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COPYRIGHT ROYALTY TRIBUNAL AND U.S. COPYRIGHT OFFICE

FILE

OVERSIGHT HEARING

BEFORE THE

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

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

COPYRIGHT ROYALTY TRIBUNAL AND U.S. COPYRIGHT OFFICE

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COPYRIGHT ROYALTY TRIBUNAL AND U.S. COPYRIGHT OFFICE

WEDNESDAY, MAY 1, 1985

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

The subcommittee met, pursuant to call, at 2:15 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Synar, Schroeder, Morrison, Boucher, Moorhead, and Swindall.

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

Mr. KASTENMEIER. The committee will come to order.

Without objection, the subcommittee will permit, today, the meeting to be covered, in whole or in part, by television broadcast and/or still photography, pursuant to rule V of the committee rules.

Also, pursuant to a standing request of my chairman, both witnesses this afternoon will be sworn in, in terms of testimony.

I would like to make this opening statement. This afternoon, the subcommittee is pleased to continue its oversight of various agencies that fall within our jurisdiction. Today's hearing will be on the two entities within the legislative branch of government: The Copyright Royalty Tribunal and the Copyright Office.

The Copyright Royalty Tribunal was created by the Copyright Act of 1976. The Tribunal is composed of five Commissioners appointed by the President, with the advice and consent of the Senate. It presently has two vacancies, probably more a finding of benign neglect by the administration than a conclusion that the agency and its authority are unimportant.

The Tribunal is important. It has general statutory authority to make determinations concerning copyright royalty rates in the area of cable television, phonograph records, jukeboxes, and noncommercial broadcasting; and further, to distribute cable and jukebox royalties deposited with the Register of Copyrights.

To set the tone for this hearing, I would like to state that I have little doubt that the Tribunal is in dire need of reform. The subcommittee has had a classic case of a broken agency on its hands. I

do not know whether the agency is broken beyond repair. I certainly hope not.

The purpose of the hearing, therefore, is to inquire as to whether the agency generally is effective and whether the Commissioners' relative lack of expertise, and I say this historically, in copyright law has hurt the Tribunal in terms of its deliberations; whether judicial review has been meaningful; whether the absence of clear guidance from Congress on how the Tribunal shall make rate decisions creates a statutory defect that ought to be rectified.

Now, I ought to point out, and I regret to do so, a recent article in Broadcasting Magazine raised several of these questions, and it also, of course, contained a discussion of a book, Foundations in Sand, authored by a Dr. Lawrence Hafstad with Marianne Mele Hall and John Morse. I have several questions about this publication that I will ask Ms. Hall during the course of the hearing.

It is, of course, constitutionally the assigned job of the Senate to analyze and assess all factors in a person's record prior to confirmation. I have strong feelings that the House should not attempt to replicate that function. I will state, however, that this subcommittee has an exceedingly high interest in whether public officials, particularly those appointed by the President of the United States, satisfy the public confidence conferred upon them.

Presidential appointees are expected to uphold the Constitution, obey the laws of the land, and satisfy high ethical standards; they should, in exchange for relatively high salaries, work hard; and, finally, should be balanced and fair in the exercising of their judgment. This was once aptly observed more than a century ago by a Member of the House of Representatives, Henry Clay: "Government is a trust, the officers of the Government are trustees; and both the trust and trustees are created for the benefit of the people."

Parenthetically, I would also address these comments to the employees of the Copyright Office, including the Register of Copyrights who is to be appointed in the near future.

Now, I, at this point, would like to call upon the Chairman of the Copyright Royalty Tribunal to come forth. I am not clear whether the other Commissioners—Commissioner Ray and Commissioner Aguero—also desire to come forward with the Chair.

Ms. HALL. They are not in attendance.

Mr. KASTENMEIER. All right.

Mr. SYNAR. Mr. Chairman, were the other two Commissioners invited?

Mr. KASTENMEIER. I don't recall specifically. It is the custom for Commissioners to come. I think technically they probably were all invited.

Mr. SYNAR. Could we receive notice on why they are not with us today?

Mr. KASTENMEIER. No; if they are not here—and I inquire again, are Commissioner Aguero and Commissioner Ray present today?

They were not, I would say to the gentleman from Oklahoma, listed as witnesses, but it is customary for them to be here.

Mr. SYNAR. Mr. Chairman, I would ask unanimous consent that the subcommittee, in writing, request an answer on why the two

Commissioners are not with us, so that we could have that for the record.

Mr. KASTENMEIER. We can determine that.

Mr. SYNAR. Thank you.

Mr. KASTENMEIER. We have an independent communication from Commissioner Ray.

Ms. Hall, would you stand, please, so I can administer the oath?

[Witness sworn.]

[Subcommittee and GPO staff have made necessary grammatical, spelling, and technical corrections to the official transcript. A copy of the original transcript is on file with the subcommittee.]

Mr. KASTENMEIER. Ms. Hall, we have your statement, which is submitted I take it on behalf of yourself, Commissioner Ray, and Commissioner Aguero. I notice you have noted in your statement where one or another of you may have differed from the conclusions therein.

Ms. HALL. Correct.

Mr. KASTENMEIER. We will accept the statement for the record together with the one-page statement of your new general counsel, Robert Cassler, as appendix E, together with other appendixes, and you may summarize your statement as you care to.

TESTIMONY OF MARIANNE HALL, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL, ACCOMPANIED BY ROBERT CASSLER, GENERAL COUNSEL

Ms. HALL. Thank you, Mr. Chairman.

It is an honor to appear before this committee to report on the operations and functioning of the Copyright Royalty Tribunal.

As you have stated, Mr. Chairman, we are a five-person Commission. Presently, there are three Commissioners onboard. We have had two vacancies since September 26 of this year.

Our statutory responsibilities, as you have stated, in rulemaking are to set the rates in four areas of copyright compulsory licensing. We are also involved in adjudication; that is, in the distribution of royalties for cables' retransmission of copyrighted works and for the use of copyrighted works by jukeboxes.

Our adjudication, or distribution, occurs yearly in both those areas. Our rate setting occurs yearly for PBS and occurs at varying intervals for the other three areas. This year we will be reviewing rates for the cable retransmissions and for Public Broadcasting.

Our agency is small and our budget is small. We operate on approximately $758,000 for fiscal year 1986. That is up approximately $36,000 from fiscal year 1985, and $32,000 of that $36,000 increase is due to statutory increases in salary and benefits over which we have no control.

The general administration of the agency is the next topic I would like to address. We have recently worked very hard at centralizing all of our files and automating our offices. It was particularly important to centralize the administrative files and to centralize and organize our accounting records.

In utilizing the newly purchased computer, we have been able to do a complete accounting review of all of our distributions. And we have found some errors in those distributions from the past. We

have corrected them to assure that all claimants receive equal pro rata shares of the moneys that are due to them as they become due.

The next topic in my statement deals with the office personnel and support. We have recently hired a general counsel. And I would like to introduce Mr. Robert Cassler, our general counsel. We hired the general counsel under the strong recommendations of this body and the Budget Subcommittee. We were aware that heretofore those recommendations had been tendered and, in fact, money had been appropriated, and yet a general counsel was not hired until this year. We are very pleased to have Mr. Cassler onboard, and we hope that he will help us in our pursuit of a more professional product from this agency.

Mr. KASTENMEIER. I dislike interrupting at this point, but it is clear that we have a vote on, a very important vote. The vote is to consider the proposition to seat Mr. McCloskey from the State of Indiana. The four of us, accordingly, must go to the House floor. I would assume, following this vote, the House will entertain the whole proposition at some length and we will be undisturbed. We can, therefore, return I think in probably greater numbers. The minority will be fully represented when we return.

That being the case, I think it is best to recess now. You may resume your testimony upon return.

The committee stands in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

When the committee recessed, 10 minutes ago or so, for a vote, Commissioner Hall was in the middle of her presentation, so we again will yield to you, Ms. Hall.

Ms. HALL. Thank you.

I believe I had just introduced our general counsel, which is the legal support we have brought onboard recently. It is my opinion that we firmly need some support in the area of economics, and I have so stated in my statement to the committee. This is my personal view. But much of what we deal with is very legal and very economic, and we need help in those areas.

Our current calendar for this year will involve the distribution of the 1983 cable royalty fund, approximately $80 to $100 million by the time it is distributed, and the 1983 jukebox royalty fund, which will approach $6 million at the time it is distributed. Both of these adjudications have been commenced, a controversy has been declared, and we have had pretrial conferences in those areas.

In addition to the adjudication for this year, we will do rulemaking. We have just completed the inflationary increase on the cable rates, which is mandated by the statute. We will, at the end of the year, adjust public broadcasting's rates as applied to their use of copyrighted works. That will involve a simple mathematical adjustment at the end of the year.

We anticipate one other major rulemaking proceeding, and that will be in response to a petition filed by Mr. Turner regarding an adjustment of the rates in 1985 of those signals which were recently deregulated, in 1980, by the FCC; 1985 is the window year in which rates set in 1982 due to the regulation in 1980 can be reviewed. To date, we have one petition filed, parties have until De-

cember 31 to file their petitions to require the review of those rates. That as of the present time Mr. Turner's petition is the only one filed, and we will wait until we hear from all of the parties or until December 31 to begin review of those rates.

We have two matters before the appellate courts at this time. The 1979, 1980, 1981 and 1982 distributions of cable royalty funds, representing approximately $150 million, have been consolidated for a final appellate review. Oral argument will be heard on May 6, of this year. We are hopeful that the appellate court will again affirm those distributions. The 1982 jukebox distribution is on appeal in the Second Circuit. Oral argument was held in February. We hope that the decision will be rendered within the next 3 months. Both of these appellate cases deal with rather complex legal issues, which I will be glad to address at the request of the committee.

The last part of my report is simply to state that I agree with Congressman Kastenmeier that the agency does need some reform. I also agree that the agency is very important, especially as the cable industry is growing and the other industries that we regulate continue to grow. I believe that this agency can function and do what it was set to do by Congress, which is to examine and study in detail all the intricate technical and economic concerns in compulsory licensing schemes. I believe that this is the best way to deal with compulsory licensing schemes.

I believe with professional support, with our legal counsel, and possibly support for him, with the hiring of an economist, if the committee will advise me as to how best to proceed in that area, with the hiring of some additional support we can do what Congress wants us to do in this area. I believe that possible legislation will be necessary to effectively carry out what Congress wants us to do in compulsory licensing, and I will answer questions in regard to how best to reform this agency.

Once again, I believe the Copyright Royalty Tribunal is necessary. The United States has always led the world in the production of entertainment. Our Copyright Royalty Tribunal can lead in the resolution of the many problems that are incumbent in the delivery of that entertainment to the people. With professional help and with the continued support of this congressional body, I believe we can do the job that Congress wants us to do.

That is the close of my summary statement, and I request that my full statement be admitted as given.

Mr. KASTENMEIER. Without objection, your statement in its entirety together with the appendices attached thereto shall be made part of the record.

[The statement of Ms. Hall follows:]

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COPYRIGHT ROYALTY TRIBUNAL

OVERSIGHT HEARING

before the

Subcommittee on Courts, Civil Liberties
and the
Administration of Justice

April 23, 1985
2:00p.m.

Respectfully submitted,

Marianne Mele Hall
Edward W. Ray
Mario F. Aguero

EXECUTIVE SUMMARY
OF PROPOSED TESTIMONY
OF CHAIRMAN MARIANNE MELE HALL

The Copyright Royalty Tribunal is composed of three Reagan appointees, Chairman Marianne Mele Hall, Commissioner Edward W. Ray and Commissioner Mario F. Aguero, one general counsel, Robert Cassler and three confidential aides who provide support services.

Our statutory responsibilities include rulemaking and adjudication. Our rulemaking involves setting royalty rates for the four compulsory licenses in the Copyright Act which are for the use of copyrighted works by cable television, jukebox, public broadcasting, and phonorecords. Our adjudication involves the distribution of the fees collected pursuant to these licenses, for cable television and jukeboxes.

Our FY 86 budget request is for $758,000, an increase of $36,000 over FY 85. $531,000 will be reimbursed from the royalty fund.

We have recently automated our office and centralized our files to:

1) maximize the use our limited staff,
2) ameliorate our recordkeeping and storage problems,
3) eliminate duplication of staff effort,
4) institute an agency memory,
5) provide better access to our master case files,
6) review, analyze and correct our accounting procedures and records regarding distributions.

We have recently hired a general counsel and have used outside counsel to study and reform our hearing procedures. With the aid of the Administrative Conference of the U.S., our general counsel is reviewing all the laws that pertain to this legislative branch agency for the purposes of rewriting our rules and instituting internal policy that better adheres to those other agency laws which, although not directly applicable, offer great guidance for internal Tribunal policy.

It is the opinion of Chairman Hall that the Tribunal should hire a full-time economist under the statutory authority of §805(a). Commissioner Ray is in favor of utilizing the services of a part-time or outside economist, as needed.

We have recently collected and enhanced our reference, research and archive materials.

We are adjudicating distributions for 1983 cable and jukebox funds. We are in the process of completing an informal rulemaking (rate-setting) for cost of living adjustment for the statutory cable rates. We anticipate a full-blown revisitation of the

controversial 3.75% marketplace rate which was set in 1982 due to the FCC deregulation of distant signals and syndicated exclusivity. We will adjust the rate for noncommercial broadcasting in December 1985.

We are awaiting appellate decisions on the 1979-82 cable distribution determinations and the 1982 jukebox determinations.

We are interacting actively with the public, Congress, other federal agencies, trade associations and prominent copyright and communications counsel.

We are consulting on foreign application of compulsory license, on domestic studies and on possible legislation.

I believe that the Copyright Royalty Tribunal is a vital organization with the clear purpose of relieving Congress of the intricate, technical details embodied in compulsory licensing schemes. With the acquisition of some professional staff and the establishment of a permanent chairmanship with authority to set internal policy, I believe this Tribunal can so relieve the Congress. This will benefit Congress, the industries involved, the courts, the public, and can serve as an example to other countries.

The United States has always led the world in the production of entertainment. We should lead the world in the resolution of the very difficult legal and economic problems incumbent in the delivery of that entertainment to the people.

Respectfully submitted,

Marianne Mele Hall

Marianne Mele Hall
Chairman

COPYRIGHT ROYALTY TRIBUNAL

Oversight Hearing

April 23, 1985

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COPYRIGHT ROYALTY TRIBUNAL

1. CREATION, HISTORY, MEMBERSHIP

The Copyright Royalty Tribunal (Tribunal) was created by §801(a) of the Public Law 94-553, the General Revision of Copyright Law of 1976, (Title 17 of the United States Code). It commenced operations in November 1977 with five Commissioners appointed by President Carter with the advice and consent of Senate: Thomas Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia.

Thomas Brennan and Douglas Coulter served their full seven year terms until September 26, 1984. Mary Lou Burg served until her death in May 1983. Frances Garcia served her full five year term until September 1982. Clarence James resigned in May of 1981. The chairmanship rotates by seniority.

Katherine Ortega was appointed by President Reagan to succeed Francis Garcia. She resigned in September 1983 to become the Treasurer of the United States. Edward W. Ray was appointed by President Reagan to succeed Clarence James.

Effective September 26, 1984, the present Tribunal consists of three President Reagan appointees: Edward W. Ray, as of February 1982, Mario F. Aguero, as of May 1984 and Marianne Mele Hall, as of July 1984. Edward W. Ray and Marianne Mele Hall will serve until September 1989. Mario F. Aguero will serve until September 1991. Mrs. Hall is serving as chairman from December 1, 1984 to December 1, 1985. Biographical sketches of the Commissioners are at appendix A.

Two seats remain vacant since the expiration of the terms of Commissioners Brennan and Coulter on September 26, 1984.

2. STATUTORY RESPONSIBILITIES

The Tribunal's statutory responsibilities are detailed in sections 111, 115, 116 and 118 of Title 17 U.S.C. The Tribunal is involved in rulemaking and in adjudication. Our rulemaking proceedings involve setting royalty rates for the four compulsory licenses authorized under Title 17. The compulsory licenses are for:

1) secondary transmissions of copyrighted works by cable television (§111),

2) production and distribution of phonorecords (§115),

3) public performances of musical works by coin-operated phonorecord players (jukeboxes) (§116),

4) the use of copyrighted works in connection with noncommercial broadcasting (§118).

The Tribunal's adjudication proceedings involve distribution of cable television and jukebox royalties collected, as per the foregoing, to the copyright owners. The Tribunal does not distribute royalties for phonorecords (§115) or noncommercial broadcasting (§118). This is handled privately by the parties involved.

3. BUDGET

Our budget request for FY 86 is $758,000 of which $531,000 will be reimbursed from the royalty funds.

The FY 86 budget request shows a net increase of $36,000 over FY 85. $31,700 of this increase is due to cost of living salary increases, and increases in benefits for new hires as mandated by P.L. 98-21.

The remaining $4,300 increase is due primarily to inflationary increases in the costs of office supplies and services. We have also reallocated some of the FY 85 requests to more realistically reflect our needs. Our budget request is at appendix B.

4. GENERAL ADMINISTRATION

A. OFFICE AUTOMATION - CENTRALIZATION OF FILES

In keeping with the legislative history and mandate, the Copyright Royalty Tribunal has remained a small, independent, legislative agency. It is currently staffed with one general counsel and three confidential assistants who provide support services for the three commissioners.

We have recently acquired a Compucorp Omega 785 word processing system which has increased the efficiency of this limited staff. It is anticipated that this computer will ameliorate the growing concern with the storage and retrieval of approximately 700 cable royalty claims yearly. We are currently utilizing this computer to centralize and organize our administrative files, our master case files and our accounting records.

The centralization of the administrative files will maximize the use of our limited staff, will minimize our recordkeeping and storage problems, will eliminate duplication of staff effort and will institute an agency memory.

The organization and centralization of our master case files will inure the benefits above as well as provide better access to hearing records, actions, determinations, etc. for reference in our present hearing calendar and for our appellate proceedings.

Lastly, our computer was invaluable in the compilation, centralization and organization of our accounting records. We have just completed a review of all past distributions for cable

and jukebox. This review revealed that we have distributed $140,109,714 in cable royalties for the years 1978 through 1982. The total cable royalties collected from 1978 through 1984 is approximately $309,179,344 as of April 8, 1985. This review also revealed that we have distributed $11,073,560 in jukebox royalties for the years 1978 through 1983. The total jukebox royalties collected for 1978 through 1984 are approximately $17,173,852 as of September 30, 1985.

In the course of this review we determined that some parties had not received equal pro rata shares of their allocation which meant that expenses and earnings on the remaining fund were not being distributed equitably among all claimants. We corrected this situation. We also equalized pro-rata distributions to those claimants whose awards had been altered by appellate decisions.

Lastly, we determined that the percentage methodology that had heretofore been used to distribute fees was illusive in that the percentages as distributed, diminish in numerical size as the remaining fund continues to grow. In light of that realization, we reworked our partial distributions for 1979 - 1982 cable royalty fees against real dollar figures and were therefore able to distribute more of the funds while still preserving sufficient funds to protect all claims currently on appeal.

The results of this review and subsequent activities is summarized in the chart in appendix C. Detailed charts of the distributions to each claimant group as per each partial distribution over the seven year history are available to the Judiciary Committee upon request.

B. PROFESSIONAL SUPPORT

1. Legal

House of Representatives Report No. 94-1476 (94th Congress, 2nd Session, 1976) had indicated legislative intent that all professional responsibilities be performed by the commissioners "except where it is necessary to employ outside experts on a consulting basis." However, recent legislative hearings and proposed legislation has indicated strong recommendations by Congress that the Tribunal hire some professional staff. Pursuant thereto and in accordance with §805(a)[1] of Title 17, the Tribunal hired a general counsel, Robert Cassler on March 4, 1985.

Mr. Cassler has served the FCC for eight years in the Private Radio Bureau doing rulemaking proceedings, in the Mass Media Bureau as a supervisor of a legal staff, and in the Office of Administrative Law Judges assisting the judges in the conduct

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[1]Section 805. Staff of the Tribunal
(a) The Tribunal is authorized to appoint and fix the compensation of such employees as may be necessary to carry out the provisions of this chapter, and to prescribe their functions and duties.

of cellular radio comparative hearings. His biographical sketch can be found in appendix D.

Section 805(b)[2] of Title 17 allows the Tribunal to procure "temporary or intermittent services" of professionals as needed. Pursuant thereto, the Tribunal commissioned a review of its administrative and hearing procedures by the law firm of Rice, Carpenter and Carraway, Arlington, VA. This memorandum, which incorporates the 1981 GAO study, provides an excellent history, summation of procedures, comparison with other similarly situated agencies, and recommendations for internal and possible legislative reforms for the Tribunal. It is available to the Judiciary Committee upon request.

This study is being used to reform our hearing procedures for both our adjudication (distribution) and rulemaking (rate setting). Earlier we had solicited public comment on procedural reforms. These comments and this Rice, Carraway & Carpenter study were made available to all interested parties in the 1983 cable distribution which commenced April 15, 1985. The parties have subsequently negotiated a stipulated agreement of procedural reforms and a calendar for this upcoming proceeding. We have accepted their agreement and calendar and will test these reforms in this distribution hearing. We will again solicit public comments on procedural reform for our rulemaking procedures and hopefully achieve a similar synthesis and agreement. We will then codify both sets of procedural reforms in a revision of 37 C.F.R.

Our General Counsel is currently reviewing all other aspects of 37 C.F.R. and the laws which impact on our agency. With the aid of the Administrative Conference , we hope to rewrite 37 C.F.R. to achieve closer conformance with the letter of the laws which govern the conduct of our agency such as the Administrative Procedure Act, and the spirit of acts such as Executive Order 12291 which do not govern this agency because it is a legislative branch agency.

2. Economics

There has been some Congressional concern for the hiring of a chief economist. It is the opinion of Chairman Hall that an economist is vital to our rulemaking (rate-setting) and would be helpful to our adjudication (distribution).

The intent of Title 17 U.S.C. §§801(b)(1)[3] and (b)(2)(A)(B)

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[2]Section 805. Staff of the Tribunal
(b) The Tribunal may procure temporary and intermittent services to the same extent as is authorized by section 3109 of Title 5.

[3]Section 801(b)(1)
"(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be--
(1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to

and (D)[4] is to require economic considerations in our rulemaking function. This function has grown to impact on approximately 550-600 million dollars that will pass from the users of copyrighted works to the owners in 1985. The Tribunal will collect and distribute approximately 120-150 million dollars for cable retransmissions and approximately 6 million dollars for jukebox. Private societies will collect and distribute approximately 4 million dollars for public broadcasting and 380-400 million dollars for phonorecords based on the rates which the Tribunal set. Chairman Hall believes an economist would greatly enhance this royalty rate setting that concerns so much of the U.S. economy.

Chairman Hall also believes that the Tribunal could use an economist in its distribution of 80 - 100 million dollars in 1985 which represents the 1983 royalty funds. This distribution will have an impact on the industry recipients. Further, our allocation of this money is often dependent upon our understanding of the economic bases of the owner's industries and the economic benefit or harm that accrues to broadcasters or cable operators based on their respective use of copyrighted works.

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reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

[4]Section 801(b)(2)(A) requires consideration of:

"(i) national monetary inflation or deflation,

(ii) changes in the average rates charged cable subscribers...to maintain the real constant dollar level...

Section 801(b)(2)(B) requires the Tribunal to "...consider...the economic impact on copyright owners and users."

Section 801(b)(2)(D) requires consideration of "national monetary inflation or deflation...to maintain real constant dollar value of the exemption." There are many more such examples of economic concerns throughout Title 17 dealing with cable (111), phonorecords (115), jukeboxes (116), and public broadcasting (118).

It is the opinion of Commissioner Edward Ray that the Tribunal should utilize the services of a part-time or outside economist, only as needed. Commissioner Ray supports the recent Tribunal opinion in its FY 86 Budget request that there is currently an insufficient need for a permanent full-time economist. He believes the Tribunal's employment of a general counsel and its utilization of a part-time economist will be responsive to Congress's concern for improved Tribunal determinations as well as to its concern for a substantial reduction in the current budget deficit.

C. REFERENCE, RESEARCH AND ARCHIVE MATERIALS

We have recently updated our library reference books and trade periodicals file. We have increased our number of trade periodicals with 5-10 free subscriptions. We have approached those 10 periodicals for which we pay and asked for gratis subscriptions. Most have complied.

We have compiled an archive of our legislative, budget and oversight hearings, we hope to compile law review articles concerning our Tribunal and similar foreign tribunals for research and reference.

We hope to reorganize and systematize our master case files. We have instituted a program of utilizing legal externs (students on a voluntary basis) to assist in these projects. They should begin this June.

We have recently collected all our cable distribution and rate determinations and the appellate decisions for publication by Shepard-McGraw-Hill as an appendix to a comprehensive work on cable TV, by Ira Stein of Falcon Cable, Inc. He has asked Chairman Hall to write the preface.

We have provided the general counsel of the Copyright Office with a complete and indexed book of all our determinations and appellate decisions with the hope that they will be incorporated in their series, Copyright Decisions.

5. STATUS OF PROCEEDINGS

A. CURRENT CALENDAR - ADJUDICATION (DISTRIBUTION)

The Tribunal's adjudication proceedings consist of the yearly distribution of cable television and jukebox royalties which are deposited with the Licensing Division of the Copyright Office. Full fees for any given year are deposited after the close of that year. Copyright owner's claims for these fees are filed with the Tribunal during the following year, therefore, the Tribunal's distribution proceedings run approximately two years behind. In FY 85, the Tribunal will determine distribution on 1983 cable royalty fees and 1983 jukebox royalty fees. A controversy has been declared in both and pretrial conferences have been held. We anticipate 20-30 hearing days collectively.

The major issue in the 1983 cable distribution of approximately $80 million dollars will be the distribution of those funds collected through the syndicated exclusivity surcharge. This is the first year of said collection. The major issue in the 1983 jukebox distribution will be the Tribunal's precedent for burden of proof requirements of the non-settling petitioner. This issue is currently on appeal in the 2nd Circuit for the 1982 jukebox distribution.

B. CURRENT CALENDAR - RULEMAKING (RATE-SETTING)

On a yearly basis, and pursuant to §118 of Title 17, the Tribunal announces a cost of living adjustment to be applied to compulsory royalty rates paid by non-commercial broadcasting entities licensed to colleges and universities for the performance of musical compositions. The adjustment for FY 85 was determined on December 1984 to be 6.1% effective January 1, 1985. In 1987, the terms and rates for all public broadcasting entities will be reconsidered.

In 1985 the Tribunal can be petitioned to reconsider its royalty rates for cable retransmissions. The Tribunal was petitioned to make a cost of living adjustment for statutory distant signals. The proceeding was commenced by the Tribunal through informal rulemaking in March, 1985. The interested parties negotiated a settlement which the Tribunal put forth for public comment. A final rulemaking order will be published in the Federal Register in April or May, 1985.

The Tribunal was petitioned in March, 1985 by Turner Broadcasting Systems, Inc. to review the rate for distant signals which were deregulated by the FCC in 1980, as it applies to WTBS. The Tribunal expects to be petitioned by other parties and to commence a hearing later this year. We anticipate 20 - 30 days of hearings, extending into FY 86.

In FY 86, The Tribunal is not required to make any other adjustments in the rates except for the yearly PBS rate discussed above. In FY 87, the Tribunal can be petitioned to reconsider the rates for making and distributing phonorecords.

C. APPELLATE PROCEEDING

The Tribunal had published a final determination for 1979 cable royalty fees in March 1982, which determination was appealed in the U.S. Court of Appeals for the D.C. Circuit. [Christian Broadcasting Network v. CRT, 720 F.2d 1295 (1983)]. A decision was rendered on October 25, 1983. This decision affirmed the Tribunal's determination in all respects but three. The Appellate Court remanded the following issues:

1) National Association of Broadcasters (NAB) claim of part of the Joint Sports share,

2) Devotional claimant's zero award in the Phase I proceeding,

3) Commercial radio's zero award in the Phase I proceed-

ing.

The Tribunal accepted a voluntary agreement in lieu of reconsidering the NAB claim and accepted evidence on the other two remand issues. Upon reconsideration, the Tribunal granted the Devotionals .35% of the Phase I fund. This was a result of reevaluating some of the evidence and apportioning different weight to the criteria of benefit and harm.

The Tribunal reconsidered and again denied an award to commercial radio, but offered a clearer explanation. The Tribunal acknowledged that the claim was justified but asserted it was unquantifiable. The Tribunal stated it was unable to discern a marketplace value for the de minimis input of the non-music portion of commercial radio.

The determination of these remand issues was published on January 20, 1984. It has been appealed. The Justice Department is representing the Tribunal.

On March 7, 1983, the Tribunal rendered a final determination on the 1980 cable royalty fees which was also appealed in U.S. Court of Appeals for the D.C. Circuit. On February 9, 1984, upon receiving the 1979 remand decision, the Tribunal moved the court to remand the 1980 case consistent with the 1979 opinion. The motion was granted.

Upon reconsideration, the 1979 remand decision was adopted for the 1980 cable royalty determination with the exception that the distribution of the Devotionals' share be pro rata shared among all Phase I claimants as opposed to the MPAA absorbing the full impact of the Devotionals' share as was done in the 1979 remand. This reconsideration is likewise on appeal.

In FY 83, the Tribunal accepted a negotiated agreement on the 1981 cable royalty distribution. The determination was rendered on February 28, 1984. Said determination also adopts the 1979 determination and is likewise awaiting the decision on the appeal of the remand.

In FY 84, the Tribunal declared a controversy and conducted hearings on the 1982 cable royalty distribution. A determination was rendered in September 25, 1984. This determination has been appealed and has been consolidated with the 1979-81 remand appeals. Oral argument is set for May 6, 1985.

In FY 84, the Tribunal accepted a negotiated agreement on the 1982 jukebox distribution. This has been appealed in the 2nd Circuit Court of Appeals. The oral argument was heard in February, 1985. We are awaiting a decision.

6. PUBLIC RELATIONS

We anticipate major substantive, procedural and possibly legislative reforms of the Tribunal during FY85-86. We are and will continue to solicit public comment on all aspects. In addition we hope to keep the public informed through press re-

leases and the public information office of the Licensing Division of the Copyright Office, who have been most supportive and helpful. We intend to work with them to produce a brochure on the Tribunal to supplement our public inquiry letters.

We have recently met with prominent personalities, Congress and other federal agencies such as FCC, Justice, OTA, CSR, and Copyright Office and many emminent copyright attorneys and trade representatives for the purpose of introducing this new Tribunal and establishing liaisons, including being placed on many mailing lists. Almost all visits resulted in support and encouragement for the initiatives this Tribunal has undertaken.

7. CONSULTATIONS

A. INTERNATIONAL - CHINA, CANADA

The Tribunal has conferred with Dr. Yang, a member of the Copyright Law Revision Committee, Ministry of Interior, Republic of China as to the feasibility of a Tribunal for his country. The Tribunal is currently consulting with Richard Beaird of NTIA with regard to possible legislative or negotiated solutions to Canada's lack of cable copyright reimbursement to U.S. copyright owners. We expect to be called on again as the cable copyright problem reaches more countries. That is why we hope to compile the research materials explained earlier.

The United States has always led the world in the production of entertainment. The U.S. Copyright Royalty Tribunal should lead the world in the resolution of the very difficult legal and economic problems incumbent in the delivery of entertainment to the people.

B. DOMESTIC - OTA, LEGISLATION

We have consulted on several occasions with the Office of Technology Assessment on their study of intellectual property requested by Congressmen Rodino, Kastenmeier, Moorhead, Fish and Senator Mathias. We remain available and await the results.

Chairman Hall has recently sent possible draft legislation for a reintroduction of H.R. 6164 to House Counsel Mike Remington. Chairman Hall's submission is intended to provide only her opinion with the hope that the subcommittee will apply its vast wisdom and experience in this area, to correct and conform this draft to the policy objectives of our Congress.

Commissioner Ray and Commissioner Aguero will be sending his opinions to the subcommittee at a later date.

APPENDIXES

A. Biographical Sketches of Commissioners.

B. FY 86 Budget Request.

C. Summary History of Distributions.

D. Biographical Sketch of General Counsel.

E. Statement of General Counsel.

APPENDIX A.

BIOGRAPHICAL SKETCHES OF COMMISSIONERS

MARIANNE MELE HALL
Chairman

MARIANNE MELE HALL was born in N.Y., N.Y., and raised in suburban New Jersey. She received her J.D. degree from Rutger's School of Law, Newark, in 1978. She is admitted to practice in New Jersey, District of Columbia, U.S. Claims Court and U.S. Supreme Court.

Mrs. Hall studied copyright at Rutgers Law School and served as a summer intern on the General Counsel's Staff, Copyright Office, during the implementation of the 1976 Revision in 1977. Among other projects, she assisted in the compilation of a 20 year legislative history on the 1976 Act.

Mrs. Hall has taught law at several local schools including Northern Virginia Law School since 1978, Antioch School of Law, and the University of D.C. She has taught Copyright Law as well as Commercial Law, Contracts, Federal Procurement Law, Conflicts of Law, Wills and Trusts and Law in the Business Environment. In addition she has maintained a limited corporate practice.

Formerly, Mrs. Hall was employed by Eastern Airlines, Riggs National Bank, NS&T Bank, High Frontier, Inc., and ISS Energy Systems, A/S.

She is co-author and/or consultant to four books in the fields of politics, economics and national defense.

Mrs. Hall is married to Dennis B. Hall, M.D. They reside in Falls Church, VA with their daughter, Rose Anne.

EDWARD W. RAY
Commissioner

EDWARD W. RAY was born in Franklin, North Carolina and has lived in Los Angeles, California for most of his life. He received an AA degree in business administration from Los Angeles City College and a bachelor of professional studies (major in commercial music and media communications) from Memphis State University. He completed advanced real estate studies in appraisals, marketing, finance and taxation from UCLA and Los Angeles City College.

He has had a long successful professional career as a music/entertainment executive in Hollywood, California and Memphis, Tennessee. During his career he served as vice president of Capitol Records, Inc., MGM Records, Inc., Pierre Cassette/Burt Sugarman Television Production Company and was president of Eddie Ray Music Enterprises.

He has been involved in the development of successful recording careers for many artists including Fats Domino, Rick Nelson, The Osmonds, Sammy Davis, Jr., Mel Tillis and Kenny Rogers.

As a division of Eddie Ray Music Enterprises, he founded and operated a commercial music school, The Tennessee College for Recording Arts.

He was appointed by President Ronald W. Reagan as a commissioner of the Copyright Royalty Tribunal in 1982 and served as chairman from December 1, 1982 to December 1, 1983.

MARIO F. AGUERO
Commissioner

Mario F. Aguero was born in Cuba. He came to the United States in 1960 and resides in New York, New York.

Mr. Aguero has had a successful career in the entertainment field as a producer in television, motion pictures, stage shows, concerts, etc. He was founder and president of the organization A.R.T.E. (Artists in Radio Television and Spectacles). Mr. Aguero is also a strong businessman and entrepreneur. He has served as the president-owner of Caribe Artists Corporation, Havana East Restaurant Corporation, Mario Aguero Productions Inc., and Amalia Realty Corporation; as well as, vice-president owner of Enterprises Latinos L.T.D. and Mariomar Inc.

Mr. Aguero has had a successful political career as a campaign organizer. He specializes in fundraiser activities and Spanish campaign medias.

Mr. Aguero was nominated by President Ronald Reagan as a Commissioner of the Copyright Royalty Tribunal for a term of seven years from September 1984.

He is married to Lilia Lazo, an actress and a painter. They have one son, Mario Alexander.

APPENDIX B.

FY 86 BUDGET REQUEST

		FY 85 Allocation	FY 86 Request
11.1	Salaries & Compensation	$512,000	$524,200
12.1	Personnel Benefits	52,000	71,500
21	Travel & Transportation	500	2,000
23A	Postage	1,000	1,000
23B	Local Telephone	2,500	3,500
23C	Long Distance Telephone	1,500	1,500
23E	Rental of Equipment	400	400
23F	Rental of Space	73,000	73,000
24F	Printing, Forms	20,000	18,000
25D	Services of Other Agencies	20,000	20,000
25G	Maintenance & Equipment Repair	2,400	3,100
25K	Cost of Hearings	34,000	32,500
26A	Office Supplies	1,500	2,000
31	Books & Library Materials	1,200	2,000
31H	Equipment	0	3,600
Total Funds Requested		$722,000	$758,300
Rounding			(300)
Total Royalty Transfer		$505,000	531,000
Total regular bill appropriation		$217,000	$227,000

APPENDIX C.

COPYRIGHT ROYALTY TRIBUNAL

HISTORY OF DISTRIBUTIONS

CABLE ROYALTY FEE FUND

Calendar Year of Collection	Approximate Value of Fund as of 3/7/85	Amount Distributed as of 3/7/85	Aproximate Total Value of Fund	Percentage Distributed as of 3/7/85
1978	$ -0-	$17,659,021.81	$17,659,021.81	100.
1979	946,736.	22,721,645.	23,668,381.	96.
1980	3,881,509.	23,843,552.	27,725,061	86.
1981	1,411,262.	33,870,267.	35,281,529.	96.
1982	1,750,635.	42,015,229.	43,765,864.	96.
1983	77,223,000. (3/28/85)	-0-	77,223,000. (3/28/85)	-0-
1984	83,856,488. (as of 4/8/85)	-0-	83,856,488. (4/8/85)	-0-

JUKEBOX ROYALTY FEE FUND

Calendar Year of Collection	Approximate Value of Fund	Amount Distributed as of 3/7/85	Approximate Total Value of Fund	Percentage Distributed as of 3/7/85
1978	$ -0-	$1,124,326.39	$1,124,326.39	100.
1979	-0-	1,359,869.45	1,359,869.45	100.
1980	-0-	1,227,575.32	1,227,575.32	100.
1981	-0-	1,183,229.97	1,183,229.97	100.
1982	172,944. (7/18/85)	3,109,981.	3,282,925. (7/18/85)	94.7320 (approx.)
1983	100,628. (3/21/85)	3,068,580.	3,169,208. (3/21/85)	96.8248 (approx.)
1984	5,826,720. (9/30/85)	-0-	5,826,720. (9/30/85)	-0-

Nota-Bene: The percentage figures applied to the respective distributions will diminish as the fund continues to grow.

Values are approximate as per the date on the column heading, except where parenthetical dates appear below a value. In those cases the value is approximate as per the parenthetical date, which date represents the maturity date for liquidation of the securities.

APPENDIX D.

ROBERT CASSLER

ROBERT CASSLER was born in Queens, New York. He was graduated from Brandeis University in 1972 where he majored in history. He received his J.D. degree from Georgetown University Law Center in 1975. He is a member of the Bar of the State of New York and the District of Columbia.

Mr. Cassler studied copyright law at Georgetown University Law Center with Dorothy Schrader, General Counsel of the U. S. Copyright Office. In 1975, he was awarded First Prize for Georgetown University Law Center in the Nathan Burkan Memorial Copyright Writing Competition sponsored by ASCAP for a paper he wrote on copyright law.

After a year in private practice in New York, Mr. Cassler joined government service with the Federal Communications Commission. His first assignment at the FCC was conducting rulemaking proceedings in the Private Radio Bureau. In 1979, he transferred to the Mass Media Bureau where he rose to the level of supervisory attorney in the AM Branch. In 1983, he joined the support staff in the Office of the Administrative Law Judges which was created especially to assist the judges in determining which communications companies would receive cellular radio licenses in the top 30 markets of the country.

Mr. Cassler enjoys theater, and has written a full-length historical drama which received a production from the Unitarian Universalist Chapter of Manassas, Virginia. He also contributes original songs and sketches each year to the musical revue produced by the Young Lawyers' Section of the Bar Association of the District of Columbia.

Mr. Cassler joined the Copyright Royalty Tribunal as General Counsel March 4, 1985.

Appendix E

STATEMENT OF THE GENERAL COUNSEL

Thank you for this opportunity to present a prepared statement before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

I was hired by the Tribunal to be General Counsel in February, and I began work on March 4, 1985. I believe I am especially suited to assist the Tribunal in reaching its regulatory goals. I attended Georgetown University Law Center where I studied copyright law under Dorothy Schrader, General Counsel of the Copyright Office. While I was at Georgetown, I received an award from ASCAP for a paper I wrote on copyright law. For eight years prior to being hired by the Tribunal, I worked at the Federal Communications Commission. In the Private Radio Bureau, I conducted informal rulemaking proceedings, and took a course in draftsmanship at the Federal Register. In the Mass Media Bureau, I supervised a legal staff whose function was to authorize new broadcast stations, and changes in existing stations. In the Office of the Administrative Law Judges, I assisted the judges in the conduct of the cellular radio comparative hearings. Of particular relevance to the Tribunal, I assisted the FCC judges in the receipt and analysis of statistical evidence relating to cellular radio.

I believe I can be of service to the Tribunal in the following respects: I can conduct research into legal matters as directed by the Tribunal especially in regard to the conduct of the Tribunal's ratemaking and distribution proceedings. I can assist the Commissioners in the legal expression of their decisions, so that any review of their decisions will reveal the evidence on which the Commissioners based their decisions, and the rationale for their decisions. I can interpret Tribunal rules and make recommendations upon review of those rules to revise or change them. I can interpret the statutes affecting the Tribunal, such as the Administrative Procedure Act, the Sunshine Act, etc., to formalize the Tribunal's compliance with those acts. I can coordinate with the Copyright Office, the Justice Department and other Federal agencies for the smooth functioning of our common goals. I can advise and make recommendations to the Tribunal with respect to proposed legislation. I hope in the future to represent the Tribunal in appellate proceedings.

Overall, I see my function for the Commissioners as helping them in all procedural matters so that they can concentrate on the substantive decision-making which the President and the Congress entrusted to them to perform.

Respectfully submitted,

Robert Cassler

Robert Cassler
General Counsel

Mr. KASTENMEIER. Thank you for your presentation.

In answer to the question raised by the gentleman from Oklahoma, is there any particular reason why the other two Commissioners are not here today?

Ms. HALL. I believe that they have indicated that they would be glad to respond to written submissions from this body. I am not sure that they were fully aware that they were supposed to be here.

Mr. KASTENMEIER. Well, it is customary. They were not mandated to be here.

Mr. SYNAR. Mr. Chairman, was the letter of invitation to all three Commissioners?

Mr. KASTENMEIER. I understand that the letter, in fact, was addressed to the Chairman.

Mr. SYNAR. Then I would renew my request that they, in writing, respond to why they are not present today.

Mr. KASTENMEIER. Ms. Hall, I have two questions. They are in two categories. Let me first say at the outset that when you were first appointed, which was quite recently—you were confirmed when by the Senate?

Ms. HALL. I was recess appointed in July. I was confirmed on April 2.

Mr. KASTENMEIER. April 2.

Ms. HALL. Of this year.

Mr. KASTENMEIER. So we are talking about 1 month ago. I heard you had made a favorable first impression on the committee. You had called on a number of the members indicating your interest in the problems of the Tribunal and possible reforms. You have indicated a willingness to work at that. And I think members of the committee were impressed.

But, as you so well know, during the past few days, there has been a lot of press dealing with your authorship of a book, "Foundations of Sand." I know you are familiar with it. It is a book which I must say offends many people, particularly the part dealing with racial matters. It appears to many people to be a racial tract, a rather radical tract.

Of course this is a free country. One is entitled to think what one will about other people. This is a free country, and, indeed, one can also express oneself in written form, in books and otherwise. But when one is a public official in a Federal position such as you, and expressed the views you have, it is a different situation. It then becomes an issue of whether you are able to serve, to have the confidence of those who are affected by your decisions and, perhaps, even of those with whom you work.

Let me ask you what was your role in writing this particular book, "Foundations of Sand"?

Ms. HALL. I was merely the editor, in an extremely ministerial position; simply verbs, nouns, pronouns, dangling participles, sentence structure.

Mr. KASTENMEIER. If you were the editor, why did you then identify yourself as an author on your copyright registration, which is on black and white? You say here that you are an author of this tract.

Ms. HALL. At best, a ghost author. A person who puts ideas into words. Dr. Hafstad is a scientist. He tends to write in very technical scientific terms. Part of my job was to, in essence, translate. So, in that sense I considered myself a ghost author. I didn't know what to call it, and I didn't know how to express it, and I was much younger, and chose the term coauthor.

However, I never did any research, or any writing, or offered opinions, or drew conclusions, or indicated that those views are mine. They are not mine. They are Dr. Hafstad's views.

Mr. KASTENMEIER. I take it that, as has been indicated, Dr. Hafstad may have had the ideas. You were more than an editor. You were, in fact, a writer of the book. At least I think Mr. Morse gives you credit for writing the book.

Ms. HALL. He gave me credit for expressing the ideas in the sense that a translator writes sentences in English from a foreign language. I guess that is the closest I will come to a proper analogy of the relationship.

Once again, I did no research, did not draw conclusions, did not offer opinions, and simply served in a ministerial task.

Mr. KASTENMEIER. Let me ask you this. Do you agree with the conclusions in the book?

Ms. HALL. No, I do not.

Mr. KASTENMEIER. Why did you not disassociate yourself, then, from the project? You have had years to do so. It was copyrighted in 1982. Now, that it has become a sort of public matter you do appear to disassociate yourself at least from the conclusions, but you did not do so earlier.

Ms. HALL. In the same sense that I edited "High Frontier," oftentimes editing is truly a function of a facility with language. Many of the hours I spent editing "High Frontier" I didn't understand what I was reading. I don't understand many parts of this book. It is not in my field of expertise by any means. It is Dr. Hafstad's field. And I take credit for the editing, and in that sense I didn't——

Mr. KASTENMEIER. Well, let me ask you this. In your biographical sketch you state that you were coauthor and/or consultant to four books in the fields of politics, economics, and national defense. Now, we know one of these. What are the titles of the other books that you are coauthor of?

Ms. HALL. One is entitled "High Frontier: A New National Strategy." It is a book compiled by LTG Daniel Graham. It is the work of a panel of physicists and economists from around the country, and it is the prototype for the Star Wars defense. For that book I was the legal counsel. I set up the corporation, I took care of the legal matters, and I did an editing of the entire work several times for the same types of things I edited for Dr. Hafstad, which was grammar, sentence structure, dangling participles, conjunctions, agreement of pronouns, and the like, and making the book readable to nonscientists. This is where I met Dr. Hafstad. He was on the team of High Frontier.

A second book on which I consulted in a legal capacity and in a copyright capacity is called the Marxist-Leninist Lexicon. It is a book written by Col. Raymond Sleeper. It is a dictionary that draws from the literature of the world on Marxist-Leninist terminology.

Clearly I am not an expert in Marxist-Leninism, either. My job, again, was ministerial.

Mr. KASTENMEIER. Many people who write on it aren't. [Laughter.]

Most, I guess.

Ms. HALL. The fourth book was, I was called upon by a black law firm in Georgetown, whose name I would rather not disclose because I don't want to hurt their project. If, in fact, this can be deemed to hurt anyone. It was a manual that was put together under contract for the SBA, which manual is designed to provide preventive legal assistance for minority businesses under the 8(a) Program of the Small Business Administration.

In this manual I wrote three out of four—out of eight chapters, and in that sense I am a coauthor. However, I don't know if the manual has been printed yet. I do know that several seminars were held, and that I was asked to speak at those seminars.

The area of expertise in which I wrote for this manual was personnel relations, Government contracts, and collections. That is the one book of the four in which I wrote substantive material because it was in my field. It was in law. It was in corporate law. And for that book I provided more than ministerial work.

Mr. KASTENMEIER. Now, in your biographical information form you gave the Senate, you were asked to list all organizations to which you belong that are active in lobbying before public bodies. You responded, None. Yet, you listed yourself as a director of High Frontier, and you are also a lawyer. You are still a director of High Frontier, are you not?

Ms. HALL. I became a director of High Frontier just a few months ago. And again, that is a ministerial position. I do not provide legal counsel to High Frontier any longer. I am not practicing law as of assuming my position on the Copyright Royalty Tribunal.

Mr. KASTENMEIER. Well, are you now aware—you certainly should have been at the time—that High Frontier is registered with the Clerk of the House of Representatives as a lobbying organization and that it also lobbies before public bodies? Do you not know this?

Ms. HALL. High Frontier has both a 501(c)(3) and 501(c)(4) organization. The work that I did for High Frontier was for the 501(c)(3) organization, the tax-exempt, charitable, and educational foundation. If they have changed their status, if the original body for whom I was a direct—am a director has changed its status to a (c)(4), no, I am not aware of that.

My position with General Graham is only with his charitable nonlobbying organization, the 501(c)(3), for which I did the legal work.

Mr. KASTENMEIER. Therefore, in a technical sense, you assert that your answer was truthful; is that correct?

Ms. HALL. It is truthful.

Mr. KASTENMEIER. Well, the organization known as High Frontier does lobby, you know that?

Ms. HALL. There is an organization known as High Frontier which does lobby. It is not one on which I am a board member. I am on the board of the charitable, of the 501(c)(3) tax-exempt, charitable foundation.

If, in fact, my name has been transferred over to the other organization, I will quickly rectify that. My position with High Frontier, as a member of their board of directors, is, again—you know, when you are in private practice of law, you are often asked to sit on boards. Especially of corporations that you form, which I have done for several corporations that I formed.

However, if that presents a problem in any way, if the technical explanation which I have given fails, I will readily resign that position. That is not a problem. I am not aware of the problem that you have uncovered.

Mr. KASTENMEIER. As a matter of fact, out of, I suppose, coincidence on Sunday night in my own district—2 nights ago—I had a debate on television, with a retired naval captain named John Morse. Mr. Morse happens to be, and I did not know so at the time, your coauthor in this enterprise and, of course, a public advocate of High Frontier.

At this point I want to yield to my colleagues. I have some other questions, but they will be in other areas. So I will yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. You have been with the Copyright Royalty Tribunal now for several months. What recommendations do you have to make to us at this time concerning the making of this Tribunal into a more workable structure?

Ms. HALL. Thank you. I believe that we do need some legislative reform at this time. The Copyright Royalty Tribunal is an organization which was set up with minimal guidelines as to structure. We have a rotating chairmanship and a very segmented office. I have begun centralizing the office and setting in systems which should be permanent, such as master filing systems for our cases and the like.

But I fear that when the chairmanship rotates these permanent systems will again become subject to the whim of another chairman's idea. And that does not render consistent internal policy in the agency nor does it give new Commissioners coming onboard a clear understanding of the legal policy of the agency, the case precedent and things of that nature.

So, I feel one thing that should be done immediately is that a permanent chairman should be appointed to organize the files, set in permanent systems, not only for our administrative in-house work, but for our casework, so that we can follow our case precedent more easily. The permanent chairman should be able to set internal policy for the agency as well.

Second, I think the agency desperately needs professional staff. We now have a general counsel. We probably could use an assistant general counsel. We need a secretary for our general counsel. And we need an economist. We cannot begin our rate hearings this year without the help of an economist. The statutory mandates are replete with references to economic indices and to economic concerns both in our rulemaking, our rate-setting function and in our distribution function. I believe we need an economist.

I believe we need subpoena power because our hearings are the result of the generosity of our claimants. It is very difficult to make decisions based on the impact on our claimants without the aid of some claimant data which we cannot subpoena.

I believe that the agency needs a closer coordination with its Licensing Division. The Licensing Division of the Copyright Office collects the fees for which we set rates on also those fees which we distribute. This Licensing Division invests that money for us, and segregates it into separate funds for each year. They roll over the investments. They are constantly working on making distributions for us. We need a closer working relationship with them. They are totally funded out of the royalty pool. They presently report to the Registrar of Copyrights, and they have nothing to do with the Registrar of Copyrights. They only serve our Tribunal.

So I believe that the Licensing Division should report to our Tribunal. That would give our Tribunal the ability to write and interpret our own regulations with regards to the collecting of the fees that we deal with, and with regards to the disbursements of those fees. It would give us a much closer working relationship. It would relieve our internal staff of duplicative recordkeeping, and it would allow us the use of the Licensing Division's very able accounting staff. Right now, we do our own accounting, and it is a very large task for someone like myself who is not an accountant.

Mr. MOORHEAD. Would it help if the Copyright Royalty Tribunal were a part of a larger agency?

Ms. HALL. I don't think that would help, and I think it might hurt because one of the most important aspects of our judicial—quasi-judicial process is our independence. I don't know what agency it could belong to and not sacrifice that independence.

Mr. MOORHEAD. For example, the Copyright Office?

Ms. HALL. Absolutely not. The Copyright Office, as I understand it, and has been reported in the trade press lately, often presents itself as the vanguard of the copyright owner. David Ladd I think said something to that effect in a recent interview. We must look fairly at both the owners and the users. And so to present ourself even in close proximity to the Copyright Office might influence our neutrality because we have to be able to deal equitably with both owners and users.

Mr. MOORHEAD. How about the Department of Commerce?

Ms. HALL. I don't know for sure. I could research that some. I still question the loss of neutrality, the loss of our independence.

Mr. MOORHEAD. Should the division of the Copyright Office that collects the statutory royalties which you distribute be a part of the Copyright Royalty Tribunal r a part of the Copyright Office?

Ms. HALL. That is the Licensing Division, and I believe they should be a part of the Copyright Royalty Tribunal. They serve no function of the Copyright Office.

Mr. MOORHEAD. And directly under your Commission?

Ms. HALL. I believe so. We have to communicate with them continually on the status of the investments and the time schedules for making disbursements without suffering a loss of interest for immature liquidation of securities and things of that nature. We continually correspond with them, and it serves no function to have them report to the Copyright Office.

Mr. MOORHEAD. You have three active Tribunal members at the present time, but I understand the law provided for five. Mr. Kastenmeier had a bill that he introduced during the last Congress that would have reduced that number to three, and I don't know

whether it has been put in again this year, but I presume it will be if it hasn't been. Which do you recommend, three or five members?

Ms. HALL. I recommend three members very strongly. We don't need more decision-makers on this Tribunal. We need professional people to do the research to give us the information so we can make the decisions. We need an economist, we need general counsel, we need an assistant general counsel, we need some staff to support them.

Mr. MOORHEAD. Thank you very much.

Ms. HALL. Thank you, Mr. Moorhead.

Mr. KASTENMEIER. In order of seniority, is it the gentleman from Oklahoma?

Mr. SYNAR. Thank you, Mr. Chairman. And welcome, Ms. Hall; we appreciate your coming down today. And before I start my questions, let me remind you that you are under oath.

Ms. Hall, do the other Commissioners on the Copyright Tribunal show up to work on a five-day-a-week basis, 9 to 5?

Ms. HALL. Can I ask you to address that question to the Commissioners?

Mr. SYNAR. Do the other two Commissioners, who are not with us today, do they show up on a regular basis 9 to 5, 5 days a week?

Ms. HALL. No. No, they do not.

Mr. SYNAR. How often do they show up?

Ms. HALL. There is no consistent schedule or pattern, sir.

Mr. SYNAR. Would it be a fair statement to say they show up very irregularly if at all?

Ms. HALL. They show up on a timetable every day, but——

Mr. SYNAR. Have there been weeks where the Commissioners have not shown up at all?

Ms. HALL. Not weeks, no, sir.

Mr. SYNAR. A couple of days in a row; 2 or 3 days in a row?

Ms. HALL. Perhaps 1 day.

Mr. SYNAR. Would you provide for the subcommittee a record of the attendance of the Commissioners since their appointments?

And I would ask unanimous consent that that would be made part of the record.

[The information submitted by the Copyright Royalty Tribunal follows:]

RECORD OF ATTENDANCE OF COMMISSIONERS

In 1978, Congress amended the Annual and Sick Leave Act to clarify questions in its application to the Commissioners of the Tribunal among other Legislative Branch officials. With the passage of S. 1676, the Commissioners of the Tribunal were given equality of leave time, and not subject to the formulas of the Leave Act. As a result, with the exception of the very early months of operation and during the conduct of formal meetings and hearings, daily attendance records of the Commissioners are not maintained.

From a historical perspective, the nine Commissioners who have served at the CRT have often differed in their individual daily schedules and office agenda separate from the conduct of formal meetings and hearings. It has not been the exception for Commissioners to individually require isolated and uninterrupted study/work time. Similarly, each Commissioner also individually determines and schedules his/her own participation in outside meethings, conferences, seminars, etc. Individual Commissioner daily business schedules are not commonly exchanged among their colleagues but, every Commissioner has been accessible at all times.

Mr. SYNAR. Ms. Hall, do you have control over the hiring and firing of your staff?

Ms. HALL. I am sorry, sir?

Mr. SYNAR. Do you have control over the hiring and firing of your staff?

Ms. HALL. No, I do not.

Mr. SYNAR. Who does?

Ms. HALL. The office is segmented. I have one person who reports to me, which is my secretary. The other secretaries report to the other Commissioners. I do not have any authority over the other secretaries.

Mr. SYNAR. Am I correct, in reading the Broadcast Magazine, the background of the other two Commissioners is one of Cuban descent who is a former Olympic basketball star, and the other one's background is he was Chuck Berry's road manager? Is that correct?

Ms. HALL. No, sir.

Mr. SYNAR. What is the background of the two Commissioners?

Ms. HALL. I believe the biographical sketches are included in the statement, Mr. Synar.

Mr. SYNAR. Did either one of them have background in the copyright area, such as in law or having dealt with copyright in any manner?

Ms. HALL. I believe they both have had extensive experience in industry.

Mr. SYNAR. In industry?

Ms. HALL. The industry that deals with entertainment and, therefore, copyright.

Mr. SYNAR. Ms. Hall, I would ask you these questions, and ask you to submit these answers—as well as the other Commissioners—to the following questions.

I would like the views of all three Commissioners with respect to compulsory license, including why they feel it exist and whether it is working; and the original reasons for the enactment, whether or not they have changed. That is the first question I would like all three Commissioners to respond to the subcommittee for.

Second, I would like their opinions with respect to the 3.75 percent on gross revenues and what their views are on that rate, and whether or not it has affected the availability and other policies with respect to the CRT's mandate.

[Information submitted by Ms. Hall follows:]

COMPULSORY LICENSING

There are four types of compulsory licenses under the 1978 Copyright Act. They are in the areas of mechanicals, (primarily phonorecords), cable secondary retransmissions, jukebox and public broadcasting.

Compulsory licensing for mechanicals was created by the 1909 Copyright Act, sections 1(e) and 101(e) to overcome the effects of the 1908 Supreme Court decision, White-Smith Music Publishing Co. v. Apollo Co., 209 US 1, 28 S.Ct 319 (1908). In this case, the Supreme Court dismissed the plaintiff's action to enjoin the infringement of copyrighted sheet music in its transcription onto piano rolls. The 1909 Act reversed this decision by granting the owner control and compensation for the use of his work by mechanical devices, hence the term "mechanicals". The 1909 compulsory license also prevented the divestiture of the work to the public domain by virtue of wide dissemination through the mechanical devices, which dissemination would have constituted publication and therefore divestiture under the common law.

Compulsory licensing for mechanicals remains comparatively unchanged in the 1978 Copyright Act, section 115.

Compulsory licensing for cable, jukebox and public broadcasting was created by the 1978 Copyright Act to allow control and compensation for the use of copyrighted works that had heretofore been uncompensated until this act was passed.

I believe Congressman Synar's questions were meant to concern compulsory licensing for cable so I shall confine further explanation accordingly.

Under the decisions rendered by the Supreme Ct. in Fortnightly Corp, v. United Artists Television, Inc., 393 US 390, 88 S.Ct. 2084, Rehearing denied, 393 US 902, 89 S.Ct 65 (1968) and Columbia Broadcasting System, Inc. v. Teleprompter Corp., 415 US 394, 94 S.Ct 1129 (1974) cable operators could retransmit broadcast signals for free. This was based on the reasoning that cable operators were simply boosting signals which would have been received under normal conditions but needed boosting to overcome a natural obstacle such as a mountain range. The typical cable operator was a community antenna operation, erected to overcome natural obstacles that interferred with normal broadcast reception. Therefore the retransmission was not considered a copyright use.

As the cable industry grew to provide signals which would not normally have been received, the issue of infringement arose and become a major obstacle in the passage of the 1978 Copyright Act.

This 1978 Copyright Revision, which was long overdue, was the result of a 20 year effort, concluded with the strong leadership of Senator McClellan and Congressman Kastenmaier. The revision had failed to pass four sessions of Congress and was threatening to fail again, in 1976 for want of the resolution of this cable copyright problem. In the last weeks of the 94th session of Congress, the competing interests of the owners and the cable users were compromised by the compulsory licensing provisions of section 111 and the creation of the Copyright Royalty Tribunal, by section 801 et. seq.

I believe that this compromise was the only ready answer that could solve the problems to allow the passage of the badly needed revision. At the time the relegation of these problems to the vicissitudes of the free market would have been harmful to all industries involved. Today's world is considerably different and relegation to the free market is much more feasible and probably desirable.

Today, approximately 700 copyright claimants have by voluntary agreement, consolidated into 7 - 10 copyright representative groups. The 6600-8000 cable operators have also consolidated into 2-4 major cable representative groups. Free market negotiations between these parties is quite possible now.

The jukebox interests have recently proven that they can resolve their differences without the need for CRT intervention.

Public Broadcasting has likewise functioned without CRT intervention for many years, except for a yearly CPI adjustment of the rates for approximately 500 college radio stations. This simple mathematical determination can be easily computed and implemented by the Licensing Division.

Lastly, the mechanical compulsory licensing collections have been amply served for decades by the performing rights societies, (ASCAP, BMI, SESAC) under a consent decree from the Justice Dept.

Free negotiations could probably function better to resolve all the concerns that the CRT was created to resolve. Breakdown in negotiations could be resolved by a three person panel of the American Arbitration Assoc as originally envisioned by the Senate version of the 1978 Copyright Act.

The Licensing Division should continue to collect the fees for cable and jukebox until private societies (if ever created) could take over those functions. The present CRT general counsel could be employed by Licensing to interface with the American Arbitration Association for the impanelling of boards when negotiations break down. He could also be responsible to implement agreements for partial distributions etc. He could report to the head of the Licensing Division and fully support that staff with regards to interpreting regulations etc. and relieve the Copyright Office General Counsel's staff of those responsibilities.

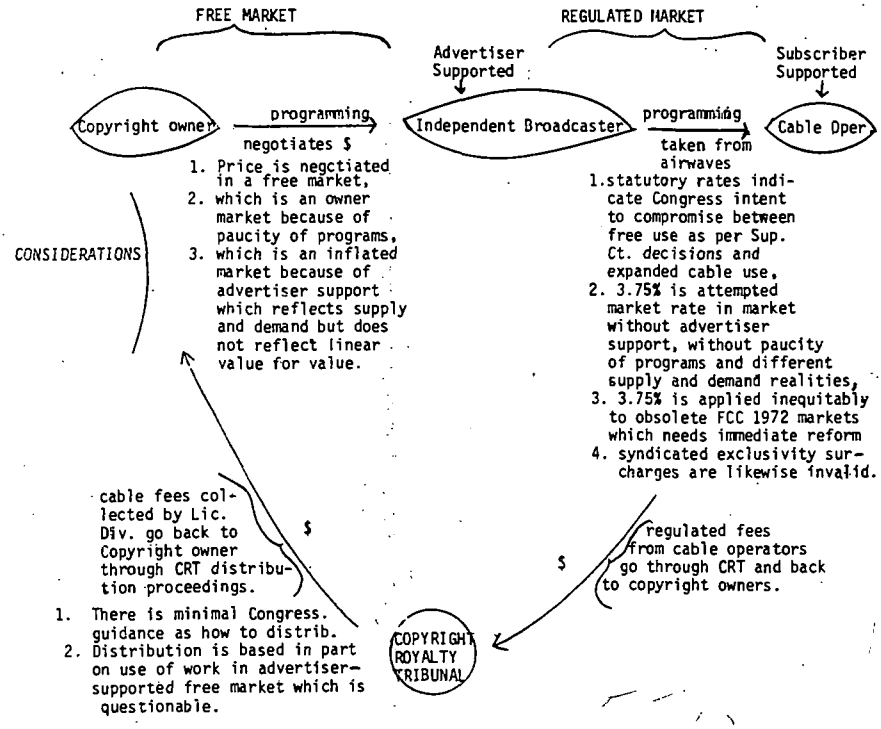
As Chairman of the CRT, I had hoped to reform the agency in 1985 by cleaning up its history and archives for permanent storage. I had hoped to render final, highly professional determinations in cable distribution and cable ratesetting during this pivotal window year. Jukebox, public broadcasting and mechanicals concerns have been and continue to be best served by the marketplace. I believe cable can be best served by the free market as well. The only fallback structure necessary would be the ability to impanel a hearing board from the American Arbitration Association. I have compiled extensive historical material which I have provided the Judiciary Committees for the House and the Senate. These materials detail the historical and present problems with the CRT. It is my strong recommendation that the agency be disbanded immediately for the reasons given in this testimony and supported by the above-mentioned documentation. I believe it is urgent that action be taken before the present 1983 cable distribution hearing process commences in June and before the cable rate review is begun.

The Copyright Royalty Tribunal is not functioning as it was envisioned to function. That is damaging to the copyright owners, the users and the American public who deserve more performance for their hard-earned tax dollar.

Submission of Marianne Mele Hall to questions raised during May 1, 1985, Oversight Hearing:

Insert at page 30, line 692:
Answer to questions raised at lines 674-677 page 29:

The 3.75% rate set by the Copyright Royalty Tribunal in 1982 was an overly simplistic, highly inadequate answer to a very complex problem. In order to arrive at a more adequate resolution, the problem should be analyzed from the legal and economic perspectives. The following schematic may help.



The simple flat fee, as applied by the CRT in the 1982 determination ignores the economic concerns of the schematic, supra. It ignores the inequity in the market application of the statutory and distant signal rates. It ignores the recent problems as evidenced in the FCC Melbourne/Cocoa Beach Rule (Final Rule MM Docket #84-111, RM4557, 50 Fed. Reg. 2565 (1985)), which problem should be resolved by the CRT, not the FCC or the Copyright Office as is occurring. Further the simple decision offers no guidance on the distribution of the syndicated exclusivity surcharge which it created (which will be distributed for the first time, this year in the 1983 cable distribution.).

The problems incumbent in the cable retransmissions of distant signals require intensive study and resolution by experts. The past and present Tribunal has managed to avert this undertaking by providing the simplistic 1982 determination. This is unfair to the owners and users who consistently present highly professional cases at great cost, in their effort to seek justice. It is unfair to the American public who have trusted the government, in the guise of the CRT, to resolve these highly complex and technical problems incumbent in the delivery of the world's finest entertainment.

I do not have the answers to these problems. I had hoped to staff the CRT with the professional support that could study and help the Commissioners find the answers. I now suggest the Congress seek the professionals, conduct the study and find the answers as soon as possible.

Mr. SYNAR. Finally, I would ask this, if I could. When was the last time the CRT met?

Ms. HALL. In a staff meeting?

Mr. SYNAR. No, the three Commissioners.

Ms. HALL. The three Commissioners, it was April 25.

Mr. SYNAR. And what were the items discussed?

Ms. HALL. We discussed several procedural problems with recent filings.

We have minutes of that meeting we will be glad to provide.

Mr. SYNAR. You would provide those for the committee.

[The information follows:]

STAFF MEETING MINUTES

As requested, the minutes of the Commissioner's April 25, 1985 staff meeting are attached.

MINUTES

A staff meeting was called by Chairman Marianne Hall for Thursday, April 25, 1985. It was convened at 10:15 A.M. and it lasted until 11:00 A.M. In attendance were Marianne Hall, Chairman, Edward Ray, Commissioner, Mario Aguero, Commissioner, and Robert Cassler, General Counsel.

The first topic which was discussed was the request by Latin American Music for copies of certain documents in the files of the Tribunal relating to earlier determinations by the Tribunal. Mr. Cassler reported that the minimum obligations of the Tribunal under the Freedom of Information Act were (1) to ascertain whether the Tribunal possessed the documents in question, (2) to locate those documents; (3) to replace those documents if it could not locate them if they are documents which should be ordinarily kept by the Tribunal; and (4) to make the documents available to Latin American Music for inspection or copying during regular business hours. It was agreed that this was what should be done, and Barbara was assigned the project of locating the documents in question before any letter would be sent to the requesters.

The second topic was the notice of proposed rulemaking issued by the Copyright Office regarding the Melbourne, Florida case. It was discussed whether the Tribunal should comment in the proceeding, and/or file reply comments. Chairman Hall stated that she would research the notice and propose to the Tribunal appropriate comments.

The third topic regarding a reply to Senator Mathias' request for testimony was raised. Each Commissioner stated that he or she would choose whether to respond to the request individually, and that circulation of each Commissioner's response to the letter was not necessary.

The fourth topic concerned the petition by MPAA to publish the Turner Broadcasting petition in the Federal Register and to invite comments. Mr. Cassler was assigned the task of researching the petition and proposing a draft notice for publication in the Federal Register.

Among miscellaneous topics, Mr. Cassler informed the Tribunal that two law students accepted the Tribunal's offer to work voluntarily for twenty hours a week during the summer. Commissioner Aguero raised the issue of helping the students out with expenses such as lunch and transportation. Each Commissioner and the General Counsel stated that they would consider whether to help the students personally. No Tribunal funds were allocated for student expenses.

In addition, the late filings of NPR and MPAA in the 1983 cable distribution proceeding were discussed. Mr. Cassler was assigned the task of drafting proposed orders for the Tribunal's consideration disposing of the late filings.

VIEWS OF COMMISSIONER RAY
ON COMPULSORY LICENSE

The Subcommittee is well acquainted with the role of compulsory license in the Copyright Act of 1976 therefore, I will not burden the record with a description of the compulsory licenses.

Under the 1976 statute there are four areas of the (utilizing) compulsory licenses: Phonorecords, jukeboxes, public broadcasting and cable television. The compulsory license for phonorecords was also included in the earlier 1909 Copyright Act. The statute (P.L.94-553) created the Copyright Royalty Tribunal to perform certain adjudication and ratemaking functions under the compulsory license scheme.

Prior to the enactment of the 1976 Copyright Act, in most traditional business transactions involving copyrighted properties in the free market, buyers and sellers were able to bargain for and reach prices which were acceptable to all concerned. In 1976, because of the unique character and role of certain copyright users and because there were no effective "in place" copyright clearance procedures for these unique users, the traditional business transactions could not be applied. In 1976, Congress found that "It would be impractical and unduly burdensome to require cable operators to negotiate with copyright owners whose works are retransmitted by cable systems." Also, cognizant of the fact that copyright is a property right that an owner cannot be deprived of without due process of law nor can the right be taken for public use without just compensation, Congress established the compulsory licensing system under the 1976 statute.

The Tribunal has not conducted any specific proceedings or studies concerning the justification or effectiveness of the compulsory licenses therefore, I limit my opinion to an informal assessment of information reported in the trade press. Based on this data, it is my view that there have been mixed reactions as to the effectiveness of the compulsory licenses. Generally speaking, Copyright owners seem to favor the elimination of compulsory licenses, while reactions from users seem to vary according to the impact a particular Tribunal determination has upon their operation. I have no knowledge of any impartial study that assesses the impact of compulsory licenses on the general public.

The Tribunal's record does reflect a modest success with owners and users towards industry settlements; particularly concerning public broadcasting rate regulation and jukebox royalty distributions. The recent agreement between the performing rights societies and the jukebox industry is further evidence that there is some progress being made in private negotiations.

Based on this record, it is my assessment that copyright owners, at least in public broadcasting and jukeboxes, are demonstrating a reasonable showing for the legitimate needs of the copyright users without disrupting their functions.

As to whether the need for compulsory licenses has changed, I am not aware of any impartial, scientific studies that reflect a lesser need for compulsory licenses today than in 1976, especially in the cable area.

To my knowledge, there has not been any significant changes in copyright clearance procedures that would substantially alter the 1976 judgment of Congress. In fact, in reference to the cable compulsory license, I believe, the tremendous growth in the cable industry since 1976 and the impact of the FCC deregulation of distant signals have added to the complexity of the compulsory license issue. However, the current private negotiations between copyright owners and cable copyright users seem encouraging.

VIEWS OF COMMISSIONER AGUERO
ON COMPULSORY LICENSE

The concept of the Copyright Royalty Tribunal was perceived as a device to relieve Congress from the continuing task of rate review and adjustment under the four compulsory license areas of the Copyright Act of 1976. The Tribunal's function was originally limited to reviewing and adjusting the royalty rates paid by record manufacturers for the use of non-dramatic musical compositions, rates payable by jukebox operators, rates for the public performance of non-dramatic musical compositions for public broadcasting stations, and rates for certain secondary retransmission of broadcast signals by cable tv systems under the compulsory licenses established by the 1976 statute. The Tribunal's initial function was expanded to cover administering the distribution of compulsory license fees paid under the jukebox and cable compulsory license areas.

Since the creation of the 1976 Copyright Act, it appears to me that the copyright owners and the users differ in their opinions on the effectiveness of the compulsory license or perhaps in the elimination or not of such controversial licenses.

I feel that the system of compulsory licensing is working in regard to the distribution of fees and the Tribunal adhering to its responsibilities under the Act to hold proceedings and to make determinations based on the evidentiary record of proceedings.

As to whether or not the concept of compulsory license has changed from its original intent, it's difficult to answer. If all the parties involved agree to the elimination of the compulsory license, Congress would have to pass a law changing those sections in the Copyright Act. If it is finally approved by the President all the copyright properties will be available in the free market and the short existence of the Copyright Royalty Tribunal would have an end.

VIEWS OF COMMISSIONER RAY
ON 3.75% CABLE RATE

I participated in the 1982 Cable Rate Adjustment Proceeding and voted in support of the 3.75 percent rate. My determination was based entirely on the record evidence presented in the proceeding. The final opinion of the proceeding details our justification for the determination.

The Subcommittee has on file a copy of the opinion (47 FR 52146-59) therefore, I will not burden the record with an itemized recital of those justifications which were also included in my testimony before you in 1983.

The Tribunal has not conducted a specific hearing or special study on the effects of the 3.75 percent rate. I also have no knowledge of any impartial scientific study on the effect the rate has had on cable operators, availability of programming to the general public, or its impact on the copyright owners. Obviously, I have reviewed many biased reports in the trade press often with conflicting analyses contending that the rate has severely (negatively or postively) impacted the general public, copyright users or copyright owners.

The 3.75 rate will possibly be reviewed by the Tribunal this year therefore, with my responsibility of impartiality in mind, I would like to decline any expression of predisposition that would be based on "hearsay" evidence prior to the conduct of that proceeding.

VIEWS OF COMMISSIONER AGUERO
ON 3.75% CABLE RATE

I did not participate in the 1982 cable rate adjustment proceeding. I was appointed to my position as a Commissioner to the Copyright Royalty Tribunal in May 1984.

Since my appointment, the Tribunal has not undertaken an independent study concerning the pros and cons of the 3.75 percent rate. However, we have been petitioned to review the rate for cable carriage of WTBS, Atlanta, Georgia, and may be

petitioned for a general review of the rate later this year. I feel to make any statement now would be unfair to all parties involved, and would be only tentative, at best.

My opinion of the 3.75 rate will be based on the evidence presented at future proceedings.

Mr. SYNAR. And when is the next scheduled meeting?

Ms. HALL. It has not been scheduled; however, it probably will occur next week.

Mr. SYNAR. And what will the agenda items be on that meeting?

Ms. HALL. We have to resolve issues with regard to the recent filing of Mr. Turner and a motion to clarify files by MPAA. We will probably at that point in time discuss some of the concerns with proceeding in our ratemaking. We have recently received, I believe today or yesterday, a motion by MPAA dealing with the 1983 cable distribution, which is again a procedural matter which we will address.

We are in the process now of doing the 1983 cable distribution, and we will be discussing the next calendar items. We have just issued two orders which are dealing with procedural matters on 1983 cable distribution, and we will have to get approval of the Commissioners on that.

We have oral argument on May 6, on our Court of Appeals cases, and we will be discussing the results. We will be discussing that oral argument and how we think we fared. We have some issues to resolve in our jukebox distribution which we will address in that meeting.

Congressman Synar, in your second question to us, second submission, you asked the Commissioners to offer their opinion on the 3.75. We have received a petition on that matter, and I think that making our opinions public on the 3.75 is probably ill-advised in that we are going to begin a proceeding on it. By making our opinions public at this point in time, it may influence whether or not other petitioners care to petition, and it will clearly indicate a predisposition on a matter when we have not yet heard evidence on the matter.

Mr. SYNAR. Well, what do you——

Ms. HALL. So, I think that will be a difficult thing.

Mr. SYNAR. The question I have is what do you think about the existing 3.75?

Ms. HALL. I don't know how we could answer that, Mr. Synar, without——

Mr. SYNAR. Well, do you think it is fair?

Ms. HALL [continuing]. Showing a predisposition with a hearing imminent.

Mr. SYNAR. Do you think it is fair? Do you think it is enough? I mean obviously you can report on what you think about it.

Ms. HALL. I obviously can report on what I think about it, Mr. Synar, but that would show prejudice. I haven't heard the testimony yet on it. We will be hearing testimony on that. Evidencing my opinion now will definitely affect that testimony, so I have a problem with it.

Mr. SYNAR. What do you think about the existing law as it is today? The 3.75 for distant signals, do you think that is fair?

Ms. HALL. I think it is far too intricate a problem to discuss right now, here and now; and furthermore, I think it would gravely show my hand at this point in time when we do have a hearing imminent.

Mr. SYNAR. Thank you, Mr. Chairman. And I would ask unanimous consent that the record be held open for all those questions as well as those attendance records, et cetera.

Ms. HALL. Attendance records are not kept, Mr. Synar.

Mr. KASTENMEIER. The gentlewoman from Colorado.

Mrs. SCHROEDER. Well, maybe I should ask why aren't attendance records kept?

Ms. HALL. They are not kept, madam.

Mrs. SCHROEDER. Why? I mean what is the reason?

Ms. HALL. The Commissioners are not subject to the annual leave or sick leave act, whatever. I am not—I am new to Government, forgive me.

I do not keep records. Attendance records are kept for the staff but not for the Commissioners.

Mrs. SCHROEDER. Are attendance records kept, though, for the Commissioners at the different Commission meetings, surely?

Ms. HALL. Oh, absolutely.

Mrs. SCHROEDER. OK, so we could at least get those I assume.

I don't have a lot to add, except that again I was very, very distressed by the morning paper. And I really don't understand quite what I think I heard you say. I think I heard you say that Dr. Hafstad was very scientific and you are trying to put the book into language that people would understand?

Ms. HALL. I said that Dr. Hafstad is a scientist. And Dr. Hafstad is a scientist, and that is all I meant by that. Now, whether that work is scientific or not, I am not qualified to judge. My personal opinion is my personal opinion. But Dr. Hafstad is a scientist. He is a physicist.

Mrs. SCHROEDER. Did that mean that when you saw the book it had lots of technical terms and you put it into things that you thought people could interpet? Is that, I think that is——

Ms. HALL. No; it is more like when I first saw the book it was many miscellaneous sheets of paper. Oftentimes very technical people tend to write and skip sentences, leave gaps in reasoning, and the like. It is the same kind of work I did on High Frontier, connecting sentences and use of conjunctions, and things of that nature.

Editing is a very ministerial task. You don't need to understand what you are doing, and you don't need to understand what you are reading. Editing is a very ministerial task if you do it as such.

Mrs. SCHROEDER. Let us take a quote. I mean this doesn't sound like it was written by a scientist. It says:

> Within a decade after the Equal Rights Voting Act visitors to Washington noted that black females suddenly became extremely active. They were attractive, well-dressed, spoke good English, walked with vigor, and moved ahead in the traditionally female jobs. However, black males had not changed notably.

Ms. HALL. I did not say that Dr. Hafstad's work was or wasn't scientific. I said that Dr. Hafstad is a scientist. Dr. Hafstad is a scientist. Those are his views. Those are not my views. What Dr. Hafstad said, what he believes is in a book. What more can I say on that?

I realize that some of those views are offensive. I wish that I could respond to them for you, but they are not my views.

Mrs. SCHROEDER. I guess my next question has to be were you that hungry? I mean I would think a young woman with your background, I guess that is what I am saying. A young woman with your background, which is, you know, a very distinguished background. I hope this country has more opportunities for young women than that. And I guess that, I mean that is all I have to say. I just find reading the book very, very distressing. And just saying, well, I did it because it was my job—maybe you had to do it because it was your job, but I thought it was still a free country and we could pick and choose jobs. And this was a job I think a lot of us wish had not been done.

Ms. HALL. I understand your feeling.

Mrs. SCHROEDER. This does not represent America as we like to think of it?

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Connecticut.

Mr. MORRISON. Thank you, Mr. Chairman.

You are assuring us now, Ms. Hall, that this is something that is not your views, this book that we are obviously focusing on. Do you think that this book, if it were your views, if this was a statement of your views, do you think that would raise questions of the appropriateness of your service in the position that you now hold? Do you think somebody with those views ought to occupy that position?

Ms. HALL. Somebody with those views does not occupy that position.

Mr. MORRISON. Well, I would like to know whether you think—this goes to the question of whether it is appropriate at all for us to be asking about all of this. Maybe this is not relevant.

Is it relevant? If these were your views, should you continue——

Ms. HALL. I think that what is relevant is my ability as a lawyer, my ability as a copyright lawyer, my ability as a manager—not those views. We have a lot of problems at the Copyright Royalty Tribunal which I am trying very hard, with the aid of my cocommissioners, to correct. I am up to my ears in reform of the Copyright Royalty Tribunal.

You are asking for an expert opinion on a piece of material on which many years ago I performed a ministerial task.

Mr. MORRISON. I am not asking for an expert opinion. I am asking you whether you think that if these are your views you should be in that position. I think that could be answered yes or no.

Ms. HALL. OK.

Mr. MORRISON. Can I have an answer?

Ms. HALL. Yes. No. A person who has those views should not be an expert, should not be serving in a job here an expertise in copyright is necessary.

Mr. MORRISON. So somebody shouldn't be in that job. So it is important for us to find out whether these really are your views.

Ms. HALL. No, it is important to find out whether I am qualified to serve as the Commissioner on the Copyright Royalty Tribunal. Whether my legal qualifications and my——

Mr. MORRISON. OK.

Ms. HALL. But I—in my mind that is an issue that's unfair.

Mr. MORRISON. Let me then ask some questions about this. You said that you have written four books?

Ms. HALL. No. I said I have edited and/or consulted on four books.

Mr. MORRISON. And were all those books completed before you filed your biographical statement with the Senate?

Ms. HALL. No, they were not. The SBA manual for minority businesses may still be in manuscript form as far as I know.

Mr. MORRISON. Nothing published, but had been finished, your writing or your editing was—in fact, you said you wrote that one, or a good part of that one. So your writing was done on that?

Ms. HALL. Yes. I haven't done any other work except work for the Copyright Royalty Tribunal since July 5, of this year.

Mr. MORRISON. So the other three—the Foundations of Sand, High Frontier, and this Marxist-Leninist dictionary—those were all done and published before you submitted this biography?

Ms. HALL. As far as I can recall. I am not sure of exact publication dates, but clearly my contributions were well completed before I became a Commissioner.

Mr. MORRISON. Why is it, then, that the only one of these works that you cited in your biographical information is the Foundations of Sand? You want us to believe that you were just a ministerial player with respect to each of these items, but one of the ministerial functions apparently was so important to you that you listed yourself as coauthor in this document. That raises questions to me. Could you explain that?

Ms. HALL. I am not sure when the Marxist-Leninist Lexicon was published. It was completed at the time, but I don't think it was published then.

Mr. MORRISON. Well, how about High Frontier? That was completed, wasn't it? That was completed a long time ago.

Ms. HALL. Yes, I believe so. I don't think the question—I can't recall the question on that.

Mr. MORRISON. The question was: "List the titles, publishers and dates of books, articles, reports, or other published materials you have written."

Now, either—you say you didn't write it, so I wonder why you listed it. And if writing it includes what you have described, then I don't know why you didn't list the other things. I don't think you can have it both ways.

Ms. HALL. I think we are getting tangled in the semantic definitions between ghostwriting, writing, consulting, editing——

Mr. MORRISON. Madam, I am not tangled at all. I am trying to find something out. You said in your testimony just a few minutes ago that if these really are your views then you oughtn't to be in your current position.

Now, you have made a self-serving statement that they are not your views.

Ms. HALL. That I——

Mr. MORRISON. Excuse me. When I pose the question you will have time to answer it.

I think it is perfectly legitimate for members of this committee to look behind your self-serving statement to discover whether it is likely that these are your views. And if you don't want to assist us

in that, we will have to look to secondary sources I suppose. But I don't think it is at all inappropriate to follow that line of questioning.

And I would like to ask you what the compensation arrangements were with respect to this book?

Ms. HALL. Let me say again these are not my views.

Mr. MORRISON. That wasn't the question.

Ms. HALL. Period. And I think that addresses your first assertion.

Mr. MORRISON. Could you answer my question, please? What were the compensation arrangements with respect to this book?

Ms. HALL. I was paid I believe the figure was $1,000.

Mr. MORRISON. For the editing?

Ms. HALL. Yes.

Mr. MORRISON. And you are also an officer and director of the corporation established to receive the profits on this book?

Ms. HALL. I am not a shareholder, and I don't receive any profits, and I don't receive any royalties. When you are in the private practice of law, you are often asked to set up corporations. Most States require three persons on a corporate board. Again, it is a ministerial position. I served as secretary because I had the legal expertise to know how to do the kinds of filings that are necessary.

The corporation is dissolved. I have served on corporate boards of several small corporations which I have formed, including a minority corporation which I had formed. The position of a lawyer in a small practice is often to name themselves as a director of a corporation.

Mr. MORRISON. So, this board, this corporation is dissolved?

Ms. HALL. Yes, sir.

Mr. MORRISON. Let me ask you about one other area. With respect to the general counsel, what was your role in the hiring of the general counsel? Your general counsel who is with you?

Ms. HALL. The hiring of the general counsel was done with the majority consent of the Commissioners, as is everything at the Commission presently.

Mr. MORRISON. What role did you play in the advertising, the search, in finding this person? How did he get hired? What role did you play?

Ms. HALL. We put an ad in several publications, and we interviewed quite a number of people, and then the Commissioners, as a body, sat down and chose between the people that we had interviewed.

Mr. MORRISON. Were you in charge of that process? Did you oversee that process?

Ms. HALL. The Chairman at the Copyright Royalty Tribunal is not in charge of anything. The Tribunal works as a majority commission.

Mr. MORRISON. But I assume there is a day-to-day process that was involved in this hiring. You didn't have three people without——

Ms. HALL. As a matter of fact, Commissioner Aguero was primarily in charge of the hiring.

Mr. MORRISON. Were there any minority candidates for the position?

Ms. HALL. Absolutely.

Mr. MORRISON. Do you have a record of the affirmative action processes that were employed in this hiring?

Ms. HALL. We have extensive records. I would be glad to provide them.

Mr. MORRISON. Would you please summarize where this was advertised, how it was advertised, what kind of applications you had, and what the sex and race of those who——

Ms. HALL. OK. Having been the EEO specialist at Riggs National Bank and having worked in EEO for several years, I can assure you we complied 100 percent.

We put two ads in the newspaper. The Washington Post, because it is the biggest and we felt it had good general appeal. We put an ad in the Washington Times because it is the other local newspaper.

We received about 50 applications. We answered no telephone calls, we took no applicant flow data because we did not entertain any preselection. We simply responded to the résumés received by our general publication advertisement.

We three Commissioners sat down and we determined by résumés, by experience and by salary qualifications which persons we would interview.

I can give you the breakdown of their races and sex. I could give it to you readily from the office or I could give it to you off the top of my head right now.

Mr. MORRISON. Well, don't give it to me off the top of your head. Just, if you would—with the chairman's permission, if you would submit in writing what I have asked for; that is, you have described the process, if you would describe it again and the data on—obviously, I don't want to know by individual what the race and sex is—that is summary data on race and sex at each stage of the process, who was interviewed and who were your applicant pool.

Ms. HALL. Um hum. Um hum.

Mr. MORRISON. And et cetera. If you could provide that, I would appreciate it.

Ms. HALL. That is standard applicant flow data.

[The information submitted by the Copyright Royalty Tribunal follows:]

Hiring of General Counsel

On November 29, 1984 the Tribunal placed ads in the Washington Post (appeared December 2, 1984) and the Washington Times (appeared December 3-9, 1984) for the position of General Counsel and received over 50 resumes. These resumes are on file in the Tribunal office. After reviewing all the resumes, the Tribunal selected 10 applicants from those submitted and began interviewing on January 3, 1985 and subsequently narrowed the list to 5 applicants. By majority vote of the commissioners on February 5, 1985, the Tribunal selected Mr. Robert Cassler as its General Counsel. Mr. Cassler's technical legal adice has already improved the quality of the Tribunal's responsibilitiess under the Copyright Act. Attached, for the record, are the newspaper ads placed for the position.

Sunday Dec 2, 1984



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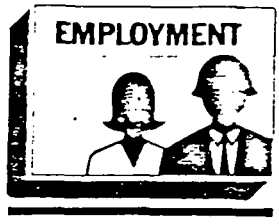
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Mr. MORRISON. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Georgia.

Mr. SWINDALL. Yes. I just have one question, Ms. Hall. On page 14 of your testimony there appears a fiscal year 1986 budget request. I would just like an itemization of the individual components comprising the "Personnel Benefits" section.

Ms. HALL. There is the breakdown of the budget on appendix B of the appendices. Is that adequate, Mr. Swindall, or do you need more?

Mr. SWINDALL. I don't have that.

Ms. HALL. I believe I see it, sir. Appendix B is page 14. Is that to what you are referring to?

Mr. SWINDALL. No, that is not adequate. That is specifically what I am asking you about.

Ms. HALL. OK. Could you tell me again exactly what you need?

Mr. SWINDALL. All right. On line item "Personnel Benefits," $71,500 for the fiscal year 1986 request.

Ms. HALL. Yes.

Mr. SWINDALL. My question is, What are the individual components comprising those personnel benefits?

Ms. HALL. May I respond to you in writing on that, sir?

Mr. SWINDALL. Sure.

Ms. HALL. It represents the Social Security contributions, and FICA, and the like, but I don't have it readily in my head.

Mr. SWINDALL. What in addition to Federal retirement and FICA would there be there?

Ms. HALL. That I will have to check for you, sir. I will be glad to provide that for you. I have to verify it.

[The information submitted by the Copyright Royalty Tribunal follows:]

PERSONNEL BENEFITS RATES

After consultation with the Library of Congress Budget Office, the Personnel Benefit FY 86 request amount ($71,500) was calculated for each employee as follows:

1. Current employees:

a. 11.45% of salaries up to $40,500. This rate applies to one Commissioner (Ray), the General Counsel, and two staff assistants.

b. 10.00% of salaries over $40,500. This rate applies to one Commissioner and the General Counsel.

2. New employees to the Federal Government (as defined by P.L. 98-21):

a. 17.15% of salaries up to $40,500. This rate applies to two sitting commissioners (Aguero & Hall), the two commissioner vacancies, one staff assistant, and two staff assistant vacancies.

b. 10.00% of salaries over $40,500. This rate applies to four commissioner positions.

Personnel Benefits include only the employer costs for Civil Service Retirement, FICA, life insurance, and health insurance.

Mr. SWINDALL. I yield.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Boucher, is recognized.

Mr. BOUCHER. Thank you, Mr. Chairman.

Ms. Hall, I think the appropriateness of this subcommittee inquiring into your views, or what may not be your views, but the views as expressed in Foundations of Sand has already been established. And I was very pleased to hear you say that those, in fact, were not your views. But I really wonder just how you feel about

the views that were expressed. They are very inappropriate from my point of view. And are they repugnant to you, or do you strongly disassociate yourself from these expressions?

Ms. HALL. I understand your concern, and I agree with you they are expressions which are very repugnant. They are not my views and, as a layperson, they are repugnant to me as well. However, Dr. Hafstad had indicated that he wished to express them. I had indicated at the time that I felt it would probably be ill-advised to publish them. However, in my limited capacity, that was all I could do.

I was into the project; I completed the job. I believe in finishing what you start. I expressed my opinions, and he proceeded to publish, as is his right as a citizen of America to publish his views.

Mr. BOUCHER. So you are saying that you told him prior to publication and prior to your participation with him in the project——

Ms. HALL. No, not prior to my participation in the project, as we were into the project. I was well into the project before many of these ideas surfaced.

Mr. BOUCHER. Well, at what point did you express to him your difference with the views that he was expressing?

Ms. HALL. At the point where we were trying—he was trying to decide whether or not to publish it.

Mr. BOUCHER. And you did tell him that you disagreed with his opinions?

Ms. HALL. Yes; I told him I thought it would be ill-advised to publish it.

Mr. BOUCHER. And if I understand you correctly, you are saying that these views to you are repugnant. Is that the term you used?

Ms. HALL. It is—yes.

Mr. BOUCHER. Quite a bit of furor has been raised with regard to your participation in the effort to publish Foundations of Sand, and some of that furor quite well might continue. That being the case, do you feel that you are in a position to effectively administer the Copyright Royalty Tribunal, and can you implement the reforms that you have said are so badly needed?

Ms. HALL. I have been working very hard toward that end. That is why it is clearly my feeling that, that the sentiments over Foundations of Sand should be directed toward Dr. Hafstad. He has indicated very strongly that, in his letter which he has sent to Mr. West, if I might take a minute to read it.

Mr. BOUCHER. Well, let me defer you from that. My primary concern is whether or not, given the furor that has been expressed over your participation in the project, you have the confidence of your Commissioners and the confidence of your staff, and the ability to effectively lead the agency. What is your response to that?

Ms. HALL. I wish I had the responsibility to lead the agency. The way the agency is presently structured I am not leading it, because the chairman does not lead. The chairman is just another Commissioner. I feel very confident that I can carry out the reforms that are necessary for this agency. I am studying very hard to that end, and I will continue to do so.

I don't think that this situation should be distracting me from my job. I have made my statements very clear to the public that my position was an editor, that my job was ministerial, that Dr.

Hafstad is the author and he will bear all the responsibility for the fallout from this work. Hopefully having made that clear here today, and with the fairness that I hope you people will treat me in having heard my feelings on that, which are very strong, I hope that we can properly direct any further fallout towards Dr. Hafstad, who has said he will gladly bear that responsibility for his work.

Mr. BOUCHER. Well, I appreciate your——

Ms. HALL. And therefore, I would like to go back to work and finish the job that I started, which is to reform the CRT.

Mr. BOUCHER. Well, I appreciate your statement very much, but in all due respect, I am not sure it answers the question. The question is do you feel that you have the confidence of the other Commissioners and of the staff at the Copyright Royalty Tribunal, and do you think you can continue effectively in the role to which you are assigned?

Ms. HALL. I hope I do. I haven't asked them pointblank. I know I have the confidence in myself. I know that I have the confidence of a good part of the staff and the confidence of the Commissioners. I will proceed to do my job. I am working very hard at it. I have put in 10 to 12 hours a day for the last 10 months. There is a great deal of work that needs to be done, and the sooner we lay this issue where it properly belongs, on the shoulders of Dr. Hafstad, the sooner we can get back to the very important work that is necessary at the Copyright Royalty Tribunal now. I am anxious to go back to that work. It is the job that I truly enjoy and want to pursue to a very successful point.

Mr. BOUCHER. All right. Thank you very much, Ms. Hall.

Mr. KASTENMEIER. Are there other questions by members of the committee?

Mrs. SCHROEDER. Mr. Chairman.

Mr. KASTENMEIER. The gentlewoman from Colorado.

Mrs. SCHROEDER. I heard that. It almost sounds to me like that is a tad sexist. I mean, you weren't a secretary, and you wrote down that you were a coauthor, and it wasn't ancient history. The book was published in 1983.

Ms. HALL. 1982.

Mrs. SCHROEDER. In 1982. And you put it down for your Senate confirmation, so you must have been proud of it. You say in the paper that you are proud of it. So, I don't know that you can——

Ms. HALL. No, I didn't totally.

Mrs. SCHROEDER [continuing]. Say that the man must answer and I was just ministerial. I mean, you are a lawyer, you are not a secretary.

But what I really wanted to ask, Mr. Chairman, was how did you find out about the job that you now hold?

Ms. HALL. I, I was called in for an interview and, and hired.

Mrs. SCHROEDER. Well.

Ms. HALL. Evidently, my name was in the White House computer having applied in 1980 when President Reagan was first elected. However, I had not worked any campaigns and I did not have any political connections, and therefore was not brought onboard in the 1980 setup of the administration.

In 1983—I can't remember—1983, evidently, my name came up on a computer roster, and my copyright credentials were noticed, and I was called in for an interview—it was totally unexpected. My credentials appeared satisfactory, and they began the investigation and subsequent hiring of me for this position.

I firmly believe that I was hired because of my copyright credentials, because of my legal credentials, because of my teaching of copyright. I clearly was not hired for any political connections. I don't have any. I just entered my résumé in 1980 along with the other hundreds of thousands that were submitted to the White House.

I haven't worked a campaign in 10 years.

Mrs. SCHROEDER. You don't think, though, that maybe the editing of some of this stuff maybe made you look philosophically OK? I mean I know lots of people who are very competent attorneys and who know about all these issues, and somehow their name never got into the computer and no one just called them and said, "Hey, have we got a job for you? Come over and apply."

Ms. HALL. I think probably my teaching credentials and my copyright credentials were more important, clearly. Because the résumé that I was called in on was still in my other married name, so it was clearly my 1980 résumé. And the press release that was issued when I was first nominated was from the 1980 résumé. So, clearly the White House was not privy to any of this work because they were still working on a 1980 résumé.

Mrs. SCHROEDER. Except that I do think that they know a lot of the people that you have worked with, especially in the High Frontiers thing. I think that at least part of that has become very, very political, as the chairman pointed out. And so you may have had some people there helping.

But, anyway, your testimony is in 1980 your résumé went into the file?

Ms. HALL. Um hum.

Mrs. SCHROEDER. And in 19——

Ms. HALL. 1983.

Mrs. SCHROEDER [continuing]. 1983 they found you?

Ms. HALL. They said that—yes. They said that they were going through the computer file and they noticed the credentials, and they called me in for an interview. I do not have the kind of political connections that most people have had heretofore on this Commission. They are clearly not there.

Mrs. SCHROEDER. OK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Are there other questions?

Let me just follow-up on Mrs. Schroeder's question because it has been raised a number of times here. Although this may have been more properly a matter for the Senate at an earlier point in time. Precisely, what copyright credentials do you have?

Ms. HALL. I have taught the subject, and I worked as——

Mr. KASTENMEIER. Taught the subject where?

Ms. HALL. I taught copyright at Northern Virginia Law School, which is a small school, an independent school, in Alexandria, Virginia, which operates a part-time program. It is just a night school.

Mr. KASTENMEIER. A night school?

Ms. HALL. Um hum.

Mr. KASTENMEIER. You taught there how many semesters?

Ms. HALL. I have taught there since 1979, I believe.

Mr. KASTENMEIER. 1979. Is this an accredited law school?

Ms. HALL. No, it is not yet accredited. It does have Virginia licensing authority to grant degrees.

Mr. KASTENMEIER. You taught there since 1979?

Ms. HALL. Um hum.

Mr. KASTENMEIER. For how many years?

Ms. HALL. We are on a trimester system, and I usually teach one, or two, or possibly three trimesters. I can't recall which years I have taught more or less. But I do teach there every year.

Mr. KASTENMEIER. Have you held yourself out in the practice of law as a copyright expert?

Ms. HALL. No; unfortunately, if you want to practice copyright law, you are pretty much limited to New York and Los Angeles for any kind of a real booming practice. I was more of a corporate consulting type. And my law practice was a very short period of time and, in fact, a very limited practice.

Mr. KASTENMEIER. So, your claims to copyright expertise, at least in terms of practice, are pretty tenuous; would that be fair to say?

Ms. HALL. I have studied it a great, great deal. I have done some copyright work, but no litigation in copyright.

Mr. KASTENMEIER. Well, I would like to put into the record the comments, the opening statement of the gentleman from California and, since the matter has been raised, Mr. Hafstad's letter in your behalf to Mr. West——

Ms. HALL. Thank you, sir.

Mr. KASTENMEIER [continuing]. Should be made part of the record together with certain other materials relating to this matter.

[The information follows:]

May 1, 1985

STATEMENT OF THE HONORABLE CARLOS J. MOORHEAD

MR. CHAIRMAN:

THIS AFTERNOON WE ARE GOING TO HEAR TESTIMONY FROM THE ACTING REGISTER OF THE COPYRIGHT OFFICE AND THE CHAIRMAN OF THE COPYRIGHT ROYALTY TRIBUNAL. BOTH REPRESENT SMALL AGENCIES, BUT BOTH ARE VERY SIGNIFICANT TO THE PROTECTION AND DISSEMINATION OF INTELLECTUAL PROPERTY.

THE COPYRIGHT ROYALTY TRIBUNAL IS AN AGENCY THAT HAS ENDURED MUCH CRITICISM SINCE ITS INCEPTION IN THE 1976 COPYRIGHT REVISION ACT. IT SERVES AN IMPORTANT FUNCTION AND I BELIEVE THIS SUBCOMMITTEE HAS AN OBLIGATION TO TRY AND PROVIDE ANY HELP IT CAN TO IMPROVE ITS EFFICIENCY AND EFFECTIVENESS. THIS SUBCOMMITTEE COULD MAKE WHAT WOULD AMOUNT TO MINOR CHANGES IN ITS STATUTORY STRUCTURE WHICH ARE NOT IN OF THEMSELVES CONTROVERSIAL, BUT SIGNIFICANT TO THE OPERATION OF THE TRIBUNAL. FOR EXAMPLE, REDUCING THE SIZE OF THE COMMISSION FROM FIVE MEMBERS TO THREE; POSSIBLY SETTING SOME QUALIFICATION STANDARDS FOR FUTURE COMMISSIONERS; PROVIDE THAT THE PRESIDENT APPOINT THE CHAIRMAN RATHER THAN HAVING IT ROTATE YEARLY; AND PROVIDE IT WITH THE NECESSARY SUPPORT PERSONNEL TO GET THE JOB DONE. I DON'T BELIEVE ANY OF THOSE ITEMS ARE CONTROVERSIAL.

HOWEVER, IF WE START PROVIDING GUIDELINES FOR THE TRIBUNAL TO FOLLOW IN MAKING ITS DECISION WHICH MAY BE IMPORTANT OR IF WE TRY AND REDUCE THE 3.75 RATE RECENTLY SET BY THE TRIBUNAL, WHICH ALSO IS IMPORTANT TO SOME MEMBERS, BUT REGARDLESS OF THE JUSTIFICATION OF EITHER OF THOSE ITEMS, THESE ISSUES WILL BE BOGGED DOWN IN DEBATE AND CONTROVERSY FOR SOME TIME. I HOPE WE TAKE THIS OPPORTUNITY TO TRY AND COME UP WITH A MECHANISM TO ASSIST THE TRIBUNAL IN ITS OPERATION AS SOON AS POSSIBLE.

THANK YOU, MR. CHAIRMAN. I AM LOOKING FORWARD TO THE TESTIMONY THIS AFTERNOON.

Dr. L. Hafstad
Rt. 1, Box 319
Chester, MD 21619
April 29, 1985

Mr. West, Editor
Broadcasting
1735 De Sales Street
Washington, DC 20036

Dear Mr. West:

Not being a professional writer myself, Marianne Mele was employed by me to edit my material for the book Foundations of Sand. In addition to correcting my spelling and rearranging the material, she made many helpful contributions. In no sense, however, should she be held responsible for any assertions of opinion, fact or logic in the content of the book. As author that responsibility rests squarely on me.

Yours truly,

L.R. Hafstad

Mr. KASTENMEIER. If there are no other questions, we thank you for your appearance. I know it has been rather difficult. I don't know whether it is the end of it. I share the gentleman from Virginia's concern about credibility here because there are a number of important duties you will have. I can only wonder whether you can discharge them as you think you may be able to. But in any event, this committee is concerned about the future of the Tribunal, and if this matter is reconciled we will, I presume, be working with you, Ms. Hall.

Ms. HALL. Thank you.

Mr. KASTENMEIER. Thank you for your appearance here today.

Next, the Chair would like to call, representing the Copyright Office as Acting Register, Mr. Donald Curran. Mr. Curran joined the staff of the Library of Congress in 1961, has worked in a variety of positions, including Associate Librarian of Congress, a title he presently holds concurrently with that of Acting Register.

So, Mr. Curran, we are very pleased to have you here this afternoon. Your 36-page statement will, without objection, be made part of the record, and you may proceed as you wish. But prior to doing so, as I indicated at the outset, I would like to be able to swear you in as a witness.

[Witnesses sworn.]

[Subcommittee and GPO staff have made necessary grammatical and technical changes to the text of the following testimony. A copy of the original testimony is on file with the subcommittee.]

Mr. KASTENMEIER. You may wish to identify your colleagues for us as well.

TESTIMONY OF DONALD C. CURRAN, ACTING REGISTER, COPYRIGHT OFFICE, LIBRARY OF CONGRESS, ACCOMPANIED BY DOROTHY SCHRADER, ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS, AND GRACE REED, EXECUTIVE OFFICER

Mr. CURRAN. Thank you, Mr. Chairman. And thank you for having us here today. On my right is Dorothy Schrader, the Associate Register for Legal Affairs, who has been a frequent witness, of course, before this subcommittee; and on my left is Grace Reed, the executive officer in the Copyright Office.

We do have a lengthy statement, and I have a much briefer one which I would like to read. It will take, perhaps, 5 or 6 minutes, if I may do so.

Mr. KASTENMEIER. We have been interrupted at this very moment by a vote on the floor. So we will have another 10-minute recess, after which time we will return to hear you.

[Recess.]

Mr. KASTENMEIER. The committee will resume its sitting. And the Chair would, again, like to yield to Mr. Curran for his statement.

Mr. CURRAN. Thank you, Mr. Chairman.

I will review briefly the administrative developments and general conditions in the Copyright Office, as well as other major legislative and international copyright issues that may have been brought to your attention earlier.

First of all, the Copyright Office is one of seven departments in the Library with a staff of 500 employees and a current-year budget of $17 million. We annually examine more than 500,000 claims to copyright for books, music, motion pictures, sound recordings, dramatic works, and works of art, and make determinations regarding the legal sufficiency of the claims presented.

A significant aspect of our role is contributing to the collections of the Library of Congress. Under the Copyright Act of 1976, copies of all works published in the United States with a notice of copyright are required to be deposited with the Copyright Office. These deposits are the primary acquisition sources upon which the Library and the Congress builds its collections.

In 1984, for the first time in its history, the Copyright Office registered over one-half million claims during the fiscal year; 502,628 claims were registered. That represented 14,372 claims higher than the previous year. Throughout the year we issued certificates of registration for routine claims; that is, those that did not require any correspondence, within the Office's goal of 3 to 4 weeks without an increase in staff. During the first half of the current year we have experienced a surge in receipts, and during the October–March period we registered 20,000 more claims than in the previous year. This represents an increase of 7 percent in the workload. In previous years during the first 6 months, the workload increase was in the order of 3 percent.

I should add that since then we have noticed that receipts are continuing to come in at a higher rate, and this, although our productivity from 1984 has been maintained, the increased receipts at this time has caused our normal processing time to increase from 4 weeks to approximately 7 weeks to issue a certificate. We are looking for ways and means of handling the backlog that is building up. This includes streamlined procedures, use of temporary students, summer employees, and judicious application of overtime and compensatory time. However, I would note that it is a matter of some concern to us if this trend continues.

I would also like to make a few comments about the mask works bill, which, of course, became effective here in January of this year and legislation which concerned this committee last year. The mask work unit, which is located in the examining division, has received 71 claims for protection of mask works embodied in a semiconduct chip as of April 15, 1985. All those claims have been examined and 17 have been registered; 14 were refused registration because they were first commercially exploited prior to July 1, 1983; the other 40 are in correspondence, including 15 that contest the validity of that portion of the interim regulations governing mask works fixed in an intermediate form of a chip. We expect some substantial increase in our receipts as the deadline for registration of mask works first commercially exploited between July 1, 1983, and November 7, 1984, approaches.

I would like to say a few words about automation. The second stage of COINS III, the on-line tracking of deposit account registration system, went into effect last year on February 23, 1984. Thus, about 55 percent of the registration workload is now being tracked online in the computer system. As early as May 1983, it was recognized that the Data General minicomputers being used in the

COINS production would not be able to handle the 63 work stations which were being planned for the full system's operation.

The automated systems office completed a study to determine replacement for the aging Data General mini-computers and decided on the new Data General 10000. This machine can support 192 work stations and has the added benefit of being able to run COIN's III software with minimal conversion. It was delivered to the Library in February 1985 and is now undergoing acceptance testing, and we estimate that the process will be completed in approximately 4 months. And we are therefore looking forward to implementation of COINS later in this summer.

There are a number of legislative issues which we have developed and presented in our full statement, and for the sake of brevity, I would like to bring two to your attention which are of concern, or which are maybe of special concern. I would like to then close with some remarks about the role of the Library and the Copyright Office, and the relationships, some of those relationships.

As far as legislative issues go, the first I would like to talk about is the status of low-power television signals under the cable compulsory license. For larger cable systems, the classification of a retransmitted broadcast station signal as local or distant markedly affects the calculation of copyright royalties. Larger cable systems pay royalties under a formula of which one factor is the number of distant signals retransmittedy.

Although the Federal Communications Commission does not regard low-power television stations as must carries for purpose of the communications law, the Copyright Office decided, after public hearings last October, that the Copyright Act is ambiguous concerning the status of low-power stations. The Office recommends amendment of the definition of local service area of a primary transmitter to make clear whether Congress intends low-power signals to be classified as local or distant for the purposes of computing royalties under the compulsory license.

Finally, for consideration of the U.S. adherence to the Berne Convention. Mr. Chairman, as you know, there are two worldwide multilateral treaties regulating copyright relationships among nations. The Universal Copyright Convention, of which the United States has been a member since 1955, and the Berne Convention for the Protection of Literary and Artistic Works. The United States is not a member. The Berne Convention has existed since 1886.

Simply stated, we have not joined the Berne Convention in the past largely because our domestic copyright law has never satisfied the minimum obligations of the convention at its various stages of development. It is not my purpose at this hearing to comment on the pros and cons of the U.S. adherence to Berne.

We at the Copyright Office are in the process of developing a position which we will recommend to the Librarian of Congress. I do want to call your attention to the revival of interest in the Berne Convention issue, to the study efforts now underway in the private sector and in Government circles, and to the likelihood that the Senate may hold public hearings on this question. The Copyright Office urges the subcommittee to engage itself fully in the issues surrounding adherence to Berne, and, as the chairman and mem-

bers deem appropriate, to coordinate with your counterparts in the Senate on a program for thorough analysis of the benefits and the disadvantages of adherence and the nature and scope of possible implementing legislation.

At various times in the recent past, questions have arisen concerning the place of the Copyright Office in the Library of Congress and, of course, most recently here today, as to the proper role of the register in carrying out the law. I would like to make a few brief remarks concerning our position in these matters. And I would add that the remarks I have here are shared by the Librarian of Congress, Dan Boorstin.

The Library of Congress, through law and historical development, has become in its 185-year history a custodian of the largest collection of intellectual property gathered in any one place. It is no accident that the Congress in 1870 gave the Library of Congress responsibility for administering the U.S. Copyright Law. It is the one place in the U.S. Government where the creator of intellectual property and the user of that property come together promoting the progress of science and the useful arts.

We have a somewhat biased view, but we believe that the Nation has been well served by the Library and its Copyright Office, and will continue to be so in the future. The benefits that are flowing to the national library and to the world of learning as a result of the deposit system are both tangible and intangible. It brings to the Nation in one place a vast body of intellectual property, published and unpublished, created by our citizens in all formats, shapes, and sizes. Much of what is obtained through deposit is not readily available or, indeed, available at all through conventional purchases or through other order arrangements.

Of course the Library obtains many thousands of items worldwide through purchase, through gift, through exchange, but copyright deposit continues to be a key element of our total acquisitions effort. Our collections are replete with unique materials acquired through the deposit process.

Substantial benefits also flow to the copyright system in the relationship of a major U.S. cultural institution with the copyright process. We believe that the Library has an intellectually stimulating working environment which is both attractive and supportive of the Copyright Office. We are able to attract and keep people who understand the importance of protecting intellectual property.

In a like manner, Library management is sensitive to the significance and importance of an activity whose function is to examine, catalog, record, process intellectual property pursuant to the copyright laws of the United States. These are not qualities always found in a large Government bureaucracy. The Library of Congress and its Copyright Office are compatible and mutually supportive.

The responsibilities of the Copyright Office are plainly set forth in title XVII. The Register directs all administrative functions and duties under title XVII not otherwise specified. Section 702 authorizes the Register to establish regulations for the administration of copyright law with the approval of the Librarian of Congress. The Register is appointed by the Librarian and carries out the duties of office made under his general direction and supervision.

The copyright law is sometimes characterized as arcane or even metaphysical. Perhaps so. However, the functions of the Office and the Register need not be so. Our purpose is to administer the law as it exists in a fair and equitable manner, and to assist the Congress and the Nation in development of copyright policy responsive to the public interest. We serve the Congress and the Nation, and it is our intention to do so in as evenhanded a fashion as possible. The duties of the Register are succinctly stated in the position description certified by the Librarian, which, very briefly, states:

> The Register of Copyrights is responsible for administering the copyright law and to the public interest accepting or rejecting claims to copyright, operating the Copyright Office in such a manner as to give maximum service to the creators and users of literary and artistic property and their attorneys and representatives. The Register of Copyright has the responsibility of serving as a principal technical adviser to the United States Government on national and international matters, advising the Congress concerning the provisions of the Constitution vesting the power in Congress to "promote the progress of science and the useful arts."

My colleagues and I are, of course, here to answer all your questions, sir.

[The statement of Mr. Curran follows:]

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

Before the Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
House Committee on the Judiciary
99th Congress, First Session
April 23, 1985

Mr. Chairman and members of the Subcommittee, I am Donald C. Curran, The Associate Librarian of Congress and Acting Register of Copyrights in the Copyright Office of the Library of Congress. I thank you and the Subcommittee staff for giving me the opportunity to appear at this oversight hearing. The Copyright Office welcomes your counsel and guidance with respect to administrative, legislative, and international copyright policy issues, and we are prepared to assist the Subcommittee by providing technical information, background studies, and draft legislative proposals, at your direction.

At this hearing, I will review briefly administrative developments and the general condition of the Copyright Office, as well as major legislative and international copyright issues that may be, or have already been, brought to your attention. I will begin with administrative developments and the functions of the Copyright Office under the Copyright Act of 1976 and the Semiconductor Chip Protection Act of 1984.

I. ADMINISTRATION OF THE COPYRIGHT OFFICE

A. Functions of the Copyright Office

The Copyright Office is one of seven departments in the Library of Congress, which itself, of course, lies within the Legislative Branch. The Office is responsible for the administration of the Copyright Act (since 1897), and of the Semiconductor Chip Protection Act of 1984 (since January of this year). A central function of the Office is the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners. The Examining Division of the Office annually examines more than 500,000 claims to copyright in an enormous variety of books, music, motion pictures, sound recordings, dramatic works, and works of art, and makes determinations regarding the legal sufficiency of the claims presented. The Division corresponds with applicants to clarify the scope of the claim and to develop an accurate public record.

The Copyright Office performs several other functions related to registration and recordation: our Cataloging Division prepares and distributes bibliographic descriptions of all registered works; the Division records documents pertaining to copyight and mask works, and provides basic cataloging for many of the Library's special collections.

Our Information and Reference Division searches and reports, upon request, the copyright facts contained in our records, provides certified copies of certificates of registration, and assists the public in using our files. It also maintains a public information office to answer mail, telephone, and personal-visit inquiries about the copyright law and

registration procedures. Unlike some other federal agencies, we often deal directly with individual authors and users who are not generally sophisticated in copyright and the legal aspects of registration. Finally, the Division has an active publication program for the distribution, free-of-charge, of circulars and similar materials on copyright.

A significant aspect of the Copyright Office operations is its role in contributing to the collections of the Library of Congress. Under the Copyright Act of 1976 (as well as under the predecessor statute), copies of all works published in the United States with a notice of copyright are required to be deposited with the Copyright Office. Those copies are made available, also by law, to the Library of Congress for its collections. Copyright deposits are thus a principal base upon which the Library of Congress builds its collections of books, periodicals, music, maps, prints, photographs, and motion pictures. Last year, the value of those Copyright Office-derived acquisitions, was about $7 million -- an interesting figure when compared to our annual budget of about $17 million with some $6 million further offset by collected fees. In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions described above, the Copyright Act of 1976 gave additional responsibilities to the Copyright Office with respect to administration of the four compulsory licenses provided for in the Act. Our Licensing Division now licenses jukeboxes to perform copyrighted music and collects the statutory royalties under these licenses. The Licensing Division also collects the royalties paid under the statutory compulsory license for secondary transmissions by cable television systems. These royalties, after deduction of reasonable administrative expenses, are deposited with the Treasury Department for investment in interest-bearing U.S. securities and are

later disbursed to copyright owners in accordance with distribution determinations by the Copyright Royalty Tribunal, which is not a part of the Copyright Office. We record notices pertaining to the recording of musical works, and to voluntary agreements regarding public broadcasting's use of copyrighted works.

The Copyright Office regularly assists both houses of Congress and their staffs in preparing and commenting on legislative proposals, responding to constituent inquiries, and assisting in the further implementation of the copyright law. As required by the Copyright Act and at the request of members of Congress, the Office conducts studies and submits reports to Congress on specific subjects. For example, within the past year, the Office has submitted studies on the size of copyright industries and the adequacy of protection abroad for United States copyrighted works.

B. Administrative Developments

1. Copyright registration process

In 1984, for the first time in its history, the Copyright Office registered over one-half million claims during a fiscal year. The 502,628 claims registered represented an increase of 14,372 claims over the 488,256 registered in fiscal 1983. Workload figures, detailed in the chart of Copyright Office Key Indicators appended to this statement, show a steady decrease in staffing amounting to 19% from fiscal year 1979 to 1984 (or, 121 fewer staff). During the same period, the annual rate of receipts has steadily increased, up 24% from FY 1979 to FY 1984; during the same period the amount of work completed has increased 16% and the physical inventory of work on hand has decreased by 3%. In fiscal 1984 the Office continued to issue certificates of registration for routine claims (those requiring no correspondence) within the Office goal of three to four weeks.

The registration workload was handled with no increase in staff. A number of work improvements made the increased output possible. Among these were: cross training and redistribution of staff resources to heavy workload areas; a 3 percent reduction in the correspondence rate from 20 percent to 17 percent (two sections achieved an all time low of 10 percent); office-wide streamlining of procedures, including examining practices and cataloging rules, and installation of new and more efficient cataloging terminals.

During the first half of FY 1985, the Office experienced a surge in receipts; during October-March 1985, 20,000 more claims were received for processing than in the same time period in FY 1984; this represents a 7% increase in workload. The normal rate of increase for this time period over the last 5 years has been 3%. The timing of this increase was most unfortunate, since it is during these months that a number of holidays and holiday-related leave occur, which each year causes the Office to develop backlogs of work to be processed. In addition, during October-March '85, the divisions most involved in the registration process, experienced a 14% vacancy rate. These vacancies are currently posted; we hope to fill them within the next 2-4 months. Even with the increase in receipts, the 1984 productivity rate was maintained (work completed during October-March FY '84: 261,000; completed October-March FY '85: 262,000). However, because of the increase in receipts, the holiday season and the unusually high vacancy rate, the time period for issuance of a certificate without correspondence has slipped from the normal 4 weeks to a present 7 week timeframe.

We are looking at means, other than massive use of overtime, for handling the backlogs to be processed. These include streamlined procedures, use of temporary/student summer employees, and judicious application of overtime and compensatory time. In addition, we are now in an advanced stage of application form redesign. We hope that clearer more simplified forms will

have a positive effect on correspondence rates and public inquiries. If the present trend of increased receipts continues, we may have to develop more dramatic strategies for coping with our workload within reasonable timeframes. We will continue to monitor these trends to enable the Office to respond in a timely manner.

In addition to the accomplishments in the registration process, the Copyright Office's two other major mission areas continued to experience significant increases in work completed.

2. Licensing

In our 1986 budget request to the Congress we are seeking authority to use fees collected for licensing activities in lieu of direct appropriations. Under present law $6,000,000 collected for registration and search fees is used in lieu of direct appropriations; however the expenses of the office for licensing jukeboxes and cable television fees are returned to miscellaneous receipts of the Treasury. Under the proposal made to the House Appropriations Committee, the usable fee for fiscal year 1986 would be increased from $6,000,000 to $6,750,000.

The licensing function continued to maintain currency in the processing of cable Statements of Account despite increased workload. This area has shown a 57 percent increase in work completed over the past 4 years; from 8,000 Statements and 20 million dollars received in fiscal 1980 to 12,526 Statements and 84 million dollars received in fiscal 1984.

Cable Royalty Fees Received 1/

1978	$ 12,937,455.66
1979	15,912,441.36
1980	20,068,359.56
1981	30,811,276.40
1982	40,913,002.72
1983	70,831,146.07
1984	84,028,393.52 2/
Total as of 4-12/85	275,502,075.29

3. Public service

In the public service area, high levels of responsiveness were maintained and in some cases improved upon. In one area phone calls were made in lieu of correspondence, resulting in more timely and personal service to the public. Work continues on improving our capacity to answer inquiries from the public, and we have high hopes for the new automatic call distribution system that was installed in January of 1985. While it is still too early to measure the impact that the new system has had on our level of service, the public has commented favorably about the fact that their calls no longer result in a busy signal. The new system allows the callers to enter a queue, and while waiting, to receive taped information about hours of service, details about registration requirements, etc. Early indications are that the number of calls handled has increased sharply, while there has been a dramatic drop in the number of complaints.

1/ Interest earned and deductions for refunds, and operating costs not included.

2/ Nearly complete; additional fees will be received.

4. Mask works registrations

The Office has taken on an additional workload since January 7, 1985, as a result of new legislation to protect semiconductor chips (mask works). The Mask Work Unit, located administratively in the Examining Division, has received 71 claims for protection of mask works embodied in semiconductor chip products as of April 15, 1985. All of the claims have been examined, and 17 have been registered. Fourteen claims have been refused registration because they were first commercially exploited before the date of retroactive protection under the statute (July 1, 1983). The other 40 are in correspondence, including 15 that contest the validity of that portion of the interim regulations governing mask works fixed in intermediate forms of a chip product.

We are unable at this point to anticipate the volume of work this unit will receive. At present, though the registration system is a world-wide one, no other nations have become eligible under either Section 902(3) or Section 914 of the Act. We do expect a substantial increase in our receipts as the deadline for registration of mask works first commercially exploited between July 1, 1983 and November 7, 1984 approaches.

Our correspondence rate has been over 80%. As the semiconductor industry grows accustomed to using the form, and the Copyright Office develops standardized practices, we project that the rate should diminish to 50% or below.

Interim regulations to implement the mask work law were issued January 3, 1985, 50 Fed. Reg. 263. The Office is now evaluating and considering public comment before issuing final regulations.

5. Automation

The second stage of COINS III, the on-line tracking of deposit account registrations also known as DA-RIP, went into operation on February 23, 1984. Thus, about 55% of the registration workload is now being tracked on-line. As early as May, 1983, it was recognized that the Data General mini-computer being used for COINS production would not be able to handle the 63 workstations initially anticipated for the full COINS III system. Therefore, plans were made to divide COINS between the current production machine and a smaller machine now used for systems development; so that 39 workstations could access one machine and 24 workstations the other. This necessitated upgrading the communications and magnetic disk capacity of both machines, which in turn required upgrading the operating system software. Unforeseen problems arose with both the hardware upgrading and system software installations during the summer of 1984; and because the staff developing COINS III were needed to help resolve these problems, very little progress was made during that time toward completing COINS III. The implementation date was then re-estimated to be September 1984. However, as a result of these delays, the size of the data base was fast approaching the maximum machine capacity, and a data purge had to be undertaken. This took several months and the estimated completion date was revised once again to early 1985. The on-line software has now been completed and thoroughly tested.

In the meantime, the Automated Systems Office completed its study to determine a replacement for the aging Data General mini-computers, deciding on the new Data General MV 10000. This machine can support up to 192 workstations and has the added benefit of being able to run the COINS III software with minimal conversion. Accordingly, a joint decision of ASO and the Copyright Office was made that, rather than incur the operational problems of running COINS III on the two older, low-capacity machines, the full system

will be installed on the larger Data General MV 10000, which was delivered to the Library on February 13, 1985 and is now undergoing acceptance testing. The Copyright Office will be training the staff on the completed COINS III software using the development machine while the Data General MV 10000 is being installed and tested along with the re-compiled COINS III software. It is estimated that this process will be completed in the next four months.

Although implementation of the COINS III system in the summer of 1985 will undoubtedly benefit the Office, we expect to experience some productivity decline at the outset. Once the period of training and adjustment caused by conversion from manual to automated modes is overcome however, we expect to begin to see gains in both efficiency and effectiveness.

II. LEGISLATIVE ISSUES

In this section, the Copyright Office briefly reviews some of the major legislative issues in the field of copyright that are likely to be brought to the attention of this Congress. The question of United States adherence to the Berne Convention is mentioned in the next section, but we note here that adherence requires changes in our domestic copyright law.

A. Cable Television

1. Recent legislative proposals

On June 15, 1984, at the second session of the 98th Congress, Representative Kastenmeier introduced H.R. 5878, a bill to amend the Copyright Act of 1976 with respect to the structure and operation of the Copyright Royalty Tribunal (CRT) and the implementation of the cable compulsory license. The bill would have changed the Tribunal's membership from five to three commissioners, and would have authorized professional staff (one economist and one general counsel). It would have established additional criteria for the Tribunal to consider in determining the reasonableness of rates and rate adjustments pursuant to section 801(b)(2)(B) of the Copyright Act, including the impact of the rates on cable subscribers both as to the availability and cost of receiving copyrighted materials. It would have excluded from the 1982 royalty rate adjustment distant signal equivalents represented by three distant independent broadcast signals in the case of any cable system which does not carry any local independent television broadcast signals, or two distant independent broadcast signals in the case of any cable system which

carries any local independent television broadcast signal. It would have clarified the existing section relating to judicial review of final decisions of the Tribunal by providing that review shall be had on the same standards and bases as any executive branch or independent regulatory agency. Finally, it would have defined the concept of "gross receipts" under section 111(d)(2)(B) of the Copyright Act so as to allow cable systems to pay copyright royalties based upon the receipts of cable systems only from subscriber groups receiving particular "tiers" of service containing secondary transmissions. 3/ This bill was approved by this Subcommittee, but it was not reported by the full Judiciary Committee.

Some of the features of H.R. 5878 may be given further consideration in this Congress.

2. Low power television

On October 12, 1984, the Copyright Office held a public hearing concerning the status of low power television stations under the cable compulsory license. Having reviewed the statute and legislative history in connection with an examination of the divergent views presented at the hearing and during the comment period, the Copyright Office concluded that the Copyright Act is ambiguous on the issue of whether, when a cable system retransmits a low power

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3/ In Copyright Office Final Regulations issued at 49 Fed. Reg. 13029, 13035 (April 2, 1984), the Copyright Office determined that the Copyright Act does not presently permit any proration or other allocation of either distant signal equivalents or gross receipts by subscriber groups where any secondary transmission service is combined with nonbroadcast services in program tiers. The Office accordingly, clarified its definition of gross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters." 37 C.F.R. §201.17(b)(1) (1984). These regulations are under review in court in National Cable Television Assoc. v. Columbia Pictures Industries, Inc., et.al., Civil Action No. 83-2785 (D.D.C., filed September 21, 1983).

television signal, the signal should be characterized as "local" or "distant" for purposes of applying the DSE value formula. Consequently, in collecting cable copyrighted royalties, the Copyright Office will take a neutral position on this specific issue. The Office recommends legislative clarification of this issue

In the same proceeding, the Office concluded that if Copyright owners and cable systems uniformly agree that negotiated retransmission consents supercede the cable compulsory license requirements of section 111 cable systems, in paying royalties pursuant to that section, need not take account of the aignal of a low power television station for which voluntary licenses have been obtained. This is so provided that the negotiated license covers all cable-retransmitted works carried by a particular broadcasting station for the entire broadcast day for each day for the entire accounting period. This decision is published at 49 Fed. Reg. 39174-39175 (October 4, 1984).

3. Administration of the cable compulsory license

a. Nonproration of the distant signal equivalent value (DSE): The Copyright Office recently issued final regulations, published at 50 Fed. Reg. 9270-73 (March 7, 1985), affirming without modification the Office's interim regulations (published at 47 Fed. Reg. 21786 [May 20, 1982]) concerning the calculation of DSE's after the FCC's June 25, 1981 deregulation of cable television. The final regulations provide that proration of the DSE is possible only as specifically legislated by Congress in the DSE definition of section 111(f).

In summary: (1) The permissive substitution referred to in section 111(f) is governed by the FCC's former local content substitution rule, which remains effective for purposes of the Copyright Act, and proration is possible; (2) proration is also possible in the case of part time carriage

for lack of activated channel capacity since these FCC rules remain in effect; (3) substitution of distant signals newly authorized by the FCC deregulation must be calculated at the full DSE value of the signal carried because Congress did not establish an open-ended policy of permitting the reduction of DSE values to correspond to actual signal carriage; (4) after June 30, 1981, proration of DSE's based upon part-time carriage pursuant to the FCC's late-night and specialty programming rules is no longer possible since the FCC, by eliminating those rules, removed the justification for proration; and (5) cable systems can no longer avail themselves of the syndicated program exclusivity rules as a basis for substitution without calculation of a DSE for such carriage. They may, however, continue to substitute other programming in place of programming deleted pursuant to the FCC's sport exclusivity rule without calculation of a DSE since those rules remain in effect.

b. Notice of inquiry regarding FCC's amendment of the Major Television Markets List: The FCC recently published a final rule amending the list of major television markets in section 76.51 of its rules to include Melbourne and Cocoa, Florida within the Orlando-Daytona Beach hyphenated market. 50 Fed. Reg. 2565-70 (January 17, 1985). In response to a petition from cable system representatives, the Copyright Office published a Notice of Inquiry [at 50 Fed. Reg. 14725, (April 15, 1985)] inviting public comment, views and information on the impact on the copyright law of a change by the FCC in the major television market list, which has the effect for FCC purposes of making a formerly "distant" signal a "local" must-carry signal, and related issues.

c. The CRT's 1985 Cable Royalty Inflation Adjustment Proceeding: Pursuant to section 801(b)(2)(A) and (D) of the Copyright Act of 1976 the Copyright Royalty Tribunal (CRT) is authorized to adjust the cable television

royalty rates and gross receipts limitations for inflation, upon the petition of parties with a "significant interest" in the royalty rates. On March 8, 1985, the CRT received a joint submission from various parties representing interested copyright owners and cable television systems whereby the parties advised that they had entered into an "Agreement of Settlement Concerning 1985 Cable Royalty Inflation Adjustment." This Settlement Agreement would, if effectuated, resolve all issues that would be raised in the adjustment proceeding by these parties. Pursuant to the joint submission, the CRT commenced an informal 1985 cable inflation adjustment proceeding and proposed adopting the adjustment of royalty rates [4/] and gross receipts limitations [5/] suggested in the Settlement Agreement, to become effective with the first accounting period of 1985. The CRT also requested comments concerning its adoption of the Settlement Agreement in lieu of holding more formal, evidentiary hearings. See Notice Commencing 1985 Cable Royalty Inflation Adjustment Proceeding and Setting Procedural Dates, 50 Fed. Reg. 10989-91 (March 19, 1985).

d. Turner Broadcasting System Rate Adjustment Petition: On March 25, 1985, Turner Broadcasting System Inc. petitioned the CRT to consider its superstation WTBS a "national distant signal" and remove the 3.75 percent

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4/ .893 (instead of the current .799) of 1 per centum for the first DSE, .563 (instead of the current .503) of 1 per centum each for the second, third and fourth DSE's, and .265 (instead of the current .237) of 1 per centum for the fifth DSE and each additional DSE thereafter. See 17 U.S.C. §111(d)(2)(B)(1984); 37 C.F.R. §308.2(a)(1984).

5/ The current $107,000 limitation would be raised to $146,000 and the $214,000 limitation would be raised to $292,000. See 17 U.S.C. §111(d)(2)(C)-(D) (1984); 37 C.F.R. §308.2(b) (1984).

royalty rate 6/ applicable to many of the large cable systems that carry the satellite-delivered station. The Turner petition argues that since WTBS pays copyright owners licensing fees that reflect the expanded audience WTBS reaches nationally, WTBS creates, in effect, a superstation submarket of the current syndication market. The petition further argues that when copyright owners receive the 3.75 percent of gross revenues of cable systems which carry WTBS in addition to licensing fees from WTBS, they receive a windfall double payment. The petition requests that the CRT adjust the rate cable systems pay for carrying WTBS from the current 3.75 fee to statutory rates for carriage of other DSE's.

B. Works Made For Hire

In the 98th Congress Senator Cochran and Congressman Frank introduced identical bills (S. 2138 and H.R. 5911) which proposed significant changes in the work for hire provisions of the law. No action was taken on either bill, and the issues raised may again be presented to the 99th Congress.

6/ Pursuant to the final rule in CRT Docket No. 81-2, Cable Television Royalty Fee Adjustment Proceeding, published at 47 Fed. Reg. 52146-59 (November 19, 1982), cable systems must pay 3.75 percent of their gross receipts per additional distant signal equivalent resulting from carriage of distant signals not generally permitted to be carried under the FCC's distant signal rules prior to June 25, 1981. This rate adjustment was established, along with a surcharge on certain distant signals to compensate copyright owners for the carriage of syndicated programming, in reaction to the FCC's elimination of its distant signal rules and its syndicated exclusivity rules in Report and Order in Docket nos. 20988 and 21284, 79 F.C.C. 2d 663 (1980). [upheld in Malrite T.V. of New York v. FCC, 652 F. 2d 1140 (2d Cir. 1981), cert. denied 454 U.S. 1143 (1982)]. The CRT adjustment was upheld in NCTA v. Copyright Royalty Tribunal, 724 F. 2d 176 (D.C. Cir. 1983). The Copyright Office issued interim and later final regulations interpreting the Copyright Act in light of the rate adjustment at 49 Fed. Reg. 14944 (April 16, 1984) and 49 Fed. Reg. 26722 (June 29, 1984).

Under the present copyright law, works prepared by employees within the scope of their employment are works made for hire. With regard to commissioned works, i.e., those prepared by independent contractors, only certain categories of works may be considered works made for hire and then only if the parties so agree in a writing signed by them. Whether or not a work is made for hire can be important. The law provides that in the case of such a work, the employer or other person for whom the work was prepared is considered the author and will own all of the rights unless the parties expressly agree in writing that this is not to be the case. Section 201 (b).

The work made for hire provisions of the law were subject to much debate during the long revision effort; these provisions have been described in the 1965 Supplementary Report of the Register of Copyrights and in both the House and Senate Reports as "the result of a carefully balanced compromise" that met the objectives of the Copyright Act while recognizing the legitimate needs of all interests involved. Some have questioned whether this delicate compromise has been upset by the recent holding in Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984). In that case the court found that the active supervision and control of one of the principals of Aldon made the work a work made for hire; this was so even though the contractor was not a formal or regular employee of Aldon. The second circuit found that in enacting the present copyright law, Congress did not intend to substitute a more narrow definition of "employee."

Almost immediately following the effective date of the present law, groups representing graphic artists, photographers, and free lance writers expressed dissatisfaction with the way the work for hire provisions of the law were being applied. They complained that publishers were forcing artists and

authors to give up their rights at bargain prices through the work made for hire doctrine. They aver that the publisher gets the "best of both worlds" -- the work is considered a work made for hire for the purposes of vesting the copyright in the employer yet the creator gets no benefits typical of an employment relationship, e.g., vacation, unemployment insurance, medical coverage, etc.

Publishers, on the other hand, argue that there has not generally been an abuse of the work for hire doctrine, although some publishers admit that in individual instances there may have been some abuses. They believe that the present law has ample safeguards to protect creators from being dealt with unfairly. Additionally, they claim that many forms of essential publications would be impossible without work for hire agreements.

There are a number of issues that graphic artists, photographers, and free lance writers have raised. Four major issues are discussed here. First, in the case of a commissioned work, when should a work made for hire agreement be signed. The present law does not specify a precise time. Freelancers have stated that publishers often demand work for hire agreements after the work is completed or well under way. Some have complained that in certain instances the agreement takes the form of a restrictive endorsement on the back of a check sent in payment for the work. They would like the law amended to provide that a work for hire agreement must be signed before any work on the project is begun. Publishers, on the other hand, believe that this is impractical and in certain instances, e.g., where time is of the essence, impossible.

Another issue concerns which categories of works should qualify as works made for hire. Freelancers would like the doctrine narrowed by deleting a large number of categories from the second part of the work for hire definition; these types of works are used primarily by the print publishing

and graphic industries. Publishers point out that Congress carefully reviewed publisher's problems in creating these categories. They also state that with regard to some of the categories, such as encyclopedias and instructional texts, the right of authors to terminate previously granted rights would be unfair. Finally, they believe that any change in the categories would upset existing business practices and would complicate the administration of rights.

Freelancers also recognize that deleting categories may not be enough since they believe that publishers will then demand an assignment of all rights for the same price. Therefore, some freelancers may seek to have the law amended to provide that where there has been an assignment of exclusive rights, those rights must be exercised within two years. After that period the unexercised right would become nonexclusive. Also, they may want any contract to spell out the price paid for each right.

Third, some freelancers believe that a work should not be considered a work made for hire unless the actual creator gets certain employee benefits. Publishers state that determination of an employment relationship has never hinged on compensation or benefits; they point out that the issue is determined by whether or not the employer or commissioning party had the right to direct and supervise the manner in which the work was prepared.

The last issue concerns the unequal bargaining power between publishers and freelancers and what some freelancers characterize as "unconscionable transfers." They want the ability to have the contract reformed if the publisher is "unjustly enriched." Publishers argue that this proposal is almost identical to one considered in 1963; that proposal, they point out, was dismissed because of vague standards and a belief that it would lead to unnecessary litigation. Publishers state that work for hire agreements are not per se unfair; employees may bargain for and receive control of certain rights. Additionally, publishers believe there are adequate safeguards for any abuses.

C. Home Recording for Private or Educational Use

The Supreme Court's long-awaited Betamax 7/ decision may not settle all questions concerning off-air taping since it is primarily directed to private, noncommercial time-shifting in the home. 8/ The Court explicitly approved the district court's finding that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. In concluding that such time-shifting was a fair use, the Court emphasized that since the television audience had been invited to watch the entire program earlier, reproduction of the entire work does not have its "ordinary effect of militating against a finding of fair use." 9/ The opinion does not directly address off-air taping of cable transmissions and subscription television, nor the case of taping for purposes of "librarying." 10/

The Supreme Court's approval of time-shifting for private use also does not resolve the question of off-air taping for educational uses. The Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes 11/ continue to provide an answer for some of these questions, but other issues remain unresolved. Can a teacher make a "fair use" copy at home for performance at school?

In the most recent litigation, the same court that had enjoined a school district from the massive and systematic copying and retention of videotapes of copyrighted works denied the school district the right to any future

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7/ Sony Corporation of America v. Universal City Studios, Inc., 104 S. Ct. 774 (1984), rev'g, Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981) rev'g 480 F. Supp. 429 (C.D. Cal. 1979).

8/ 104 S. Ct. 774., 778-79.

9/ Id, at 792-93.

10/ The only reference to librarying is found at note 39.

11/ H.R. Rep. No. 495, 97th Cong., 2d Sess. 8 (1982).

temporary off-the-air videotaping of plaintiffs' copyrighted works. [12] The Court mentioned the Guidelines and noted that one plaintiff had not permitted temporary off-the-air videotape use and two would not permit Boces to videotape their works in the future for temporary use. Instead of discussing whether the Guidelines should be applicable, the court looked at the fair use factors and held that "[I]t is not reasonable to permit defendants to engage in copying and using plaintiffs' works for a limited period of time when these same copyrighted works are readily available from the plaintiffs for a limited period of time." [13]

Other questions concerning off-air taping for use outside the home still arise and have not been answered by either the reported cases or the Guidelines; however, the use of rented videocassettes inside and outside the home will probably be a more pressing issue in the 99th Congress.

D. Commercial Lending of Sound Recording and Audiovisual Works (Video)

1. Sound recordings

The President signed the Record Rental Amendment on October 4, 1984, and it became effective on that date. It has no retroactive effect, and it automatically expires on October 5, 1989. [14] This amendment adds a new section to the First Sale Doctrine (17 U.S.C. §109) giving the owners of copyright in the sound recording and in the musical works embodied therein the authority to decide how to market their property -- through sale, rental or both; they do not have to authorize rentals. [15]

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[12] Encyclopaedia Britannica Educational Corporation v. Crooks, 558 F. Supp. 1247 (W.D.N.Y. 1983). See also 542 F. Supp. 1156 (W.D.N.Y. 1982).

[13] 558 F. Supp 1247, 1250, 1251.

[14] §4 Pub. L. No. 89-450, 98 Stat 1727 (1984).

[15] See H. Rep. No. 987, 98th Cong., 2d Sess. 4 (1984); S. Rep. No. 162, 98th Cong., 1st Sess. 6 (1983).

A compulsory licensing system for rental of recorded musical works is added to 17 U.S.C. §115. [16/] But this system "is not intended to impose any obligation on the owner of copyright in a sound recording to rent or authorize rentals of that sound recording." [17/] Should these copyright owners decide to authorize record rentals, amended section 115 provides for the payment of royalties and also directs the Register of Copyrights to issue the necessary regulations.

At the time this amendment was enacted, there were approximately 250 record rental stores in the United States. It was felt, however, that the development of the more expensive and longer lasting compact disc could magnify this problem in the future.

2. Video rental

It is estimated that there are now over 11,000 video specialty stores [18/] in the United States. However, there are many other outlets for video rentals -- grocery stores, drug stores, gasoline stations, and even private homes. Video rental legislation was not enacted in the last Congress, and questions concerning royalties and/or the legitimate use of rented cassettes outside the home will probably continue to recur this session.

The public performance issue has been raised in several cases where a videocassette was exhibited outside the home situation. In Columbia Picture Industries, Inc. v. Redd Horne Inc., the Third Circuit affirmed the lower

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[16/] S. Rep. No. 162 at 7.

[17/] Id.

[18/] This figure is based on a projection made by Video Store Magazine (Sept. 1984) 52. A video specialty store is defined as a retail store which derives more than 51% of its gross revenues from sale or rental of video products. Id.

court's decision that the showing of video tapes in private screening rooms was a public performance that infringed plaintiffs' copyrights. 19/ Members of the Motion Picture Association of America have also filed suit against prison systems which were showing rented videocassettes to prisoners. Recently, the Wisconsin Health and Social Services Department has entered into a stipulation with MPAA members agreeing to a permanent injunction from all unauthorized transmissions or other public performance of the plaintiff's copyrighted works. 20/

E. Jukebox Compulsory License

1. Administration of 17 U.S.C. §116

Section 116 of the Copyright Act establishes a compulsory license for public performance of nondramatic music on coin-operated phonorecord players ("jukeboxes"). To obtain the compulsory license, a jukebox operator must record each jukebox annually with the Copyright Office, pay the annual royalty fee per jukebox to the Copyright Office, and affix the certificate of recordation issued by the Copyright Office at an appropriate place on the jukebox so recorded. The fees are deposited with the United States Treasury for later distribution by the Copyright Royalty Tribunal to

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19/ Slip opinion, Civ. No. 83-5786 (3d Cir. Nov. 23, 1984) aff'g 568 F. Supp. 494 (W.D.PA. 1983).

20/ In several other stsates the Attorney General has issued an opinion on whether such a use is a fair use. California: public performance of rented cassettes violates copyright law, OP 81-803, 567 PTCJ A-1; Florida: all institutions under the jurisdiction of the State should purchase or rent cassettes only from the copyright owners or their authorized non-theatrical distributors; Item 4, MPAA 1984 Composite Antipiracy Newsletter; Louisiana: occasional showing of rented videocassettes to 20-30 incarcerated persons would be a permissible "fair use." 29 PTCJ 480-81 (1985).

copyright owners and the performing rights societies, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

In its last rate adjustment, the Copyright Royalty Tribunal determined that the original statutory royalty of $8 per jukebox should be raised to $25 per jukebox effective January 1, 1982, and $50 per jukebox on January 1, 1984, with a cost of living adjustment effective on January 1, 1987. Fifty dollars per box is the current rate.

The number of boxes recorded with the Copyright Office has declined each year since 1978, as the following statistics show.

Year	Number of Certificates Issued 21/	Rate	Royalty Fees Received 22/
1978	144,493	$ 8.00	$1,149,160.00
1979	138,158	8.00	1,100,909.00
1980	137,167	8.00	1,095,520.00
1981	135,338	25.00	1,076,019.00
1982	126,400	25.00	2,902,980.00
1983	114,326	25.00	2,862,478.00
1984	103,798	50.00	5,188,423.00
1985 23/	72,041	50.00	3,968,330.00

21/ The number of certificates issued includes both full-year and half-year certificates. Also note that the figures for the earlier years may not agree with those given out in the past. A recent review of the statistics has resulted in a slight readjustment of some of these figures.

22/ The royalty fee figures have been rounded and do not include: interest accrued nor deductions for operating costs, refunds or distributions.

23/ Note that the 1985 license year has not ended and these figures can be expected to increase by the end of the year.

While estimates of the U.S. jukebox population vary from the high of 400,000 (performing rights societies' estimate) to a low of 250,000 (Amusement and Music Operators Association's estimate), very substantial noncompliance with this compulsory license is evident. (This may be contrasted with a 97% average filing rate by cable systems pursuant to 17 U.S.C. §111.) Recent developments, however, create hope that negotiations between the private sector interests, initiated last year at the behest of this Subcommittee, will lead to increased compliance.

2. Legislative proposals

Intense dissatisfaction by jukebox operators with the royalty rates established by the CRT resulted in proposals in the 98th Congress (H.R. 3858; H.R. 4010; S. 1734) to establish a one-time royalty payment mechanism in lieu of annual recordation of boxes and royalty payments.

At your request, Mr. Chairman, representatives of jukebox operators, jukebox manufacturers, and performing rights societies began meeting last year in an attempt to reach an agreement, which would resolve their respective concerns.

The Copyright Office understands that an agreement in principle has been reached as a result of these negotiations. The parties continue to negotiate about details, but there is every reason to hope that the Chairman's initiative will lead to an agreement that may resolve this issue without legislation and will ultimately increase the level of compliance with section 116.

The agreement apparently involves proposals for rulemaking by the Copyright Office, with respect to recordation of boxes and the issuance of certificates. In due course, the parties will formally petition the Office to open a public rulemaking proceeding. The Office will respond as positively to the proposals as is consistent with our rulemaking authority and the public interest.

F. Computer Software

There are two specific issues concerning copyright protection for software which may arise during this Congress. In addition, of course, one must observe the continued activity in the courts, the Office of Technology Assessment, and elsewhere in attempting to define the scope of copyright in software, its propriety and other "big" questions.

Under the present law, the owner of an authorized copy of a computer program is entitled to make a further copy of the program "for archival purposes only." This is the result of the codification of the proposal of the National Commission on New Technological Uses of Copyrighted Works (CONTU) that the law provide clearly that software is copyrightable subject matter and that rightful users not be impeded in their use by copyright restrictions. Thus, to guard against the possibility that theft, erasure, or electrical or physical damage to the media in which programs are stored would seriously adversely affect the operations of rightful users, Congress has clearly authorized them to prepare archival copies. These copies are not to be proliferated or used on multiple machines; they are simply to provide insurance against the unavailability of the copy which the user owns.

As part of a wide-ranging effort to safeguard their works against piracy, several publishers of software have employed a variety of technological means to prevent their software from being copied. Chief among these, and the one with some potential copyright ramifications, is "copy protection." By various means, software may be stored on a floppy diskette in such a manner that it can be "read" into a computer's memory for use, but can not be copied onto another diskette. While no such scheme is absolutely foolproof, copy protection may be effective in preventing a majority of users from making unauthorized copies.

To circumvent such systems, a number of programs have been written and distributed, sometimes openly, sometimes not, which permit the ordinary user (as distinct from the computer professional or industrious "hacker" to whom copy protection schemes may pose only a trivial delay rather than an insurmountable barrier) to copy "protected" software. There have been no court cases to date precisely testing the legality of such "de-encryption" or "code-breaking" programs, although one District Court has granted a preliminary injunction against the sale of a "PROM blaster" (a device used to duplicate video game software stored in game cartridges). Atari, Inc. v. JS & A Inc., 597 F.Supp 5 (N.D. Ill. 1983). It is possible, but not clear, that such works might be held to infringe the copyright owner's rights in the copied program. There may be an attempt by software copyright owners to obtain this result in the legislature. To the extent that some software copyright owners use encryption methods which prevent the making of the one archival copy to which users are clearly entitled under the law, such initiatives should be cautiously evaluated. On the other hand, it appears that some copy protection systems permit the user to make one or two (uncopiable) copies of the software before "switching on" to prevent further copying. It seems appropriate that a balance be struck between the rights of copyright owners for protection against copying and the rights of users to be able to use that which they have paid for, but the Copyright Office is not now prepared to recommend any legislation.

Another private initiative about which you may hear is the desire of many software proprietors to add software to the list of works (now limited to sound recordings, motion pictures, and other audiovisual works) in 18 U.S.C Sec. 2319(b) for whose criminal infringement the penalties are enhanced. Proponents state two reasons why this should occur: enhanced penalties make potential criminal cases more attractive to the Department of Justice and U.S.

Attorneys with whom prosecutorial discretion lies, and, under the present law, the criminal infringement of software which "drives" such audiovisual video games as Pac-Man or Space Invaders may be subject to the enhanced penalties applying to audiovisual works, while the criminal infringement of business or scientific software, which result in no audiovisual performances or displays, is clearly not.

The Copyright Office is unaware of any criminal copyright infringement cases concerning software. It seems somewhat premature to say that this is due entirely to the lower criminal penalties applicable to infringements of this type of work, although this can not be completely ruled out. As to the inconsistency between video-game and other software, an anomaly may exist. The Office is not aware, however, of any litigation involving the application of any criminal copyright sanctions against video-game pirates. If an attempt were made to treat such games as audiovisual works for purposes of applying criminal penalties appropriate for audiovisual works, it is not clear that the effort would succeed; strict construction of criminal laws might result in the imposition of the standard penal provisions rather than those for sound recordings, motion pictures, and other audiovisual works.

G. Satellite Issues

1. U. S. Ratification of the Brussels Satellite Convention

An important step toward world-wide cooperation in the international protection of copyrighted programming carried by satellites was taken on October 12, 1984, as the United States Senate ratified the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the Brussels Satellite Convention).

Only 20 years ago the Telstar satellite carried the first live television signals across the Atlantic Ocean. Since then satellite transmission has become a powerful force in the delivery of television signals of nearly perfect quality all across the world. But the unauthorized reception and distribution of those signals ("poaching") has deprived copyright owners of the revenues they could obtain by licensing their works.

The unauthorized interception and distribution of American programming transmitted via satellite has occurred throughout the Western Hemisphere, but most particularly in the countries where the natural "footprint" of those signals extends, in part of Canada, Latin America, the Caribbean, and Mexico. As more powerful satellites are launched into space, the problems of satellite poaching may extend beyond the Hemisphere and take on global proportions.

The Convention was ratified by the United States Senate without any amendment of domestic law. The United States ratified the Convention on the basis that the obligations of the Convention were satisfied by provisions of the existing communications and copyright laws. Congress subsequently amended the communications law and established civil and criminal penalties for satellite piracy in certain cases. Section 705 of P.L. 98-549.

The Convention, developed in Brussels in 1974 and now consisting of nine member states, obligates contracting states to take adequate measures to prevent the unauthorized distribution of programming carried by satellite on or from their territories. The Convention leaves each state free to choose its own method of implementation including designation of the specific beneficiaries of protection. The Convention, however, exempts signals which

are intended for direct reception from satellite by the general public; these broadcast satellite signals are generally already regulated under the copyright or neighboring rights regimes of most states. Nor does the Convention apply to individual reception of satellite signals for purposes of private viewing (the "back-yard" satellite dishes).

Ratification by the United States of the Brussels Satellite Convention will not in itself stop unauthorized retransmissions of satellite-borne signals. Ratification will confirm, however, that foreign program-originating organizations are protected against unauthorized distribution in the United States: moreover, it will serve both as a model to other nations which look to the United States for guidance in resolving questions raised by new technologies and as a bench-mark of fairness from which the United States can seek similar treatment in the markets of our trading partners.

2. "Back-yard" satellite dishes

The 98th Congress enacted a major reform of cable communications law by passing Public Law 98-549 (hereafter the Cable Communications Policy Act of 1984). The law provides for the first time a comprehensive framework for cable industry operations in this country. Although the law at more than one point states that it does not affect rights and liabilities under the Copyright Act, the law deals with certain issues that have copyright policy implications. One is the treatment of direct reception of satellite signals by "back-yard" satellite dishes (discussed in the next paragraph) and the other is theft of cable service (discussed in the next subsection.)

New section 705 of title 47 replaces section 605 of the Communications Act of 1934. Section 705(b) requires owners of rights in "satellite cable programming" to develop marketing systems to authorize private viewing at home where the signals have not been encrypted. If the signals are encrypted, then unauthorized reception is prohibited and rightsholders have been given new remedies and penalties.

3. Theft of cable service

Section 633(a)(1) of the Cable Communications Policy Act prohibits any person, without proper authorization, from intercepting or receiving any communications service offered over a cable system, or from assisting in such activities. Penalties in the nature of fines and/or imprisonment are imposed for violation of the law.

The federal government has now joined with many states who have enacted cable service theft laws; the new federal law specifically does not preempt state laws. According to Cable/Vision (April 1, 1985) at 37, all but 17 states have toughened their laws in recent years. Cable operators sue individual violators and distributors of illegal equipment.

In a major development, an ad hoc group was organized last fall (the Coalition Opposing Signal Theft), whose members include representatives from program suppliers (the motion picture industry and professional sports), equipment makers, cable networks and cable operators. The group will stress that cable service theft is a crime, will serve as a resource center for combatting cable service theft, and will assist the member industries in lobbying the remaining 17 states for stricter theft-of-service laws.

III. INTERNATIONAL COPYRIGHT ACTIVITIES

Protection abroad for works of United States authorship has become a major concern to American industry. The quality of foreign copyright laws has sometimes been criticized. The adequacy of the treaty bases upon which the international recognition of authors' rights rests has been questioned by some.

Business men and women have been pressing their government to use its power and influence to reshape the network of international copyright arrangements; yet, where this may lead us is not entirely clear.

It is not the purpose of this hearing to explore in depth the many proposals for improving the global protection of copyright, or the implications of such efforts for our own domestic copyright policies. But, the Copyright Office wishes to note certain key developments as of possible interest to the Subcommittee.

Asian Meetings

The Copyright Office has participated in a number of international meetings and missions whose substance may briefly be noted.

In April and May of 1984, the Copyright Office was represented on a United States delegation to Taiwan and Singapore, to discuss ways in which the piracy of United States works in those places could be reduced through the improvement of local copyright laws. We worked closely with the International

Trade Administration, the United States Trade Representative and the Department of State, providing technical support based upon our familiarity with foreign copyright laws and practices, international conventions and the overall problems of building balanced copyright systems in developing countries.

In November 1984, we provided similar support to a United States delegation to South Korea.

Most interestingly, we participated in a series of copyright seminars organized in three ASEAN states, Malaysia, Thailand and Indonesia, in January, 1985. These seminars were jointly proposed by the Office of the Pacific Basin of the ITA and the Copyright Office. The idea was warmly supported by the concerned United States embassies and the Department of State. Our feeling was that the gradual development of modern copyright systems in the region characterized as the Pacific Basin called for the United States to listen to local needs and fears as much as to insist flatly upon an end to piracy of our works. These seminars brought a small group of United States specialists into open discussions with local experts and interests. The frank exchange of viewpoints, concerns and options was, we believe, every bit as valuable in building for the future as are trade-based exhortations.

Copyright Office Report On Protection of U.S. Works Abroad

Many of the attitudes of the Copyright Office on the problems of protecting authorship throughout the world are reflected in a report we published at the close of 1984. Our objective in writing the report, which was requested by Sentor Patrick Leahy and Representative Michael Barnes, was to provoke thought and discussion within the Congress on the relationship

between bilateral trade incentives to promote better protection of copyrighted works abroad and multilateral copyright treaties. In short, to examine the utility and fairness of ultimately coercive trade incentives and to compare these devices with the gradual consensus-building process of the Universal and Berne copyright conventions.

UNESCO-WIPO Copyright Meetings on Private Copying, Video and Audio Rental, and Computer Software

There were a number of meetings held under the auspices of the World Intellectual Property Organization (WIPO) and UNESCO, exploring contemporary copyright problems which are all too familiar to this Subcommittee and the Congress as a whole: protection of computer software, rental rights for audio and video recordings, private copying, and copyright aspects of direct satellite broadcasting. We believe it is fair to say that the questions asked by the Chairman and members of this Subcommittee when these subjects have arisen are similar to those raised in Paris and Geneva.

The Copyright Office believes that developments in foreign countries with respect to private copying and rental rights could usefully be examined by the Congress, if these issues are given consideration by the Subcommittee. It is not simply a matter of whether we should have such rights because foreign countries do or vice versa. It is a practical matter of evolution of a global marketplace. If major foreign markets for United States audio and video works adopt relatively similar approaches to rental rights, then, if only as a trade matter, we may come under pressure to reciprocate; and, such pressure need not involve either copyright convention.

In February WIPO and UNESCO held the first meeting to consider specifically copyright protection for computer software. It was a most interesting beginning to a study program which will doubtlessly continue for the next several years.

At the risk of oversimplifying a complex question, we feel that two trends were revealed at this meeting: 1) most industrialized countries seem to prefer the protection of computer software under copyright and approve of the applicability of existing copyright conventions to this new category of works; and, 2) few seem to know in what manner traditional copyright doctrines should be applied to determine rights, infringement and permissible uses of software. Put another way, most industrialized countries have found software copyrightable subject matter, but lack the experience of litigation or specific legislation to be sure about the precise extent of copyrightability in any given piece of software.

The dispute between Japan and the United States over industrial property protection versus copyright protection for software appears to have been resolved initially in favor of copyright. But, the essentials of this debate may have shifted to a "North-South" disagreement (that is, western developed countries and Japan versus many developing countries and some socialist countries).

The emerging consensus of industrialized countries in favor of copyright in principle should not be taken to mean agreement on the kind or level of copyright protection for software which may be appropriate as time passes. Subjecting software to copyright protection does not mean that all software or all parts of software are copyrightable; presumably, it does mean that basic rights to control reproduction, adaptation, performance or display, and distribution depend upon the extent to which creative authorship is found to exist.

United States Adherence to Berne

Finally, the Copyright Office would like to call attention to consideration of United States adherence to the Berne Convention for the Protection of Literary and Artistic Property. Private sector and governmental

groups are studying the pros and cons of United States adherence to Berne with principal reference to today's realities and the perceived challenges of tomorrow, rather than as a theoretical exercise in the "philosophy" of authors' rights. For example, the Authors' League of America has formed a small group to study problems of implementing legislation. All of this is tentative and exploratory -- the possible beginnings of a difficult and time-consuming process.

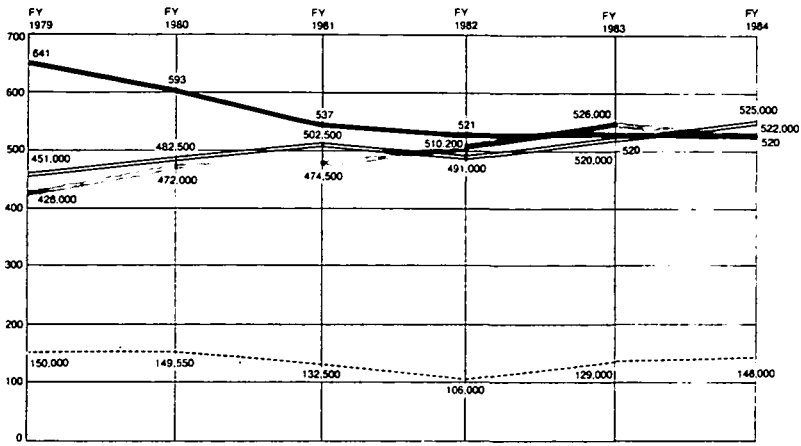
This hearing is of course not the place to explore the many issues which adherence to Berne must necessarily raise. But the Copyright Office urges the Subcommittee to engage itself fully in the matter of Berne adherence and, ideally, to coordinate with its Senate counterpart a program for thorough analysis of the impact of adherence upon our present copyright law as well as certain important areas for possible future development.

Thank you for the opportunity to report on the condition of the Copyright Office and on some of the major copyright policy issues. My colleagues and I would be pleased to respond to your questions, either now or at a later time for the record.

Appendix A

COPYRIGHT OFFICE KEY INDICATORS

SEPTEMBER 30, 1984



STAFFING—19% DECREASE FY 1979 TO FY 1984 (00)
(121 LESS ACTUAL STAFF)

WORK COMPLETED—16% INCREASE FY 1979 TO FY 1984 (000)
(74,000 ADDITIONAL CLAIMS COMPLETED PER YEAR)

RECEIPTS—24% INCREASE FY 1979 TO FY 1984 (000)
(96,000 ADDITIONAL CLAIMS RECEIVED PER YEAR)

INVENTORY—3% DECREASE FY 1979 TO FY 1984 (000)
(4,200 LESS CLAIMS ON HAND)

C 732 February 1985

Mr. KASTENMEIER. Thank you, Mr. Curran. I would also hope to have your second appended statement, which you have just delivered, in writing.

Mr. CURRAN. I will supply it for the record, sir.

[The summary statement of Mr. Curran follows:]

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

Before the Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
House Committee on the Judiciary
99th Congress, First Session
May 1, 1985

The Place and Role of the Copyright Office of the Library of Congress

The Library of Congress through law and historical development has become in its 185-year history the custodian of the largest collection of intellectual property gathered in any one place. It is no accident that the Congress in 1870 gave the Library of Congress responsibility for administering the U.S. copyright law. It is the one place in the U. S. Government where the creator of intellectual property and the user of the property come together, promoting "the progress of science and useful arts."

I would like to share with you our thoughts on the place and role of the Copyright Office. The Copyright Office became a separate department of the Library by statute in 1897.

We have a somewhat biased view but we believe that the Nation has been well served by the Library and its Copyright Office, and that it will continue to be so in the future.

The benefits flowing to the national library and the world of learning as a result of the deposit system are both tangible and intangible. It brings to the nation in one place a vast body of intellectual property, published and unpublished, created by our citizens in all formats, shapes and sizes. Much of what is obtained through deposit is not readily available, nor indeed available at all through conventional purchase order arrangements. Of course the Library obtains many thousands of items world-wide through purchase, gift, and exchange, but copyright deposit continues to be a key element of our total acquisitions effort. Our collections are replete with unique materials acquired through the deposit process.

Substantial benefits also flow to the copyright system in the relationship of a major U. S. cultural institution with the copyright process. We believe the Library has an intellectually stimulating working environment which is both attractive and supportive of the Copyright Office. We are able to attract and keep people who understand the importance of protecting intellectual property. In like manner, Library management is sensitive to the significance and importsnce of an activity whose function is to examine, catalog, record, and process intellectual property pursuant to the copyright law of the United States. These are not qualities always found in a large government bureaucracy. The Library of Congress and its Copyright Office are compatible and mutually supportive.

The responsibilities of the Copyright Office are plainly set forth in Title 17. The Register directs all administrative functions and duties under Title 17 not otherwise specified. Section 702 authorizes the Register to

establish regulations for the administration of the copyright law with the approval of the Librarian of Congress. The Register is appointed by the Librarian and carries out the duties of the Office under his general direction and supervision. Copyright law is sometimes characterized as arcane or even metaphysical. Perhaps so; however the functions of the Office and the Regiater need not be. Our purpose is to administer the law as it exists in a fair and equitable manner and to assist the Congress and the Nation in the development of copyright policy responsive to the public interest. We serve the Congress and the Nation, and it is our intention to do so in as evenhanded a fashion as possible. The duties of the Regiater are most succinctly stated in the position description certified by the Library.

> "The Register of Copyrights is responsible for administering the copyright law in the public interest, accepting or rejecting claims to copyright, and operating the Copyright Office in such a manner as to give maximum service to creators and users of literary and artistic property and their attorneys and representatives. The Regiater of Copyrights has the responsibility of serving as principal technical adviser to the United States Government on national and international copyright matters and advising Congress concerning the provision of the Constitution vesting the power in Congress to "promote the progress of Science and useful Arts ..."

Mr. KASTENMEIER. With respect to the value of the Library of Congress and its collections and copyright deposits, with which I concur, doesn't the Berne Convention adherence affect that function, prospectively, in this country?

Mr. CURRAN. We understand that is one of the issues which, of course, would need to be carefully considered and thought out. When we talk about adherence, there are many, of which, obviously, I am not competent to go into today. But there is a significant point of view that suggests that the deposit laws can be—that you can have deposit laws and still be in adherence to Berne. Many countries, presumably, as I understand it, do that. And that would be precisely our point, to ensure that the kinds of things which we think are critical and important in the American copyright system are preserved in any Berne adherence. Considerations that might be made here.

Mr. KASTENMEIER. Well, I note your urging this subcommittee to engage itself fully in the matter of Berne adherence and you further instruct us to coordinate with the other body, with the Senate counterpart, I gather.

Mr. CURRAN. Our remarks there, and I hope they are not misinterpreted, are simply to suggest that any consideration of Berne adherence necessarily involves both the House and the Senate, and certainly that is true with regard to any changes in legislation that might be required in that process.

Mr. KASTENMEIER. Mr. Ladd, for whom I have great personal affection—I have known him for many, many years—gave 3 months' notice before his departure. Now, it's 3 months, maybe 4 months have gone by and, even though you are doing a splendid job, Mr. Curran, we don't have a permanent Register. Can you tell us why the selection process is taking so long?

Now, I know it is the Librarian's function and not yours, but still I think you must be close enough to it to give us some advice on what is transpiring.

Mr. CURRAN. I share your concern. And I would only—if I may take just a couple of minutes to take you through the process, but I will speak to the end first. The best qualified list is in the hands of the Librarian. I understand they are making appointments for interviews now, and then, hopefully, they will be interviewing in the immediate future. To set up appropriate interviews, and that decision will be forthcoming in the near future.

The worst is behind us as far as I know. The process is, however, unfortunately long and tedious, and I share your concern. I am sure the Librarian shares your concern. And perhaps we need to do something about that. But the process in this case was in the first instance to organize a search committee, since it was considered a matter of some importance, to find people who might not otherwise come forth through an advertising process, and that consisted of Dan Lacey, a vice president of McGraw-Hill, Bob Wedgworth, the executive director of the American Library Association, and Stanley Gortikoff, president of Recording Industry Association of America and, I believe, chairman of the board of the Copyright Council as well.

That group did make some effort at trying to search about and find people who would be willing to take the job and might be in-

terested in doing it. And they did their thing and that took some time. At the same time, we were advertising in accordance with our own rules and regulations in appropriate newspapers, and I am not sure which ones, but there were a list of papers where we were advertising. And then there is a process of going through the list and determining those who are qualified. This is in accordance with the Librarian's regulations and systems.

That having been done, then there is a panel of senior managers—I was not one of them—who looked at these people who were determined to be qualified, and from that, weeded it down to a best qualified list. And that is the group the Librarian now has, and he is setting up interviews and appointments.

I share your concern, sir. I think it is intolerable and it is too long.

Mr. KASTENMEIER. If you will permit an aside, I hope they are not using the same computer the White House is. [Laughter.]

Mr. CURRAN. We are in the legislative branch, sir. I don't think we do that.

Mr. KASTENMEIER. Maybe at this point I should yield to my colleague, Mr. Boucher, for any questions he may have. Obviously, we are going to be running off here in a moment or two.

Mr. BOUCHER. Thank you, Mr. Chairman. I really just have one question.

We have heard some testimony today from the Chairman of the Copyright Royalty Tribunal, during the course of which she has suggested that additional staff be provided for that agency. It is my understanding that the agency relies today on the Copyright Office for its technical and research support.

Do you believe that that relationship should continue in that manner, or do you think that the Copyright Royalty Tribunal should be given that staff on its own?

Mr. CURRAN. I think it is a fair question, and I think it is one that I don't believe I can accurately summarize or characterize very briefly here. The background of the 1976 act is one that I, personally, am not familiar with. I am going to ask Dorothy Scrader, our counsel, who is much more knowledgeable about this than I, to add her comments.

But we run the Licensing Division as provided by the law; and, frankly, I think that works rather well. As far as I know, it works rather well, and my experience might be not shared by others. But the process of—there are 25 people who are doing this: The process of carrying out the law, of collecting the money, issuing the licenses, doing all the things—investing the money—works as far as I know as smoothly as that sort of thing can work. And the Library supports it rather heavily; that is, the division itself, with the resources of the Copyright Office, which are not charged back I should add, the space which is not charged back, an assortment of things that we do to see that they get their job done. And as far as I know, they do precisely that: They get their job done.

Now, the kinds of things that the Tribunal wants some assistance in doing are decisions that the Congress is going to have to decide. I mean, what do you want the Tribunal to be? Do you want it to be a judiciary kind of thing, a tribunal that makes certain decisions among competing parties? Do you want it to have a differ-

ent kind of responsibility and a different kind of role? This is where I think you have to go back to the act of 1976 and start over, and say, well, and if you want them to do certain kinds of things, then I guess you are going to have to give them the staff to do that.

Mr. BOUCHER. Thank you. We do need to depart now. Thank you very much for the answer.

Mr. KASTENMEIER. Certainly. Otherwise, we miss the vote.

Does the gentleman wish to pursue this?

Mr. BOUCHER. It would be helpful, perhaps, if you could make some written response. I wouldn't want to put you to a lot of trouble.

Mr. KASTENMEIER. I would make the same request. I have a couple of questions as well, but I think we should adjourn in view of the hour, and the fact we have to go vote again. So we will put our further questions to you in writing. And we thank you very much for your appearance today.

Mr. CURRAN. Thank you, sir.

Mr. KASTENMEIER. This terminates our hearing today.

[Whereupon, at 3:52 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL STATEMENTS

National Cable Television Association

James P. Mooney
President &
Chief Executive Officer

1724 Massachusetts Avenue, Northwest
Washington, D.C. 20036
202 775-3655

May 8, 1985

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee of the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the National Cable Television Association, I am pleased to transmit our statement concerning administration of the Copyright Act of 1976.

NCTA respectfully requests that this statement be made part of the record of the Subcommittee's oversight of the Copyright Royalty Tribunal and the Copyright Office in the administration of this Act.

Sincerely,

James P. Mooney

JPM/cfg

STATEMENT

OF

THE NATIONAL CABLE TELEVISION ASSOCIATION

BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,

AND THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

CONCERNING OVERSIGHT OF THE ADMINISTRATION OF THE

COPYRIGHT ACT OF 1976

May 1, 1985

The National Cable Television Association appreciates this opportunity to provide the subcommittee with its views on the adminstration of cable-related copyright law.

NCTA is the principal trade association of the cable television industry. Its members include over 2,000 cable television systems operating throughout the United States, serving approximately 28.5 million homes.

Cable television exercises one of the four compulsory licenses granted by Congress in its 1976 overhaul of the federal copyright laws. Cable thus has extensive experience with the Copyright Royalty Tribunal and with the Copyright Office of the Library of Congress. Last year, cable operators paid 87 million dollars for the use of their compulsory license in the retransmission of programming from distant communities. NCTA anticipates that payments for 1985 will exceed 100 million dollars.1/ Ultimately, of course, it is cable consumers who bear the cost of these copyright fees.

1/ Neither of these figures reflects the separate copyright compensation paid by cable operators directly to satellite video programmers, such as Home Box Office or Nickelodeon, whose programming is carried on cable systems through independent contractual arrangements.

The CRT-established royalty rates for distant signals and the Copyright Office accounting rules used to compute liability under these royalty rates have a substantial, composite effect: they restrain the number of programming alternatives available to consumers over cable systems by artificially inflating the price of those distant signals.

The Copyright Act of 1976 has been used, in effect, to do exactly what Congress intended that it should not do. It has been used to cross the threshold that has divided copyright problems from communications policy. The consumer has paid the price for this expansive application of the Copyright Act through less choice in programming at higher cost.

In order to better appreciate the dimensions of this problem, it may be helpful to review events which have led us to this situation.

Prior to the adoption of the Copyright Act in 1976, the Supreme Court had held clearly and unequivocally that under the then-existing copyright law, cable was subject to no liability for retransmission of program signals. All of that changed with the 1976 Act. As the House Judiciary Committee stated:

> "In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on carriage of copyrighted material and that copyright royalties should be paid by cable operators to the creators of such programs. 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."2/

Accordingly, Congress granted a compulsory license to cable for the retransmission of broadcast signals and required it to pay royalty fees for the retransmission of distant, nonnetwork programming.

In 1976, the Federal Communications Commission had an elaborate series of rules in effect which restricted the number of distant signals (generally, a signal whose primary transmitter was located 35 miles or more from the cable system) which could be imported by a cable operator. Congress was well aware in 1976 both of the tension between communications policy and the copyright laws and of the fact that the FCC's distant signal rules were under review.

> "While the Committee has carefully avoided including in the bill any provision which would interfere with the FCC's rules, or which might be characterized as affecting 'communications policy', the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation. . . . Specifically, we

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2/ H.R. Rpt. 1476, 94th Cong., 2nd Sess. 89 (1976).

would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulations or the increased use of imported distant signals."3/ (emphasis added)

On July 22, 1980, the FCC after years of review repealed the rules limiting distant signal carriage by cable systems, finding that they had caused "significant sacrifices in consumer welfare."4/ The Commission went on to note: "The costs of our current regulations fall on existing and potential cable subscribers, each of whom is denied some increase in freedom of choice. The costs . . . also fall on society as a whole, to the extent we have inadvertently stifled some participants in the system of freedom of expression."5/

By eliminating the rules restricting distant signal carriage, it was the intent of the FCC to further federal communications policy which promotes the availability to cable subscribers of the broadest possible diversity of programming sources. As FCC Chairman Ferris noted: "By today's action, the

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3/ Id., at 89.

4/ Report and Order in Docket Nos. 20988, and 21284, 79 FCC 2d 673 (1980).

5/ Id., at 674.

FCC has removed the regulatory debris of a previous decade; we have thus expanded the choices that consumers will have in the future."6/

Unfortunately for consumers, a mere two years later the Copyright Royalty Tribunal took action to undo that expansion of choice.

The 1976 Act established statutory rates for the importation of distant signals, but also provided that the CRT could adjust those rates if the FCC changed its signal carriage rules. Following the elimination of the distant signal carriage restrictions by the FCC, the CRT in 1982 issued a ruling which raised the copyright royalty fees for distant signals added as a result of the deletion of the FCC's rules. The new rates for these added signals were almost 400% over the average rate, and as much as 1500% over the lowest rate, paid by cable operators prior to the CRT ruling. The result of this draconian increase was predictable: consumers were hurt.

After the CRT decision, subscribers in many markets were unwilling or unable to finance the huge cost increase, so signals such as Ted Turner's WTBS superstation and the Chicago Cubs' station WGN were dropped from cable

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6/ Id., Separate Statement of Chairman Charles Ferris, at 890.

systems. A study by NCTA revealed that, in all, 76 percent of the systems affected by the CRT decision were forced to drop distant signals. Over 10 million homes across the country lost the availability of alternative programming.

Even worse, this CRT rate adjustment was more than simply a one-time disaster for cable consumers. The economic ceiling imposed in 1982 by the CRT still acts today as an artificial, regulatory barrier to providing more programming on cable television.

While the provision of distant signals over cable systems is of value to consumers in terms of diversity and freedom of choice, the economics of these signals historically have been marginal to cable operators. Cable consumers frequently have indicated a desire to receive these distant, commercial television signals, but they have not generally been willing to pay the kind of premium prices paid for ad-free programming such as Home Box Office and Showtime. The imposition of the CRT copyright royalty rate has severely impacted this marginal situation and made carrying these additional signals simply too costly for many consumers. Accordingly, these consumers are denied the expanded choice in programming that federal communications policy has sought to provide.

In 1982, when the CRT handed down its decision, there were approximately 29 million cable homes across the country. Now there are over 38 million. Most of the cities which were unwired in 1982 have since completed the

franchise process and either now have, or soon will have, cable television available to their consumers. Perhaps more important, where cable systems have been in operation for several years, there exists a pattern in the industry for systems to upgrade the facilities and services available to their consumers. There is technical capacity in cable systems all around the country to bring consumers additional programming through importation of distant signals, but carriage of these signals is effectively prohibited by the copyright royalty rates established by the CRT.

Some fine-tuning of the CRT and Copyright Office rules also may be necessary in order to relieve this anachronistic, anti-consumer impact and allow consumers access to the greatest possible choice in programming.

Here are basic principles that should be followed to ensure a fair and balanced copyright policy for consumers:

- o Consumers should not pay copyright royalties on programming they do not receive. Consumers today are forced in three different ways to pay copyright royalties for programming they do not even receive.

  The Copyright Office currently treats contiguous systems under common ownership and operating out of the same headend as a single cable system for copyright royalty purposes, regardless of the programming carried by each system. Yet these systems are generally programmed independently of each other and frequently

do not provide all of the same programming. Under Copyright Office rules on contiguous systems, consumers are charged copyright royalties for distant signals imported into a neighboring system, even if their system does not even carry those signals.

A dramatic illustration of this inequity recently occurred in Pittsburgh. A cable company, which owned cable systems in several suburbs of Pittsburgh, acquired the franchise for the city itself. A total of six distant signals were provided over all the systems; but the most any single system carried was two, and which two varied from system to system. With the acquisition of the franchise for the city of Pittsburgh, these independent systems became one giant, contiguous system for copyright royalty purposes. Under the Copyright Office's rules, royalty would be charged against the revenues for all cable subscribers for all six different signals, even though the total number of distant signals received by any individual cable subscriber was only two. Because the copyright rules consider Pittsburgh and its suburbs now to be a single system, local consumers would be forced to pay more than $2,000,000 a year extra for copyright royalties without receiving any additional programming.

Where cable systems are operated as independent, franchised entities, they should be treated as separate entities for copyright purposes.

In addition to the problem of contiguous, commonly-owned systems, consumers are required in another way to pay for programming they don't receive. Because of the accounting mechanisms established by the Copyright Office under the Act, consumers must pay copyright royalties on distant signals based on the system's subscriber revenues for a six-month period, even if the signal was not provided throughout that six-month period.

A major component of the Cable Communications Policy Act of 1984 provides cable operators with greater flexibility to change their programming line-up offered to consumers. When consumers act through the marketplace to reject a particular programming service, operators will remove that service from the system and switch to another. Yet under the current copyright law, consumers would continue to pay royalties for the service they do not want -- and do not get -- throughout the full six-month period. This problem could be mitigated by substantially shortening the accounting period to reduce consumer liability.

Finally, the Act currently forces payment of a minimum copyright fee by consumers through their cable systems even if the system carries no distant signals at all. This problem could be solved by eliminating the minimum payment provision, allowing consumers to pay only for those signals they actually receive.

- Consumers should pay copyright royalties based on the programming they receive, not the size of the town they live in. Currently consumers in small communities must pay a greater rate for the second and third distant television signals than consumers in large metropolitan areas. In other words, cable consumers must pay more dearly for diversity if they happen to live in small cities. Consumers should be treated equally, regardless of the size of their communities.

- Consumers should not over-pay copyright royalties. Currently, consumers must pay royalty fees for distant signals based on the revenues from the tier of programming services which includes those signals. Yet, typically, these tiers include many made-for-cable programming services such as C-SPAN, Cable News Network, and ESPN. Cable operators offering these services do so through individual contracts with the program suppliers which include copyright compensation. Distant signal royalties based on tier revenue -- rather than revenue attributable only to the distant signals -- force consumers to overpay the fair rate of compensation for those signals and provide windfall money to copyright holders for the programming carried on distant signals. Consumers should pay a fair rate for each service they purchase.

- Consumers should not again be victimized by an unguided Copyright Royalty Tribunal -- Congress should establish standards and procedures to be followed by the CRT in a rate adjustment

proceeding. In setting the level of cable copyright liability, the CRT performs an essentially legislative function; but does so with very little substantive guidance from Congress. In 1982, the only time that the CRT has conducted a major rate adjustment proceeding, the public's interest in access to a diversity of programming at reasonable rates was subjugated almost entirely to the interests of the movie studios and other program creators.

Congress should instruct the CRT as to the methods to be used in any rate adjustment proceeding so that the interests of cable consumers are given appropriate consideration and weight. The CRT should protect the legitimate interests of copyright holders, cable systems, and the public.

Congress should also insure that the CRT has funding and staff adequate to accomplish these important goals.

As the members of the Subcommittee know, we are at a critical juncture in the administration of the Act. The CRT may again this year consider the rates charged for cable retransmission of distant television signals. If consumers are to benefit from the broadest possible diversity in programming choices, some changes clearly must be made. NCTA stands ready to work with the Subcommittee, the CRT, and the Copyright Office to bring the system back into balance in order to protect the legitimate interests of cable systems, copyright holders, and -- most important -- consumers.

MAY 15 1985

OLIVER BERLINER

213/276-2726

POST OFFICE BOX 921 • BEVERLY HILLS, CALIFORNIA 90213

SEN. CHARLES MATHIAS (R-MD) & Hon. ROBERT KASTENMEIER (D-WI)
SENATE OFFICE BLDG HOUSE OFFICE BLDG.
WASHINGTON 20510 D.C D.C 20515

Re: COPYRIGHT ROYALTY TRIBUNAL 1985 May 11th

Gentlemen,

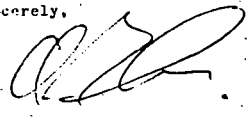
With the abrupt departure of Marianne Melec Hall as chairman of the Copyright Royalty Tribunal, the entire status of the Tribunal has come into focus. I especially share your concern because, you see, I have been under consideration by the President for appointment as a Commissioner of the Tribunal, for quite some time.

The truly scary aspects of the Tribunal's status are (1) that no president has ever appointed to the Tribunal anyone with copyright experience; and (2) The President, in a commendable desire to reduce government spending, has attempted to limit the number of Commissioners to 3 when it desperately needs the full complement of 5. After all, we are talking about the disposition of billions of dollars of royalties over the years...a division not only among factions of opposing goals but among recipients envious of what other recipients receive.

To the best of my knowledge I'm the only person under consideration as a Commissioner who has had direct music and literary copyright experience (I operated publishing enterprises for more than a quarter-century) and I understand that Senator Wilson and Congressman Badham have both urged the President to consider me upon the aforesaid basis, among others.

I should be delighted to come to Washington at my expense to testify in connection with the need for the Tribunal and for experienced Commissioners at any time you find the need for such commentary.

Sincerely,



Disney stockholders win in L.A. court re Steinberg injunction

By PAUL DRESKI

Disney stockholders won another round Wednesday in the Saul Steinberg "greenmail" court case when a state appeals court in Los Angeles upheld a lower court injunction freezing profits the New York financier garnered in his hostile takeover attempt of Walt Disney Prods.

Stating that the stockholders have a "reasonable chance" to prove that Disney's board of directors violated a fiduciary relationship, Second District Justice Earl Johnson and two other judges on the panel let stand a Los Angeles Superior Court preliminary injunction issued last July that requires Steinberg to hold $73 million in trust pending the outcome of the case, brought by the stockholders against Steinberg and the Disney board of directors.

"We think it's a landmark decision in that it is the first of its kind to declare greenmail illegal," stockholder attorney Michael Hennigan said.

Hennigan said he thought the court decision could have a chilling effect on hostile takeover attempts. "I think the court sent a message that it's going to be tough in California to engage in the practice of greenmail. ... If you're going to take over a company, you had better go through with it because you are not going to sell your shares out at a premium," he said.

In the opinion of the three justices, Disney management was acting to protect itself, not the shareholders, when it paid a total of $77 a share (or $325 million) to buy back Steinberg's 12% interest in the company. At the same time the judges decided Steinberg, as the major stockholder, violated his duty to the other 60,000 shareholders.

Disney spokesman Ben Chester said, "This is a long-term thing. The Steinberg group may decide to appeal. We're still waiting for this case to be decided on the lower court and no date has yet been set." At press time, attorneys for Steinberg had not returned phone calls.

ABC taps Burnett

NEW YORK — Carol Burnett will star in her first comedy special for ABC to air during the 1985-86 season.

The special will showcase the unique range of Carol Burnett's performing talents. Joining Burnett will be various guest stars (to be announced shortly), in a stylish and contemporary one-hour program.

Assn. of Film Commissioners meets in Chicago

By DAVID JANDA

CHICAGO — The 10th annual convention of the Assn. of Film Commissioners got under way yesterday with some 160 commissioners from across the United States, Puerto Rico, the Virgin Islands and Canada. Suzy Kel-

'Gimme a Break's' Sweet dies at age 65

Dolph Sweet, 65, died May 8, after a long illness. Born in New York City, he grew up in Northport, Long Island and was educated at the Univ. of Alabama and Columbia College at Columbia Univ., where he earned an M.A. in English and comparative drama. During a "temporary job" after World War II he was an English teacher, coach and director of plays at Barnard College of Columbia Univ., he stayed for 12 years, eventually becoming head of the college's drama division.

With more than 50 theatre roles to his credit, the Broadway shows encompassed "Rhinoceros," "Streamers," "The Penny War," "The Sign in Sidney Brustein's Window," and the musical "Billy." His feature films include "You're a Big Boy Now," "Heaven Can Wait," "Which Way is Up?" and "The New Centurions."

Sweet's most recent role was that of Carl Kanisky, police chief on "Gimme a Break." Additionally, he had made more than 70 appearances on primetime TV productions. He also portrayed Gil on the daytime series "Another World" for four years.

A memorial service will be held on May 11, at 2:30 p.m. at St. Bridget of Sweden Church, 7100 Whitaker Ave. in Van Nuys. His costar from "Gimme a Break," Nell Carter, will deliver the eulogy. He is survived by his wife, actress Iris Braun. In lieu of flowers, donations can be made to the American Cancer Society.

Wolper to produce Ford bio for ABC

David L. Wolper will produce a three-hour telefeature for ABC based on "Times of My Life," the autobiography of former First Lady Betty Ford. The film will be produced in association with Warner Bros. TV.

Karen Hall will adapt "Times of My Life" for TV.

Wolper noted that he had been trying for five years to convince Betty Ford to allow a TV version of her book, and he was "delighted" that she has finally agreed to do it.

lett, Illinois film commissioner and host of Cinepromotion '85, is pleased with this year's record turnout.

Joe Glass, director of the film office in Arkansas — the state that put itself on the map by offering a 5% production rebate — announced plans for yet another effort by his state to promote production.

Glass told The Hollywood Reporter that a committee of major Arkansas bankers, investment counselors, CPAs and lawyers will meet June 22 to discuss funding independent production. He foresees a $2 to 3 million financial pool to be used by local producers for first-quarter or first-half money on low-budget independent features. He estimates that four or five films a year could be generated in Arkansas in this manner.

First-day workshops, panels and seminars concentrated on how film commissioners could cut through bureaucracy and work with their communities.

Lucy Salenger, Illinois Film Office consultant, said, "Dollars talk. Once your state legislature or city political body recognizes how much money can be brought into a state and how many extra jobs and services can be generated by on-location filming, half your battle is over."

Joe O'Kane, San Jose film commissioner, noted, "There is no school, no book, that teaches how to be a film commissioner. You have to be ambidextrous. You must have the lobbyist skills of a politician, be a budget director and tour guide."

Cutting through all the bureaucracy and red tape is the hardest part of being a commissioner, according to Arizona's Bill MacCallum. "It is a 24-hour job."

Once the red tape has been cut, working with local merchants and residents has its own problems. Ken Buchanan, town manager of Florence, Ariz., related an unhappy situation his town had when a TV production company asked to shut down Main Street during the height of the Christmas selling season. Merchants were told the street would be closed for about 15 minutes of film time. That took over a week.

Buchanan said the town learned in a hurry and now is more sophisticated. The recent shooting of "Murphy's Romance" in Florence has generated more than $2 million and $1 million in nearby Mesa. "The residuals outweigh the inconvenience," he said.

Copyright Tribunal under close scrutiny

By THERESA McMASTERS

WASHINGTON — With the departure of Marianne Mele Hall as chairman of the troubled Copyright Royalty Tribunal there are now only two members left at the five-member panel that makes decisions on how to parcel out some $100 million a year it collects in copyright royalty fees.

Hall resigned from the CRT Wednesday under pressure from the White House after a congressional uproar over her role in editing a booklet that was derogatory to blacks and after several members of the House Judiciary subcommittee questioned not only her ability to do a fair job but whether the CRT was able to function at all, given the lack of expertise its members have in copyright laws.

Her resignation prompted Rep. Bob Kastenmeier (D-Wis.), chairman of the House subcommittee with jurisdiction over copyright matters, to question White House appointments and the qualification of those made to the CRT. He said, "We need to consider whether the tribunal can discharge the duties imposed on it and whether it should be reformed or eliminated. The subcommittee intends to look into it in the near future."

Hall's departure leaves only Edward Ray and Mario Aguero out of what is supposed to be a five-member commission. Ray, who has been with the CRT since 1982, is a former record producer and distributor. Aguero, who joined the tribunal one year ago, is a Cuban immigrant and former producer of TV and concerts.

Sen. Charles Mathias (R-Md.), chairman of the Senate copyright subcommittee, who was among the

Cervenka inks for 'Twilight Zone' TV

Exene Cervenka, vocalist and lyricist for acclaimed L.A. rock act X and its offshoot country-folk band the Knitters, will star in a William Friedkin-directed segment on the upcoming CBS "Twilight Zone" TV series. According to executive producer Phil DeGuere, however, the casting coup doesn't mean the program will be "front-loaded with names you see on MTV" to attract a young, pop music-oriented audience.

Nevertheless, while DeGuere says the revived "Twilight Zone" is "not like 'Miami Vice,' " he has commissioned the Grateful Dead to do the show's theme music, which he describes as "essentially abstract, and not a pop tune." DeGuere picked the Dead because "they're world-renowned experts in the Twilight Zone."

In the Friedkin-directed segment, titled "Night Crawlers," Cervenka portrays a waitress named Cheryl who encounters the "ghosts of Vietnam coming back to life," according to DeGuere, who claims the rocker's acting is "first-rate, excellent" and may even debut the series this fall.

The executive producer stressed that

I. FURTHER MATERIALS RELATING TO THE COPYRIGHT ROYALTY TRIBUNAL

A. Correspondence and Memoranda

PETER W. RODINO, JR. (N.J.), CHAIRMAN
JACK BROOKS, TEX.
ROBERT W. KASTENMEIER, WIS.
DON EDWARDS, CALIF.
JOHN CONYERS, JR., MICH.
JOHN F. SEIBERLING, OHIO
ROMANO L. MAZZOLI, KY.
WILLIAM J. HUGHES, N.J.
SAM B. HALL, JR., TEX.
MIKE SYNAR, OKLA.
PATRICIA SCHROEDER, COLO.
DAN GLICKMAN, KANS.
BARNEY FRANK, MASS.
GEO. W. CROCKETT, JR., MICH.
CHARLES E. SCHUMER, N.Y.
BRUCE A. MORRISON, CONN.
EDWARD F. FEIGHAN, OHIO
LAWRENCE J. SMITH, FLA.
HOWARD L. BERMAN, CALIF.
FREDERICK C. BOUCHER, VA.
HAMILTON FISH, JR., N.Y.
CARLOS J. MOORHEAD, CALIF.
HENRY J. HYDE, ILL.
THOMAS N. KINDNESS, OHIO
HAROLD S. SAWYER, MICH.
DAN LUNGREN, CALIF.
F. JAMES SENSENBRENNER, JR., WIS.
BILL MCCOLLUM, FLA.
E. CLAY SHAW, JR., FLA.
GEORGE W. GEKAS, PA.
MICHAEL DEWINE, OHIO
STAFF DIRECTOR
GENERAL COUNSEL
ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

December 18, 1984

Mrs. Marianne Hall, Chairman
Copyright Royalty Tribunal
1111 20th Street
Washington, D.C. 20036

Dear Mrs. Hall:

As you know during the 98th Congress, our Subcommittee devoted much time and attention to examining the operations of the Copyright Royalty Tribunal. Hearings were held and ultimately a bill was favorably reported (H.R. 6164) that, in large part, was designed to improve the functioning of the CRT. In brief, H.R. 6164 authorizes the Tribunal to hire an economist and a general counsel, reduces the number of commissioners from 5 to 3, sets forth objective criteria that the Tribunal shall consider in setting copyright royalty rates for retransmission of distant signals by cable television, and modifies the current law relating to judicial review of final Tribunal decisions.

We would like to solicit Tribunal comment on the sections of H.R. 6164 as they relate directly to your agency. You need not take a position on Title II of the bill, which sets forth provisions concerning retransmission of distant signals and tiering.

As regards the staffing needs of the Tribunal, we are cognizant of the fact that funds have been legislatively appropriated for the past two years. We fully expect the Tribunal to respect the will of the policy-making branch in this regard, and to hire a general counsel and an economist.

In our capacity as ranking members on your oversight Subcommittee, we will persist in our efforts to focus on the staff needs of the CRT through legislative hearings and oversight. However, since you already have the funds available to take action, it is our opinion that additional legislative authorization is not necessary prior to your hiring a staff.

In conclusion, the Copyright Royalty Tribunal is already six years old: a relatively mature age for government agencies. The days are long since past when arguments could be presented to courts or Congress that the youth of the CRT meant that it was entitled to more deference, to be less responsive to the tax dollar and the public interest, and to render a less than satisfactory work product.

Please accept these comments as being constructively made. We look forward to working with you and Commissioners Edward Ray and Mario Aguero during the 99th Congress.

In advance, thank you for your time and cooperation.

Sincerely,

ROBERT W. KASTENMEIER, Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice

CARLOS MOORHEAD, Ranking Minority Member
Subcommittee on Courts, Civil Liberties
and the Administration of Justice

1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

January 29, 1985

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kastenmeier:

On behalf of the Tribunal, I would like to thank you for your time and interest as displayed in your joint letter with Congressman Moorhead of December 18, 1984.

You will be pleased to know that we are actively in the process of hiring a General Counsel, which selection should be completed shortly. Unfortunately, there is not enough money in the budget to hire a full time economist, however, we hope to have some funds available for economic studies, as needed this year. If a bill such as H.R. 6164 is passed we presume additional funds will be allocated to cover a full time economist.

We shall be glad to offer comments on any legislation which impacts on the Copyright Royalty Tribunal. We await your solicitations.

Lastly, Commissioners Ray, Aguero and myself are very dedicated to serving the copyright owners, the industry users and the general public whose collective rights and claims have been entrusted to us. With the continued support of your committee and other federal agencies who have helped us during our transition, we hope to deliver a more than satisfactory work product.

We thank you again for your time, concern and interest.

Sincerely,

Marianne Mele Hall

Marianne Mele Hall
Chairman

MMH/cc

MEMORANDUM FOR THE RECORD

INTRODUCTION

This memo has been generated to provide information on the operations of the Copyright Royalty Tribunal (Tribunal). It does not address the substantative aspects of our hearings or determinations. It discusses the following administrative concerns:

1) Master Case Files
2) Accounting Records
3) Administrative Office Files
4) Reference Materials
5) Legal Counsel
6) Office Staff
7) Public Image

The Copyright Royalty Tribunal commenced operations in November 1977 with five Carter appointees: Thomas Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia.

Thomas Brennan and Douglas Coulter served their full seven year terms until September 26, 1984. Mary Lou Burg served until her death in May 1983. Frances Garcia served her full five year term until September 1982. Clarence James resigned in May of 1981. The Chairmanship rotated by seniority. The senior-most commissioner (Thomas Brennan) served whenever there was a default in the chairmanship.

The present Tribunal consists of three Reagan appointees; Edward Ray, February 1982, Mario Aguero, May 1984 and Marianne Mele Hall, July 1984. Edward Ray and Marianne Mele Hall will serve until September 1989. Mario Aguero will serve until September 1991.

The Chairmanship history is as follows:

Brennan(D)	Nov.	77	-	Dec. 78
Coulter(D)	Dec.	78	-	Dec. 79
Burg(D)	Dec.	79	-	Dec. 80
James(D)	Dec.	80	-	May 81
Brennan(D)	May	81	-	Dec. 81
Garcia(D)	Dec.	81	-	Dec. 82
Ray(R)	Dec.	82	-	Dec. 83
Brennan(D)	Dec.	83	-	Sep. 84
Ray(R)	Sep.	84	-	Dec. 84
Hall(R)	Dec.	84	-	

Upon arriving at the Tribunal in July, 1984 I was immediately impressed with the lack of organization and the paucity of administrative, reference and archive materials. The following represents some of that which I have discovered and some of the actions I have taken.

1) MASTER CASE FILES.

Since 1977, the Tribunal has determined the distribution of over 130 million dollars representing years 1978 - 1982. There will be approximately 150 million dollars to be distributed for years 1983 and 1984 and the amount will continue to grow accordingly. It has also conducted several major rate proceedings, which impact on the record and cable industries, representing 450 million dollars and 80-100 million dollars yearly, respectively.

These hearings are contained in approximately 22 file drawers. These case files are the only official archives on this agency's proceedings. They should contain all correspondence, pleadings, motions, orders, transcripts, copies of evidence, determinations etc. There are numerous documents missing from these 22 drawers.

A cursory review of one file drawer representing the 1982 cable distribution (compiled under Chairman Thomas Brennan in 1984) revealed that the following documents were missing.

1) Exhibits 8-24 for Devotional claimants, Phase I proceeding,
2) Exhibits 2, 4A, 4B, 4C, 5A, 5B, 5C, 7 and 8 for Joint Sports claimants, Phase II proceeding,
3) Exhibits 1-12 for MPAA, Phase II proceeding
4) Exhibits 12-14 for Multimedia, Phase II proceeding,
5) Pre-hearing statement for Joint Sports claimants, Phase II proceeding,
6) Pre-hearing statement for MPAA, Phase II proceeding.

I have approached counsel and the other commissioners and have located and replaced all of these missing documents.

Further examination of this file, in preparation for the appeal now taken in the D.C. Circuit Court reveals that the dispositions of motions before the Tribunal have not been effectively recorded and filed. (See the charts below).

CRT 83-1 - 1982 Cable Royalty Distribution - Motions

PHASE I

Date	Motion	Disposition
9/15/83	NAB Request For Extension of Time	
9/19/83	Reply Comments for NAB 9/15 Petition	

9/19/83	CRT Order for NAB Petition	Denied	
11/4/83	NAB Motion for Stay	Denied	
11/14/83	Petition for Review		?
11/18/83	Reply comments Re: NAB Motion for Stay		
11/18/83	CRT Order for NAB Motion for Stay	Denied	
11/23/83	NAB Moves To Withdraw Petition to Review Partial Distribution		?
5/22/84	Devotionals Request for Extension of Time (verbal)	Granted until 6/11/84	
6/13/84	Settling Parties Request Extension of time		?
7/30/84	Devotional Motion To Strike		?
7/31/84	Opposition to Motion To Strike Settling Parties		?

PHASE II

7/16/84	Motion For Phase II Allocation to NAB of 0.8 Percent of Syndicated Program Royalties		
7/17/84	CRT Order of NAB 7/16 Motion	Granted	
7/17/84	Motion to Dismiss sports Claim of SIN		?
7/20/84	Response of Program Suppliers to Motion to Dismiss		?
7/20/84	Opposition of SIN to Joint Sports Claimants Motion to Dismiss		?
8/31/84	Turner Broadcasting/Motion For Leave to Intervene	Granted	
9/6/84	CRT Order Turner Motion		
9/7/84	Multimedia/Motion to Strike		?
9/14/84	Opposition to Motion to Strike/ Program Suppliers		?

For those motions with a question mark, there appears to be no written order of disposition. It is possible that the disposition was relayed orally in the hearing or over the telephone to interested counsel. Verification of that can possibly be obtained by rereading the transcripts, which should be done. A record of all orders to all motions should be generated, for reference during the appeal and to preserve the precedent.

It should be noted that I was able to easily spot the above deficiencies in this file drawer because I sat in on these hearings. Review of the other 21 drawers of case files will be more difficult since all deficiencies must be deduced by reading the transcripts and through legal reasoning.

In daily operations I have noticed other file deficiencies. For example, in conjunction with an inquiry I discovered that all the original Pre-hearing Statements for the 1980 cable rate determination were missing. I have made copies of the copies in the public information file, as the originals appear lost.

I have also discovered that the Proposed Findings of Fact for the 1982 cable rate determination is missing. Likewise, the Consumer Price Index file and computations for the PBS yearly adjustment for the years 1979 - 1983 is missing. I have not verified if these two files have been located subsequently.

This week I have discovered that a November 17, 1983 pleading, served on us for the 1982 jukebox appeal, taken in the 2nd Circuit, is missing. Also in that file there is an Order to a motion (granting extension of time for submission of justification of evidence), but there is no motion in the file. Apparently the motion is missing or was never filed, however we have no way of knowing which occurred.

These discoveries, which were made in the course of daily operations and not upon systematic review, have cast serious doubt on the recordkeeping over the past seven years. Extensive systematic review of all 22 file drawers should be conducted.

On November 19, I brought these concerns to the attention of the other two commissioners and suggested that we employ the voluntary services of a law student as a 1985 spring semester extern to review and organize all case files. I was asked to write a memorandum justifying the use of volunteer law students, in government. My memorandum could not be completed in time for the December 1 deadline so I shall present it in time for the 1985 fall semester. (It should be noted that a student from UCLA Communications Law department was willing to pay his own airfare and expenses to be here in January for this externship. His undergraduate major was economics. His law work concentrated in Communications law and new technologies such as DBS - Direct Broadcast Satellite).

In addition, all the public information files which are the only duplicates of our case archives are disordered and need a thorough review.

2) ACCOUNTING RECORDS

In trying to make further partial distributions on 1979, 1980, 1981, and 1982 cable distribution determinations, I have discovered that the history on the distribution of close to 120 million dollars has never been compiled or preserved in the central files. Apparently Commissioner Douglas Coulter made all the mathematical computations and he left no central record. I am now collecting and compiling past orders and sketchy accounting files to generate a comprehensive central file. It has taken over two weeks and is not yet completed.

Further, since we are dealing with tens of millions of dollars, we calculate to 5 figures beyond the decimal point. This means that we are actively working in numbers that can include 13 places. We should have an accountant to handle these types of computations. In the interim I am trying to get access to an accountant at the Library of Congress to verify my compu-

tations. Further, since we are still distributing 1978 funds, precise operational recordkeeping for at least ten years is probably necessary. The Tribunal should consider hiring an accountant.

3) ADMINISTRATIVE OFFICE FILES

A. Testimony before Congress

A cursory review of the administrative office files of our hearings revealed that we did not have copies of all of our budget or oversight hearings inhouse. I have now collected either official testimony or photocopies of all. (See charts below). I have not had time to review if we have any legislative hearings in testimony or draft form inhouse. My limited understanding indicates that there is very little here. This should be researched, collected and filed for the Commissioner's use and for preservation in our archive. I am establishing a relationship with Gilbert Gude of the Congressional Research Service. I believe his organization may be able to assist in this search and compilation.

BUDGET HEARINGS - HOUSE OF REPRESENTATIVES

			Not in house upon my arrival	Archive Printed	Archive Photocopy	Draft in File
2/8/77	FY 78			X		
2/22/78	FY 79	Brennan	X		X	X
2/14/79	FY 80	Coulter	X		X	X
2/21/80	FY 81	Burg	X		X	X
3/2/81	FY 82	James	X		X	
3/4/82	FY 83	Garcia	X		X	X
3/1/83	FY 84	Ray		X		
2/8/84	FY 85	Brennan		X		

BUDGET HEARINGS - SENATE

3/1/77	FY 78			X		
3/20/78	FY 79	Brennan		X		X
2/21/79	FY 80	Coulter	X	X		X
3/4/80	FY 81	Burg	X	X		X
3/11/81	FY 82	James			X	
5/14/82	FY 83	Garcia		X		
3/10/83	FY 84	Ray		X		X
3/84	FY 85	Brennan		X		

OVERSIGHT HEARINGS - HOUSE

4/9/79	96th Sess		X	X		X
6/11/81	97th Sess			X	X	
3/3/83	98th Sess		X	X		X

OVERSIGHT HEARINGS - SENATE

4/29/81	Brennan	97th Sess	X	
3/10/83	Ray	98th Sess	X	X

B) Correspondence files

I have just completed collecting all the chronological files of the chairman and placing same in a central research corner. They appear complete.

The central correspondence files for the Tribunal including correspondence with the legislative bodies, other agencies, interested parties and counsel, public inquiries and general office business correspondence are extremely sketchy after 1980. There appears to be no way to determine what is missing. My concern now is to try and collect all that is available and place it in one central file for the use and history of the Tribunal.

4) REFERENCE MATERIALS

Our library contains very limited reference materials. Upon arriving I ordered the 1984 pocketpart for Title 17, USC, the Copyright Act, as our only copy had a 1979 pocketpart.

I ordered the current 37 CFR which contains our rules of procedure. The version inhouse and being distributed to the public had been superceded.

I ordered Title 47, USC, the Communications Act and the current pocketpart as the only copy inhouse is the 1970 USCA, (superceded). It has not arrived.

There was one law review article on the Tribunal, inhouse. I have determined that over thirty have been written and I will strive to purchase these.

I have purchased the last two volumes (1977 & 1978) of Copyright decisions printed by the Copyright Office, to update our series. I have compiled our determinations into one notebook for the General Counsel's staff of the Copyright Office so they may include our determinations in their series.

We read approximately 15 trade journals on a periodic basis. Files used to be kept of the articles of interest to the Tribunal in these periodicals. I have discovered that this collection became rather sketchy after about 1982. I had the files repaired and organized and have re-instituted the practice of clipping and preserving relevant articles for use, research and archival purposes.

I have researched our legislative history and collected several copies each of the House Report 94-1476, Senate Report 94-473 and Conference Report 94-1733 for the Commissioners' use and for our archives.

I have reviewed the miscellaneous materials in the library and filed it into categorical files, two of which were abstracted by a volunteer law student. He reviewed the Australian and British Copyright Royalty Tribunal materials but found that our files contained information only as current as 1980. There are several more such files which need to be abstracted and updated for basic information.

There is enough library work to employ a voluntary legal extern on a permanent basis. I strongly recommend this.

5) LEGAL COUNSEL

We have retained outside counsel to do a review of our internal policies and of our hearing procedures. We expect this report in January. Meanwhile we have solicited comments on our procedure from interested parties and we shall analyze those comments along with our commissioned report to possibly restructure our rules of procedure and our internal policy practices.

I have discovered in my visits with legislators that both House and Senate Judiciary Committees have strongly advised that the Tribunal hire counsel and have appropriated funds for the FY 84 and FY 85 specifically for that purpose. Apparently the earlier Commissioners felt that a General Counsel was not necessary.

I became chairman on December 1 and on December 2 we began advertising to hire a General Counsel. We closed receipt of resumes on December 14. Needless to say we were deluged with approximately fifty extremely impressive resumes. I had hoped to start interviews on December 17 so that we might have counsel inhouse by January, however, the other commissioners felt that we should not begin interviews until January 3. Interviews have been set up in accordance with their wishes. I am hopeful that we will make our choice by January 11.

6) OFFICE STAFF

In 1977 the Tribunal determined that each commissioner shall have one confidential aide. We are presently staffed with three confidential aides. I hired my aide in August 1984. The other two aides were hired in 1977 and 1980 and have been rehired when their respective original commissioners retired. In 1977 the Tribunal also determined that each aide shall report only to their respective Commissioner despite the legislative mandate and history that states the aides shall work for the Tribunal. This segmentation of staff probably contributed to the incomplete central files. Each aide kept files for their respective Commissioner and it is apparent that much of these

files were taken with each commissioner as he and his aide departed. No one in particular was charged with maintaining a central file for the Tribunal. Therefore, it was done haphazardly if at all.

The Chairman's aide was charged with maintaining the central case files however that person changed each year. Apparently none had any paralegal training, therefore the case files for each year are organized differently. This makes retrieval of information for precedent-following purposes extremely difficult.

The budget function has remained with one aide for several years, however she reports only to her Commissioner, so requests for budget information must go through that Commissioner. Nothing is automatically circulated.

An incoming Commissioner who brings his own aide, as I did, is greatly disadvantaged by the state of the central files and the segmentation of staff. If material is not obvious in the central file, the new Commissioner must ask a more senior Commissioner to ask his aide to retrieve the information. The new Commissioner must then generate his own file. I have been working since Sept 26 (when Commissioner Coulter and Brennan left) on generating central files. The two senior aides have been resistant. My aide has been more successful in locating missing documents (such as testimony, etc.) by going to outside sources such as outside counsel, legislators' staffs, agency staffs, etc. The process is slow and solely dependent on the time and graciousness of outside sources. There is still a great deal of work to be done to reconstruct seven years of agency practice, policy and record-keeping.

My efforts to organize the central files and the staff into areas of expertise to maximize efficiency and communication have been resisted by two of the three aides. However, I feel that such a small agency must be organized around central files and clear delegation of work per staff member, to maximize the use of personnel and minimize recordkeeping and storage. I shall continue working towards these goals despite the inertia.

7) PUBLIC IMAGE

Lastly I have discovered that this Tribunal has had a poor image within the Congress, within Federal agencies, before the industry, the copyright owners and the public. Part of the problem has been an isolationist attitude. I have made courtesy calls to the following offices for the purpose of introducing myself, explaining our functions, and eliciting support, particularly of legislators and federal agencies.

1) Counsel Staff to the Judiciary, U.S. Senate,
2) Counsel Staff to the Judiciary, U.S. House of Representatives,
3) Several Congressmen who oversee our Tribunal,

4) I am awaiting return calls from several Senators who oversee our Tribunal,
5) Chairman, FCC,
6) OTA Project Director of Intellectual Property Rights study ($620,000 study commissioned by Congress),
7) Gilbert Gude, Director of Congressional Research Service,
8) General Counsel, Copyright Office and other Copyright Office Counsel,
9) Library of Congress, administrative officers (who handle our administrative functions),
10) Counsel, Justice Department (who represent us),
11) Many distinguished Copyright and Communications Counsel, (when not involved in hearings).

I am overwhelmed by the positive and supportive responses I have received from all whom I have visited. This encourages me to believe we can make the changes that are necessary to make this Tribunal more effective and successful.

Respectfully submitted,

Marianne Mele Hall
Chairman
Copyright Royalty Tribunal

December 31, 1984

1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

April 16, 1985

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kastenmeier:

In further response to your joint letter with Congressman Moorhead of December 28, 1984, enclosed find draft language for Title I of H.R. 6164. Some of the language reflects the consensus of the Tribunal. Other examples are the individual views of the Chairman. Further individual views may be forthcoming from the other Commissioners. We hope this documentation will serve as guidance for future legislative proposals regarding the Copyright Royalty Tribunal.

Thank you for your time and interest in the CRT. If there is anything more that you need, please call on us. As always, it is a pleasure to deal with you and your very competent staff.

Sincerely,

Marianne Mele Hall
Chairman

MMH/cc

1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

April 16, 1985

The Honorable Carlos Moorhead
Ranking Minority Member
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Moorhead:

In further response to your joint letter with Congressman Kastenmeier of December 28, 1984, enclosed find draft language for Title I of H.R. 6164. Some of the language reflects the consensus of the Tribunal. Other examples are the individual views of the Chairman. Further individual views may be forthcoming from the other Commissioners. We hope this documentation will serve as guidance for future legislative proposals regarding the Copyright Royalty Tribunal.

Thank you for your time and interest in the CRT. If there is anything more that you need, please call on us.

Sincerely,

Marianne Mele Hall

Marianne Mele Hall
Chairman

MMH/cc

This possible draft legislation reflects the opinion of the Chairman only. Commissioner Ray does not concur and will subsequently submit his comments on these issues.

Membership of the Tribunal

Sec. 101 (a) The first sentence of section 802(a) of Title 17, United States Code, is amended to read as follows: "The Tribunal shall be composed of three Commissioners appointed by the President, by and with the advice and consent of the Senate, for a term of seven years each; each Commissioner shall be either a member of the bar of any of the fifty states, the District of Columbia, U.S. territory, or the Commonwealth of Puerto Rico, or a person considered by the President and Senate to be an expert on copyright and/or communications law.

(b) The amendment made by subsection (a) of this section shall take effect on _____ , but shall not affect the terms of office of the Commissioners of the Copyright Royalty Tribunal remaining on such effective date. At that time the Tribunal should be composed of five Commissioners. Three of the terms shall expire in 1991 and two in 1989. Section 802(b) shall be deleted and replaced with the following 802(b), "Of the five Commissioner positions, one 1989 position shall be perpetuated with a five year extension to 1994. Two of the 1991 positions shall be perpetuated, one to 1996 and one to 1998. One 1989 position and one 1991 position shall be eliminated. Subsequent

terms shall be seven years each.".

(c) Section 802(c) of title 17, United States Code, is deleted and replaced with the following section 802(c). "The Chairman shall be appointed by the President, from among the members of the Tribunal. The Chairman shall be a member of the bar of any of the fifty states, the District of Columbia, any U.S. territory or the Commonwealth of Puerto Rico. An individual may be appointed as a member of the Tribunal and as Chairman at the same time.

(d) Section 802(d) of title 17, United States Code, shall be added to state "No vacancy in the Tribunal shall impair the right of the remaining Commissioners to exercise all the powers of the Tribunal but two members of the Tribunal shall constitute a quorum for the transaction of business.

(e) The following Sections 802(e)(f) and (g) shall be added:

(e) The Chairman of the Tribunal shall be the principal executive officer of the Tribunal, and he shall exercise all of the executive and administrative functions of the Tribunal, including functions of the Tribunal with respect to (A) the appointment and supervision of personnel employed under the Tribunal (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Tribunal, and (C) the use and expenditure of funds.

(f) In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Tribunal and by such regulatory decisions, findings and determinations as the Tribunal may by law be authorized to make.

(g) The Chairman may employ such other officers and employees as are necessary in the execution of the Tribunal's functions.

There has been some discussion as to requiring that Commissioners be attorneys. This chart (taken from GAO report) may prove helpful. See last two Columns.

Table 4

Selected Features of the Copyright Royalty Tribunal and Six Other Federal Commissions

Organization	Commissioners	Commissioners experienced in work of the Commission	Criteria for commissioner selection in law	Term of commissioner	Selection and term of chairperson	Office of general counsel	Commissioners have access to expert staff	Subpoena power	Survey conducted September 1984 by telephone: Does law require Comm. be lawyers	Are all Comm. lawyers
Copyright Royalty Tribunal	5	1 of 5	No	7 years	Rotated annually	No	No	No	no	no
Federal Communications Commission	7	3 of 7	No	7 years	Selected by President for full term	Yes	Yes	Yes	no	no
Federal Maritime Commission	5	Most have some experience	No	5 years	Selected by President for full term	Yes	Yes	Yes	no	no
Federal Trade Commission	5	Most have some experience	No	7 years	Selected by President for full term	Yes	Yes	Yes	no	no
Foreign Claims Settlement Commission	3*	2 of 3	No	3 years	Selected by President for full term	Yes	Yes	Yes	yes	yes
Interstate Commerce Commission	11	4 of 5 (6 vacancies)	No	7 years	Selected by President for full term	Yes	Yes	Yes	no	no
Occupational Safety and Health Review Commission	3	All are experienced	Yes	6 years	Selected by President for full term	Yes	Yes	Yes	yes	yes

* Only the Chairperson is full time. Other commissioners serve on an as-needed basis.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

April 8, 1985

OFFICE OF
THE CHAIRMAN

Honorable Marianne M. Hall
Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W. - Suite 450
Washington, D.C. 20036

Dear Chairman Hall:

You have asked what are the usual arrangements in agencies headed by a collegium of advice-and-consent appointees for the allocation of responsibilities between the chairman and the members of the agency. You point out that although the statute establishing the Copyright Royalty Tribunal, P.L. 94-553, §101, 17 U.S.C. §802, provides for a rotating one-year chairmanship, nothing is said regarding the powers and responsibilities of the chairman vis-a-vis the other members of the Tribunal.

While the arrangements vary somewhat among the agencies, it is almost the universal practice to delegate by law the principal administrative responsibilities to the chairman, subject to the right of the members to set general policy. Fairly typical is the arrangement in the Federal Trade Commission, as prescribed by Reorganization Plan No. 8 of 1950, 15 U.S.C. §41 note:

> §1. Transfer of Functions to the Chairman
>
> (a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the Federal Trade Commission, hereinafter referred to as the Commission, to the Chairman of the Commission, hereinafter referred to as the Chairman, the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds.
>
> (b)(1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

> (2) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.
>
> (3) Personnel employed regularly and full time in the immediate offices of members of the Commission other than the Chairman shall not be affected by the provisions of this reorganization plan.
>
> (4) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

This reorganization plan was adopted in response to the recommendations of the First Hoover Commission. Very similar provisions have been adopted for other major independent regulatory commissions, either by reorganization plan, see 15 U.S.C. §78d note (SEC); or by statute, see 49 U.S.C. §10301(f) (ICC). Furthermore, recent statutes establishing new commissions, while deviating somewhat from the 1950 model, have specifically vested administrative responsibilities in the chairman. See 15 U.S.C. §2053 (CPSC); 7 U.S.C. §4a (CFTC); 49 U.S.C. App. §1902(b) (Natl. Transportation Safety Board).

The only collegial agency I know of where the chairman is not delegated broad administrative powers is the Federal Election Commission, 2 U.S.C. §437c. The FEC also has a one-year rotating chairmanship. However, to provide for continuity in administration the Federal Election Campaign Act provides for a staff director and a general counsel who perform most of the administrative functions.

In 1980 hearings were held by the Committee on House Administration of the House of Representatives to consider certain questions relating to the structure and operation of the Federal Election Commission. At this hearing I testified, as did Professor David Welborn, who had done a study for the Conference on chairman/member relations at the major regulatory commissions. I enclose copies of our testimony. (The last page of my testimony deals with Commission structure.) You will note that in arguing for a "strong chairmanship" Professor Welborn pointed to the following advantages:

> (1) [T]he time of members for important substantive matters and larger administrative questions is conserved, because routine business is handled by the chairman; (2) the provision of a central point of access and responsibility at the commission level enables staff to more efficaciously raise administrative problems and secure their resolution; (3) a chairman with clear responsibility and tenure beyond a year is more inclined and able to tackle complex administrative dilemmas and plan and develop improved management systems in association with the staff; (4) a strong chairmanship serves as a means for linking commission-level policy activity and day-to-day operations to the benefit of both; (5) as spokesman for the commission, a strong chairman can provide priorities and clear policy direction for the staff; (6) as a natural outgrowth of their central place in agency administration,

chairmen tend to perform important functions in policy planning and management, such as identifying problems, setting priorities, and moving processes along, which otherwise are likely to fall into the crack separating commission and staff; and (6) [sic] as the principal voice of the agency, the external liaison activities in which strong chairmen typically engage facilitate communications between the agency and its constitutencies, which in turn generally has positive effects on regulatory policy and operations.

As you know, I am not sufficiently familiar with the work of the Copyright Royalty Tribunal to judge to what extent the foregoing discussion is relevant to the experience in your agency. However, there seems to be sufficient similarity to the problems addressed in the 1980 hearing to warrant my bringing the enclosed materials to your attention.

Sincerely,

Richard K. Berg

Richard K. Berg
General Counsel

Enclosures

Statement of David M. Welborn
Department of Political Science
University of Tennessee
Knoxville, TN

THE CHAIRMANSHIP OF THE FEDERAL ELECTION COMMISSION

Task Force on Administration
and Clearinghouse
Committee on House Administration
U.S. House of Representatives
May 14, 1980

exercise its broader administrative responsibilities, and avoid compromising its position as the center for substantive decision-making.

SPECIFICATIONS

In conclusion, it seems to me that altering the nature of the FEC chairmanship is a necessary and desirable first step in increasing the commission's administrative and policy capacities. Presidential appointment is the preferred means of selection. The tenure question is a troublesome one. The Harvard recommendation is for a four year term. On balance I would prefer service as chairman at the pleasure of the President. For reasons stated above, I think it highly unlikely that such an arrangement would itself encourage political mischief or threaten to compromise or skew commission implementation of the law. Furthermore, appointment for a fixed term lessens accountability and makes it difficult to correct problem situations. Under such conditions, deficiencies in performance, whether from presidential, congressional or other perspective, would be most difficult to remedy. Given the importance of the commission and its effects on the political system, this would be a most unfortunate situation.

There remains specification of the chairman's authority and the limits to be placed upon it. A number of statutes employ similar language which has served quite well over the years and covers the necessary points. That found in the reorganization plan for the Interstate Commerce Commission is illustrative. There is vested in the chairman

> the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds.

> In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.
>
> The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.
>
> Personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman shall not be affected by... (these) provisions.
>
> Requests for regular, supplemental or deficiency appropriations for the Commission...shall require the approval of the Commission....

Such provisions establish a basic and workable framework for agency administration which centralizes authority, allows commission involvement in critical determinations, yet is sufficiently flexible to allow for future adaptation in the conduct of agency affairs as circumstances change.

HEARINGS BEFORE THE
COMMITTEE ON HOUSE ADMINISTRATION'S TASK FORCE
ON ENFORCEMENT

June 18, 1980

Testimony of Stephen L. Babcock, Executive Director,
and Richard K. Berg, Executive Secretary, Office of the Chairman
of the Administrative Conference of the United States

Of course, it is fair to ask another question: What is wrong with the Commission proceeding by way of advisory opinion rather than by rule? Obviously, one disadvantage from Congress' point of view is that the Congressional review process provided for rules is avoided. But for critics of statutory provisions for "legislative veto" of agency rules—and the Administrative Conference has criticized such provisions, Recommendation 77-1, 1 C.F.R. § 305.77-1—avoidance of Congressional review is hardly a calamity, and, of course, Congress is free to overturn by legislation any advisory opinion with which it disagrees.

But there are disadvantages where the advisory opinion process is unduly emphasized at the expense of the rulemaking process, and my previous testimony has suggested some of them. First, concentration on the facts of one or a few specific cases may skew the agency's perception of the overall problem. The advisory opinion process is likely to encourage a cautious, narrow and incremental approach in which each case decides as little as possible. Sometimes this is desirable, but usually an agency would be better advised to deal with a problem comprehensively, in the interests both of organizing its own thinking and of providing maximum guidance to the regulated community.

Second, the rulemaking process is more open. Comprehensive rules adopted after the full notice-and-comment process of 5 U.S.C. § 553 are likely to reflect a wider and more considered range of information and comments from interested persons than can be obtained in the notice-and-comment process provided in section 437f.

Finally, rulemaking is a means whereby the agency can seize control of its agenda and address those problems which it believes need resolution.

For these reasons the Commission should be encouraged to use its rulemaking authority, and Congress should carefully evaluate those features of the statutory scheme which appear to provide disincentives to rulemaking.

Let me close with a few words on the subject of the organization of the Commission.

---

vigorous in pursuing finite matters where its mandate is clear while allowing difficult policy questions to languish" (p.135).

I have read with great interest the testimony submitted to the Task Force by Professor Dave Welborn and found it persuasive. As you know, a few years ago Dave did an especially valuable study for the Administrative Conference on the subject of the structure and management of the collegial regulatory agencies and I commend that study to your attention.

Of course, revising the structure of the FEC to provide for a strong chairman, whether with a fixed term or serving at the pleasure of the President, is an obvious prescription for a more activist, more effectively run Commission. In a sense, this begs the major question, which is, What kind of Commission does Congress want? The Federal Election Campaign Act reflects an obvious and an understandable concern that the Act not be administered in such a manner as to serve the interests of one political party over another. Therefore, Congress provided, quite deliberately, one must conclude, for a "weak" Commission, in which every action of any significance commands a substantial consensus among the members. There are certain inescapable costs of such a governing structure in an agency. At a minimum there is a substantial risk that the attention of the members will be diverted from long term planning and the resolution of hard policy questions. They will get involved, and probably bogged down, in routine matters and administrative details that could better be handled by the chairman individually or even delegated to staff. I cannot say that this has in fact occurred at the FEC, merely that the statutory structure, and, particularly, the provisions of section 437c(c) make it very likely.

If the Federal Election Commission can be analogized to an automobile, any consideration of the Election Campaign Act must conclude that more legislative attention was lavished on the brakes than on the engine. Without endorsing any particular design change, we suggest that if the Task Force determines that performance has been inadequate, adding more power to the engine is the way to go.

We are grateful for the opportunity to appear today and will be very glad to attempt to answer your questions.

This possible draft legislation reflects the opinion of the Chairman only. Commissioner Ray does not concur and will subsequently submit his comments on these issues.

Staff of the Tribunal

SEC. 102. (a) Section 805 of title 17, United States Code, is to be amended by deleting section 805(a) and replacing it with the following new subsections:

"(a) The Chairman, subject to the approval of the Commission shall appoint and fix appropriate compensation for a general counsel and a chief economist and sufficient staff to carry out the functions of said offices."

(b) The appointments required by section 805(a) of title 17, United States Code, as amended by subsection (a) of this section, shall be effective no earlier than _____.

SEC. 102(b) Section(b) of 805 of Title 17 is redesignated as section (c).

This possible draft legislation reflects the opinion of the Chairman only. Commissioner Ray concurs with sections (a) & (b) but may submit subsequent comments.

Judicial Review of Tribunal Decisions

SEC. 103. (a) Section 810 of Title 17, United States Code, is amended by inserting after the second sentence the following: "Such judicial review shall not be affected by the creation of the Tribunal in the legislative branch.".

(b) The amendment made by subsection (a) of this section shall not apply to appeals filed before the date of the enactment of this Act.

This possible draft legislation reflects the opinion of the Chairman only. Commissioner Ray does not concur and will subsequently submit his comments on these issues.

Language in Section 104(b) may be superfluous. It serves to reinforce the language in Section 201(a) which the Chairman endorses.

Tribunal Guidelines

SEC. 104 (a) Section 801(b)(B) of title 17, United States Code, is amended in the second sentence by striking out "In" and all that follows through "users:" and inserting in lieu thereof the following: "In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, and any subsequent adjustment to those rates pursuant to section 804(b), The Copyright Royalty Tribunal shall consider the broad policy objectives set forth in clause (1) of subsection 801(b) and shall apply said policy by considering, among other factors, (1) the extent to which television broadcast stations compensate copyright owners for the secondary transmission of their signals by cable systems located outside their respective local service areas, (2) the extent to which television broadcast stations are compensated by advertisers for the secondary transmission of their signals by cable systems, (3) the competitive harm to television broadcast stations by the importation of distant television signals into their markets, (4) the extent to which the value to cable systems of additional distant signals decreases or increases as such signals are carried, (5) the impact of the rates on cable subscribers both as to the availability and as to cost of receiving copyrighted materials, (6) the impact of the rates on

competition between cable and television broadcast stations, and (7) the impact of rates on the economies of industries, with regard to availability, marketability and cost of delivery of copyrighted works to viewers.".

SEC. 104(b). Section 801(2)(B) shall be amended by adding the following language at the end thereof:

"However the protection embodied in the aforementioned proviso shall not be used to mandate adjustment for those signals not specifically exempted by the Federal Communication Commission as described under (i) and (ii) of this subsection.".

(c) Section 801(b)(2)(C) of title 17, United States Code, is amended by adding at the end thereof the following new sentence: "In determining the reasonableness of such rates, and any subsequent adjustment to those rates pursuant to section 804(b), the Copyright Royalty Tribunal shall consider the broad policy objectives set forth in clause (1) of this subsection 801(b) and the factors set forth in subclause (B) of this clause.".

The Tribunal feels that the subpoena power is necessary to our hearing procedures. It should probably be included between Section 804 and 805, 17 USC. Possible draft language appears below:

Subpoena Power of the Tribunal

(a) For the purposes of any proceeding conducted pursuant to Section 801 of this Act, the Tribunal shall have the power to require by subpoena the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.

(b) Motions to limit or quash any subpoena shall be filed with the Tribunal within ten (10) days after service of the subpoena. The Tribunal will consider and act upon compulsory process under this section with due regard for the public interest, and the established legal standards for determining whether justification exists for the disclosure of information which may constitute trade secrets or privileged or confidential commercial or financial information.

(c) The production of such documentary evidence may be required from any place in the United States at any designated place of hearing. In the case of disobedience to a subpoena, the Tribunal, or any party to a proceeding before the Tribunal, may invoke the aid of any court of the United States in requiring the production of documents under the provisions of this section.

(d) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any party to a proceeding before the Tribunal, issue an order requiring such party to produce such documents, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The Chairman feels that the Licensing Division of the Copyright Office should be transferred to the Copyright Royalty Tribunal to facilitate the functioning of this office and to minimize or eliminate questionable communications between the Copyright Office and the CRT. This is the opinion of the Chairman and does not reflect the views of the Tribunal. Commissioner Ray does not concur and will subsequently submit his comments on this issue. Possible draft language appears below. Also note that changes in sections 111, 115, 116, 118 and 801 will be necessary to conform Title 17 to this amendment. See attached mark-up of relevant Title 17 provisions.

Licensing Division of the Tribunal

(a) As of _____ , there shall be established in the Copyright Royalty Tribunal a Licensing Division. The Licensing Division shall perform all the functions assigned to it under Sections 111, 115, 116, and 118 including:

(1) receiving the royalty fees and statements of accounts required by Section 111;

(2) receiving the royalty fees and applications for certificates required by Section 116;

(3) examining the statements of account and the applications for certificates, and after deducting the reasonable operating costs pursuant to Sections 111 and 116, depositing the balance of the fees in an interest-bearing account with the Treasury of the United States for later distribution to copyright owners by the Tribunal;

(4) recording the original notice of intention to obtain a compulsory license for making and distributing phonorecords as required by Section 115;

(5) assessing and collecting fees for the recordation of

notices in subsection (4) above;

(6) recordation of voluntary license agreements between copyright owners and public broadcasting entities as required by Section 118.

(7) assessing and collecting fees for the recordation of agreements in subsection (6) above.

(b) The Tribunal shall have the authority to adopt such regulations as necessary to carry out the functions of the Licensing Division, including the imposition of reasonable surcharges or interest on those persons who fail to deposit timely, or accurately the royalty fees required by Sections 111 and 116.

(c) Consultation between the CRT, and the Copyright Office, shall be limited to that consultation which is authorized by statute. Minutes or other written record of such consultation shall be readily available to the public and interested parties during business hours.

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the ~~Copyright Office~~ a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the ~~Register of Copyrights, after consultation with the~~ Copyright Royalty Tribunal ~~(if and when the Tribunal has been constituted)~~, shall prescribe by regulation to carry out the purpose of this clause. Notice. Licensing Division of the Copyright Royalty Tribunal

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the ~~Register of Copyrights, in~~ accordance with requirements that the ~~Register shall, after consultation with the~~ Copyright Royalty Tribunal ~~(if and when the Tribunal has been constituted)~~, prescribe by regulation— Licensing Division

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the ~~Register of Copyrights may, after consultation with the~~ Copyright Royalty Tribunal ~~(if and when the Tribunal has been constituted)~~, from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and Statement of account. Nonnetwork television programming.

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows: Total royalty fee.

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programing of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

Licensing Division

(3) ~~The Register of Copyrights~~ shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by ~~the Copyright Office~~ under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. ~~The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.~~

Licensing Division

Statements of account, submittal to Copyright Royalty Tribunal.

Royalty fees, distribution.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programing consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures: Distribution procedures.

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

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

(e) NONSIMULTANEOUS SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does

copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords 17 USC 115.

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the ~~Copyright Office~~. The notice shall comply, in form, content, and manner of service, with requirements that the ~~Register of Copyrights~~ shall prescribe by regulation.

Licensing Division of the Copyright Royalty Tribunal

Copyright Royalty Tribunal

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

Failure to serve or file notice, penalty.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after

being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.

Royalty payments. Regulations.

(3) Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the ~~Register of Copyrights~~ shall prescribe by regulation. The ~~Register~~ shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

Copyright Royalty Tribunal

Tribunal

(4) If the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

17 USC 116.

§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

(a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless—

(A) such proprietor is the operator of the phonorecord player; or

(B) such proprietor refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

(b) RECORDATION OF COIN-OPERATED PHONORECORD PLAYER, AFFIXATION OF CERTIFICATE, AND ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available on that particular phonorecord player, the operator shall file in the ~~Copyright Office~~, in accordance with requirements that ~~the Register of Copyrights, after consultation with~~ the Copyright Royalty Tribunal ~~(if and when the Tribunal has been constituted)~~, shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and deposit with the ~~Register of Copyrights~~ a royalty fee for the current calendar year of $8 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.

(B) Within twenty days of receipt of an application and a royalty fee pursuant to subclause (A), the ~~Register of Copyrights~~ shall issue to the applicant a certificate for the phonorecord player.

(C) On or before March 1 of the year in which the certificate prescribed by subclause (B) of this clause is issued, or within ten days after the date of issue of the certificate, the operator shall affix to the particular phonorecord player, in a position where it can be readily examined by the public, the certificate issued by the ~~Register of Copyrights~~ under subclause (B), of the latest application made by such operator under subclause (A) of this clause with respect to that phonorecord player.

(2) Failure to file the application, to affix the certificate, or to pay the royalty required by clause (1) of this subsection renders the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(c) DISTRIBUTION OF ROYALTIES.—(1) The ~~Register of Copyrights~~ shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the ~~Copyright Office~~ under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. ~~The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).~~

(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final,

Licensing Division of the Copyright Royalty Tribunal

Licensing Division

Licensing Division

Licensing Division

Licensing Division of the Copyright Royalty Tribunal

Licensing Division

Statements of account, submittal to Copyright Royalty Tribunal. Claims.

except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(3) After the first day of October of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1). If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

Distribution procedures.

(4) The fees to be distributed shall be divided as follows:

(A) to every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

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

Regulations.

(5) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited.

Civil action.

Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

(d) CRIMINAL PENALTIES.—Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes

such a certificate to a phonorecord player other than the one it covers, shall be fined not more than $2,500.

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

(1) A "coin-operated phonorecord player" is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An "operator" is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

§ 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems 17 USC 117.

Notwithstanding the provisions of sections 106 through 116 and 118, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting 17 USC 118.

(a) The exclusive rights provided by section 106 shall, with respect to the works specified by subsection (b) and the activities specified by subsection (d), be subject to the conditions and limitations prescribed by this section.

(b) Not later than thirty days after the Copyright Royalty Tribunal has been constituted in accordance with section 802, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d) with respect to published nondramatic

Notice, publication in Federal Register.

musical works and published pictorial, graphic, and sculptural works during a period beginning as provided in clause (3) of this subsection and ending on December 31, 1982. Copyright owners and public broadcasting entities shall negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results. Notwithstanding any provision of the antitrust laws, any owners of copyright in works specified by this subsection and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.

(1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may, within one hundred and twenty days after publication of the notice specified in this subsection, submit to the Copyright Royalty Tribunal proposed licenses covering such activities with respect to such works. The Copyright Royalty Tribunal shall proceed on the basis of the proposals submitted to it as well as any other relevant information. The Copyright Royalty Tribunal shall permit any interested party to submit information relevant to such proceedings.

(2) License agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Tribunal: *Provided*, That copies of such agreements are filed in the ~~Copyright Office~~ Licensing Division of the Copyright Royalty Tribunal within thirty days of execution in accordance with regulations that the ~~Register of Copyrights~~ Copyright Royalty Tribunal shall prescribe.

Rates and terms, publication in Federal Register.

(3) Within six months, but not earlier than one hundred and twenty days, from the date of publication of the notice specified in this subsection the Copyright Royalty Tribunal shall make a determination and publish in the Federal Register a schedule of rates and terms which, subject to clause (2) of this subsection, shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether or not such copyright owners and public broadcasting entities have submitted proposals to the Tribunal. In establishing such rates and terms the Copyright Royalty Tribunal may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in clause (2) of this subsection. The Copyright Royalty Tribunal shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities.

(4) With respect to the period beginning on the effective date of this title and ending on the date of publication of such rates and terms, this title shall not afford to owners of copyright or public broadcasting entities any greater or lesser rights with respect to the activities specified in subsection (d) as applied to works specified in this subsection than those afforded under the law in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) The initial procedure specified in subsection (b) shall be repeated and concluded between June 30 and December 31, 1982, and at five-year intervals thereafter, in accordance with regulations that the Copyright Royalty Tribunal shall prescribe.

(d) Subject to the transitional provisions of subsection (b) (4), and to the terms of any voluntary license agreements that have been negotiated as provided by subsection (b)(2), a public broadcasting entity may, upon compliance with the provisions of this section, including the rates and terms established by the Copyright Royalty Tribunal under subsection (b)(3), engage in the following activities with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works:

(1) performance or display of a work by or in the course of a transmission made by a noncommercial educational broadcast station referred to in subsection (g); and

(2) production of a transmission program, reproduction of copies or phonorecords of such a transmission program, and distribution of such copies or phonorecords, where such production, reproduction, or distribution is made by a nonprofit institution or organization solely for the purpose of transmissions specified in clause (1); and

(3) the making of reproductions by a governmental body or a nonprofit institution of a transmission program simultaneously with its transmission as specified in clause (1), and the performance or display of the contents of such program under the conditions specified by clause (1) of section 110, but only if the reproductions are used for performances or displays for a period of no more than seven days from the date of the transmission specified in clause (1), and are destroyed before or at the end of such period. No person supplying, in accordance with clause (2), a reproduction of a transmission program to governmental bodies or nonprofit institutions under this clause shall have any liability as a result of failure of such body or institution to destroy such reproduction: *Provided*, That it shall have notified such body or institution of the requirement for such destruction pursuant to this clause: *And provided further*, That if such body or institution itself fails to destroy such reproduction it shall be deemed to have infringed.

(e) Except as expressly provided in this subsection, this section shall have no applicability to works other than those specified in subsection (b).

(1) Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon filing in the ~~Copyright Office~~ Licensing Division of the Copyright Royalty Tribunal, in accordance with regulations that the ~~Register of Copyrights~~ Copyright Royalty Tribunal shall prescribe.

(2) On January 3, 1980, the Register of Copyrights, after consulting with authors and other owners of copyright in nondramatic literary works and their representatives, and with public broadcasting entities and their representatives, shall submit to the Congress a report setting forth the extent to which voluntary licensing arrangements have been reached with respect to the use of nondramatic literary works by such broadcast stations. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted. Report to Congress.

(f) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, the unauthorized dramatization of a nondramatic musical work, the production of a transmission program drawn to any substantial extent from a published

compilation of pictorial, graphic, or sculptural works, or the unauthorized use of any portion of an audiovisual work.

"Public broadcasting entity."
47 USC 397.

(g) As used in this section, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in clause (2) of subsection (d).

Chapter 2—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.
201. Ownership of copyright.
202. Ownership of copyright as distinct from ownership of material object.
203. Termination of transfers and licenses granted by the author.
204. Execution of transfers of copyright ownership.
205. Recordation of transfers and other documents.

17 USC 201.

§ 201. Ownership of copyright

(a) INITIAL OWNERSHIP.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) WORKS MADE FOR HIRE.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) CONTRIBUTIONS TO COLLECTIVE WORKS.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) TRANSFER OF OWNERSHIP.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) INVOLUNTARY TRANSFER.—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

17 USC 202.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of

individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and

(3) to distribute royalty fees deposited with the ~~Register of Copyrights~~ under sections 111 and 116, and to determine, in cases where controversy exists, the distribution of such fees.

Notice.

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

17 USC 802.

§ 802. Membership of the Tribunal

(a) The Tribunal shall be composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each; of the first five members appointed, three shall be designated to serve for seven years from the date of the notice specified in section 801(c), and two shall be designated to serve for five years from such date, respectively. Commissioners shall be compensated at the highest rate now or hereafter prescribe for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

(b) Upon convening the commissioners shall elect a chairman from among the commissioners appointed for a full seven-year term. Such chairman shall serve for a term of one year. Thereafter, the most senior commissioner who has not previously served as chairman shall serve as chairman for a period of one year, except that, if all commissioners have served a full term as chairman, the most senior commissioner who has served the least number of terms as chairman shall be designated as chairman.

(c) Any vacancy in the Tribunal shall not affect its powers and shall be filled, for the unexpired term of the appointment, in the same manner as the original appointment was made.

17 USC 803.

§ 803. Procedures of the Tribunal

(a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedure and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).

5 USC 551, 701.

Publication in Federal Register.

(b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the

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April 18, 1985

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Rodino:

Thank you for your letter of April 9, 1985.

The Tribunal is pleased to accept your invitation to appear and testify before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Chairman Marianne Mele Hall will appear as the Tribunal's designated witness. The Tribunal would also like to introduce its General Counsel to the Subcommittee, Mr. Robert Cassler. Commissioners Edward W. Ray and Mario F. Aguero have indicated that they will be pleased to answer any questions the Subcommittee may have by written response. Commissioner Aguero will be present at the hearing, but will not testify.

Enclosed please find 75 copies of our prepared statement. Included in the testimony is an Executive Summary of Chairman Hall's proposed testimony and biographical sketches of all three Commissioners and the General Counsel.

We look forward to appearing before the Subcommittee on April 23.

Sincerely,

Marianne Mele Hall

Marianne Mele Hall
Chairman



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COPYRIGHT ROYALTY TRIBUNAL

FY 1984 Annual Report

October 1, 1983 - September 30, 1984



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COPYRIGHT ROYALTY TRIBUNAL

1. CREATION, HISTORY, MEMBERSHIP

The Copyright Royalty Tribunal (Tribunal) was created by §801(a) of the Public Law 94-553, the General Revision of Copyright Law of 1976, (Title 17 of the United States Code). It commenced operations in November 1977 with five Commissioners appointed by President Carter and confirmed by Senate: Thomas Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia.

Thomas Brennan and Douglas Coulter served their full seven year terms until September 26, 1984. Mary Lou Burg served until her death in May 1983. Frances Garcia served her full five year term until September 1982. Clarence James resigned in May of 1981. The chairmanship rotates by seniority.

Katherine Ortega was appointed by President Reagan to succeed Francis Garcia. She resigned in September 1983 to become the Treasurer of the United States. Edward W. Ray was appointed by President Reagan to succeed Clarence James.

Effective September 26, 1984, the present Tribunal consists of three President Reagan appointees: Edward W. Ray, as of February 1982, Mario F. Aguero, as of May 1984 and Marianne Mele Hall, as of July 1984. Edward W. Ray and Marianne Mele Hall will serve until September 1989. Mario F. Aguero will serve until September 1991. Mrs. Hall is serving as chairman from December 1, 1984 to December 1, 1985.

Two seats remain vacant since the expiration of the terms of Commissioners Brennan and Coulter on September 26, 1984.

2. STATUTORY RESPONSIBILITIES

The Tribunal's statutory responsibilities are detailed in sections 111, 115, 116 and 118 of Title 17 U.S.C. The Tribunal is involved in rulemaking and in adjudication. Their rulemaking proceedings consist of setting royalty rates for the four compulsory licenses authorized under Title 17. The compulsory licenses are for:

1) secondary transmissions of copyrighted works by cable television (§111),

2) production and distribution of phonorecords (§115),

3) public performances of musical works by coin-operated phonorecord players (jukeboxes) (§116),

4) the use of copyrighted works in connection with non-commercial broadcasting (§118).

The Tribunal's adjudication proceedings are to distribute the cable television and jukebox royalties collected, as per the foregoing, to the copyright owners. The Tribunal does not distribute royalties for phonorecords (§115) or non-commercial broadcasting (§118). This is handled privately by the parties involved.

3. GENERAL ADMINISTRATION

In keeping with the legislative history and mandate, the Copyright Royalty Tribunal has remained a small, independent, legislative agency. It is presently staffed with three confidential assistants who provide support services for the three commissioners. The recent acquisition of a Compucorp Omega 785 word processing system has increased the efficiency of this limited staff. It is anticipated that this computer will ameliorate the growing concern with the storage and retrieval of approximately 700 cable royalty claims yearly. We also hope to fully utilize this computer to centralize, organize and store much of the administrative and case files. This will relieve concerns of space limitations in our rented offices.

House of Representatives Report No. 94-1476 (94th Congress, 2nd Session, 1976) had indicated legislative intent that all professional responsibilities be performed by the commissioners "except where it is necessary to employ outside experts on a consulting basis." However, recent legislative hearings and proposed legislation has indicated strong recommendations by Congress that the Tribunal hire some professional staff. Pursuant thereto and in accordance with §805(a) of Title 17, the Tribunal has begun the selection process for hiring a General Counsel, which selection should be completed shortly.

Section 805(b) of Title 17 allows the Tribunal to procure "temporary or intermittent services" of professionals as needed. Pursuant thereto, the Tribunal commissioned a review of its administrative and hearing procedures by the law firm of Rice, Carpenter and Carraway, Arlington, VA. This memorandum provides an excellent history, summation of procedures, comparison with other similarly situated agencies, and recommendations for internal and possible legislative reforms for the Tribunal.

There has been some Congressional concern for the hiring of a chief economist. Economic studies were not needed in FY 84, as there was limited rate-setting activities. In FY 85, the Tribunal hopes to be able to commission independent economic studies as needed as per §805(b), until such time as an economist is mandated by legislation and so provided for.

4. INTRODUCTION

The major activities for the Copyright Royalty Tribunal in FY 84 concerned distribution and disbursement of cable royalty fees. Determinations for the 1981 and 1982 cable royalties were rendered this year. Both have been appealed.

The appellate decision for the 1979 cable royalty determination was rendered. The U.S. Court of Appeals for the D.C. Circuit affirmed the Tribunal in almost all respects, remanding on three issues. The Tribunal reconsidered the three issues, which determination is on appeal, awaiting a decision. The 1980 and 1981 cable royalty determinations will adopt the results of this appeal of the 1979 remand.

Meanwhile, the Tribunal actively disbursed cable royalty funds for several past years, which funds were deemed to not be in controversy.

In addition, The Tribunal rendered a determination and disbursed some royalties on the 1982 jukebox distribution. The determination has been appealed in the Second Circuit.

Lastly, the Tribunal announced a cost of living adjustment for public broadcasting entities licensed to colleges and universities.

5. ADJUDICATION (DISTRIBUTION)

The Tribunal's adjudication proceedings consist of the yearly distribution of cable television and jukebox royalties which are deposited with the Licensing Division of the Copyright Office. Full fees for any given year are deposited after the close of that year. Copyright owner's claims for these fees are filed with the Tribunal during the following year, therefore, the Tribunal's distribution proceedings run approximately two years behind. In FY 84, the Tribunal determined distribution on 1982 cable royalty fees and 1982 jukebox royalty fees.

A. 1982 Cable Royalty Distribution

In FY 84, approximately 635 copyright owners filed claims for approximately $50 million in cable television royalties deposited with the Licensing Division of the Copyright Office for 1982. Voluntary agreements resolved all but three claims. The Devotional claimants sought more of the Phase I distributions. Spanish International Network (SIN) sought a share of the Joint Sports allotment for its World Cup soccer broadcasts, (Phase II). Multimedia Entertainment Inc. (Multimedia) sought to defend its share of the Program Syndicators' award since it discontinued satellite transmission of some of its works, (Phase II).

A controversy was declared on October 6, 1983. Hearings were held through July and August 1984. A determination was

rendered on September 20, 1984. The Tribunal increased the Devotional share, granted a small share of the Joint Sports award to SIN and decreased the Multimedia share. Appeal has been taken by several parties, in the U.S. Court of Appeals for the D.C. Circuit. The Department of Justice is representing the Tribunal.

B. 1982 Jukebox Distribution

Seven claims were filed in January 1983 for approximately $3,676,000 in jukebox royalty fees deposited with the Licensing Division of the Copyright Office for 1982. A controversy was declared on December 8, 1983. Voluntary agreement by four claimants was reached. Subsequently, the Tribunal determined to award the full fund to these four claimants, ASCAP, BMI, SESAC, and the Italian Book Company on August 28, 1984. Of the other three claimants: Sammie Belcher offered no evidence, Michael W. Walsh's claim was determined to be de minimus and A.C.E.M.L.A.'s claim was denied for failure of proof.

On January 19, 1984, and before the determination above, the Tribunal distributed about 90% of the fund to these four claimants based on the history of past jukebox determinations and on the conclusion that approximately 10% of the fund remained in controversy.

Appeal has been taken by A.C.E.M.L.A. in the Second Circuit. The Justice Department is representing the Tribunal.

C. 1979, 1980, 1981 Appellate Proceedings

The Tribunal had published a final determination for 1979 cable royalty fees in March 1982, which determination was appealed in the U.S. Court of Appeals for the D.C. Circuit. [Christian Broadcasting Network v. CRT, 720 F.2d 1295 (1983)]. A decision was rendered on October 25, 1983. This decision affirmed the Tribunal's determination in all respects but three. The Appellate Court remanded the following issues:

1) National Association of Broadcasters (NAB) claim of part of the Joint Sports share,

2) Devotional claimant's zero award in the Phase I proceeding,

3) Commercial radio's zero award in the Phase I proceeding.

The Tribunal accepted a voluntary agreement in lieu of reconsidering the NAB claim. The Tribunal accepted evidence on the other two remand issues. Upon reconsideration, the Tribunal granted the Devotionals .35% of the Phase I fund. This was a result of reevaluating some of the evidence and apportioning different weight to the criteria of benefit and harm.

The Tribunal reconsidered and again denied an award to commercial radio, but offered a clearer explanation. The Tribunal acknowledged that the claim was justified but unquantifiable. It reasserted that it was unable to discern a market-place value for the de minimus input of the non-music portion of commercial radio.

The determination of these remand issues was published on January 20, 1984. It has been appealed. The Justice Department has represented the CRT. We are awaiting a decision.

On March 7, 1983, the Tribunal had rendered a final determination on the 1980 cable royalty fees which was also appealed in U.S. Court of Appeals for the D.C. Circuit. On February 9, 1984, upon receiving the 1979 remand decision, the Tribunal moved the court to remand the 1980 case consistent with the 1979 opinion. The motion was granted.

Upon reconsideration, the 1979 remand decision was adopted for the 1980 cable royalty determination with the exception that the distribution of the Devotionals' share be pro rata shared among all Phase I claimants as opposed to the MPAA absorbing the full impact of the Devotionals' share as was done in the 1979 remand. This reconsideration is likewise on appeal.

In FY 83, the Tribunal had declared a controversy and conducted hearings on the 1981 cable royalty distribution. The determination was rendered on February 28, 1984. Said determination also adopts the 1979 determination and is likewise awaiting the decision on the appeal of the remand.

D. 1978, 1979, 1980, 1981, 1982 Disbursement of Cable Royalty Fees

Pursuant to §111(d)(5)(c) of Title 17 and in keeping with policy strongly promoted by Commissioner Ray during his tenancy as chairman, the Tribunal has actively disbursed fees which were deemed to not be in controversy.

On October 6, 1983, the 1978 fund which had received late fees was again totally distributed. In January and March 1984, 41% of the 1979 fund was disbursed to bring its total distribution to 91%. The 1980 fund which was 80% disbursed, was not further disbursed in FY 84. In November 1983 and August 1984, an additional 11.5% of the 1981 fund was disbursed to bring its total distribution to 96.5%. Lastly, in December 1983, 90% of the 1982 fund was disbursed.

6. RULEMAKING (RATE-SETTING)

On a yearly basis, and pursuant to §118 of Title 17, the Copyright Royalty Tribunal announces a cost of living adjustment to be applied to compulsory royalty rates paid by public broadcasting entities licensed to colleges and universities for the

performance of musical composition. The adjustment for FY 84 was determined on November 28, 1983 to be 5.4% effective January 1, 1984.

7. Fiscal Statement of Account

		1984 Actual	1984 Authority
11.1	Salaries & Compensation	$ 326,322	$ 497,700
12.1	Personnel Benefits	34,699	50,300
13.5	Unemployment Compensation	3,117	0
21	Travel & Transportation	354	0
23A	Postage	1,029	500
23B	Local Telephone	3,463	2,500
23C	Long Distance Telephone	824	1,500
23E	Rental of Equipment	417	300
23F	Rental of Space	55,570	56,000
24F	Printing, Forms	10,462	25,000
25D	Services of Other Agencies	15,000	15,000
25F	Professional & Consultant (Legal)	5,000	0
25G	Maintenance & Repair to Equipment	2,331	2,200
25K	Cost of Hearings	7,865	46,000
26A	Office Supplies	937	1,000
31	Books & Library Materials	1,559	1,000
31H	Equipment	11,114	
		$ 480,063	$ 700,000
	Less: Royalty Fee Fund Transfer	- 336,044	- 490,000
	TOTAL REGULAR BILL	$ 144,019	$ 210,000

8. Conclusion

The Copyright Royalty Tribunal benefitted in FY 84 with the acquisition of a word processor/computer system and with the temporary employment of outside counsel. Distribution and disbursement of cable television and jukebox royalty fees were the primary focus, as well as the remand and reconsideration of past cable and jukebox royalty distributions. The coming year shall include statutory cable and non-commercial broadcasting rate reviews, possible reevaluation on petition, of the cable rates that were set in 1982 (due to FCC deregulation), yearly cable and jukebox royalty distribution, and hopefully the finalization of several years of appellate review in both cable and jukebox distribution cases.

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April 22, 1984

The Honorable
Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

In response to your joint letter of December 18, 1984 with Congressman Moorhead to Chairman Marianne Hall, enclosed are my comments on Title I of HR 6164. These comments reflect my individual views and may not represent the consensus of the Tribunal.

Thank you for providing the Tribunal an opportunity to submit its views on this bill.

Sincerely,

Edward W. Ray
Commissioner

The committee has not been impressed

The following comments reflect only the opinion of Commissioner Edward W.Ray.

Membership of the Tribunal Sec. 101(a) 802(a) and 802 (b) of Title 17.

I am in support of the amendment to reduce the size of the Tribunal membership from five to three commissioners. I believe that with more precedents established by the Courts, an increase in private settlements among the parties, and the appointment of professional staff will lessen the Tribunal's future workload. I am not persuaded that a reduction in the size of the Tribunal will adversely impact on the quality of its determinations.

Staff of the Tribunal Sec. 102(a) Section 805(c).

General Counsel

The Tribunal record will reflect my consistent support for the employment of legal counsel. The G.A.O., in a June 11, 1981 report on the operations of the Copyright Royalty Tribunal, recommended the use of expert legal counsel by the Tribunal.

I believe that presently the Tribunal has an even greater need for expert legal assistance. The technical legal advice of a General Counsel, in my opinion, will substantially improve the quality of the Tribunal's determinations.

Chief Economist

I am in support of the Tribunal's employment of an economist, as needed. Many of the issues raised in the Tribunal's hearings are based on economic analysis and, the Tribunal should have access to the expert opinion of an economist. I do not believe, however, that there is presently a sufficient need for a permanent, full-time economist.

The satisfactory performance of the Tribunal's functions, in my opinion, can be achieved by the appointment of a General Counsel and the employment of a part-time economist without incurring a substantive budget increase.

Judicial Review of Tribunal Decisions Sec. 103(a) Section 810 of Title 17.

I support the amendment and believe it will be helpful to the Tribunal in its rulemaking and will assist the Courts in their review of Tribunal determinations.

Adjustment of Copyright Royalty Rates by the Tribunal Sec. 104(a) Sections 801(b) (2)(B) and 801(b)(2)(C) of Title 17.

The GAO, in its June 11, 1981 report on the operation of the Copyright Royalty Tribunal, determined that the Tribunal had not been given a clear legislative criteria for its distribution and rate setting determinations. The Courts, on occasions, have also commented on the lack of clear legislative guidance to the Tribunal in its rulemaking. The amendments, in my opinion, will

be of invaluable assistance to the Tribunal in subsequent cable rate adjustment determinations.

Subpoena Power.

Although this subject is not currently addressed in HR 6164, I recommend that the Tribunal be given limited subpoena power. The Tribunal's decisions have significant financial impact on interested parties but, it is dependent solely on the information provided by those parties. The Tribunal has been denied access to data it considers essential for a rational and informed decision. As an example, during the 1982 Cable Rate Adjustment hearings, it would have been helpful if the record could have reflected the actual purchase prices paid by "Superstations" for syndicated programming. However, neither the copyright owners nor users would voluntarily submit this data for the record.

STATEMENT OF MARIANNE HALL

May 2, 1985

I was working as an editing clerk at High Frontier where I met Dr. Hafstad and Mr. Morse, who were working on that project. Dr. Hafstad asked me to review a short manuscript to consider editing it for grammer, sentence structure and punctuation only. This piece contained none of the controversial material. I reviewed the piece and accepted the task. The controversial material appeared at the end of the project, as it appears at the end of the book. I advised Dr. Hafstad not to print it because I felt that it was "inflamatory, explosive, repugnant and distasteful." In my limited capacity, I voiced my sentiments as strongly as I could. Dr. Hafstad, the author, decided to publish it regardless. I finished the clerical task which I began.

For the record, I want to reiterate that I did not write the material. I disavow it fully. I find it inflammatory, explosive, repugnant and distasteful as I have testified.

Marianne Hall

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May 6, 1985

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kastenmeier:

In further response to your questions concerning the status of the Copyright Royalty Tribunal, enclosed find two of my recent work products which address some of your concerns.

Sincerely,

Marianne Mele Hall
Chairman

MMH/cc

On December 31, 1984, I wrote a memorandum detailing some of my concerns involving the procedural aspects of the Copyright Royalty Tribunal. This memo is an update (in boldface type) of the December 31 memo (in regular type) included herin.

April 30, 1985 UPDATE ON:
MEMORANDUM FOR THE RECORD
Written December 31, 1984

INTRODUCTION

This memo has been generated to provide information on the operations of the Copyright Royalty Tribunal (Tribunal). It does not address the substantive aspects of our hearings or determinations. It discusses the following administrative concerns:

1) Master Case Files
2) Accounting Records
3) Administrative Office Files
4) Reference Materials
5) Legal Counsel
6) Office Staff
7) Public Image

4/30/85 - Several substantive legal problems have subsequently arisen concerning our past 1979-1982 cable distributions totaling approximately $140,000,000. Case records and administrative files to resolve these problems appear disorganized and inadequate. An-indepth analysis of substantive concerns appears necessary now. These issues, if pursued to unacceptable conclusions, can invalidate four years of cable distribution which have been consolidated and will be argued in the Court of Appeals for the D.C. Circuit on May 6, 1985. A lessor concern is violation of the Government in the Sunshine Act. Greater concerns may reveal arbitrary and capricious conduct.

The Copyright Royalty Tribunal commenced operations in November 1977 with five Carter appointees: Thomas Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia.

Thomas Brennan and Douglas Coulter served their full seven year terms until September 26, 1984. Mary Lou Burg served until her death in May 1983. Frances Garcia served her full five year term until September 1982. Clarence James resigned in May of 1981. The Chairmanship rotated by seniority. The senior-most commissioner (Thomas Brennan) served whenever there was a default in the chairmanship.

The present Tribunal consists of three Reagan appointees; Edward Ray, February 1982, Mario Aguero, May 1984 and Marianne Mele Hall, July 1984. Edward Ray and Marianne Mele Hall will serve until September 1989. Mario Aguero will serve until September 1991.

The Chairmanship history is as follows:

Brennan(D)	Nov.	77	- Dec.	78
Coulter(D)	Dec.	78	- Dec.	79
Burg(D)	Dec.	79	- Dec.	80
James(D)	Dec.	80	- May	81
Brennan(D)	May	81	- Dec.	81
Garcia(D)	Dec.	81	- Dec.	82
Ray(R)	Dec.	82	- Dec.	83
Brennan(D)	Dec.	83	- Sep.	84
Ray(R)	Sep.	84	- Dec.	84
Hall(R)	Dec.	84	-	

Upon arriving at the Tribunal in July, 1984 I was immediately impressed with the lack of organization and the paucity of administrative, reference and archive materials. The following represents some of that which I have discovered and some of the actions I have taken.

1) MASTER CASE FILES.

Since 1977, the Tribunal has determined the distribution of over 130 million dollars representing years 1978 - 1982. There will be approximately 150 million dollars to be distributed for years 1983 and 1984 and the amount will continue to grow accordingly. It has also conducted several major rate proceedings, which impact on the record and cable industries, representing 450 million dollars and 80-100 million dollars yearly, respectively.

These hearings are contained in approximately 22 file drawers. These case files are the only official archives on this agency's proceedings. They should contain all correspondence, pleadings, motions, orders, transcripts, copies of evidence, determinations etc. There are numerous documents missing from these 22 drawers.

A cursory review of one file drawer representing the 1982 cable distribution (compiled under Chairman Thomas Brennan in 1984) revealed that the following documents were missing.

1) Exhibits 8-24 for Devotional claimants, Phase I proceeding,
2) Exhibits 2, 4A, 4B, 4C, 5A, 5B, 5C, 7 and 8 for Joint Sports claimants, Phase II proceeding,
3) Exhibits 1-12 for MPAA, Phase II proceeding
4) Exhibits 12-14 for Multimedia, Phase II

proceeding,
5) Pre-hearing statement for Joint Sports claimants, Phase II proceeding,
6) Pre-hearing statement for MPAA, Phase II proceeding.

I have approached counsel and the other commissioners and have located and replaced all of these missing documents.

Further examination of this file, in preparation for the appeal now taken in the D.C. Circuit Court reveals that the dispositions of motions before the Tribunal have not been effectively recorded and filed. (See the charts below).

CRT 83-1 - 1982 Cable Royalty Distribution - Motions

PHASE I

Date	Motion	Disposition
9/15/83	NAB Request For Extension of Time	
9/19/83	Reply Comments for NAB 9/15 Petition	
9/19/83	CRT Order for NAB Petition	Denied
11/4/83	NAB Motion for Stay	Denied
11/14/83	Petition for Review	?
11/18/83	Reply comments Re: NAB Motion for Stay	
11/18/83	CRT Order for NAB Motion for Stay	Denied
11/23/83	NAB Moves To Withdraw Petition to Review Partial Distribution	?
5/22/84	Devotionals Request for Extension of Time (verbal)	Granted until 6/11/84
6/13/84	Settling Parties Request Extension of time	?
7/30/84	Devotional Motion To Strike	?
7/31/84	Opposition to Motion To Strike Settling Parties	?

PHASE II

7/16/84	Motion For Phase II Allocation to NAB of 0.8 Percent of Syndicated Program Royalties	
7/17/84	CRT Order of NAB 7/16 Motion	Granted
7/17/84	Motion to Dismiss sports Claim of SIN	?
7/20/84	Response of Program Suppliers to Motion to Dismiss	?
7/20/84	Opposition of SIN to Joint Sports Claimants Motion to Dismiss	?
8/31/84	Turner Broadcasting/Motion For Leave to Intervene	Granted
9/6/84	CRT Order Turner Motion	
9/7/84	Multimedia/Motion to Strike	?
9/14/84	Opposition to Motion to Strike/ Program Suppliers	?

For those motions with a question mark, there appears to be no written order of disposition. It is possible that the disposition was relayed orally in the hearing or over the telephone to interested counsel. Verification of that can possibly be obtained by rereading the transcripts, which should be done. A record of all orders to all motions should be generated, for reference during the appeal and to preserve the precedent.

4/25/85 - Nothing further has been done concerning these problems.

It should be noted that I was able to easily spot the above deficiencies in this file drawer because I sat in on these hearings. Review of the other 21 drawers of case files will be more difficult since all deficiencies must be deduced by reading the transcripts and through legal reasoning.

In daily operations I have noticed other file deficiencies. For example, in conjunction with an inquiry I discovered that all the original Pre-hearing Statements for the 1980 cable rate determination were missing. I have made copies of the copies in the public information file, as the originals appear lost.

I have also discovered that the Proposed Findings of Fact for the 1982 cable rate determination is missing. Likewise, the Consumer Price Index file and computations for the PBS yearly adjustment for the years 1979 - 1983 is missing. I have not verified if these two files have been located subsequently.

4/15/85 - These files have not been located yet.

This week I have discovered that a November 17, 1983 pleading, served on us for the 1982 jukebox appeal, taken in the 2nd Circuit, is missing. Also in that file there is an Order to a motion (granting extension of time for submission of justification of evidence), but there is no motion in the file. Apparently the motion is missing or was never filed, however we have no way of knowing which occurred.

4/15/85 - The November 17, 1983 pleading has been admitted in the 2nd Circuit Court of Appeals by stipulation of the parties. The concern over the motion has not been resolved yet.

These discoveries, which were made in the course of daily operations and not upon systematic review, have cast serious doubt on the recordkeeping over the past seven years. Extensive systematic review of all 22 file drawers should be conducted.

On November 19, I brought these concerns to the attention of the other two commissioners and suggested that we employ the voluntary services of a law student as a 1985 spring semester extern to review and organize all case files. I was asked to write a memorandum justifying the use of volunteer law students,

in government. My memorandum could not be completed in time for the December 1 deadline so I shall present it in time for the 1985 fall semester. (It should be noted that a student from UCLA Communications Law department was willing to pay his own air fare and expenses to be here in January for this externship. His undergraduate major was economics. His law work concentrated in Communications law and new technologies such as DBS - Direct Broadcast Satellite).

4/25/85 - After the preparation of a 5 page memo and considerable discourse , the Tribunal has instituted a program of utilizing legal externs (law students on a volunteer basis) to review and reorganize these files. Under normal circumstances, based on my work on the 1982 drawer, this project should take in excess of six months. We hope to have externs begin this summer.

In addition, all the public information files which are the only duplicates of our case archives are disordered and need a thorough review.

4/25/85 - This should take another 4-6 months after the master files are completed.

2) ACCOUNTING RECORDS

In trying to make further partial distributions on 1979, 1980, 1981, and 1982 cable distribution determinations, I have discovered that the history on the distribution of close to 120 million dollars has never been compiled or preserved in the central files. Apparently Commissioner Douglas Coulter made all the mathematical computations and he left no central record. I am now collecting and compiling past orders and sketchy accounting files to generate a comprehensive central file. It has taken over two weeks and is not yet completed.

Further, since we are dealing with tens of millions of dollars, we calculate to 5 figures beyond the decimal point. This means that we are actively working in numbers that can include 13 places. We should have an accountant to handle these types of computations. In the interim I am trying to get access to an accountant at the Library of Congress to verify my computations. Further, since we are still distributing 1978 funds, precise operational recordkeeping for at least ten years is probably necessary. The Tribunal should consider hiring an accountant.

4/25/85 - It took 3 months but I have just completed an intensive compilation, centralization and analysis of all distributions of all royalties since the inception of this agency. This review revealed that the Tribunal has distributed $140,109,714 in cable royalties collected from 1978 through 1984. The total of cable royalties collected from 1978-1984 is approximately $309,179,344 as of April 8, 1985. This review also revealed that we have distributed

$11,073,560 in jukebox royalties for the years 1978 through 1983. The total of jukebox royalties collected for 1978 through 1984 is approximately $17,173,852 as of September 30, 1985.

In the course of this review I determined that some parties had not received equal pro rata shares of their allocation which meant that expenses and earnings on the remaining fund were not being distributed equitably among all claimants. I corrected this situation. I also equalized pro-rata distributions to those claimants whose awards had been altered by appellate decisions.

Lastly, I determined that the percentage methodology that had heretofore been used to distribute fees was illusory in that the percentages as distributed, diminish in numerical size as the remaining fund continues to grow. In light of that realization, I reworked our partial distributions for 1979 - 1982 cable royalty fees against real dollar figures and was therefore able to distribute more of the funds while still preserving sufficient funds to protect all claims currently on appeal. Earlier I urged that the Tribunal consider hiring an accountant. I have recently written draft legislation to suggest that the Licensing Division of the Copyright Office, who collects, invests and disburses these fees, should report to the Tribunal instead of to the Register of Copyright. The only function of the Licensing Division is to collect, invest and disburse copyright royalty fees for us. They should report to us to eliminate our duplicative recordkeeping, to eliminate the superfluous reporting to and through the Copyright Register's office, to relieve the General Counsel's staff of the Copyright Office of writing and interpreting our regulations and to allow us greater access, availability and coordination with this staff that serves our Tribunal. We would not then need an accountant.

3) ADMINISTRATIVE OFFICE FILES

A. Testimony before Congress

A cursory review of the administrative office files of our hearings revealed that we did not have copies of all of our budget or oversight hearings in-house. I have now collected either official testimony or photocopies of all. (See charts below). I have not had time to review if we have any legislative hearings in testimony or draft form in-house. My limited understanding indicates that there is very little here. This should be researched, collected and filed for the Commissioner's use and for preservation in our archive. I am establishing a relationship with Gilbert Gude of the Congressional Research Service. I believe his organization may be able to assist in this search and compilation.

BUDGET HEARINGS - HOUSE OF REPRESENTATIVES

			Not in house upon my arrival	Archive Printed	Archive Photocopy	Draft in File
2/8/77	FY 78			X		
2/22/78	FY 79	Brennan	X		X	X
2/14/79	FY 80	Coulter	X		X	X
2/21/80	FY 81	Burg	X		X	X
3/2/81	FY 82	James	X		X	
3/4/82	FY 83	Garcia	X		X	X
3/1/83	FY 84	Ray		X		
2/8/84	FY 85	Brennan		X		

BUDGET HEARINGS - SENATE

3/1/77	FY 78			X		
3/20/78	FY 79	Brennan		X		X
2/21/79	FY 80	Coulter	X	X		X
3/4/80	FY 81	Burg	X	X		X
3/11/81	FY 82	James			X	
5/14/82	FY 83	Garcia		X		
3/10/83	FY 84	Ray		X		X
3/84	FY 85	Brennan		X		

OVERSIGHT HEARINGS - HOUSE

4/9/79	96th Sess		X	X		X
6/11/81	97th Sess			X	X	
3/3/83	98th Sess		X	X		X

OVERSIGHT HEARINGS - SENATE

4/29/81	Brennan	97th Sess	X			X
3/10/83	Ray	98th Sess	X	X		X

4/25/85 - It took 6 weeks to collect our testimony before the Senate and House Budget and Oversight Committees. The Congressional Research Service has sent over some of our Legislative Hearing testimony. I believe there are more hearings to be located and hope to have an extern research that and any other deficiencies. I am trying to collect Budget, House, Senate and Conference Reports, which I hope to have in 2 months.

B) Correspondence files

I have just completed collecting all the chronological files of the chairman and placing same in a central research corner. They appear complete.

4/25/85 - Commissioner Ray's files are absent.

The central correspondence files for the Tribunal including correspondence with the legislative bodies, other agencies, interested parties and counsel, public inquiries and general office business correspondence are extremely sketchy after 1980. There appears to be no way to determine what is missing. My concern now is to try and collect all that is available and place it in one central file for the use and history of the Tribunal.

4/25/85 - I consider the collection and centralization of the available resources completed.

4) REFERENCE MATERIALS

Our library contains very limited reference materials. Upon arriving I ordered the 1984 pocketpart for Title 17, USC, the Copyright Act, as our only copy had a 1979 pocketpart.

I ordered the current 37 CFR which contains our rules of procedure. The version inhouse and being distributed to the public had been superceded.

I ordered Title 47, USC, the Communications Act and the current pocketpart as the only copy inhouse is the 1970 USCA, (superceded). It has not arrived.

4/25/85 - Title 47 and Title 5 have been received.

There was one law review article on the Tribunal, inhouse. I have determined that over thirty have been written and I will strive to purchase these.

4/25/85 - I hope to have a student extern research these articles and approach the publishers for gratis copies or we shall purchase them.

I have purchased the last two volumes (1977 & 1978) of Copyright decisions printed by the Copyright Office, to update our series. I have compiled our determinations into one notebook for the General Counsel's staff of the Copyright Office so they may include our determinations in their series.

4/25/85 - It appears that the Copyright Office cannot include our determinations in their 1979 volume. I hope they will reconsider for the 1980 volume.

4/25/85 - Our determinations are not published by any reporter except the Federal Register which makes it very difficult for new petitioners before us to retain adequate counsel. I am going to approach several private publishers and the GPO to get all of our determinations (and their appeals) published. Meanwhile Shepard-McGraw Hill has decided to publish all of our cable determinations in a comprehensive

manual on cable television. They have asked me to write the preface. I am pleased at their decision and honored to write for them.

We read approximately 15 trade journals on a periodic basis. Files used to be kept of the articles of interest to the Tribunal in these periodicals. I have discovered that this collection became rather sketchy after about 1982. I had the files repaired and organized and have re-instituted the practice of clipping and preserving relevant articles for use, research and archival purposes.

4/25/85 - I have approached these trade periodicals and approximately ten others for gratis subscriptions. Most are complying.

I have researched our legislative history and collected several copies each of the House Report 94-1476, Senate Report 94-473 and Conference Report 94-1733 for the Commissioners' use and for our archives.

4/25/85 - I have obtained extensive resource materials and reports form the Copyright Office, the Judiciary Committees, the FCC, and the Administrative Conference.

I have reviewed the miscellaneous materials in the library and filed it into categorical files, two of which were abstracted by a volunteer law student. He reviewed the Australian and British Copyright Royalty Tribunal materials but found that our files contained information only as current as 1980. There are several more such files which need to be abstracted and updated for basic information.

There is enough library work to employ a voluntary legal extern on a permanent basis. I strongly recommend this.

5) LEGAL COUNSEL

We have retained outside counsel to do a review of our internal policies and of our hearing procedures. We expect this report in January. Meanwhile we have solicited comments on our procedure from interested parties and we shall analyze those comments along with our commissioned report to possibly restructure our rules of procedure and our internal policy practices.

4/25/85 - We have analyzed these comments and reports and with a stipulated agreement by the parties to the 1983 cable distribution we are implementing procedural reforms. We will test these reforms in this 1983 cable distribution and in our rate hearing this year and hopefully codify them when we review and rewrite all of our rules in 37 C.F.R. We have found that most of our rules need reformation to fully comply with the spirit or letter of the laws that govern most federal agencies.

I have discovered in my visits with legislators that both House and Senate Judiciary Committees have strongly advised that the Tribunal hire counsel and have appropriated funds for the FY 84 and FY 85 specifically for that purpose. Apparently the earlier Commissioners felt that a General Counsel was not necessary.

I became chairman on December 1 and on December 2 we began advertising to hire a General Counsel. We closed receipt of resumes on December 14. Needless to say we were deluged with approximately fifty extremely impressive resumes. I had hoped to start interviews on December 17 so that we might have counsel inhouse by January, however, the other commissioners felt that we should not begin interviews until January 3. Interviews have been set up in accordance with their wishes. I am hopeful that we will make our choice by January 11.

4/25/85 - We hired a general counsel on March 4, 1985. I am going to ask for a chief economist and a secretary in our Oversight Hearing on May 1.

6) OFFICE STAFF

In 1977 the Tribunal determined that each commissioner shall have one confidential aide. We are presently staffed with three confidential aides. I hired my aide in August 1984. The other two aides were hired in 1977 and 1980 and have been rehired when their respective original commissioners retired. In 1977 the Tribunal also determined that each aide shall report only to their respective Commissioner despite the legislative mandate and history that states the aides shall work for the Tribunal. This segmentation of staff probably contributed to the incomplete central files. Each aide kept files for their respective Commissioner and it is apparent that much of these files were taken with each commissioner as he and his aide departed. No one in particular was charged with maintaining a central file for the Tribunal. Therefore, it was done haphazardly if at all.

4/25/85 - I have reconstructed as much of the central agency files as is possible.

The Chairman's aide was charged with maintaining the central case files however that person changed each year. Apparently none had any paralegal training, therefore the case files for each year are organized differently. This makes retrieval of information for precedent-following purposes extremely difficult.

4/25/85 - This should be completely reorganized as expressed earlier. We hope to have legal externs begin this on June 1. A permanent system and person to maintain it should be set in place.

The budget function has remained with one aide for several years, however she reports only to her Commissioner, so requests for budget information must go through that Commissioner. Nothing is automatically circulated.

4/25/85 - All budget correspondence now goes through the Chairman's office and is circulated to all commissioners.

An incoming Commissioner who brings his own aide, as I did, is greatly disadvantaged by the state of the central files and the segmentation of staff. If material is not obvious in the central file, the new Commissioner must ask a more senior Commissioner to ask his aide to retrieve the information. The new Commissioner must then generate his own file. I have been working since Sept 26 (when Commissioner Coulter and Brennan left) on generating central files. The two senior aides have been resistant. My aide has been more successful in locating missing documents (such as testimony, etc.) by going to outside sources such as outside counsel, legislators' staffs, agency staffs, etc. The process is slow and solely dependent on the time and graciousness of outside sources. There is still a great deal of work to be done to reconstruct seven years of agency practice, policy and recordkeeping.

My efforts to organize the central files and the staff into areas of expertise to maximize efficiency and communication have been resisted by two of the three aides. However, I feel that such a small agency must be organized around central files and clear delegation of work per staff member, to maximize the use of personnel and minimize recordkeeping and storage. I shall continue working towards these goals despite the inertia.

4/25/85 - I have written draft legislation and shall approach the Oversight Committee for the authority to implement management reforms that I feel are necessary. I will also approach the Oversight Committee to hire more professional staff and support staff that serve the Tribunal, not just private commissioners.

7) PUBLIC IMAGE

Lastly I have discovered that this Tribunal has had a poor image within the Congress, within Federal agencies, before the industry, the copyright owners and the public. Part of the problem has been an isolationist attitude. I have made courtesy calls to the following offices for the purpose of introducing myself, explaining our functions, and eliciting support, particularly of legislators and federal agencies.

1) Counsel Staff to the Judiciary, U.S. Senate,
2) Counsel Staff to the Judiciary, U.S. House of Representatives,
3) Several Congressmen who oversee our Tribunal,

1111 20th Street, N.W.
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(202) 653-5175

April 30, 1985

Senator Charles McC. Mathias
Chairman
Subcommittee on Patents, Copyrights
& Trademarks
Room 387 SROB
Washington, DC 20510

Dear Senator Mathias:

Thank you for your kind words of congratulations. I am honored to work with you and your staff and shall strive to fulfill your expectations.

Thank you for your invitation to the Copyright Royalty Tribunal (Tribunal) to submit written testimony for the April 17 hearings on civil and criminal enforcement of the Copyright Act. I heartily commend the Judiciary Committee's efforts to explore and resolve some of the problems in the enforcement of the Copyright Act. As you well know, piracy causes daily losses in revenues to the creators and producers of intellectual property. The losses in the audio industry predict what will happen in the video industry and the software/information industries, as piracy progressively encroaches upon each industry. A frightening aspect of this increasing piracy is that the daily losses on yesterday's intellectual property will take its toll on our creators' inspiration and desire to create tomorrow's works. That is why your work today is so important.

In my private capacity, I accept your invitation to submit written testimony on a statutory change that may improve collections of the royalty payments that this Tribunal distributes. The other Commissioners may wish to add their comments at a later time. It is my opinion that the Tribunal should be empowered to assess fair market interest and/or a surcharge on royalty payments which are not timely filed.

The Copyright Royalty Tribunal is responsible for distributing royalties collected for the retransmission of copyrighted works

by cable television and for the use of copyrighted works by jukeboxes, (17 U.S.C. Section 111 & 116), among other responsibilities.

The Licensing Division of the Copyright Office collects these royalties from approximately 7,000 cable systems and from approximately 3,000 jukebox operators representing approximately 100,000 jukeboxes. These royalties are segregated into funds by year and invested in interest-bearing, United States securities by the Licensing Division.

To date approximately $309,179,344 have been collected for cable and $17,173,852 have been collected for jukebox, approximately $140,109,714 of the cable collections and 11,073,560 of the jukebox collections have been distributed to respective claimants.

The only enforcement in the collection of these fees is the threat of a suit for infringement that may be brought by the copyright owner. While this enforcement capability is very important and should be preserved at all costs, often it is not very effective. The result is that the users may file late or not at all with minimal actual or apparent sanctions. Further, if an infringement action is brought, the user can practically moot the action by a prompt late payment, veritably rendering the damages de minimis, (leaving attorneys fees and costs).

These late payments play havoc with the Licensing Division's accounting procedures and with our distribution process. Often late sums are less than $10,000 so they cannot be immediately invested, causing loss of interest to owners. Often late payments are to funds that have been fully distributed, requiring further Tribunal determinations, publications, and disbursements. The 1978 cable fund has been zeroed out three times, the latest being March, 1985. We recently received an $8.00 jukebox fee on the 1979 fund, which has been closed for years.

Lastly, the present system practically encourages late payments in that the tardy payer has greater use of his money for longer

periods without cost. This is neither the intent nor the spirit of the Copyright Act.

It should be noted that most copyright users are prompt and accurate in the payments of royalty fees. The tardy payments problem for cable barely approaches 3%. It is harder to determine compliance in jukebox and it should be noted that the performing rights societies do actively enforce compliance. The Licensing Division would be able to provide more accurate accounting of the late payments problem upon request.

Even though the tardy payments problem is small, clearly it refutes the intent of the legislation, and there is no reason to not strive towards 100% compliance. The threat of the assessment of fair market interest may help achieve that. Again, I feel strongly that the suit for infringement remedy (including attorney fees) is one of the greatest reforms to come from the 1976 Copyright Act and I believe it must be preserved at all costs. This suggestion would only supplement the greater remedy and would do so at no cost to the copyright owner, also in keeping with the intent of the Copyright Act.

I have recently submitted draft legislation to Congressman Kastenmeier and Moorehead, upon their request, to suggest empowering the Tribunal to assess and collect interest for late payments. This draft also suggests establishing the Licensing Division under the Tribunal rather than the Copyright Office to facilitate the management of the funds, and eliminate some of the communications between the Copyright Office and the Copyright Royalty Tribunal. Part of this draft legislation is attached for your information.

If you need any further information or assistance please do not hesitate to contact me.

Sincerely,

Marianne Mele Hall

Marianne Mele Hall
Chairman

MMH/cc
Enclosure

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TO: Members of the Bar who practice before the Tribunal;
Administrative Conference of the United States

The Copyright Royalty Tribunal was created by the Copyright Act of 1976 to be composed of five commissioners, but currently consists of two sitting commissioners. Several procedural questions have been raised because of this situation. The purpose of this letter is to inform you of conclusions reached by the Tribunal and to solicit your comments on these conclusions.

First, Section 802(c) of the Copyright Act of 1976 (Act) states, "Any vacancy in the Tribunal shall not affect its powers . . ." Section 301.7(b) of the Tribunal's rules states, "A majority of the members of the Tribunal constitutes a quorum." 37 U.S.C. 301.7(b). It is the conclusion of the Tribunal that a quorum consists of a majority of sitting Commissioners, whatever its number. We find support for our conclusion in FTC v. Flotill Products, Inc. 389 U.S. 179 (1967), and Assure Competitive Transportation, Inc. v. United States, 629 F. 2d 467 (1980). Therefore, the Tribunal believes it has legal authority to carry out the functions conferred on it by the Act so long as both sitting Commissioners concur in the action.

Secondly, the Tribunal has also researched the question of whether a Commissioner appointed during or after the course of an on-the-record proceeding, whether adjudication or rulemaking, may participate in the decision. The Tribunal believes that a deciding officer, in this case a Commissioner, does not have to be present to hear the testimony, except when the demeanor and credibility of the witness is of such a substantial factor that the absence of the deciding officer would be a denial of a fair hearing. The Tribunal believes that it is enough if the deciding officer considers and appraises the written record. The Tribunal has drawn upon the Administrative Law Text by Kenneth Culp Davis for this conclusion.

The Tribunal solicits comments as to whether the Bar and the Administrative Conference of the United States agree with our conclusions. The Tribunal is especially interested in whether any party believes that the demeanor and credibility of any witness is of a substantial factor in the forthcoming proceedings. Although the Tribunal does not know when future Commissioners will be appointed and confirmed, it believes it is important to resolve this question at this time. Comments on the Tribunal conclusions must be filed by June 4, 1985. The comments will be discussed in our pre-hearing conference already schedule for June 7.

Thank you for your cooperation.



Edward W. Ray
Acting Chairman

Dated: May 12, 1985

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CHAPTER III--COPYRIGHT ROYALTY TRIBUNAL

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PART 301—COPYRIGHT ROYALTY TRIBUNAL RULES OF PROCEDURE

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AUTHORITY: 17 U.S.C. 803(a).

SOURCE: 43 FR 53719, Nov. 17, 1978; unless otherwise noted.

Subpart A—Organization

§ 301.1 Purpose.

The Copyright Royalty Tribunal (Tribunal) is an independent agency in the Legislative Branch, created by Pub. L. 94-553 of October 19, 1976.

The Tribunal's statutory responsibilities are:

(a) To make determinations concerning copyright royalty rates in the areas of cable television covered by 17 U.S.C. 111.

(b) To make determinations concerning copyright royalty rates for phonorecords (17 U.S.C. 115) and for coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116).

(c) To establish and later make determinations concerning royalty rates and terms for non-commercial broadcasting (17 U.S.C. 118).

(d) To distribute cable television and jukebox royalties under 17 U.S.C. 111 and 17 U.S.C. 116 deposited with the Register of Copyrights.

§ 301.2 Address for information.

The official address of the Copyright Royalty Tribunal is 1111 20th Street NW., Washington, DC 20036, until March 31, 1979. Office hours are Monday through Friday, 8:30 a.m. to 5:30 p.m., excluding legal holidays.

§ 301.3 Composition of the Tribunal.

The Tribunal is composed of five members appointed by the President with the advice and consent of the Senate.

§ 301.4 The Chairman.

(a) On December 1st of each year the Chairman will be designated for a term of 1 year from the most senior Commissioner who has not yet previously served as Chairman, or, if all the Commissioners have served, the most senior Commissioner who has served the least number of terms will be designated Chairman.

(b) The responsibilities of the Chairman are, first, to preside at meetings and hearings of the Tribunal, and second, to represent the Tribunal officially in all external matters. In matters of legislation and legislative reports, the Chairman will represent the majority opinion of the Tribunal; however, any Commissioner with a minority or supplemental opinion may have that opinion represented also. The Chairman is the initial authority for all communications with other government officials or agencies and is the contracting officer; however, another Commissioner or subordinate official may be designated to act in his stead. The Chairman shall convene a meeting of the Tribunal upon the request of a majority of the Commissioners.

§ 301.5 Standing committee.

The Tribunal may establish standing or temporary committees to act in whatever capacity the Tribunal feels is appropriate. Said committees are authorized, in the areas of their jurisdiction, to conduct hearings, meetings, and other proceedings, but no such subdivision shall be authorized to act on behalf of the agency as a whole within the official meeting of 5 U.S.C. 552(a)(1).

§ 301.6 Administration of the Tribunal.

The administration of the Tribunal denotes chiefly the maintenance of the Tribunal records and the custodianship of Tribunal property. The records to be maintained include legal and public records, a current index of opinions, orders, policy statements, procedures, and rules of practice, and instructions that affect the public. Also, announcements of Tribunal actions must be published in the FEDERAL REGISTER as required, and the observance by the Tribunal of appropriate administrative procedure must be supervised, as well as the disposition of Tribunal correspondence. From time to time other administrative responsibilities may emerge. To manage the above, the Tribunal may choose to install an Administrative Officer; however, if not, it will be the Chairman's duty to see that these responsibilities are met.

§ 301.7 Proceedings.

(a) *Location.* The Tribunal will normally hold all proceedings at its principal office, except under exceptional circumstances, in which case the Tribunal may perform its duties anywhere in the United States. The Tribunal's proceedings will all be public, except as exempted in § 301.15.

(b) *Quorum.* A majority of the members of the Tribunal constitutes a quorum.

(c) *Voting.* Each Commissioner's vote shall be recorded separately, and the votes of the Commissioners shall be taken in order of their seniority, except that the Chairman shall vote last. No proxy votes will be recorded.

Subpart B—Public Access to Tribunal Meetings

§ 301.11 Open meetings.

(a) The purpose of this chapter is to comply with the Government in the Sunshine Act, Pub. L. 94-409; 90 Stat. 1241 *et seq.*, 5 U.S.C. 522(b), and insure that all Tribunal meetings shall be open to the public. The conditions under which meetings, as an exception, may be closed, are listed in § 301.13

(b) Each meeting announcement by the Tribunal shall be made at least 7 calendar days in advance in the FEDERAL REGISTER and shall state the time and place of the meeting, the subject to be discussed, whether the meeting is to be open or closed, and the name and telephone number of the person to contact for further information.

(c) If amendments are made to the original announcement, they must be placed in the FEDERAL REGISTER as soon as practicable. Changes in time and place may be made simply by making such an announcement, but a change in subject matter requires a recorded vote by Commissioners, with the results of that vote appearing in the announcement of the amendment.

(d) If it is decided that a meeting must be held on shorter notice than 7 days, that decision must be made by recorded vote of Commissioners and included in the announcement.

§ 301.12 Conduct of open meetings.

(a) Meetings of the Tribunal will be conducted in a manner to insure both the public's right to observe and the ability of the Tribunal to conduct its business properly. The Chairman or presiding officer will take whatever measures he feels necessary to achieve this.

(b) The right of the public to be present does not include the right to participate or make comments.

(c) Reasonable access for news media will be provided at all public sessions provided that it does not interfere with the comfort of Commissioners, staff, or witnesses. Cameras will be admitted only on the authorization of the Chairman, and no witness may be photographed or have his testimony recorded for broadcast if he objects.

§ 301.13 Closed meetings.

In the following circumstances (as per 5 U.S.C. 552(c), 1-10) the Tribunal may close its meetings or withhold information from the public:

(a) If the matter to be discussed has been specifically authorized to be kept secret by Executive order, in the interests of national defense or foreign policy;

(b) If the matter relates solely to the internal personnel rules and practices of the Tribunal;

(c) If the matter has been specifically exempted from disclosure by statute (other than 5 U.S.C. 552) and there is no discretion on the issue;

(d) If the matter involves privileged or confidential trade secrets or financial information;

(e) If the result might be to accuse any person of a crime or formally censure him;

(f) If there would be a clearly unwarranted invasion of personal privacy;

(g) If there would be disclosure of investigatory records compiled for law enforcement, or information which if written would be contained in such records, and to the extent disclosure would (1) interfere with enforcement proceedings, (2) deprive a person of the right to a fair trial or impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclosure the identify of a confidential source or, in the case of a criminal investigation or a national security intelligence investigation, confidential information furnished only by a confidential source, (5) disclosure investigative techniques and procedures, or (6) endanger the life or safety of law enforcement personnel.

(h) If premature disclosure of the information would frustrate the Tribunal's action, unless the Tribunal has already disclosed the concept or nature of the proposed action, or is required by law to make disclosure before taking final action.

(i) If the matter concerns the Tribunal's participation in a civil action or proceeding or in an action in a foreign court or international tribunal, or an arbitration, or a particular case of formal agency adjudication pursuant to 5 U.S.C. 554, or otherwise involving a determination on the record after opportunity for a hearing.

§ 301.14 Procedure for closing meetings.

(a) Meetings may be closed, or information withheld from the public, only by a recorded vote of a majority of the Commissioners. Each question, either to close a meeting or withhold information, must be voted on separately.

unless a series of meetings is involved, in which case the Tribunal may vote to keep the discussions closed for 30 days, starting from the first meetings. If the Tribunal feels that information about a closed meeting must be withheld, the decision to do so must also be the subject of a recorded vote.

(b) Before a discussion to close a meeting or withhold information, the Chairman must certify that, in his opinion, such a step is permissible, and he shall cite the appropriate exemption under § 301.13. This certification shall be included in the announcement of the meeting and be maintained as part of the Tribunal's records.

(c) Following such a vote, and by the end of the working day, the Chairman must transmit the following information to the FEDERAL REGISTER for publication:

(1) The vote of each Commissioner;

(2) The appropriate exemption under § 301.13;

(3) A list of all persons expected to attend the meeting and their affiliation.

§ 301.15 Transcripts of closed meetings.

(a) All meetings closed to the public shall be subject to either a complete transcript or, in the case of § 301.13(l) and at the Tribunal's discretion, detailed minutes. Detailed minutes shall describe all matters discussed, identify all documents considered, summarize action taken as well as the reasons for it, and record all rollcall votes as well as any views expressed.

(b) Such transcripts or minutes shall be kept by the Tribunal for 2 years or 1 year after the conclusion of the proceedings, whichever is later. Any portion of transcripts of meetings which the Chairman does not feel is exempt from disclosure under § 301.13 will ordinarily be available to the public within 20 working days of the meeting. Transcripts or minutes of closed meetings will be reviewed by the Chairman at the end of each calendar year and if he feels they may at that time be disclosed, he will resubmit the question to the Tribunal to gain authorization for their disclosure.

§ 301.16 Requests to open or close meetings.

(a) Any person may request the Tribunal to open or close a meeting or disclose or withhold information. Such a request must be captioned "Request to Open" or "Close" a meeting on a specific date concerning a specific subject. The requester must state his or her reasons, and include name and address, and desirably, telephone number.

(b) In the case of a request to open a meeting the Tribunal has previously voted closed, the Tribunal must receive the request within 3 working days of the meeting's announcement. If not, it will not be heeded, and the requester will be so notified. Requests are desired in seven copies.

(c) For the Tribunal to act on a request to open or close a meeting, the question must be brought to a vote before the Tribunal by one of the Commissioners. If the request is granted, an amended meeting announcement will be issued immediately and the requester notified. If a vote is not taken, or if after a vote the request is denied, the requester will also be notified promptly.

§ 301.17 Ex parte communication.

(a) No person not employed by the Tribunal and no employee of the Tribunal who performs any investigative function in connection with a Trubunal proceeding shall communicate, directly or indirectly, with any member of the Tribunal or with any employee involved in the decisions of the proceeding, with respect to the merits of any proceeding before the Tribunal or of a factualiy related proceeding.

(b) No member of the Tribunal and no employee involved in the decision of a proceeding shall communicate, directly or indirectly, with any person not employed by the Tribunal or with any employee of the Tribunal who performs an investigative function in connection with the proceeding, with respect to the merit of any procerding before the Tribnal or of a factually related proceeding.

(c) If an *ex parte* communication is made to or by any member of the Tri-

bunal or employee involved in the decision of the proceeding, in violation of paragraph (a) or (b) of this section, such member or employee shall promptly inform the Tribunal of the substance of such communciation and of the circumstance surrounding it. The Tribunal shall then take such action it considers appropriate; provided that any written *ex parte* communication and a summary of any oral *ex parte* communication shall be made part of the public records of the Tribunal, but shall not be considered part of the record for the purposes of decision unless introduced into evidence by one of the parties.

(d) A request for information with respect to the status of proceeding shall not be considered an *ex parte* communication prohibited by this section.

Subpart C—Public Access To and Inspection of Records

The following is the manner in which Tribunal opinions, recommended decisions, orders, public reports and records shall be made available to the public.

§ 301.21 Public records.

(a) Final official determinations of the Tribunal will be published in the FEDERAL REGISTER and include the relevant facts and the reasons for those determinations.

(b) An annual report, required of the Tribunal to be presented to the President and Congress each fiscal year, along with a detailed fiscal statement of account, will be available both for inspection at the Tribunal and for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) All other Tribunal records are available, for inspection or copying at the Tribunal, except:

(1) Records that relate solely to the internal personnel rules and practices of the Tribunal;

(2) Records exempted by statute from disclosure;

(3) Interoffice memoranda or correspondence not available by law except to a party in litigation with the Tribunal;

(4) Personnel, medical, or similar files whose disclosure would be an invasion of personal privacy;

(5) Communications among Commissioners concerning the drafting of decisions, opinions, reports, and findings on any Tribunal matter or proceeding;

(6) Offers of settlement which have not been accepted unless they have been made public by the offerer;

(7) Records not herein listed but which may be withheld as "exempted" if the Tribunal finds compelling reasons exist.

§ 301.22 Public access.

(a) Information may be requested from the Tribunal in person, by telephone, or by mail.

(b) If the material sought is not a Tribunal record, is exempted, or for some reason is unavailable, the person requesting it will be so informed and, in the case of an "exempted record," will be explained the reason for the exemption and the procedure for appeal under the Freedom of Information Act, § 301.13.

(c) Fees for copies of Tribunal records are: $.15 per page; $10 for each hour or fraction thereof spent searching for records; $4 for certification of each document; and the actual cost to the Tribunal for any other costs incurred.

[43 FR 53719, Nov. 11, 1978, as amended at 44 FR 53161, Sept. 13, 1979]

301.23 Freedom of Information Act.

(a) If a request is made under the Freedom of Information Act (5 U.S.C. 552), it must be in writing, be captioned "Freedom of Information Act Request," and identify as accurately as possible, the information desired.

(b) Within 10 working days after the Tribunal has received such a request, the Chairman shall inform the requester how the records may be inspected or copied and the cost (as under § 301.22) of copying. The chairman may, however, extend this time limit up to 10 working days if:

(1) Records must be located or transferred;

(2) Voluminous material must be examined;

(3) Other agencies with substantial interest in the matter must be consulted or other elements of the Tribunal must be consulted.

In this case the requester shall be notified in accordance with 5 U.S.C. 552 (a)(6)(B).

(c) If the request is denied, the Chairman shall so inform the requester in writing, citing the exemption authorizing the denial and informing the requester that he or she may appeal the denial to the Tribunal within 20 working days. Appeals must be in writing and must be acted on by the Tribunal within 20 working days of their receipt. If the appeal is rejected, the requester must be so notified immediately and informed of the provisions for judicial review under 5 U.S.C. 552(a)(4).

§ 301.24 Privacy Act.

(a) The Privacy Act of 1974 (Pub. L. 93-579) 5 U.S.C. 552(a), concerns only requests which contain personal information retrievable by a personal identified. This section does not apply to personnel records located in Government-wide systems elsewhere.

The purpose of the Privacy Act is to enable individuals to:

(1) Learn if the Tribunal maintains records concerning them;

(2) Have access to such records;

(3) Learn if and to whom the Tribunal has disclosed such records; and

(4) Amend such records.

The Tribunal, in compliance with paragraph (a)(4) of this section, will record the disclosures of all records, their dates, the material disclosed, and to whom the material has been disclosed.

(b) A request made under the Privacy Act must be in writing, captioned "Privacy Act Request," and identify as accurately as possible the records in question and the nature of the information desired. This section is not to be construed as allowing an individual access to information compiled in reasonable anticipation of a civil action or proceeding.

(c) The request must be signed by the person making it, and such signature will be considered certification that the person signing is either the individual involved or that person's guardian. If the Chairman considers it necessary, he may require additional verification. Section 552(a)(i)(3) of the Privacy Act; 5 U.S.C. 552(a)(i)(3), states the penalties for false representation.

(d) If a medical record is involved and the chairman feels that its disclosure might adversely affect the individual, he shall require that person to designate a medical doctor to whom the record will be transmitted.

(e) Within 10 working days after the Tribunal has received such a request, the Chairman shall acknowledge its receipt to the requester and within 30 days shall inform the requester how the records may be inspected and the cost for copying, unless the records are exempted under § 301.21(c).

(f) If an individual who has obtained access to personal records wishes to have those records amended, he or she must make such a request in writing, state the nature of the information desired amended, and cite the reasons. Within 10 working days after the Tribunal has received such a request, the Chairman shall acknowledge its receipt and inform the requester whether or not the request has been granted. If the request is denied, the Chairman shall explain why and inform the requester of the right to appeal the denial to the Tribunal. All appeals must be in writing, with the caption "Privacy Act Appeal," and the Chairman will inform the requester of their disposition within 30 working days, unless there is good cause for the time to be extended. If the appeal is denied the requester will be notified of the provision for judicial review under 5 U.S.C. 552(b).

(g) Exempt from this section is all investigatory material compiled for law enforcement purposes as stipulated in 5 U.S.C. 552(k)(2).

Subpart D—Equal Employment Opportunity

§ 301.31 Purpose.

(a) This section sets forth the Tribunal's policy concerning Equal Employment Opportunity and the complaint

procedures in the case of discrimination.

(b) The policy of the Tribunal is to oppose discrimination in all areas of job application, employment, and promotion on the basis of race, religion, sex, national origin, age, or physical handicap; this is because such a policy is right and any other would be morally indefensible. This policy will be pursued actively and affirmatively.

§ 301.32 Recruitment and hiring.

(a) Except in the case of the personal staffs of Commissioners, responsibility for equal employment opportunity is the Tribunal's as a whole; however, the authority to execute this policy may be delegated to a Personnel Committee.

(b) All hiring will be done on the basis of individual qualifications, without discrimination. The criteria of who is best qualified to fill a vacancy rests with the Tribunal, but there will be no criteria which discriminates in the areas covered by § 301.31(b).

(c) In soliciting job applicants, systematic efforts will be made to locate and encourage qualified minority and women candidates. Where appropriate, the positions will be advertised in publications with primarily minority and women readership and announced through organizations or groups with high minority and women representation.

(d) Applicants for the same position will be required to have the same skills and to provide the same background information. The total number of applicants considered must reflect the proportion of minorities and women reasonably available for such a position. The criteria by which applicants are screened and selected shall be job related.

§ 301.33 Complaint procedures.

(a) Any person who believes that he or she has been discriminated against on the basis of race, religion, sex, national origin, age, or physical handicap, must first resolve such a complaint through the following procedure before taking civil action. Before a complaint may be presented formally the procedures for resolving it informally must be exhausted.

(1) *Informal complaint procedures.* (i) Within 30 days of an alleged discriminatory act, or in the case of a personnel action, within 30 days of its effective date, the complainant must contact the Chairman of the Personnel Committee and explain the case for the complaint. In case the complaint is against the Chairman of the Personnel Committee, it will be made to the chairman of the Tribunal. The complainant may be accompanied or represented by any person of his or her choosing.

(ii) The chairman of the Personnel Committee, or the Chairman of the Tribunal, or a Commissioner designated by the Chairman, shall then make whatever inquiry seems necessary into the circumstances surrounding the complaint and shall attempt to resolve it, informally through counseling. Such counseling shall be completed within twenty-one (21) days of the date on which the complaint was first brought, and written record will be kept. If an informal resolution is reached, its terms will be in writing. The identity of the complainant at this stage, however, will at no time be revealed unless he or she specifically authorizes it.

(iii) If an informal resolution is not reached, the complainant will be advised that he or she may then file a formal complaint.

(2) *Formal complaint procedure.* (i) Within 15 days of the final counseling session under the informal procedure above, and if no resolution has been reached, the complainant may file a formal written complaint addressed to the Chairman of the Tribunal, signed by the complainant, and specifying all the details surrounding the complaint.

(ii) On receipt of the complaint, the Chairman shall request an investigation by the Chairman of the Personnel Committee and two Commissioners not on the Committee. This investigation will review thoroughly all the circumstances surrounding the alleged discrimination and analyze the treatment of the complainant as compared with others in the same situation. The results shall be in writing and a copy sent to the complainant. The complainant shall then be given the opportunity to meet with the Commis-

sioners who prepared this report to try to reach an adjustment of the complaint. The complainant may be accompanied or represented by a person of his or her own choosing. If the complainant is an employee of the Tribunal, he or she shall be allowed sufficient official time to present the complaint. If the complainant has designated another Tribunal employee to advise or represent him, that person shall be allowed sufficient official time to perform the appropriate duties.

(iii) If an adjustment is reached at this point, it must be signed by the complainant and shall serve to terminate the matter. If an adjustment is not reached, the investigative report will be transmitted to the Chairman of the Tribunal, and the Tribunal shall make a disposition of the complaint to take affect within 15 days. This disposition will be relayed to the complainant in writing immediately. The complainant shall also be advised of his or her right to file a civil action, or in the case of an employee of the Tribunal to demand a hearing.

(iv) Within 15 days of the announcement of the Tribunal's proposed disposition, a complainant who is an employee of the Tribunal may request a hearing. Upon receipt of such a request, the Chairman shall request from another Federal agency, a qualified Hearing Examiner who has been certified to hear Equal Employment Opportunity complaints.

(v) The Hearing Examiner, within 21 days, shall conduct a hearing. Witnesses will be allowed to testify, but their testimony must relate only to the complaint; information will be admitted into evidence, but only information having a direct bearing on the complaint. Both parties to the complaint shall have the opportunity to cross-examine. The hearing shall be recorded, and the transcript as well as the findings and recommendations of the Hearing Examiner shall be transmitted to the Tribunal for a final decision.

(vi) The Tribunal will give special consideration to the recommendations of the Hearing Examiner, and if he wishes to reject or modify those recommendations, the Tribunal must accompany such a decision with a letter detailing his reasons. The Tribunal's final decision will be accompanied by a copy of the Hearing Examiner's findings and recommendations and a transcript of the hearing.

(vii) After the decision has been issued, the complainant shall be advised immediately that he or she has the right to file a civil action in the appropriate District Court within 30 days.

(viii) If within one hundred eighty (180) days from the date the complainant first brought the complaint, the Tribunal has failed to issue a decision, the complainant will also have the right to file a civil action.

(ix) Where discrimination is found, the Tribunal shall review the matter which gave rise to the complaint, and determine whether or not disciplinary action is necessary. The basis for this action shall be in writing, but not included in the complaint file.

§ 301.34 Third party allegation of discrimination.

Organizations or third parties may bring allegations of discrimination against the Tribunal in areas unrelated to individual complaints, but such allegations must be in writing, and in sufficient detail for the Tribunal to investigate them. The Tribunal may order an investigation, and the party bringing the allegations will be informed of its results as well as of any decision by the Tribunal and corrective action.

§ 301.35 Business relations.

Business contracts entered into by the Tribunal shall stipulate that all contractors, subcontractors, and suppliers to the Tribunal conform in their own policies with the substance of the Tribunal's Equal Employment Opportunity Policy.

Subpart E—Procedures and Regulations

§ 301.40 Scope.

All Tribunal proceedings will be governed by the procedures of this subpart. This subpart does not apply to general statements of policy or to

rules of agency organization, procedure, or practice.

§ 301.41 Formal hearings.

(a) The formal hearings which will be conducted pursuant to the rules of this subpart are rate adjustment proceedings, royalty fee distribution proceedings, and all rulemaking proceeding in which it has been determined to conduct a hearing. The Tribunal may also, on its own motion or on the petition of an interested party, hold other proceedings it deems necessary on any matter it has the authority to investigate, in order to obtain information in determining its policies, in exercising its duties, or in formulating or amending its rules and regulations. Such proceedings also will be subject to the rules of this subpart.

(b) Studies or conferences the Tribunal may hold in carrying out its statutory responsibilities may be conducted in whole or in part under the provisions of this subpart, depending upon the discretion of the Tribunal.

§ 301.42 Suspension, amendment, or waiver of rules.

(a) The provisions of this subpart may be suspended, revoked, amended, or waived, in whole or in part, at any time by the Tribunal for good cause shown, subject to the provisions of the Administrative Procedure Act. Where procedures have not been specifically prescribed in this subpart, the Tribunal shall follow those which in its opinion will best serve the purposes of a proceeding.

§ 301.43 Notice of proposed rulemaking.

(a) *General notice.* Public notice for rate adjustment and royalty distribution proceedings is covered in Subparts F and G of this part. Before the adoption of any rule of general applicability, or the commencement of any hearing on any proposed rulemaking, the Tribunal shall publish a general notice in the FEDERAL REGISTER, such notice to be published not less than 30 days prior to the date on which the proposed rules may be considered by the Tribunal, or the date of any hearing on such proposed rules. However, where the Tribunal, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may adopt the rules without notice by incorporating a finding to such effect and a concise statement of the reasons therefor in the notice.

(b) *Notice.* A rule proceeding shall commence with a notice of proposed rulemaking. Such notice shall be published in the FEDERAL REGISTER, and to the extent practicable, otherwise made available to interested persons. The notice shall include: (1) The terms or substance of the proposed rule or a description of the subjects and issues involved; (2) reference to the legal authority under which the rule is proposed; (3) a statement describing the particular reason for the rule; and (4) an invitation to all interested persons to comment.

(c) *Hearing notice.* A hearing notice of proposed rulemaking shall be published in the FEDERAL REGISTER, and to the extent practicable, otherwise made available to interested persons. The hearing notice shall include: (1) Designated issues which are to be considered; (2) the time and place of hearing, and (3) instructions to interested persons seeking to make oral presentation.

§ 301.44 Conduct of proceedings.

(a) At the opening of the proceeding the Chairman shall announce the subject under consideration.

(b) Only Commissioners of the Tribunal, authorized Tribunal staff, or counsel as provided in this chapter shall question witnesses.

(c) Subject to the approval of the Tribunal, the Chairman will have the responsibility for:

(1) Setting the order of presentation of evidence and appearance of witnesses;

(2) Ruling on objections and motions;

(3) Administering oaths and affirmations to all witnesses;

(4) Making all rulings with respect to introducing or excluding documentary or other evidence;

(5) Regulating the course of the proceedings and the decorum of the parties and their counsel, and insuring

that the proceedings are fair and impartial;

(6) Announcing the schedule of subsequent hearing;

(7) Taking any other action which is consistent with this chapter and which has been authorized by the Tribunal.

(d) With all due regard for the convenience of witnesses, proceedings shall be conducted as expeditiously as possible.

(e) Following the opening statement, the Tribunal may convene first in executive session if such is the requirement of a statute or rule.

§ 301.45 Declaratory rulings.

In accordance with 5 U.S.C. 554(e), the Tribunal may on motion of its own, or on motion of an interested party, issue a declaratory ruling in order to terminate a controversy or remove uncertainty.

§ 301.46 Testimony under oath or affirmation.

All witnesses at Tribunal proceedings shall be required to take an oath or affirmation before testifying; however, attorneys who do not appear as witnesses shall not be required to do so.

§ 301.47 Transcript and record.

(a) An official reporter for the recording and transcribing of hearings will be designated by the Tribunal from time to time. Anyone wishing to inspect the transcript of any hearing may do so at the Tribunal; however, anyone wishing a copy must purchase it from the official reporter.

(b) After the close of the hearing, the complete transcript of testimony together with all exhibits shall be certified as to identity by the Chairman and filed in the offices of the Tribunal.

(c) The transcript of testimony and all exhibits, papers, and requests filed in the proceeding, shall constitute the exclusive record or decision. Any decision resting on official notice of a material fact not appearing in the record shall automatically afford any party, on timely request, to have an opportunity to show the contrary.

§ 301.48 Closing the hearing.

To close the record of hearing, the Chairman shall make an announcement that the taking of testimony has concluded. In its discretion the Tribunal may close the record as of a future specified date, and allow time for exhibits yet to be prepared to be admitted: *Provided,* That the parties to the proceeding stipulate on the record that they waive the opportunity to cross-examine or present evidence with respect to such exhibits. The record in any hearing which has been recessed may not be closed by the Chairman prior to the day on which the hearing is to resume, except upon 10 days' notice to all parties.

§ 301.49 Documents.

(a) *Copies of documents.* The original and 15 copies of every document filed and served in proceedings before the Tribunal shall be furnished for the Tribunal's use, except exhibits made a part of the record.

(b) *Subscription and verification.* (1) The original of all documents filed by any party represented by counsel, shall be signed by at least one attorney of record and list his address and telephone number. All copies shall be confirmed. Except when otherwise specifically provided, documents signed by the attorney for a party need not be verified or accompanied by an affidavit. The signature of an attorney constitutes certification by him that he has read the document, that to the best of his knowledge and belief there is good ground to support it, and that it has not been interposed for delay.

(2) The original of all documents filed by a party not represented by counsel shall be both signed and verified by that party and list that party's address and telephone number.

(3) The original of a document that is not signed, or is signed with intent to defeat the purpose of this section, may be stricken as sham and false and the matter proceed as though the document had not been filed.

§ 301.50 Reopening of proceedings, modification or setting.

(a) *Condition for reopening.* (1) Except in the case of rate adjustment proceedings and distribution proceedings the Tribunal may, upon petition or its own motion, reopen any proceeding, after reasonable notice, for the purpose of rehearing arguments or reconsideration.

(2) After granting an opportunity to be heard, the Tribunal may alter, modify or set aside in whole or in part, the report of its finding or order if it finds such action required by changed conditions, by material mistake of fact or law, or by the public interest

(b) *Petition for reopening.* A petition for reopening shall be made in writing and shall state its grounds. If it is a petition to take further evidence, the nature and purpose of the new evidence to be adduced shall be stated briefly, and an explanation given for why such evidence was not available at the time of the prior hearing. If it is a petition for reargument or reconsideration, the matter that is claimed to have been erroneously decided shall be specified and the alleged errors outlined briefly. Copies of the petition shall be furnished to all participants or their counsel.

(c) *Stay of rule or order.* No petition for reopening nor permission for reopening shall constitute a stay of any Tribunal rule or order; except that the Tribunal may postpone the effective date of any action taken by it pending judicial review and if, in the Tribunal's opinion, justice so requires.

301.51 Rules of evidence.

(a) *Admissibility.* In any public hearing before the Tribunal, evidence which is not unduly repetitious or cumulative and is relevant and material shall be admissible. The testimony of any witness will not be considered evidence in a proceeding unless the witness has been sworn.

(b) *Documentary evidence.* Evidence which is submitted in the form of documents or detailed data and information shall be presented as exhibits. Relevant and material matter embraced in a document containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence. A document in which material and relevant matter occurs which is of such bulk that it would unnecessarily encumber the record, may instead be marked for identification, and the relevant and material parts, once properly authenticated, may be read into the record. If the Tribunal desires, a true copy of the material and relevant matter may be presented in extract and submitted as evidence. Anyone presenting documents as evidence must present copies of all other participants at the hearing or their attorneys, and afford them an opportunity to examine the documents in their entirety and offer any other portion in evidence which may be felt material and relevant.

(c) *Documents filed with the Tribunal.* If the matter offered in evidence is contained in documents already on file with the Tribunal, the documents themselves need not be produced, but may instead be referred to according to how they have been filed with the Tribunal.

(d) *Public documents.* If a public document is offered in evidence either in whole or in part, such as an official report, decision, opinion or published scientific or economic data, and the document has been issued by an Executive Department, a legislative agency or committee, or a Federal administrative agency (Government-owned corporations included), and is proved by the party offering it to be reasonably available to the public, the document need not be produced physically, but may be offered instead by identifying the document and signaling the relevant parts.

(e) *Copies to participants.* Copies of all prepared testimony and exhibits must be distributed to the Tribunal and to other participants or their counsel at a hearing, unless the Chairman directs otherwise. For its use the number of copies the Tribunal requires is seven.

(f) *Reception and ruling.* Any ruling on the admissibility of evidence will be made by the Chairman, and he shall control the reception of evidence and

insure that it confines itself to the issues of the proceeding.

(g) *Offers of proof.* If the Chairman rejects or excludes proposed oral testimony and an offer of proof is made, the offer of proof shall consist of a statement of the substance of the evidence which it is contended would have been adduced. In the case of documentary or written evidence, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(h) *Introduction of studies and analysis.* If studies or analysis are offered in evidence, they shall state clearly the study plan, all relevant assumptions, the techniques of data collection, and the techniques of estimation and testing. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. If requested, tabulations of input data shall be made available to the Tribunal.

(i) *Statistical studies.* Statistical studies offered in evidence shall be accompanied by a summary of their assumptions, their study plans, and their procedures. Supplementary details shall be added in appendices. For each of the following types of statistical studies the following should be furnished:

(1) *Sample surveys.* (i) A clear description of the survey design, the definition of the universe under consideration, the sampling frame and units, the validity and confidence limits on major estimates; and

(ii) An explanation of the method of selecting the sample and of which characteristics were measured or counted.

(2) *Econometric investigations.* (i) A complete description of the econometric model, the reasons for each assumption, and the reasons for the statistical specification;

(ii) A clear statement of how any changes in the assumptions might affect the final result; and

(iii) Any available alternative studies, if requested, which employ alternative models and variables.

(3) *Experimental analysis.* (i) A complete description of the design, the controlled conditions, and the implementation of controls; and

(ii) A complete description of the methods of observation and adjustment of observation.

(4) *Studies involving statistical methodology.* (i) The formula used for statistical estimates;

(ii) The standard error for each component;

(iii) The test statistics, the description of how the tests were conducted, related computations, computer programs, and all final results; and

(iv) Summarized descriptions of input data and, if requested, the input data itself.

(j) *Cumulative evidence.* Cumulative evidence will be discouraged by the Tribunal and the Tribunal may limit the number of witnesses that may be heard in behalf of any one party on any one issue.

(k) *Further evidence.* At any state of a hearing the Chairman may call upon any party to furnish further evidence upon any issue.

(l) *Rights of parties as to presentation of evidence.* Every participant shall have the right to present his case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be necessary to disclose the facts fully and truthfully. The Chairman, however, may limit introduction of evidence, examination, and cross-examination if in his judgment this evidence or examination would be cumulative or cause undue delay.

§ 301.52 Participation in any proceeding.

Interested persons will be afforded an opportunity to participate in any proceeding and submit written data, views, or arguments, with or without the opportunity to present the same orally. If proposed rules are required by statute to be made on the record after opportunity for a hearing, such a hearing shall be conducted pursuant to 5 U.S.C., Subchapter II, and 7 U.S.C., and the procedure will be the same as in § 301.55 herein.

301.53 Examination, cross-examination, and rebuttal.

(a) Each Commissioner may examine ny witness at any time.

(b) Examination, cross-examination, nd rebuttals relevant to the issues nder consideration, shall be allowed y the Chairman, but only to the xtent they are necessary for a full nd true disclosure of the facts.

(c) *Selection of representatives for ross-examination.* The Tribunal will ncourage individuals or groups with he same or similar interests in a proeeding to select a single representaive to conduct their examination and ross-examination for them. However, f there is no agreement on the selecion of a representative, then each inividual or group will be allowed to onduct his own examination and ross-examination, but only on issues ffecting his particular interest.

301.54 Proposed findings and conclusions.

(a) Any party to the proceeding may ile proposed findings of fact and conlusions, briefs, or memoranda of law, r may be directed by the Chairman o to file, such filings to take place vithin 20 days after the record has een closed, unless additional time is ranted.

(b) Failure to file when directed to o do may be considered a waiver of he right to participate further in the roceeding, unless good cause is hown.

(c) Proposed findings of fact shall be umbered by paragraph and include ll basic evidentiary facts developed n the record used to support proosed conclusions and cite appropriately the record for each evidentiary act. Proposed conclusions shall be tated separately. Proposed findings ubmitted by someone other than an pplicant in a proceeding shall be reticted to those issues which specifially affect that person.

(d) Proof of service upon all other ounsel or parties in a proceeding nust accompany pleadings and all ther papers filed under this section.

§ 301.55 Promulgation of rules or orders.

(a) In adopting a rule or order the Tribunal will consider all relevant matters of fact, law, and policy, and all relevant matters which have been presented by interested persons, and will exercise due discretion. Together with a concise general statement of its basis and purpose and any necessary findings, the rule or order will be published in the FEDERAL REGISTER, and if any other public notice is necessary that will be made also.

(b) The effective date of any rule, or its amendment, suspension, or repeal, will be at least 30 days after it is published in the FEDERAL REGISTER, unless good cause has been shown and is published with the rule.

§ 301.56 Public suggestions and comments.

(a) The Tribunal encourages the public, not just those persons subject to its regulations, to submit suggestions and proposals concerning any substantial question before it, when that question will have subtantial impact either upon those directly regulated by the Tribunal or upon others. It is in the best interests of both the Tribunal and the public at large that the Tribunal be advised on issues and problems that are potentially significant to it. This will permit the Tribunal to consider policy questions and administrative reforms early enough so that they may be viewed in a general context and not in the detailed application of a particular proceeding.

(b) Upon receiving such suggestions or proposals, the Tribunal shall review them and take whatever action seems necessary. Further information may be requested from the party submitting the suggestion or proposals, and the Tribunal staff may be asked to make a study, or an informal public conference may be held. Conferences or procedures undertaken pursuant to this section shall not be deemed subject to the Administrative Procedure Act with respect to notice of rulemaking. They are intended by the Tribunal simply as a means of determining the need for Tribunal action, prior to issuing a notice of proposed rulemaking.

(c) Such suggestions or proposals, however, shall be filed in accordance with the Tribunal's rules.

(d) This policy may not be used to advocate ex parte a position in a pending proceeding. Suggestions or proposals offered must relate to general conditions, such as conditions in industry, the public interest, or the policies of the Tribunal.

Subpart F—Rate Adjustment Proceedings

§ 301.60 Scope.

This chapter governs only those proceedings dealing with royalty rate adjustments affecting cable television (17 U.S.C. 111), the production of phonorecords (17 U.S.C. 115), coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116), and non-commercial broadcasting (17 U.S.C. 118). It does not govern unrelated rulemaking proceedings. Those provisions of Subpart E generally regulating the conduct of proceedings shall apply to rate adjustment proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 301.61 Commencement of adjustment proceedings.

(a) In the case of cable television, phonorecords, and coin-operated phonorecord players (jukeboxes) rate adjustment proceedings will commence by the publication of a notice to that effect in the FEDERAL REGISTER on January 1, 1980, pursuant to 17 U.S.C. 804(a)(1). In the case of non-commercial broadcasting the notice will be published on June 30, 1982 and at 5-year intervals thereafter, pursuant 10 U.S.C. 118(c). The notice shall, to the extent feasible, describe the general structure and schedule of the proceeding.

(b) Initially, as outlined in paragraph (a) of this section a petition from an interested party is not necessary to commence proceedings. Thereafter, however, for rate adjustment proceedings to commerce, a petition must be filed by an interested party according to the following schedule:

(1) Cable Television: During 1985 and each subsequent fifth calendar year.

(2) Phonorecords: During 1987 and each subsequent 10th calendar year.

(3) Coin-operated phonorecord players (jukeboxes): During 1990 and each subsequent 10th calendar year.

(c) Cable television rate adjustment proceedings may also be commenced by the filing of a petition, according to 17 U.S.C., 801(b)(2) (B) and (C), if the Federal Communications Commission amends certain of its rules concerning the carriage by cable of broadcast signals, or with respect to syndicated and sports program exclusivity.

(d) In the case of non-commercial broadcasting, a petition is not necessary for the commencement of proceedings. They commence automatically according to paragraph (a) of this section.

§ 301.62 Content of petition.

(a) The petition shall detail the petitioner's interest in the royalty rate sufficiently to permit the Tribunal to determine whether the petitioner has "significant interest" in the matter. The petition must also identify the extent to which the petitioner's interest is shared by other owners or users, and owners or users with similar interests may file a petition jointly.

(b) In the case of a petition for rate adjustment as the result of a Federal Communications Commission rule change, the petition shall also set forth the action of the Federal Communications Commission which the party filing the petition feels authorizes a rate adjustment proceeding.

§ 301.63 Consideration of petition.

The Tribunal shall not start to consider any petition before the expiration of 90 days from the start of the calendar year specified in § 301.61(b) or 90 days from the effective date of the Federal Communications Commission action mentioned in § 301.62(c). Similar petitions may be joined together by the Tribunal for the purpose of determining "significant interest", and the Tribunal may permit written comments or a hearing on pending petitions.

§ 301.64 Disposition of petition.

At the end of the 90-day period, the Tribunal shall determine as expeditiously as possible if one or more peti-

oner's interest is "significant"; and ıall publish in the FEDERAL REGISTER notice of its determination and the ɔasons therefor, together with a otice of the commencement of prɔceedings if it has been determined to ɔmmence a proceeding. Any comıencement notice shall, to the extent ʻasible, describe the general structure nd schedule of the proceeding.

301.65 Rate adjustment proceedings.

In any rate adjustment proceeding, ll interested persons shall have the pportunity to present written comıents and oral testimony, subject to ıe general provisions of Subpart E.

301.66 Publication of proposed rate determination.

(a) Following the conclusion of the earings, the Tribunal shall publish as ɔon as possible in the FEDERAL REGISER, a notice of its proposed findings nd conclusions in the rate adjustment roceeding. The Tribunal shall afford ll parties a reasonable opportunity to ıbmit written comments on the proosed determination. The Tribunal ıay, if necessary, conduct additional earings.

(b) A proposed determination will ot be published if, in the Tribunal's ıdgment, a final determination ınnot feasibly be rendered before the ear's end as required by 17 U.S.C. 18(c) and 17 U.S.C. 804(e) concerning ıe termination of proceedings.

301.67 Final determination.

Upon the conclusion of the proceures for proposed determinations deɔribed in § 301.66, or upon the conclun of the rate adjustment proceedıgs provided in § 301.65, if the publiıation of a proposed rate determinaon is not feasible because of the reuirements to reach a final determinaon before the end of the year (17 .S.C. 118(c) and 17 U.S.C. 804(c)), the ʻribunal shall publish in the FEDERAL EGISTER a written opinion stating in etail the criteria it found applicable, ıe facts found relevant, and the speıfic reasons for its determination.

301.68 Reopening of proceedings.

Following the publication of a final ɔterminatıon in the FEDERAL REGISTER the Tribunal shall not reopen or conduct any further proceedings.

§ 301.69 Effective date of final determination.

A final determination by the Tribunal shall become effective thirty days following its publication in the FEDERAL REGISTER, unless an appeal has been filed prior to that time pursuant to 17 U.S.C. 810 to vacate, modify or correct a determination, and notice of the appeal has been served on all parties who appeared in the proceeding.

Subpart G—Royalty Fees Distribution Proceedings

§ 301.70 Scope.

This subpart governs only those proceedings dealing with the distribution of compulsory cable television and coin-operated phonorecord player (jukebox) royalties desposited with the Register of Copyrights, according to the terms of 17 U.S.C., 111(d)(5) and 116(c). It does not govern unrelated rulemaking proceedings. Those provisions of Subpart E generally regulating the conduct of proceedings shall apply to royalty fee distribution proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 301.71 Commencement proceedings.

(a) *Cable television.* In the case of compulsory royalty fees for secondary transmissions by cable television, any person claiming to be entitled to such fees must file a claim with the Tribunal during the month of July each year in accordance with Tribunal regulations.

(b) *Coin-operated phonorecord players.* In the case of compulsory royalty fees for the use of nondramatic musical works by coin-operated phonorecord players (jukeboxes) any person claiming to be entitled to such fees must file a claim with the Tribunal during the month of January each year in accordance with Tribunal regulations.

§ 301.72 Determination of controversy.

(a) *Cable television.* After the first day of August each year, the Tribunal

shall determine whether a controversy exists among the claimants of cable television compulsory royalty fees. In order to determine whether a controversy exists, the Tribunal may conduct whatever proceedings it feels necessary, subject to the procedures and regulations of Subpart E. The results of this determination shall be announced in the FEDERAL REGISTER. If the Tribunal decides that a controversy exists, the FEDERAL REGISTER notice shall also announce the commencement of the royalty distribution proceeding, and shall, to the extent feasible, describe the general structure and schedule of the proceeding.

(b) *Coin-operated phonorecord players.* After the first day of October each year, the Tribunal shall determine whether a controversy exists among the claimants of coin-operated phonorecord player (jukebox) compulsory royalty fees. In order to determine whether a controversy exists the Tribunal may conduct whatever proceedings it feels necessary, subject to the procedures and regulations of Subpart E. The results of this determination shall be announced in the FEDERAL REGISTER. If the Tribunal decides that a controversy exists, the FEDERAL REGISTER notice shall also announce the commencement of the royalty distribution proceeding, and shall, to the extent feasible, describe the general structure and schedule of the proceeding.

§ 301.73 Royalty distribution proceedings.

In any royalty distribution proceeding all interested claimants shall have the opportunity to present written comments and oral testimony, subject to the general provisions of Subpart E.

§ 301.74 Publication of proposed royalty distribution determination.

(a) Following the conclusion of the hearings, the Tribunal shall publish, as soon as possible, in the FEDERAL REGISTER, a notice of its proposed findings and conclusions in the royalty distribution proceeding. The Tribunal shall afford all claimants a reasonable opportunity to submit written comments on the proposed determination. The Tribunal may, if necessary, conduct additional hearings.

(b) A proposed determination will not be published if, in the Tribunal's judgment, a final determination cannot feasibly be rendered before the year's end, as required by 17 U.S.C. 804(e) concerning the termination of proceedings.

§ 301.75 Final determination.

Upon the conclusion of the procedures for proposed determination described in § 301.74, or upon the conclusion of the royalty distribution proceedings provided in § 301.73, if the publication of a proposed royalty distribution determination is not feasible because of the requirements to reach a final determination before the end of the year (17 U.S.C. 804(e)), the Tribunal shall publish in the FEDERAL REGISTER a written opinion stating in detail the criteria it found applicable, the facts found relevant, and the specific reasons for its determination.

§ 301.76 Reopening of proceedings.

Following the publication of a final determination in the FEDERAL REGISTER, the Tribunal shall not reopen or conduct any further proceedings.

§ 301.77 Effective date of final determination.

A final determination by the Tribunal shall become effective thirty days following its publication in the FEDERAL REGISTER, unless an appeal has been filed prior to that time pursuant to 17 U.S.C. 810 to vacate, modify, or correct a determination, and notice of the appeal has been served on all parties who appeared in the proceeding.

PART 302—FILING OF CLAIMS TO CABLE ROYALTY FEES

Sec.

302.1 General.
302.2 Filing of claims to cable royalty fees for secondary transmissions during the period January 1 through June 30, 1979.
302.3 Content of claims.
302.4 Forms.
302.6 Filing of claims to cable royalty fees for secondary transmissions during the period July 1 through December 31, 1978.

Sec.

302.7 Filing of claims to cable royalty fees for secondary transmissions during calendar year 1979 and subsequent calendar years.
302.8 Compliance with statutory dates.
302.9 Proof of fixation of works.
302.10 Deduction of costs of distribution proceedings.

AUTHORITY: 17 U.S.C. 111(d)(5)(A).

SOURCE: 43 FR 24528, June 6, 1978, unless otherwise noted.

§ 302.1 General.

This regulation prescribes procedures pursuant to 17 U.S.C. 111(d)(5)(A), whereby persons claiming to be entitled to compulsory license fees for secondary transmissions by cable systems shall file claims with the Copyright Royalty Tribunal (CRT).

§ 302.2 Filing of claims to cable royalty fees for secondary transmissions during the period January 1 through June 30, 1979.

Every person claiming to be entitled o compulsory license fees for secondary transmissions by cable systems luring the period January 1 through June 30, 1978, shall file in the office of he Copyright Royalty Tribunal a laim to such fee during the calendar nonth of July 1978 or July 1979. Any laimant so filing shall be considered s having filed a claim for the period anuary 1 through June 30, 1978. For urposes of this clause claimants may ile claims jointly or as a single claim. joint claim shall include a concise tatement of the authorizations for he filing of the joint claim.

[44 FR 60727, Oct. 22, 1979]

302.3 Content of claims.

The claims filed pursuant to § 302.2 hall include the following informaon:

(a) The full legal name of the person r entity claiming compulsory license ees.

(b) The full address, including a spefic number and street name or rural oute, of the place of business of the erson or entity.

(c) A general statement of the ature of the copyrighted works, whose secondary transmission provides the basis of the claim.

(d) Identification of at least one secondary transmission establishing a basis for the claim.

§ 302.4 Forms.

The Copyright Royalty Tribunal does not provide printed forms for the filing of claims.

§ 302.6 Filing of claims to cable royalty fees for secondary transmissions during the period July 1 through December 31, 1978.

(a) During the month of July 1979, every person claiming to be entitled to compulsory license fees for secondary transmissions during the period July 1 through December 31, 1978, shall file in the offices of the Copyright Royalty Tribunal a claim to such fees. Any claimant so filing shall be considered as having filed a claim for the period July 1 through December 31, 1978.

(b) Every person who filed in the office of the Copyright Royalty Tribunal during the calendar month of July, 1979, claiming to be entitled to compulsory license fees for secondary transmissions by cable systems during the period July 1 through December 31, 1978, but who did not file a claim for the period January 1 through June 30, 1978, shall be considered as having filed a claim for the period of January 1 through June 30, 1978.

(c) For the purpose of this clause claimants may file claims jointly or as a single claim.

[44 FR 60727, Oct. 22, 1979]

§ 302.7 Filing of claims to cable royalty fees for secondary transmissions during calendar year 1979 and subsequent calendar years.

(a) During the month of July 1980 and in July of each succeeding year, every person claiming to be entitled to compulsory license fees for secondary transmissions during the preceding calendar year shall file a claim to such fees in the office of the Copyright Royalty Tribunal. No royalty fees shall be distributed to copyright owners for secondary transmissions during the specified period unless such owner has filed a claim to such fees

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during the following calendar month of July. For purposes of this clause claimants may file claims jointly or as a single claim. Such filing shall include such information as the Copyright Royalty Tribunal may require. A joint claim shall include a concise statement of the authorization for the filing of the joint claim.

(b) Claims filed during the month of July 1980 shall include the following information:

(1) The full legal name of the person or entity claiming compulsory license fees.

(2) The full address, including a specific number and street name or rural route, of the place of business of the person or entity.

(3) A general statement of the nature of the copyrighted works, whose secondary transmission provides the basis of the claim.

(4) Identification of at least one secondary transmission establishing a basis for the claim.

[45 FR 26959, Apr. 22, 1980]

§ 302.8 Compliance with statutory dates.

For purposes of 17 U.S.C. (d)(5)(A), claims required to be filed with the Copyright Royalty Tribunal during the month of July shall be considered as timely filed if: (a) They are addressed to the Copyright Royalty Tribunal, 1111 20th Street NW., Washington, D.C. 20036, and deposited with the U.S. Postal Service with sufficient postage as first class mail prior to the expiration of the statutory period, and (b) they are accompanied by a certificate stating the date of deposit. The persons signing the certificate should have reasonable basis to expect that the correspondence would be mailed on or before the date indicated.

§ 302.9 Proof of fixation of works.

The Copyright Royalty Tribunal shall not require in any proceeding for the distribution of cable royalty fees the filing by claimants of tangible fixations of works in whole or in part. In the event of a controversy concerning the actual fixation of a work in a tangible medium as required by the Copyright Act, the Copyright Royalty Tribunal shall resolve such controversy for purposes of the distribution proceeding solely on the basis of affidavits by appropriate operational personnel and other appropriate documentary evidence, and such oral testimony as the Copyright Royalty Tribunal may deem necessary. Affidavits submitted by claimants should establish that the work for which the claim is submitted was fixed in its entirety, and should state the nature of the work, the title of the program, the duration of the program, and the date of fixation. No such affidavits need be filed with the Copyright Royalty Tribunal unless requested by the Tribunal.

[43 FR 40225, Sept. 11, 1978]

§ 302.10 Deduction of costs of distribution proceedings.

In compliance with 17 U.S.C. 111(d)(5)(c) and 17 U.S.C. 807, before any distributions are made pursuant to 17 U.S.C. 111, the Copyright Royalty Tribunal will deduct all costs which would not have been incurred by the Tribunal but for the distribution proceeding.

[44 FR 29894, May 23, 1979]

PART 303—ACCESS TO PHONORECORD PLAYERS (JUKEBOXES)

Sec.

303.1 General.

303.2 Access to establishments and phonorecord players.

§ 303.1 General.

This regulation prescribes the procedures pursuant to 17 U.S.C. 116 by which persons who can reasonably be expected to have claims to royalty fees paid by the operators of coin-operated phonorecord players under the compulsory license established by 17 U.S.C. 116 may have access to the establishments in which such phonorecord players are located and to the phonorecord players located therein to obtain information which may be reasonably necessary to determine the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposit-

ed. The terms "operator" and "coin-operated phonorecord player" have the meanings given to them by paragraph (3) of section 116 of Title 17.

(17 U.S.C. 116(c)(5); 17 U.S.C. 801(b))

[43 FR 40500, Sept. 12, 1978]

§ 303.2 Access to establishments and phonorecord players.

A person, or authorized representatives of such person, who can reasonably be expected to have claims to royalty fees paid by the operators of phonorecord players shall have access to the establishments in which such phonorecord players are located during customary business hours on regular business days. Such access shall be only for the purpose of obtaining information concerning the performance of musical works by the phonorecord players. The right of access shall be exercised in such a manner as not to cause any significant interference with the normal functioning of an establishment.

(17 U.S.C. 116(c)(5); 17 U.S.C. 801(b))

[43 FR 40500, Sept. 12, 1978]

PART 304—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING

Sec.

304.1 General.
304.2 Definition of public broadcasting entity.
304.3 [Reserved]
304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).
304.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.
304.6 Performance of musical compositions by other public broadcasting entities.
304.7 Recording rights, rates and terms.
304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.
304.9 Unknown copyright owners.
304.10 Cost of living adjustment.
304.11 Notice of restrictions on use of reproductions of transmission programs.
304.12 Amendment of certain regulations.
304.13 Issuance of interpretative regulations.

AUTHORITY: Pub. L. 94-553, unless otherwise noted.

SOURCE: 47 FR 57925, Dec. 29, 1982, unless otherwise noted.

§ 304.1 General.

This Part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic, and sculptural works during a period beginning on January 1, 1983 and ending on December 31, 1987. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity.

As used in this part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of Title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3 [Reserved]

§ 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities (other than those covered by §§ 304.5 and 304.6) engaged in the activities set forth in 17 U.S.C. 118(d), of copyrighted published nondramatic musical compositions, other than such compositions subject to the provisions of 17 U.S.C. 118(b)(2).

(a) *Determination of royalty rate.*

For the performance of such a work in a feature presentation of PBS:

1983-1984	1985-1986	1987
$140.00	$148.00	$157.00

For the performance of such a work as background or theme music in a PBS program:

1983-1984	1985-1986	1987
$35.00	$37.30	$39.65

For the performance of such a work in a feature presentation of a station of PBS:

1983-1984	1985-1986	1987
$10.00	$12.00	$13.00

For the performance of such a work as background or theme music in a program of a station of PBS:

1983-1984	1985-1986	1987
$2.50	$2.70	$2.85

For the performance of such a work in a feature presentation of NPR:

1983-1984	1985-1986	1987
$14.00	$14.90	$15.85

For the performance of such a work as background or theme music in an NPR program:

1983-1984	1985-1986	1987
$3.50	$3.70	$3.90

For the performance of such a work in a feature presentation of a station of NPR:

1983-1984	1985-1986	1987
$1.00	$1.10	$1.15

For the performance of such a work as background or theme music in a program of a station of NPR:

1983-1984	1985-1986	1987
$0.25	$0.30	$0.35

For the purpose of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively and the rate specified in this section for a PBS or NPR program, respectively.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated October 28, 1982 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) *Terms of use.* The applicable fee in this schedule shall be the fee for the time period during which the first performance in a program occurred, and shall cover performances of such work in such program for a period of three years following the first performance.

§ 304.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by nonprofit radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established by this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of copyrighted musical compositions, including performances by nonprofit radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic music compositions subject to the following schedule of royalty rates:

For all such compositions in the repertory of ASCAP annually	$140
For all such compositions in the repertory of BMI annually	140
For all such compositions in the repertory of SESAC annually	31
For the performances of any other such composition	1

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC, not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI, and SESAC upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

[47 FR 57925, Dec. 29, 1982, as amended at 48 FR 54224, Dec. 1, 1983]

§ 304.6 Performance of musical compositions by other public broadcasting entities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to college, universities or other nonprofit educational institutions.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and nonprofit radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by nonprofit radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

For all such compositions in the repertory of ASCAP,
in 1983, $180;
in 1984, $190;
in 1985, $200;
in 1986, $210;
in 1987, $220

For all such compositions in the repertory of BMI,
in 1983, $180;
in 1984, $190;
in 1985, $200;
in 1986, $210;
in 1987, $220

For all such compositions in the repertory of SESAC,
in 1983, $40;
in 1984, $42;
in 1985, $44;
in 1986, $46;
in 1987, $48

For the performance of any other such composition, in 1983 through 1987, $1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI, and SESAC not later than July 31, 1983, for the calendar year 1983, and not later than January 31 for each calendar year thereafter.

(e) *Records of use.* A public broadcasting entity subject to this section

shall furnish to ASCAP, BMI, and SESAC, upon request, a music use report during one week of each calendar year. ASCAP, BMI, and SESAC each shall not in any one calendar year request more than 5 stations to furnish such reports.

[47 FR 57925, Dec. 29, 1982, as amended at 48 FR 22716, May 20, 1983

§ 304.7 Recording rights, rates and terms.

(a) *Scope.* This section establishes rates and terms for the recording of nondramatic performances and displays of musical works on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such recorded nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities, as defined in 17 U.S.C. 118(g). The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) For uses described in subsection (a) of a musical work in a PBS-distributed program:

	1983-1984	1985-1986	1987
Feature	$75.00	$80.00	$85.00
Concert feature (per minute)	22.25	23.75	25.25
Background	37.50	40.00	42.50
Theme:			
Single program or first series program	37.50	40.00	42.50
Other series program	15.25	16.25	17.25

For such use other than in a PBS-distributed television program:

	1983-1984	1985-1986	1987
Feature	$5.00	$5.35	$6.00
Concert feature (per minute)	1.60	1.60	1.70
Background	2.50	2.70	2.85
Theme:			
Single program or first series program	2.50	2.70	2.85
Other series program	1.00	1.10	1.15

In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs includes all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

	1983-1984	1985-1986	1987
Feature	$7.50	$8.00	$8.50
Concert feature (per half hour)	11.00	11.00	12.00
Background	3.75	4.00	4.25
Theme:			
Single program or first series program	3.75	4.00	4.25
Other series program	1.50	1.60	1.70

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation of all or part of a symphony, concerto, or other serious work originally written for concert or opera performance.

(4) For such uses other than in a NPR produced radio program:

Feature	$ 50
Feature (concert) (per ½ hour)	$1 00
Background	$ 25

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1987 shall be subject to the rates established in this schedule.

(c) *Payment of royalty rates.* PBS, NPR, or other television public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later then January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR or other television public broadcasting entity shall maintain and furnish to copyright owners whose musical works are recorded pursuant to this schedule copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners. Such cue sheets or summaries shall be furnished not later than July 31 of each calendar year for recording the first six months of the calendar year, and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Royalty Tribunal (CRT).* (1) Deposit of cue sheets or summaries. PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the CRT copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year, and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the Copyright Royalty Tribunal upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

§ 304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) *Scope.* This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

For such uses in a PBS-distributed program:

For a featured display of a work.

1983–1984	1985–1986	1987
$45.75	$49.00	$52.00

For background and montage display.

1983–1984	1985–1986	1987
$22.25	$23.75	$25.25

For use of a work for program identification or for thematic use.

1983–1984	1985–1986	1987
$90.25	$96.25	$102.25

For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1983–1984	1985–1986	1987
$29.50	$31.50	$33.50

For such uses in other than PBS-distributed programs:

For a featured display of a work.

1983–1984	1985–1986	1987
$29.50	$31.50	$33.50

For background and montage display.

1983–1984	1985–1986	1987
$15.25	$16.25	$17.25

For use of a work for program identification or for thematic use.

1983–1984	1985–1986	1987
$60.75	$64.75	$68.75

For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1983–1984	1985–1986	1987
$15.25	$16.25	$17.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the single program theme rate.

In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display *appearing on the screen for more than three seconds.* Any display less than full-screen or substantially full-screen, or *full-screen for three seconds or less,* is deemed to be a "background or montage display".

(3) "Thematic use" is the utilization of the work of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine art.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic, and sculp-

tural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) *Filing of use reports with the CRT.* (1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule. Succeeding broadcast use periods will require the following additional payment: second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1987 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118(f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 304.9 Unknown copyright owners.

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this Part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 304.10 Cost of living adjustment.

(a) On December 1, 1983 the CRT shall publish in the FEDERAL REGISTER a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) from the May, 1982 to the last Index published prior to December 1, 1983. On each December 1 thereafter the CRT shall publish a notice of the change in the cost of living during the period from the first Index published subsequent to the previous notice, to the last index published prior to December 1 of that year.

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the CRT shall publish in the FEDERAL REGISTER a revised schedule of rates for § 304.5, alone, which shall adjust those royalty amounts established in dollar amounts according to the change in the cost of living determined as provided in paragraph (a) of this section. Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule of rates for § 304.5, alone, shall become effective thirty days after publication in the FEDERAL REGISTER.

§ 304.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of no more then seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 304.12 Amendment of certain regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this part adopted pursuant to 17 U.S.C. 118(b)(3) by which "copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities".

§ 304.13 Issuance of interpretative regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretative regulations as may be necessary or useful the implementation of this part. Such regulations may not prior to January 1, 1988, alter the schedule of rates and terms of royalty payments by this part.

PART 305—CLAIMS TO PHONORECORD PLAYER (JUKEBOX) ROYALTY FEES

Sec.

305.1 General.
305.2 Time of filing.
305.3 Content of claims.
305.4 Justification of claims.
305.5 Forms.

AUTHORITY: 17 U.S.C. 116(c)(2).

SOURCE: 43 FR 40501, Sept. 12, 1978, unless otherwise noted.

§ 305.1 General.

This regulation prescribes procedures pursuant to 17 U.S.C. 116(c)(2), whereby persons claiming to be entitled to compulsory license fees for public performances of nondramatic musical works by means of coin-operated phonorecord players shall file claims with the Copyright Royalty Tribunal.

§ 305.2 Time of filing.

During the month of January in each year every person claiming to be entitled to phonorecord player fees for performances of nondramatic musical works during the preceding calendar year shall file a claim with the Copyright Royalty Tribunal. Claimants may file jointly or as a single claim. A performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard membership or affiliation agreements, for purposes of this filing and fee distribution.

§ 305.3 Content of claims.

The claims filed shall include the following information:

(a) The full legal name of the person or entity claiming compulsory license fees. Performing rights societies are not required to include lists of members or affiliates to whom distributions would be made by such societies.

(b) The full address, including a specific number and street name or rural route, of the place of business of the person or entity.

(c) A specific agreement to accept as final the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of

royalty fees, except for the judicial review provided in 17 U.S.C. 116.

§ 305.4 Justification of claims.

(a) Not later than the first day of November of each year, every person or entity which has filed a claim pursuant to § 305.2 shall file with the Copyright Royalty Tribunal a statement claiming the proportionate share of compulsory license fees to which such person or entity believes it is entitled. The statement shall include a detailed justification for the requested entitlement and shall also include such specific information as the Copyright Royalty Tribunal may require by regulation or order.

(b) The entitlement justification statement required by paragraph (a) need not be filed with the Copyright Royalty Tribunal if it has been determined by the Tribunal that there is no controversy as to the distribution of royalty fees.

§ 305.5 Forms.

The Copyright Royalty Tribunal does not provide printed forms for the filing of claims.

PART 306—ADJUSTMENT OF ROYALTY RATE FOR COIN OPERATED PHONORECORD PLAYERS

Sec.

306.1 General.
306.2 Definition of coin-operated phonorecord player.
306.3 Compulsory license fees for coin-operated phonorecord players.
306.4 Cost of living adjustment.

AUTHORITY: 17 U.S.C. 801(b)(1) and 804(e).

SOURCE: 45 FR 890, Jan. 5, 1981 unless otherwise noted.

§ 306.1 General.

This Part 306 establishes the compulsory license fees for coin-operated phonorecord players beginning on January 1, 1982, in accordance with the provisions of 17 U.S.C. 116 and 804(a).

§ 306.2 Definition of coin-operated phonorecord player.

As used in this part, the term "coin-operated phonorecord player" shall have the same meaning as set forth in 17 U.S.C. 116(e)(1).

§ 306.3 Compulsory license fees for coin-operated phonorecord players.

(a) Commencing on January 1, 1982 the annual compulsory license fee for a coin-operated phonorecord player, as set forth in 17 U.S.C. 116(b)(1)(A), shall be $25.

(b) Commencing on January 1, 1984 the annual compulsory license fee for a coin-operated phonorecord player, as set forth in 17 U.S.C. 116(b)(1)(A), shall be $50, subject to adjustment in accordance with § 306.4 hereof.

(c) In accordance with 17 U.S.C. 116(b)(1)(A), if performances are made available on a particular phonorecord player for the first time after July 1 of any year, the compulsory license fee for the remainder of that year shall be one half of the annual rate of (a) or (b) of this section, subject to adjustment in accordance with § 306.4 hereof.

§ 306.4 Cost of living adjustment.

(a) On August 1, 1986 the Copyright Royalty Tribunal (CRT) shall publish in the FEDERAL REGISTER a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) from the first Index published subsequent to February 1, 1981 to the last Index published prior to August 1, 1986.

(b) On the same date as the notices published pursuant to paragraph (a), the CRT shall publish in the FEDERAL REGISTER a revised schedule of the compulsory license fee which shall adjust the dollar amount set forth in § 306.3(b) according to the change in the cost of living determined as provided in paragraph (a). Such compulsory license fee shall be fixed at the nearest dollar.

(c) The adjusted schedule for the compulsory license fee shall become effective on January 1, 1987.

PART 307—ADJUSTMENT OF ROYALTY PAYABLE UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

Sec.
307.1 General.
307.2 Royalty payable under compulsory license.
307.3 Adjustment of royalty rate.

AUTHORITY: 17 U.S.C. 801(b)(1) and 804.

§ 307.1 General.

This Part 307 adjusts the rates of royalty payable under compulsory license for making and distributing phonorecords embodying nondramatic musical works, under 17 U.S.C. 115.

[46 FR 891, Jan. 5, 1981]

§ 307.2 Royalty payable under compulsory license.

With respect to each work embodied in the phonorecord, the royalty payable shall be either four cents, or three-quarters of one cent per minute of playing time or fraction thereof, whichever amount is larger, for every phonorecord made and distributed on or after July 1, 1981, subject to adjustment pursuant to § 307.3.

[46 FR 891, Jan. 5, 1981, as amended at 46 FR 62268, Dec. 23, 1981]

§ 307.3 Adjustment of royalty rate

(a) For every phonorecord made and distributed on or after January 1, 1983, the royalty payable with respect to each work embodied in the phonorecord shall be either 4.25 cents, or .8 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (b) and (c) of this section.

(b) For every phonorecord made and distributed on or after July 1, 1984, the royalty payable with respect to each work embodied in the phonorecord shall be either 4.5 cents, or .85 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraph (c) of this section.

(c) For every phonorecord made and distributed on or after January 1, 1986, the royalty payable with respect to each work embodied in the phonorecord shall be either 5 cents, or .95 cent per minute of playing time or fraction thereof, whichever amount is larger.

[46 FR 62268, Dec. 23, 1981]

PART 308—ADJUSTMENT OF ROYALTY FEE FOR COMPULSORY LICENSE FOR SECONDARY TRANSMISSION BY CABLE SYSTEM

Sec.
308.1 General.
308.2 Royalty fee for compulsory license for secondary transmission by cable systems.

§ 308.1 General.

This part establishes adjusted terms and rates or royalty payments in accordance with the provisions of 17 U.S.C. 111 and 801(b)(2)(A), (B), (C), and (D). Upon compliance with 17 U.S.C 111 and the terms and rates of this part, a cable system entity may engage in the activities set forth in 17 U.S.C. 111.

(17 U.S.C. 801(b)(2) (A) and (D))

[47 FR 52159, Nov. 19, 1982]

§ 308.2 Royalty fee for compulsory license for secondary transmission by cable systems.

(a) Commencing with the first semiannual accounting period of 1981 and for each semiannual accounting period thereafter, the royalty rates established by 17 U.S.C. 111(d)(2)(B) shall be as follows:

(1) .799 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (a) (2) through (4);

(2) .799 of 1 per centum of such gross receipts for the first distant signal equivalent;

(3) .503 of 1 per centum of such gross receipts for each of the second, third and fourth distant signal equivalents; and

(4) .237 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter.

(b) Commencing with the first semiannual accounting period of 1981 and for each semiannual accounting period thereafter, the gross receipts limitations established by 17 U.S.C. 111(d)(2) (C) and (D) shall be adjusted as follows:

(1) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmission of primary broadcast transmitters total $107,000 or less, gross receipts of the cable system for the purpose of this paragraph shall be computed by subtracting from such actual gross receipts the amount by which $107,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to les than $4,000. The royalty fee payable under this paragraph shall be 0.5 of 1 per centum regardless of the number of distant signal equivalents, if any; and

(2) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $107,000 but less than $214,000, the royalty fee payable under this paragraph shall be: (i) 0.5 of 1 per centum of any gross receipts up to $107,000 and (ii) 1 per centum of any gross receipts in excess of $107,000 but less than $214,000, regardless of the number of distant signal equivalents, if any.

(c) Notwithstanding paragraphs (a) and (d) of this section, commencing with the first accounting period of 1983 and for each semiannual accounting period thereafter, for each distant signal equivalent or fraction thereof not represented by the carriage of:

(1) Any signal which was permitted (or, in the case of cable systems commencing operations after June 24, 1981, which would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, or

(2) A signal of the same type (that is, independent, network, or non-commercial educational) substituted for such permitted signal, or

(3) A signal which was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules were in effect on June 24, 1981;

the royalty rate shall be, in lieu of the royalty rates specified in paragraphs (a) and (d) of this section, 3.75 per centum of the gross receipts of the cable systems for each distant signal equivalent; any fraction of a distant signal equivalent shall be computed at its fractional value.

(d) Commencing with the first accounting period of 1983 and for each semiannual accounting period thereafter, for each distant signal equivalent or fraction thereof represented by the carriage of any signal which was subject (or, in the case of cable systems commencing operations after June 24, 1981, which would have been subject) to the FCC's syndicated exclusivity rules in effect on June 24, 1981 (former 47 CFR 76.151 3et seq.), the royalty rate shall be, in addition to the amount specified in paragraph (a) of this section,

(1) For cable systems located wholly or in part within a top 50 television market,

(i) .599 per centum of such gross for the first distant signal equivalent;

(ii) .377 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iii) .178 of 1 per centum for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;

(2) For cable systems located wholly or in part within a second 50 television market;

(i) .300 per centum of such gross receipts for the first distant signal equivalent;

(ii) .189 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents; and

(iii) .089 of 1 per centum for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;

(3) For purposes of this section "top 50 television markets" and "second 50 television markets" shall be defined as the comparable terms are defined or interpreted in accordance with 47 CFR 76.51, as effective June 24, 1981.

(17 U.S.C. 801(b)(2)(A) and (D))

[46 FR 897, Jan. 5, 1981, as amended at 47 FR 44728, Oct. 12, 1982; 47 FR 52159, Nov. 19, 1982]

MEMORANDUM TO THE COPYRIGHT ROYALTY TRIBUNAL
CONCERNING PROCEDURE, EVIDENCE AND RELATED SUBJECTS

By letter of August 20, 1984, the Copyright Royalty Tribunal has asked this firm to prepare a memorandum of law which will review and analyze the Tribunal's hearing procedures and will comment on evidentiary matters and the Tribunal's lack of subpoena power. This memorandum responds to the Tribunal's letter.

We hope that the memorandum is clear and complete. We welcome the Tribunal's critical comments. It seems logical to us to begin the memorandum with a review of the Tribunal's enabling legislation and then proceed to a section on procedures. We have included recommendations for procedures from the initial Federal Register notice through the writing of the Tribunal's decision. The third section of the memorandum covers evidence, and the fourth groups subjects that did not seem to belong in the first three groups, including cross- and redirect-examination and subpoena and discovery powers.

I

ENABLING LEGISLATION

The Copyright Royalty Tribunal (Tribunal) was created by the Copyright Act of 1976[1/] (the Act). Congress directed the Tribunal to set or revise the rates paid by users of copyrighted

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1/ 17 U.S.C. §§ 101-810.

materials and to distribute the payments among the copyright owners. The function of the Tribunal as a ratemaker and distributor was based on Congress's decision that it was impractical to allow each copyright owner to deal directly in the marketplace with each copyright user.2/ Instead, the users are charged with obtaining compulsory licenses and with payment of license fees (also referred to as "rates" or "royalties"). The licenses allow the users to record, replay, or retransmit copyrighted material for compensation without the holders' express permission. The license royalties compensate the owners.

Prior to the Act, there was only one compulsory license, for "mechanical royalties," which since the early 1900's allowed the mechanical license holder to record non-dramatic works on phonograph records upon payment of a statutorily-determined license fee, paid directly to the copyright owner. The Act modified the mechanical license but retained its character as a compulsory license. The Act added three compulsory licenses for: retransmission of distant broadcast signals of non-network programming by cable systems; the use of musical records in jukeboxes for profit by jukebox owners; and the use of music and other artistic creations by non-commercial broadcasters.

The Act set the initial rates of payment under three of the four compulsory licenses, provided criteria and timetables for rate adjustments, and charged the Tribunal with the duty of adjusting the rates. Initial non-commercial broadcast royalties

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2/ H.R. Rep. No. 1476, 94th Cong. 2nd Sess. 89, reprinted in 1976 U.S. Code, Cong. & Ad. News 5659, 5704.

were to be set by the Tribunal shortly after it began operations. The Act also charged the Tribunal with distribution of some of the royalties. Mechanical license fees continue to be paid directly to the copyright owners by the users, without Tribunal participation. Non-commercial broadcast license royalties are paid by the users to the owners pursuant to "terms and rates"[3/] established by voluntary agreement or by the Tribunal, but without active Tribunal participation in the distribution process. The Tribunal distributes jukebox and cable royalties pursuant both to voluntary agreements by the owners and to allocations determined by the Tribunal after hearing.

The Act establishes a license fee of $8 per jukebox and directs the Tribunal to hold hearings in 1980 to determine whether the annual fee needed adjustment. The Tribunal held hearings and published its final decision on January 5, 1981, raising the annual fee to $50 per jukebox to be phased in over two years and allowing the rate to be adjusted for inflation in 1987. The Act provides that, upon the petition of a person with a significant interest, the rate can be adjusted in 1990 and every ten years thereafter.[4/] Thus, although the Tribunal was specifically directed to hold hearings in 1980, subsequent proceedings are to be held only on petition of an interested party. The Tribunal is responsible for adjusting the rates under the other three compulsory licenses also, in proceedings similar

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3/ 17 U.S.C. § 118; 37 C.F.R., Part. 304.

4/ 17 U.S.C. § 804(a)(2)(C).

to that for the jukebox rates. The Act sets forth the specific dates or events when these rates can or may be adjusted.

The jukebox and cable royalties are paid periodically to the Registrar of Copyrights. As of early December, 1984, jukebox royalties for 1983 exceeded $2.8 million, and cable royalties for 1983 exceeded $69 million.

As noted, the Tribunal is not directly involved in the distribution of mechanical and non-commercial broadcast royalties, but actively participates in the distribution of jukebox and cable royalties, which, by statute,5/ are required to be distributed annually.

The Act provides antitrust immunity for private agreements.6/ If the claimants cannot agree voluntarily on the distribution of the cable or jukebox royalty fees, the Tribunal resolves the dispute.

In the jukebox proceedings, the number of claimants has been small, and the Tribunal considers all claims in the same proceeding. However, due to the number of claimants in the cable royalty distribution proceeding, the Tribunal considers the claims in two phases. In Phase I, the Tribunal allocates the fund among the various groups of claimants. In Phase II, the Tribunal determines the awards within each group. Partial voluntary agreements are often achieved. For example, in the 1982 Phase I proceeding, the Motion Picture Association of

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5/ 17 U.S.C. § 804(e).

6/ 17 U.S.C. §§ 111(d)(5)(A), 116(c)(2), 118(b).

America represented approximately six dozen claimants. Distribution of the Phase I award among these claimants was settled voluntarily except for one claimant, Multimedia, which instituted proceedings in Phase II to prove its entitlement to a larger share of the Phase I award.

It may be useful to review the chronology of both a rate adjustment proceeding and a royalty distribution proceeding to illustrate the competing claims of the parties and the procedures and decisions of the Tribunal in resolving those claims.

An example of a full-blown rate adjustment proceeding was the Tribunal's adjustment of the cable royalty fees pursuant to the repeal by the FCC of its distant signal carriage and syndicated program exclusivity restrictions on cable transmissions. Congress specifically authorized the Tribunal, upon the request of interested parties, to adjust the cable royalty fees if and when those rules were repealed.7/ The proceeding developed as follows:

1. On June 21, 1981, the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's repeal of the rules and on June 25, 1981, lifted its stay on the implementation of the repeal.
2. On August 11, 1981, the National Cable Television Association (NCTA) petitioned the

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7/ 17 U.S.C. SS 801(b)(2)(B),(C).

Tribunal to adjust the cable royalty rates to reflect the repeal of the rules.

3. On August 18, 1981, the Tribunal published a Federal Register notice directing interested parties to submit comments on the NCTA petition not later than September 24, 1981; several parties complied.

4. On September 14, 1981, the Motion Picture Association of America (MPAA) requested the Tribunal to adopt interim rates and to set the date on which any adjustments made would be effective.

5. On September 18, 1981, the Tribunal published a Federal Register notice requesting comments by October 1 on the jurisdictional and procedural questions raised by the MPAA petition, with reply comments to the comments submitted on both September 24 and October 1 due by October 7.

6. On October 7, the Tribunal published a Federal Register notice of a meeting on October 14 to consider the comments; at the meeting the Tribunal approved the commencement of a cable royalty fee adjustment proceeding and resolved not to adopt interim rates.

7. On October 19, 1981, MPAA filed with the Tribunal a request for a ruling on the effective date for any adjusted cable royalty fees.

8. The announcement that cable royalty fee adjustment proceedings were to be held was published in the Federal Register on October 21.

9. On October 26, 1981, the Tribunal published a Federal Register notice requesting comments on the MPAA proposal not later than November 5, 1981.

10. Pursuant to the October 21, 1981, notice the Tribunal received jurisdictional and procedural motions and proposals on January 11, 1982, and reply comments on February 10, 1982.

11. On March 25, 1982, the Tribunal published a Federal Register notice of a meeting on March 31, 1982 to consider the jurisdictional and procedural issues raised in the comments.

12. On March 31, 1982, the Tribunal announced in the Federal Register that a prehearing conference would be held on May 11 to consider procedures for the cable royalty adjustment proceedings.

13. Royalty adjustment hearings were held by the Tribunal, with the direct cases beginning on June 15 and ending July 22, 1982; rebuttal testimony was heard from August 3 through August 6.

14. Proposed findings of fact and conclusions of law were received by the Tribunal on September 1, 1982.

15. The Tribunal, by oral request of September 14, 1982, directed the parties to submit comments by September 16, 1982, concerning the impact on the cable television industry of the rate adjustment proposed by the copyright owners. Reply comments were received by the Tribunal on September 21, 1982.

16. At a public hearing on October 20, 1982, the Tribunal adopted the final rule for the adjustment of cable royalty rates.

17. The final rule was appealed to the U.S. Court of Appeals for the District of Columbia and, on December 30, 1983, was affirmed.8/

The 1982 cable royalty distribution proceeding provides an example of the interplay of voluntary and mandatory distribution:

8/ National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983).

1. On August 8, 1983, the Tribunal published a Federal Register notice directing claimants to royalties to notify the Tribunal by September 20, 1983, whether a controversy existed with regard to distribution of the 1982 cable royalty fees; several claimants responded.

2. On October 12, 1983, the Tribunal published in the Federal Register its finding that a controversy existed; the Tribunal ordered a partial distribution as of December 1, 1983, of 90 percent of the royalty fund, based on the Tribunal's determination that this portion was uncontested.

3. On May 6, 1984, several claimants submitted to the Tribunal an agreement which resolved most of the disputes about allocation of the 1982 cable royalty fees, leaving only the Devotional Claimants as a Phase I claimant.

4. The Tribunal on June 18, 1984, published a notice stating that, unlike previous years, it would hold hearings on Phase II prior to completing Phase I and directing each Phase I claimant category to notify it of voluntary agreements for distribution of the cable

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(cont.)

royalty fees by July 3, 1984. The notice also stated that any claimant desiring to present evidence during Phase II should notify the Tribunal, not later than July 10, of its intention and also of the Phase II issues to be resolved. In the notice, the Tribunal further directed the parties to file with the Tribunal and exchange with other parties their direct, written cases, including lists of witnesses, prehearing statements, any written statements and all documentary evidence.

5. The Tribunal held hearings on Phase I and Phase II on both direct cases and rebuttal cases during late July and early August of 1984.

6. The parties submitted proposed findings of fact and conclusions of law to the Tribunal on August 22, 1984.

7. Reply findings were due to be submitted to the Tribunal by the parties on August 31, 1984.

8. The Tribunal published its decision in the Federal Register on September 25, 1984.

9. The parties had thirty days to appeal the decision of the Tribunal to a United States Court of Appeals.

II

PROCEDURES

Our review of the procedures of the Tribunal and our interviews with the Tribunal Commissioners and with members of the Tribunal bar suggest to us several areas where revised procedures should result in a definition of issues and claimants' positions prior to hearing; more efficient hearings; a more relevant record; and Tribunal decisions which are fully responsive to statutory and judicial standards. The recommendations in each procedural area are summarized below and then discussed in detail. The procedural discussion chooses as its model a cable royalty distribution proceeding, since this type of proceeding seems the most demanding procedurally. In less-complex distribution proceedings, the procedures can be simplified. In ratemaking proceedings, the Tribunal can adopt the following procedures where appropriate.

(a) Initial Federal Register notice. The initial FR notice should require that claimants to royalty fees paid by cable operators submit by a date certain the information summarized in paragraph (b), below.

(b) Prehearing statement. Each claimant responding to the initial Federal Register notice discussed in paragraph (a) above, should be required to submit, individually or jointly, in writing to the Tribunal by a date certain the claimant's statement as to whether a controversy exists within the meaning of 17 U.S.C. § 111(d)(5)(B). The statement should include the results of any agreement between the claimant and other claimants reached under

the provisions of 17 U.S.C. § 111(d)(5)(A). To the extent the claimant believes a controversy exists, it should be required to submit in writing to the Tribunal by the same date: a statement of the issues; an estimate of its percentage claims; a summary of the basis of that estimate; recommended dates for the prehearing submission and exchange of testimony and exhibits (as outlined in paragraph (e), below) and for the hearing; and the number of witnesses the claimant intends to present at the hearing.

(c) Federal Register notice of the existence of a controversy. The Tribunal's Federal Register notice that a controversy exists should also: identify as parties to the proceeding the claimants who have responded to the initial Federal Register notice; identify, for each party, the person on whom copies of the submissions of other parties shall be served; require each party to serve upon all other parties by a date certain a copy of the party's prehearing statement; and set the date of a prehearing conference.

(d) Prehearing conference. At the conference the Tribunal should attempt to: simplify the issues; refine the claims of the parties; identify actual or potential areas of agreement; establish procedures and dates for the prehearing exchange of written testimony and exhibits; and set a date for the hearing. The Tribunal should then issue a directive to all parties reflecting the procedures and dates established at the prehearing conference.

(e) Prehearing submission and exchange of written testimony and exhibits. The parties should be required to submit,

individually or jointly, the direct testimony of their witnesses in writing by a date certain. All supporting exhibits should be submitted by that date. After a reasonable interval, all parties should be required to submit rebuttal evidence and supporting exhibits in writing by a date certain.

(f) Hearing. At the hearing, each party, individually or jointly, in the order established in the Tribunal's directive, should present its case in chief, consisting of its primary written evidence and written exhibits, through a competent witness present at the hearing. The Tribunal should rule upon challenges to the witness's competency and upon motions to strike the evidence. The witness should be made available for cross-examination. Upon completion of such examination, the evidence should be admitted or excluded. Upon completion of the presentation of all direct testimony, the Tribunal should hear rebuttal testimony, subject to the procedures outlined for direct testimony.

(g) Posthearing submissions. The parties, individually or jointly, should be required to submit: a brief fully summarizing the facts and law and conclusions reached by applying the law to the facts; recommended findings of fact; a draft Tribunal decision; or a combination of these.

(h) Tribunal decision. The Tribunal's decision should make findings of fact, state the issues, summarize the applicable law, and apply the law to the facts to resolve the issues. The basis of the conclusions should be concrete and explicit. The decision may necessarily be long and complex, but it must also be clear.

It should hew closely to the relevant statutory standards, to judicial interpretation of these standards, and Tribunal precedent.

A detailed discussion follows of the eight areas summarized above.

A. Initial Federal Register Notice

The initial notice presently issued by the Tribunal asks claimants to royalty fees paid by cable operators for secondary transmissions during a given year to declare by a date certain whether a controversy exists with respect to distribution of those fees. The notice also solicits the claimants' views on hearing schedules and procedures.9/

We recommend that the Tribunal preserve this format but expand it to require the parties to submit to the Tribunal a detailed prehearing statement, setting forth: (1) the nature of the parties' claims and any voluntary resolution of those claims; and (2) recommendations which will allow the Tribunal to schedule a prehearing conference and, ultimately, the hearing.

B. Prehearing Statement

We note that the Tribunal has used prehearing statements, but for limited purposes. We recommend that the statement be expanded to include detailed information in two categories, as outlined in the above section on the "Initial Federal Register Notice."

9/ See, e.g., 49 F.R. 39360 (1984).

We note, with respect to the first category, that certain claimants have recently objected to prehearing revelation of their claims, on the grounds that the claims are not known with precision until the positions of other parties are known and that early revelation can lead to inflation of claims. We believe, on the contrary, that legitimate claims can be presented with precision at this stage and that the requirement that the parties later support their claims with concrete evidence will deter inflation of those claims. The earlier a formal declaration of claims is required the more likely the claimants are to determine what level of claims they can legitimately defend.

As to the second category, we believe the Tribunal should learn, as early as possible, the number of witnesses each party intends to present to support its claims and the party's choice of hearing dates. This information, together with what the Tribunal has learned about the size and nature of the claims, will allow the most intelligent planning of both the prehearing conference and the hearing itself.

The task facing the Tribunal is complicated by the fact that before and during the Tribunal's adjudication of the parties' competing claims, the parties are attempting to reach a voluntary resolution of those claims. The Tribunal should afford sufficient time after the initial notice to allow the parties to carefully formulate their prehearing statements. Although the claims and estimates in the prehearing statements should not be absolutely binding on the parties, the Tribunal should demand that any departure from them be fully justified.

C. Federal Register Notice of the Existence of a Controversy

The Tribunal presently uses this notice to announce the existence of a controversy and to make partial distributions. We recommend these uses be continued, but that the notice be expanded to include: identification of the parties and their representatives; the requirement that the prehearing submissions be served on those parties; and the date for the prehearing conference.

It is important that claimants be specifically designated as parties, thus establishing their right to participate in the prehearing conference and the hearing and alerting each party to the identity of all other parties.

Once a controversy is declared by the Tribunal, time is a critical element given the one-year deadline set by statute,[10/] and in the notice the Tribunal should set a date in the immediate future for a prehearing conference. The parties have already prepared their preliminary statements, and no deadline has yet been set for submission of written evidence and exhibits. There is no reason to delay the prehearing conference.

Although the Tribunal may wish to consider including in the notice a summary of the position of the parties on the issues, we recommend that the Tribunal not impose this burden on itself. The parties will learn each other's position when the preliminary statements are distributed. Furthermore, the Tribunal should hear the evidence before attempting a summary.

10/ 17 U.S.C. 804(e).

We note the argument of some claimants that the Tribunal should not make preliminary distribution of the royalty fund, reserving all of it as a prod toward faster voluntary settlements. We disagree. More precise and exacting procedures should achieve this purpose without withholding the funds the Tribunal has decided may be distributed. Furthermore, preliminary distribution is specifically allowed by statute.11/

D. Prehearing Conference

We understand the Tribunal has held prehearing conferences for limited purposes. We recognize these conferences are often overused and overworked by administrative agencies. However, we believe the Tribunal's unique task makes the prehearing conference a vital procedural step unless the parties' conflicts have been largely resolved.

The prehearing conference has the dual function of: (a) bringing the parties together for further voluntary resolution of their competing claims (under the candid application of pressure by the Tribunal); and (b) to the extent the claims are not resolved, establishing guidelines and deadlines for the prehearing submission of written evidence and exhibits and for the hearing itself. The prehearing conference will demand patience and "political" skill on the Tribunal's part. Reconciliation of competing claims is a subtle task, and the second function discussed above can often help accomplish the first: the demand for precise written evidence and the knowledge that that evidence

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11/ 17 U.S.C. §§ 111(d)(5)(C), 116(c)(4)(C).

will be strictly tested at the hearing (see the discussion under "Hearing," below) can hasten settlement.

The Tribunal should adopt, after consultation with the parties, deadlines for the exchange of written testimony and for the hearing. These dates should be confirmed by the Tribunal in a prehearing conference directive sent to all parties.

E. Prehearing Submission and Exchange of Written Testimony and Exhibits

We recommend that--through a directive issued after the prehearing conference--the Tribunal require each party, individually or jointly with other parties, to submit in writing to the Tribunal in advance of the hearing, with copies to all other parties, the case in chief (testimony and exhibits) upon which the party relies to support its claim. After a reasonable interval, the parties should be required to submit to the Tribunal and to exchange written rebuttal evidence and accompanying exhibits.

This procedure appears to be a sharp departure from the Tribunal's present policy of requiring only a summary of the evidence before hearing. We considered alternatives, such as a more complete summary, or the written presentation of part of the evidence (e.g., the direct evidence) with the balance (e.g., the rebuttal evidence) presented orally. Our conclusion is that presentation of both primary and rebuttal testimony in writing prior to hearing will accomplish the following:

(a) Because the testimony and exhibits can be reviewed by the claimant's counsel before submission, they should be well organized and relevant;

(b) The Tribunal can review the evidence before hearing and can identify additional evidence which may be needed;

(c) Each party can review the case in chief of the other parties and can prepare specific rebuttal evidence and motions to strike (to be presented and made at the hearing);

(d) As is discussed below under "Hearing," the evidence and exhibits can be introduced rapidly at the hearing and motions to strike can be made and ruled upon promptly;

(e) The testimony should begin with an identification of the witness who will present it and his qualifications. This will allow challenges to the witness's competence to be made promptly at the start of the hearing and to be ruled on promptly.

In general, written testimony is more concise, more relevant, and can be presented and ruled upon far more quickly than oral testimony. It eliminates surprise. At the hearing, the Tribunal can allow oral updating and other necessary amendments to the written evidence in the interest of a complete record, while preserving the basic value of the written presentation.

We do not recommend that the Tribunal prescribe the format for the written testimony. Each party's presentation will necessarily be different. However, the Tribunal should require a complete identification of the witness who will provide the testimony and/or exhibits. Primary evidence can properly reach any issue relevant to the proceeding (see the discussion of relevance, below). Rebuttal evidence should be confined to

answering or challenging the evidence in chief (see the discussion on scope of rebuttal, below).

We should add that our personal experience has been that written evidence is a boon to the smaller parties. It gives them time to prepare evidence properly. It assures that the less-facile witness will present his facts relevantly and in a logical order. It impersonalizes the testimony. In the long run, it is probably the cheaper form of presentation. Written evidence seems especially suited to the complex, technical subjects with which the Tribunal has to deal.

F. Hearing

The major change in the Tribunal's present hearing procedures will occur if the testimony is presented in writing in advance of the hearing, as discussed in Section E, above. The following discussion is based on the assumption that the written format is adopted.

After identification of counsel, the hearing should begin with the presentation of the first witness for the party which the Tribunal, in its prehearing conference directive, has designated to begin. After he is sworn in, his written primary testimony should be identified by the witness and given an exhibit number. Exhibits supporting the written testimony which are physically part of the written testimony should be shown as appendices to the exhibit. Exhibits which by their nature must be physically separate from the written testimony should receive their own exhibit numbers. When the witness has identified the testimony and exhibits he is sponsoring and identifying numbers

have been assigned, the witness should be allowed to correct inadvertent errors and update his presentation. On the one hand, such changes should not be a vehicle for the introduction of evidence which should have been part of the written presentation and which would surprise and/or prejudice the opposing parties. On the other hand, corrections and updating should be liberally allowed in the interests of a complete record. The witness should then be made available for cross-examination.

Opposing parties, which have had the opportunity to review the testimony and exhibits, should then make those challenges which are appropriate prior to cross-examination. These challenges may be to the competency of the witness and to the relevancy and admissibility of the evidence, and the Tribunal should require that they be made concisely and without delay.

After the Tribunal has ruled on these various challenges, the opposing parties should be required to begin cross-examination without delay. (See the discussion of "Scope of Cross-Examination" in Section IV, below.)The order in which the parties cross-examine is not critical--the opposing parties can decide this among themselves--but duplicative cross-examination should not be allowed, and each party should be allowed only a single opportunity to cross-examine each witness.

The Tribunal should not allow abusive cross-examination, but searching questions are appropriate. Objections to the witness's competency and to the evidence's relevance and admissibility can be made, at counsel's discretion, during cross-examination or when cross-examination is complete. Cross-examination should be

limited to matters contained in the witness's direct examination (i.e., the written evidence, as amended orally). The reason for such limitation is that each claimant has the burden of supporting its claim by direct, probative evidence. To the extent the claimant fails to do this, its claim should be disallowed. Cross-examination is the vehicle for testing the strength and validity of the direct evidence; it is not a vehicle for introducing evidence to rebut the direct evidence. Failure to limit cross-examination can lead to lengthy testimony on irrelevant subjects.

Following cross-examination, counsel for the witness should be allowed to conduct brief re-direct examination of the witness, and such examination should be strictly limited to matters raised on cross-examination. (See the discussion on "Scope of Redirect Examination" in Section IV, below.)

Examination of each witness should end after direct-, cross-, and re-direct examination. We do not recommend repeated rounds of examination. As the proponent of the evidence, the witness's counsel gets two bites at the apple (direct and redirect examination), which is appropriate for the side bearing the burden of going forward.

The Tribunal has the right--and should feel free--to interrupt counsel and examine the witness at any stage. The Tribunal's motive should not be to supersede counsel but to assure a complete record. Such intervention should be undertaken sparingly but is often critical.

When examination of the witness is complete, his testimony and exhibits should be received, subject to whatever motions to strike have been granted by the Tribunal.

When all witnesses presenting evidence supporting the cases in chief have been examined and their evidence and exhibits have been received, the Tribunal should hear the witnesses presenting rebuttal evidence. (Even if the same witness is presenting primary and rebuttal evidence, we recommend that the latter be deferred.) The same rules which apply to the former witnesses should apply to the latter.

G. Posthearing Submissions

The Tribunal regulations provide:

> (a) Any party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law, or may be directed by the Chairman so to file, such filings to take place within 20 days after the record has been closed, unless additional time is granted.
>
> (b) Failure to file when directed to so do may be considered a waiver of the right to participate further in the proceeding, unless good cause is shown.
>
> (c) Proposed findings of fact shall be numbered by paragraph and include all basic evidentiary facts developed on the record used to support proposed conclusions and cite appropriately the record for each evidentiary fact. Proposed conclusions shall be stated separately. Proposed findings submitted by someone other than an applicant in a proceeding shall be restricted to those issues which specifically affect that person.12/

Samples of posthearing documents provided to us suggest that the Tribunal does not require strict compliance with these regulations. The current Tribunal practice for posthearing

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12/ 37 C.F.R. 301.54 (1984).

submissions appears to be to have the parties submit proposed findings of fact and conclusions of law and later submit reply findings. Discussions with members of the Tribunal's bar reveal a general feeling that the findings and conclusions are too adversarial in nature.

The Tribunal has a choice of posthearing submissions. Those we recommend follow: (a) a brief, which traditionally summarizes the evidence and law and presents the position of the parties in an argumentative fashion; (b) findings of fact and/or memoranda of law, which should contain no argument; and (c) combinations of (a) and (b). An example of (c) is a draft decision, in which each party writes a decision in the proper form, based on the assumption that the Tribunal has reached a conclusion favorable to its case.

The brief, as we envision it, should include a summary of the facts, a summary of the law and Tribunal precedent, and conclusions reached by applying the law to the facts. Because the brief is adversarial in nature, the Tribunal could require the parties to go a step further and submit recommended findings of fact, which would provide a source of material for use in the Tribunal's decision writing.

As noted, the parties can be asked to submit a proposed Tribunal decision. This provides an excellent source of material to be used in writing the final decisions. Other agencies' regulations provide for the submission of proposed decisions or orders.13/

13/ See e.g. 29 C.F.R. § 102.42 (1984) (National Labor Relations Board); 40 C.F.R. § 22.26 (1984) (Environmental Protection Agency); and 7 C.F.R. § 1.142(b) (1984) (Department of Agriculture).

To avoid burdening a party, each party could be asked to address only the issues relevant to its case. Thus, from most parties, the Tribunal might receive findings of fact, conclusions of law, briefs, or proposed decisions on limited aspects of the entire case pending before the Tribunal. Not infrequently, administrative agencies use part or all of these documents in their decisions, even verbatim, in effect weaving them together to compose the final decision.

It should be stressed that a major factor in using post-hearing submissions to provide the Tribunal with material that can be used in writing decisions is to ensure that the adversarial material can be separated from the material that should be more objective in character. As under current practice, parties that are in agreement on an issue can submit joint post-hearing documents. This would help to alleviate some of the effort involved in preparing expanded post-hearing submissions.

H. Tribunal Decisions

Almost all of the Tribunal's decisions have been subjected to judicial review in various United States Courts of Appeal, most often in the District of Columbia Circuit, and, with the exception of the remand of small parts of some of those decisions, have been affirmed by those courts. Nonetheless, the District of Columbia court has made it clear that the decisions at times lacked clarity. The court has in certain instances affirmed under relaxed judicial standards adopted in recognition of the Tribunal's limited staff and legal resources.

In its 1981 decision,[14] reviewing the Tribunal's increase of license royalty rates, the D.C. Court said:

> We expect that in future years the staggering of the Tribunal's workload will permit a fuller explanation of the Tribunal's conclusions, more facilitative of judicial review ...

In its 1982 decision,[15] which reviewed the Tribunal's first royalty rate adjustment, the Court strove to ensure that the Tribunal's decisions:

> provide a basis for popular review by requiring that the choices they reflect are informed by the views of all interested parties and are fully disclosed .... In particular, the Tribunal was not always explicit when it rejected evidence proffered by the parties and it left doubt in some instances whether a given decision resulted from a considered policy choice or an understanding of statutory authority. While we do not sanction these lapses, we have regarded them charitably in light of the Tribunal's lack of a professional staff and the novelty of the proceeding. We expect the quality of the Tribunal's decisionmaking to improve with experience.

The Court's 1983 decision,[16] reviewing the Tribunal's second royalty distribution, quoted its 1982 admonition and added: "The time for improvement is now."[17]

The task facing the Tribunal in writing its decisions is a formidable one. The record is long and very technical. The issues are complex. The controlling statute provides only some

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14/ Recording Industry Ass'n v. Copyright Royalty Tribunal, 662 F.2d 1, 18 (D.C. Cir. 1981).

15/ National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

16/ Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983).

17/ Id. at 1307.

guidance. The decisions of other agencies are not helpful because of the Tribunal's unique function. However, the Circuit Courts of Appeal, in their opinions, have supplied useful guidance. The following analysis suggests approaches which may help meet the Courts' concerns.

1. Statutory Guidelines

Section 803(a) of 17 U.S.C. states that "the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended." Section 803(b) gives the following guidance for the Tribunal's decisions:

> Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

Section 810 provides that judicial review shall be based on chapter 7 of Title 5 of the U.S. Code. The Circuit Courts have held that the Tribunal's royalty determinations will be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"18/ and that the Tribunal's royalty distributions are subject both to these criteria and the requirement that they be supported by substantial evidence.19/

The Seventh Circuit has held that the distinction between the "arbitrary and capricious" standard, on the one hand, and the

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18/ Recording Industry Ass'n v. Copyright Royalty Tribunal, 662 F.2d 1, 7-8 (D.C. Cir. 1981), quoting 5 U.S.C. § 7066(2)(A).

19/ National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 374-75 (D.C. Cir. 1982).

"substantial evidence" standard, on the other, is largely semantic, and that "what is basic is the requirement that there be support in the public record for what is done."[20]

The District of Columbia Circuit has held that Tribunal's decisions are sufficiently clear if the court can discern the path the Tribunal took from the facts of record to its final determination.[21]

The courts have recognized the delegation by Congress to the Tribunal of broad discretion for the determination of distribution of cable royalties[22] and in fixing the royalties,[23] and thus have refrained from substituting their judgment if the Tribunal's decisions fall within a zone of reasonableness.[24] Operating within this broad discretionary range, the Tribunal has, with court approval, shied away from formulas,[25] looking instead to marketplace equivalents, to the extent possible.[26]

20/ Amusement & Music Operators v. Copyright Royalty Tribunal, 676 F.2d 1144, 1150-51 (7th Cir. 1982) cert. denied, 459 U.S. 907 (1982), quoting the opinion of Judge Leventhal in American Pub. Gas Ass'n v. FPC, 567 F.2d 1016, 1028-29 (D.C. Cir. 1977).

21/ Recording Industry Ass'n, supra at 14, citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974).

22/ Christian Broadcasting, supra, 720 F.2d, at 1303.

23/ National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176, 181-82.

24/ Christian Broadcasting, supra, 720 F.2d, at 1304, 1308; National Cable Television Ass'n, supra, 724 F.2d, at 189.

25/ National Ass'n of Broadcasters, supra, 675 F.2d, at 373.

26/ National Cable Television Ass'n, supra, 724 F.2d, at 183-84.

Where the Courts have criticized the Tribunal's expressions, they have failed to find the basic support--in the Tribunal's decision itself or in the underlying record--for the Tribunal's conclusions. For example, in its review of the Tribunal's second annual distribution of royalties, the District of Columbia Circuit remanded the matter for further explanation of the failure to award any share to the devotional claimants.27/ Specifically, the Court found a lack of support in the record for the Tribunal's action and criticized the Tribunal's failure to discuss both the evidence supporting some award and the contentions of the devotional claimants. The Court noted apparently uneven treatment of similarly-situated parties. The court pointed out "the Tribunal's obligation to consider all legally-cognizable evidence of economic harm placed before it by the parties."

It is, of course, impossible to lay down a fixed rule for writing decisions which will satisfy judicial standards. However, a logical progression in identifying a discernible path is: (1) statement of relevant facts; (2) statement of the issues; (3) summary of pertinent law; (4) application of the law to the facts to resolve the issues.

The facts should be presented concisely and with sufficient reference to the record to satisfy the reviewing authority that the statement accurately reflects the evidence. Great care should be taken in determining the order in which the facts are presented. They may be summarized for each party, or with respect to

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27/ Christian Broadcasting , supra, 720 F.2d, at 1309 et seq.

each issue, or with reference to the decisional criteria to be applied, or chronologically, but in any event in a logical manner that facilitates logical review. The decision-writer should presume that the reviewing authority is unfamiliar with the subject matter. Following the reviewing authority's reading of the facts, he should have a firm grasp of the "who," "what," "when," "where," and "why."

The statement of the issues should place in precise focus the competing contentions of the parties. Who is asking for what and why? The court decisions reviewing the Tribunal decisions are good models. For example, the portion of Judge Mikva's 1983 opinion under the heading "The Positions of the Claimants" is a cogent statement of the issues with respect to each party.28/

The summary of the pertinent law can include statutes, court decisions, the Tribunal's own precedents, or other relevant guides. These are the yardsticks by which the evidence will be measured. Obviously, all criteria cannot be used, and care should be taken to choose those which are relevant to the issue, not just those which support a predetermined conclusion.

If the decision is carefully written, the reader should be able to predict the resolution of the issues from the discussion of facts, issues, and law. The resolution of the issue should be firmly rooted in the record and the governing criteria. The court's criticism of the Tribunal's lack of any award to the devotional claimants was not of the lack itself--which may have

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28/ Christian Broadcasting Network, supra, 720 F.2d, at 1301-03.

been justified--but of the failure to explain and support that lack.

III

EVIDENCE

This portion of the memorandum will discuss various rules of evidence and will suggest to the Tribunal ways in which to evaluate evidence when it is presented to the Tribunal at ratemaking and royalty distribution hearings. Hopefully, the suggestions will help the Tribunal rule on motions to disqualify a witness or to exclude evidence.

We recognize that administrative agencies are not quick to exclude evidence, and properly so. This liberal attitude is based on two important considerations. First, the agency wishes to have a complete record before it when reaching its decision. The theory goes: better to admit a questionable piece of evidence and later exclude it from the decision-making process than not to admit it at all. Second, the agency is composed of experts who will not be prejudiced by improper evidence. Their expertise allows them to identify the worthwhile facts. They are not a lay jury, susceptible to being swayed.

Although these important considerations clearly demand that the agency admit evidence about which some doubt exists, they do not require the agency to accept evidence which, under established rules, is not admissible. The agency does itself and those it administers a disservice by letting in clearly inadmissible evidence. Such evidence makes the record unnecessarily long and thus increases the agency's job of reviewing that

record. Inadmissible evidence can taint good evidence. The agency, in reviewing the record, cannot with precision isolate the bad evidence once it is in and therefore may give it credence which it does not deserve. Inadmissible evidence prejudices the interests of the party against whom it is directed. A party should not be subject to irrelevant material, to rank hearsay, or to evidence unsupported by a competent witness.

It should not be forgotten that it is the Tribunal's duty to produce a decision which is not arbitrary or capricious and which, if offered in distribution proceedings, is supported by substantial evidence. These factors are discussed below in the section of this memorandum entitled "Agency Decision." The basic rule is that, to withstand review by an appellate court, the decision must be supported by the record. It is therefore essential that the record be both complete--containing all the facts the Triunal needs for its decision--and sound--comprised of relevant, properly supported facts, uncluttered by inadmissible evidence.

With this background in mind, a discussion of various rules of evidence follows:

A. Admissibility

The rule regarding the admissibility of evidence in Tribunal proceedings is set forth at 37 C.F.R. § 301.51(a):

> Admissibility. In any public hearing before the Tribunal, evidence which is not unduly repetitious or cumulative and is relevant and material shall be admissible. The testimony of any witness will not be considered evidence in a proceeding unless the witness has been sworn.

The Administrative Procedure Act to which the Tribunal is expressly made subject[29] states with regard to the admission of evidence:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.[30]

Davis, in his Administrative Law Treatise,[31] cites with approval the standard set forth by the Federal Maritime Commission for admission of evidence:

> In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative and not unduly repetitious shall be admissible. All other evidence shall be excluded.[32]

Thus, it appears that the CRT's rule regarding the admissibility of evidence is consistent with the APA and those of other agencies.

Courts tend to interpret admissibility standards for administrative agencies broadly. The "residuum rule," which required a reviewing court to set aside an administrative finding unless that finding was supported by evidence that would be admissible

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29/ 17 U.S.C. § 803(a).

30/ 5 U.S.C. § 556(d) (1977).

31/ 3 K. Davis, Administrative Law Treatise 236 (2d ed. 1980).

32/ 46 C.F.R. § 502.156.

in a jury trial has essentially been abolished.[33/] Notwithstanding the soundness of the Tribunal's rule on admissibility, our review of hearing transcripts and our discussions with Tribunal Commissioners reveal two problems: first, often irrelevant and immaterial evidence was admitted; second, evidence was often admitted without a proper foundation or proper supporting witness. The following discussion will focus on these two aspects of admissibility.

1. Relevancy and Materiality

In law, "relevancy" and "materiality" are often used in conjunction with each other; however, there is a distinction. Evidence is immaterial if it "tends to establish a proposition that has no legal significance;" it is irrelevant if it is "insufficiently probative of a fact that, if established, does have legal significance."[34/] Thus, the Tribunal should initially subject evidence to two tests. First, does it have to do with a matter of importance in the Tribunal's inquiry (materiality). Second, even if it does, does it tend to establish the truth or falsity of that matter (relevancy). The Ninth Circuit has provided a useful definition of relevant evidence: "[E]vidence which tends in any reasonable degree to establish the probability of a disputed fact ..."[35/] And in upholding a federal district

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33/ See Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980). "This rule [the residuum rule] no longer controls."

34/ 1 J. Wigmore, Wigmore on Evidence 18 (Tillers Rev. 1983).

35/ Sears v. Southern Pac. Co., 313 F.2d 498, 505 (9th Cir. 1963).

Judge's decision to exclude evidence in a jury trial, the reviewing Circuit Court stated:

> A lawyer with a weak case may throw in a lot of evidence to confuse the jury--a tactic sometimes called "serving up the muddle." As the federal courts become even busier, the need for district judges to manage trials with a firm hand becomes even greater. The district judge is to be commended rather than criticized for not taking the easy way out, which would have been to let in all the minimally relevant nonprivileged evidence either party cared to offer.[36/]

In another Circuit Court case, plaintiff sued for breach of a contract to perform mailing services. Defendant sought to introduce evidence that fraud and illegality were involved in obtaining plaintiff's non-profit mailing permit. The Circuit Court affirmed the trial court's ruling that such evidence was irrelevant and should be excluded, because the defendant could perform the contract regardless of the separately calculated postal charges.[37/]

Federal administrative agencies, like federal courts, will, and should, exclude clearly irrelevant evidence. For example, a railroad which opposed a competing truck line's application to serve additional points in the railroad's territory sought to introduce evidence of the railroad's tax payments and employment. The ICC properly excluded the evidence as irrelevant to the issue of the railroad's ability to provide transportation service.[38/]

36/ Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 968 (7th Cir. 1983).

37/ Contemporary Mission, Inc. v. Bonded Mailings, 671 F.2d 81 (2nd Cir. 1982).

38/ Inter-City Trucking Co. Extension of Operations, 4 M.C.C. L55, L58 (L938).

Similarly, the ICC excluded evidence on the property investment, fixed charges, and net income of certain railroads as irrelevant to the issue of the proper rate levels of competing motor carriers.[39]

2. Admissibility of Expert Testimony

Because the Tribunal considers highly technical and complex matters, the evidence it hears is often presented by experts. Determination of the admissibility of expert testimony is a special challenge.

In a recent case,[40] a federal District Court was called upon to rule on the admissibility of expert testimony in the form of a written report on accounting procedures. In summarizing Federal Rule of Evidence 702, the court stated:

> [T]he admissibility of expert testimony requires: (1) that specialized knowledge be of assistance to the trier of fact in understanding the evidence or determining factual issues; and (2) that a witness qualify as an expert by virtue of his or her "knowledge, skill, experience, training or education." Zenith Radio Corp. v. Matsushita Electrical Industrial Co., Ltd., 505 F. Supp. 1313, 1334 (E.D. PA 1981).[41] 545 F.2d 1372.

The issue was whether the defendant accounting firm had complied with generally accepted auditing standards in evaluating certain transactions. The court ruled that the expert witnesses had met the two criteria and admitted the report and testimony.

39/ Food Products from Pittsburgh, Pa., to Trenton, N.J., 19 M.C.C. 463, 465 (1939).

40/ Fund of Funds, Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314 (S.D. NY 1982).

41/ Id. at 1372.

In a 1980 opinion,[42] a federal Circuit Court ruled that a study conducted by an expert witness should not have been admitted into evidence by the trial court because it was hearsay and not independently admissible. Plaintiff had sued for damages which he claimed were the result of blasting at a mine by the defendant and offered a study to show damage to houses in the vicinity of the mine. The appellate court stated:

> To qualify a study or opinion poll for admission into evidence, there must be a substantial showing of reliability. There must be some showing that the poll is conducted in accordance with generally accepted survey principles and that the results are used in a statistically correct manner.[43]

In a 1982 case[44] involving litigation over asbestos-related product liability, the court was called upon to rule on whether an environmental consultant qualified as an expert witness to introduce a list he had compiled of articles relating to the hazards of asbestos. These articles were published prior to 1940, and plaintiffs asserted that they should have put defendant on notice of the hazards of asbestos at the time of their publication. Plaintiffs conceded that the consultant was not qualified to interpret or analyze the contents of the articles but argued that he was there merely to establish that the defendants could have located these articles and informed themselves as to the hazards at a much earlier time.

42/ Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980).

43/ Id. at 552.

44/ In re Asbestos Cases, 543 F. Supp. 1142 (N.D. CA 1982).

The court held that the expert witness would not be allowed to introduce the list of articles or to read excerpts because the witness was not qualified to testify as to the reception the articles received in the relevant scientific community at the time they were published. The court allowed the expert to be a foundation witness and testify that he investigated articles written on the subject of asbestos hazards, describe his research methods, and identify the articles he located. However, the articles would not be admitted into evidence unless:

> [P]laintiff selicit from a qualified expert witness what the content of each article is, whether the source which published the article was well known or obscure, and how each article was received by the medical community.45/

3. Hearsay

The hearsay rule provides generally that testimony in court or written evidence of a statement made out of court, offered to show the truth of the matters asserted therein, should not be admitted into evidence because it relies on the credibility of the out-of-court declarant, and thus the credibility of his assertion is not available for cross-examination to challenge the accuracy of his declaration.46/ The abolition of the residuum rule, previously discussed, has allowed administrative agencies to admit evidence, including hearsay, which would not be admissible in jury trials.

45/ Id. at 1150.

46/ See, generally, McCormick, Handbook of the Law of Evidence § 225 (1954).

We recommend for the Tribunal's review the Ninth Circuit's discussion of the admissibility of hearsay in administrative hearings, set out in Calhoun v. Davis.47/ The Court began by noting that strict rules of evidence do not apply in the administrative context, citing the APA rule that irrelevant, immaterial, or unduly repetitious material should be excluded. The Court pointed to hearsay as the type of evidence most often admitted in administrative hearings under the more relaxed rules. The important test of admissibility, the Court stated, was whether the evidence was probative and its use fundamentally fair. The Court pointed out that hearsay evidence can be substantial evidence if it is of sufficient weight and reliability. The Court listed the following tests:

-- If the hearsay statements are written, are they sworn or attested to?

-- Is the hearsay evidence contradicted by firsthand evidence?

-- Is the declarant available and if so why was he not called?

The Court went on to discuss the import of the agency's treatment of a motion to exclude or strike hearsay evidence. The Court pointed out that the motion need not be made nor ruled upon until the close of evidence; such delay allows the trier of fact to consider the entire record in deciding whether to admit the testimony. The Court concluded:

47/ 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981).

> Clearly, the more central the hearsay is to the agency's case, the more serious the question of basic fairness and the more critical the question of reliability may become .... [I]t is important that the [trier of fact] critically examine the issues of fairness and reliability on the record so that reviewing courts can determine from the record that the duty has been discharged.[48]

4. Business Records

A common and valid exception to the hearsay rule concerns business records. The exception allows records kept in the ordinary course of business to be admitted into evidence without the testimony of the person who prepared them, as long as other testimony or circumstantial evidence is provided that supports their trustworthiness. The rationale for this rule is the presumption that these records are accurate since they are relied upon in the ordinary course of business.

An example of the type of foundation necessary to establish business records under the exception is set forth in Itel Capital Corp. v. Cups Coal Co., Inc., 707 F.2d 1253 (11th Cir. 1983). In that case the court allowed leases and related documents into evidence where there was testimony that these were the types of documents kept in the ordinary course of business.

48/ Id., at 150.

2. Competency of Witness

Evidence should be presented by a competent witness. Competency has been described as "the witness' capacity to observe, remember, and narrate" which "also requires an assessment of the potential prejudicial effects of allowing the jury to hear the testimony." 48/

Expert testimony also must be presented by a competent witness, one who is familiar with the evidence and who can answer questions about it, in other words, withstand cross-examination about the evidence. In proceedings of the type conducted by the Tribunal, it can be argued that virtually every witness is an expert in his field and is testifying not only about what he has seen and heard but also about his conclusions as an expert. His testimony, therefore, may be a mix of fact and opinion. An expert witness should be given far greater latitude in rendering an opinion than a lay witness would be but, as an expert, should be subject to a stricter test of his competency than a lay witness would be.

The following distinction should be kept in mind: A witness who qualifies as an expert may render an opinion about matters of which he does not have first-hand knowledge. This is the essential function of an expert witness and is the reason his expert knowledge must be firmly established. The test was clearly expressed by a federal Circuit Court as follows:

48/ United States v. Benn, 476 F.2d 1127, 1130 (D.C. Cir. 1973).

> The principle to be distilled from the cases is plain: if experience or training enables a proffered expert witness to form an opinion which would aid the jury, in the absence of some countervailing consideration, his testimony will be received.[49]

On the other hand, the expertness of a witness does not qualify him to testify to the truth or falsity of matters of which he does not have first-hand knowledge. In a school segregation case, a federal District Judge ruled that an expert witness could not testify because she was not familiar with the specific local situation. Plaintiffs offered the witness as an expert on the effect of residential housing patterns on school desegregation. Although the judge acknowledged that her testimony would have been helpful in resolving the complicated issues involved in the case, he refused to qualify her. The expert had spent only one day in the area before attempting to give her opinion. The court stated: "General textbook theories may not be applied across-the-board in such a complicated matter."[50]

In summary, the Tribunal should demand that testimony be offered by a witness who has first-hand knowledge of the facts. If the witness does not have such first-hand knowledge, the Tribunal should convince itself that the testimony, although hearsay, is reliable and that opposing parties may test it through cross-examination. Exhibits should be sponsored by a witness who knows and understands their preparation and content

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49/ Jenkins v. United States, 307 F.2d 637, 644 (D.C. Cir. 1962).

50/ Andrews v. City of Monroe, 513 F. Supp. 375, 393 (W.D. La. 1980).

and who can answer questions about them. For example, unless all parties agree to admit a study not sponsored by the person who prepared it or knows about it, the study is suspect because there is no one to verify its reliability. If a party wishes to introduce a fact, a study, technical data, or any other matter, it should be required to produce a witness qualified to substantiate that evidence. Expert testimony should be offered only by a witness who is technically qualified.

3. Burden of Proof

The Tribunal's decisions, as reviewed by the Circuit Courts, have taken a common-sense approach to the question of burden of proof. The Tribunal declined to accept as precedent the statutory jukebox and cable royalties established by Congress. Instead, the Tribunal relied on the record before it in its initial ratemaking proceedings. However, the Tribunal has now ruled that its initial cable royalty distribution formula will represent the status quo, to be altered only upon a showing of changed circumstances. This approach indicates a comprehension on the Tribunal's part of the duty each party has of proving its position. The following section will review the concept of burden of proof in the context of the position taken by the Tribunal in its various decisions.

The Tribunal's governing statute provides that chapter 5, subchapter II, and chapter 7 of the APA are applicable to the Tribunal's proceedings.[51/] Subchapter II of chapter 5 states in

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51/ 17 U.S.C. § 803(a).

part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[52] The application of this rule to the Tribunal's proceedings has been discussed in two decisions by federal Circuit Courts.

In its 1982 decision reviewing the Tribunal's increase from eight to fifty dollars of the jukebox royalty fee,[53] the Seventh Circuit rejected the contention of the fee payers that the royalty owners had the burden of proof in justifying an increase. The Court questioned the applicability of section 556(d) of the APA and instead found that the statutory requirement for an initial ratemaking proceeding to establish the rate gave neither the payers nor the owners a greater burden than the other.[54]

And in its 1982 decision, reviewing the Tribunal's rate adjustment following FCC repeal of rules affecting cable operators and copyright owners,[55] the District of Columbia Circuit affirmed the Tribunal's holding that neither side in the controversy had the superior burden of proof, stating:

52/ 5 U.S.C. § 556(d).

53/ Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982), cert. denied 459 U.S. 907(1982).

54/ Id. at 1154.

55/ 17 U.S.C. § 118(b)(2); see also 37 C.F.R. § 301.61.

> Absent a presumption that the statutory rates were reasonable, it was not inappropriate for the CRT to refuse to place the burden of proving reasonableness on either party. Especially in light of the significant changes in the cable industry worked by the FCC's 1980 deregulation, the Tribunal's position on burden of proof was eminently sensible.56/

Cable and jukebox royalty distribution proceedings are to be held annually if the claimants fail to agree on the distribution of the award among themselves. In its decision distributing cable royalty fees for 1980, the Tribunal stated that the 1979 proceeding provided a reasonable basis for distribution of the fund and that to justify an increase or decrease from its previous year's award, the proponent would have to prove changed circumstances.57/ An appeal of the decision is pending.58/

The term "burden of proof" should be distinguished from the ultimate burden of persuasion. Courts have held that the term "burden of proof" as used in section 556(d) of the APA means the burden of coming forward with proof, not the ultimate burden of persuasion.59/

The terms were construed by the District of Columbia Circuit, which held that if a party has the burden of proof, it

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56/ National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176, 186 n.15 (D.C. Cir. 1983).

57/ 48 Fed. Reg. 9564 (1983).

58/ The discussion of changed circumstances contained in this memorandum is limited to the doctrine as it affects the burden of proof. A more-detailed consideration should await judicial discussion of the concept.

59/ Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998 (D.C. Cir. 1976) cert. denied, 431 U.S. 925 (1977).

must initially come forward with sufficient evidence to demonstrate the reasonableness of its position. Once that threshold is crossed, it is incumbent upon the opposing party to rebut the showing.

As stated in the legislative history of the APA:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence.60/

In future proceedings, the Tribunal should continue its common-sense approach to determining burden of proof. The party desiring to change the status quo has the burden of showing by a preponderance of the evidence that the change is warranted. Each party has the burden of establishing a prima facie case with respect to its position.

IV

MISCELLANEY

A. Scope of Cross-Examination

The Tribunal has requested guidance on the proper scope of cross-examination of witnesses at their hearings. Federal Rule of Evidence 611(b) provides:

60/ S. Rep. No. 752, 79th Conr., 1st Sess. 22 (1945).

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of witnesses. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Thus, generally, questions on cross-examination should only relate to the subject matter of direct examination. Following are some examples of the operation of this rule and its general principles.

In Rose Hall, Ltd. v. Chase Manhattan Overseas Banking,[61] the court affirmed a trial court decision limiting the scope of cross-examination. A surveyor was called to authenticate a survey of a tract of land. On direct examination, the surveyor was not asked about the water system the property had which could affect the value of the property, but the subject was raised on cross-examination. The court disallowed the cross-examination because it clearly exceeded the scope of direct examination. The court noted that other witnesses could have been cross-examined who had testified about the water system, or any witness could have been tendered it desired on the subject:

> Having failed to seize the proper opportunity to pursue this line of questioning, [plaintiff] cannot be permitted to cry foul at this late stage.[62]

In Caisson Corp. v. Ingersoll-Rand Co.,[63] a witness called to testify about the performance of a drill bit was qualified as an expert on the basis of experience and not technical education.

61/ 576 F. Supp. 107 (D. DE 1983).

62/ Id. at 158.

63/ 622 F.2d 672 (3rd Cir. 1980).

The trial court ruled that cross-examination on technical matters involving knowledge of physics and metallurgy would not be proper, a ruling affirmed by the appellate court:

> However, counsel for [defendant] was questioning him on technical matters, involving knowledge of physics and metallurgy, which were unrelated to the basis of his expertise, which was experience.64/

In Harris v. U.S.,65/ the trial court had limited the testimony of an expert witness to "ten more minutes" and was affirmed by an appeals court. Opposing counsel objected to the limitation but made no offer of proof as to the nature of additional cross-examination. The Court of Appeals, upholding the trial court's effort to expedite the trial, looked at the nature of the examination in chief and the length, duration, and effectiveness of the cross-examination that was permitted.

Miller v. Universal City Studios, Inc.66/ involved a suit for copyright infringement where the trial court allowed the plaintiff to testify regarding the similarities between his work and the allegedly infringing work. When the plaintiff and his expert witness were being cross-examined, the court refused to allow questions regarding their having copied from previous works in their own writing. The trial court, in ruling that cross-examination on this matter would not be allowed, had held that that line of questioning was not relevant to the central issue in the case, the alleged copyright infringement.

64/ Id. at 682.

65/ 350 F.2d 231 (9th Cir. 1965).

66/ 650 F.2d 1165 (5th Cir. 1981).

B. Scope of Redirect

Generally, since the party that called the witness has the opportunity during direct examination to obtain from that witness all the facts relevant to the party's case, the scope of redirect examination is limited, even more so than the scope of cross-examination. On redirect examination, the questions should be limited to eliciting information necessary to explain, in a more favorable light, facts brought out on cross-examination that tend to discredit or weaken the party's case. Also, redirect may be used to elicit facts which cross-examination has developed relevant to the party's case. As Wigmore states:

> Honest misjudgments and inadvertent omission often occur during the direct examination, and the repetition of particular parts may be desirable; while, on the other hand, the only danger to be guarded against is the unfair misleading of the opponent by the reservation of important testimony until the redirect examination, when he may have dismissed the needed witness in opposition.67/

In Walker v. Firestone Tire & Rubber Co.,68/ the appellate court found that the trial court had erred in refusing to allow questions which would have served to explain an apparent inconsistency between the witness's statements on direct examination and on cross-examination. On direct examination, an expert witness projected a certain level of alcohol in a deceased's blood at the time of an accident, based on the actual level found

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(cont.)

67/ 6 J. Wigmore, Wigmore on Evidence (Chadbourn Ed. 1976), § 1896.

68/ 412 F.2d 60 (2nd Cir. 1969).

in a test made several hours later. On cross-examination, the witness was asked whether he could say with any reasonable certainty whether the blood alcohol level when the patient arrived at the hospital was higher than the test results, which took place several hours later, indicated. The expert witness replied that he could not. Counsel, on redirect, sought to ask the expert whether it was probable that the decedant's blood alcohol level was higher than the test showed several hours later.

In Clayton Center Asso. v. Schindler Haughton Elevator,[69] the trial court refused to allow questions on redirect examination about an estimate the witness had made, stating that this would amount to improper summarization of the witness's deposition. The appellate court disagreed because the questions related directly to estimates testified to by the witness on cross-examination.

In Ramsey v. Honeywell,[70] the plaintiff's expert witness had testified that he had been called upon to examine and evaluate a number of valves, including those of the defendant. On cross-examination, the witness was asked to name the company whose valves caused the most trouble, and he named a company other than the defendant. On redirect, the witness was permitted to testify that he had also encountered problems with the defendant's valves because his testimony on cross-examination

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69/ 731 F.2d 536 (8th Cir. 1984).

70/ 540 F.2d 932 (8th Cir. 1976).

left the impression that defendant's valves were safer than those of other companies. Since the defendant had raised this issue, it was clearly within the discretion of the trial court to allow the plaintiff to attempt to rebut that impression.

C. Subpoena and Discovery Power

The Tribunal has asked us to examine the subject of subpoena power and to recommend whether the Tribunal should seek it. Subpoena power is the power to require, under law, the appearance of a witness or the production of documents. It may be useful to examine subpoena power in conjunction with the process of discovery, which is the mechanism one party in an adversarial proceeding uses to obtain from another party information relevant to the controversy. Discovery is widely used in court proceedings, and, to a much lesser extent, in administrative proceedings, to define, simplify, and reduce the issues at the trial or hearing, to allow proper preparation for the trial or hearing, and to prevent surprise.

The Tribunal's enabling statute does not grant it subpoena or discovery power, and it appears that where Congress wishes an agency to have that power it grants it specifically.[71/] The few cases which bear on the subject suggest that absent a specific legislative grant, an agency like the Tribunal lacks subpoena power and cannot read it into other enabling language. On the other hand, it is probable that the Tribunal's broad enabling

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71/ See, eg., 49 U.S.C. §§ 10321(c), 11913, granting subpoena power to the ICC.

language[72] gives it the power to promulgate regulations establishing discovery procedures.[73] However, absent the power to subpoena, it is questionable whether the discovery regulations would have the "teeth" necessary to make them effective.

Although the tightened evidentiary procedures recommended in this memorandum should lessen the need for subpoena power, we nonetheless recommend that the Tribunal petition Congress for such power and that, concurrently, the Tribunal promulgate discovery procedures. Both subpoena and discovery powers should prove useful tools. We have discovered at least one instance from our conversations with members of the Tribunal bar which suggests the need for subpoena power: the lack of access to information and witnesses from cable operators during the cable royalty distribution proceedings. Since the cable operators are the marketplace for the copyright owners and the Tribunal's mission is to determine the relative marketplace value in allocating the fund among the claimants, greater access to information and witnesses in this proceeding is critical to the Tribunal's mandated duties. Of course, during rate adjustment proceedings that are scheduled to take place every five years, cable

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72/ 17 U.S.C. § 803(a).

73/ See, contra, Federal Maritime Comm'n v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964), a decision which has received hostile criticism, e.g., K. Davis, Administrative Law Treatise § 14.8 (1980 Ed.). For a decision representative of the prevailing view, see Federal Communication Comm'n v. Schreiber, 381 U.S. 279,. 290 (1969), where the Supreme Court held that administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

operators have interests adverse to those of the copyright owners and may therefore object to revealing such information on an annual basis to copyright owners. Given such adversity, subpoena power may be essential.

We have examined similarly-situated agencies with regard to subpoena power. The General Accounting Office's Report[74] on the Tribunal's operations examined seven similarly-situated agencies and found that all possessed subpoena power. The report stated:

> We have found that it is highly unusual for a regulatory or rate setting organization such as the Tribunal to lack subpoena power.[75]

A 1974 report by the Administrative Conference of the United States[76] confirms this assertion. That report found only a few instances where agencies did not have subpoena power. In those instances, the lack of subpoena power was confined to specific types of hearings within the agency.

Ernest Bruce for
Rice, Carpenter & Carraway

74/ The Operation of the Copyright Royalty Tribunal, Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (testimony of Wilbur D. Campbell).

75/ Id. at 15.

76/ R. Berg, Explanatory Memorandum in Support of Recommendations 74-1, Subpoena Power in Formal Agency Proceedings, 3 Recommendations and Reports of the Administrative Conference (1973-74) 408.

C. Magazine and Newspaper Articles

CRT: Small "Cog," Big Clog?

(By Hale Montogmery)

"We are just a small cog in a very big wheel involving the dissemination of entertainment in this country."

This modest assessment of the role of the Copyright Royalty Tribunal in the swirling controversy over royalty fees is offered by its new chairman, Marianne Mele Hall.

Even in a city where numerous small agencies often bloom unseen and unheard in the bureaucratic bush (e.g., Foreign-Trade Zone Board American Battle Commission, Gorgas Memorial Institute of Tropical and Preventive Medicine, etc.), the Copyright Royalty Tribunal (CRT) stands back as one of the more arcane Washington public bodies.

Operating from leased office space with linoleum tile floors and no hearing room the agency has, by federal government standards, a small budget of about $725,000 per year, a tiny staff—and a large mandate from Congress. It will collect about $80 million in royalty fees from cable television operators for 1984.

Former Chairman Thomas Brennan, noting the absence of a conference room, once cracked, "We haven't had to meet in the park yet, but the day may come." The agency uses borrowed conference facilities at the Postal Rate Commission and elsewhere around town to conduct hearings. It probably is one of the few agencies to call off a hearing because of rain. This actually occurred one day in 1982, when none of the staff had an umbrella and it was necessary to carry documents and papers several blocks in a downpour.

The Tribunal on the average conducts about 60 days of hearings a year. This year may be an exception. Despite its relative anonymity, it is expected to be an early focal point of cable industry efforts to combat higher royalty fee payments.

What threatens the Tribunal's year-in and year-out obscurity this year is the fact that it must conduct hearings (every fifth year) to adjust the rates of congressionally-mandated compulsory license fees to cost-of-living changes. 1985 is a COLA year. But the real controversy centers in the 3.75 percent rate the Tribunal set in 1982 for certain distant signals freed from the FCC regulation.

"Its obvious that we're going to have a full blown proceeding," conceded Hall during an interview in her office where the windows overlook a service alley.

At present the Tribunal has a trio of commissioners: chairman Hall, a Washington-area lawyer; Mario F. Aguero, an owner of the Havana East Restaurant in New York City, both newly appointed in July of last year; and Edward W. Ray, a former Capitol and MGM Records executive and vice president of Eddie Ray Music Enterprises, the only Reagan holdover appointee.

There are two vacancies; sources indicate that the White House has no plans to fill them. Each commissioner has a personal assistant; there is no professional staff, although chairman Hall is in the process of hiring the first full-time legal counsel in the Tribunal's history.

She would like a full-time staff economist too, "but it's just not in the budget."

Congress created the CRT in 1976 to oversee the rate structure of the Copyright Act. Under the Act, the cable industry pays compulsory license fees for broadcast programs it takes off the air and retransmits, rather than negotiating prices individually with every programmer or copyright owner.

WIDE DISCRETION

The mandatory hearings by the CRT this year, which are to adjust the compulsory license fee schedule, are considered to be fairly mechanical. The CRT may use the Labor Department's Consumer Price Index, or some other recognized index, to adjust fees accordingly for the five-year review period.

However, the CRT has wide discretion over rate fixing "We can set rates however we determine them," emphasizes Hall. And the Tribunal in the past has done just that.

In 1980, the FCC withdarw prohibitions on the use by cable systems of signals from distant independent TV stations. It opened the way for cable systems to import signals from distant cities to add program variety, and ushered in superstations. But the CRT then stepped in to establish rates for these "new" signals not specifically covered by the schedule of compulsory rates listed in the 1976 Act.

In 1982, the Tribunal found that "a fair distant signal is 3.75 percent [of gross revenues]." This meant fees 15 to 20 times higher than the compulsory fees being paid for other programming by the cable industry.

The result has been a furor in the cable industry and in Congress, with complaints over higher fees rising to shriller levels every year. The motion picture industry and other copyright owners, in contrast, complain that the fees are too low.

Rep. Robert W. Kastenmeier (D-Wis) chairman of a House Judiciary subcommittee on copyright matters, thinks the CRT has overstepped its authority. He called the 3.75 percent fees "arbitrary, capricious and an abuse of the discretion placed in ther Tribunal by Congress." At another point he accused the Tribunal of "trying to set policy, not rates."

The commissioner at the time disagreed. They responded that they used good common sense in setting the rates for copyrighted distant programming, basing their decision on marketplace values for creative materials.

Although the CRT cannot review its 3.75 percent decision unless petitioned to do so, few believe it won't be considered. And when that happens, many in the cable industry are convinced that the Tribunal is predisposed to favor copyright owners. Dr. John C. Malone, president of TCI and chairman of the NCTA copyright committee, predicted at the Western Cable Show in Anaheim that the 3.75 percent issue will come up, that the Tribunal will hike it to 5 percent and that "there's not a hell of a lot we can do about it."

The principal debate at the Western Show, however, centered not so much on the CRT, but on how the industry might win copyright reforms through Congress, and through the courts. The general congressional consensus: to concentrate efforts on a bill narrowly aimed at correcting "inequities" in the current law, rather than pushing for a comprehensive rewrite of the Copyright Act.

In Anaheim, Jack Valenti, head of the Motion Picture Association of America (MPAA), called for cable and programmers to cooperate, not fight over copyright. The programming offered by the MPAA and others "is the key."

"It, and it alone, unlocks the door to enduring success," he exclaimed.

Cable operators, Valenti said, are paying only about 22 cents a month per subscriber in royalty fees, less, for example, than their monthly mailing costs to subs. And only 192 cable systems paid for any distant signals at the 3.75 percent rate, he claimed. But, he warned, "if the cable industry determines it wants to start a war, then we are prepared to defend ourselves."

Copyright reform however, is not the Tribunal's bag. "The Tribunal is just a hearing body," says Hall. "We have no regulation-writing functions. The Copyright Office (in the Library of Congress) does that. We so not have the staff to do that. We are involved in setting rates."

But it is this critical rate-making function that is expected to be the object of the opening battle over copyright this year. And once the parties are marshalled in evidentiary hearings before the little CRT, the game can get complicated. The ployers include, among others, professional sports interests, cable television, motion picture studios, consumer groups, broadcasters, networks and independent producers.

In previous hearings, pleadings have become intense. Opposing sides employ A.C. Nielsen ratings, attitudinal surveys, market penetration data, economic sudies of diminishing returns, audience fragmentation reports and, of course, critiques of each other's data.

Among the players, there are potential conflicts within conflicts: Some broadcast networks have cable holdings, some cable companies produce programming and receive copyright fees (seven of the 10 members of the NCTA copyright committee are MSOs, most associated with some programming interests). Most of the major-league sports organizations are not so much interested in receiving higher royalty fees, or any fees at all, as they are in totally barring cable system carriage of out-of-town sports events.

Broadcasters are more interested in protecting the must-carry rules than in royalty payments, which are not that large a source of income. Steve Effros, executive director of CATA, estimated that individual TV stations receive an average of less than $4,000 a year in cable royalty payments. But for the MPAA, which receives the lion's share (70 percent) of the approximately $80 million paid by cable annually, the fees are a significant number.

And the MPAA, which represents the big-seven movie studios, makes no secret of its desire to eliminate compulsory fees entirely, and force cable to bargain for programming in the marketplace. "We would just as soon eliminate compulsory license fees altogether," says MPAA attorney Fritz Attaway, reiterating his group's ultimate threat in the royalty wrangle.

TO BE OR NOT

When the big players—the cable industry, MPAA and broadcasters—can compromise their differences is not now known. Some deal makers have suggested cable might accept higher royalty fees in a trade for elimination of the must-carry rules. "It's to early for details," say Effros. "The industry is not yet united on what it wants in copyright."

Meanwhile, back at the Tribunal, civil servant Hall indicates she expects to earn her pay ($66,700 a year) this year. "We will give everyone a full, a fair hearing. I feel my only goal is to seek a balancing of the equities."

Commissioner Ray says he expects 60 to 70 days of hearings.

As for the cable industry argument that the 3.75 percent rate has caused wholesale cancellation of distant signals by cable operators, thus defeating the Tribunal's objective of wider distribution and increased royalties to copyright owners, Hall says, "That will be the centerpost of the testimony."

Ray says the cable industry will need to substantiate that claim. "We don't have the staff to get those figures," Ray declaims. "We welcome the testimony of MSOs and other cable companies besides the NCTA."

Chairman Hall acknowledges that entertainment is big business in this country, and the copyright laws are intended in part to promote science and the arts "by securing the exclusive use for a period of time of the creations" of various artists or inventors.

"I am not looking to bolster or project one industry or one side.

"I look at the end result and I see a fine product coming out of Hollywood, out of New York, our of Nashville and this whole great country. I see more opportunity for young creators. . . and I see a more satisfied public than in any other country in the world. There is simply no comparison.

"I could not jeopardize or interfere with the internal business policies of this business," says Hall, and repeats:

"We are just a small cog in a very big wheel involving the dissemination of entertainment in this country."

The Film Estate

1983

Broadcasting Apr 29

The curious combination at the CRT

The weak link in implementation of the Copyright Act of 1976 has always been the Copyright Royalty Tribunal, whose mission has never been matched by resources; this is the story of the three commissioners now trying to keep up



Aguero, Hall and Ray

The Copyright Act of 1976 placed much of its hope for marketplace justice in the Copyright Royalty Tribunal, a tiny—but increasingly powerful—federal agency that determines how much cable operators pay for the compulsory copyright license and how the collected royalties—now amounting to tens of millions of dollars a year—are split among program producers and suppliers. The incumbent clout is concentrated in the hands of three individuals—Chairman Marianne Mele Hall and Commissioners Edward W. Ray and Mario F. Aguero.

They're a curious combination. Hall, who joined the CRT last November, is a 34-year-old lawyer with a pronounced conservative bent who has had more experience in teaching law than in practicing it. Ray, 58, who was appointed to the CRT in 1982 and who served as its chairman in 1983, is a soft-spoken former record producer and distributor. And Aguero, 53, named a commissioner last May, is a Cuban immigrant and former New York businessman and producer of concerts, motion pictures and television shows.

The three have at least one thing in common: All are staunch Republicans with enough of the right connections to secure a presidential appointment to the CRT—a seven-year job with a current annual salary of nearly $70,000.

Only Hall joined the tribunal with any kind of background in copyright matters. But that's not unusual. Indeed, during the seven-year history of the CRT, only Hall and Thomas Brennan, a former congressional staffer who helped draft the 1976 act, have had measurable copyright experience, even though the act's legislative history suggests that the President appoint "persons who have demonstrated professional competence in the field of copyright policy."

Since its inception, the CRT has earned little respect from the industries it affects, the Congress or the courts. That's attributed to a number of factors, including the inexperience of most of the commissioners, the lack of staff and small budget ($722,000 this year) and the absence of clear guidance from the Copyright Act.

The cable industry feels the CRT is inherently biased toward the copyright holders and seems to have given up all hope of getting what it considers "a fair shake" from it. John Malone, president of Tele-Communications Inc. and chairman of the National Cable Television Association's copyright committee, said, "If the cable industry is going to get a fair shake, it will be through legislation and the courts."

Three years ago, Senator Charles Mathias (R-Md.) told a group of broadcasters that the White House considers the CRT "a useful place to put some otherwise embarrassing applications for jobs." And Robert Kastenmeier (D-Wis.), chairman of the House Copyright Subcommittee, has written that subcommittee believes the body is "in dire need of reform."

Moreover, the U.S Court of Appeals in Washington has twice stated in upholding CRT decisions: "While we do not sanction [the quality of the CRT's explanation]. We have regarded [it] charitably in light of the tribunal's lack of a professional staff and the [relative] novelty of the proceeding. We expect the quality of the tribunal's decision-making to improve with experience."

As the CRT is now constituted, Hall is the key player, not so much because she is current chairman, but because of her intention to improve the much-maligned agency by tightening up procedures, restructuring its organization and strengthening the soundness of its opinions.

Her interest in copyright goes back to the summer of 1977 when she worked as an intern at the Copyright Office of the Library of Congress, the agency that actually collects and disburses the cable copyright fees.

Since being graduated from Rutgers Law School in 1978, Hall has taught law, worked for several banks and has become involved with a number of right-wing groups.

Most of her teaching has been done at Northern Virginia Law School in Alexandria, Va., which Hall describes as a "small

private school with a part-time program." Calls to the school, which is not accredited by the American Bar Association, are answered by a recording describing the school as "the weekend-only law school," and offering information through a post office box. Returning a call left with his answering service, Alfred Avins, the head of the school, said Hall is an "instructor" at the school, but declined further comment.

In the fall of 1981, she taught one semester of estates and wills at Antioch Law School in Washington, where her conservative values often clashed with those of the liberal students and faculty. According to Antioch professor Richard Rubenstein, who hired Hall, she "did very well." He remembers that she would "provoke her students by saying things she knew they would disagree with." And, he said, she was always prepared to defend her views. "She talks back," he said. "She doesn't take s... from anyone."

Hall says she also taught one semester of "law in the business environment" in the business school of the University of the District of Columbia in the spring of 1981.

Some of Hall's conservative views are distilled in a 71-page booklet—"Foundations in Sand"—that she helped write and publish with two others, Lawrence Hafstad and John H. Morse, in 1982.

The booklet's most controversial chapter may be the one that addresses *The Minority Problem*. It argues that black males are at a disadvantage in Western culture because of the "10,000 years of selective breeding" that allowed them to thrive in the African jungles. "Black male youths have great difficulty overcoming their millenia of breeding for short-sighted, high-energy solutions to problems," it says. "Their race has skipped the centuries of training which has produced in other races the discipline, foresight and tolerance of drudgery, necessary for success in the agricultural and industrial ages in the temperate zones.... "

It's possible for black males to overcome their genetic handicap, the booklet says. And to help them, it says, the country should set up a "separate, but superior school system" for blacks. Because black males resent the authority of whites and females, it says, the schools should have male teachers and, whenever possible, former star athletes as principals. Black students who accept "the work ethic" would qualify for integration into "the majority schools," it says.

The chapter proffers other unconventional ideas. It asserts that "life is still cheap in Africa," citing Idi Amin's reign of terror in Uganda. It also contends that slavery was an African tradition and that it died out in European cultures because it proved "inefficient."

Although she told the Senate Judiciary Committee that she "co-authored" the booklet, Hall told BROADCASTING the ideas are really those of Hafstad and that she acted primarily as an editor. She doesn't, however, disavow the booklet and the ideas it contains. The booklet was intended "to stir thinking into alternative methods of solving our problems," she said.

Although "Foundations in Sand" firmly rejects "affirmative action" as a means of improving the lot of blacks and other minorities in business, Hall says she helped implement an Equal Employment Opportunity program for Washington's Riggs National Bank when she worked for the bank between March 1979 and May 1980. She says she also set up a system to aid the bank in making sure it stays in compliance with federal and city EEO laws.

In 1981, Hall worked with Lieutenant General Daniel O. Graham (U.S. Army, now retired) and others on "High Frontier: A New National Strategy," a study that proposed the "strategic defense initiative" that was later adopted in part by the Reagan administration and popularized as "Star Wars." The study also spawned a permanent organization, High Frontier Inc., on whose board of advisers, according to project director Graham, Hall still serves. Graham strongly endorses Hall, calling her a "brilliant young woman."

And over the past few years, Hall has also advised and contributed money to the Leadership Foundation, a conservative group headed by former broadcast newswoman Martha Rountree. According to Rountree, one of the goals of the group is to "clean up" television by encouraging grass-roots protests against excessive sex and violence on television. Like Graham, Rountree praises Hall as "one of the most conscientious people I know.... I don't know anyone with more integrity. She'll do her homework and she'll be fair."

Hall anticipates that the remainder of 1985 will be busy for the CRT. "I don't think we are going to get a day off for the next eight months," she said. The proceeding to determine the distribution of the 1983 copyright pool, which amounts to around $85 million, will be more complicated, and, possibly, more contentious than ever, she said. For the first time, she said, the pool includes fees stemming from the CRT's 1982 rate increases—3.75% of gross revenues for distant signals added by cable systems after the FCC dropped its distant-signal rules and an across-the-board hike on all distant signals to compensate copyright holders for the FCC's elimination of the syndicated exclusivity rules.

At the same time, she said, the CRT will probably have to launch a proceeding to review the 3.75% rate and the so-called syndicated exclusivity surcharge. Turner Broadcasting System, owner of superstation WTBS(TV) Atlanta, has already petitioned the CRT to review the 3.75% rate for cable systems wishing to add the superstation. And, she said, she expects others to petition for a broader review and trigger a "full-blown

LPTV grants. FCC has tentatively granted low-power television applications of Mountain TV Network for channels 52 and 54, Hazen, N.D.; 45 and 47, Hamilton, Mont.; 64, Malta, Mont.; 55, 33, 31, 63, 67, 61, 59 and 65, all Bonilla, S.D.; 60, 68, 62, 56, 64 and 58, all Chamberlain, S.D.; 36, 44, 54 and 60, all Wishek, N.D.; 23, 25, 62, 64 and 31, all Dubois, Wyo.; 62, Rugby, N.D.; 20, 28 and 36, Wheatland, Wyo.; 68, Reva, S.D.; 49, 51 and 53, Hyannis, Neb. It also has tentatively granted applications of State of Alaska for ch. 24, Trapper Creek, Alaska; Douglas Televiewers Inc., ch. 2, Douglas, Ga.; Steven C. Nelson, ch. 8, Fairmont, N.D.; Harlan L. Jacobsen, ch. 12, Mitchel & Woonsocket, S.D.; Graphic Scanning Corp., ch. 69, Wichita, Kan.; State Board of Directors for Educational Television, ch. 9, Mitchell, S.D.; Bear Paw TV Club, ch. 11, Lloyd, Mont.; John W. Smith Sr. and Mary L. Smith, ch. 5, Jeffersonville, Ind.; Regents of the University of New Mexico and Board of Education of the City of Albuquerque, ch. 32, Albuquerque, N.M.; Arapahoe County TV Club, ch. 30, Gallup, N.M.; North Tillamook County Translators Inc., channels 53, 44 and 57, Rockaway (and vicinity), Ore.; Kentel, ch. 47, Boise, Idaho; North Sherman TV Co-op, ch. 67, Wasco, Ore.; World Out Reach For Deliverance, ch. 60, Keokuk, Iowa, and Five County Public Telecommunications Project, ch. 62, Lake George, Colo.

CPB budget hearings. The threat of the administration's $14 million rescission of the Corporation for Public Broadcasting's proposed fiscal 1987 appropriation, died last week. The White House recommended that Congress cut the $200 million proposed for CPB to $186 million; however, 45 legislative days had passed since the rescission request was filed. Since Congress had not voted on it, the requested cut expired April 24. In an attempt to avoid a third Presidential veto, CPB has also supported the administration's proposed FY 1988 appropriation of $214 million. With that, $108.3 million would go to noncommercial television stations in the form of community service grants (CSG's); $36.1 million for national television program production, and $48.2 million for radio's CSG program and national radio program production, CPB Chairman Sonia Landau told House Appropriations Subcommittee members April 18.

At a Senate Appropriations Subcommittee hearing last Thursday (April 25), CPB Landau offered her "personal observations about CPB's priorities": Public broadcasting "can, and should play a meaningful role in educating America's children"; CPB was "committed to opening up the benefits of public broadcasting to the physically impaired"; public broadcasting "should never become preoccupied with ratings," and noncommercial broadcasting should do "more in the area of public affairs." For the last, she would like to see "more extensive coverage of Congress," including programs offering an historical prospective on it. She also wanted to attract more "innovative producers" of children's programing to noncommercial broadcasting, she said. Among other topics discussed during the hearings was CPB's relationship with National Public Radio. Pfister told the House subcommittee members that CPB had a "testy" relationship with the noncommercial radio network.

proceeding."

One task the CRT will not have to perform this year is deciding on an adjustment of the copyright fees for inflation. The cable industry and the programers got together earlier this year and agreed to increase the rates nearly 12%, obviating the need for the CRT proceeding. "The inflation proceeding is pretty much laid to rest," Hall said.

To do the job and do it right, Hall feels that the CRT must have something it has never had: a competent "professional staff" to support the work and decisions of the commissioners. She has already hired the CRT's first general counsel—former FCC attorney Robert Cassler—and would like to hire at least two more lawyers, an economist and an accountant.

Although the Copyright Act specifies five commissioners, Hall believes it can get along with just three. In fact, she believes the appointment of two more commissioners would "be a frightful waste." She said she plans to ask Congress to allow her to use money earmarked for the absent commissioners for additional staffers.

Once the upcoming distribution and rate-review proceedings are wrapped up, Hall said she would like to explore rewriting parts of the Copyright Act to "see if we can't officially reorganize the [CRT] into a more workable structure" with three commissioners and sufficient staff. (She said she would also like to see a rewrite of Section 111 "to make it more readable. That thing is just like mud.")

In preparation for this year's hearings, Hall said she is also in the process of reforming the procedures "to give them more structure and more consistency." The CRT has hired a law firm to help analyze the procedures and recommend improvements, she said.

"The next big headache... is really beefing up our opinions, our determinations, so that they have more substance than they have had in the past," she said. "That is going to be a project in which I with my legal counsel had a half a dozen assistants because the determinations we come out with this year are going to be major."

Despite her conservative credentials, or perhaps because of them, Hall is a dedicated reformer—at least when it comes to the CRT. "I think this agency needs a total overhaul," she said. "When every determination results in people storming the courts and storming the Congress, that says to me that this agency is not doing the job that it was expected to do. You expect half the sides to be unsatisfied. But when the biggest takers are still dissatisfied, it tells me we have to look at what we are doing and why."

The cable industry has long maintained that the CRT has a bias in favor of the copyright holders. This bias, they say, was manifested in 1982 with the CRT rate increases. "It's not so much a function of bias," said Hall in response to the charge. "It's more a function... of inactivity. If [the previous commissioners] did more, studied more, worked harder toward finding a better answer then maybe some of the discontent from all sides would have been ameliorated.

"I'm not going to sit here and say I'm going to make it all better. I don't know if I can," said Hall. "But I do know that I will work as hard as I can to try to find better solutions."

Of the three commissioners, Ray now has the most experience, having arrived at the CRT in 1982 and having served as chairman in 1983. He is the only current commissioner to have participated in the controversial 3.75% rate hike proceeding. Ray supported the increase.

Like Aguero, Ray has strong ties with the entertainment industry. His career spans several decades in the music industry beginning in the 1950's when he worked for Central Record Sales, a record distribution firm in Los Angeles. In 1955, he joined Imperial Records, another Los Angeles record distribution firm, as national promotion manager. For five years, he worked for Capitol Records, eventually becoming a vice president, and later joined MGM Records where he served as senior vice president.

Ray left MGM Records in 1974 to establish Eddie Ray Music Enterprises, whose holdings included a recording studio, music publishing and record production divisions. The company also operated the Tennessee College of Recording Arts, a vocational college for those interested in the recording business. In 1979, Ray returned to Los Angeles as president of California Multiple Industries Inc., a real estate and music consulting company.

In California, he was active in Republican politics and was a California state co-chairman for Republican Black Voters for the Reagan/Bush Campaign in 1980. And during the 1984 campaign Ray served on the national advisory committee of the National Black Republican Council and was an active Republican Eagle in 1983.

(He received a bachelor of professional studies degree from Memphis State University and studied in business administration at Los Angeles City College.)

Nominated initially to fill the unexpired term of Clarence James, Ray was reappointed for a full term which expires September 1989. At the time of his second confirmation before the Senate, there was some congressional concern that Ray's background in the record industry might compromise his position at the CRT. Nonetheless those concerns were quelled. And as Ray explains: "The position of the people at the White House who recommended me was that they felt it was time to have someone at an agency in Washington who was not the typical Washington lawyer type, but someone who had business experience, who had a practical working knowledge, that can give a different perspective." Moreover, Ray says that when the 1987 recording rate proceeding comes before the tribunal he will not participate if the parties feel it's necessary.

As for the size of the CRT, Ray agrees with Hall that it should be reduced from five to three commissioners. He says he has always taken that position. He also backed the decision to hire a chief counsel. During his chairmanship, with the help of then commissioner Katherine Ortega, Ray was able to get a budget set aside to hire a chief counsel. But he failed to convince the rest of his colleagues. He's now "very happy" they finally got one.

However, that's as far as he will go. He doesn't see any need for more staff or a full-time economist. "Unless there are additional responsibilities given to the CRT I think it would be a terrible waste of time and money to have a full-time ecoonomist. As to whether we might hire an outside economist for a specific project, that's another thing that I would probably support," Ray said.

Ray was reluctant to comment on the Turner petition, although he expressed surprise that the CRT hadn't been petitioned sooner for a review of the 3.75% rate.

"By no means am I closing my mind or making prejudgments as to what a review might turn up," he said. "My decisions are based on the record before us.... If the record has changed, if other things are presented then, of course, I have no idea what my vote will be on the appeal until that record is recorded."

His view on the compulsory license is similiar to Hall's. "I have always taken a position that if and when the industries can develop an internal mechanism in which they can negotiate themselves in a free market atmosphere—I would love to see that day happen—I think then that there certainly would be no need for the CRT or anything like the CRT. I am not convinced at this point, in fact I know at this point, they have not been able to do that."

Ray has had some doubts about the CRT's role from the very beginning. He questions whether "taxpayers should be responsible for these kinds of actions." However, "as long as Congress does not change it and as long as the industries themselves cannot develop the kind of mechanisms so that they can do it themselves, I don't see any other way," he added.

But as far as copyright reform goes, Ray is not anxious to become entangled in such an endeavour. What's more, he said, it's not in the CRT's mandate to seek reform. "I would not be in favor of a member of the tribunal becoming a lobbyist on the Hill."

If cable operators petition the CRT to lower the 3.75% copyright rate, they will have to deal with at least one unsympathetic commissioner, Mario Aguero. Asked what he thought about the rate, Aguero said, "I don't think it's too much, the 3.75%." And, apparently unaware of the NCTA's ill-fated court appeal of the rate, he added, "So far today we haven't had any challenge of the 3.75%. What do you think?"

Aguero was appointed in May 1984 to fill out the unexpired term of the late Marylou Burg (Burg died in May 1983) and was reappointed in September 1984 to a full seven-

year term. He says he received a bachelor's degree in science and letters from the Camaguey Institute before leaving Cuba in 1960, and a degree in business administration from Havana University.

Soon after arriving in the U.S., Aguero founded Enterprises Latinos, which dubbed Spanish soundtracks onto English movies, and Artists in Radio, Television and Spectacles, a union for foreign performers. Neither company nor union exists today.

Aguero became involved in other show business jobs and ventures. Calling himself a "theatrical entrepreneur," Aguero says he served as a talent consultant for several Latin American television stations and says he produced numerous concerts, stage and radio shows at Carnegie Hall and Lincoln Center. He cites his production of "Roberto Iglesias Ballet Espanol," which appeared on the New York stage as well as the *Ed Sullivan Show* and *Bell Telephone Hour*, as one of his major accomplishments.

Aguero owned and operated a New York restaurant, Havana East, for 10 years before selling it in 1981. And at the beginning of this year, he sold off his real estate interests, mostly apartment buildings held by Amalia Realty Corp. As a CRT commissioner, Aguero feels it's necessary to rid himself of any possible conflicts of interest. "As long as I am here I want to be in the best possible shape with the tribunal."

Aguero was particularly active in President Reagan's 1980 presidential campaign and in 1983 was named chairman of public relations for the Republican National Hispanic Assembly, a post he held until Feb. 24, 1985.

Since his roots are in show business, some CRT watchers may feel Aguero will lean in favor of the copyright holders. Not so, the commissioner maintained. "We are here to make decisions in the right manner. We don't have any favorites. We make the most honest decision we can afford. It's our job," he said. Furthermore, Aguero added, he has already participated in at least 11 tribunal hearings and has not shown an inclination toward any certain entity. "I loved my career as a producer, I love actors and performers, but this has nothing to do with the business of the tribunal," he said.

Aguero also deflects any criticism that all the commissioners should have some background in copyright law. "I think we combine a good team here. That team represents people who know the law very well and very deeply and people involved in business." In his opinion, it's combinations like that that have made the "tribunal great in the last seven years."

Like Hall, Aguero wants to strengthen the tribunal. However, he would go about that differently. He favors filling the two vacant commission seats to give the CRT a full complement. With only three commissioners, Aguero fears there will be times the tribunal won't be able to assemble a quorum. Moreover, he said, the CRT will have its hands full with the 65 hearings scheduled this year. And he expects the workload to increase. "I think the television industry is growing so much that in the next three years we're going to surpass the $100 million mark. The more money we have the more troubles we're going to face." (Aguero also thinks the tribunal needs an economist.)

Although it's unclear whether Aguero is a hard-line advocate of the compulsory license scheme, he doesn't seem anxious to see it disappear. "How do you control the rights of the composers and performers without a compulsory license?" he asked. What about turning it over to the marketplace? "I never thought of that, I don't know," he responded. "The compulsory license has helped a lot so far to my knowledge."

Aguero isn't the only member of his family working for the government. His wife, Lilia Lazo, an actress, has joined the Cuban service of Voice of America (Radio Marti), as an anchor.

The lawyers who deal with the CRT in behalf of the various cable, broadcasting and programing lobbies privately question the competence of the three commissioners. But some are impressed with Hall's enthusiasm and determination to reform the agency and are hopeful that she can bring some order to its procedures and some reason to its decisions. Now, they are waiting to see if she can deliver. □

Hall assailed for tract called racist

CRT chairman who began week credited with being co-author of controversial booklet ends week claiming to have had only clerical role; she seeks to disassociate from racist views; House panel skeptical, questions whether agency is 'broken'; other commissioners' attendance questioned

The effectiveness of the Copyright Royalty Tribunal and the competence of its commissioners were called into question last week by the House Copyright Subcommittee, which challenged the abilities and qualifications of CRT Chairman Marianne Mele Hall and Commissioners Edward W. Ray and Mario F. Aguero during an oversight hearing. Hall, who was the only commissioner to appear before the panel, also came under serious criticism for her role in the creation of a controversial 71-page booklet called "Foundations of Sand"—an association first disclosed in BROADCASTING's April 29 issue.

Indeed, House Copyright Subcommittee Chairman Robert Kastenmeier said the tribunal is in "dire need of reform." He said the subcommittee has a "classic case of a broken agency on its hands." And, he added, "I don't know, at this time, whether the agency is broken beyond repair."

Kastenmeier explained that the purpose of the hearing was to inquire into whether "the agency generally is effective, whether the commissioners' relative lack of expertise in copyright law has hurt the tribunal, whether judicial review has been meaningful, and whether the absence of clear guidance from Congress on how the tribunal should make rate decisions creates a statutory defect that must be rectified.

"A recent article in BROADCASTING raised several of these questions," the chairman continued. "The article also contained a discussion of a book, 'Foundations of Sand,' authored by Dr. Lawrence Hafstad with Marianne Mele Hall and John Morse. Admittedly, Chairman Hall authored (or edited) the article prior to her appointment by President Reagan as a commissioner. I have several questions about 'Foundations of Sand' that I will ask during this hearing," he said.

For the most part, the hearing focused on Hall's association with the book. One chapter—"The Minority Problem"—has drawn the most fire. It holds that "Black male youths have great difficulty overcoming their millenia of breeding for short-sighted, high-energy solutions to problems. Their race has skipped centuries of training which has produced in other races the discipline, foresight and tolerance of drudgery, necessary for success in the agricultural and industrial ages in the temperate zones...."

However, some members, including Kastenmeier, addressed the subject of the overall competence of the agency and its commissioners. There was even some concern expressed as to why the other commissioners were not present at the hearing. It was revealed later, however, that only Hall was officially invited. Usually, the chairman is accompanied by other tribunal members.



Hall

The subject of the other commissioners' absenteeism was raised. "Do the other commissioners show up to work five days a week on a 9 to 5 basis?" asked Representative Mike Synar (D-Okla.). "No, they do not," Hall answered. Their attendance record, she noted, has "no consistent schedule or pattern." Synar requested a record of their attendance at tribunal meetings.

"Am I correct that the background of the other two commissioners is that one is of Cuban descent who is a former Olympic basketball star and the other one is a Chuck Berry road manager? Is that correct?" Synar inquired. Hall replied, "No." "Do either one of them have background in the copyright area?" Synar pressed on. Hall said they both had extensive experience in industry.



Kastenmeier

Synar also asked that the commissioners submit written answers concerning their views on the compulsory license and the CRT's 3.75% distant-signal rate hike decision. Hall, however, declined to comment on the the 3.75% decision because Turner Broadcasting has asked for a review of it and she was reluctant to comment until the proceeding is completed.

Hall, Kastenmeier noted, had made a favorable first impression on the subcommittee because of her "willingness to work" and her interest in reforming the agency. Since the revelation of the book, however, Kastenmeier said the subcommittee's concern about the tribunal and its effectiveness as well as Hall's own "competence" had become an issue.

During the hearing Hall presented some of the views that have earned her a reputation as a CRT reformer. "I believe there is more need for legislative reform at this time," she said. Hall suggested that the chairmanship, which rotates from one commissioner to another each year, be made a permanent position. She criticized the current system because it makes it difficult for the CRT to "render a consistent internal policy." Moreover, Hall asserted the agency needs more professional staff and an economist. The CRT, she recommended, also needs subpoena power.

In addition, she suggested that the agency needs closer coordination with the licensing division of the Copyright Office. "I believe the licensing division should report to our tribunal," she said. "Do you think the tribunal should be part of a larger agency; would that help?" asked Representative Carlos Moorhead (R-Calif.). "I don't think that would help; it could hurt. We need to be independent," she answered.

Hall also discussed the size of the agency. Of the five commission seats, only three are currently filled. (A fourth member was nominated last week [see box, page 45].) "I recommend three members. We don't need more decision-makers. We need more professionals," she said.

Despite Hall's testimony on the CRT, the subcommittee was more interested in the book and continued to raise serious doubts about her ability to serve on the tribunal. Kastenmeier noted that when a public official in a federal position expresses "these views," it becomes an issue of whether or not she could continue in her job and maintain the "confidence of those who are affected by your decisions."

Kastenmeier asked Hall what her role was in writing the book. She denied she was anything more than an editor. "I was merely the editor in an extreme ministerial position. Simply nouns, verbs, pronouns, dangling participles, sentence structure," she answered. The book, published in 1982, credits "Dr. Lawrence Hafstad with Marianne Mele, John Morse" as the authors. And according to a certificate of copyright registration filed by Hall with the Copyright Office

on Aug. 23, 1982, she is listed as one of three authors and signed the document as the "authorized agent" of the book. Hall, who was confirmed by the Senate on April 2, also listed herself as a "co-author" of the booklet in a sworn statement submitted to that chamber.

Kastenmeier asked Hall why she identified herself as an author if she were only the editor. Hall contended she considered herself a ghost author. "I didn't know what to call it, I didn't know how to express it and I was much younger. However, I never did any research or offered an opinion or drew conclusions or indicated those views were mine. They are not mine, they are Dr. Hafstad's."

But the chairman and others doubted her assertions. "You were more than an editor, I take it. You were in fact a writer," Kastenmeier said. But Hall insisted she had only acted "in the sense of a translator who writes sentences in English from a foreign language." The chairman wanted to know if she agreed with the conclusions and why she had not disassociated herself from the book. Hall said she did not agree with the conclusions.

The CRT official argued that in the same sense she had edited "High Frontier: a New National Strategy," a study that proposed the "strategic defense initiative" that was later adopted in part by the Reagan administration. "Many of the hours I spent editing 'High Frontier' I didn't understand what I was writing." And she claimed she didn't understand many parts of "Foundations of Sand."

Kastenmeier was also concerned about Hall's affiliation with the High Frontier organization. He asked if she realized the organization is listed as a lobbyist. Hall explained that she served as a director in the belief that High Frontier had tax exempt charitable status and did not lobby. "I am not aware of the problem you've uncovered," she told Kastenmeier. On the whole, the congressmen appeared dissatisfied with Hall's answers. "Were you that hungry?" remarked Patricia Schroeder (D-Colo.), "to say, 'Well, I did it because it was my job; I thought it was still a free country and we can pick and choose jobs,'?" she added.

Later Schroeder asked Hall how she got the job. The CRT official claimed she was called in for an interview and hired. It was a reply that generated laughter from the audience. Her name, she said, was in the White House computer because of a resume she sent in 1980. "Don't you think your editing of these works looked philosophically appealing to the White House?" Schroeder asked. "I think probably my teaching credentials and copyright credentials were more important," Hall contended.

That prompted Kastenmeier to query Hall about her copyright credentials. She told the chairman she has taught copyright at Northern Virginia Law School since 1979. "So really your claim to copyright expertise at least in terms of practice is pretty tenuous," the congressman said. "I've studied it a great, great deal. I've done some copyright

Aroused Congress calls for Hall resignation; investigation launched

There were repeated calls on Capitol Hill last week for the resignation of Copyright Royalty Tribunal Chairman Marianne Mele Hall for her association with "Foundations of Sand," a book the lawmakers were calling "racist garbage" (see story, page 44). And as Hall spent the week trying to distance herself from the book, House members were mounting a campaign to remove her from the chairmanship. And at week's end, Senator Charles Mathias (R-Md.), head of a Senate Judiciary Committee unit charged to investigate the Hall matter, had concluded that she should resign, and advised President Reagan to that effect. "People who hold or have associated themselves with the racist views expounded by this book do not belong in public office. . . I personally request, and I officially advise, that you seek Ms. Hall's immediate resignation," Mathias said.

The Senate Copyright Subcommittee kicked off an investigation of the matter, and while Hall was testifying before a House Copyright Subcommittee on Wednesday, House members were making one-minute speeches calling on the President to fire her. Representatives Don Edwards (D-Calif.), Howard Wolpe (D-Mich.), Norman Mineta (D-Calif.) and Thomas Downey (D-N.Y.) all issued such a request. They were responding to a *Washington Post* account concerning Hall and the book in which she said—after being asked why she hadn't left her name off the work—"If I wash a floor real well, I'll take credit." Remarked Mineta: "Ms. Hall didn't wash a floor real well. She took part in a vile, baseless and racist piece of literature."

Hall also told the *Post*: "For me to become defensive now will turn this into a spat, and this whole experience doesn't deserve that kind of dignity. If somebody calls you a whore, and you protest, what can you say? Can I scream I'm not a whore?"

Edwards, along with 56 other House members, sent a letter to President Reagan urging him to seek her resignation. "We were appalled to learn today that Marianne Mele Hall, the newly confirmed chairperson of the Copyright Royalty Tribunal, is also the co-author of a book which reeks with the stench of racism," the letter said. "Mr. President, we call upon you to provide the only effective remedy for this slanderous insult to the American people by removing Ms. Hall from her privileged position of public service without delay."

A White House spokesman said there would be "no reaction," and that Hall was an editor of the book, "grammar and spelling only" and that she was "no scientist or anthropologist." She was asked to "edit it for grammar and punctuation—not for content," he said.

In addition to congressional pressure, civil rights groups and women's organizations were also issuing statements seeking Hall's removal. Bill Richardson (D-N.M.), chairman of the Congressional Hispanic Caucus, also called for Hall's resignation. The Congressional Black Caucus introduced a "Sense of the House" resolution" demanding Hall's immediate resignation. "It is our belief that her involvement as co-author of 'Foundations of Sand,' containing abhorrent racist philosophies, is an indictment of her judgment and in and of itself is grounds for dismissal," stated CBC Chairman Mickey Leland (D-Tex.) during a press conference in which he was joined by Mineta, Wolpe, Edwards and others.

"This agency needs to know that we'll be looking with great askance at their budget," warned Representative Vic Fazio (D-Calif.), chairman of the House Legislative Appropriations Subcommittee, which has jurisdiction over the CRT budget. "It's important that this is not a long, drawn-out affair. It's important that this individual resign," Fazio added. Mineta questioned whether the CRT was a necessary agency. "I don't even know in this day or age if we need a tribunal. Maybe we better take a basic look at the situation," he said.

Meanwhile, in the Senate, Strom Thurmond (R-S.C.), chairman of the Senate Judiciary Committee, which confirmed Hall, asked Charles McC. Mathias Jr. (R-Md.), chairman of the Senate Copyright Subcommittee, to look into the matter. The investigation will determine whether Hall authored or edited the book. "He's concerned that there appears to be a discrepancy between what she testified and wrote," a Thurmond aide said. They also want to know if Hall "personally associates herself with those remarks."

In Hall's sworn statement to the Senate, she said she was a co-author. (A committee staffer noted that no one, at the time, had looked at the book, adding that there was "no reason to." Indeed, many Senate nominees list books they have written and the staff doesn't check them all out unless there is a reason. "No one had heard of it," he said. And the committee had been busy with the appointments of several judges, said another staffer.)

A spokesman for Mathias's subcommittee said the investigation was underway. He noted that although there may also be some discrepancies on her resume, the book remains the essential problem. "It's pretty clear that she consistently calls herself author until this week," he noted.

But the question remains, he added, after she knew what was in it, "Why did she agree to put her name on it?" Moreover, he noted that Hall's role in publishing the book is even "more troubling." "I don't know what her role really was, but no one forced her to put her name on it," he said. Although Mathias has not called any hearings the spokesman noted it is a possibility.

Meanwhile, last Tuesday (April 30), the White House nominated Rose Marie Monk for a seven-year term on the CRT, one of two vacancies on the tribunal. She is executive assistant with Nofziger Communications, the political consulting firm run by Lyn Nofziger, former assistant to the President for political affairs. She also served as executive assistant to Nofziger when he was at the White House in 1981 and 1982 and when he was with the Reagan for President Committee in 1980. She was with Nofziger at the Lyn Nofziger Co. in Los Angeles from 1979 to 1980. Monk also was a special assistant to Milan D. Bish, ambassador to Barbados and the Eastern Caribbean from 1982 to1983.

Hill reaction to the Monk nomination was one of surprise. Mathias, an aide said, asked Thurmond to hold off on the Monk nomination until the Senate receives another candidate to fill the other vacancy on the tribunal. Mathias prefers considering both nominations rather than taking a "piecemeal" approach, he said. He noted that Monk, whose background appears to have little to do with copyright, would be in for a "much more thorough investigation than Hall."

work but no litigation," she replied.

"If these were your views do you think that would raise questions as to the appropriateness of your service?" asked Representative Bruce Morrison (D-Conn.). Hall said that what is relevant is her ability as a lawyer and manager, and not those views. Morrison was not satisfied with her reply. Finally, Hall agreed: "A person who has those views should not be serving in a job where expertise in copyright is necessary."

Morrison also asked why Hall, who listed in her biographical sketch at the CRT that she is "co-author and/or consultant to four books," cited only "Foundations of Sand" to the Senate. "You want us to believe that you were just a ministerial player with respect to each of these items, but one of these ministerial functions was so important to you that you listed yourself as co-author in this document," Morrison said. "I think it's perfectly legitimate for members of the subcommittee to look behind your self-serving statement to discover whether it's likely that these are your views," Morrison said. "I don't think you can have it both ways."

Hall argued: "I think we're getting tangled in the semantic definition between ghostwriting and writing." Replied Morrison: "Ma'am, I am not tangled at all. I am trying to find something out."

Hall also told the Senate Judiciary Committee she is a director and secretary for HMM Inc., "which is a privately held corporation for the purpose of producing and marketing our book." She testified that the corporation has since been dissolved. Hall revealed that she was paid $1,000 for her work on the book.

Morrison was equally interested in determining Hall's role in the selection of the tribunal's chief counsel. He asked her to provide data on the candidates, including the number of minorities and women who applied for the post.

"I am very pleased to hear that those are not your views," stated Representative Frederick (Rick) Boucher (D-Va.). "But I really wonder just how you feel about the views that were expressed. They are very inappropriate from my point of view. Are they as repugnant to you?" he asked.

"I understand your concern," Hall responded. "I agree with you. They are expressions which are very repugnant. They are not my views and as a lay person they are repugnant to me as well. I told Hafstad it would be ill-advised to publish them. However, in my limited capacity that was all I could do. I was into the project, I completed the job. I believe in finishing what you start."

Hall maintained that any further fallout should be directed toward Dr. Hafstad. "I would like to go back to work and finish the job," Hall stated.

Hall also submitted for the hearing record a letter by Hafstad that was delivered to BROADCASTING last Monday morning (April 29): "Not being a professional writer myself, Marianne Mele was employed by me to edit my material for the book 'Foundations of Sand.' In addition to correcting my spelling and rearranging the material, she made many helpful contributions. In no sense, however, should she be held responsible for any assertions of opinion, fact or logic in the content of the book. As author, that responsibility rests squarely on me," Hafstad wrote.

On Thursday, Hall sought to put still more distance between herself and the controversial material in "Foundations of Sand." In a written statement delivered to the Copyright Subcommittee she repeated her claims to having performed only a clerical role in reviewing "grammer [sic], sentence structure and punctuation" and said: "For the record, I want to reiterate that I did not write the material. I disavow it fully. I find it inflammatory, explosive, repugnant and distasteful." □

CRT chairman resigns under fire

Marianne Hall tells President her effectiveness was undermined by controversy over association with *book termed racist; both Senate* and House vow efforts for reform

The Copyright Royalty Tribunal may never be the same. The resignation last week of Chairman Marianne Mele Hall, as a result of her association with the controversial booklet, "Foundations of Sand," has triggered congressional interest in the tiny agency that could result in its complete overhaul or even elimination.

Hall, who was confirmed by the Senate April 2, came under fire after it was disclosed in BROADCASTING's April 29 issue that she was listed as co-author of a tract that holds black males "insist on preserving their jungle freedoms, their women, their avoidance of personal responsibility and their abhorrence of the work ethic." Although Hall stated in a Senate questionnaire that she was the book's "co-author," she told a House Copyright Subcommittee two weeks ago that she was only an editor (BROADCASTING, May 6). Later that week she issued a statement claiming her role was only "clerical" and saying the ideas in the booklet were "repugnant and distasteful."

But Hall could not escape the controversy. More than 70 House members called for her resignation. And Senator Charles McC. Mathias (R-Md.), chairman of the Copyright Subcommittee, charged with investigating the Hall matter, concluded she should resign. In a letter to President Reagan, he listed three reasons why she should step down.

"First, Ms. Hall's name appears on the book 'Foundations of Sand' as its co-author, notwithstanding her recent statements that she was merely the editor. In any event, there is no dispute that her name was listed in this manner with her consent. The nature of her association with this project may be judged from the fact that she dedicated her contribution to it to her parents and daughter." Mathias wrote. He also pointed out that Hall played an active role in the book's publication. She agreed, he said, to serve on the board of a corporation "established to receive the proceeds from the sale of the book."

In her resignation to President Reagan, Hall wrote that racism is "repugnant and unacceptable to me," and that such views and attitudes "have never been a part of my life." And therefore, she wrote, "I will not allow my past technical work as an editor to taint my life's commitment to equal opportunity for all." Hall noted that the issue had become "so overwhelming" that "it may have totally undermined my effectiveness as a force for the change that is so desperately needed within the Copyright Royalty Tribunal." And there is work, she continued, that "critically needs to be done there." She also urged the President to move quickly to "find individuals who can and will carry out that very important mission."

Hall, according to White House Assistant Press Secretary Dale Petroskey, had been in touch with administration officials over the past week to "determine what was best for everybody involved—herself, the White House and the tribunal." She decided, he said, that the best thing to do was to resign and "the White House concurred with her wishes." Petroskey denied reports that the White House forced her out. "It was her decision," he stated.

The White House, Petroskey added, would be "moving soon" on the other vacancies. Only two weeks ago (April 30) the administration nominated Rose Marie Monk to a seven-year term on the CRT (BROADCASTING, May 6). Monk was most recently executive assistant with Nofziger Communications, the political consulting firm run by Lyn Nofziger, former assistant to the President for political affairs. A Senate source said the administration has not tried to push Monk's nomination through. Another name to surface as a possible CRT candidate is that of Ralph Oman, counsel to Mathias's Copyright Subcommittee. Oman submitted his name to the White House almost a year ago for a seat on the CRT and has been called in for several interviews. Nonetheless, his name is still pending at the White House. In the meantime, he has not involved himself in CRT matters.

Still, it may be a while before the CRT has its full complement. Indeed, Mathias wants to hold off on Monk's nomination and review all the candidates at once. Mathias, an aide said, wants to know "what the whole picture is."

In any event, the subcommittee's inquiry will continue. "The American people deserve an explanation as to how this episode was permitted to occur and a statement of what will be done to prevent a recurrence," Mathias said. The investigation, he continued, will not focus on Hall but will examine the nomination and confirmation process that "served the nation so poorly in this case."

Hall's departure raises some serious ques-



Hall

tions concerning the tribunal's future. With only two of the CRT's five seats filled—by Commissioners Edward W. Ray and Mario F. Aguero—the tribunal may be unable to operate. Ray will serve as acting chairman until December when Aguero assumes the post. "It's obviously not an ideal situation," said a Senate Copyright Subcommittee source, and the subcommittee will be looking at the matter.

However, according to the tribunal's general counsel, Robert Cassler, the tribunal will still be able to carry out its business. "It is the opinion of the tribunal that a quorum for tribunal action is based on a majority of sitting commissioners, not a majority of authorized commissioners. It takes two commissioners to constitute a quorum and they would have to agree for tribunal action," Cassler explained. He noted that the commissioners will make every effort to reach an agreement and avoid any deadlocks. "We're going full steam ahead," Ray said.

Currently, there are three issues pending before the tribunal. One is the 1983 cable royalty fund distribution proceeding in which the CRT will divide $79 million among the Motion Picture Association of America, joint sports claimants, the National Association of Broadcasters, National Public Radio, Public Broadcasting Service, Canadian claimants, American Society of Composers, Authors and Publishers, Broadcast Music Inc., SESAC, and religous programers. Also under review is the CRT's distribution of the 1983 jukebox royalty fund. The distribution of 95% of the fund has been settled, but the remaining 5% is still being contested. And the tribunal has been petitioned by Turner Broadcasting to review its 1982 3.75% rate increase for distant signals. No action has been taken on that matter.

To House Copyright Subcommittee Chairman Robert Kastenmeier (D-Wis.) Hall's resignation raises two larger issue: "the quality of the nominating process and the future of the CRT." Kastenmeier, during a CRT oversight hearing just two days after Hall's association with the book was revealed, stated that the tribunal is in "dire need of reform." But his concerns are not new; in the last Congress he offered legislation calling for minimum reform of the tribunal. It would have reduced the size of the tribunal from five to three and would require the CRT to hire a general counsel and economist. But now the chairman is considering making major revisions.

In any event, Kastenmeier told BROADCASTING that discussions are now in the preliminary stages and are "exploratory in terms of CRT reform or even possibly elimination, in which case there would have to be a substitute for it. . . . I am not sure that's necessary, but that will be seriously considered." He expects the subcommittee will be able to devote more attention to the subject in another two weeks.

Kastenmeier noted that appointments to the tribunal have not been taken seriously by both the Carter and Reagan administrations. "That is not to say that every person is unqualified. Indeed, that's not the case. But many of them appear to be primarily political appointments. And I think that is in part what has frustrated the work of the tribunal and probably resulted in it being underfunded and not recognized for the mission that it has. And we may have to deal with that realization.

Kastenmeier believes Congress should try to encourage Presidents to carefully select highly qualified people as commissioners. One way to do that, he said, is to include some kind of qualifying language in the legislation. "I know Ms. Hall is an attorney and she claims some copyright knowledge prior to her appointment, but that's an unusual case and even Ms. Hall seems to have problems." There is nothing in the Copyright Act that requires the commissioners to have any copyright experience. Only the bill's legislative history suggests they have some "professional competence in the field of copyright policy." □

FOUNDATIONS OF SAND

A Hard Look at the Soft Sciences

Lawrence Hafstad, Ph.D.
with
Marianne Mele, J.D. John Morse, M.A.

Introduction by Elbridge Dubrow,
U.S. Ambassador (Ret.)

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I would like to thank Dr. Hafstad for putting into print his brilliant ideas which reflect the thinking of so many of us and Marianne Mele for expressing them so effectively.

J. M.

COMMENTS

This book proves the need for the acceptance of obligations and personal responsibility by the citizens of a democracy.

Admiral Arleigh Burke, (USN, Ret.)

The experience of decades of attempts by "social engineers" to make a utopia out of America has demonstrated a desperate need for some thinking based on common sense. We now have an example. . . .

Steve M. Antosh
Executive Director, The Center
on National Labor Policy.

A hard scientist uses the discipline of his field to measure the performance of the soft sciences. Hafstad, Mele and Morse expose the real "softness" of the soft sciences with great clarity and style.

Martha Rountree
TV Producer and Journalist,
Founder, President,
Leadership Foundation

Anyone seriously interested in the impact of "pseudo" science or social science fiction masquerading as scholarship, on the basic value systems and therefore the national will and purpose of America, must read and discuss with his friends and professional colleagues, this enormously powerful book.

Frank R. Barnett
President, National Strategy
Information Center, Inc.

This is clear-headed work by clear-headed authors and should be must reading for all American policy makers—and this certainly includes military men.

Lt.Gen. Daniel O. Graham, (USA, Ret.)
Project Director, High Frontier

This analysis of the present deficiencies in the American system and in its leadership is telling and timely. The prescription for correcting these deficiencies is straightforward and urgent. This is must reading for all concerned Americans.

Professor Raymond S. Sleeper
University of Tennessee
Space Institute, (Ret.)

This book presents a penetrating analysis of the causes creating our falling economy. Adhering to the authors' sensible precepts could surely relieve human unrest and aid in restoring America to its previous, high, world status.

Dr Gordon Volkenant
Research Director (Ret.)
Honeywell Corp.

It requires courage to question the underlying reasons of myths that have been elevated to holy, immutable dogma. To do so effectively demands perception, intelligence and knowledge. The authors have demonstrated they have these abilities in abundance.

They have more—the rare capability of presenting their views in a persuasive and compelling manner that forces one to look at our society as it is and to ask what it will be.

This analysis challenges us to face reality, to think, to question, to seriously consider where we are and where we are going—and why. But more importantly, it asks if this is what we want for ourselves and our children. If not, do we have the courage to make the needed changes that will enable our nation to once more realize its true directions and goals.

More than anything else, it stresses the importance of personal dignity and responsibility, and in so doing, it recognizes the importance of the individual.

Lastly, it carries a message of faith in our people and their ability to meet the challenges of tomorrow regardless of the obstacles and in spite of the misdirection and confusion of recent times.

It has been said that man is judged by the magnitude of the challenge he is called upon to meet—the greater the challenge overcome, the greater the man. The authors have given us a magnificent challenge. Are we capable of meeting it?

Raymond M. Momboisse
Attorney, Author

THE MINORITY PROBLEM

VII

"Sooner or later Blacks will have to get their hands out of the White man's pocket."

Adam Clayton Powell*

Most people will probably agree that the minority situation in this country has improved little in the last thirty years. This is another sociological problem that demands rectification for the survival of our society. To correct it, we must first understand it. Let us try another "Gedanken experiment" to think through to the roots of the problem.

Suppose that ten thousand years ago we placed a group of two thousand people in Uganda and in Scotland to see how they would adapt and evolve. The groups would be as homogeneous as possible; young, vigorous and equally intelligent, not in the standard I.Q. sense, but in the true test of intelligence, the ability to survive. They would be placed in each of the above countries without tools or provisions and left for ten thousand years.

After a year in Uganda the men have learned to hunt and trap for the game that is plentiful. The women have learned which plants are safe to eat and have begun gardening. All the women are pregnant or have children. Population is increasing. After a year in Scotland most of the people have died from the cold winter. The few that have survived in caves have barely avoided starvation by learning to fish and hunt for what little game there is. A few edible vegetables have been discovered.

A few thousand years later, the population in Africa has grown enormously. There are many women and children so they do the menial chores of gardening and housekeeping. They are cheap and easily replaced. Men are at a premium, especially the healthy, young and vigorous. Most men are accomplished hunters and warriors according to the Territorial Imperative of Robert Ardrey. A man's stature is measured by the number of possessions and wives he has obtained by raiding neighboring tribes. Stealing and killing is a way of life. All other work is considered menial and to be done by females who are relegated to exclusively subservient roles. The young males have complete jungle freedom in all areas, including sex, except in time of war. They bear no responsibilities except

*Former Congressman from Harlem, New York

to hunt or fight when called upon. Naturally they practice fighting, hold war councils to plan attacks, etc. They have structured their life goals around combat and enjoying the spoils of victory.

In Scotland the population has increased slowly. Life goals are carefully structured around storing and rationing food for survival. Stout habitations and store houses are necessary to provide warmth for winter survival. Food and fuel must be collected and preserved. Both sexes bear the responsibilities for planning to assure mere survival. People have learned that there are more fish in the ocean and with village scale cooperation, they build large and maneuverable boats. Town meetings to plan such cooperative projects are called.

Nine thousand years later both systems have survived, because both groups were equally intelligent and adaptable. Both have adapted but each to its own environment. Millenia of adaptation has produced two totally different societies and cultures from the same original stock.

In Africa, the males are superb physical specimens, bred by natural selection to excel in hand to hand combat and as hunters of big game. They are good at solving short-term problems, but have no need to develop long-term problem solving ability. They are effective for short bursts of very high energy and equipped with high tolerance levels for the boredom that characterizes the "hurry-up and wait" aspects of both warfare and hunting. These virile male specimens are bred for heroic deeds. They are intolerant of routine or menial work since that can be done by the expendable women. Since life is comfortable in this environment for 100 watt man, they need few craftsmen; only those to make crude hand weapons. Their leaders tend to be ruthless, military heroes with dictatorial powers, because the society follows the strongest power. Constant challenges to the existing powers assure the evolution of stronger dictatorships.

In Scotland, the population is small but stable and relatively homogeneous. The males cannot match the Africans in virility and physical strength because they are biologically disadvantaged. They value foresight highly, because many of their problems are long-term. Their need for tools to augment production, has required craftsmanship and an understanding of the laws of nature. The work ethic and a "time is money" philosophy has emerged. There is a firm conviction that leisure time should be utilized to prepare for future problems. The work ethic becomes religious dogma. Restrictions have evolved to limit the right to marry and produce offspring. The development of personal and social responsibility has become mandatory for acceptance within this society. Society values and promotes cooperation, technological advancement and responsible progress towards attainable goals.

Nine thousand, eight hundred years later, the descendants of the long-term problem solvers have learned to navigate the oceans. They reach the shores of Africa, bringing their technology to amplify the productivity of the native 100 watt man. The clash of jungle freedom and the work ethic begins. Noting the availability of slaves for purchase, they acquire many and distribute them around the world. For a time slavery seems profitable, but it is proven eventually to be inefficient for the reason that slavery increases productivity only by addition. Each slave could add one hundred watts of energy to any activity but probably adds only fifty watts or less because he is unmotivated. Technology on the other hand increases productivity by multiplication. Accordingly, after some years of experimentation, the world dropped the African tradition of slavery[1] in favor of the European invention of technology.

1 There seem to be two theories as to the origin of slavery. The more popular one is that white European sea captains invaded the interior of a peaceful, agricultural Africa and captured and carried away the hard working and highly cultured blacks, into slavery and degradation. The other theory is that Africa had for millenia, been engaged in tribal warfare, that female prisoners taken through warfare became additional wives for the victors and that male prisoners were either killed, since life was cheap, or if buyers could be found,

After ten thousand years both groups are highly successful, each in its own environment, but the two groups are totally different in goals, values, aptitudes, mores, life styles and cultures. Race horses and draft horses have similarities and differences, for the same reasons. They may be equal in price but not in utility. The bottom line is that although both cultures are viable and valuable, this equality extends only in their respective environments. The problems arise when you displace the jungle-freedom-types into the Scotland-type environment which is America, or when you displace the work-ethic-types to South Africa.[2] Herein lies the conflict. Survival laws require species to adapt to their new environment. Sociologists overtly encourage disobedience of this law.

In the United States we are fortunate in that Martin Luther King and others of the nonviolent movement have induced a large percentage of American blacks to adopt the work ethic and other American values. They are moving to the suburbs, learning the problems of home maintenance, endorsing education and the American dream, welcoming police protection, etc. They are merging into the American melting pot as other ethnic groups have. However, in our ghettos, there remain many blacks who still hold to their African traditions. These traditions include lauding supremacy over those whom one can defeat in hand weapons combat and other displays of physical power. There is bitter resentment that their physical inferiors have more money and live better than they. There is resentment for police and all authority figures. They insist on preserving their jungle freedoms, their women, their avoidance of personal responsibility and their abhorrence of the work ethic. They look down upon blacks who have adopted American values as "Uncle Toms". It is these African blacks who fill our jails and emerge more bitter and more determined to pursue their careers of violence.

This misplaced set of values is obvious even to blacks as reported by WASHINGTON POST columnist William Raspberry:

"... so it is with a number of assumptions black youngsters make about what it is to be a 'man', physical aggressiveness, sexual prowess, the refusal to submit to authority. The prisons are full of people who, by this perverted definition, are unmistakably men."[3]

Further untraditional values have arisen from the American slavery era as reported by economist Thomas Sowell. He states:

"With little incentive to work any more than necessary to escape punishment, slaves developed foot dragging, work evading patterns that were to remain as a cultural legacy long after slavery itself disappeared. Duplicity and theft were also pervasive patterns among antebellum slaves, and they too remained long after slavery ended."[4]

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were sold as slaves. The key phrase here is "since life was cheap." Is it true that life was cheap and if so why?

In Livingston's report on his search for the origin of the Nile River, he relates his experience as the first white man to visit Uganda. He showed his gun to the then ruler and told him what a deadly weapon it was. The ruler handled it admiringly and then gave it to a servant and told the servant to go out and shoot someone to see if the gun really worked. It did. That life is still cheap in Africa is suggested by the behavior of Idi Amin, also of Uganda in recent years.

Plato speaks of natural slaves. If life in the African interior has not changed significantly in the turbulent years of the last century or two, it seems safe to assume that it had been constant for millenia before that. According to this theory, slavery was an African tradition and has existed there for thousands of years. Europeans experimented with this African invention for an instant of geologic time and discarded it of their own free will. It is hard to see why white Americans should be called on for reparations for having tested an African tradition.

Nevertheless many blacks and sociologists call for such reparations. It would make an interesting study to estimate the total sum of money that whites have given to blacks in reparations and whether the gifts have proven to be investments or outright charity. It would also be interesting to make a sequel to "Roots" portraying the relative standard of living of the descendants who stayed in Africa versus those who were brought to the United States.

Now both of the above theories on slavery cannot be true. In due course our distinguished social scholars may be able to pick one or the other.

2 Many of these ideas and conclusions are expressed in a recent article, Richard Critchfield, "What is Going Wrong in Africa?" WASHINGTON POST (Aug. 8, 1982), p. C1.

3 William Raspberry, "Black by Definition," WASHINGTON POST (Jan. 6, 1982), Sec. A.

4 Dr Thomas Sowell, "Sowell on the Firing Line," TIME MAGAZINE (Aug. 24, 1981), p. 25.

No one is disputing that this effect is real, but why is it so long lasting? In the 1860s, abolitionists argued that all that was needed was opportunity. Black colleges were founded and black leaders like Booker T. Washington and G. W. Carver tried to interest their people in education. Leagues of northern ladies tried as well. Their efforts are enshrined in literature by scholars such as Dr. Kelley Miller of John Hopkins and Howard Universities, who described these legions as:

> "... band(s) of heroes who followed the Northern Armies to do a worthier cause... These are they who sowed the seeds of intelligence in the soil of ignorance... As long as the human heart beats in grateful response to benefits received, these women shall not want a monument in living ebony and bronze."[5]

This type of tribute speaks to the dedication and ability of these educators. They should have inspired a chain reaction in the production of black scholars. They did not. The black colleges produced reverends and political activists. Where were the businessmen, the engineers, the scientists who could have planted the seeds for black business activities and academic achievements? For example, Mom and Pop stores in black communities would have been tolerated by southern whites. It was not the blacks, but the Jews who capitalized on this opportunity. Why?

Except for a few blacks like Dr. Sowell and Jesse Jackson, most who have succeeded by accepting the American ethic tend to evade their African-oriented counterparts. They are content to melt into the American scene and to insulate themselves from the problems that remain behind them in the black ghetto. These successful blacks should be encouraged to reach back to the ghetto to set the example and show the proofs which would inspire others to follow their lead.

Thirty million black slave descendants live among 200 million whites in the United States. Conditioned by 10,000 or more years of selective breeding for personal combat and the antiwork ethic of jungle freedoms, it seems unlikely that the explosion which black columnists have anticipated can be far off. In the end thirty million blacks in the United States must adapt to the values and wishes of two hundred million whites. This is the American legacy and has worked for scores of other ethnic groups. Likewise, four million whites who are immersed among 400 million blacks in Africa must adapt to their environment as well.

Such facts have long been obvious, but confident in the Supreme Court's interpretation that all men are created equal, our sociologists have insisted that school busing for a few years will solve these problems. Could the differences between race horses and draft horses be eliminated by their living and training together? The only way to influence free people to adapt is by manipulating their incentives. To become useful members of the American society, the black must believe that it is in his interest to adopt the work ethic, as it truly is. So how do our sociologists go about it? What incentives do they use? They put blacks on welfare so that they can continue their jungle freedoms of leisure time and subsidized procreation. The child labor laws assure that no young people will have marketable skills at that critical point around age sixteen. Furthermore, minimum wage laws assure that no young people can find work in which they can learn by doing, except as an outright gift from the employer, at the inflated minimum wage.

The unions recognized that both the child labor restriction and the minimum wage law would reduce effective job competition, so they promoted the passage of these laws with the resultant windfall reaped mostly by young whites who are usually at an advantage culturally and therefore can compete better for the few jobs that are available. However, these inflated wages are damaging even to whites in that they promote a false sense of the value of their work and develop false expectations that lead to later disillusionment and depression.

5 Julie Boublitz Morgan, "Dr. Kelley Miller," JOHNS HOPKINS MAGAZINE (Jun. 1981), p. 20.

We have stated that little real progress for minorities has occurred in 30 years. This is true regardless of the many apparent changes. Those of us old enough to have been in Washington, DC in the twenties and thirties remember it as a pleasant, sleepy, white, southern town. The few blacks worked primarily at menial jobs. Most considered their condition hopeless and made the best of it. Nothing had really changed in nearly a hundred years since the Civil War.

In the 1950s and 1960s, Martin Luther King opened a window of opportunity for blacks with his nonviolent, supportive philosophy. Within a decade after the Equal Rights Voting Act, visitors to Washington noted that black females had suddenly become extremely attractive. They were well-dressed, spoke good English, walked with vigor and moved ahead into the traditionally female jobs. However, black males had not changed noticeably. This puzzled casual, outside observers. There were reports that the emancipated, black females were beginning to prefer white males which black males resented. They obviously felt the pressure to shape up and some did. Those who were willing to "play by American free enterprise rules," as Dr. Sowell describes it, are now the accepted black successes in the white business community, but where are the black business successes in the black community? This is where they are needed, to hire without discrimination and to discipline, train and test young blacks. If whites train and therefore discipline blacks, it is racism, so blacks must do it themselves.

As Dr. Sowell has stressed in his writing, the American system has worked for every ethnic group that plays by its rules. The normal procedure is for the ethnic group to start in a compound or ghetto for language reasons. Their economy starts with a local grocery store and develops stepwise to one paralleling that of the majority. The children become bilingual. They gain work experience in local stores and factories, etc. The more gifted young people move rapidly in the local economy which is their minor league. The better ones emerge into the established economy, the major leagues. As they earn the respect of major league members they lift the reputation of their entire ethnic group.

As an example the following excerpt from a circa 1900, Eau Claire, Wisconsin newspaper reports on what life was like in a Norwegian ghetto:

"An infant would be delivered at home by a Norwegian doctor or a midwife, baptized and confirmed in Norwegian. If one did not attend public school one went to the Norwegian school where reading, geography, arithmetic and Bible History and Catechism were taught. Getting married one appeared before a Norwegian County Clerk for a license, went to a Norwegian Church or Parsonage for the wedding, and then visited a Norwegian Photographer. One would trade at a Norwegian Grocery Store, search out a Norwegian clerk in the Dry Goods Store and belong to a mutual Aid Society with all business done in Norwegian. One would keep informed by a Norwegian newspaper. When ill one would go to a Norwegian Doctor who wrote out a prescription in Norwegian for a Norwegian Pharmacist. Eventually one would be brought to a Norwegian Mortuary after which there was a funeral service in Norwegian in the home or the church and the burial in the Norwegian cemetary, as distinct from the other cemeteries — The Swedish Lutheran, German Catholic, Irish Catholic or Jewish."

Waldemar Ager

This example of the development of the bilingual communities, businesses and leaders and the conversion of the second generation to American values is typical of the many ethnic groups that have been absorbed in the American melting pot. To be accepted the immigrant must adapt and become committed to the work ethic and American values and lifestyle. It is the responsibility of the immigrant and his offspring to earn this acceptance. Becoming fluent in the English language is the first step in this process.

Those of us of the World War I era can recall that there was much soul searching by minority groups at that time. The conclusion in all cases

was that "the hyphen must go". Now we hear the opposite demand for black English and bilingual Spanish in our schools. This is evidence of the weak ambition and dedication of these minority groups to pursue the first steps in adopting the American culture. In addition, look at the present ghettos. Where are the repair shops, the second hand stores, the furniture shops, the handymen and the gardeners training their own? There are few and they are resented by the young who feel discriminated against when working for whites, but do not want to work for their own either.

The United States has absorbed immigrants from all over the world for many years. Nearly all have merged effectively into the melting pot. Therefore, it would seem difficult to argue that U.S. citizens are prejudiced against any group. If anything, the U.S. tradition is to favor the underdog. The Chinese coolies who worked the mines and the railroads of the early west faced great resistance. Now there are Chinese successes and innumerable Chinese businesses in parity with all other groups in America. The essential requirement for acceptance in the pioneering society of the 1880s and 1890s was a reputation for honesty and hard work. The ubiquitous Chinese laundries and restaurants established that reputation for this minority group. There must be something other than skin color involved for the blacks. It is important to determine what and why that is.

Not long ago there was a newspaper report in Washington DC, that four black owned banks were giving up, because they found "they were not needed." No new private enterprise is "needed" when it is started. Its task is to make itself needed. If a black bank fails in a black community it must be because it could not give service good enough to compete with the existing banks, or that the predominately black customers were bad business risks. That is not discrimination. It is plain failure to perform.

Observation also suggests that black females are more easily absorbed than males, which is another puzzle. Also about half of the white, career females seem to feel that they too are discriminated against and here skin color is certainly not involved. What is it that black males and white females have in common?

The female problem is complicated by the sex and child-bearing role. However, it is hard to see how the black male problem should be any different from that of the Chinese male. The outstandingly attractive and successful blacks on television attest to the fact that the color of skin is not the issue so this excuse for failure by blacks is questionable. The problem stems from different life styles, values and work ethics, but few seem to understand this reality.

All immigrant minorities must overcome discrimination to some extent, or more accurately, prove their responsibility and competence in their minor league. Blacks and interestingly enough, the women's movement are trying to skip this essential minor league qualification. They feel discriminated against when not automatically accepted in the major leagues. The ones so sure that they are underutilized should be the outstanding stars in their minor league, one level below.

Note the rapid successes of the recent influx of Korean and Vietnamese in Mom and Pop stores and repair businesses. Both these opportunities have been available to blacks and women for decades, but not capitalized upon. Skills and knowledge can be learned and measured, but responsibility, integrity and judgment can be demonstrated only by past performance in the real world.

Minor league experience is essential for any minority, but especially so for blacks and female whites. If they find their advancement slow in the majority dominated organization, they blame it on discrimination, but if they worked in their own environments they could not rely on this excuse. They would have to accept competition as the brutal test of ability, which is how competition produces excellence in performance. Without real competition, the Peter Principle takes over. People tend to be promoted to a position a notch above their competence and stay there. That may be comfortable but it is also inflationary and defeats the survival of the fittest

law which assures the advancement of a society.

Blacks and women will be accepted but only when the major league companies pick the promising, future stars from the minor leagues based on their good judgment of the performance they observe and not under political and bureaucratic pressure.

With the background, now consider the following generalizations that seem obvious to hard scientists but have been evaded by the soft sciences:

1) Bright blacks are as smart as bright whites.

2) Blacks have inherited a different set of aptitudes, values, mores, goals and lifestyles over a period of 10,000 years.

3) Species adapt on a geologic time scale but behavior in local time is largely determined by genes.

4) Black males are not lazy when high rewards are at stake, but a hero complex makes them resent routine and tedious tasks, which for them is women's work.

5) It is no accident that so many black males choose the Moslem religion. The African attitude toward women and multiple wives is almost identical with that of the Arabs.

6) Blacks resent attending American schools for many reasons. First, they consider the curriculum irrelevant, which indeed it is for them. Second, they find it humiliating that female teachers should instruct black males. Third, they find discipline by any females but especially white females, to be insulting for a self-respecting black male.

Such a formulation of the problem makes clear why the separate but equal education theory can not work and why the current integration system with forced busing can only reduce standards. What we need is a separate but superior system for blacks, tailored to their special needs. Precisely, this concept was expressed by a group of successful black businessmen on Washington, DC's channel 9 "Morning Break" program on August 19, 1982.

We should enhance this superior system, not with busing, but with taxi rides and similar honors for those blacks who accept the work ethic and qualify for integration in the majority schools. Serious attention might well be given to a massive vocational training program, perhaps similar to that carried out in South Korea after the 1950s war.[6] This national school system must have male teachers and it probably would be wise to have retired star athletes as principals. Such support would be an investment rather than charity. As Congressman Adam Clayton Powell said years ago, "Sooner or later blacks will have to get their hands out of the white man's pocket."

As biologists are fond of quoting, "The ontogeny of the individual recapitulates the phylogeny of the species." Black male youths have great difficulty overcoming their millenia of breeding for short-sighted, high energy solutions to problems: Their race has skipped the centuries of training which has produced in other races, the discipline, foresight, and tolerance of drudgery, necessary for success in the agricultural and industrial ages in the temperate zones and the chain reaction for continued success. Because of this many young blacks will continue to resent bitterly any efforts to enforce adaptation and discipline by whites either as teachers, police, etc. because this encroaches on their traditions of jungle freedom.

The minority problem in the United States urgently needs a rational solution, not only for our sake but as a pilot model for solving the much larger problem in Africa. Fortunately, a large fraction of the black population in this country has already accepted the work ethic and the American values to prove that it can be done and that it is worthwhile to do. High I.Q. blacks

6 Oral Report by Admiral Arleigh Burke of project by General Sun Yup Paik now President of Korea General Chemical Corporation, C.P.O., Box 1714, Seoul, Korea

will continue to adapt readily to American mores and values, while the low I.Q. blacks will continue to look upon them as Uncle Toms. American black leaders must bear the heavy responsibility for solving this African black problem.

Lastly, hard science has always been open to all nationalities regardless of race or creed. It is basically international in scope. Much the same is true in high technology. This being so, one would think that those who feel discriminated against would flock towards the sciences and engineering.

Likewise, science is also a highly democratic environment. Any graduate student can challenge an Einstein. At the same time, science is extremely aristocratic. The garden variety scientists learn quickly that they are not in the same league with the geniouses. While there is perfect equality of opportunity in science, there is and can be no equality of achievements. The best outperform the mediocre, but that is what produces results.

In the hard sciences and technology, there is not nor has there ever been, discrimination because of race, color, religion or sex. Here is an opportunity that should be taken advantage of.

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*Corrected by C.O. authority telephone conversation of 4/6/83 with Marianne Mele.

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III. FURTHER MATERIALS RELATING TO THE COPYRIGHT OFFICE

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May 15, 1985

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration
of Justice of the House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Kastenmeier:

At the Subcommittee's May 1, 1985 oversight hearings on the Copyright Office and the Copyright Royalty Tribunal, the Copyright Office submitted a statement which included a discussion of criminal copyright proceedings. As a supplement to the material presented by the Copyright Office in this regard, I enclose copies of two recent opinions rejecting challenges to indictments handed down under 18 U.S.C. §§2314, 2319(b) and for conspiracy to violate 17 U.S.C. §506(a) with respect to allegedly infringing electronic video games. Of note in these cases is the fact that the allegedly infringing copies were apparently not exact copies; that the court held probable cause may be found by applying the so-called "ordinary observer" test for substantial similarity; and that one charge of the indictment possibly alleges an infringing criminal performance, although it is unclear if this charge is actually a part of an allegedly infringing distribution charge.

I am also aware of the pending criminal proceeding involving copyrighted software. United States v. Teh Yi Huang, CR 84-2093 RPA (N.D. Cal. San Jose Division).

Sincerely yours,

William F. Patry

William F. Patry

Enclosures

UNITED STATES OF AMERICA v. STEERWELL LEISURE CORP., INC., BURT STEIR, LARRY SHAPIRO, PETER SCATTOLINI AND MICHAEL SANDERS

United States of America v. *Larry Shapiro.*

In the United States District Court for the Western District of New York. CR-84-51C and CR-84-52C. Dated November 16, 1984.

CRIMINAL OFFENSES—DISTRIBUTION—INDICTMENT.—The defendants' motion to dismiss an indictment against them for criminal copyright infringement and conspiracy to infringe on the grounds that their public performance and display of infringing video games did not constitute distribution, as required to support the indictment, was premature. In the indictment, the government alleged distribution and was entitled to the opportunity to prove it.

CRIMINAL OFFENSES—VIDEO GAMES—NOTICE.—It was not necessary that the copyrightability of video games be clearly settled under the law when criminal copyright violations allegedly committed by the defendants occurred because the law was sufficiently clear to inform the defendants that their actions came close to being illegal.

CRIMINAL OFFENSES—INTERSTATE TRANSPORTATION OF STOLEN GOODS—VIDEO GAMES.—Despite a conflict of authorities, intangible copyright rights embodied in tangible video games were goods, wares, or merchandise subject to prosecution under the law prohibiting interstate transportation of stolen goods.

CRIMINAL OFFENSES—SEARCH WARRANTS—PROBABLE CAUSE.—The conclusions of investigators for firms whose copyrights were allegedly infringed and conclusions of federal agents that infringing games were located on the premises were sufficient to support search warrants. Althought the possibility of bias in the conclusions of the investigators for the copyright owners might reduct their credibility before a jury, their conclusions justified the issuance of the warrants.

Salvatore R. Martoche, U.S. Attorney, Cathleen M. Mehltretter, Assistant U.S. Attorney, Buffalo, N.Y. for the plaintiff Albert F. Cullen, Jr., and Robert V. Carr of Cullen & Wall, Boston, Mass., and Patrick J. Baker of Boreanaz, Baker & Humann, Buffalo, N.Y., for the defendants.

OPINION IN FULL TEXT

CURTIN, *District Judge.* This case concerns the alleged distribution of video games which the government contends infringe upon valid copyrights. Several motions are pending. The crimes charged in the indictment are conspiracy to violate 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b)(2)(B), relating to copyright infringement (Count I) substantive copyright infringement offenses (Counts II–VI); and interstate transportation of stolen goods (Counts VII–IX).

The defendants essentially claim that Counts I–VI of the indictment fail to properly allege violations of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b)(2)(B).[1] Section 2319(b)(2)(B) provides for a maximum penalty of two years imprisonment and a $250,000.00 fine for violations of section 506(a) if the offense "involves the reproduction for distribution, during any one-hundred and eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more . . . audiovisual works."

Defendant Steir also argues that prior to January 20, 1982, 17 U.S.C. § 506(a) did not give adequate notice that video games could be the subject of a copyright infringement offense. This is the date of the Second Circuit's decision in *Stern Electronics* v. *Kaufman*, 669 F.2d 852 (2d Cir. 1982). Steir also attacks each count of the indictment because a "first sale" is not alleged.

Counts VII–IX allege violations of 18 U.S.C. § 2314, concerning interstate transportation of stolen items worth $5,000.00 or more. Defendants contend that infringing video games are not "goods, wares, mechandise," etc., which can be the subject of a prosecution under the statute.

The defendants have also filed a motion to suppress evidence seized pursuant to several search warrants issued by United States Magistrates.

Finally, defendant Shapiro has moved to dismiss the indictment due to certain expert testimony considered by the grand jury.

For the reasons stated below, these motions are denied.

---

[1] 17 U.S.C. § 506(a) provides as follows:

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

I

With respect to Counts I-VI, the defendants contend that dismissal is required because the indictment fails to charge "distribution" of infringing items. In *Stern* v. *Kaufman, supra,* the Second Circuit held that video games are "audiovisual works" subject to copyright protection. The indictment specifically alleges that "the defendants did willfully and unlawfully . . . distribute to the public" infringing video games (Indictment CR-84-51, at p. 4).

Reproduction and distribution of copyrighted works are among the exclusive rights of copyright owners 17 U.S.C. § 106. The present indictment does not charge reproduction. It does allege distribution. The defendants attack this allegation by focusing upon other language in the indictment which charges the defendants with publicly performing and displaying the video games (Indictment, CR-84-51, at p.4).

The argument is that public performances and displays do not constitute distribution and that the business arrangements of the defendants did not amount to distribution. It is not necessary at this time to reach a legal conclusion upon the effect of the charges of performance and display. In *American Lithograph, Inc.* v. *Levy,* 659 F.2d 1023, 1027 (9th Cir. 1981), the court stated that mere performance does not amount to publication or distribution. However, the case does not stand for the proposition that performance and display are immaterial to the question of distribution.

More significantly, the court cannot, on a motion to dismiss, accept the defendants' way of characterizing the various transactions involved in this case. The indictment has charged distribution, and the government must now be given the opportunity to prove it. The motion to dismiss for failure to properly allege distribution is denied.

II

The motion to dismiss for lack of notice is also denied. The dates upon which the alleged violations took place all occurred before the date of the decision in *Stern* v. *Kaufman.* Before *Stern,* the question of whether video games qualified for copyright protection was not definitively settled.

However, it is not necessary that the law be absolutely settled. A defendant is on sufficient notice as long as the law is clear enough so that he is informed that the course of conduct he contemplates may fall perilously close to the line which separates what is legal from that which is not. Copyrightability of intangibles is hardly a novel idea. *United States* v. *Bottone,* 365 F.2d 389 (2d Cir. 1966). The defendants in this case were on sufficient notice that the conduct alleged in the indictment was illegal. The motion to dismiss for lack of notice is denied.

III

The absence of an explicit allegation concerning a "first sale" is also not grounds for dismissal of this indictment. The first sale doctrine is the principle that a copyright owner loses his exclusive right to sell a particular copy of his work after he parts with title to that particular copy. *United States* v. *Moore,* 604 F.2d 1228 (9th Cir. 1979). However, this doctrine applies only to copies that are lawfully made. *United States* v. *Drum,* 733 F.2d 1503, 1507 (11th Cir. 1984).

The present indictment contains allegations which, if true, preclude the possibility of a first sale. Specifically, the defendants are charged with distributing "unlawfully manufactured and unauthorized copies" of certain audiovisual works. The indictment is therefore sufficient.

IV

The defendants next attack the legal sufficiency of Counts VII-IX, which charge them with interstate transportation of stolen goods. *See,* 18 U.S.C. § 2314. Primary reliance is placed upon the Fifth Circuit's decision in *United States* v. *Smith,* 686 F.2d 234 (1982). *Smith* held that the words, "goods, wares [or] merchandise," as used in 18 U.S.C. § 2314, were not meant to describe such incorporeal privileges as copyrights, 686 F.2d at 241.

However, *Smith* is not the law in this circuit. Judge Friendly's opinion for the Second Circuit in *United States* v. *Bottone,* 365 F.2d 389, stated in no uncertain terms that intangible rights, embodied in tangible objects which are not themselves stolen, can be the basis of a prosecution under 18 U.S.C. § 2314. *Accord, United States* v. *Drum,* 733 F.2d 1503; *United States* v. *Gallant,* 570 F.Supp. 303 (S.D. N.Y. 1983). The motion to dismiss Counts VII-IX is therefore denied.

Defendant Shapiro's motion to dismiss the indictment due to what he calls improper testimony by a grand jury witness is also denied. Shapiro argues that an expert witness's grand jury testimony, in which he stated his opinion that the video games at issue here infringed certain copyrights, usurped the function of the grand jury. This argument is not persuasive. The grand jury was free to accept or reject this testimony concerning infringement. The grand jury also could have rejected one expert's testimony on the ground of bias. (The witness was an employee of the manufacturer of the infringed games.) The defendants have failed to overcome the presumption that the grand jury proceedings were conducted according to law.

VI

Finally, the defendants have moved to suppress physical evidence seized pursuant to warrants signed by United States Magistrates in Buffalo New York and Newark, New Jersey. This motion is also denied.

As a preliminary matter, the court notes that the government's response to the motion relies primarily upon the recent decision of the Supreme Court in *United States v. Leon*—U.S.—52 U.S.L.W. 5155 (July 5, 1984). In that case, the Court modified the exclusionary rule, holding that it would not be applied to suppress evidence seized in good faith reliance upon a search warrant. However, this does not mean that trial courts ought to neglect making a determination of the probable cause issue. In a case such as this one, involving a difficult criminal statute, the government should have directed more of its energy toward the sufficiency of the affidavits upon which the warrants were based.

The affidavit of Special Agent John D. Culhane was the basis for 30 warrants authorizing searches of a Steerwell location in Cheektowaga, New York, and 29 businesses in the Buffalo area where allegedly infringing games leased by Steerwell were located. An affidavit by Special Agent John F. Campanella was the basis of the warrant authorizing the search of a Steerwell location in North Bergen, New Jersey.

The objects of both warrants were audiovisual works computer programs, and business records relating to video games which were substantially similar or identical to video games which are protected by valid copyrights. Particular attention was directed at games which were thought to infringe the following video games and their respective copyright holders:

Video game	Copyright holder
Galaxian	Midway Manufacturing Co.
Pac Man	Midway Manufacturing Co.
Rally X	Midway Manufacturing Co.
Donkey Kong	Niintendo of America Inc.
Amidar	Konami Industry Co., Ltd.
Frogger	Gremlin Industries, Inc., a/k/a Sega Enterprises, Inc.

See Culhane affidavit [hereafter "Culhane."] p. 4.

The Culhane and Campanella affidavits relied heavily upon investigators employed by the firms whose copyrights were allegedly infringed. For example, Robert Landry of the Midway Company went to the City Lights bar in Buffalo and examined what he thought to be an infringement of the Pac-Man video game. The game at the City Lights had the words "Pac Man" on it and was enclosed in a white cabinet. Landry concluded it as an infringing game, because real Pac-Man games are in yellow cabinets with red Pac-Man figures. The electronic figures used in the game at City Lights were identical to real Pac-Man figures (Culhane, app. 11–12.¶ 29).

Jon Pederson is Technical Services Manager for Nintendo, Inc., holder of the Donkey-Kong copyright. In January of 1983, he examined a game called "Congorilla" at Masullo's restaurant in Buffalo. He concluded that "the play of the game" was exactly like Donkey-Kong, "except that the play sequences were out of order" (Culhane, p. 9. ¶ 25).

Approximately one month earlier, Agent Culhane had posed as a person opening a video arcade and spoke to Michael Sanders of Steerwell, Inc. Sanders told Culhane that one had to be careful of copyright violations and that one could get into trouble with "bad" games. Later, Culhane spoke with Peter Scattolini, a Steerwell manager. Scattolini told Culhane that " 'Congorilla' was supposedly an infringement on a copyright and the Justice Department would normally investigate that type of viola-

tion." (Culhane, pp. 5–6, ¶¶ 12, 14, 17.) Culhane subsequently learned that in July, 1982, a federal court had issued a temporary restraining order preventing Steerwell from infringing upon Donkey-Kong through the use of games called "Congorilla." "Crazy-Kong" and "Donkey-Kong" (Culhane, p. 5. ¶ 12).

Mr. Landry, Midway's expert, examined a game called "Galaxy" and concluded that it infringed upon Midway's copyright for Galazian. The game had been purchased from Steerwell and had no copyright information on its electronic board. Landry said that "the play of the game is exactly the same as . . . "Galaxian.' " (Culhane, pp. 9, 10. ¶ 26).

Landry reached a similar conclusion with respect to "Gobbler," a video game also purchased from Steerwell. He examined this game and noted that the figures were different from those on Midway's Pac-Man but that "the play" of the two games was identical. Landry's opinion was that Gobbler was an infringing game (Culhane, p.11, ¶28).

In the same way, Mr. Landry made a determination that a game called "Bull Frog" infringed Midway's copyright for Frogger. Landry examined a "Bull Frog" game at a Buffalo restaurant and saw that its electronic board had no copyright information. He concluded that it was an infringing game (Culhane, p. 10, ¶27). Moreover, Agent Campanella described the play of "Bull Frog" during a telephone conversation with an attorney for Frogger's copyright holder (Sega Enterprises). The attorney indicated that "Bull Frog" plays exactly as Frogger does (Culhane, p. 10, ¶27).

A game called "Amigo" was described by Agent Campanella to Special Agent Warren Flagg. Agent Flagg had done extensive work investigating infringements upon a game called Amidar, whose copyright was held by Konami Industry Co., Ltd. Flagg's opinion was that "Amigo" infringed the Amidar copyright (Culhane, p. 12. ¶30).

Agent Campanella examined an unnamed game at Millie and Dave's bar in Buffalo, New York. The game had no copyright information on it and had a play sequence similar to that of the Rally-X game. Midway holds the copyright for Rally-X. Campanella described the untitled game to a Midway investigator. Based upon Campanella's description and the absence of copyright information, the investigator concluded that the game was an infringement of the Rally-X copyright (Culhane, pp. 12–13. ¶31).

During the course of their investigation, the agents learned that "circuit boards" which determine the play of a particular video game can be copied "relatively easily and at minimal expense." They also became aware that illegal games usually can be identified by the absence of a copyright notice or the presence of a false copyright notice, *logo,* or label. Illegal circuit boards can be identified in the same way (Culhane, pp. 3, ¶9, 34–35. ¶63).

The burden of proof in a criminal copyright case is particularly onerous. Works which are very similar to a protected work may still be found not to infringe that work. The nature of the offense is such that questions of probable cause must be addressed most carefully, because it is not illegal to possess works which come close to being infringements. If follows that it is, and should be, relatively difficult to establish the probability that criminal infringement has occurred. *United States v. Bily,* 406 F. Supp. 726 (E.D. Pa. 1975).

The government's theory, as revealed by the affidavits, is that Steerwell leased video games to various businesses and that these games were substantially similar to games protected by copyrights. Substantial similarity is established "when an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd.,* 360 F.2d 1021, 1022 (2d Cir. 1966). This is shown when the questioned work is so similar to the protected work that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same. *"Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.,* 274 F.2d 487, 489 (2d Cir. 1960). Further, copyrights do not protect ideas, but only the expression of ideas. *Atari, Inc.* v. *North American Consumer Electronics Corp.,* 672 F.2d 607, 615 (7th Cir. 1982). In a criminal case, the elements of willfulness, and the purpose of commercial gain are added. 17 U.S.C. § 506(a); 18 U.S.C. § 2319.

With these principles in mind. I find that there was probable cause to believe that the video games called "Congorilla," "Galaxy," "Gobbler," "Bull Frog," and "Amigo," were, respectively, infringements upon the copyrights for Donkey Kong, Galaxian, Pac-Man, Frogger, and Amidar. I also find that there was probable cause to believe that the untitled game at Millie and Dave's bar infringed the copyright for Rally-X and that the "Pac-Man" game examined by Mr. Landry at the City Lights bar infringed the Pac-Man copyright.

In the cases of "Congorilla." "Galaxy," "Bull Frog," the untitled game, and the "Pac-Man" game at the City Lights bar, persons employed by various copyright holders viewed the games (or had them described to them) and concluded that they were illegal games. The possible bias on the part of these persons may reduce their credibility as witnesses before a jury, but the magistrate was entitled to accept their conclusions, absent any indication of deliberate falsification. With respect to "Amigo," an agent experienced with investigating infringments of the Amidar copyright believed that Amidar was infringed.

However, a note of caution should be sounded. A magistrate's determination of probable cause would be facilitated if the agents affidavits contained more details concerning the comparison between protected games and infringing games. The details would not need to be technical. The finding of substantial similarity is one that is based upon the view of a lay person. *See, Ideal Toy Corp.* v. *FAb-Lu Ltd.*, 360 F.2d at 1022. *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d at 489. Accordingly, probable cause could be established by a lay person's description of the shape of a game's figure, the pattern of play, the sounds that accompany the play of the games, the scoring and other factors.

The lack of such detail in the affidavits accompanying the warrants in this case does not prevent a finding of probable cause. The magistrates were informed that copying circuit boards is rather easy. Several games had no copyright information which is, as it were, a trademark of illegal games. Agent Culhane's conversations with Sanders and Scattolini at Steerwell's store in the Buffalo area gave further indication that the various games were illegal. Therefore, there was probable cause to search Steerwell's Buffalo area location for infringing games, circuit boards, and related business records.

There was also probable cause to search the 29 other Buffalo area locations. Agents observed "Congorilla" games at twelve of these places,[2] "Bull Frog" at four,[3] "Galaxy" at four,[4] "Gobbler" at six,[5] bogus "Pac-Man" games at four,[6] an untitled game similar to "Gobbler" at one,[7] untitled games similar to RALLY-X at two,[8] and a game called "Rally-Z" at one location.[9] Each location named in the warrants was a business to which agents had observed at least one video game which they had reason to believe was illegal.

The warrant for the search of Steerwell's location in North Bergen, New Jersey, was also supported by probable cause. This warrant was issued on January 22, 1983, two days after the execution of the warrant authorizing the search of Steerwell's Buffalo location. This warrant was based upon an affidavit by Agent Campanella.

The Campanella affidavit closely parallels the Culhane affidavit. However, it also contains statements taken from Scattolini and Sanders shortly after they were arrested during the search of Steerwell's Buffalo area location.[10] (Campanella affidavit, pp. 14-16.) Sanders and Scattolini admitted that Steerwell frequently handled illegal, or "brown bag," video games.

They also stated that these games were shipped from Buffalo to New Jersey every month. Sanders said that Steerwell's books at the Buffalo location were altered to conceal the fact that Steerwell dealt with illegal games. Finally, Scattolini said that Steerwell's headquarters were at the North Bergen location. Thus, there was ample probable cause to search this location for infringing games and related items.

The motions to suppress the evidence seized pursuant to the warrants are denied.

So ordered.

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[2] *I.e.*, Art's Deli, Alma's Fun Shop, Barnaby's, City Lights, Gem Soul City, Keith's Deli, Lloyd's Lounge, The Maple Leaf, Masullo's, McCompton's, Miller's Pub, and the Pollex Deli (Culhane, pp. 17-30, ¶¶34-36; 40-43; 45-47; 49-51, 55).

[3] At Alma's, Barnaby's, Cameron's, and Reid Superette (Culhane pp. 17-20, 31, §§34, 36, 39, 57).

[4] At Club 1218, The Cracker Box Lounge, The Palladium, The Cavern (Culhane, pp. 22, 29, 33, ¶¶40, 53, 60).

[5] At Alma's, Ciano's, Kar-Cyn's Straw Hat, Unnamed Bar, Squeezer Floyd's and The Gate (Culhane, pp.17, 21, 23, 32-33, ¶¶34, 39, 44, 58, 59, 61).

[6] At Alma's, Barnes' Door, City Lights, and the Malamate (Culhane, pp. 17, 19, 21, 26, ¶¶34, 37, 40, 48).

[7] This game was seen at Pete's Pizzeria. Licensing records indicated that a PAC-MAN game was at this location but no PAC-MAN game was observed there (Culane, p. 30, ¶54(b)).

[8] At Millie and Dave's and at the Thruway Inn (Culhane, pp. 28, 34, ¶¶52, 62).

[9] At Barnes' Door (Culhane, p. 20, ¶37).

[10] Since the search of Steerwell's Buffalo area location was supported by probable cause, so too were the arrests of Sanders and Scattolini. Therefore, their statements were properly taken after they were advised of their rights. No deficiency in the *Miranda* warnings is alleged here.

¶ 25,735 **United States of America v. Carmen Gallo and Alfred Melchiorre.**

In the United States District Court for the Western District of New York. CR-84-50C. Dated December 10, 1984.

Criminal Offenses—Distribution—Indictment.—An indictment for criminal copyright infringement and conspiracy to infringe could not be dismissed on the grounds

John Patrick Pieri of Lorenzo & Pieri, Buffalo, N.Y., for the defendant Gallo. Patrick J. Baker of Boreanaz, Baker & Humann, Buffalo, N.Y., for the defendant Melchiorre, Salvatore R. Martoche, U.S. Attorney, Kathleen M. Mehltretter, Assistant U.S. Attorney, for the United States of America.

[Opinion in Full Text]

CURTIN, *District Judge:* The alleged distribution of video games said to infringe upon valid copyrights is at issue in this case. Several motions are pending, many of which parallel motions made in another video case, *United States v. Steerwell Corp., et al.*, CR-84-51C. A decision and order denying the motions in that case was issued November 16, 1984. There are, however, significant differences between the two cases.

In the instant case, defendants are charged with conspiracy to violate 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b)(2)(B), relating to copyright infringment (Count I of the indictment); substantive copyright infringment (Counts II—V); importation of merchandise by means of false statements in violation of 18 U.S.C. § 542 (Counts VI—VIII); and smuggling goods into the United States in violation of 18 U.S.C. § 545 (Counts IX and X).

Defendants have moved to dismiss all counts of the indictment and to suppress evidence seized pursuant to a warrant. For the reasons discussed below, the motions are denied.

I. Motion to Dismiss Counts I -V

Defendants claim that Counts I -V of the indictment do not properly allege violations of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b)(2)(B). Section 506 sets forth the crime of copyright infringement; section 2319(b)(2)(B) provides for a maximum penalty of two years' imprisonment and a $250,000 fine for violations of section 506(a) if the offense

> involves the reproduction *or* distribution, during any one-hundred-and eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one of more . . . audiovisual works.

(Emphasis added.)

Counts II—V clearly charge that defendants did "distribute to the public for sale, *perform* publicly and display publicly ... more than seven but less than sixty-five copies infringing the copyrights ..." (Indictment, p. 4). Count I charges a conspiracy to do this. Defendants argue that public performance or display does not constitute distribution. They claim that only three incidents of distribution are charged in the indictment (paragraph 8 of the overt acts alleges three sales of infringing boards), not the statutorily required minimum of seven.

As was stated by this court in *Steerwell*, it is not necessary to reach a legal conclusion at this time as to the effect of the charges of performance and display. Although the United States Court of Appeals for the Ninth Circuit has concluded that mere performance is not the equivalent of publication of distribution, that court did not hold that performance and display are immaterial to the question of distribution. *Ameri-*

can Lithograph, Inc. v. Levy, 659 F.2d 1023 (9th Cir. 1981).

The indictment has properly charged distribution. Whether the government can prove that distribution occurred and that it involved the requisite number of copies is a question for trial. The motion to dismiss Counts I-V is denied.

II. Motion to Dismiss Counts VI—VIII

Defendants attack Counts VI—VIII on two theories. The first is disposed of readily. Defendants allege that there was insufficient evidence before the grand jury to support a charge of introducing goods into the United States by means of a false statement (18 U.S.C. § 542). They fail, however, to offer any support for this allegation and so do not overcome the presumption of regularity which attaches to a grand jury indictment. *United States v. Morano*, 697 F.2d 923 (5th Cir. 1983).

Defendants' second ground of attack on Counts VI—VIII merits closer consideration. Defendants maintain that, under section 542, the goods must have entered the county "by means of" the false statement; that without the statement, the goods would not have been admitted. Defendants rely on *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982), for this proposition.

The government asserts that, under section 542, materiality to the importation process is all that is required. It cites *United States v. Ven-Fuel, Inc.*, 602 F.2d 747 (5th Cir. 1979), noting that the court in that case read a materiality requirement into the statute. However, that court seemed to read section 542 in the same light as did the court in *Teraoka*, 669 F.2d 577. The *Ven-Fuel* court concluded that there must be a "logical nexus" between the false statement and the "*actual* importation." *Id.* at 753 (emphasis added).

In a recent Second Circuit decision, the court briefly discussed section 542. *United States v. Meldish*, 722 F.2d 26 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 1597 (1984). The court noted that, under section 542, the attempt to import goods must be "by means of" the false statement. Citing *Teraoka*, the Court stated: "Section 542 concerns itself only with whether a false statement was made *to effect or attempt to effect the entry of the goods* in question." *Id.* at 28 (emphasis added).

In this case, defendants are specifically charged with three counts of importing merchandise by means of a false consumption entry form. The question in this case is whether the merchandise would have been admitted in any event, thereby showing that the false statements were not material to the *entry* of the games.

At oral argument, the government admitted that the game boards probably would have been admitted even if defendants had given the correct answers. Yet, it claims to have evidence showing that, had defendants been truthful about the value and purpose of the goods, further investigation would have ensued, eventually revealing the allegedly infringing nature of the boards. This is an issue for trial.

It should be remembered, however, that the question of materiality, while resting on a factual showing, is ultimately a legal issue. Defendants' motion to dismiss is denied for the present, but defendants may raise it again at trial.

III. Motion to Dismiss Counts IX and X

Defendant Melchiorre seeks dismissal of Counts IX and X, charging him with a violation of 18 U.S.C. § 545. His theory is that since section 545 speaks in terms of smuggling "goods" or "merchandise," it does not apply to the facts of this case. Defendant relies on *United States v. Smith*, 686 F.2d 1234 (5th Cir. 1982), in which the court held that the words, "goods, wares or merchandise," as used in 18 U.S.C. § 2314, were not meant to describe incorporeal privileges, such as copyrights. Section 2314 deals with interstate transportation of stolen goods.

The law of this circuit is that intangible rights can be the basis of a prosecution under 18 U.S.C. § 2314. *United States v. Bottone*, 365 F.2d 389 (2d Cir. 1965). In similar fashion, intangible rights can be the basis of a prosecution under section 545. The motion to dismiss Counts IX and X is denied.

IV. Motion to Dismiss for Lack of Notice

Defendant Gallo moves to dismiss the indictment for lack of sufficient notice that video games could be subject to the copyright laws. Defendant claims that this insufficient notice makes it "improbable" that he was willful, a requisite element of all crimes charged in the indictment.

As defendant Gallo points out, the Second Circuit first *explicitly* held that the sequence of sounds and images of a video game could qualify for copyright protection in *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852. The case was decided January 20, 1982. The indictment covers events occurring at

ter that date, between approximately June 1982 and January 1983.

Moreover as was noted by this court in the *Steerwell* decision, the law need not be absolutely settled to put a defendant on notice. The fact that intangibles could be copyrighted has been known since the decision in *United States v. Bottone*, 365 F 2d 389, in 1966.

Defendants were on notice that video games were capable of being copyrighted. The question of their willfulness is a matter for trial.[1] Defendant's motion to dismiss the indictment is denied.

V. Motion for Suppression of Evidence Seized Pursuant to a Warrant

Defendants move to suppress evidence seized pursuant to four search warrants. Three authorized the searches of 67--69 Allen Street, 79 Allen Street, and 177 Lancaster Avenue and were issued January 20, 1983. The warrant authorizing the search of the garage at 177 Lancaster Avenue was issued February 16, 1983. Defendants claim that the issuance of these warrants was not based on probable cause and that the warrants did not describe with particularity what was to be seized.

All warrants issued on the strength of two affidavits by John P. Culhane, Jr., a special agent of the Federal Bureau of Investigation. The first, covering three of the four sites, was signed on January 20, 1983; the second was signed February 16, 1983. The objects of the warrants resulting from these affidavits were audiovisual games, keys to these games, computer programs, and business records covering games substantially similar or identical to copyrighted video games. The warrant focused on games believed to infringe on the following copyrighted games: PAC-MAN, MS. PAC-MAN, SUPER PAC-MAN, DONKEY-KONG, DONKEY-KONG JUNIOR, PENGO, and FROGGER (January affidavit, p. 15).

The government argues that the recently decided opinion of the Supreme Court controls. *United States v. Leon*, _ U.S. _ 52 U.S.L.W. 5155 (July 5, 1984). There, the Court limited the scope of the exclusionary rule, holding that it does not apply to suppress evidence seized in good faith reliance on a search warrant. However, as this court stated in *Steerwell*, trial courts should not avoid making a determination on probable cause before turning to the question of good faith reliance on a search warrant.

In this case, as in *Steerwell*, the affidavits relied partially on the opinions of investigators employed by the firms whose copyrights were allegedly infringed. A game with "Superstar" on the marquee was examined by Jon Pederson, Technical Services Manager from Nintendo of America, Inc., which holds the DONKEY-KONG and the DONKEY-KONG JUNIOR copyrights. Pederson indicated that the "electronics" of the game were exactly the same as the electronics of DONKEY-KONG JUNIOR (January affidavit, p. 9).

Robert Landy examined another game with "Superstar" on the marquee. Landy is an investigator for Bally-Midway, Inc., holder of the PAC-MAN series of copyrights. He concluded merely that the "audiovisual display of this video game was a copyright infringement on Bally-Midway's 'SUPER PAC-MAN.'" (January affidavit, p. 10).

Finally, agents contacted a Robert Crane, an attorney representing Sega Enterprises, Inc., which owns the copyright on PENGO. Mr. Crane did not even examine the game. He heard the "play" of the game described over the telephone by agents and concluded that it infringed on PENGO (January affidavit, p. 10).

As we noted in *Steerwell*, the possible bias on the part of these employees of firms holding copyrights may hurt their credibility before a jury, but the magistrate was entitled to accept their conclusions. However, the government is again reminded that the magistrate's inquiry into probable cause would be significantly aided if the agents' affidavits contained more detailed comparisons of protected games and infringing

[1] In its brief at page 7, the United States Attorney noted that copyrights alleged to have been violated were duly registered on the dates listed in Counts II through V. However, the court notes that one of the games, PENGO, which forms the basis of Count V, was not duly registered until November 2, 1982 (Registration number 152 539, Sega Enterprises). The infringement charged in Counts II—V was said to have begun on October 6, 1982, and continued until January 20, 1983. The distribution charged in Counts II—V was said to have occurred for a 180 day period, ending January 20, 1983. Of course, there can be no infringement or illegal distribution until a game is protected by a copyright. In the case of PENGO, the government must prove enough instances of distribution occurring after its November 2, 1982 registration date to fulfill the statutory requirements. Evidence as to activities involving PENGO before the registration date could perhaps be relevant to other matters, but not to show copyright infringement or wrongful distribution of PENGO.

games. "The details need not be technical; a finding of substantial similarity is based on the view of a lay person. *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966).

Fortunately, in this case, Agent Culhane's affidavit did provide more details for two of the games, DONKEY-KONG and PAC-MAN. While at 69 Allen Street, Agent Culhane played a game "identical in sound and video" to each of these games which he states he has played in the past (January affidavit, p. 5).

Additionally, Agent Culhane observed approximately 25 games with the label "Super Star" on the front. Small pieces of masking tape were attached to several machines with names such as "Puck-man," "Donky-Kong" and "Pengo" written on them. Agent Culhane also saw stickers reading "Made in Taiwan" on these machines. At a later date, Agent Culhane observed boxes large enough to hold video games at 79 Allen Street. These boxes were stamped "Made in Taiwan." An employee of defendant Gallo told Agent Culhane that games are stored there (January affidavit, p. 8). Defendant Gallo also told Agent Culhane that he had a game at his home, which is at 177 Lancaster Avenue (January affidavit, p. 11).

Finally, defendant Gallo made statements which serve to bolster the magistrate's finding of probable cause. He advised Agent Culhane about how to avoid having machines he might purchase confiscated by the authorities (January affidavit, pp. 6-7).

Defendant Gallo told Culhane he has 65 games, 10 of which are protected by copyrights. These are the newer games, such as SUPER PAC-MAN. Culhane was warned that if he put one of these "patented" games into his arcade immediately, it would be confiscated. He was advised to first buy a game not subject to any copyrights and therefore available for everyone's use. This way, defendant Gallo said, he would avoid being checked by the authorities. Later, Culhane could then substitute a "patented" game.

It is difficult to establish probable cause that a criminal copyright violation occurred, because it is not illegal to possess something which comes close to being a copyright infringement. *United States v. Bily*, 406 F.Supp. 726 (E.D. Pa. 1975) The games in this case must be substantially similar to games protected by copyrights. Substantial similarity is established "when an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu. Ltd.*, 360 F.2d at 1022.

The court finds there was probable cause to believe defendants possessed and sold video games which infringed on the copyrights of the games listed in the indictment. Therefore, the court finds that there was probable cause for the issuance of the three warrants based on the January 20, 1983, affidavit of Agent Culhane. There was also probable cause for the warrant authorizing the search of the garage at 177 Lancaster, based on Culhane's February 16, 1983, affidavit. That later affidavit encompassed the facts put forth in the January affidavit. It also stated that only 17 suspect machines were found in the first search, leaving 23 unaccounted for. A named informant told agents more were stored in the garage at 177 Lancaster Avenue (February affidavit, pp. 13-15).

Before moving to defendants' next claim, it should be noted that they also urge there was no probable cause to believe the games were infringing, because the affidavits failed to state that there was no "first sale." Under the first sale doctine, a copyright owner loses his protection as to a particular copy once he gives up title to that copy. No subsequent purchases of that particular copy will infringe the copyright. But this doctrine *only* applies to copies lawfully obtained. *United States v. Moore*, 604 F.2d 1228 (9th Cir. 1979). The affidavits never explicitly state that defendants are not bona fide distributors, but the whole theory of the affidavits is clearly that the copies were unauthorized.

Defendant's motion to suppress evidence seized pursuant to the search warrants is denied.

VI. Motion to Suppress Evidence Found in Defendant Gallo's Wallet

Defendant Gallo moves to suppress items taken from his wallet at the time of his arrest. At the time the search warrants issued on January 20, 1983, an arrest warrant was issued for defendant Gallo. The search of his wallet was authorized as a result of the arrest *United States v. McEachern*, 675 F.2d 618 (4th Cir. 1982) The motion is denied.

Defendants' motions to dismiss the indictment and for suppression of evidence are denied.

So ordered.