

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

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In the Matter of )  
 )  
1986 Cable Royalty )  
Distribution Proceedings )  
 )  
Phase II )  
\_\_\_\_\_)

Docket No. 88-2-86CD

PHASE II REPLY FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

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BROADCASTERS

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March 31, 1989

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**PHASE II REPLY FINDINGS OF FACT  
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The National Association of Broadcasters ("NAB"), by its attorneys, hereby submits its Reply Findings of Fact and Conclusions of Law in the Phase II evidentiary proceeding concerning the distribution of 1986 cable royalties for syndicated programming.

**I. MPAA Has Not Demonstrated Its Entitlement To Any Increase Over the Share it Has Received in Previous Years**

1. At first reading, parts of MPAA's<sup>1</sup> Proposed Findings in this proceeding seem truly remarkable. Never before has MPAA complained that it is, "through the Nielsen Study ... limited to a portion of the year and a fixed number of stations." MPAA Findings at 7. And MPAA presents for the first time a list of

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<sup>1</sup> MPAA persists in referring to itself as "Program Suppliers," even though all claimants in this Phase II proceeding are program suppliers. See Tr. 286 (Ray).

"non-measurement" programs -- programs in the never-never-land outside its own viewing study -- that it argues should entitle it to additional credit. Id. at 9-10.

2. A closer reading, however, brings to mind the old maxim, "the more things change, the more they stay the same." In the end, MPAA's unprecedented claim for "non-measurement" programs is a pretense. MPAA presents not one bit of marketplace value evidence regarding those programs. Tr. 214 (Kessler).<sup>2</sup> And MPAA would not pay one cent of the additional royalties it seeks to the owners of those programs for the "non-measurement" distant signal broadcasts. Tr. 99 (Cooper), 209-210 (Kessler).

3. Indeed, MPAA has presented non-viewing evidence only for the purpose of arguing that the Tribunal should ignore such evidence (because the "ratio" is assertedly the same), and make its Phase II awards to all program suppliers on the basis of MPAA's viewing study alone.<sup>3</sup> The Tribunal should see this

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<sup>2</sup> MPAA does present some distant signal subscribership figures, which are of questionable accuracy. See Tr. 629 (Kessler). Even if they were correct, more than 90 percent of the "mind boggling" total of 30 billion subscriber incidents simply result from the multiplication of the subscribers to each of the three superstations hundreds and hundreds and hundreds of times again, to represent a handful of black-and-white reruns and old sitcoms that are already amply measured in the MPAA viewing study. See MPAA Exs. 9, 10; Tr. 129-130 (Kessler). But MPAA, showing its true colors once again, argues that these gross subscriber incidence counts -- described by Mr. Cooper in a prior proceeding as "ludicrous" -- are simply a poor substitute for viewing numbers, and not an independent indication of marketplace value. MPAA Findings at 11-12.

<sup>3</sup> Actually, by refusing to make the adjustment for "unclaimed" programs that the Tribunal has always followed, MPAA would even deprive NAB and Multimedia of a portion of their respective viewing shares. See NAB Findings at 8 & n.4.

circular argument for what it is, and reject it again, as it has in each and every Phase II proceeding to date.

4. The Tribunal has repeatedly rejected the MPAA viewing study as the sole basis on which to allocate the program suppliers' royalties, for two reasons. First, the Tribunal has found that the MPAA study disproportionately fails to measure or undermeasures the programs of claimants not represented by MPAA. 1985 Cable Royalty Distribution Final Determination, 53 Fed. Reg. 7132, 7136 (March 4, 1988). Second, the gross viewing numbers do not reflect the marketplace value of programs in a cable marketplace since

"the cable industry is not advertising-based, but depends instead on selling subscriptions, so that adding to the diversity of the offerings which may induce more people to subscribe could be more valuable to a cable operator than the actual viewing achieved by the individual programs."

Id. (emphasis added)

5. MPAA has presented absolutely no evidence that would dissuade the Tribunal from these conclusions. And although it pretends to accept the Tribunal's judgment as to its viewing study (See, e.g., MPAA Findings at 2, 34), it has not proved either the disproportionate undermeasurement of its own programs or any special marketplace value of its programs compared with those of NAB and Multimedia. By contrast, both NAB and Multimedia have proved their entitlement under these criteria.

## II. NAB Has Proved Its Entitlement To A Larger Share

6. MPAA's attempts to discredit NAB's proof of the comparatively superior marketplace value of NAB-represented programs fall far short. First, MPAA makes the stunning assertion that Dr. Ducey's professional expertise and practical experience in the cable distant signal marketplace are somehow irrelevant. MPAA Findings at 32-33. This, of course, is absurd.

7. Unlike both of MPAA's witnesses, Dr. Ducey has had actual experience making real distant signal programming decisions in the real cable distant signal marketplace. Tr. 353-354 (Ducey). His experience in making program-by-program selections enabled him to see how the cable marketplace really works, and what kinds of distant signal programs are really valuable to cable operators and subscribers. Tr. 353-355, 392-396 (Ducey); Statement of Richard V. Ducey at 4. Notwithstanding MPAA's confused assertions to the contrary,<sup>4</sup> this first-hand experience is directly relevant to the comparative analysis, based on distant signal cable marketplace value, that must be done by the Tribunal.<sup>5</sup>

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<sup>4</sup> See MPAA Findings at 35.

<sup>5</sup> Dr. Ducey was required to make comparative choices among all available distant signal programs, including sports programs, widely syndicated sitcoms, movies, and regional programs. He made those comparative choices on the basis of whether the distant signal program offered something that was not already available to his subscribers, and whether it had some additional special appeal. This standard is the same one the Tribunal has identified and has applied in its own comparative analysis. See, e.g., 1985 Final Determination, supra, at 7136; NAB Proposed Findings at 12-13.

8. Moreover, Dr. Ducey, unlike MPAA's witnesses, presented descriptive evidence about every 1986 program in the NAB claim. Tr. 367-371, 373-375, 380-383, 387-391 (Ducey); Statement of Richard V. Ducey at 5-15. For example, Dr. Ducey identified which of NAB's 1986 programs were sports programs, and, on the basis of his professional and practical cable marketplace experience, explained that those programs had a substantially higher value in the cable marketplace than programs represented by MPAA. Tr. 364-371; 392, 395, 458 (Ducey); Statement of Richard V. Ducey at 6-7, 9-12. Indeed, Dr. Ducey was able, by way of specific examples based on personal knowledge, to demonstrate the even stronger regional appeal of programs like hockey in Minnesota, candlepin bowling in New England, and the "Empire State Games" in upstate New York. Tr. 370. He did the same thing for non-sports programs. E.g., Tr. 374-375, 368-369, 390-391, 455-456.

9. There can be no question that Dr. Ducey has both the qualifications and the specific knowledge to provide relevant, current and persuasive evidence about the marketplace value of NAB's 1986 programs.

10. Besides the special marketplace value provided by sports programs, by fresh, timely programs, and by programs of special regional appeal, one of the principle elements of marketplace value that is not measured by viewing is uniqueness or diversity. See 1985 Final Determination, supra, at 7136; Tr. 386-387, 392, 395-396, 458 (Ducey). Even MPAA argues in its Proposed Findings that "the widespread over-the-air availability dilutes the attractiveness of the program on a distant signal basis." MPAA

Findings at 37. And the vast majority of programs in NAB's 1986 list are not likely to be duplicated, either over-the-air or on local signals, when they are retransmitted on a distant signal basis. Tr. 364-365 (Ducey).

11. MPAA did not prove that any of its programs provided unduplicated diversity on a distant signal basis. NAB proved that its programs, by contrast with MPAA's list, were unique. Tr. 364-365 (Ducey). But NAB also went beyond general proof of its programs' uniqueness, providing specific examples of totally non-duplicated distant signal carriage to illustrate this special value. Tr. 374-375, 387, 390-391 (Ducey); Statement of Richard V. Ducey at 16-17. Even when MPAA attempted to show that there was regional over-the-air carriage of coaches' shows, it provided evidence of yet another example of unduplicated distant signal carriage of NAB's programs. Tr. 455-456 (Ducey); MPAA Ex. 16X.

12. NAB's evidence establishes that, on a comparative basis, its programs have a special cable distant signal marketplace value that MPAA programs do not. MPAA misleadingly attempts to take NAB to task for not ranking the value of various programs within the NAB claim. See MPAA Findings at 35. The point of the proceeding, of course, is the comparison with the MPAA claim. Virtually all of the 1986 NAB programs have some special appeal, recognized by both the Tribunal and the Court of Appeals and testified to by Dr. Ducey, that makes them more valuable than comparable MPAA programs. NAB Proposed Findings at 3-6, 12-13. The factor may be different for different programs (for example, nationally distributed "INN Evening News" may have special appeal compared

with MPAA reruns because it is timely and fresh, whereas a particular sports program may have special regional appeal), but all are more valuable than MPAA programs.

III. NAB-Represented Program Suppliers Should Be Awarded At Least 0.8 Percent of the 1986 Program Suppliers' Royalties

13. NAB should receive at least 0.8% of the Program Suppliers' royalties, because that is the percentage the Tribunal awarded in all of the Phase II proceedings until 1984, when it found that NAB had not presented current marketplace value evidence. In the 1986 proceeding, NAB has provided that marketplace value evidence.

14. MPAA proposes again, however, that NAB be awarded only its percentage share measured by MPAA's own 1986 viewing study.<sup>6</sup> NAB believes that the Tribunal should again reject this approach, for the same two reasons it has rejected it in the past.

15. First, MPAA's study fails to measure a large proportion of NAB's programs at all, and undermeasures NAB's programs that show up on the study.<sup>7</sup> As set out in NAB's Proposed Findings,

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<sup>6</sup> As described above, MPAA has, for reasons known only to itself, proposed an award of 0.38% for NAB, which fails to credit NAB with its share of "unclaimed" viewing. The viewing percentage for NAB-represented programs is 0.41% for all NAB-claimed programs, or 0.40% excluding programs also claimed by MPAA. NAB Findings at 8. This is comparable to the viewing percentage for NAB-represented programs in the 1984 proceedings (0.404%) which was the most recent viewing study for NAB programs. MPAA's apparent proposal that the Tribunal compare the 1986 percentage with 1983, and make a reduction that was already reflected in the 1984 decision, makes no sense whatsoever. See MPAA Findings at 30-32.

<sup>7</sup> Curiously, MPAA appears to attempt to suggest that NAB accepts the validity of the MPAA viewing study. (See MPAA



MPAA's 1986 viewing study measured only about 18% of NAB-represented specials, and covered only about 5½ percent of the Form 3 distant signals carrying them. NAB Findings at 11. By contrast, MPAA's evidence about its own programs proved, if anything, that they were overrepresented, not underrepresented, in its viewing study. See NAB Findings at 15 n. 11.

16. Second, even with respect to that roughly 5½%, the MPAA study, because it measures only viewing, understates the special cable marketplace value of NAB's programs, for the reasons the Tribunal has previously adopted, which NAB has established above.

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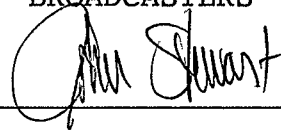
Findings at 38-39). Let there be no mistake about NAB's position: viewing in general is not an accurate measure of cable marketplace value, and the MPAA study in particular, since it is not a representative sample, is defective. The Nielsen studies that NAB relies on for broadcast marketplace research (Tr. 820-821) bear no relation to the special MPAA study. Dr. Ducey "accepted the study at face value" only for purposes of rebuttal, to show that MPAA had made errors in crediting viewing to NAB in its own analysis of its own study. Tr. 859; Rebuttal Statement of Richard V. Ducey.

Conclusion

For the foregoing reasons, NAB respectfully requests that it be awarded at least 0.8% of the 1986 Phase I Program Suppliers allocation.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
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March 31, 1989

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The Honorable Edward W. Ray  
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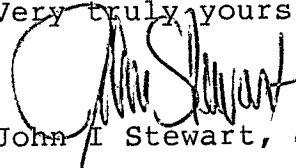
Re: 1986 Phase II Cable Royalty Distribution  
Proceeding, CRT Docket No. 88-2-86CD

Dear Chairman Ray:

Transmitted herewith for filing with the Tribunal on behalf of the National Association of Broadcasters are an original and five copies of the Reply Findings of Fact and Conclusions of Law of the National Association of Broadcasters.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,



John I. Stewart, Jr.

Enclosure

cc w/encl: Arnold P. Lutzker, Esq.  
Dennis Lane, Esq.