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COPYRIGHT ROYALTY TRIBUNAL

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IN THE MATTER OF :

1986 CABLE ROYALTY
DISTRIBUTION PROCEEDINGS : CRT DOCKET NO. 88-2-86CD

PHASE II :

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(This Volume contains pages 1 through 113)

Room 458
1111 20th Street, N.W.
Washington, D.C.

Monday, February 13, 1989

The above-entitled matter came on for hearing, pursuant to notice, commencing at 10:00 a.m.

BEFORE:

EDWARD W. RAY	Chairman
MARIO F. AGUERO	Commissioner
J.C. ARGETSINGER	Commissioner
ROBERT CASSLER	General Counsel

APPEARANCES:

On behalf of the Program Suppliers:

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On behalf of Multimedia Entertainment, Inc.:

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C O N T E N T S

WITNESS	EXAMINATION DIRECT	CROSS	REDIRECT	RECROSS
ALLEN R. COOPER				
By Mr. Lane	6	--	107	-
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By Mr. Lutzker	--	37	--	--
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E X H I B I T S

NUMBER		FOR IDENTIFICATION	RECEIVED
	Program Suppliers		
1	(List 99 Prog Sup Claimants)	12	12
2	(Copy MPAA-Claimant Agrmt)	12	12
3	(List Sample Sta, 86 Spec Sty)	23	23
4	(Percent Non-Ntwk Prg Vw Hrs)	24	24
5	(Copy Cert of Rqmt)	29	29
6	(Ltr dtd 2-10-89 w/List of Prop)	29	29
7	(List SS/S/M w/Dist Sig HHVH)	35	35
	NAB (Cross)		
II-3X	(Copy pg 281, MPAA-CDC 86 Dist)	75	75

P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN RAY: Good morning.

Today we start the direct case of Phase II of the 1986 Cable Royalty Distribution Proceeding, CRT Docket No. 88-2-86CD.

Last October, the Tribunal proposed to modify many of the rules of procedure for our distribution hearings. Comments were received and they are still under consideration. In the meantime, for this proceeding, the current regulations of the Tribunal and the procedures which were adopted for the '83 Cable Distribution Proceeding will apply.

The amendment to MPAA's direct case, correcting the list of properties contained in Exhibit ARC-6, filed February the 10th, will be admitted into the record, unless there are any objections.

(No response)

CHAIRMAN RAY: There is just one other motion outstanding. and rather than wait until Wednesday, when Mr. Lutzker has his direct case, I would like to ask Mr. Lane, have you had an opportunity to discuss this motion with Mr. Lutzker, to dispose of it? Because I do want to make a comment. I would like to caution all the attorneys that we will not look kindly upon the same objections that

have been brought up before us on similar issues for the past seven years.

You should know the manner in which we are going to resolve these motions. So, be kind to each other and kinder to us, by not wasting our time with a lot of them.

I am not saying this particular motion, Mr. Lane, is one that is a waste of time.

I would like to give you this opportunity, if you want, Mr. Lutzker, to respond to that motion. And we will render a decision on it Wednesday. If you have had a chance to --

MR. LUTZKER: I have seen the motion.

CHAIRMAN RAY: Would you like to do this at a later date?

MR. LUTZKER: I would prefer it, if that's all right.

CHAIRMAN RAY: No problem.

Okay, Mr. Lane, do you have any opening statement?

MR. LANE: I would just like to respond to one thing on that motion, a very similar motion was presented last year, and you did strike the exhibit. I think it is virtually the same evidence, if not, it was at least the same newspaper articles. And I don't know whether --

CHAIRMAN RAY: I think we owe Mr. Lutzker the

courtesy of having his response.

Go ahead.

MR. LANE: I just would like to say that we are happy to be in your new hearing room, and to inaugurate it. And I would just proceed directly to go with Mr. Cooper's direct case.

CHAIRMAN RAY: Okay.

Mr. Cooper, would you please stand?

Whereupon,

ALLEN R. COOPER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN RAY: We welcome you again, for the umpteenth time as a witness before us.

Please continue, Mr. Lane.

THE WITNESS: I am delighted to be in your new hearing room. I congratulate you.

CHAIRMAN RAY: Thank you.

DIRECT EXAMINATION

BY MR. LANE:

Q Would you please state your name?

A I am Allen, A-l-l-e-n R. Cooper.

Q And what is your position, Mr. Cooper?

A I am Vice President, Technology Evaluation and Planning for the Motion Picture Association of America.

Q Mr. Cooper, did you prepare a 12-paged document entitled Testimony of Allen R. Cooper, Vice President, Technology Evaluation and Planning, Motion Picture Association of American, that was previously exchanged in this case?

A I did.

Q Do you have any additions, or corrections to that testimony?

A I have a few corrections that I would like to make. Just going to one which is strictly a typographical mistake, the last page of Exhibit 7, ARC-7 --

Q Allen, just the testimony.

A Just the testimony?

Q Yes.

A All right, I will stay with the testimony. (Perusing document) On page 5 there is a possibility of some misunderstanding in connection with the 1986 Special Study Sample, and I would like to clarify whatever needs to be done there.

CHAIRMAN RAY: What portion of that?

THE WITNESS: The first full paragraph on that page that deals with the size of the number of TV households on which the study was based. The NSI diaries were distributed to approximately 950,000 television households. Since -- as part of the discovery request, I

did go to the Nielsen Company and ask them to give me the number of households for which In-Tab diaries was supplied from cable households during the period studied.

They were able to give me data for four of the six cycles. And I can give you the figures now, or I can hold off until later. The total number of diaries that were distributed In-Tab, that were distributed and collected In-Tab for the four principal cycles totaled 436,000. These are the ones In-Tab which means that they were returned, reviewed by the Nielsen Company, and accepted as accurate.

Of the 436,000 for February, May, July and November 1986, 230,839 or 52.94 percent were from cable households.

CHAIRMAN RAY: Well, you are not correcting --

THE WITNESS: Well, I suggested in "maintained by" in the third line of that paragraph, that should more correctly be said "distributed to".

CHAIRMAN RAY: I don't see the --

THE WITNESS: See "diaries maintained by", and it should be "distributed to".

CHAIRMAN RAY: Are there any objections to this -- or do you want to just wait until he is finished?

(No response)

CHAIRMAN RAY: Okay, there is no objection.

Okay, any other changes?

THE WITNESS: None in the testimony, that I am aware of, sir.

BY MR. LANE:

Q Mr. Cooper, did you prepare, or have prepared under your direction and supervision, the seven exhibits which were previously identified as ARC-1 through ARC-7?

A Yes, sir.

MR. LANE: Mr. Chairman, I guess I would ask that those be marked as Program Supplier Exhibits 1 through 7.

CHAIRMAN RAY: All right.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibits Nos. 1 through 7.)

BY MR. LANE:

Q Do you have any additions, or corrections to those exhibits?

A Yes. On ARC-3 a statement identified with the call sign KDOC, in Anaheim, California, was not part of the sample. That should be stricken from the sample.

A further correction is just a mere typo on page 3 of ARC-7. The heading on the top of that page which says "continued" should be 100,000 to 249,999, not one

1.249.999.

CHAIRMAN RAY: At the top of page 3?

THE WITNESS: Yes.

CHAIRMAN RAY: In seven?

THE WITNESS: In seven.

CHAIRMAN RAY: Okay.

THE WITNESS: Where it says one million --

CHAIRMAN RAY: I see, uh-huh.

THE WITNESS: It should be 100,000.

BY MR. LANE:

Q And those are all of your corrections and additions?

A Yes, sir.

Q Mr. Cooper, you have testified, have you not, several times in front of the Tribunal?

A I have, sir.

Q And you have been involved, have you not, in virtually all aspects of the MPAA distribution process and presentation of exhibits and testimony to the Tribunal, have you not?

A Yes, sir, I have been involved with the MPAA presentation now for almost 12 years.

Q And before that -- I don't want you to go into great detail, but you were involved in the broadcast industry for many years before that, is that correct?

A That's correct, this is my incredibly 43rd year in allied businesses, starting with advertising agencies, television network, Public Broadcasting Service and Motion Picture Association of America.

MR. LANE: Mr. Chairman, we have previously gone into Mr. Cooper's qualifications in many proceedings, and I would just incorporate that by reference. And I would suggest that now is the proper time for voir dire.

CHAIRMAN RAY: Any voir dire?

(No response)

CHAIRMAN RAY: No voir dire.

Continue, please.

BY MR. LANE:

Q Mr. Cooper, whom do you represent in this proceeding?

A I represent 99 program suppliers, these are distributors, producers, syndicators of non-network programming.

Q Did you prepare a list of these 99 claimants?

A Yes, I did, sir.

Q And is that Exhibit -- Program Suppliers' Exhibit 1?

A It is the one that is listed as ARC-1.

MR. LANE: Mr. Chairman, I would ask that the two-paged exhibit entitled 99 Program Supplier Claimants

Represented by MPAA in 1986, be marked as Program Suppliers' Exhibit 1.

CHAIRMAN RAY: It will be marked.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibit No. 1.)

COMMISSIONER AGUERO: For calendar year 1985?

THE WITNESS: Yes.

BY MR. LANE:

Q Mr. Cooper, what is the basis for MPAA's representation of these claimants?

A Each of these parties filed a timely claim with the Copyright Royalty Tribunal has signed and entered into a voluntary agreement with MPAA for representation in these proceedings.

Q And have you presented a form of that agreement, a blank form of that agreement?

A I have, sir, and this is ARC-2.

MR. LANE: Mr. Chairman, I would ask that that be marked as Program Suppliers' Exhibit 2.

CHAIRMAN RAY: It will be.

MR. LANE: Thank you.

(Whereupon, the document was

marked for identification as Program Suppliers' Exhibit No. 2.)

BY MR. LANE:

Q In the 1985 proceeding you represented 94 claimants. Would you explain the difference between the 94 in 1985, and the 99 in 1986?

A Right. 12 of the 1985 claimants did not file timely claims for shares in the 1986 royalties; 17 producers and syndicators who had not filed for 1985, did file timely claims for 1986 royalties. We represent these 17 producers and syndicators who had not filed in '85, but did file in '86. And their names and claim numbers are listed below, on page 1 of my Phase II testimony.

Q Mr. Cooper, did all of the MPAA-represented claimants in the 1985 proceeding, who claimed in 1986, sign the representation agreement that has been marked as Program Suppliers' Exhibit 2?

A Yes, without exception.

Q What, in your judgment, does this repeat business signify?

A It indicates, again, an affirmation of the acceptance by producers and distributors of syndicated programming, their evaluation of the fairness, equity and accuracy of distribution procedures employed by MPAA.

Q Would you briefly describe what is the basis for those distribution procedures?

A Yes, sir. Since the 1979 proceeding, we have used as the basis for distribution Nielsen studies. These are studies commissioned by the MPAA from the A.C. Nielsen Company, based upon the Nielsen Station Index Reports.

Q How has the Nielsen Study been treated by the Tribunal in past proceedings?

A The Tribunal has consistently indicated its feeling that the special studies are the most probative evidence presented in these proceedings. And in the 1985 Notice of Final Determination, for example, the Tribunal said, "The Tribunal is satisfied that MPAA has gone to great lengths in devising a study which measures a great amount of programming. And we agree with MPAA that any extra efforts might well prove too costly, in relation to the value of the additional data".

And this is presented in 53 Fed Reg at 71-36.

Q Mr. Cooper, are you advocating here that the Tribunal limit its decisionmaking in this proceeding to the results of the Nielsen Study?

A No, I do not, we have not in the past. We feel that the Tribunal has indicated that some reliance should be placed upon criteria which are not presented in the Nielsen Study. These include such rather ephemeral

categories of information as "quality" and other considerations, including "time".

Q What, in your judgment, is the comparative weight that the Tribunal should give to the Nielsen Study evidence, and other evidence?

A I share the Tribunal's view, and I am pleased to be able to do that, that the Nielsen studies provide the hard data, the only hard data that is generally presented in these proceedings, that is responsive to the criteria in the Act, and the principal criteria enunciated by the Tribunal.

Q Has MPAA responded in the past to the stated concerns of the Tribunal about alleged problems with the Nielsen Study?

A Yes, we certainly have. We have tried our very best to respond in every instance, to whatever criticisms were made. These have included increasing the size of the sample, the number of stations that were selected for the study. These have included expanding the number of cycles for which data are available from four to six, that's 24-weeks, rather than 16.

We have also responded in terms of taking the direction of the Tribunal with respect to the re-definition of syndicated programming. And we have one further one, which goes back to one of the early

proceedings. In our initial study we had differentiated between multiple-system owners and those that owned only a single station. We had confined the sample to a single station of the multi-station owner.

This was criticized, and we have eliminated that restriction.

Q Are there still erroneous impressions about what the Nielsen Study base is?

A Unfortunately, there seems to be one. In the 1985 Final Notice, the Tribunal appeared to agree with Multimedia's contention that the study measured only viewing in Form 3 cable households. The Nielsen studies include and encompass all cable households, of all cable systems in the United States, Form 1, Form 2 and Form 3. There is no differentiation made in the sample selected and used by the Nielsen Company, in terms of the information that came from diaries, between subscribers of small cable systems, medium-sized cable systems and large cable systems.

CHAIRMAN RAY: Mr. Cooper, I am confused about that. If you turn to page 5 --

THE WITNESS: (Perusing document)

CHAIRMAN RAY: In the last paragraph, near the -- I think it is the last sentence, "While the sample selection process relies on Form 3 system data, the

viewership that is compiled from the NSI data comes from subscribers of all cable systems which are outside-- explain this again. I am a little confused about this.

THE WITNESS: Only the statements of account filed by Form 3 cable systems are required -- the cable systems are required to report for each station they retransmit, whether it is distant, or local to that cable system.

CHAIRMAN RAY: Okay.

THE WITNESS: The sample then is based upon the data as filed in the Statement of Account, we use that for selecting the stations that comprise the sample.

CHAIRMAN RAY: All right.

THE WITNESS: However, once the --

CHAIRMAN RAY: These are Form 3?

THE WITNESS: These are Form 3 systems.

CHAIRMAN RAY: And the data you gather --

THE WITNESS: No, the data we had started with, in terms of selecting the stations for the sample, is based on Form 3 data.

CHAIRMAN RAY: Okay.

THE WITNESS: However, the Nielsen Study, once the sample has been selected, counts the viewing of those stations as distant signals in all cable households, regardless of whether the cable household is a Form 1,

Form 2, or Form 3.

CHAIRMAN RAY: Is that clear to you?

THE WITNESS: The sampling is done on the basis of Form 3. The study includes subscribers of all cable systems in the United States.

CHAIRMAN RAY: Thank you.

BY MR. LANE:

Q Mr. Cooper, is it fair to say that one way of looking at this is that the diaries sent out by Nielsen go to cable households, and that cable household might be a Form 1 cable household, or a Form 2 cable household? Nielsen has no way of just limiting the diary sent to a household to just Form 3 households.

A The Nielsen sampling is not based upon the size of the cable system.

CHAIRMAN RAY: Well, I was aware of that. But the information that you gather from the Nielsen data is information which was erroneously thought to be only applicable to a cable --

THE WITNESS: No, no, it includes the subscribers of all cable systems, regardless of size. In other words, it would include the universe of cable households that we are dealing with in the study, it includes all cable households in the United States.

CHAIRMAN RAY: All right, that's clear.

BY MR. LANE:

Q Mr. Cooper, you previously discussed the numbers of the cable household diaries. Is there anything further you wish to add to that?

A As I indicated, the figures that I had read off earlier related only to the four principal cycles, the ones in February, May, July and November. In addition, we also included data in the study from the January and October reports. These are not included in the counts I have given you.

It is my best estimate that if you included the cable households for the other two cycles, that the total number of cable households in the universe -- rather the total number of cable households from which In-Tab diaries were received by Nielsen and used to determine the data in this study, would total at least 300,000.

CHAIRMAN RAY: One other question, Mr. Cooper. What motivated you to modify the sample? I don't believe we suggested that you do so.

THE WITNESS: To modify the sample?

CHAIRMAN RAY: The stations, to increase the number of sample stations, to change the cut-off, what motivated you to do that?

THE WITNESS: There has been consistently, Chairman Ray, an indication that somehow, and for someway,

that the study would be improved if every broadcast station in the United States was included in this sample.

We have -- also, I have testified over and over again, that there is a law of diminishing returns that steps in, and economically, principally for economic reasons, there is no justification for increasing the size of the sample.

We do use the sample, the data from the Nielsen studies particularly for the Phase II distribution. And it appeared to us that it would be fairer to the people we represent, to the extent that we could increase the sample in reasonable limits, so we would have access to more programming data.

CHAIRMAN RAY: So are you saying that you had questions from claimants that you represent, as well as questions from other claimants in this hearing?

THE WITNESS: There are limitations to the study, which we have all discussed earlier. Possibly the biggest limitation of the study is that it does not cover the full 52-week period of the year. We do not have data -- there just doesn't exist, as far as we can determine from any source. And we have tried, to the extent possible, to expand the information that we have concerning programs which were re-transmitted as distant signals.

One way of doing that, that is somewhat feasible, is to increase the size of the sample. And that is what we have done, and continue to do each year.

CHAIRMAN RAY: Thank you.

BY MR. LANE:

Q Mr. Cooper, what was the bases for choosing sample stations in 1986?

A The 1986 sample selection situation, which we undertook in November of 1978 --

Q '87.

A -- 1987, pardon me, I reversed on the numbers-- was complicated by the pendency of the decision in the CableVision case. Many cable systems which had previously been Form 3 cable systems, were reporting themselves as Form 2, and not providing the data that they would be required to provide as Form 3 cable systems.

There are complications such as that, which has subsequently been corrected, as a result of a decision in the CableVision case, to encompass -- to provide the sample selection -- our primary basis for selection was to use a cut-off, based not on any total number of subscribers receiving stations as a distant signal, but a percentage of the incidence of distant signal carriage.

The figure that we selected at that time, again with regard to the overall number of stations that would

picked was, I believe, .11 percent of the incidence of carriage -- a little over one-tenth of the incidence of carriage. And the sample was selected on that basis.

Subsequently, I can report to you that the cut-off point at the .11, was equivalent to 80,000 subscribers, full-time, distant signal subscribers per station.

Q And how would this 80,000 subscriber cut-off compare with the 1985 cut-off?

A In 1985, the cut-off was 100,000 subscribers. So we have reduced the level of distant signal subscribers in the 1986 study.

Q And was the result of this to bring in more stations?

A Well, the result of it has been the increase in the number of stations.

Q Could you provide us the number and type of stations in the 1986 study?

A Yes. These data are presented on page 6. The 1985 study, composed of 64 network affiliates and 40 independents, for a total of 104 commercial stations. For the 1986 study, 71 network affiliates and 42 independents qualified, along with 17 non-commercial, PBS stations.

In other words, in 1986, the Nielsen Study included a total of 130 stations, including the 17 PBS

stations, versus 104 total in 1985.

Q Mr. Cooper, did you provide a list of those stations included in the -- the commercial stations included in the 1986 study?

A Yes, this is presented as ARC-3.

MR. LANE: Mr. Chairman, I would ask that that four-paged exhibit entitled Sample Stations 1986, Special Study, be marked as Program Suppliers Exhibit 3.

CHAIRMAN RAY: It will be marked.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibit No. 3.)

BY MR. LANE:

Q Mr. Cooper, on this exhibit you have also shown the number of cycles measured, have you not?

A I have.

Q And would you indicate what the average number of weeks studied in the 1986 Special Study was?

A The average was 20.3 weeks per station, effectively an average of five cycles, five four-week cycles per station.

Q And could you just provide to the Tribunal how many stations were studied for four, five and six week cycles?

A Yes, sir. For the six cycles, which is 24 stations, there were 56 stations; for five cycles there were nine stations, and for four cycles 48 stations.

Q Mr. Cooper, did you analyze the amount of total household viewing that was shown in the Nielsen Study for each of the sample stations?

A Yes, the non-network program viewing.

Q Did you prepare an exhibit on this?

A I did. This is Exhibit ARC-4.

MR. LANE: Mr. Chairman, I would ask that a two-paged exhibit entitled Percent of All Non-Network Program Viewing Hours Attributed to Each Commercial Station in the Special Study, 1986 Sample, be marked as Program Suppliers' Exhibit 4.

CHAIRMAN RAY: It will be so marked.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibit No. 4.)

BY MR. LANE:

Q Would you explain how Program Supplier Exhibit 4 is set-up, Mr. Cooper?

A Yes, sir. The stations in the sample are listed in descending order, with respect to the percentage of the total hours of non-network program viewing for each

station. WTBS, the Superstation in Atlanta, alone accounted for 40.314 percent of the total of 3.269 billion hours, household viewing hours of distant signal viewing that was reported in the Nielsen Study.

As I indicated, all of the stations in the sample are listed in this descending order, with the next one being WGN, the third one being WOR.

Further, I have cumulated the percentage progressively as each station is added to the sample. In other words, the addition of WGN increased the CUME, the percentage of the 3.3 billion hours, to 58.143 percent.

Q Mr. Cooper, what is the purpose of presenting this exhibit to the Tribunal?

A The principal purpose, again, relates to the arguments, if you would, that have been presented over the past years, regarding the number of stations that are included in this sample, and the extent to which the sample should, or should not be enlarged to include a larger number of stations.

CHAIRMAN RAY: Mr. Cooper, in looking at WTBS and WGN, it is rather disturbing, a program that was added to those two stations during any one year, it may jump from being 400 on the list, to number one, two, three on the list. And if it is dropped the following year, number one, or number two may drop four or five hundred. That's a

tremendous impact -- judging the value of the -- I don't want to re-invent the wheel, but I looked at the chart positions of certain programs. And without even knowing it, I could almost assume that a program had been dropped from WTBS, or WGN.

Does that disturb you in anyway, in reaching the evaluation of the program?

THE WITNESS: No, sir. Because the decisions that are made are not made by MPAA, or Nielsen. The decision as to whether or not to carry by a cable system operator, to carry a station as a distant signal is made by the cable system operator.

The decision as to whether or not to --

CHAIRMAN RAY: I understand that. I guess what I was getting to -- I was trying to get you to comment on -- I will drop the question.

THE WITNESS: No, you are hitting a very important point, Mr. Chairman. I mean, the fact is that these are decisions that are not made by us. They are made by cable system operators.

CHAIRMAN RAY: You are saying they are made, based on the value of the program to them.

THE WITNESS: That's right.

CHAIRMAN RAY: So that would translate into value.

THE WITNESS: Exactly, that's what the cable system operator says, "I want that station because it has those programs on it". So those are the decisions that are made. And that's what these data reflect.

CHAIRMAN RAY: Thank you.

BY MR. LANE:

Q Mr. Cooper, have you done any analysis, based on the numbers in Exhibit 4, on the additional viewing of newly added stations?

A Well, I think Chairman Ray was really seizing upon the evidence that I would present in this. For example, if you look at just the top ten stations that were included in the sample. These represent about 80 percent of total viewing of the total.

If you take the top 25 out of the 113, you will find 90 percent of the total viewing is accounted for by the top 25. If you go to the 50th, which would be the column ending with WBZ on the second -- on the right-hand side, the first group on the right-hand side, you will find that over 97 percent of total viewing is accounted for by the first 50 stations.

If you look at the bottom of the list, on page 2 of this exhibit, you will see that the last stations that were added, KQTV in St. Joseph, Missouri, WJBK in Detroit, added only .0004 of one percent of the viewing of the

total 3.3 billion hours of viewing that were found by Nielsen in the study.

Q Mr. Cooper, do MPAA represented claimants certify their entitlement to royalties for particular programs?

A Yes, sir, not one penny is distributed to any claimant represented by MPAA, unless the claimant certifies that he is entitled to receive the royalties for that program. And this statement is duly notarized.

Q To your knowledge, did companies, MPAA represented companies in the 1986 proceeding delete, or change programs from one owner to another owner, in the certification?

A Yes, they have. I think the process, which I believe Ms. Kessler will testify to in more detail, involves sending a tentative list of -- computer-generated tentative list of programs attributed to each represented claimant, with instructions to that claimant to delete properties to which he is not entitled to receive royalties, and to let us know if there are other properties that he believes were retransmitted as distant signals. And we check that out.

Q Have you included a copy of the certification form as one of your exhibits?

A I have done so, sir. This is ARC-5.

MR. LANE: Mr. Chairman, I would ask that the one-paged exhibit entitled Certification of Entitlement to Cable Copyright Royalties, Calendar Year 1986, be marked as Program Supplier Exhibit 5.

CHAIRMAN RAY: It will be recorded.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibit No. 5.)

BY MR. LANE:

Q Mr. Cooper, have you listed the programs included in the MPAA claim in this proceeding?

A I have, sir.

Q And is that what has been previously marked as ARC-6?

A Yes, sir, ARC-6 is a listing of the programs that include our claim. And as the Tribunal is aware, there was an error in the preparation of Exhibit 6.

MR. LANE: Mr. Chairman, I would ask that a 133-paged document, one of which page begins, 1986 MPAA Properties Ranked by Viewing, be marked as Program Suppliers' Exhibit 6.

CHAIRMAN RAY: It will be so marked.

(Whereupon, the document was marked for identification as

Program Suppliers' Exhibit No. 6.)

MR. LANE: The list of programs, just to be clear, is 130 pages, and then there was a summary of one page, and then I am including the letter and the revision as two separate pages, for a total of 133 pages.

CHAIRMAN RAY: I do have a question, Mr. Cooper. Whenever I see the title, for example, No. 8, M*A*S*H, okay, No. 8 -- when I see M*A*S*H appearing again as No. 775, would that be the movie M*A*S*H? Why would you add that --

THE WITNESS: Movies are indicated with the release year figure. The series are indicated with an "S".

CHAIRMAN RAY: That is not an error here, M*A*S*H may show up more than one time in here? One as a syndicated series and one as the movie?

THE WITNESS: Yes. If you notice 775, Mr. Chairman, does not have that little "S" in front, which indicates a series, and it also indicates that this movie was released in 1982.

CHAIRMAN RAY: So it was a movie?

THE WITNESS: Yes.

MR. LANE: I think that was 1970.

THE WITNESS: Pardon me, am I reading it wrong? 1970.

CHAIRMAN RAY: I notice there was also a duplication for Dallas, and I don't recall Dallas ever having a movie, but --

THE WITNESS: Dallas was also -- I know without looking at the figures, it was presented as a tele-film.

CHAIRMAN RAY: It is No. 478, and then it shows up again as No. 649, and I just wondered why? Maybe that's your answer, it is a tele-film?

THE WITNESS: Again, 649 is shown as --

CHAIRMAN RAY: Oh, I see, a television movie, okay.

THE WITNESS: 1958, and '54, I guess.

CHAIRMAN RAY: Well, you know, we do read your exhibits.

THE WITNESS: I am pleased that you do, sir.

BY MR. LANE:

Q Mr. Cooper, you submitted with your testimony a summary page of Exhibit 6, do you have that?

A I do, sir.

Q And just to go through the numbers, would you describe on the summary page the total household viewing hours in the syndicated program category, and just those that are MPAA-represented household viewing hours?

A At the last page of Exhibit 6, page 130, you will see the total household viewing hours count of

2,617,554,478. This was intended to represent the total number of viewing hours of programs owned by MPAA-represented claimants. That is the figure that appears, the first figure that appears on Exhibit 6, as revised, the summary page.

The second figure on that revised page excludes 8,000,463,698, which are Multimedia properties, based upon their filing in this proceeding, which was exchanged subsequent to the preparation of Exhibit 6. And the total for those, as I have indicated, is 8.4 million, which leaves a total of 2,609,090,780 after the deduction of the Multimedia properties.

Excluded from Exhibit 6, again by inadvertence, not intentionally, were 9 million hours that were distributed -- represents distribution to MPAA-represented claimants for "anonymous cartoons".

As I testified earlier, "anonymous cartoons" relate to cartoons in programs with names like Funtime, which is a WTBS program, or various other programs with local titles, which consist of cartoons distributed by MPAA-represented claimants.

We distribute these hours for those programs, based upon the information we obtain from program suppliers we represent and other sources.

There is also one movie that was inadvertently

omitted, and that is this Enter Three Dragons, which counts for a very small number of viewing hours. And there is also an infinitesimal problem related to computer rounding, and that then leaves us with a bottom line figure on Exhibit 6 as revised, which is the total number of household viewing hours attributable and credited to, and certified by MPAA-represented claimants. And that total is 2,618,283,918.

Q Mr. Cooper, how does that number compare to the total household viewing hours of all syndicated programs?

A It is in excess of 99.3 percent. The exact number as stated in my testimony -- (perusing documents) -- on page 12, is 99.352 percent of the total of all syndicated series, specials and movies of the total hours, determined by the Nielsen Study.

Q Mr. Cooper, would you turn to Exhibit 6 again, please?

A Yes, sir. (Perusing documents)

Q And would you turn to the original summary page of that exhibit, not the revision?

A Yes, sir.

Q Do you have that page?

A I do.

Q And based on that page, what is the total number of viewing hours in the syndicated program category?

A 2,685,113,405.

Q And of that total, what is the percentage represented by MPAA claimants?

A As shown --

Q As shown on that page?

A 97.5 percent.

Q And what constitutes the remaining 2.48 percent?

A Programs which were either unclaimed, or whose owner was unknown, or was not represented by MPAA.

Q And, Mr. Cooper, do you have an estimate of how many programs would be in that last category, that is the unclaimed, unknown, or non-MPAA-represented?

A Approximately 2,000. And that is titles, not counting the episodes of series.

Q Mr. Cooper, have you performed any analyses of the programs that were contained, or some of the programs that were contained in this last category?

A I have.

Q And is that presented on your Exhibit ARC-7?

A Yes, sir.

MR. LANE: Mr. Chairman, I would ask that a three-paged exhibit entitled Syndicated Series, Specials and Movies, with 100,000 or more distant signal cable household viewing hours, not attributed to, certified by MPAA-represented claimants be marked as Program Suppliers'

Exhibit 7.

CHAIRMAN RAY: It will be marked.

(Whereupon, the document was marked for identification as Program Suppliers' Exhibit No. 7.)

BY MR. LANE:

Q Mr. Cooper, would you just briefly explain what is shown on this exhibit?

A Yes. Out of the approximately 2,000, there were some 72, I believe, that had household viewing hours of 100,000 or more. And all of these are listed in Exhibit 7.

Q What does 100,000 viewing hours represent of the total syndicated program category viewing hours?

A Essentially, less than four one-thousandths of one percent, four one-thousandths of one percent.

Q Mr. Cooper, using the guidance from the Tribunal's past proceedings, have you attempted a starting off point analysis?

A I have, sir.

Q And is that analysis described on page 11 and 12 of your testimony?

A It is, sir.

Q What assumptions did you make to try to come up with some sort of a starting point analysis?

A Well, as I have previously testified before, the MPAA-represented claimants' programs attested to and certified by these claimants, represented 99.352 percent of all of the programs -- of the viewing of all of the programs in the category that we are dealing with today.

We propose that taking into account programs of non-claimants, and other parties in this proceeding, that an award by the Tribunal of 99.3 percent to MPAA would be justified. This would allow -- the difference, while it is small, represents approximately 150 programs that we are not claiming, that would flow into -- would be contemplated by the difference between 99.352 and 99.3.

MR. LANE: Those are all the questions that I have on direct, Mr. Chairman.

CHAIRMAN RAY: Mr. Cooper, I must admit, I did not go over each title in six. Do you know from the best of your recollection, is 39 Steps included in that? I am only kidding.

THE WITNESS: I know.

CHAIRMAN RAY: Mr. Lutzker will probably --

THE WITNESS: This year, if I recall correctly, Mr. Chairman, 39 Steps in previous proceedings, was claimed primarily by Janus, and Janus is not a claimant we represent in this proceeding. And, therefore, 39 Steps, if it were a Janus property, would not show up here.

CHAIRMAN RAY: Well, Commissioner Mario -- you notice I didn't even try to pronounce the last name-- Commissioner Mario informed me last week that he watched this movie on TV.

COMMISSIONER AGUERO: Channel 20, they have it on at 2:30 in the afternoon.

THE WITNESS: It is a wonderful film, but as I indicated, my recollection is that it was distributed by Janus, and Janus is one of those claimants that did not file a timely claim for 1986.

CHAIRMAN RAY: Okay, let's move on.

Commissioner, do you have any questions?

COMMISSIONER AGUERO: No, no questions.

COMMISSIONER ARGETSINGER: No questions.

CHAIRMAN RAY: Maybe we should take a break, give Phyllis a break here. Let's take a 10-minute break.

(Whereupon, a short recess was taken)

CHAIRMAN RAY: Back on the record.

Mr. Lutzker.

MR. LUTZKER: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. LUTZKER:

Q Good morning, Mr. Cooper.

A Good morning.

Q I would like to sort of, hopefully, focus on new

things in the proceeding.

A Good.

Q And maybe we can narrow the focus and direction. In terms of claimants, you have a few more claimants in grand total, than in the prior year. I understood you to say that there were a number of prior represented claimants that filed untimely claims, that you are not representing?

A I believe there was one claimant that was untimely, and not accepted by the Tribunal. The others did not file at all.

Q There were no filings at all. And did you make any effort to get them to file?

A We have consistently made efforts to contact all program suppliers, whose claims -- who have filed timely claims, based upon the Tribunal's list. And we wrote to them, called them on the telephone, and the net result is, as I have testified.

COMMISSIONER AGUERO: They filed in, July, August, September, a year later, a month later -- how long?

THE WITNESS: I believe that these late filings probably occurred in August, or September.

COMMISSIONER AGUERO: Uh-huh.

THE WITNESS: There were, I think, just a very

small number of those. But you did not allow certain late filed claims.

BY MR. LUTZKER:

Q So, basically, there were 12 claimants that you represented in '85, that you don't represent, one filed late, 11 didn't file. Were any programs of those 11 in your study?

A Yes.

Q All of the 11 are represented in your study?

A They are not included, not listed in Exhibit 6.

Q I understand that, but they are included in the survey?

A If they had programming, they would be included in the survey. The survey includes all syndicated programming, broadcast by the sample stations.

Q You are saying if they did -- did they have programs? Were you able to identify with respect to the 11, those 11 parties, or companies, whatever, whether they had programs within the --

A I didn't study that exactly, Mr. Lutzker. My answer would be yes, that they did have programs that were identified in the study.

Q Did all of them have programs identified in the study?

A I can't answer that question.

Q In terms of the parties that you list as new participants, did any of these participate in prior years?

A (Perusing documents) I don't think so. No, I think these are new claimants.

COMMISSIONER AGUERO: Mr. Cooper, for our record, Steve Rotfeld and Titan Sports, what sport do they represent?

THE WITNESS: I think Titan Sports is wrestling, primarily. Steve Rotfeld and his brother, who is listed ARC-1, you will see that Steve Rotfeld is 419 on Exhibit 1. And his brother, I believe --

COMMISSIONER AGUERO: Which exhibit?

THE WITNESS: On page 2, and on page 1 of Exhibit 1 --

COMMISSIONER AGUERO: Yes, but there is no number for Mr. Rotfeld?

THE WITNESS: Yes, there is.

COMMISSIONER AGUERO: 419?

THE WITNESS: Yes. Everyone has a number. If you will see, on page 1, the seventh one down is Berl Rotfeld, his brother. Berl Rotfeld had filed previously, Steve Rotfeld had never filed before. And their program is not a wrestling program, I believe it is a compilation of sports type material.

COMMISSIONER AGUERO: Okay, thank you.

BY MR. LUTZKER:

Q But just to clarify the question I was asking, companies like Gaylord, ITF, Lansburgh, Larry Harmon, Walt Disney have not filed before?

A No, not to the best of my knowledge.

Q Or were not filed in previous years?

A Not to the best of my knowledge.

Q Do you have any idea as to how many program suppliers' programs are carried, of the 99, are carried on WTBS?

A On WTBS of the 99?

Q Yes.

A Do I have any idea -- an idea would be like possibly --

Q Do you know?

A No, I do not know, I do not know.

Q Is that something that Ms. Kessler would generally be aware of?

A It could be ascertained from our data.

Q And you wouldn't know in terms of the top five, in your listing, in Exhibit 4, I believe, you wouldn't know --

A Exhibit 6?

Q Exhibit 4.

A Exhibit 4.

Q You don't have any idea -- Commissioner Ray was noting about WTBS and WGN, the striking number of viewing hours. You don't know how many program suppliers, of the 99, are represented by just those two stations?

A I think probably -- again, I don't know. I would speculate that probably half of them are on either WTBS, or WGN, or both.

Q Of these 17, other than Steve Rotfeld, are there any others that deal with sports? Titan Sports, I assume that would be a sports category?

A (Perusing documents) I know most of these people, what their programs are. I do not know, and I can't testify as to BFV Productions, ITF Enterprises, or -- those two I really don't know. They may be sports, they may not be sports.

Q Okay. But as far as you are concerned, in terms of the remaining claimants, the 99 that you represent, they all filed valid claims, as far as you are concerned?

A As far as the CRT is concerned. The CRT provided claim numbers and accepted them for the 1986 proceedings.

Q This one entity that filed the late claim, that was not accepted by the CRT, as opposed to your indicating that you were not going to represent them because it was late, is that it?

A Unless a claim was filed on a timely basis, and accepted by the CRT, it could not be an MPAA claimant. It could not be a claimant in this proceeding under any circumstance.

Q And in past years there have been efforts to seek a waiver of the rules, or whatever, but this is nothing that you considered doing with respect to this particular claimant?

A To the best of my knowledge, we did not request a waiver.

MR. LANE: Just to clarify the record, Mr. Chairman, I believe that the process, at least that I have been involved in, is the claimant itself requests a waiver, and we may, or may not file the type of paper supporting that claim.

CHAIRMAN RAY: That is true, Mr. Lane.

I was going to suggest that, Mr. Lutzker, you can always check our files, because we do get several requests for waivers. And you are welcome to check the records.

BY MR. LUTZKER:

Q Regarding the number of stations in the sample, Allen, do I read from your testimony that what you believe is an appropriate sample base, is about 50 stations?

A No, I don't feel that way. I indicated that,

particularly for Phase I, that 50 stations would be totally adequate. However, for Phase II, the distribution proceeding, we do need more stations, in order to reach programming of -- particularly of producers and distributors of programs which are not licensed to the principal stations.

Q In terms of the number of stations that you have in this sample, I was a little unclear about your comments about the CableVision case and the impact of that on your collection of data. Can you amplify on that, please?

A Yes, a lot of cable systems that should have reported as Form 3 cable systems did not. The CableVision case, as the Tribunal is aware, relates to a pro ration of receipts. And subsequently, the Appeals Court rejected the pro ration method, and required cable systems to report and determine their royalty obligations on the basis of their total gross receipts for basic service.

This decision, if I recall correctly, was handed down in 1988. Subsequently, the Copyright Office required cable systems to amend their returns, to reflect their proper gross receipts, and pay their proper amount of royalties.

At the time we were making the sample selection, which I have indicated was in 1987, the revised and amended Statements of Accounts had not been filed. We,

therefore, used only the Statements of Account that had been filed as Form 3 statements by cable systems. And with the appreciation of the fact that this number was not particularly precisely as accurate as it had been in prior years.

We used the incidence of carriage as a substitute, temporary substitute for the number of subscribers.

Q I am a little confused about the process. In terms of determining the 113 stations, that selection was made in 1987?

A That's correct.

Q In 1987, there were cable systems, based upon the earlier CableVision decision, that were filing Form 2, rather than Form 3 forms?

A That's correct.

Q In the filing of the Form 2, or whatever form they filed, if they are not filing in Form 3, they don't identify which stations are distant and which are local?

A That is correct.

Q So that when you compiled, in effect, Exhibit 4, you did not have the information regarding those cable systems?

A The cable systems which had erroneously filed as a Form 2.

Q The cable systems, as I understand it, file pursuant to court orders, and their interpretation of the court order, in terms of what their revenues were?

A No -- oh, you are talking about the Judge June Greene decision?

Q Yes.

A Well, that wasn't a court order, that was an interpretation of some kind, or a misinterpretation, possibly.

(Laughter)

BY MR. LUTZKER:

Q But turning to Exhibit 4 -- in other words, if a cable system in 1987, had on the books a Form 2 form, that listed KATV -- or it wouldn't have listed it, if it is Form 2 it wouldn't have listed KATV on a distant. And you would not have included that data --

A That's correct.

Q Even though -- so that there is --

MR. LANE: Excuse me. May I make a clarification, Exhibit 4 has nothing to do with number of subscribers. It has to do with distant household viewing hours. So I don't want the record to be mistaken that somehow Exhibit 4 lists subscribers. It does not.

MR. LUTZKER: Exhibit 4 identifies the sample stations that are used in the study.

THE WITNESS: So does Exhibit 1. And I would prefer you to use Exhibit 1.

BY MR. LUTZKER:

Q We will use Exhibit 1 -- no, Exhibit 3.

A Okay.

Q You indicated you chose the cut-off -- so that a difference between the 1985 study and the 1986 study was in 1985, were your results at all tempered by the CableVision decision?

A No.

Q So in 1986, there were signals that were, in fact, distant and the cable system, in your view, should have filed, and later did, presumably file an amended Form 3, but that data was not included in your determination of these sample stations?

A It was not.

Q And in terms of the data that was omitted, did you make any effort to go back, subsequent to the filings of the amended Statements of Account, and review this data?

A We did not.

Q In terms of the Nielsen diary numbers that you were clarifying, as far as your statement, 950,000 you said were maintained, but in fact, about half that number were In-Tab, and another half of that, approximately, were

cable diaries, is that --

A Well, the 950,000 that I maintained was for all six cycles. The figure that we are dealing with, in terms of the number that I mentioned, the 436,000 In-Tab, relates only to four cycles.

Q And you don't have the data as regards the other cycles?

A I do not.

Q Is there a reason why you don't?

A It was unavailable to me for this proceeding.

Q Had it been available in prior proceedings?

A It had been available in a prior proceeding, and was testified to, I believe, by Paul Lindstrom, of the Nielsen Company.

Q In which proceeding was that?

A I would assume it was the 1983 proceeding.

Q Have you ever obtained that data from Nielsen in the past?

A No, sir. I obtained these data largely in response to a discovery request, I believe, from you.

Q In prior proceedings has Multimedia made a discovery request of similar information?

A And we supplied the data in the prior proceeding.

Q And did you supply data on the other two, the

January and October?

A I can't recall, I would believe, if my recollection is correct, and I am going back some five, six years, that Mr. Lindstrom may have testified that the figures that were placed in the record included all six cycles.

Q In the 1985 proceeding, did you make any response to the discovery request regarding --

A I do not recall.

Q Are there any other changes in the cable marketplace between the '85 proceeding and the '86 proceeding, other than this CableVision?

A Would you be more specific?

Q In terms of your assessment of the cable marketplace?

A Well, I think that the cable marketplace has changed to some extent, by virtue of the increase in number of basic cable networks in operation. These are not included in the Copyright Royalty Tribunal's area of concern in this proceeding.

Q Would that be the principal change, in your view?

A Yes, sir.

Q Are you aware of any cable system that has subscribed to Nielsen data, comparable to what you have

been producing on viewership?

A I am quite certain that there are many cable systems that subscribe to Nielsen -- for Nielsen data.

Q In terms of just comparable to your data?

A In terms of the viewing of their programs.

Q I'm sorry, the viewing of --

A The viewing by their subscribers of the programs which they present.

Q Does Nielsen produce reports on viewing, such as --

A For cable systems?

Q For cable systems?

A Yes, I believe they do.

Q And does that cover the distant signal retransmissions, as well as --

A It would cover all of the services which a cable system distributes.

Q Have you reviewed any of those documents from Nielsen?

A I have not seen any of them.

Q Have you asked --

A I have not. I believe this is absolutely proprietary information.

Q Nielsen is now preparing viewership data for all cable services?

A Yes.

Q Is that a recent phenomenon?

A No. I have been tracking the viewing of cable in various Nielsen reports, that I know of, since at least 1985, and possibly earlier than that.

Q And with regard to that data, does that data limit itself to a selected sample of broadcast stations?

A No, it covers the full United States. It does not differentiate between distant signal and local signals, for example.

Q And have you considered discussing with them--not necessarily getting access to the data, as such, but have you discussed with them the utility of those reports, compared with this specialized thing that you have produced?

A I have not. If you asked a specific question, the answer is no.

THE WITNESS: I should advise the Tribunal, those reports that I am referring to are based upon the Nielsen Television Index sample of approximately 1500 to 2,000 households.

BY MR. LUTZKER:

Q What is that intended to suggest?

A It is useless in terms of being able to get the specific type of data that we need for this proceeding.

Q Turning to Exhibit 4.

A (Perusing document)

Q These are percentages of all the non-network viewing hours, as I read this, which is --

A For syndicated series, specials and movies.

Q It lists --

A No, no, no, excuse me. That is for the total.

Q You have the number of approximately 2.6 and this is a 3.2 number --

A That's correct, this is for all categories of programs.

Q What is included in here that is excluded in Exhibit 6?

A It does not include major sports programs, such as baseball, football, basketball.

Q I'm sorry, this does include -- Exhibit 4?

A Exhibit 4 does include those.

Q Does include.

A And they are not included in any MPAA claim.

Q Are there any other --

A It does not include the devotional programs, and it does not include local news and other types of programs, produced by local stations, non-syndicated programming. And those are the principal categories it does not include.

Q If you exclude that programming, so you focus on the 2.6 number, approximately what is the percentage for WTBS --

A We could probably provide that, but I don't have that information now.

Q Can you provide that?

A Yes, we can provide that.

Q With regard to the question I was asking you about, the cable marketplace, are you aware whether in 19 -- well, let me strike that.

The approach that you have taken in terms of viewing hours, has been a consistent approach, dating back to 1979, is that correct?

A That's correct.

Q And between 1979 and today, from what I understand, the principal changes that you've made are to increase the sample study by a number of stations, perhaps if I recall, 60 or so stations, up to the current number that we have now?

A Yes, we have doubled the number of stations, at least.

Q And are there any other major changes that you have made in the study, in the philosophy of the study, during that period?

A The philosophy of the study has been unchanged,

but in addition to the increase in the number of stations, a principal change has been the increase in the number of cycles.

Q So you have increased the number of cycles, and you increased the number of stations -- you have collected more data and organized it in a viewing hour approach?

A Well, the viewing hour thing is unchanged. It is the fact that the stations, the number of stations in the sample has increased, and the number of cycles has increased.

Q And you have consistently indicated that that is intended to reflect your interpretation of the Tribunal's criteria, which is the benefit to the system, the hard to the syndicator and marketplace value, and you also acknowledged, based on the way you came up with whatever numbers, that you giving about the time and quality, ephemeral, as it may be?

A That is correct.

Q With respect to WTBS, whatever your number is, it is 40 percent of the 3.2 billion, and it, presumably, is approximately the same, or slightly greater, or less, or the 2.6. So, for our purposes let's assume they are the same.

Have you reflected at all on the change in WTBS's treatment by program syndicators during the period

when you have conducted this study, in terms of how program syndicators have negotiated with WTBS?

A I think the principal change, as far as WTBS is concerned, has been Turner's acquisition of a good part of the MGM/UA library of films. Since they have -- WTBS is now much more than a simple licensee of the programs, they are the owner of thousands of movies and other programs, as a result of that acquisition.

I think that there is still significant reluctance, if not total refusal on the part of most major program suppliers of offering their most popular new programming to WTBS for broadcast purposes.

Q Let me ask one preliminary question. When did Turner buy the MGM library?

A I believe Turner bought the library in about 1986, '85 or '86.

Q And for purposes of your study in '86, was that a significant factor, was Turner's acquisition of the MGM library in '86?

A I didn't reflect upon that. Are you asking me if there had been changes concerning the sources of syndicated programming available to Turner, and I thought I responded to that by indicating that the acquisition of the MGM/UA library, or a good part of it, did cause a significant change.

Q But in terms of the 1986 proceeding, do you feel that had a significant impact?

A I would -- I have not analyzed it, but I would expect that Turner and WTBS have been using more MGM/UA product -- ex-MGM/UA product each year, than they have previously, then they did prior to acquiring the MGM/UA library.

Q So are you saying -- I just want to know what you are saying -- for the '86 proceeding, did it make a difference?

A I haven't analyzed it. All I am suggesting is that if I owned programming, that I would be more likely to use it on my facility, than if I didn't own the programming.

Q Typically, these would be films, I assume, motion pictures?

A And television series.

Q Are they -- if ownership changes, does this impact on the licensing to television facilities, immediately?

A No. The fact that they continue to be syndicated programming is not changed by whoever owns it.

Q Typically, a film licensed for television facilities is how long? A movie package, an MGM movie package is licensed --

A Well, again, the way of licensing films has changed also over the years. In my limited knowledge of that, I would assume that film contracts ran five years, probably.

Q So if there was a stream of years going on, during the course of the MGM acquisition by Turner, wouldn't necessarily impact on his ability to show a film on WTBS in 1986?

A That's correct. The size of their library suggests there are a lot of films that they own, which were not previously licensed to other stations.

COMMISSIONER AGUERO: Mr. Cooper, one second, please. Does that include many series?

THE WITNESS: Many series.

COMMISSIONER AGUERO: Uh-huh, because the first film in your list is number 62, Lawrence of Arabia. Do you consider the Goodwill Games a series, or a special program?

THE WITNESS: The Goodwill Games are definitely a syndicated series.

COMMISSIONER AGUERO: How many days?

THE WITNESS: Many, many days.

COMMISSIONER AGUERO: It is a special, not a series -- isn't it a special program?

THE WITNESS: It is a special program, yes, sir.

COMMISSIONER AGUERO: It's not a series?

THE WITNESS: It's not considered a series, like Dynasty or Hotel or something of that nature. I feel that it's a series like wrestling is a series.

COMMISSIONER AGUERO: Unless it's a term applied to like the Goodwill Games, the time of the year?

THE WITNESS: That's correct. Well, the Goodwill Games, as you know, was licensed by Turner to-- I don't know -- approximately a hundred stations across the United States.

COMMISSIONER AGUERO: Thank you.

BY MR. LUTZKER:

Q Mr. Cooper, let's suppose that a Program Supplier had a program which we assigned a market value to, taking all the Tribunal's criteria into account, of $100,000, and the program appears on a hundred stations, and we'll assume an average of about $1,000 paid by each station.

Now let's suppose that the same program, in negotiations with a particular station, the Program Supplier asserts a premium for that program because of cable distant retransmissions. And in context of this, let's assume the Program Supplier receives $100,000 from that single station and, in addition, licenses the program to the remaining stations for $1,000, so that there's a

gross income for this program of $199,000.

What impact would those facts have on your study?

A Well, I think that your assumptions are cockeyed.

Q I'm not asking you to question the assumptions --

A No, but you're asking me to --

Q I'm asking you to comment on the impact --

A No, you're asking me for a bunch of assumptions, and you're asking me on a basis which I consider to be ludicrous. I mean, obviously, I would not get the $100,000, as you assume, from one station, unless that one station was carried all over the United States and had a very detrimental impact upon the audiences of the other 99 stations you're referring to.

You're making the assumption that if I could sell a program to one station which is almost like the equivalent of a network, that all of the other stations would pay me the same amount of money. I think that's ludicrous.

Q But apart from whether it's ludicrous or not, as regards your study, how would those facts be articulated in the results?

A They would not be reflected.

Q They would not be reflected. Let's say, instead of garnering $199,000 in gross, they garner $149,000 in gross. Would that change the results for your study?

A Still within your assumptions, the answer is negative.

Q So, in general terms, if a Program Supplier receives any premium above a defined market value for a program, would that be reflected in your study?

A I just don't understand the whole routine of your question. Obviously, if a station is willing to page $100,000 for a program, that station really considers that program to be very valuable. And that's the kind of a price, the marketplace, that the Tribunal was concerned about.

You're indicating that such a sale substantially increases the marketplace value of that program, and I agree with you.

Q If one of the factors which the Tribunal over the years has been concerned about is the harm to the syndicator, and if the syndicator receives additional royalties in exchange for a station's attention to the programming delivered very widely throughout the United States, does that have any bearing --

A Well, that's why I said your assumption is ludicrous because, obviously, the harm that was being done

was related to the other "99 stations" in your assumption, that if I sold it to that one station for $100,000, I couldn't sell it to the other 99 for 50 cents.

CHAIRMAN RAY: Mr. Cooper, in the scenario which you don't consider realistic, would you also say that the compensation that the copyright owner would receive from compulsory license, would not compensate him for the loss that he lost to the other 99 stations?

THE WITNESS: Yes, that is exactly precise, sir -- that the loss from not being able to sell every station in the country or --

CHAIRMAN RAY: Even if he got a premium.

THE WITNESS: -- even if he got a premium.

BY MR. LUTZKER:

Q You were asked a minute or two ago about the Goodwill Games. You've indicated these were syndicated to a wide number of stations in 1986?

A Yes, sir.

Q Do you know how many?

A I just estimated about a hundred.

Q Your comments taken in terms of the percentage amount that you would award, take into account Ms. Kessler's exhibits, do they not?

A I don't know what you're referring to.

Q When you indicate in your statement the

percentage award that you're seeking --

A 99.3.

Q -- you reflect upon giving consideration to the additional non-sweep evidence?

A Yes, sir.

Q How are you suggesting the agency take that into account?

A I'm suggesting that the argument that other adversaries in this proceeding were penalized because their programs were not covered during the sweep weeks is -- I consider that to be unfortunate, but no more entitling them to a higher reward, and the fact that among the claimants we represent, many, many of their programs are not included within the sweep weeks.

CHAIRMAN RAY: Mr. Lutzker, I'm glad you brought this up. I was going to hold my comments for Ms. Kessler, but since you brought it up, I'd like to ask a question.

Do you feel that if a copyright owner who has filed a timely claim and presents evidence that his program was retransmitted to us, and claims for this program, should we penalize just because there were program owners who didn't claim?

THE WITNESS: No. I think that any claimant, big or small, who has -- believes that his programs were retransmitted by cable systems, filed a timely claim, is

entitled to receive royalties.

CHAIRMAN RAY: Even if it was not picked up on the sweep period?

THE WITNESS: Yes, sir. I think that he is completely --

CHAIRMAN RAY: Well, by putting in evidence of other programs that were carried but were not picked up during sweep periods, and there's no claim before us for them, how can that impact what we do with the claimant that duly files and brings evidence that it has been carried. I don't quite understand how it would impact our prior decisions.

THE WITNESS: I think that the extent to which any parties in this proceeding that come before you say that they are being unfairly or discriminated against by virtue of the fact that their programs were broadcast outside the sweep weeks whereas, presumably, the MPAA claimants' programs were broadcast during the sweep weeks, that this is an argument which does not demonstrate any form of discrimination or unfairness because MPAA claimants --

CHAIRMAN RAY: Well, why don't they come in and file a claim for the programs that appeared outside the sweep? Those are your policies, your regulations of how you pay your claimants, not ours.

THE WITNESS: Well, they understand that the information that we are presenting to the Tribunal, that we use for distribution, is the best, most accurate hard data available, and they are willing to accept that in terms of being a fair and equitable method of distribution.

There are unquestionably claimants that we represent that are being -- receiving less than their appropriate share of the royalty as a result of that.

CHAIRMAN RAY: We may agree with you.

THE WITNESS: For example, one of the things that I bleed for is Mr. Irving Brecker. Mr. Irving Brecker owns one property. This is called Life of Riley, and Life of Riley is broadcast occasionally at 5:00 o'clock in the morning, by a single station in New York, and that period just is not covered in the Nielsen Study sample. Nielsen Study does not include any programming that's broadcast at 5:00 a.m.

CHAIRMAN RAY: Of course, Mr. Cooper, as our final determinations will indicate, we're not talking about a huge award that we have ever given for any program that was not within a sweep, but I don't understand your approach this time, saying that "Look at all the things we got that were transmitted outside the sweep periods", but what are we supposed to do with this?

You are not bringing in any claim for these added things.

THE WITNESS: I think Ms. Kessler, in her testimony, will indicate to you, just on the basis of "hard information" that we have --

CHAIRMAN RAY: All right. Fine. I'll discuss it with her. Sorry to interrupt you, Mr. Lutzker.

THE WITNESS: -- of the relationship, Mr. Chairman, between the hours claimed for non-sweep programs by parties in this proceeding and the MPAA.

CHAIRMAN RAY: I understand what she is attempting to do, but I'm wondering if -- okay.

BY MR. LUTZKER:

Q And, Allen, I have some questions about -- that sort of -- questions of the merger of ARC-6 and Marsha's exhibit, and I don't know whether -- and I may ask you a few more but, if you feel it's more appropriate to be addressed to her --

A Well, if the questions relate to non-sweep programming, that is really in Marsha's area.

Q And you do not know -- you didn't prepare this MEK-1?

A I didn't even see it.

Q You haven't seen it, so you don't know the content of that as it compares your --

A That's correct.

Q That will save some time.

Can you -- are you aware between 1985 and 1986, there was any increase in distant viewing by cable subscribers?

A I don't understand the question. In total hours? Total hours of Household viewing did increase between 1985 and 1986.

Q The total Household Hours in your study?

A Based upon our study, and I'm quite sure they increased even outside of our study. The reason for that, Mr. Lutzker, is just the increase in number of cable households.

Q You mentioned a group of anonymous cartoons that you're claiming for?

A Yes.

Q Is there some identification of those cartoons, or can you supply for the record an identification?

A If there's a question, we can do that. You mean each cartoon, for each of the stations, for which an anonymous cartoon credit was granted --

Q You have added, as I understand it, in your amended Exhibit 6, you've added approximately 9 million viewing hours for cartoons.

A We will provide you with a listing of the

stations with the anonymous cartoon series that accounted for this total.

CHAIRMAN RAY: Would you also provide us with a copy of that?

THE WITNESS: Of course, sir.

BY MR. LUTZKER:

Q Your percentage total of viewing hours constitutes 97.5 percent?

A Plus a little.

Q And you are seeking an award of 99.3 percent?

A That's correct.

Q How do you get from one to the other?

A The unclaimed -- the programs of claimants that did not file timely claims in this proceeding. We're just following the Tribunal's past precedence in pro-rating the unclaimed and unidentified programming.

Q What is the percentage of unclaimed and unidentified programs?

A I believe that -- is that possibly presented in ARC-6? ARC-6 indicates that there were some 66 million, including non-MPAA-represented. I would -- again, without being overly precise at this time, I think that the number of unclaimed, unidentified is probably 45-46 million.

Q Which amounts to how much percent, approximately?

A That would be two-thirds of 2.5 -- about 1.7 percent.

Q I'm sorry. You say 1.7 and I'm adding that to the 97.5, and I get 99.2?

A 99.4, don't you? Again, my figures are approximate. Yes, 99.35 is based upon a very accurate determination of distribution of the unclaimed fund.

Q Can you provide for the record, this percent of the unclaimed number?

A The problem that we have right now, of course, is that the category includes, as I say in Exhibit 6, non-MPAA-represented. I'm not quite absolutely certain what that figure is right now.

Q I don't understand why you're not certain. I assume that it is NAB and Multimedia, is that correct?

A Yes.

Q Is there anybody else?

A No, but that does not indicate the total that should go to either of those parties. I don't want to get into detail on that. That gets into rebuttal, Mr. Lutzker.

For example, let us say that programs that are claimed by either Multimedia or NAB are also claimed by other parties.

Q Are also what?

A Claimed by other parties.

Q That are represented by MPAA.

Q Are there programs claimed by Multimedia that are claimed by other parties?

A No.

Q And you've indicated the Multimedia share already, in this amended exhibit?

A Pardon?

Q You've indicated a viewing hour total --

A Yes, I have.

MR. LANE: I'm going to object to further-- this is clearly rebuttal, and I know, for example, that there is a Multimedia program for which there is a challenge claim. So, I think that we'll get into that during rebuttal.

You know, last year, we had all these motions to strike this type of evidence as properly rebuttal, and we've tried to live by that --

MR. LUTZKER: I'm just trying to get a handle on this 99.3 number, and I don't mean to step into rebuttal, but it's not --

CHAIRMAN RAY: But you will have an opportunity in rebuttal, so could you move on, Mr. Lutzker?

BY MR. LUTZKER:

Q Allen, turning to Exhibit 7 -- strike that.

I'm concluded.

CHAIRMAN RAY: Any questions from Commissioners?

COMMISSIONER AGUERO: Mr. Cooper, in your Exhibit Number 4, you have KMEX indicated as a Spanish television station, and number 74, WNJU, indicated as a Spanish television station.

In your list of representations, do you have the Spanish International Network for a division of your claim, and also the one WNJU-TV or something?

THE WITNESS: We do represent --

COMMISSIONER AGUERO: On Exhibit Number 1?

THE WITNESS: Yes, it should be on Exhibit Number 1. Virtually all of the programming on KMEX has been identified and paid over to --

COMMISSIONER AGUERO: As you may know, SIN doesn't exist any longer.

CHAIRMAN RAY: May of '86.

COMMISSIONER AGUERO: May of '86, I really don't remember. And you know the station in New York, WNJU, was sold by a group from California to Telemunda, Inc, but you don't have Telemunda here --

THE WITNESS: Those companies don't exist. I believe -- again, Ms. Kessler is in a much better position to answer the question than I am. I suspect that the principal claimant for the KMEX program is referred to as

ELP Communications with claim number 393. I'm not certain of that.

COMMISSIONER AGUERO: 393 is ELP Communications?

THE WITNESS: Yes, sir. Now, as you know, I believe that Hallmark purchased the principal SIN situation --

COMMISSIONER AGUERO: You don't have Hallmark here.

THE WITNESS: No, Hallmark operates those stations. I believe it's under -- as one of our claimants, and I believe it's ELP, but I'm not sure of that.

COMMISSIONER AGUERO: And number 74, WNJU-TV, what do you have there?

THE WITNESS: We have -- WNJU's programs also are by other --

COMMISSIONER AGUERO: Marsha will give the --

THE WITNESS: Yes, she can tell you which of the claimants we represent, owned and certified programs that were broadcast by KMEX and WNJU.

COMMISSIONER AGUERO: Okay.

CHAIRMAN RAY: Mr. Lane?

MR. LANE: I think Mr. Stewart would like to cross, first.

CHAIRMAN RAY: Oh, forgive me. You weren't here

for the last proceeding, and I had forgotten that you were part of this.

MR. STEWART: I didn't want to be in this proceeding.

(Laughter.)

MR. STEWART: Mr. Chairman, what is your preference about schedule. I have more than a half-hour, but I could go a half-hour now and --

CHAIRMAN RAY: Why don't we break now and return at 2:00.

(Whereupon, at 12:05 p.m., the luncheon recess was taken.)

AFTERNOON SESSION

(2:00 p.m.)

CHAIRMAN RAY: Okay. Mr. Stewart?

CROSS-EXAMINATION

BY MR. STEWART:

Q Good afternoon, Mr. Cooper.

A Good afternoon, John.

Q Mr. Cooper, it is true, is it not, that MPAA submitted a Phase I direct case in this 1986 proceeding, before Phase I was settled?

A Yes, that's true.

Q Did you prepare that Phase I direct case submission?

A Yes, I did.

Q And in that submission there is a summary that lists the number of Household Viewing Hours to Syndicated Series and Movies. Do you have that in mind, or do you have that document with you right there?

A I have a copy of the Phase I submission that was not offered in testimony.

Q Wasn't ultimately, that's right.

Do you have there what was labeled ARC-6, the proposed Exhibit Number 6?

A I have that.

Q Do you see in that exhibit that the 1986

Household Viewing Hours total for Syndicated Series and Movies is 2,703,305.5 is indicated?

A I see that number.

Q The number that you've provided in this Phase II proceeding is 2.618 billion, roughly, in your Exhibit Number 6 that's just been admitted this morning?

A My Exhibit Number 6 deals only with MPAA-represented claimants and Multimedia programs.

Q I'm sorry, I was referring to the wrong number. The 2.685 billion figure that's listed in the first line of Exhibit 6, isn't that a --

A Excuse me a moment, let me find that. You're talking about the revised or the original?

Q The original.

A Summary. I see it.

Q Now, there is some discrepancy between those two numbers. Are they not comparable, or can you describe those for me -- the difference between the 2.7 billion number exchanged earlier and this 2.685 number exchanged -- or provided this morning?

A There is an explanation, and this is due, I believe, Mr. Stewart, to the fact that certain local programs were erroneously classified initially as Syndicated Series, and we deducted them in the testimony that I am presenting in this proceeding.

Q Let me show you a document -- this is a copy of one page of documents provided by your counsel in response to a discovery request, and I have marked it for identification now, NAB Exhibit II-3X, to designate a cross-examination exhibit, and I'll hand out copies of that now.

(Whereupon, the document was marked for identification as NAB Exhibit No. II-3X.)

Mr. Cooper, do you recognize this page that I've marked Exhibit II-3X?

A It appears to be a page from a Phase I report for WGN Chicago.

Q And it's a printout that appears to be dated July 3, 1988, is that correct?

A That's correct.

Q Was this -- let me start over.

In the fourth column from the left-hand side of the page, there is a column heading Program Type, and below that, opposite each program, are codes, the first of which is 2SS, do you see that?

A That's correct, I do.

Q And that indicates Syndicated Series, isn't that right?

A That's correct.

Q And then a few more down, there are several codes, 1LC, and that represents local programs, is that correct?

A That's correct.

Q And that was the program categorization that was done by you and Nielsen, as part of putting this report together, is that right?

A It was done by the Nielsen Company, ultimately. I say ultimately because where there were any questions, the resolution was made by Nielsen.

Q And we have talked about that at some length in earlier proceedings?

A Yes, of course.

Q But this printout represents and includes the Syndicated Series and Movie viewing that is included in your -- for the programs included in your Exhibit 6 today, is that right?

A Subject to the exceptions which I mentioned earlier, it does.

Q Can you tell me what those exceptions were? What local programs were recategorized between the Phase I submission and --

A I'm sorry, I can't answer that question at this time. I don't know detail station-by-station. We have thousands and thousands of entries, and I don't know. I

don't recognize any of them here that were reclassified. There may have been, but I don't recognize them.

Q Did you personally -- I'm sorry.

A The only one that's possibly involved in that could be the Bear's Parade, but I'm not certain about that at all, but that would go the reverse way, anyhow. It would have to be a Syndicated Series that was then changed to a Local program, to account for the difference that you referred to earlier. So, I should look at the ones that are marked 2SS and see which of those, if any, were then modified to be local. Is that what you're pursuing?

Q Let me ask you more generally. Were you personally involved in the recategorization of programs between the Phase I submission and the Phase II hearing today?

A I was not.

Q Who did -- who was involved in that?

A This was primarily a situation involving Ms. Kessler, the Nielsen representatives in Dunedin, Florida and Mr. Larson.

Q And then in response to my question, do you know of any programs in the whole study, not just on this page, that were categorized as 2SS or Syndicated and have, since the Phase I submission, been recategorized as Local programs?

A Yes, I believe there were two or three programs on WTBS that were reclassified, and this, I should add, Mr. Stewart, is based upon the certification process.

Q All right. And are you aware of any programs that were recategorized in the other direction, between the Phase I submission and the Phase II hearing -- that is, programs that were originally categorized as Local and have since been categorized as Syndicated Series and included among the programs you've presented today?

A I'm not aware of any, Mr. Stewart.

Q Was the certification process completed prior to your submission of the Phase I direct case in the 1986 proceeding?

A I don't know if it was entirely completed by the, Mr. Stewart. It was essentially completed, yes, but I don't know if it was entirely completed.

Q Do you know if you had received certification materials that formed the basis for the program recategorization from WTBS before or after the submission of the Phase I direct case?

A I think Ms. Kessler is better able to answer those questions. She's had extensive conversations with Mr. Shultz of WTBS, in connection with the programming.

Q Okay. On page 1 of the direct statement -- I'm sorry -- testimony of Allen R. Cooper that you sponsored

this morning, you note that 17 producers/syndicators who had not filed for -- I'm sorry -- let's go the other way around -- 12 of the 1985 claimants did not file in 1986, is that correct?

A That's correct.

Q Did any of those 12 participate in previous years, in distributions, with MPAA?

A Yes.

Q Did any of those 12 receive zero distribution for any of their programs, as a result of the application of the --

A Not that I'm aware of.

Q Not that you're aware of?

A No.

Q Do you know for a fact that all 12 received compensation for all of their programs --

A I know neither that they received zero nor received anything.

Q Okay. You make the point a few times in this testimony that the Nielsen Special Study includes viewership data from subscribers of all U.S. cable systems, is that correct?

A Yes, sir, that's what I say, and what I refer to is that it does not deal only with subscribers of Form 3 cable systems.

Q You don't mean literally that there is actual viewing -- actual reported viewing from every cable system that is included in your Syndicated Series viewing total, do you?

A What I mean is that the universe from which the cable households are selected and ultimately provide diaries, include the total universe of all cable subscribers in the United States.

Q So that it is possible that any cable system might actually report viewing that actually shows up in your studies, is that what you're saying?

A Would you try the question again?

Q Well, let me try it the other way around.

If there is a cable system that doesn't include any distant signals -- that doesn't retransmit any distant signals that are in your list, then no viewing of any cable subscriber on that system to distant signals will show up in your study, isn't that right?

A If the cable system did not retransmit one of the distant signals in our sample, then it wouldn't show up.

Q Okay. And if there is -- let's assume that there is a small cable system of 100 or 200 subscribers, based on the random sampling, it's not guaranteed that there is going to be a diary in one of the households of

those subscribers every sweep period, for example?

A There probably would not be any in that system --

Q Right.

A -- but there would be -- since the cable system, Form 3 cable systems, account for well over 90 percent of all of the distant signal subscribers, their loss would be de minimis for a cable system of that size in terms of its viewing situation or its distant signal carriage.

Q Unless there were many of that size, and when you aggregate them, it may be --

A Well, even if you aggregated all of the Form 1 systems, they still account for a pittance of the total number of cable subscribers in the United States.

Q Now, if you had a cable system that did retransmit one of the signals on your list, but also retransmitted other distant signals that weren't on your list, and the cable subscribers viewed the other signals and not yours, their viewing wouldn't show up in this list either, would it?

A The viewing of distant signals originated by stations that were not in our sample -- yes, that would not show up.

Q This morning you talked about how many cable household diaries were In-Tab for the four principal sweep

periods, and you said that you didn't have the data for the other two sweep periods, is that correct?

A That's exactly correct.

Q The other two sweep periods do not -- excuse me.

In the other two sweep periods, Nielsen does not measure viewing in all U.S. markets, does it?

A No, they are only partial.

Q How many markets?

A I think -- I don't know the exact numbers. I think we are dealing with over 100-odd -- 125-odd in January, and probably 80-odd in October, but those 100-odd and those 80-odd account for a very large majority of all the population of the United States.

Q Yes, but to the extent cable systems are located in markets below the Top 100 for January and below the Top 80 for October, then their viewing wouldn't show up in those sweep periods, is that correct?

A Their viewing would not be counted. There wouldn't be any diaries from the subscribers of those systems.

CHAIRMAN RAY: Mr. Stewart, before you leave that point, let me try once again, for something that's rather confusing for me even the second time around -- let me put it simple for me. I want a simple answer.

Is any of this viewing data that's been

presented in evidence in this Phase II -- are any of the data here in this book, in all of these exhibits, gathered from systems other than Form 3?

THE WITNESS: Yes, sir. The universe consists of all household --

CHAIRMAN RAY: I know the universe from which the -- I know this is very simple, but for some reason I have a block here, okay, so bear with me.

The universe -- I know the sample stations, the 130 stations, were chosen from the total cable universe, right?

THE WITNESS: They were chosen only from Form 3 --

CHAIRMAN RAY: Form 3 that cut off at a certain --

THE WITNESS: Right, exactly.

CHAIRMAN RAY: Without going through this, I understand that. So, the data that you received back that you used, from the Nielsen data -- I don't care what Nielsen got, I'm only concerned about the data that you used for this proceeding, from the Nielsen data -- was data that only related to the sample stations?

THE WITNESS: That's correct, however --

CHAIRMAN RAY: Well, I must be missing something.

THE WITNESS: -- the viewing of those sample stations as distant signals is measured in all cable Households, regardless of whether the cable household was part of a Form 1 system, or a Form 2 system, or a Form 3 system.

CHAIRMAN RAY: Yes, but would any specific program -- the specific programs that we see in this huge list only appeared on Form 3 cable systems.

THE WITNESS: No, sir. The stations were carried on Form 1, Form 2 and Form 3 cable systems, and wherever the stations were carried and whenever the viewing of those stations as distant signals was concerned, it was counted.

In other words, once you have made the selection, then the business of Form 3 disappears. We are now dealing with the viewing of each station as a distant signal in all cable households.

CHAIRMAN RAY: I see, because it's in all cable households.

THE WITNESS: That's right, regardless of whether it's a Form 1, Form 2 or Form 3.

CHAIRMAN RAY: Why is it so difficult for me today?

THE WITNESS: Well, because we all make the switch from the sample selection basis, a criterion based

on Form 3 --

CHAIRMAN RAY: Oh, to an incidence --

THE WITNESS: -- to a different viewing level which includes all cable systems.

CHAIRMAN RAY: Okay. Thank you.

Okay, Mr. Stewart, I'm sorry to interrupt you.

MR. STEWART: That's fine. And, in fact, let's talk about the selection of the sample itself, or the list of programs itself -- I'm sorry -- the list of stations itself.

BY MR. STEWART:

Q You testified this morning that you thought it necessary to include as many stations as you have this year in order to pick up additional programs and programs supplied by additional producers, is that right?

A Yes. The extension of the sample beyond the 50 where it becomes infinitesimal additions for Phase I purposes is -- we go through that process primarily for Phase II distribution purposes.

Q And you do pick up new programs, in effect, by extending the list?

A Yes, we do.

Q And it's the case, isn't it, that each of these stations differs somewhat from the others in terms of the programming it provides and the viewing patterns to that

program among distant signal carriers?

A That's true, Mr. Stewart.

Q Otherwise, you could just measure the first station and be done with it?

A Of course, each station has a different schedule.

Q And you and we have, I think, agreed in prior proceedings, that there is a basic difference, in general, between independent stations on the one hand and network affiliates on the other hand, as to the kinds of non-network programming they provide and the viewing patterns to the programs among distant signal interests, is that correct?

A I don't think there's a difference so much in terms of the kinds as it is among the quantity.

Q All right. So that the configuration and the viewing patterns differed generally between independent stations and network affiliate stations, is that right?

A Yes. Generally, independent stations will transmit three or four times as many quarterhours, if you would, of Syndicated Series and Movies than would a network affiliate.

Q Okay. If you would turn to your Exhibit 4, which lists the stations. First, when you talked this morning about reducing the number of stations in the list

based on considerations of cost, or cost-benefits --

A Yes, cost efficiency.

Q Do you think that it's appropriate for the Tribunal to consider issues of cost and efficiency in deciding whether measuring less than the universe is adequate?

A Yes, I think it's pertinent for the Tribunal to consider that.

Q Now, if you look at the list here in Exhibit 4, you testified this morning that the 50 cut-off was below WBZ up there in the upper part of the right-hand column?

A That's correct.

Q That suggestion would be then to eliminate from measurement here, all the stations that follow WBZ, down the right-hand column and then on the second page of this exhibit?

A I said for Phase I purposes.

Q Yes. And if you look at the types of stations involved there, it's clear, isn't it, that virtually all of the stations you would exclude under that proposal would be network affiliates?

A That's correct.

Q You say in your testimony that you project that the hundreds of other stations that aren't on your list would represent a maximum of 5 percent of the total

distant signal viewing, is that right?

A That's exactly correct.

Q And then if you looked at Exhibit 4, up at the WBZ line, you would be knocking off an additional 3 percent roughly, of what you actually included in your study?

A That's correct.

Q So that if you only measured the first 50, in your view, you would be excluding 8 percent of the viewing in the distant cable marketplace?

A Let's hear it again?

Q The bottom 63 stations --

A You want me to add the 5 and the 3, is that what you're trying to do?

Q Is that not appropriate?

A No, that's not appropriate.

Q Okay. Could you explain why?

A I think the reason I say not appropriate, Mr. Stewart, is that even after I get to the 51st and below that I'm getting into such tiny, small numbers again in terms of percentages --

Q For each station.

A Yes -- that the 5 percent figure I used is based upon like the 110th to the 113th station, which is a fairly high level whereas, if I were to include the other

400 and added these into it, too, it would probably still only be at 5 percent.

Q So you're just saying that your 5 percent estimate was so conservative, from your perspective --

A That's exactly right.

Q -- that you don't think --

A The 5 percent -- I think that the 5 percent figure was conservative.

Q But you didn't measure viewing on any of the other stations that weren't in your sample?

A Obviously not. We would have reported so.

Q Okay. At the top of page 10 of your testimony, Mr. Cooper, you describe discrepancies and the situation where properties may have been omitted or erroneously and tentatively credited to claimants other than the ones that should have gotten credit for it, is that right?

A That's correct.

Q Now, let me describe what I understand of your process, and you tell me if it's correct.

You first ask claimants to identify for you lists of properties that belong to them, that ran on the sample stations, correct?

A That is correct.

Q You next take those property lists and the information available to you from the study itself and

other information, and you send back to them a list of programs that you're tentatively crediting to them, and then you ask them to certify which of those are actually theirs coming back. Is that basically it?

A We tentatively identify from numerous sources, including these property lists submitted by the claimants we represent and, from that, we generate -- this is not a Nielsen thing at all, this is all done by MPAA -- we generate a property owner, the owner of that program based upon those data.

Based upon that information, a computer list is generated for each claimant, which lists the program title, does not list the household viewing hours attributed to it, and asks the -- demands, if you would, that the claimant examine the list carefully, and delete any properties which are tentatively attributed to him, for which he does not have a right to receive royalties, and also to advise us if any additional properties that are not on the list that was generated for him, for which he believes that may have been retransmitted during the measurement periods, by one or more stations in the sample. That's the procedure.

Q Were there any lists -- in the original property lists you received from the claimants, any properties on those lists that you later determined were actually owned

by someone other than the claimant who sent them to you in the first place?

A To the best of my knowledge, none. I should forego answer to that question, and I must rely upon Ms. Kessler's testimony because I do not, personally, undertake that job.

Q Do you know then, whether there were any cases where both a producer and a separate syndicator made claim to the same property?

A Yes, I believe there are cases, and there have been cases like that over the years, and in accordance with our procedures such funds are put in escrow pending resolution by the conflicting parties, disputing parties, of their conflict.

Q Now, have you already distributed all of the 1986 royalties that were distributed by the Tribunal earlier this year -- earlier last year?

A Yes, all the funds that have been turned over to us have been distributed.

Q Are there any still in escrow pending resolution of disputes?

A I'm quite certain there are.

Q There are?

A Yes.

Q Are any of those escrows -- do any of those

escrows involve cases where both the producer and a syndicator have claimed the same property?

A I don't know that to be a fact, but I would not be surprised if they did.

Q So, you don't automatically distribute the royalties for a program to the syndicator in a situation like that?

A No.

Q You hold them in escrow?

A That's correct. Where more than one MPAA-represented claimant asserts a claim and certifies a claim for a property, until they resolve the problem the monies are kept in escrow, in an interest-bearing account.

Q Do you know how many such disputes there are with respect to the 1986 --

A There aren't as many anymore. I think that there were an accumulation over a period of years, until, I think, in 1988, most of these escrow disputes were resolved.

Q In your Exhibit 2 -- your Exhibit 2 is the agreement you have with claimants you represent?

A Yes.

Q Are there any changes in the agreement for 1986, that you used for 1986 as opposed to prior years?

A You mean in terms of principal clauses. I mean,

the dates are different, of course.

Q Oh, yes, I'm sorry. Besides updating the date references, were there other changes?

A Yes, I think the principal one is one to which I was alluding, particularly the 7(b) on ARC-2.

Q And that's a clause -- well, 7(a) is what describes the escrow process, is that right?

A That's correct.

Q And that provision has been in previous years' agreements?

A That's correct.

Q So, what is new is charging by MPAA of a fee for the escrow, is that right?

A For managing the escrow accounts. That's the 7(b).

Q Why was that change made?

A Because it was a great deal of difficulty for us to manage those accounts, and also to encourage the claimants to settle these disputes among themselves.

Q Now, your Exhibit 2 agreement does not include an express authorization by the claimant for MPAA to represent it in any CRT distribution proceedings, isn't that correct?

A Let me hear that again?

Q There's no provision in this agreement that says

"I, Claimant, authorize you, MPAA, to represent me..." --

A What does it say in the very first paragraph?

Q -- "... to represent me in any distribution proceedings before the Copyright Royalty Tribunal".

A I think that that's what is understood in the first paragraph. I would say that it does not use your language specifically, but that's clearly understood.

Q And by the first paragraph, you mean the paragraph number (1) which reads "To accept the methodology for distribution to 'Program Suppliers' set forth in a letter dated December 4, 1987 from MPAA Manager, Cable Copyright Marsha Kessler..." --

A That's not what I consider the first paragraph.

Q I'm sorry, which do you consider the first paragraph?

A I consider the first paragraph "In consideration for the administrative processing of 1986 funds allocated by the Copyright Royalty Tribunal...". I believe that that is covered along with the letter dated December 4, 1987, which I think was submitted in discovery.

Q But not as an exhibit here?

A It's not an exhibit.

Q So, it's your position that the authorization for MPAA to represent individual claimants is included in that paragraph "In consideration for the administrative

processing of 1986 funds..."?

A That's exactly right, it's an umbrella clause.

Q Could you turn to your Exhibit 5, please?

A I have it.

Q And this is the certification form used for 1986, as you have described it earlier?

A That's right, John.

Q And other than the change in the dates, were there changes in this form, from those used in previous years?

A I don't believe so. I believe this is identical to the forms used in prior years.

Q This form does not require the claimant to identify the copyright owner -- let me start over.

This form doesn't require the claimant to identify whether its claim is as copyright owner or as agent of copyright owner, is that correct?

A Does not.

Q It's either/or?

A That's correct.

Q And if the claimant is claiming as an authorized agent of the copyright owner, it doesn't require the claimant to identify who the copyright owner is, is that right?

A Does not.

Q And doesn't require the claimant to indicate whether the authorization is in writing or, in fact, in what form the authorization is in at all, is that right?

A It does not.

Q Now, would you look at your Exhibit 6, please, this list of programs?

A I have it.

Q First, can you tell me which, if any, of these programs were broadcast only on WTBS?

A I cannot tell you that. To answer your question, it would be my understanding that none -- none of the programs listed in Exhibit 6 was broadcast only by WTBS. They may have been broadcast only by WTBS among the sample stations, but absolutely not broadcast only by WTBS among all stations during 1986.

Q And that's because the definition of Syndicated Series requires that?

A Exactly right, exactly.

Q Then let me ask my question more precisely. Can you tell me which of these programs was broadcast only on WTBS within the -- as among the stations included in your Nielsen Viewing Studies?

A I don't have such information.

Q Okay. Over on -- if you go to page 114 of this exhibit, page number 114, I guess then, for the next 16

pages, or all the way through 130, there are programs listed with zero viewing hours, do you see that?

A Yes, sir.

Q Is it your view that those programs with zero viewing hours have no marketplace value for purposes of Tribunal distributions?

A It's my view that a program with zero viewing hours has de minimis value, certainly to cable subscribers, based upon the sample, who did not view these programs, or to the cable system operator who I don't think would use the channel time for programs which were unviewed by his subscribers.

Q And that's your opinion?

A I think it's -- it's my opinion. I think it is a very reasonable opinion.

Q And that's based on an assumption that those programs that show zero viewing in your study, are not viewed on other stations on a distant signal basis, outside your study, or outside --

A If they are viewed, they are de minimis numbers; absolutely infinitesimal. In comparison with those programs with substantial viewing hours, it's of little value.

Q Little value. Okay. Now, in the list of programs that's been provided by Ms. Kessler here -- and I

understand you said this morning you had not seen those and you weren't familiar with the details of them, but I just want to ask you --

A Which programs are you referring to?

Q The lists that are provided in the proposed Exhibits MEK-1 and MEK-2.

A I have a copy of those, but I have not examined them, as I testified earlier today.

Q Had you seen those lists, or were you aware of those lists before you prepared your direct testimony?

A No, sir. Well, those lists were assembled while I was in Brussels.

Q I see. Okay. Are you aware of what these lists represent?

A I believe that Exhibit 1 -- and, again, I'm just speculating -- that both Exhibits MEK-1 and MEK-2 relate to programs that were broadcast outside the sweep weeks or on stations that weren't included in the sample.

Q Okay.

A And all of these were programs of MPAA-represented claimants.

Q And were those -- did any of those programs receive any royalties in the distribution of the 1986 royalties?

A The answer is "yes".

Q Did any of those programs receive --

A The answer is "yes" for the programs, not particularly for these broadcasts.

Q I was going to clarify that. Did any of these programs receive royalties -- a distribution of royalties for the -- outside the sweep weeks or outside the sample list broadcasts that you've collected --

A Mr. Stewart, the distribution of royalties is made precisely in accordance with the data from the Nielsen Study.

Q Now, if a program appeared on this list that Ms. Kessler has put together because it didn't appear within the survey weeks or within your list of stations, but it also appeared on the list of programs claimed by NAB, would you insist that that program not receive any royalties?

A I don't understand your question. To the best of my knowledge, this lists consists only of programs claimed by MPAA claimants.

Q I see.

A You're saying that NAB is claiming programs that are also claimed by MPAA claimants?

Q I'm asking you a hypothetical --

A I mean, is that what you are saying?

Q I'm asking you to assume that.

A You want me to assume that?

Q Sure. That's why I started the sentence with "if". If that were the case, would you insist that those programs receive no royalties from the Tribunal?

A I don't insist that the Tribunal -- I don't insist that the Tribunal do anything. It will do whatever it wants to.

Q Okay. On pages 11 and 12 of your testimony, you lay out the percentages and state your percentage claim, and I'll wait until you get to those papers.

A Okay.

Q And let me just make sure I understand where the numbers come from. I know you discussed this with Mr. Lutzker this morning.

Basically, you are able to account for 97.511 percent -- I'm sorry, maybe that percentage has changed with your revision -- roughly, 97.5 percent of the total Syndicated Series and Movies viewing as being associated with MPAA-represented claimant programs, is that right?

A That's correct, Mr. Stewart.

Q And you, having looked at the viewing for these four programs you identify on page 11 as having been claimed by other parties in prior years, have been able to identify .636 percent of the viewing that is associated with those programs?

A That's correct.

Q So, you have 97.5 for MPAA and .6-something for the others, which totals 98.1 percent, roughly.

A All right.

Q Leaving --

A 1.9 percent.

Q 1.9 percent. And of that 1.9 percent, you add 1.8, roughly, to the MPAA share and roughly .1 to the other --

A I'll take 97.5 percent of the 1.9 and add that to the MPAA share, in accordance with the Tribunal's previous rulings, and the balance would go to the other claimants.

Q Now, if you discovered that more programs represented among the viewing in the MPAA-Nielsen Study, more viewing to additional programs were attributable to programs represented by other parties in this case, then you would have to increase the .6 percent figure and the ultimate 99.352 percent figure for MPAA would also be correspondingly lower, is that correct?

A And that's what we have indicated, and have made an allowance for that.

Q Okay. Do you recall what the comparable numbers were in the 1984 proceeding, Phase II?

A In 1984, I do not.

Q Please explain to me the last sentence. You start with 99.352 percent -- this is on page 12 of your testimony -- you start with 99.352 percent, and then the sentence describes how you give consideration to the Tribunal's view about the starting point analysis, and consideration to the additional non-sweep evidence related to MPAA-represented programs introduced by Ms. Kessler, and then propose an award of 99.3 percent.

A That's correct.

Q That's .05 percent lower than what you've described as the starting --

A That is correct.

Q Could you describe for me how that 99.3 percent number derives?

A I did partially, during my testimony in response to Mr. Lutzker. I mean, we have determined that programs that are not included within that group have household viewing hours in terms of thousandths of a percentage, and making an allowance even for a hundred programs other than the ones that we have previously identified, the total of those is still a couple of hundredths of a percent, at most, and this would then leave some additional part of the difference between 93 and 93.52, for factors which I consider to be -- and which I know the Tribunal has considered to be -- of a secondary importance, at best,

such as this quality and time per se. The 99.3 percent figure is, in effect, our offer to take into account the fact that the Nielsen Study data are not all together precise, nor do they take into account all the factors, and I think that the difference is absolutely de minimis.

Q So, in part, you would account for additional programs that actually are represented by other claimants but whose viewing you think is de minimis?

A Which we have reason to believe is de minimis.

Q So, that's a viewing that would simply be a refinement of the viewing study, itself?

A I have indicated we started in Exhibit 7 -- we have indicated down to four one-thousandths of one percentage, programs other than those claimed and certified by MPAA claimants, that we are not claiming or not listed in Exhibit 6, and that is already at a very, very low level, and there are several -- approximately 1900 programs below that .004 that we're not counting.

Q So, some of them might belong to other parties and, therefore, you could modify down the 99.35 somewhat?

A That's correct.

Q But that would just be an application of the viewing study, a further application of the viewing study?

A No, I think that if I just took, again, all the data that we have in terms of viewing hours, for all the

programs -- and, again, I don't want to get into a rebuttal situation -- claimed by NAB or claimed by Multimedia, that the number would still be less than 0.7 percent.

Q Okay. I guess I'm having trouble understanding the difference between viewing as a starting point and viewing as an ending point. If your starting point is 99.35 and you assume that some of the additional programs just on a straight viewing basis, would also have to be subtracted from that, so you get down to something between 99.35 and 99.30 --

A Right.

Q -- then the entire effect of accommodating all the other considerations the Tribunal has stated, is to move from something less than 99.35 to 99.30?

A That is an accurate statement of my evaluation of these other criteria.

Q Okay. Now, I just want to show you -- let me show counsel as well, and I won't introduce this as an exhibit because it's in the 1984 record -- but I want to show you the first several pages of testimony of Allen Cooper which was submitted in the 1984 proceeding, and point you to page 3 of that testimony, in the right-hand column, the table that appears on the top of that page.

A Yes.

Q Isn't it the case that for the 1984 proceeding, you presented a number of 99.37 percent?

A Yes.

Q And that's comparable to the 99.352 percent?

A That's right.

Q And that you then stated a claim --

A The 99.35 is equivalent to 96.34, I believe-- no, no. Let's stay with this for a second. Let me just compare it. The 99.35 is equivalent to 99.37.

Q And if you look further in your testimony there, you stated a claim for 99.3 -- the next sentence following the table -- "on the basis of these data, Program Suppliers represented by MPAA assert a claim for at least 99.3 percent of the Phase I award to the Program Suppliers category".

A Yes, sir.

Q So, in 1984, you showed 99.37 instead of 99.352 --

A Now, the difference -- there's a difference here, Mr. Stewart, versus the figures that are on page 12, in my estimation.

This page reflects data from Multimedia productions and broadcasts as NAB deductions. As I have indicated in my testimony, that the figures that we have used for NAB and Multimedia have been restricted to just

the four programs that are listed on page 11 whereas, here, I would assume, just looking at this thing, that the other Phase II claimant figures are for all the programs of Multimedia and for NAB, as submitted in Phase II.

Q But there is a difference.

A The '84 records say that they are not the precisely comparable figures.

Q But the difference would be that instead of 99.37 as in '84, or 99.35 as you've given us here, if you included those additional Multimedia and NAB programs, your 99.35 number would go further down, isn't that right?

A 99.352. It would be reduced, yes.

Q Okay. Back to 1984, your number was 99.37 instead of, as you have pointed out, something less than 99.352. You made a claim, the same claim you're making today, of 99.3 percent, isn't that right?

A That's correct.

Q The Tribunal did not award you 99.3 percent in the 1984 Phase II proceedings, isn't that right?

A They did not.

Q Okay.

A Unfortunately.

A Is the -- other than having a different list of programs, your 1986 case differs from your 1984 case principally in that Ms. Kessler will be introducing these

additional exhibits, is that right?

A I thought that the -- if I recall, Mr. Stewart, that the issue with respect to the non-sweep week programs occurred in 1985 rather than 1984, but I may be mistaken in that regard. You're saying it differed in comparison between the '84 and the '86 case --

Q Yes.

A -- and that's why I'm trying to possibly correct you in that regard.

Q All right, but I was fortunate not to have to participate in the 1985 case, and my point of comparison is 1984. As compared with the 1984 case, the lists of programs to be presented by Ms. Kessler represent the only new kind of evidence that MPAA is submitting this year?

A Yes. They are in response to a point that was brought up by opposing counsel during, I believe, the 1985 proceeding.

MR. STEWART: Thank you, Mr. Cooper, I have no further questions.

CHAIRMAN RAY: Thank you, Mr. Stewart.

Now, Mr. Lane, I believe it is your turn.

REDIRECT EXAMINATION

BY MR. LANE:

Q Mr. Cooper, looking at your Exhibit 6, the original Summary page --

A Yes, sir.

Q -- isn't it true, Mr. Cooper, that comparing that to the document that Mr. Stewart just handed you, that the number of distant signal household viewing hours between 1984 and 1986, for MPAA claimants, has increased by over 200 million?

A By 272 million.

Q Just for the MPAA-represented --

A Just the MPAA claimants, from 2.413 billion to 2.685 billion.

Q 2.618 billion.

A 2.618 billion -- okay. I stand corrected. The figure increases 205 million, not 280.

Q And isn't it also true, Mr. Cooper, that the total syndicated properties have increased by approximately 180 million -- 181 million?

A Yes, sir.

Q And isn't it also true that the percentage total of the MPAA-represented claimants, of the entirety, in 1984 was 96.34 percent and now has increased to 97.51 percent?

A According to this exhibit, yes.

Q So that at least just looking at these two pages, that many of the numbers are entirely, or very substantially, different, are they not?

A They are. At the same time, Mr. Lane, I could say also that the numbers are still very consistent over the years.

Q I want to ask you a very simple question, Mr. Cooper. Is TBS available to Form 1 and Form 2 cable systems, as well as Form 3 cable systems?

A WTBS is carried by approximately 95 percent of every cable system in the United States, Form 1, Form 2 and Form 3.

Q And there are viewers that watch WTBS that are cable subscribers on Form 1 and Form 2 systems, are there not?

A Yes, sir.

Q And some of those viewers on those Form 1 and Form 2 systems, over the years and in 1986, got Nielsen diaries, did they not?

A Yes, sir.

Q And if they were distant to WTBS in 1986 and 1985, those viewing hours for those Forms 1 and 2 system subscribers were counted in the study, were they not?

A Yes, sir.

Q And if I asked you the same questions about WGN and WOR and WPIX and all the 113 stations, we could go through that and the answers would be the same, would they not?

A Yes, sir.

CHAIRMAN RAY: Thank you, Mr. Lane, that was very simple.

MR. LANE: That's all the redirect I have.

THE WITNESS: How about --

MR. LANE: I must have another question that just slipped my mind.

BY MR. LANE:

Q Do you have anything else you'd like to say, Mr. Cooper?

A Yes. I'd like to advise Commissioner Aguero that the principal claimant for the programs on KMEX is listed in our claim as LatCom. They are the successor to Univision.

COMMISSIONER AGUERO: LatCom? And the other one?

MR. LANE: 408.

THE WITNESS: That's claimant 408. LatCom, Inc.

CHAIRMAN RAY: Well, thank you, Mr. Cooper, we appreciate your presence.

(Whereupon, the witness was excused.)

Before we adjourn today, Mr. Lutzker, do you have any comments on that motion, so we can take care of it tomorrow morning?

MR. LUTZKER: Sure. Very briefly, the -- I

think our pleading is clear. We are not making any claim for the 20th anniversary program. The Tribunal will recall that last year this program was offered as a rebuttal document on the grounds that it was not necessarily appropriate at the rebuttal time, that it was more appropriate as a direct presentation. We are presenting it this year, as evidence of the nature and quality of the Donahue program.

There are, within this program which was broadcast in 1987, numerous clips from programs that were originally aired in 1986 that are covered by our claim. The documentation as regards the newspaper articles are, again, supportive of the nature and quality of the Donahue program, and they bespeak that show covering the entire period of which 1986 proceeding the programs broadcast during that period are one portion.

I am also aware that the Tribunal is intimately familiar with the program, and I would like to keep the document and the program in the case, but it is not intended to distort, in any fashion, the 1986 claim. The '86 claim is clearly laid out, and this is designed to be further illustrative of the programming that is available through Multimedia, and particularly on Donahue.

CHAIRMAN RAY: Do you know what percentage of that show contains episodes that were viewed in '86?

MR. LUTZKER: I don't have an exact percentage, but I think it would be at least between 5 and 10 percent. I believe in most cases, they indicate in the course of the program when they quote a clip from the prior year in 1986, 1983, but it is visible on the program itself.

CHAIRMAN RAY: Mr. Lane, one last word on this?

MR. LANE: Mr. Chairman, I think this proves my point, that if there is no more than 5 percent that relates to 1986, what are we fooling around with. Mr. Lutzker has agreed, and I think it's ad nauseam --

COMMISSIONER AGUERO: How long is the entire show?

MR. LUTZKER: It's a little short of an hour.

COMMISSIONER AGUERO: And 5 percent would be 3 minutes.

MR. LANE: I would have no objection to showing just the clips from 1986.

COMMISSIONER AGUERO: We don't mind.

CHAIRMAN RAY: We will render a decision on this tomorrow morning. In the meantime, we will recess until 10:00 tomorrow, at which time we will continue with MPAA's direct case, with Ms. Kessler.

(Whereupon, at 3:06 p.m., the hearing was adjourned, to reconvene on Tuesday, February 14, 1989, at 10:00 a.m., in the same room.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: CRT - 1986 CABLE ROYALTY DISTRICUTION PROCEEDINGS - PHASE II

Before: EDWARD W. RAY, CHAIRMAN

Date: FEBRUARY 13, 1989

Place: WASHINGTON, D.C.

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

Phyllis Young

PHYLLIS YOUNG