable television systems. A copy of that resolution is also attached to my statement.

AFFILIATES OF THE DEPARTMENT FOR PROFESSIONAL EMPLOYEES

Actors Equity Association; American Federation of Government Employees; American Federation of Musicians; American Federation of State, County and Municipal Employees; American Federation of Teachers; American Federation of Television and Radio Artists; American Guild of Musical Artists; Association of Theatrical Press Agents and Managers; Brotherhood of Railway and Airline Clerks; Communications Workers of America; Insurance Workers International Union; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators; International Association of Machinists; International Brotherhood of Electrical Workers; International Chemical Workers Union; International Federation of Professional and Technical Engineers; International Union of Electrical, Radio and Machine Workers; International Union of Operating Engineers; National Association of Broadcast Employees and Technicians; Office and Professional Employees International Union; Retail, Wholesale and Department Store Union; Screen Actors Guild; Service Employees International Union; Seafarers International Union; United Association of Journeymen Plumbers; and United Food and Commercial Workers.

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BROADCAST RETRANSMISSIONS

Since their inception, radio and television broadcasting have developed into our principal means of mass communications. Except in the case of sound recordings, a system for compensating artists, performers, and copyright holders has been worked out with the broadcasting industry.

Presently, however, cable television is emerging as a significant alternative means of mass communications. In 1979, over 4,000 cable television systems serve approximately 14 million subscribers and the number of systems and subscribers is increasing rapidly. Cable television systems flourish through the retransmission to their subscribers of broadcast programming which those subscribers might not otherwise be able to receive. Some systems also provide programming and services not available off-the-air.

By utilizing microwave and satellite technology, the reach of cable television systems for broadcast signals has been substantially extended. Today, the signals of one television broadcast station are carried by cable television systems in 46 states.

Because of the interplay between the new communications technologies, Federal copyright law, and rules of the Federal Communications Commission, the orderly marketing of broadcast programming has been seriously distorted resulting in artists, performers, and copyright owners being substantially under-compensated for their performances and creations which are retransmitted by cable television systems: Therefore, be it

*Resolved,* That the Department for Professional Employees, AFL–CIO urges the Congress and the Federal Communications Commission to adopt a system of retransmission consent for broadcast signals, or other means such as program exclusivity, as may best insure that fair compensation is received by artists, performers and copyright owners for their performances and creations which are retransmitted by cable television systems.

Mr. GOLODNER. Basically, I am here representing not only the Department of Professional Employees of AFL–CIO, but the AFL–CIO itself, which adopted a regulation endorsing the effort of the people you have heard already to achieve proper compensation for the use of programing material transmitted by a cable.

Because of the membership of our affiliated organizations, included with my statement is a list of those organizations, we are concerned not only with the interest of the performers, but the consumer, as we, who seeks high quality for his or her growing leisure hours. Happily, we believe both are served when workers, in this case, the performers, are properly compensated. As Abe Lincoln once said, every worker is worthy of his hire. In other words, if I benefit from someone's labor, I should pay for it. This is the only way to assure the continuation of that person's labor at a quality level which will benefit us all.

Technology, from it, perceives blessings and curses. If we are to be masters, not servants, of technology, we as a society must determine its proper use. Using it to steal or take someone else's work without payment is not a proper use.

Mr. Chairman, I am joined today by two eloquent spokesmen of the industry, Mr. Sanford Wolff, executive secretary, American Federation of Television and Radio Artists, and Miss Kay Peters of the Screen Actors Guild, and I will relinquish my time to them.

Mr. KASTENMEIER. Thank you.

## TESTIMONY OF KAY PETERS

Ms. PETERS. Mr. Chairman, I am Kay Peters, and I am speaking in behalf of the Screen Actors Guild. Thank you for allowing us to express our concerns. Someone asked me the other day, "Why should the Government be concerned about actors? When a person chooses the acting profession, it is selected poverty." There is some

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truth in that statement. Most actors do exist on a poverty level. Only 1 percent of our membership earn over $100,000 and 80 percent earn less than $3,500 a year. Therefore, the Screen Actors Guild fervently supports the performer right to copyright protection and a fair wage.

Having no copyright protection, our only course of action is to attempt to negotiate an adequate contract with the producers. But the negotiation of those wages is dependent on the entire financial structure of the communication industry. Currently that financial structure is being determined, not in the marketplace, but right here in Washington. Through legislation and regulations, you are determining our negotiable wage. It is our contention that networks, independent broadcaster, cable and satellite systems can all coexist profitably. But the value of these various systems should ultimately be determined through fair competition in the marketplace. Any regulations or legislation should encourage and protect new technology only in the early stages of development, but never at the expense of existing systems. If the Government believes that cable and satellite systems need extensive protection, then the Government should subsidize them. Actors cannot afford to subsidize them.

We would hope that any legislation would be flexible enough to gradually ease the new technological systems into fair competition in the marketplace. Under the Copyright Act of 1976, this is impossible. The Copyright Royalty Tribunal does not have adequate authority or flexibility to accomplish this.

One, the tribunal cannot adjust the statutory rates upward according to cable's ability to pay.

Two, the tribunal cannot adjust the statutory rates on signals currently allowed, even if the FCC removes the distant-signal regulations.

Three, the tribunal cannot adequately compensate for the $400 million loss created if the FCC removes the syndicated exclusivity regulations.

Four, the tribunal even seems to be having trouble determining how to distribute the miniscule fees paid by cable for all of their programing through the compulsory license fees.

Section 111 of the Copyright Act of 1976 takes on a different perspective with the tremendous growth of cable and satellite systems. It must, therefore, be reconsidered.

No one is denying that this new technology is excellent for the distribution of programs. But cable and satellites do not create programs. They cannot, promise diversity and quality in programing. They can merely provide additional channels to carry the programs. According to the Parke report requested by the FCC, cable TV has only a minor impact on broadcasters.

When this report has been successfully challenged to the extent that the FCC has requested that the Rand Corp. reevaluate the impact studies. All it really takes is commonsense to realize that with the growth of cable at some point if not now, cable TV will encroach on the broadcaster's audience, and therefore reduce the revenues available for new productions. The main concern, then, is now to coordinate the programers and the distributors, so as to allow the continued or increased flow of television programing to

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the public. Without legislative changes, the public loses in many ways.

First of all, the networks will become even stronger than they are now, because they will have the financing to do the programing much longer than the independent producer, so rather than creating more competition, there will be less, because we will eliminate the independent producer.

Second, instead of diversity, the public will have multiple channels showing the reruns of the reruns.

Third, television will be available to only those who can afford cable, and we will no longer have free television as we have it today.

Fourth, eventually the quality and the quantity of programing will evaporate because it is unprofitable.

There are also certain blatant inconsistencies within the law that need to be addressed. Copyright laws exist to protect private property rights, but it is inconceivable that cable has the right legally to take someone else's property without consent or meaningful payment and sell it for profit. In any other situation it would be called stealing.

Regarding the unwilling superstation, how can a satellite system like ASN take the signal of KTTV Los Angeles and retransmit it without permission or payment while at the same time KTTV is required to get permission to boost its own signal?

To quote from Shakespeare's King Lear, "Nothing will come from nothing." Speak again. We are asking you to speak again, because nothing can be created or produced from nothing.

There is a cost and a fair payment, and ultimately the marketplace should determine that payment, but in the meantime it is essential to reevaluate the Copyright Act of 1976. Since that law was adopted there has been tremendous growth and changes in communication technology. There are also certain inequities that certainly need to be addressed, and the Copyright Royalty Tribunal does not have the authority or the flexibility to accomplish them. We must mandate syndicated exclusivity into the law and not leave it within the hands of 7 people to determine our fate. We must have consideration of retransmission consent at least in regard to unwilling superstations. We must readdress the law. Thank you.

Mr. KASTENMEIER. Thank you, Ms. Peters. Mr. Wolff.

## TESTIMONY OF SANFORD WOLFF

Mr. WOLFF. Thank you, Mr. Chairman. We have filed a written statement with you, and inasmuch as I fully support that which Ms. Peters has said and what Mr. Golodner has said in announcing to you the position of the AFL-CIO I will get the title today for brevity.

I think that I have been identified as the chief executive of the American Federation of Television and Radio Artists. The union represents in the United States and all over the United States in excess of 40,000 persons, men and women, who are professionals in the radio, television, recording, phonograph recording, sound recording business.

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I just want to make two statements, and then I would ask you, hopefully that you get time to read the statements we filed.

We confess to an enlightened self-interest in the subject matter. It is my and our firm belief that we are here to espouse safeguarding the free enterprise system, and guarding it against what we consider to be presently lawful piracy, but stark immorality. We stand in danger, threatened by available technology, of losing all that we have gained in the past 40 years by peaceful and, we hope, intelligent collective bargaining. The action, the activity required of the Congress, as outlined by Ms. Peters and Mr. Golodner we support, and that is all I would like to say, and again commend you to our written statement. Thank you.

Mr. KASTENMEIER. Thank you very much, Mr. Wolff, for that very brief statement. Your statement and the attachment will be received and made part of the record.

[The information follows:]

STATEMENT OF SANFORD I. WOLFF, NATIONAL EXECUTIVE SECRETARY, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL–CIO)

My name is Sanford I. Wolff. I am the Chief Executive of the American Federation of Television and Radio Artists (AFTRA), AFL–CIO. AFTRA is the collective bargaining representative for over 40,000 actors, dancers, newspersons, announcers, disc jockeys, and other professionals who inform and entertain the public from coast-to-coast on television, radio, sound recordings, slides, films, and cable.

I appear before you this morning to discuss the vexatious problem of retransmission of television broadcast signals by cable television systems. This problem arises from the interplay of the following:

Rapid changes in communications technology. Specifically the transition from land based microwave links to communications satellites as the means of feeding distant television broadcast signals to cable television systems.

A shift in prevailing regulatory philosophy at the Federal Communications Commission from reliance on classic government regulation to reliance on market forces. Currently, the Commission has proceedings underway which could eliminate distant signal and syndicated program exclusivity restraints now applicable to cable television systems.

Section 111 of Title 17 (copyrights) of the U.S. Code providing a compulsory license for cable television systems enabling them to carry television broadcast signals upon payment of royalty fees based on gross receipts from subscribers. This provision was enacted in 1976 when the state of the art for delivering distant television broadcast signals to cable systems was based on land based microwave links which imposed effective limits on the reach of cable television systems.

Presently, the term "television superstation" is finding its way into our vocabulary. This is a television station whose signal is picked up off-the-air (often contrary to the station's wishes) and beamed to a communications satellite which in turn transmits it to cable television systems in various parts of the United States. WTBS–TV (Atlanta, Channel 17) was the first such superstation and remains the best known. However, the following television stations are or are about to become superstations also, some, as I have indicated against their wishes: WCVB–TV (Boston), WSBK–TV (Boston), WGN–TV (Chicago), KTTV (Los Angeles), WOR–TV (New York), WCBS–TV (New York), WPIX (New York), and KTVU (Oakland).

As a result of the interplay of the factors which I listed before, cable television systems are receiving copyrighted television programming having an estimated worth of between $1 and $2 billion dollars in return for compulsory license fees of about $13 million, about 1 percent of the value of the programming.

Mr. Chairman, this has to affect television broadcasters and the broadcasting industry. And let me acknowledge the symbiotic relationship that exists in some areas between members of AFTRA and that industry. When that industry is unfairly dealt with to its economic detriment, as in this case, our members are affected also, and we join the broadcasting industry and others who are seeking redress of this injustice.

But our members are also directly affected. Let me present you with two specific examples:

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If an AFTRA member makes a commercial in Atlanta, Georgia, for 13 weeks use in that market, he or she is paid $163.65. Let me emphasize that this is for use in the Atlanta market only. However, if that commercial is shown on WTBS-TV (Atlanta, Channel 17), a television superstation, a matter over which the performer has no control, it is beamed by satellite to cable television systems in 46 states, including Alaska and Hawaii (see exhibit attached; in 1978 WTBS-TV was WTCG-TV). The "national" rate for such a performance is about $1,000 for the same 13 week period. Thus, our performer loses over $800: money which most actors and artists can ill-afford to lose.

Network Newscasters receive approximately three times the salary of a newscaster in the Atlanta market. Yet, thanks to satellite dissemination, the Atlanta newscaster is carried to as many places as his/her colleagues who work for the television networks.

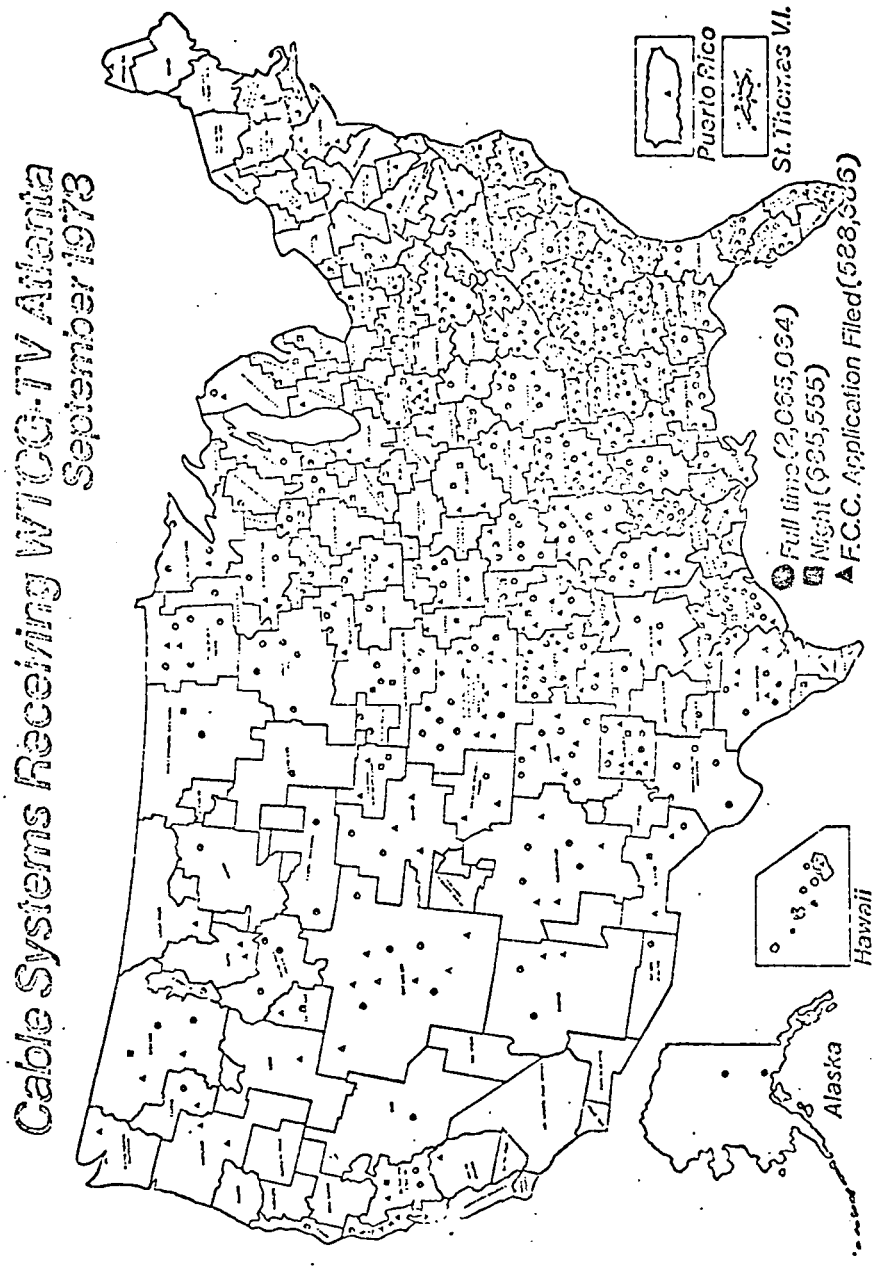
That is the problem, Mr. Chairman. And I think that everyone who has studied the matter agrees that it is a serious problem with far-reaching consequences. In the time remaining to me this morning rather than voicing abstract principles on which a solution should be based, I would like to present the following specific legislative proposal for your consideration:

First, make no change in existing signal carriage arrangements of cable television systems as of a selected date. But broaden the authority of the Copyright Royalty Tribunal to enable the Tribunal to adjust compulsory license fees to more equitably reflect the value of the programming covered by the compulsory license.

Second, provide that there would be complete copyright liability for distant signals added to a cable system after the date determined for purposes of the preceding paragraph or carried by a cable system established after that date.

To permit you to legislate in a deliberate manner, the regulatory status quo should be maintained with regard to the FCC's rules on syndicated program exclusivity and carriage of distant signals. This could probably be achieved by a letter or resolution from this Subcommittee or the House Judiciary Committee directed to the FCC stating your intention to legislate on this matter and requesting the Commission's forbearance until you had a reasonable opportunity to do so.

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Mr. WOLFF. Thank you.

Mr. KASTENMEIER. Now I would like to call on Mr. Chapin, representing Broadcast Music, Inc., as vice president and general counsel.

## TESTIMONY OF EDWARD CHAPIN, VICE PRESIDENT AND GENERAL COUNSEL OF MUSIC BROADCAST, INC.

Mr. CHAPIN. Thank you very much. I, too, will be very brief. We have filed a statement, a three-page statement with the subcommittee, and I would like to have it made part of the record if that is agreeable, if you have it.

Mr. KASTENMEIER. Without objection.

[The information follows:]

STATEMENT OF BROADCAST MUSIC, INC.

After nearly two years and with no frame of reference against which to make its decisions, the Copyright Royalty Tribunal remains enmeshed in predictable argument over distribution of royalties collected from the cable television industry. That is understandable. The Tribunal is faced with an incredibly complex problem: how to distribute $12 million already paid by the growing cable industry for much of the programming it offers its customers.

Collectively, cable's four major suppliers—music rights organizations, motion picture producers, broadcasters, and sports teams owners—have been able to provide little help. Despite many meetings the four groups have been unable to agree upon any formula for a suggested proportioning of these funds. Instead, as Variety has pointed out, there is a seemingly unending chorus of "me, me, me" assailing the ears of the Tribunal. Among these is one small voice which embraces three unique organizations, unique in the sense that they represent the creators and owners of almost all protected music in the world today. We hope that our voice now will be loud and clear as we offer, as we have attempted to do in the past, a solution to at least one significant portion of the cable TV royalty distribution problem.

It is a solution that clearly meets the requirements of the cable industry by insuring the maximum availability of copyrighted music and a minimum of accounting and negotiation.

It assures equal treatment to both the owners of music and the cable industry without preference to anyone.

It is in the public interest and it is simple.

We live in a period of meaningful deregulation. We have already witnessed major deregulation of the airlines. There is serious consideration of deregulating some functions of both the ICC and the FCC. You now have the opportunity to deregulate a significant part of the cable television payment distribution system before it takes hold and unnecessarily enmeshes the Tribunal. Without such action, hearings complex almost beyond imagination must be held. And clearly, as a result, writers and publishers of music will not receive their 1978 royalty payments until sometime in 1980, or perhaps well beyond, the victims of a serious devaluation of payment for something used at least two years before. We cannot believe this is what Congress intended when it drafted and passed Section 111.

You can begin by eliminating some of the regulatory snarl simply by removing music from the scope of the Tribunal's function.

The present portion of the copyright law that affects us today, and which has created the problem vexing the Tribunal, was written because CATV expressed concerns to the Congress. It was concerned about its ability to obtain certain rights; the difficulty of clearing individual musical compositions for performance at stated times; the fear that rights in music might be restricted; the difficulties of distributing royalties among individual copyright owners; and a fear that unreasonable fees might be exacted.

No basis for any of these apprehensions existed then and no basis exists today!

None of the three music licensing organizations defined in the Copyright Act of 1976—ASCAP, BMI or SESAC—grants exclusive rights. Any licensee can play any composition in any of these three repertoires at any time. Under the blanket license form for musical performances prevailing throughout the world there is no need of separate or individual notices, permissions, or clearances, to any individual or work.

Music performing rights organizations have no interests adverse to any present or potential music user, most certainly not the cable industry. Writers and publishers of music are interested only in having the maximum exposure in the greatest

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possible number of performing fields. The three of us—ASCAP, BMI and SESAC—can take full responsibility for dividing and equitably distributing any sums collected to the writers and publishers we represent. All of us are committed to the fixation of license fees by dispassionate negotiation, arbitration, or through the federal courts.

The pattern of music licensing that exists between us and every other music user can be extended and affords you an extraordinary opportunity for simplification of the Tribunal's chore, and an appropriate and far more timely distribution of royalties to writers and publishers of music.

We urge you, therefore, to remove music licensing from Section 111 of the law and allow the licensing of cable television to proceed in the traditional fashion of negotiation, agreement and, failing agreement, arbitration. The repertoires of ASCAP, BMI and SESAC fully satisfy the needs of the braodcasting industry. They similarly satisfy the needs of the cable industry. We ask only that you permit us to treat both equally, to deal with both on the same basis.

Mr. Chapin. I as the other witnesses, will not read it, but will just highlight a few of the points that I have made in the statement. BMI, to the extent that some of you may not know, is a performing rights society. We are involved with music licensing, and we therefore are one of the program suppliers. One of the problems that is presented here is evidenced by the fact that the Copyright Royalty Tribunal has a pool of money to distribute, but that the four major supplier groups have been unable to agree on the division of how the funds should be distributed.

We have a solution to this problem, at least as far as music is concerned. Obviously, one solution would be to have no compulsory license at all, and therefore the tribunal would not have the problem. But if the tribunal continues to be involved with compulsory license, at least music we feel need not be a part of the distribution process, because we are different in several ways from the other program suppliers.

I would point out that there is a public interest in removing all or part of the program suppliers from this process. The whole trend toward deregulation points to the interest, the public interest, in this direction.

The solution is to remove music from the scope of the tribunal's function, and from section 111. The reason we are able or music can be different from the others is that we do not have some of the problems perhaps that the other program suppliers do. We have no problems of clearances. We have no problems of distribution, since we have our own distribution systems that work well.

There is no problem of holding back any product, since this has traditionally been granted through licenses of our whole repertoire to all users of music, so that we feel that if any segment of the music suppliers can be taken out of this process and left to the free marketplace, we feel that music can. Again, if the compulsory license does remain, we feel that it does not have to remain for music. With that I will conclude my remarks.

Mr. KASTENMEIER. Thank you, Mr. Chapin. Your view on this matter also reflects that of, for example, ASCAP?

Mr. CHAPIN. Yes. They have not filed a statement as far as I know, but I would assume that all the performing rights would have—well, maybe I should not assume that, but I am here really only speaking——

Mr. KASTENMEIER. There is no reason this would not reflect their views?

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Mr. CHAPIN. I think that would be a fair statement.

Mr. KASTENMEIER. One of the questions in addition to the cable thing which we are looking at, as you well know, are performance rights in sound recording. I ask this only as a reference point. Do you have a point of view on that?

Mr. CHAPIN. We have filed a statement several years back with either the Register of Copyrights or this committee, I forget which, but basically we wear two hats in this respect. On the one hand, we represent the writers and publishers of music, but to the extent that they are also performers in addition to being writers and publishers, to that extent we would have one view. To the extent we are dealing with writers and publishers per se, without their being performers, we might have a different view, so that the end result is that we don't come out strongly one way or the other.

Mr. KASTENMEIER. That is one of the interesting situations, that many people wear many hats.

Mr. WOLFF. Would the chairman like a statement today?

Mr. KASTENMEIER. I was going to say I think Mr. Wolff and Mr. Golodner will be speaking later to this question and I won't raise it.

Mr. WOLFF. That was facetious. I am sorry.

Mr. KASTENMEIER. If I might ask Ms. Peters whether she has any view about performance rights in sound recordings.

Ms. PETERS. We are definitely supporting performers' rights in any way, yes, especially in sound recordings at this stage, yes.

Mr. KASTENMEIER. Do you draw any analogy between the fact that an actor gets no individual royalty presently from a studio, for example?

Ms. PETERS. I see the performers' rights in sound recordings as a step forward for any performer in any direction, and any step is better than nothing.

Mr. KASTENMEIER. I assume that regarding the cable question, you see the possibility that some sort of change with respect to the liability of cable retransmissions may benefit performers, generally speaking, in any category; is that correct?

Ms. PETERS. Yes, since we have no copyright protection, we are dependent on what is paid to the producers for their programs, and therefore if they are paid adequately we can negotiate our fair payments.

Mr. KASTENMEIER. Thank you. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I am going to pass. I got here very late.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I just have one or two questions that I want to ask, Ms. Peters. I gather that you feel that you are hurt in two ways by the retransmission. One is that the people that you negotiate with for your money for your performance, if the amount that they have available is cut down, then the amount that the actors and performers are paid will be less. But also I gather from your testimony that you felt that there was a lot of rebroadcasting of the same shows, and that there was less opportunity for performers in new work that they might do and they would not be hired as many times?

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Ms. PETERS. I think that the excitement about cable is the fact that there will be additional channels that might possibly mean new programing that is created and produced by producers, and as an actor we would hope that cable would be encouraged in that way. But they must pay for their programing or there isn't going to be programing on cables and there are going to be reruns on what we have even now on networks.

Mr. MOORHEAD. Are there any instances where the actors themselves get royalties from the rebroadcasts?

Mr. WOLFF. May I try to answer the Congressman's question? Both the Screen Actors Guild and AFTRA—and I guess AFTRA prior to the Screen Actors Guild's activities because we were in radio some 40 years ago—we have been successful in negotiating with the producers that hire our people, payments for the replay of programs. The effect of the superstation is to cut down that whole market, and so necessarily that is going to mean that the replay and residual formula either is going to dilute materially, and I don't think it can happen in our lifetime but it could, by a complete erosion, or if it is not completely eroded, we would have to in collective bargaining understand that which has occurred to the producer, and therefore we would have to lower our sights completely.

A question was asked earlier of the previous panel regarding the effect on the marketplace. Programs are sold more than once in the same market. License is a better word than sold, and I think it is more correct. If a program broadcast in Latin is picked up by 60 different markets or 160 or 400 markets, that immediately limits the marketing place of the syndicator, and it may be said: Well, what do you care about that? Aren't you getting into bed with strange people?

The fact of the matter is these are employers. This is the industry in which we earn a living, both on tape or on film or on sound recordings. You limit his market, you must make it necessary for us to lower our sights, and we are not in the business of doing that.

Mr. Sawyer, you made reference to the home dish. It has already occurred that individual engineers, for less than, I think less than $700, with scrap parts, have been able to put together the kind of receiver that is known as the dish for their own homes. That kind of thing probably is not going to be capable of legislating for or against, and I think it would be necessary that—that is the fortune of war. If you don't want to pay $11,000 for a Ford or a Buick, if you are capable of building yourself a car and it is safe on the highway, you are certainly not going to legislate against it, and I think that is probably what will occur. But the marketplace is going to see $700 and $900 and $1,200 receivers. There is no question about it. So we have to go back to the source, not to the home receiver but to the source of the broadcaster, the producer.

Mr. MOORHEAD. I just want to make one slight comment on something you said about the pay that the average performer gets. I happen to have an area where many, many of them live, and I know a lot of performers that are very capable have to wait around hoping that they will get called for work, day after day or week after week. They may be very capable and qualified people but they have to wait for the part that they fit into, and it does not

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happen every week. And so many of them only get part-time employment.

Ms. PETERS. I think we forget because we think in terms of the visible people, who do make quite a bit of money, but they certainly are not the majority of our membership.

Mr. MOORHEAD. Thank you.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. Mr. Chairman, I wanted to make one comment and then one very brief question. Mr. Wolff in his written statement has given a very good illustration of what the superstation achieves when someone makes a commercial, and is paid on the basis of a certain market scope, and then that commercial actually is projected in effect to a national market, and is therefore deprived of what would have been four or five times the rate that otherwise would have been appropriate for that so-called superstation.

I do not believe I heard you comment on that directly in your remarks during the course of your presentation, but I think it does give a rather classic example of the situation where the performer has a direct compensation value that is not compensated according to the pattern of that value.

My question, though, is this: I gather from your conclusions as expressed here that you see the day coming when there may be need to be a more complete system of copyright liability for distant signals, that there should be a grandfathering in of some type, and that in all events, this syndicated program exclusivity must be maintained?

Mr. WOLFF. Yes, sir, if that is a question, yes, sir.

Mr. GUDGER. Thank you. That was my question, and I wanted to get the summary of your comments in that regard.

Mr. WOLFF. Yes, sir.

Mr. GUDGER. Ms. Peters, do you generally agree with this conclusion, these propositions that have just been expressed by Mr. Wolff?

Ms. PETERS. Yes, indeed.

Mr. GUDGER. Thank you.

I believe Mr. Chapin is the same?

Mr. CHAPIN. Yes.

Mr. GUDGER. I wanted to make sure that all three of those who were addressing themselves to this area of concern speak in the same conclusions.

Mr. WOLFF. Mr. Chapin took a little detour that I wasn't aware he was going to take, and I would rather not even make a statement in that regard.

Mr. GUDGER. All right. I had understood there was a little bit of a variance, but none other than that. Thank you very much.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I was just trying to get a handle on the possible approaches to such a problem. It almost follows like night follows day that the more stations that are available to any given television set owner, the more it diminishes the market for any given stations. There is a limited amount of time to watch stations, and I can see the problems in trying to reduce that selection possibility to the public.

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I wonder, do you have any insight into why it is necessary to have a mandatory licensing situation, why stations wouldn't be willing to sell at some negotiated price to cable?

Mr. WOLFF. If I may, Mr. Sawyer. In the best of all worlds I would certainly support and favor just the open market, whoever has license with the copyright owner, owner of the copyright was then free to license to whomever he would want to license, or the owner of the copyright could say, "I am only going to license to so-and-so for a period of 3 months, and that is it." And I believe he can say to himself and to the public that wants to buy his program, "I think I have produced a true, evergreen, "Gone with the Wind," and I am not going to let it be shown every day in every year. I am going to let it be shown in a timely fashion that I think I, as the producer, am going to best profit by the showing of the movie, so I will bring it back every 2 or 3 years.

Mr. SAWYER. The thing that concerns me, though, is that apparently, at least at some point in time, this compulsory licensing was thought to be necessary. Do you know historically why it was? In other words, why is there a compulsory licensing provision in the picture at all?

Mr. WOLFF. In my opinion?

Mr. SAWYER. Yes.

Mr. WOLFF. I think that constitutionally the only reason there is copyright protection is so that you support the artist, the creator, in some way, to make it possible for him to exist, and create, and therefore enrich the lives of the citizens of the United States living under the Constitution.

On the other hand, on the other side of the coin, we don't want people creating and keeping it away from the people. We don't want the artist to create and keep it away from the people, so we are setting up, as has been set up in music, in some restricted fashion, you have set up a compulsory license, because you want the people's lives to be enriched, and I use the term advisedly, advised by the music that is being written by the creators.

Mr. SAWYER. Why wouldn't the normal marketplace incentives produce voluntary licenses? In other words, you might get someone who decides to keep it in his act, but if there is a good price available, I don't think we will risk too much.

Mr. WOLFF. I think historically, Mr. Sawyer, the creator has been incapable of negotiating for himself in many instances. I think that there are horror stories, that horror stories abound of inventions and patents and copyrighted material being stolen for a pittance, and this was an effort I think to put some order out of the chaos. I think the whole constitutional provision, plus the first Copyright Act were gems of creativity.

Mr. SAWYER. Why couldn't a system exist that required cable companies, let's say, to go to any stations whose broadcast they wanted to pick up, and negotiate some kind of deal on a free market basis?

Mr. WOLFF. I think they can do that. I think they should. That would be the best of all worlds. I would agree with it completely, if it could be achieved.

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Mr. SAWYER. The thing I don't see is why it was necessary to go the other route. Is there a reluctance of the broadcasters to license at any cost?

Mr. WOLFF. I think the only answer I could give concerning reluctance is that—and I won't name the superstation or the personnel that I talked to at superstations, but the superstation programs for that satellite buy a baseball team, things of that nature. The cables then, the satellite then wants to pick up the program. The only reason the satellite picks it up is so it can feed it for a fee to cable operators. If he cannot feed it to cable operators, he is not going to pick up the programing of a superstation. The superstation then is very much interested in the success of the satellite operator. I am using lay terms, because I very frankly get all mixed up if I start talking about transponders and things of that nature.

The self-interest of the superstation is such, and it is tied with that of the satellite operator, but it is such that he does not want to have to go, or he doesn't want the cable company to have to come to him in every instance to license the use of his programing material, because he is afraid they are not going to come to him. He is afraid that it is going to be extremely clumsy and awkward for him to have to talk to—and if you would look, sir, at the attachment to the statement that I filed, you would see how many cable operators and communities would be coming to the superstation. That is the only reason I can give.

Mr. SAWYER. One thing on which I am not clear is the definition on the quality that makes a station a superstation?

Mr. WOLFF. The examples abound. There is one station, the first one on the air, which brought the attention of all of us to this thing of superstations. It is just a plain, ordinary station in a town, and that station would probably not prosper in that town—and I take for example the Atlanta situation. It is no secret, because it has been said publicly by people representing the station, it is no secret that were the superstation to be in some way legislated out of business—that is, legislate out of business the satellite picking up the superstation and licensing it to the cable operators—if that procedure were legislated out of business, that station would go out of business, because Atlanta did not need another local station. In Atlanta, the baseball team, the Braves, were purchased as the headline program. It all goes together. So, there is no satellite up there, a pirate just stealing the programing from that superstation. That superstation is proud of its relation with the satellite, and it programs its station in such a way that the cable companies will want to pick it up.

Mr. CHAPIN. May I add one answer to your question. From Muzak's point of view, the doing away with the compulsory license is what we have been for right along, and are still for it, and so we would certainly support an affirmative answer to your question.

Mr. KASTENMEIER. The Chair would like to say to the gentleman that I think the next set of witnesses who have a great interest in the compulsory license can perhaps respond further. It may be better to ask the question of them.

Historically, there are a number of compulsory licenses. One of the reasons for this is, when you move from a position of total

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nonliability to full marketability, compulsory license is used as a mechanism to cushion the economic effect. It is a compromise between economic forces.

As Mr. Chapin knows, in the recording industry we have had for a long time the compulsory license. Once an author has made his music available he is not able to deny that composition to other companies. That was done a long time ago. That is a compulsory license. The industry of artists have not complained about it. We had no noticeable complaint about the compulsory license in the years it was considered. The only consideration was the amount. Nor is this the only compulsory license. We have had the same thing which happened with respect to jukeboxes. They came from no liability to a total liability position. So we said in essence by statute, we will not deny you the music, except you will pay for it. There will be a liability for it and the same is also true of certain public broadcasts. One can criticize compulsory license, but it is sometimes a useful device to accommodate diverse interests in copyright law. Particularly so when a change in liability is contemplated by the statute.

Mr. RAILSBACK. I apologize for not being here earlier. Is there consensus, in your opinion, that you agree with the motion picture industry generally in the thrust?

Mr. WOLFF. Yes. I think for the first time, at least to my knowledge, for the first time the red room suite is pretty crowded with some very diverse people.

Mr. RAILSBACK. You are even agreeing with the broadcasters.

Mr. WOLFF. Yes, they even said hello to me this morning, politely.

Mr. RAILSBACK. May I just ask, what is happening with the superstation, the satellite which is the carrier? They pick up the signals and on some occasions, without even permission——

Mr. WOLFF. No permission necessary, no permission granted.

Mr. RAILSBACK. Then they are not really required to pay any fee at all. They enter into an agreement with the cable people for a fee to provide——

Mr. WOLFF. Let me do it very quickly. There is a station in Chicago, a powerful station, WGN-TV. A satellite operator decided he was going to pick up WGN-TV. There is nothing WGN-TV can do about it. It is an independent station. The satellite operator goes to the cable operator and says I have all this good programing from WGN-TV in Chicago and I will license it to you. He does, and he gets money for it. If WGN-TV were not as good a station as it is, it would start programing for a satellite, and then make its money by saying we cover 500,000 homes you cannot otherwise get because we have gone to cable, therefore our advertising rates have been increased, come to us.

Ms. PETERS. There is some confusion in terms of superstation. It sounds as though it is owned by one station. We think in terms of Ted Turner as being the originator of the concept. Originally he did own the whole thing. He was then told he could not be a common carrier and a broadcaster, so he sold the common carrier portion to a friend for a dollar. We are having unwilling broadcasters picked up by satellite——

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Mr. RAILSBACK. Are there a number of satellites now that are doing it?

Mr. WOLFF. Yes.

Mr. GUDGER. May I inject one question here? It is my impression a satellite may carry as many as 20 signals. Can those be packaged so as to restrict a cable station, so that it can only gain limited access?

Mr. WOLFF. Can the satellite operator restrict use of the material it picks up?

Mr. GUDGER. Use of the material by the cable TV.

Mr. WOLFF. Yes, sir. I cannot tell you how, but it is like you cannot get tuned in. I think it is a scrambling type of thing. You have to turn to the right place on the dial.

Mr. RAILSBACK. I just flew in, so I have not had a chance to carefully study the statements. Are you as concerned as others have been in conversations I have had with them, like the motion picture industry, for one, about all the problems confronting the Copyright Tribunal, the fact they have not made their distribution, that it is tied up? What should be done in addition to extending the authority of the Copyright Tribunal, which I understand you want to do? But what about the sad fact that it apparently has all it can do to deal with the problems now confronting it?

Mr. WOLFF. I only have one answer to that. Get down to the business entirely and have retransmission consent.

Mr. RAILSBACK. That probably will not happen. Based on your experience, do they need more staff, more clearly defined guidelines?

Mr. WOLFF. Well, in order for it to be made meaningful, they will have to somehow increase the rates of compensation. Now whether that should be left to the tribunal to make its own survey and establish how many homes are being serviced in this manner by cable, et cetera, or whether a legislated increase such as a cost-of-living—I do not know how that would work. I would say at the moment, I would like to see a fence put around the area and no hunting allowed by any of the other regulatory or executive or administrative branches.

Mr. RAILSBACK. Do you see that as providing stability which you feel are incursions by other regulatory agencies which could disrupt the function of the tribunal?

Mr. WOLFF. I do not want the FCC to throw this thing wide open without some concern being expressed by the legislative body.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. Ms. Peters, you represent Screen Actors Guild. Is Kathleen Nolan still president?

Ms. PETERS. No, Bill Shellig is the new president.

Mr. KASTENMEIER. Thank you. Indeed, the committee thanks all four of you for your testimony.

Right now, the Chair would like to greet Mr. Tom Wheeler, president of the National Cable Television Association; Steve Effros, counsel, Community Antenna Television Association; and Mr. Barry Simon, vice president and general counsel of Teleprompter.

Mr. Wheeler.

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## PANEL REPRESENTING THE CABLE INDUSTRY: THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION; STEPHEN EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION; BARRY P. SIMON, VICE PRESIDENT AND COUNSEL, TELEPROMPTER CORP.

### TESTIMONY OF THOMAS E. WHEELER

Mr. WHEELER. We appreciate your diligence and patience for wading through an arcane situation at best.

I am Tom Wheeler, president of the National Cable Television Association. Thank you for the opportunity to appear before you today. I do confess, however, a certain degree of amazement that the cable copyright question is once again a matter of congressional concern so quickly after the passage of the Copyright Act of 1976.

Cable television operators have, as the result of this committee's decision, recently reversed 30 years of precedent and have begun making copyright payments. In the Copyright Act of 1976 this committee vacated two Supreme Court decisions which found that cable had no copyright liability. The Court found that cable merely enhanced the capacity of viewers to receive broadcast signals, and did not perform copyrighted material. To paraphrase the Court, cable copyright liability is the equivalent of buying two tickets to one performance.

Judging from your statement in the Congressional Record, Mr. Chairman, there are two key issues around which any decision to reopen the Copyright Act should revolve. These issues are the impact of new technological developments, such as satellite distribution of television signals, and the proposed Federal Communications Commission deregulation of the cable signal carriage rules. Briefly, let us address each of these.

#### SATELLITE IMPACT

Cable television systems are the largest users of communications satellites in the country. However, the vast minority of programs so transmitted are broadcast retransmissions and thus the topic of today's hearing. The majority of satellite-fed cable programs are not available on broadcast television and have been purchased specifically for cable use.

As the chart indicates, out of the top 20 satellite-fed channels, only four are retransmitted broadcast signals. Even that number is about to diminish, as KTVU is being taken off the satellite for lack of interest.

In the top 12 satellite-fed cable programs, there is only one so-called superstation, channel 17 from Atlanta. I should hasten to point out that the program prices charged channel 17 as a result of its superstation status have been equally super—up 171 percent in 1 year.

The second-ranked broadcast signal, WGN, ranks 14th in overall cable usage, with one-sixth as many subscribers as channel 17. The next ranked broadcast station, WOR, is ranked 17th, and only has one-twentieth the subscribers as WTBS. As I mentioned before, No. 19, KTVU, is going off the satellite.

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Clearly, there is only one superstation, channel 17, and it is paying dearly for that right. To assume a flood of superstations resulting in the radical overhaul of television production and broadcasting is erroneous for several reasons. For one, FCC studies and cable industry experience have demonstrated that while distant signals are important to cable's consumer acceptance there is, nonetheless, a decreasing marginal value to each additional signal. One reason this occurs is because of the duplicated programing which makes independent stations look alike. In addition, the fact that cable operators must pay the double costs of satellite transmission and copyright fees raises real bottom-line considerations. The basic fact is that most cable systems have 12 channels and just do not have room for unlimited duplicated programing on which they pay twice.

While we are discussing WGN and WOR, however, it is important to note that these so-called reluctant superstations do not hesitate to promote their cable audience. For example, the rate cards for WGN and WOR indicate that these stations are actively selling the additional cable audience to advertisers. This produces extra cable-induced income which the program producers should treat the same way as channel 17's increased income is created—by increasing program prices to reflect increased audience.

### PROPOSED CABLE DEREGULATION

Presently, the Federal Communications Commission is in the midst of a rulemaking to consider the elimination of the restrictions on cable carriage of broadcast signals. The inquiry which led to this rulemaking began 3 years ago and the Commission has yet to make a decision.

The FCC rules in question limit the number of signals a cable system may import. In addition, the FCC requires that syndicated programs under contract to local broadcasters be blacked out on the cable-imported distant signals.

Attempting to reopen the Copyright Act based on the potential of an FCC rule change is a specious argument. First, the FCC has yet to act in this proceeding and the specifics of the outcome are totally speculative and uncertain.

Second, linking revision of the Copyright Act to possible changes in FCC rules is putting the cart before the horse. As the Court of Appeals for the D.C. Circuit held just a few weeks ago in *Geller* vs. *FCC,* the 1972 rules were adopted as a copyright surrogate in the expectation that they would facilitate enactment of copyright legislation. Passage of the 1976 Copyright Act requires Commission consideration of the continuing need for those rules.

This point is emphasized by the fact that the Congress anticipated future changes in FCC rules and created a Copyright Royalty Tribunal to adjust cable fees in response to FCC rule changes. Section 801(b)(2)(B) of the Copyright Act clearly states in pertinent part:

> "*In the event that the rules and regulations of the Federal Communications Commission are amended* at any time after April 15, 1976, *the royalty rates* established by section 111(d)(2)(B) *may be adjusted* to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations.

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*In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users.* (Emphasis added.)

This was interpreted by the legislative history of the act to:

* * * give the Commission broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. . . . *In determining the reasonableness of rates under this provision, the Commission should consider, among other factors, the economic impact that such adjustment may have on copyright owners and users,* including broadcast stations, and the effect of such additional distant signal equivalents, if any, on local broadcasters' ability to serve the public. (Emphasis added)

Mr. Chairman, while satellite technology and potential FCC deregulation are exploited by some to attempt to justify reopening the act, it is clear that both issues are strikingly similar to a description Churchill once affixed to an opponent: "There's a lot less there than meets the eye."

CABLE ECONOMICS

You have also, Mr. Chairman, raised the question of the impact of cable television on existing business relationships. In order to explore this, it is first necessary to take a look at some basic cable economics:

1. The FCC inquiry into the economic relationship between broadcast and cable television showed that even total cable deregulation would have minimal impact on broadcasters. Failing to impact on broadcasters, therefore, the deregulation has a similar absence of impact on program producers, and

2. The FCC made a further finding that while distant signals are an essential component of cable programing, there is a decreasing marginal value for each additional distant signal. This clearly indicates that a flood of superstations will never occur.

Mr. Chairman, I respectfully request that the conclusions of the FCC's economic inquiry be included in the record.

Before looking at the specific findings of the economic inquiry, it is important that we draw the nexus between impact on broadcasters and impact on program owners who sell to the broadcasters. There is a direct linkage which is essential to the understanding of the issues before you today, to wit: if cable does not have an impact on the value of the local broadcaster's programing, then it likewise does not have an impact on the price the local broadcaster should pay for the programing. Broadcasters pay a price for programing which is determined by the number of viewers it will attract. The FCC's studies show that cable competition does not detract from viewers; thus the value of the programing is unchanged and the impact on the copyright holder negligible.

The arguments you have heard previously are based on what the FCC calls the "intuitive model." This assumes that cable competition fractionalizes audiences and thus diminishes the value of the programing. This intuitive model has been explicitly rejected by the FCC research and without it, the claims of those who want to reopen the Copyright Act fall apart. But do not believe me, look at the results of the FCC's study.

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". . . *the effect on local station audiences of eliminating the signal carriage rules appears small.* In all but the most extreme cases, the additional audience loss will be less than 10 percent in the foreseeable future. Moreover, these losses will take place in a context of offsetting factors. Increases in population and in the level of economic activity result in fairly steady growth in the demand for advertising exposures and in station revenues. (Emphasis added.)

. . . *we were able to conclude confidently that cable deregulation would visit no negative near-term effects upon the supply of television programming.* We also estimated that there is *little likelihood that the elimination of the rules* requiring blackouts of syndicated programs under contract to local market broadcasters *would adversely affect the supply of television programming at any point in the forseeable future."* (Emphasis added.)

Witnesses the morning asked for "free market" and said cable carriage distorts "free market."

There is no free market in the classic sense. There is a web of facts and conditions that constrain free markets. Some include:

Broadcast outlets are limited by the FCC. Thus there is no free entry.

Producers have oligopoly, a limited number of suppliers. Practices like blind bidding and block booking constrain the market.

Sports producers have an antitrust waiver that permits their otherwise collusive agreements not to compete in each other's markets.

They seek exclusivity to protect these sweetheart deals.

Exclusivity is: The right to carve up markets. The right to withhold the product from the public. The right to limit or preclude competition. The right to bid up the price.

Exclusivity is the opposite of—antithetical to—free competition and the free market.

Exclusivity would ratify and confirm the technology, the marketing mechanisms resulting from broadcast technology and limitations. Protection of a technology is not the proper function of copyright law.

Even setting aside the FCC's conclusions, the actions of the program suppliers themselves should establish once and for all the emptiness of their argument in favor of opening up the Copyright Act. They, claim, remember, that additional showings of a program hurts the syndication market for that product. If that is so, why then are the program suppliers actively selling into syndication programs like "MASH" at the same time, in the same market, that they sell the programs for network distribution? If additional showings by cable are harmful, why is it not likewise harmful to sell into syndication programs which are still running on the networks?

Answer: the products are heterogeneous, different installments and different times are treated differently by the audience, thus their action shows no impact.

The claim that cable importation decreases the value of a program has been found to be a myth. There is another myth also as vacuous: the claim that superstations will totally distort and revamp the marketplace for creative products.

The fact is, as you have seen by the chart of the top 20 satellite services, the superstation boom has peaked.

Why are superstations not living up to doomsayers' predictions? Again, the FCC's economic inquiry provided some interesting answers. The FCC found that the marginal value of distant television signals decreases significantly as additional signals are added. For

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example, one distant signal delivered to cable subscribers receives a 10-percent share of total audience; addition of a second signal brings the total share up to 16 percent. However, the third signal adds only 1 percent to the total, raising it to 17 percent. This is not to say that distant signals are unimportant; in fact a recent nationwide survey showed them to be a determining factor in the public's desire for cable television. It is to suggest, however, that an infinite number of signals is not a practical option.

Again, the chart of satellite services illustrates this point. One distant signal, channel 17, is successful; the other two stations have one-sixth and one-twentieth as many subscribers. For the reasons we discussed previously—similarity of product, double cost of paying for the transmission and copyright and the fact that most cable systems this 12-channel capacity—the natural market for superstations is limited.

Finally, Mr. Chairman, I cannot address the question of cable economics without asking as Howard Cannon, chairman of the Senate Commerce Committee did recently, just who is getting the free ride that we hear about.

It costs approximately $3.5 million to build a major market VHF television station. Yet these stations are selling for prices in excess of $50 million. Why? The answer is, of course, the fact that the Government has given these broadcasters the pathway into the home—the airwaves. It is this gift which makes up the value of a broadcast station. Cable operators, on the other hand, must build a pathway into each home at costs for major markets of from $50 to $80 million.

This Government subsidy of broadcasters is shared by program producers who are thus able to distribute their product more extensively, more economically, and more profitably than would otherwise be possible.

You have heard talk today about how cable doesn't pay as great a percentage of its income for programing as to broadcasters. Cable is an entirely different business with an entirely different set of economics based largely on the fact that we are given nothing.

Let's look at just what we get when we get cable copyrights, when we buy these rights. The program that we pay copyright on we cannot edit. We cannot control its content. We cannot substitute commercials. In essence, we don't have the same rights that a broadcaster does for the product, so why then should we pay the same price if we are getting different rights?

Thus far we have talked about everything but how the Copyright Act of 1976 came to be and how it works. As Register of Copyrights Barbara Ringer testified, the act is a "comprehensive amalgamation of fragile deals."

Let's look first at the concept of the act as an agreement, or "deal" in Ms. Ringer's words. As we have discussed before, two Supreme Court decisions held that cable operators had no copyright liability; "two tickets to one show," they called it. It became clear during the consideration of revisions to the Copyright Act of 1909, that Congress was going to reverse the Supreme Court's findings. Thus began the great cable copyright war which tore our industry asunder.

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In fact, the other cable association you will hear from today, Mr. Effros and the Community Antenna Television Association, was founded by those who quit the NCTA over the question of whether or not the industry should agree to some form of copyright payment. You must remember that 30 years of precedent, two Supreme Court decisions and some rather compelling logic that cable systems didn't use copyrighted products but merely acted as a superantenna made it pretty hard for cable operators to swallow the idea of paying copyright, but nevertheless swallow it we did, at least at NTCA.

We bought the FCC's logic that the signal carriage rules were a copyright substitute. We expected that once we started paying copyright the FCC would eliminate its rules. We have now been paying copyright for over a year and the FCC has yet to provide relief, giving us the worst of all words—copyright and restrictive rules. Now, on top of all this, the program producers decide they want more dollars out of cable. We are back before the Congress arguing an issue which we thought had been put to bed 3 years ago. My first recollection of the copyright issue was about 3½ years ago, just after I had joined NTCA. Bob Schmidt, who was at that time president of NCTA, and I went to Jack Valenti's office to plan strategy on how we were going to jointly present the newly signed MPAA-NCTA copyright agreement to this committee. The three of us then walked lockstep up the Hill explaining the validity of the approach to which we had agreed.

I even remember after the Copyright Act was signed into law how we were invited to one of the famous MPAA movie screenings to celebrate our joint victory. Now we find MPAA complaining to the Congress that it was a bad deal, that they were politically muscled into the agreement and participated only because it was a necessary evil.

To my friend Jack Valenti I can say, "We know how you feel." The cable industry was dragged kicking and screaming to the agreement and felt that we were being muscled. After all, we were giving up two Supreme Court decisions that we should pay nothing. It wasn't only a matter of dollars to cable operators but a matter of "moral principle."

Nevertheless, the MPAA-NCTA agreement is now law and let's look at how it works. I report to you today the same thing MPAA and NCTA explained in 1976—this act will work well if given a chance.

As this committee knows, under the law, cable systems are given a compulsory license to carry those broadcast signals authorized by the FCC. In return, cable pays a statutory fee for the rights to be licensed. The Copyright Royalty Tribunal was established to collect the fees and to distribute the proceeds to copyright claimants as well as to adjust the cable fee levels.

It was estimated by MPAA and NCTA that the new law would result in first year copyright payments of $8.7 million. In reality the cable industry paid $12.7 million—45 percent higher than MPAA and originally found sufficient. Furthermore, NAB has estimated that the cable copyright payment will grow to $30 million by 1980.

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Now you are being urged by the same interests who urged you to vacate the Supreme Court decisions to reopen the Copyright Act to generate more funds. Two vehicles are suggested to accomplish this goal: retransmission consent or an adjustment in the copyright rates.

We submit to you that nothing has happened to even suggest that the mechanism originally created by the committee—the Copyright Tribunal—is incapable of doing the job for which it was created. We submit that the tribunal has not been given an opportunity to exercise its authority and that, as such, any change in the law is precipitous.

Nevertheless, let's look at the two proposals.

Mr. Sawyer, you were raising some very interesting questions a few moments ago about retransmission consent and why it won't work. It is an idea that has been tried time and time again, and has been found in actual experience not to work. For instance, from 1968 to 1972, the FCC had retransmission consent as part of its cable rules. During that 4-year period, two cable systems in the entire country got the necessary consent. Why? Because there was a basic fallacy in retransmission consent, and that is that the cable operator has to go to the people with whom he wants to compete, and ask them for the product to compete.

They are not crazy. They want in some way to restrict or control our access, and thereby restrict or control our competition. For this reason this idea was specifically rejected by this committee in 1976. It surfaced again in the Communications Subcommittee's rewrite of the Communications Act, but it quickly died there.

I guess the best thing I can say to answer your question, Mr. Sawyer, and others, is to cite some of the things that have been said about retransmission consent. This committee's report called it impractical and unduly burdensome. Congressman Danielson said, "It is impossible and impractical for the cable system to negotiate for a license with the copyright owners in advance of transmitting the programing."

Register of Copyrights Ringer told the House Communmications Subcommittee, "If you came down to the fact that the copyright owner or the broadcaster could cut off the cable system's waters, it would do that. I believe, honestly, a retransmission consent provision would be a retransmission denial provision."

The other proposed solution in search of a problem is to somehow adjust the copyright fee schedule, either explicitly or through delegation to some authority. Again, the question remains, Why? The Copyright Act has generated almost 50 percent more revenue than predicted, the FCCs rules have not changed and if they should change, there is provision for adjustment by the Copyright Tribunal. In addition, as we have discussed previously, the "Superstation Scare" is more hype than substance with FCC studies showing that cable does not impact on broadcasters or program owners.

In conclusion, Mr. Chairman, I am reminded of one of the arguments used against NCTA when we were agreeing with this committee and MPAA to reverse the Supreme Court decisions. One of our cable operators asked one day, "Do you know how to boil a frog?"

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He then explained that to boil a frog you don't bring the water to a boil and then throw the frog in because he'll jump right now. What you do is get the water nice and warm, put the frog in, he kind of swims around happily and then you turn up the heat, and bingo! it's too late.

We were warned 3 years ago that we were the frog in the MPAA-NCTA copyright agreement, that as soon as we agreed to vacate the Supreme Court's decision that we had no copyright liability the water would be boiling. Indeed, that appears to be the strategy of those who ask you to reopen the act.

I made a note here as Mr. Valenti was testifying. He called the copyright agreement his Vietnam. Perhaps it is our Bay of Pigs.

There are many good reasons why now is not the time to reopen the Copyright Act:

The mechanism established in the act have yet to be given an opportunity to function;

The FCC has not deregulated cable television and, as the Court found, even if it did, that would be a response to the Copyright Act, not a trigger for reopening the act;

The so-called superstation threat shows no signs of existing in reality;

The communications marketplace is evolving but as the Court found in the *Betamax* case, it is not the job of Government to intervene to stop changes in the marketing of products, and

The FCCs economic inquiry has conclusively demonstrated that cable does not impact on broadcasters or program suppliers.

Mr. Chairman, we commend the committee for the judicious exercising of its oversight function in this matter. Clearly, this is a matter for which oversight is appropriate. A reopening of the legislative morass, however, is distinctly inappropriate.

Thank you.

[The information follows:]

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STATEMENT OF THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

I am Tom Wheeler, President of the National Cable Television Association.[1] Thank you for the opportunity to appear before you today. I do confess, however a certain degree of amazement that the cable copyright question is once again a matter of Congressional concern so quickly after the passage of the Copyright Act of 1976.

I can understand why the television broadcast interests would want to see this issue reopened: anything to retard the growth of cable and help broadcasting maintain its monopoly.[2] I can also understand why the motion picture community would want to see this issue reopened in order to put more money in their pockets.[3]

Cable television operators, on the other hand, have, as the result of this Committee's decision, recently reversed thirty years of precedent and have begun making copyright payments. In the Copyright Act of 1976 this Committee vacated two Supreme Court decisions which found that cable had no copyright liability. The court found that cable merely enhanced the capacity of viewers to receive broadcast signals, and did not perform copyrighted

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1 NCTA represents approximately 1500 cable television systems nationwide which, combined, account for approximately 70% of all cable television subscribers.

2 This despite the position of the broadcasters as described in the November 19, 1979 NAB Highlights that NAB is "opposed to paying for the privilege of playing records". Broadcasters have, for years, successfully opposed performance royalty legislation imposing on them an analogous copyright liability.

3 According to a movie industry briefing of Wall Street analysts, reported in the April 16, 1979 issue of New York, movie production is in "an era of steadily increasing profitability and diminished risks." Andy Albeck, President of United Artists, described it as "almost like a gold mine that you can keep digging over and over again."

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material.[4] To paraphrase the Court, cable copyright liability is the equivalent of buying two tickets to one performance.

Mr. Chairman, our goal today is not to revisit the threshold issue of cable copyright liability. You and your colleagues have decided that issue and we are complying with your decision.[5] We would, however, like to address the question of why the committee is even considering opening the bag of worms that is the cable portion of the Copyright Act. In particular, why is there any need to reopen the issue when the 1976 statute created a mechanism to deal with any potential changes in the marketplace? And, specifically, why consider reopening the Act before the built-in adjustment mechanism has had the opportunity to operate?

Judging from your statement in the Congressional Record, Mr. Chairman, there are two key issues around which any decision to reopen the Copyright Act should revolve. These issues are the impact of new technological developments, such as satellite distribution of television signals, and the proposed Federal Communications Commission deregulation of the cable signal carriage rules. In addition, we note in your October 15, 1979 speech to the Texas Association of Broadcasters that you are concerned over the effect of cable on existing business relationships, specifically on "a continual supply of creative programming." Briefly,

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4 Fortnightly Corporaton vs. United Artist Television, Inc., 392 U.S. 390 (1968); Teleprompter Corporation vs. Columbia Broadcasting System., Inc.; 415 U.S. 394. (1974)

5 Register of Copyrights Barbara Ringer testified before the Subcommittee on November 15, 1979 that "there is very nearly complete statutory compliance by the CATV industry and more royalty fees are being generated than were originally estimated."

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let's address each of these.

Satellite Impact

Cable television systems are the largest users of communications satellites in the country. However, the vast minority of the programs so transmitted are broadcast retransmissions and thus the topic of today's hearing. The majority of satellite-fed cable programs are not available on broadcast television and have been purchased specifically for cable use.

As the chart indicates,[6] out of the top twenty satellite-fed channels, only four are retransmitted broadcast signals. Even that number is about to diminish as KTVU is being taken off the satellite for lack of interest.

TOP 20 CABLE SATELLITE PROGRAMMERS

| Rank | Service | Distributor | Subscribers (millions) | CATV Systems | Type |
|---|---|---|---|---|---|
| 1 | CBN | CBN | 6.2 | 1,200 | F |
| 2 | WTBS Atlanta | SSS | 6.1 | 1,300 | B |
| 3 | C-SPAN | C-SPAN | 5.0 | 550 | B |
| 4 | Madison Sq. Garden | UA-Columbia | 4.5 | 450 | B |
| 5 | ESPN | ESPN | 4.2 | 600 | A |
| 6 | HBO | HBO | 3.0 | 1,200 | P |
| 7 | Trinity | Trinity | 2.5 | 138 | F |
| 8 | Modern Talking Pict. | Modern Cable | 2.1 | 285 | A |
| 9 | Thursday Baseball | UA-Columbia | 2.0 | 300 | B |
| 10 | PTL | PTL | 1.5 | 150 | F |
| 11 | Calliope | UA-Columbia | 1.5 | 300 | B |
| 12 | Nickelodeon | Warner | 1.2 | 270 | B |
| 13 | SPN | SSS | 1.1 | 144 | A |
| 14 | WGN-TV Chicago | United Video | 1.0 | 450 | B |
| 15 | Showtime | Showtime | 0.9 | 450 | P |
| 16 | UPI Newstime | SSS | 0.7 | 900 | B |
| 17 | WOR-TV N.Y. | E. Microwave | 0.3 | 100 | B |
| 18 | Star Channel | Warner | 0.2 | 120 | P |
| 19 | KTVU Oakland-S.F. | Warner | 0.2 | 80 | B |
| 20 | Home Theater Network | SSS | 0.1 | n/a | A |

[6] Satellite Week, Vol. 1, No. 15, Page 3, November 5, 1979.

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In the top twelve satellite-fed cable programs, there is only one so-called "superstation", Channel 17 from Atlanta. I should hasten to point out that the program prices charged Channel 17 as a result of its "superstation" status have been equally super -- up 171% in one year.

The second-ranked broadcast signal, WGN, ranks 14th in overall cable usage with one sixth as many subscribers as Channel 17. The next-ranked broadcast station, WOR, is ranked 17th and only has one twentieth the subscribers as WTBS. As I mentioned before, Number 19, KTVU is going off the satellite.

Clearly, there is only one "superstation", Channel 17, and it is paying dearly for that right. To assume a flood of superstations resulting in the radical

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7 Contracts on the following programs have been renewed by WTBS since the station's entry into a satellite distribution system.

| Program | Original Per Episode Price | Renewal | Percent Increase | Distributor |
|---|---|---|---|---|
| Addams Family | $ 203 | $ 500 | 146% | Rhodes |
| Andy Griffith | 1,000 | 3,360 | 236 | Viacom |
| Beverly Hillbillies | 846 | 2,500 | 196 | Viacom |
| Flintstones | 400 | 800 | 200 | Columbia |
| Gomer Pyle | 600 | 1,500 | 150 | Viacom |
| Hogan's Heroes | 900 | 3,500 | 288 | Viacom |
| I Love Lucy | 350 | | | Viacom |
| Little Rascals | 303 | 1,002 | 231 | King World |
| Our Gang | 100 | 100 | 0 | United |
| Three Stooges | 100 | 200 | 100 | Columbia |

Notes

1. This includes all renewals of product within the last year. Average increase is 171 percent.

2. There are a total of 85 syndicated programs under contract to WTBS, so these 10 renewals represent about 12% of total programs.

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overhaul of television production and broadcasting is erroneous for several reasons. For one, FCC studies and cable industry experience have demonstrated that while distant signals are important to cable's consumer acceptance there is, nonetheless, a decreasing marginal value to each additional signal. One reason this occurs is because of the duplicated programming which makes independent stations look alike. In addition, the fact that cable operators must pay the double costs of satellite transmission and copyright fees raises real bottom line considerations. The basic fact is that most cable systems have 12 channels and just don't have room for unlimited duplicated programming on which they pay twice.

While we are discussing WGN and WOR, however, it is important to note that these so-called "reluctant superstations" do not hesitate to promote their cable audience. For example, the rate cards for WGN and WOR indicate that these stations are actively selling the additional cable audience to advertisers. This produces extra cable-induced income which the program producers should treat the same way as Channel 17's increased income is treated -- by increasing program prices to reflect increased audience.

Mr. Chairman the claims of those who foretell of superstation-induced doom to the existing production and broadcast distribution mechanism just do not hold up. There simply is not, nor will there be, a flood of superstations.

Proposed Cable Deregulation

Presently, the Federal Communications Commission is in the midst of a rulemaking to consider the elimination of the restrictions on cable carriage of broadcast signals. The inquiry which led to this rulemaking began three years ago and

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the Commission has yet to make a decision.

The FCC rules in question limit the number of signals a cable system may import. In addition, the FCC requires that syndicated programs under contract to local broadcasters be blacked out on the cable-imported distant signals. These rules were described by the Commission as a substitute for cable copyright liability, justified as a means of "facilitating the passage of cable copyright legislation."[8]

Attempting to reopen the Copyright Act based on the potential of an FCC rule change is a specious argument. First, the FCC has yet to act in this proceeding and the specifics of the outcome are totally speculative and uncertain.

Even if the FCC were to totally deregulate, I am confident that the same broadcast and program interests which are before you today would be the first to file suit to block any deregulation, thus moving real deregulation even further into the future.

Second, linking revision of the Copyright Act to possible changes in FCC rules is putting the cart before the horse. As the Court of Appeals for the D.C. Circuit held just a few weeks ago in Geller vs. FCC,[9] the 1972 rules were

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8 Second Report and Order on Cable Television, February, 1972, page 65.

9 Geller vs. FCC, No. 77-1093 (D.C. Circuit), decided Nov. 7, 1979), slip opinion at 2

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adopted as a copyright surrogate in the expectation that they would facilitate enactment of copyright legislation. Passage of the 1976 Copyright Act requires Commission consideration of the continuing need for those rules.

Thus, according to the Court in the Geller decision, the "regulations of the Federal Communications Commission [were] initially promulgated to facilitate the enactment of new copyright legislation," and cannot subsist "without a fresh determination that they serve the public interest in some other manner".

To claim that a potential change in the rules requires reopening of the Copyright Act is revisionist history of the worst order.

This point is emphasized by the fact that the Congress anticipated future changes in FCC rules and created a Copyright Royalty Tribunal to adjust cable fees in response to FCC rule changes. Section 801(b)(2)(B) of the Copyright Act clearly states:

> In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users. [emphasis added]

This was interpreted by the legislative history of the Act to:

> . . . give the Commission broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. ...In determining the reasonableness of rates under this provision, the Commission should consider, among other factors, the economic impact that such adjustment may have on copyright owners and users, including broadcast stations, and the effect of such additional

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> distant signal equivalents, if any, on local broadcasters' ability to serve the public. [Emphasis added] [10]

Mr. Chairman, while satellite technology and potential FCC deregulation are exploited by some to attempt to justify reopening the Act, it is clear that both issues are strikingly similar to a description Churchill once affixed to an opponent: "There's a lot less there than meets the eye."

Cable Economics

You have also, Mr. Chairman, raised the question of the impact of cable television on existing business relationships. In order to explore this, it is first necessary to take a look at some basic cable economics:

1. The FCC inquiry into the economic relationship between broadcast and cable television showed that even total cable deregulation would have minimal impact on broadcasters. Failing to impact on broadcasters, therefore, the deregulation has a similar absence of impact on program producers, and

2. The FCC made a further finding that while distant signals are an essential component of cable programming, there is a decreasing marginal value for each additional distant signal. This clearly indicates that a flood of "superstations" will never occur.

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10 House Report on the Copyright Act of 1976, HR No. 94-1476. 94th Congress, 2nd, Session, 176 (1976).

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Over three years ago, the FCC instituted an inquiry into the economic relationship between broadcast and cable television. This inquiry featured extensive research by cable, broadcast and production interests, coupled with exhaustive original research by the FCC itself. The study concluded that cable had little or no impact on broadcasting.

Mr. Chairman, I ask that the conclusions of the FCC's Economic Inquiry be included in the Record.

Before looking at the specific findings of the economic inquiry, it is important that we draw the nexus between impact on broadcasters and impact on program owners who sell to the broadcasters. There is a direct linkage which is essential to the understanding of the issues before you today, to wit: if cable doesn't have an impact on the value of the local broadcaster's programming, then it likewise does not have an impact on the price the local broadcaster should pay for the programming. In other words, if local broadcast programming is as valuable as a generator of advertising income with cable importation as without cable importation, then the value of specific programs is undiminished. Broadcasters pay a price for programming which is determined by the number of viewers it will attract. The FCC's studies show that cable competition does not detract from viewers; thus the value of the programming is unchanged and the impact on the copyright holder negligible.

The arguments you have heard previously are based on what the FCC calls the "intuitive model". This assumes that cable competition fractionalizes audiences and thus diminishes the value of the programming. This "intuitive model" has been explicitly rejected by the FCC research and without it, the claims of

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those who want to reopen the Copyright Act fall apart. But don't believe me, look at the results of the FCC's study.

- ...the effect on local station audiences of eliminating the signal carriage rules appears small. In all but the most extreme cases, the additional audience loss will be less than 10 percent in the forseeable future. Moreover, these losses will take place in a context of offsetting factors. Increases in population and in the level of economic activity result in fairly steady growth in the demand for advertising exposures and in station revenues. [Emphasis added] [11]

- One additional fact of interest is that UHF stations, particularly UHF independents, often receive audience gains from cable television. [12]

- ...we were able to conclude confidently that cable deregulation would visit no negative near-term effects upon the supply of television programming. We also estimated that there is little likelihood that the elimination of the rules requiring blackouts of syndicated programs under contract to local market broadcasters would adversely affect the supply of television programming at any point in the forseeable future. [Emphasis added] [13]

- On the basis of the record before us today, there is ample reason to conclude that consumers will benefit from elimination of the rules and almost none to conclude that they will be injured. Thus, the burden upon those who would maintain the rules is to show, by means of economic evidence, that the rules protect the public from an identifiable harm. [14]

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11 FCC 79-241, para 117

12 FCC 79-243, para 116

13 FCC 79-243, para 62

14 FCC 79-243, para 64

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This committee has today been barraged with claims of impact and cries for increased compensation based on the same assumptions which the FCC examined and found to be unsupportable. We remind the committee that if cable has only a minimal impact, or none at all, on broadcast programming, then it likewise has only a minimal impact, or none at all, on the dollar value of that programming.

But, Mr. Chairman, even setting aside the FCC's conclusions, the actions of the program suppliers themselves should establish once and for all the emptiness of their argument in favor of opening up the Copyright Act. They, claim, remember, that additional showings of a program hurts the syndication market for that product. If that is so, why then are the program suppliers actively selling into syndication programs like "M*A*S*H*" at the same time, in the same market, that they sell the programs for network distribution? If additional showings by cable are harmful why isn't it likewise harmful to sell into syndication programs which are still running on the networks?

The claim that cable importation decreases the value of a program has been found to be a myth. There is another myth also as vacuous: the claim that "superstations" will totally distort and revamp the marketplace for creative product.

The fact is, as you've seen by the chart of the top twenty satellite services, the superstation boom has peaked. The marketplace has already weeded out one for lack of interest. The fantasy of superstations flooding television markets and disrupting program delivery has expired.

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Paul Bortz, until recently Henry Geller's Deputy and Assistant Administrator of The National Telecommunications and Information Administration, even went so far as to observe in a speech to the National Association of Broadcasters that superstations are "a passing fancy."[15]

Why aren't superstations living up to doomsayers predictions? Again, the FCC's economic inquiry provided some interesting answers. The FCC found that the marginal value of distant television signals decreases significantly as additional signals are added. For example, one distant signal delivered to cable subscribers receives a 10% share of total audience; addition of a second signal brings the total share up to 16%. However, the third signal adds only 1% to the total, raising it to 17%. This is not to say that distant signals are unimportant, in fact a recent nationwide survey showed them to be a determining factor in the public's desire for cable television.[16] It is to suggest, however, that an infinite number of signals is not a practical option.

Again, the chart of satellite services illustrates this point. One distant signal, Channel 17, is successful; the other two stations have one sixth and one twentieth as many subscribers. For the reasons we discussed previously — similarity of product, double cost of paying for the transmission and copyright and the fact that most cable systems have 12 channel capacity — the natural market for superstations is limited.

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15 Television Digest, Vol.19, No.43,October 22, 1979, p 4.

16 Hart Research Associates, 1979

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Moreover, the purpose of the Copyright Act is to secure compensation to the copyright holder. It is not intended to freeze economic or technologic relationships. As the District Court recognized recently in the Betamax case, the purpose of the copyright law is not to protect authors from changes in the marketing of their products. Satellite carriage of distant signals represents a change in the program marketing system resulting from the particular TV allocation plan established by the FCC in 1948. The evolution of satellite distribution, however, like the growth of video tape recorders; is the type of technologic change the court declined to thwart.

Finally, Mr. Chairman, I cannot address the question of cable economics without asking as Howard Cannon, Chairman of the Senate Commerce Committee, did recently, just who is getting the "free ride?"

It costs approximately three and one half million dollars to build a major market VHF television station. Yet these stations are selling for prices in excess of $50 million. Why? The answer, of course, is the fact that the government has given these broadcasters the pathway into the home — the airwaves. It is this gift which makes up the value of broadcast stations. Cable operators, on the other hand, must build a pathway into each home at costs for major markets of $50-$80 million.

This government subsidy of broadcasters is shared by program producers who are thus able to distribute their product more extensively, more economically, and more profitably than would otherwise be possible.

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You have heard talk today about how cable has been inordinately blessed by government, or how cable doesn't pay as great a percentage of its income for programming as do broadcasters. I urge you not to fall for such rhetorical ploys. Cable is an entirely different business with an entirely different set of economics based largely on the fact that we are given nothing.

Functioning of the Copyright Act

Thus far we've talked about everything but how the Copyright Act of 1976 came to be and how it works. As Register of Copyrights Barbara Ringer testified, the Act is a "comprehensive amalgamation of fragile deals."

Let's look first at the concept of the Act as an agreement, or "deal" in Ms. Ringer's words. As we have discussed before, two Supreme Court decisions held that cable operators had no copyright liability; "two tickets to one show," they called it. It became clear during the consideration of revisions to the Copyright Act of 1909, that Congress was going to reverse the Supreme Court's findings. Thus began the "great cable copyright war" which tore our industry asunder.

In fact, the other cable association you will hear from today, CATA, was founded by those who quit the NCTA over the question of whether or not the industry should agree to some form of copyright payment. You must remember that thirty years of precedent, two Supreme Court decisions and some rather compelling logic that cable systems didn't "use" copyrighted products but merely acted as a super antenna made it pretty hard for cable operators to swallow the idea.

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Nevertheless, swallow it we did (at least at NCTA). We bought the FCC's logic that the signal carriage rules were a copyright substitute. We expected that once we started paying copyright the FCC would eliminate its rules. We have now been paying copyright for over a year and the FCC has yet to provide relief, giving us the worst of all worlds -- copyright and restrictive rules. Now, on top of all this, the program producers decide they want more dollars out of cable. We are back before the Congress arguing an issue which we thought had been put to bed three years ago.

Let's have a look at that agreement which became the cable portion of the Copyright Act of 1976.

My first recollection of the copyright issue was about three and a half years ago, just after I had joined NCTA. Bob Schmidt, who was at that time President of NCTA, and I went to Jack Valenti's office to plan strategy on how we were going to jointly present the newly signed MPAA-NCTA copyright agreement to this committee. The three of us then walked lockstep up the Hill explaining the validity of the approach to which we had agreed.

I even remember after the Copyright Act was signed into law how we were invited to one of the famous MPAA movie screenings to celebrate our joint victory. Now we find MPAA complaining to the Congress that it was a bad deal, that they were politically muscled into the agreement and participated only because it was a necessary evil.

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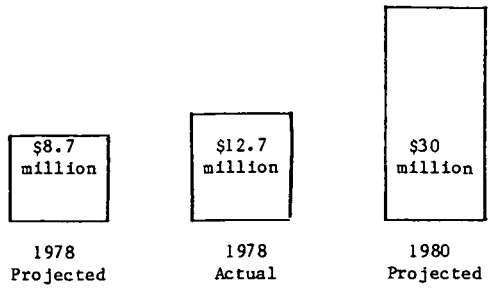
To my friend Jack Valenti I can say, "we know how you feel." The cable industry was dragged kicking and screaming to the agreement and felt that we were being muscled. After all, we were giving up two Supreme Court decisions that we should pay nothing. It wasn't only a matter of dollars to cable operators but a matter of "moral principle."

Nevertheless, the MPAA-NCTA agreement is now law and let's look at how it works. I report to you today the same thing MPAA and NCTA explained in 1976 — this Act will work well if given a chance.

As this committee knows, under the law, cable systems are given a compulsory license to carry those broadcast signals authorized by the FCC. In return, cable pays a statutory fee for the rights to the license. The Copyright Royalty Tribunal was established to collect the fees and to distribute the proceeds to copyright claimants as well as to adjust the cable fee levels in response to inflation, changes in average cable rates, and/or changes in the FCC's carriage rules.

It was estimated by MPAA and NCTA that the new law would result in first year copyright payments of $8.7 million. In reality the cable industry paid $12.7 million — 45% higher than MPAA had originally found sufficient. Furthermore NAB has estimated that the cable copyright payment will grow to $30 million by 1980.

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Now you are being urged by the same interests who urged you to vacate the Supreme Court decisions to reopen the Copyright Act to generate more funds for the program producers. Two vehicles are suggested to accomplish this goal: retransmission consent or an adjustment in the copyright rates.

We submit to you that nothing has happened to even suggest that the mechanism originally created by the committee — the Copyright Tribunal — is incapable of doing the job for which it was created. We submit that the Tribunal has not been given an opportunity to exercise its authority and that, as such, any change in the law is precipitous.

Nevertheless, let's look at the two proposals.

Retransmission consent has had a history of failure:

- It was tried from 1968 to 1962 when Henry Geller was General Counsel of the FCC. During that time only two operators in the nation received the necessary consent. It is fatally flawed in the respect that it puts the cable operator in a position of going to his competition and asking for the product with which to compete.
- It was rejected by this committee as a possible approach to the Copyright Act of 1976, and

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- It surfaced again in the Communications Subcommittee's Rewrite of the Communications Act but quickly died again,

The bankruptcy of retransmission consent was highlighted by this sub-committee's report on the Copyright Act of 1976:

> The committee recognizes, however, 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. [Emphasis added] [17]

Others have been equally outspoken:

- FCC Chairman Ferris:

  > I think there is another factor that should be kept in mind...it is not only the economic interests involved but the public interests. I have strong reservations with respect to any option that eliminates further viewing options of the public and interposes any form of private interdiction of potential options of the public. I think some of the options that have been bandied about would have that effect and give undue emphasis to economic interests and not the public interest. [Emphasis added] [18]

- Copyright Commissioner Brennan:

  > I do not recall any Congressional dissent from the conclusion expressed in HR 94-1476 (1976 Copyright Act), 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. I am not aware that any viable alternative has emerged to alter the judgement reached by the Congress only three years ago.

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17 Report to the House Committee on the Judiciary, Copyright Law Revision, 1976.

18 Testimony before U.S. House of Representatives, April 11, 1979.

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The Subcommittee is being urged to adopt essentially the same approach previously discarded by both the Congress and the Federal Communications Commission. The inherent limitations of that approach are made manifest by the effort already to qualify it by grandfather clauses, transitional periods, and exemptions. [Emphasis added] [19]

- Congressman Danielson:

It is impossible and impractical for the cable system to negotiate for a license with the copyright owners in advance of transmitting the programming. At the same time, item-by-item negotiating between users and owners of copyright prior to each performance would be so burdensome as to destroy this valuable means of communication and would also effectively deny a valuable market to the copyright owners. [Emphasis added] [20]

- Register of Copyrights Ringer:

The Copyright office is opposed to this retransmission provision for four fundamental and interrelated reasons: 1) the provision would not work as it is intended to work; 2) the need for the provision has not been shown; 3) even if some change is needed, the provision goes too far, and 4) if enacted, the provision would undermine, in my opinion, the existing copyright law.

If you came down to the fact that the copyright owner or the broadcaster could cut off the cable system's waters, it would do that. I believe, honestly, a retransmission consent provision would be a retransmission denial provision... I think that it would be a repetition of an experience that I was very closely involved with at the time. I think it would be worse now than it was in 1968. [Emphasis added] [21]

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19 Testimony before U.S. House of Representatives, June 12, 1979.

20 Congressional Record, September 22, 1979.

21 Testimony before U.S. House of Representatives, June 28, 1979.

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The other proposed solution in search of a problem is to somehow adjust the copyright fee schedule, either explicitly or through delegation to some authority. Again, the question remains, why? The Copyright Act has generated almost 50% more revenue than predicted, the FCC's rules have not changed and if they should change, there is provision for adjustment by the Copyright Tribunal. In addition, as we have discussed previously, the "Superstation Scare" is more hype than substance with FCC studies showing that cable does not impact on broadcasters or program owners.

Conclusion

In conclusion, Mr. Chairman, I am reminded of one of the arguments used against NCTA when we were agreeing with this Committee and MPAA to reverse the Supreme Court decisions. One of our cable operators asked one day, "Do you know how to boil a frog?"

He then explained that to boil a frog you don't bring the water to a boil and then throw the frog in because he'll jump right out. Instead, you put the frog in a pan of warm water and begin to slowly raise the heat. The frog swims around until suddenly its too late.

We were warned three years ago that we were the frog in the the MPAA-NCTA copyright agreement, that as soon as we agreed to vacate the Supreme Court's decision that we had no copyright liability the water would be boiling. Indeed, that appears to be the strategy of those who ask you to reopen the Act.

There are many good reasons why now is not the time to open up the Copyright Act:

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- The mechanisms established in the Act have yet to be given an opportunity to function;
- The FCC has not deregulated cable television and, as the Court found, even if it did, that would be a response to the Copyright Act, not a trigger for reopening the Act;
- The so-called "superstation threat" shows no signs of existing in reality;
- The communications marketplace is evolving but as the Court found in the Betamax case it is not the job of government to intervene to stop changes in the marketing of products, and
- The FCC's economic inquiry has conclusively demonstrated that cable does not impact on broadcasters or program suppliers.

Mr. Chairman, we commend the Committee for the judicious exercising of its oversight function in this matter. Clearly, this is a matter for which oversight is appropriate. A reopening of the legislative morass, however, is distinctly inappropriate.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Wheeler, for a very impressive presentation. Before I go to Mr. Effros I would like to comment on the analogy with the Bay of Pigs and Vietnam. It is amazing how two industries as well represented as they are, and were, could arrive freely at the agreement which produced such disastrous results.

Mr. Effros.

## TESTIMONY OF STEPHEN EFFROS

Mr. EFFROS. Thank you, Mr. Chairman. As Mr. Wheeler just mentioned, I represent an association of cable operators also. We are the fellows who knew how the frog was getting cooked, and we are the ones who warned about that slow heat.

The Community Antenna Television Association primarily represents the small cable television operators, the rural operators, and these are fellows who have been around a long time. The advantage of being around a long time is that you get some perspective of the history of what has gone on in signal carriage regulation. Just as Mr. Wasilewski was up here before mentioning his long history in this entire process, I, too, have had that history. I, too, was at the FCC when these rules were first promulgated, the FCC's signal carriage and exclusivity rules were first promulgated back in 1971 and the entire fight for copyright after that.

I think it would be interesting and hopefully beneficial for this committee to remember a few of the things that happened during that little debate at the FCC.

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Mr. KASTENMEIER. Mr. Effros, may I ask you—possibly I missed it—at the outset to identify or distinguish your organization from that of the NCTA for purposes of the panel.

Mr. EFFROS. Mr. Chairman, the Community Antenna Television Association is primarily, as I say, made up of the smaller, more rural cable television operators, the independent operators primarily. The difference that I usually point out between the National Cable Television Association represented by Mr. Wheeler and my own association is that we represent the independent owner operator, the fellow who not only went out and built the system and got the money to build it, but also climbs poles and puts the wires out and has to receive the complaints each day if something goes wrong on his cable system. That is not to say Mr. Wheeler's association does not represent some small systems, but by and large the smaller cable operators are represented by the community television operators and the larger multiple-system operators are represented by the National Cable Television Association.

Mr. KASTENMEIER. Wouldn't that also mean, then, that the law doesn't impact on your members financially very much?

Mr. EFFROS. No, sir, the law impacts on my members in a very real sense, and that is the mistake that is often made in the assumption that since there is a small system exemption, for instance, there is an exemption at the FCC of a thousand subscribers or less we don't have to worry about signal carriage rules as it is today. We have neither of those rules impacting on us on a system of a thousand subscribers or less. And by the way, in the communities around the country these systems have been importing these signals for a long time. They have not been providing syndicated exclusivity, and so far the sky has not fallen on any broadcaster in their area.

However, we are impacted by the rules, because the Community Antenna Television Association, and its members, were one of the groups that was most active, for instance, in getting satellite coverage for cable systems. We were the association that applied to be allowed to use small Earth terminals, rather than the $100,000 Earth terminals that had previously been allowed by the FCC. We did this because in most of rural America there is no other way of getting television signals.

This business that we are hearing today, all the palaver actually up here about superstations, is actually very amusing. There is nothing strange or different about superstations other than it is a cheaper mode of transmission of a signal than we had before. Microwave transmission of television stations by common carriers with the same rules as we have right now has been going on for years. Hundreds of thousands of people on cable systems up in the New York or in the New England area, for instance, were watching WPIX long before there was a satellite. It is just that the publicists didn't think of calling it a superstation. It was transmitted by microwave.

Well, it just happens for just a piece of technical information that the same frequency, the microwave frequency, is used for satellite. The only difference is that instead of hopping it across the plane of the earth from one antenna to the next to finally get to the cable system, they now shoot it up to the bird, to the satellite,

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and then it goes down to the cable system. There is no difference. The only difference that has happened between the microwave transmission of signals and the satellite transmission of signals is a lot of publicity, and a lot of talk about money.

Now you asked the question of whether we are impacted by these rules. The answer is yes. The small system out in Oklahoma or in North Carolina or Kentucky, or wherever, behind a hill, whatever the problem is, was not able to get television signals to its viewers, particularly independent television signals, which is primarily what we are talking about here. The only way that these small systems have now been able to get to rural America communications that have not been available to them before is by satellite. Now what we hear happening is the suggestion that, well, we will let everything else stay around, but we have got to kill that satellite station. We have got to kill that thing called the superstation.

I wish the publicists never thought of that word because there is no difference between microwaving it across the face of the Earth and shooting it up to a satellite and coming down. The only difference to the small operator is that now it costs us maybe $12,000 to $15,000 for an earth terminal as opposed to before when if we were going to microwave it to our subscribers it would cost us $20,000 per hop of that microwave, so it would be about $20,000 per 60 miles or so, 20 to 60 miles depending on the terrain and so on.

Mr. RAILSBACK. May I ask one quick question. Am I right in the one case there is copyright liability, and in the other one there is not?

Mr. EFFROS. No, sir, there is copyright liability in both. That is another thing that this morning the panelists managed to confuse you very well on. There is no difference between the two. It is true that a common carrier picks up the signal from a television station such as WGN. He then retransmits it via the satellite on a cable system. As soon as the cable system carries it, he is liable just as any other independent signal to pay copyright for it. There is no difference whatever between the two. He still pays copyright for that signal. It is an independent signal.

The only one that does not pay copyright, as has always been the case with the microwave system as well as the satellite, is the guy who delivers it from the broadcaster to the cable operator, but the cable operator still pays that copyright. There is no difference at all. The only difference that has happened is that somebody has decided—and I am not going to mention whether they are creators or imitators—that they needed more money, and in order to get more money they had to come back to this forum, because they found that the FCC, for once, was looking at facts instead of intuitive models, and the facts, low and behold, showed that there was no significant impact on broadcasters. There was no significant impact on the program producers of television retransmission by cable, and I would here disagree with my friend Mr. Wheeler.

He asked is there going to be signal carriage deregulation. None of us can guarantee that at the commission, obviously. That fourth vote is a very illusory vote, but I will say this, I think there will be deregulation, because if it doesn't come at the commission it is going to come in the courts, because finally we do have those facts.

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They were entered into the record of this testimony just a few minutes ago. The facts of the economic inquiry of the FCC showed that every one of their presumptions, every one of their intuitive models that were based on the yelling and the screamings of Mr. Valenti and Mr. Wasilewski, and so on, every one of them was wrong. That when you got to the economics, when you looked at the numbers, when you looked at the facts, in fact there was no reason for those rules, and if the commission doesn't eliminate those rules, because every political pressure or for whatever other reason, I suggest that the courts will, because there is no basis for those rules to exist any more.

Let's look at the facts.

You know Mr. Valenti was saying the real world, don't listen to what we say, watch what we do.

Well, I would recommend that applies very, very appropriately to Mr. Valenti, and to the program producers.

I was just reading the newspaper yesterday. I hope you saw it, but the new movies there are about to be coming out. This is an industry, by the way, that cable is about to destroy, remember that. Paramount Pictures spending $42 million on "Star Trek," $9 million for advertising alone. Dino DeLaurentis spending $30 million on "Flash Gordon"—"Star Wars" grossing $294 million on a $10 million investment. This is the industry that cable television is going to destroy.

We have $84 million, by the way, and this is an important little point, because everybody seems to like to bring up "All in the Family" and Norman Lear. Poor Norman Lear, the syndicated market is going to be destroyed, and Norman Lear is not going to be able to get "All in the Family" broadcast around the country.

Well, "All in the Family" has just broken all syndicated program monetary receipts in this country worldwide. It has received, so far as I understand it, $84 million in syndication. This is a program that we are now being cited as cable television is destroying their ability to sell it, $84 million, the highest gross so far in syndication. This is the industry we are going to destroy. Let's look at that real world.

I get very tired of Mr. Land and Mr. Wasilewski telling you that the broadcast industry is going to die, and Mr. Valenti telling you that the program industry is going to die. Let's look at the real world. Do any of you gentlemen know of a major market television station that is being sold on fire sale because the economics are such that they have decided it is no longer profitable? No, of course not. The broadcast industry is more profitable today than it has ever been. The sale of broadcast stations is going for higher prices than has ever happened before.

Let's look at that real world. Do the people who are putting down their dollars and cents think that cable television is about to destroy broadcasting? On the contrary, they are killing each other to try to get broadcast stations.

Mr. Valenti mentioned an article about the Canadians coming into the United States because there was a license to steal, and they are trying to get cable systems in the United States. Well, I happen to welcome that competition myself, but I point out that they would be more than happy to get broadcast stations if they

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could legally buy them, because that is an even bigger license to steal, if you want to use those terms. I don't think either are licenses to steal. I think both industries are doing very well, thank you.

The broadcasters are doing extremely well, certainly better than we are. The cable operators are doing well, but not out of any unique circumstance.

I point out one more thing. I know I am running long here, but it gets so tiring to hear facts being sent around that are not real facts.

We have had a number of people come up here this morning talking about the sudden explosion of technology that is going to require you gentlemen to rethink what you did in 1976. Balderdash. Your counsel on both sides are not dumb, they didn't wait in 1976 before this bill was adopted and not tell you the information that was going on. You got the information. The concept that cable television suddenly came out of the sky after 1976 and is growing at some fantasic rate is not true. In 1970 and 1971 you had the Sloan Commission report that said they expected cable television to have 50 percent penetration by 1979 or 1980. Well, we are nowhere close.

The concept that we suddenly have grown and are just sort of gobbling up all the territory of the United States is not true. Our growth curve has not been any more unique or extraordinary than what it was expected to be in 1976 or 1974 or 1971. If these gentlemen who are talking about television being destroyed by the sudden growth on the horizon called cable, I would say they are having a little problem with tunnel vision, not television, because the technology is not different. The satellite has come into being, so now we have a new publicity tool.

Cable is certainly building in the major markets finally, but without that building in the major markets the rural markets won't get any television. Without the benefit of companies like Teleprompter, for instance, building a major market and being able to pay for the programing coming off the satellite, the independent small cable television operators will not be able to pay for that programing by themselves, and that is why this proposed legislation or the regulations before the FCC impact very directly on rural America. They impact on a cable operator, whether he is 2,500 or 4,000 or 5,000 subscribers, because if you just segregate that market of a 5,000-subscriber cable system or less, the satellite programing that you see on the chart or you saw on the chart a few minutes ago will not exist. There aren't enough of us aggregating to pay for that programing. The cable television industry is an industry. We have different interests, but as an industry, we need each other to be able to survive.

All of this comes together, and suggests that if there is a need for any regulation from Community Antenna Television's point of view it would be to eliminate copyright payments but leave us the compulsory license. After all, we are the ones who are now paying in some instances when we don't get this and we still have to pay copyright, so we are paying twice for that same ticket, or two tickets for one show, as it were.

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My members don't understand, quite frankly. I have still got this problem. They do not understand what Mr. Wheeler was mentioning before. They don't understand why their viewers who are finally for the first time getting the right to see some independent programing or maybe the third network finally, why, they go out and pay their price for Cheerios, and Cheerios of course pays the advertising and the advertising pays the program producers and the program producers and the broadcasters get together. They pay the same price for Cheerios, but they don't get the programing.

Now finally we are getting the programing, and what is happening? The people who make that programing say, "We want to be paid more and we want to be paid twice." I suggest to you that this committee can do a lot more studying particularly on that economic inquiry before returning to judgment that the program producers or broadcaster being hurt in any way by cable television, and in fact that all three of us can live and succeed with the Copyright Act the way it sits right now.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Effros. The next witness will be Mr. Barry Simon, in place of Russell Karp. However, we will admit Mr. Karp's written statement into the record.

[The information follows:]

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