Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

ORIGINAL

MAY 7 1982 RECD

In the Matter of:	)	
	)	CRT Docket No. 82-1
1980 Cable Royalty Fund	)	
Distribution Proceeding	)	

COMMENTS OF
PUBLIC BROADCASTING SERVICE

In accordance with the Tribunal's notice dated February 17, 1982 Public Broadcasting Service offers the following comments with regard to the 1980 distribution proceeding.

A
Use of Existing Record

The Tribunal now has the benefit of two hearing records in the 1978 and 1979 proceedings, also the decision of the Court of Appeals affirming the 1978 decision in virtually all respects. As a matter of law, the legal rulings in the 1978 decision are of binding force and effect, at least as to all parties to that proceeding. Only new legal issues or decisionally significant changes in facts pertinent to the court-approved criteria employed by the Tribunal should be entertained. The scope of the 1980 and future proceedings should be circumscribed as narrowly as possible for another reason as well, to yield the maximum net distribution of

funds to the copyright owners. In the 1978 and 1979 proceedings the copyright owners have incurred major litigation expenses that have substantially detracted from their net receipts. This impact of litigation costs has been particularly heavy on parties having a relatively small share of the royalty fund, such as public television. Since the Tribunal is dealing with recurring similar factual situations and now established legal principles applicable to those factual situations, it can and should rely upon the existing record in prior proceedings as much as possible.

The Administrative Procedure Act offers wide latitude to federal agencies to adapt their hearing procedures and practices to achieve a fair and efficient handling of the particular matters that may be dealt with by that agency. We suggest that the Tribunal's procedural ground rules for the 1980 proceeding be along the following lines:

1. Require each party to identify the evidence in the existing record, together with an identification of the findings and conclusions in the Tribunal's 1978 and 1979 final decisions, on which it intends to rely. This should be accompanied by a reasonably specific statement by the proponent party of the position that it will argue based upon said evidence, findings and conclusions.

2. All other parties should then be given an opportunity to counter-designate evidence in the existing record, accompanied

by a counter-designation of the findings and conclusions of the Tribunal's final decisions and a similar statement by said other party of the position it will argue based upon said evidence, findings and conclusion.

3. In the 1980 proceeding the Tribunal should receive new evidence only upon a satisfactory showing that such new evidence constitutes new or changed facts or circumstances that are decisionally significant within the now established criteria and legal rulings of the Tribunal as affirmed by the Court of Appeals.

4. Parties wishing to offer new evidence should be required to tender their exhibits and lists of witnesses with a reasonably informative description of proposed oral testimony and an explanation of eligibility of such proofs under the standard set forth in 3 above.

5. The Tribunal should make an initial determination of whether a threshold appearance of decisional signficance has been made (with or without the benefit of responsive written comment by opposing parties or oral argument as the Tribunal may determine). The application of such a standard should not prejudice parties that did not participate in prior proceedings. If the proponent party is one that has not heretofore participated in the 1978 and 1979 proceedings and demonstrates that its participation is likely to offer

new matters of decisional significance under this standard, said party would be entitled to offer its proofs. However, parties that did not participate in the 1978 and 1979 proceedings and that cannot demonstrate they have anything substantial to add to the existing record will be required (and permitted) to argue their cause based upon that record (created by other parties having similar interests) just like everyone else.

6. Only if -- and with regard to those specific matters concerning which the Tribunal finds such a threshold showing -- should an evidentiary hearing be held with the introduction of written evidence, presentation of witnesses, cross examination and presentation of rebuttal evidence. Material tendered in support of a threshold showing, as to which the Tribunal finds such a showing has not been made, should be placed in a segregated closed file in the offices of the Tribunal, and shall not be considered in the proceeding.

B
Partial Distribution of 1980 Funds

In the 1978 proceeding the Court of Appeals has given comprehensive affirmance of the legal rulings, procedures, criteria and application of those criteria to the facts by the Tribunal. In the remand of that proceeding only one quarter of one percent of the fund remains in issue.

In the 1979 proceeding the evidence, parties and Tribunal's decision have followed a similar pattern. While some adjustments have been made and there has surfaced a new controversy concerning the internal distribution under Phase II of the program syndicators' award, it is inconceivable that the appeals of the 1979 proceeding will impact on the award of as much as fifty percent of the total fund.

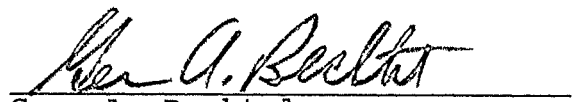
While the 1980 proceeding may involve further similar adjustments and changes in the parties and proofs, it is inconceivable that said proceeding will result in a wholesale change in the allocation of the 1980 funds from the allocation in the 1978 and 1979 proceedings. Accordingly, we believe the Tribunal would be warranted in making a prompt distribution of fifty percent of the 1980 funds to those claimants or categories of claimants that were awarded funds in the 1979 proceeding and in the same proportionate amounts, subject to adjustment at the conclusion of the 1980 proceeding.

C
Phase I Categories

In both the 1978 and 1979 proceedings public television has been treated as a single unit for all purposes, i.e., public television stations and other program producers. The claimant copyright owners involved in the distant signals of noncommercial educational television stations have homo-

geneous interests that logically and efficiently are dealt with as a group. In the 1978 and 1979 proceedings these copyright owners have reached accord under a fair and administratively efficient formula for distribution of the public television award, without any need to litigate their claims in Phase II proceedings before the Tribunal. We have no reason to believe that this will change in the 1980 or future proceedings, and we ask the Tribunal to continue to treat public television as a single Phase I category.

Respectfully submitted,



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May 7, 1982

CERTIFICATE OF SERVICE

I, Gene A. Bechtel, do hereby certify that I have, this 7th day of May, 1982, caused copies of the foregoing "Comments of Public Broadcasting Service" to be served on the parties on the attached list by first class United States mail, postage prepaid.

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