

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. CRT 88-2-86CD]

ORIGINAL

1986 Cable Royalty Distribution Proceeding

AGENCY: Copyright Royalty Tribunal

ACTION: Notice of final determination.

SUMMARY: The Copyright Royalty Tribunal announces the adoption of its final determination in the proceeding concerning the distribution to certain copyright owners of royalty fees paid by cable systems for secondary transmissions during 1986.

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SUPPLEMENTARY INFORMATION:
Authority

Section 111(d)(3) of the Copyright Act, as amended August 27, 1986, authorizes the Copyright Royalty Tribunal to distribute annually royalty fees paid by cable systems to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) Any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) Any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under paragraph (1)(A); and

(C) Any such owner whose work was included in non-network programming consisting of aural signals carried beyond the local service area of the primary transmitter of such programs.

This Proceeding

In this proceeding, the Tribunal takes up the distribution of the royalty fees deposited by cable operators for the calendar year 1986. In accordance with past procedure, the Tribunal

resolved that the 1986 distribution proceeding would be conducted in two phases. In Phase I, the Tribunal would determine the allocation of cable royalties among various program categories of claimants. The Phase I categories were: Program Suppliers (MPAA, Multimedia, NAB), Sports (Major League Baseball, NBA, NHL, NCAA), Noncommercial Television (PBS), U.S. Commercial Television (NAB), Music (ASCAP, BMI, SESAC), Devotional Programs (CBN, PTL, OTGH), Canadian Programs (CBC, CTV), Noncommercial Radio (NPR) and Commercial Radio (NAB)¹. In Phase II, the Tribunal would allocate cable royalties to individual claimants within a program category.

For this 1986 proceeding, there were no controversies in Phase I. All Phase I parties settled based upon the allocations made by the Tribunal in the 1983 cable distribution proceeding. (The 1984 and 1985 Phase I controversies were similarly settled on the basis of the 1983 allocations.)

In Phase II, there was one controversy. Within the Program Suppliers categories, three parties advanced claims which, when combined, exceeded 100% of the category. The three parties were: the Motion Picture Association of America, Inc. (MPAA), Multimedia Entertainment, Inc. (Multimedia), and the National Association of Broadcasters (NAB).

MPAA claimed 99.3% of the Program Suppliers category, while proposing that NAB be awarded 0.38%, and Multimedia be awarded 0.32%. Multimedia claimed 0.975% of the Program Suppliers

¹The parties mentioned in parenthesis are the major claimants in each category. The listing is for the reader's edification, and is not intended to be a complete list.

category, while proposing that MPAA be awarded 98.225%, and NAB be awarded 0.8%. NAB claimed 0.8% of the Program Suppliers, while proposing that MPAA be awarded 98.225% and Multimedia be awarded 0.975%.

Background and Chronology

Seven hundred and twenty-one (721) individual or joint claims were filed with the Tribunal for the 1986 cable royalty fund. On December 15, 1987, the Tribunal published a notice directing all claimants to inform the Tribunal by February 4, 1988 whether any controversies existed concerning the distribution of the 1986 cable copyright royalty fees. 52 FR 47626.

In response to requests filed by the claimants, the Tribunal twice extended the time to file comments concerning a controversy, first to March 4, 1988, then to April 15, 1988. Order, dated February 4, 1988; Order, dated March 8, 1988.

Based upon written comments filed April 15, 1988, the Tribunal concluded that controversies existed regarding the distribution of the 1986 cable copyright royalty fees, both in Phase I and in Phase II of the proceeding, effective April 21, 1988. At the same time, the Tribunal ordered a partial distribution of the 1986 cable royalty fund. 53 FR 13144 (April 21, 1988).

The filing of written direct cases in Phase I was originally scheduled for August 5, 1988, but was delayed twice at the request of the parties to facilitate settlement negotiations and

for delays in the production of evidence due to the U.S. Court of Appeals' decision in Cablevision v. MPAA, et. al. Order, dated July 11, 1988; Order, dated September 30, 1988.

On October 12, 1988, the Tribunal received a motion from all Phase I claimant groups informing the Tribunal that they had reached an agreement regarding the Phase I allocations for five of the claimants groups - U.S. Commercial Television, Music, the Devotional Programs, the Canadian Programs, and Noncommercial Radio - and asking the Tribunal to adopt the agreed-upon allocations. The allocations the parties agreed to were the same percentages allocations as those for the 1983-1985 cable royalty funds.

On December 2, 1988, the Tribunal was notified that Program Suppliers, Sports and Public Broadcasting Service had reached a settlement of their controversy, which was confirmed at the scheduled hearing, December 5, 1988. Consequently, all controversies in Phase I were resolved. The Tribunal adopted the agreed-upon allocations, and ordered another partial distribution of the 1986 cable royalty fund. Order, dated December 5, 1988.

On February 6, 1989, the Phase II claimants, MPAA, Multimedia and NAB, filed their written direct cases. The hearing of the direct cases took place on February 13, 14, 15 and 16, 1989.

Phase II rebuttal cases were filed February 27, 1989, and hearing of the rebuttal cases took place on March 2, 6, 7, and 8, 1989. The record in the proceeding was closed March 17, 1989.

The Program Suppliers claimants filed their Proposed Findings of Fact and Conclusions of Law on March 24, 1989. Reply Proposed Findings of Fact and Conclusions of Law were filed on March 31, 1989.

Findings of Fact

Previous Findings. The Tribunal took evidence regarding allocations among MPAA, Multimedia and NAB in the Program Suppliers category in the 1979, 1980, 1982, 1983, 1984 and 1985 cable distribution proceedings. All the findings of fact of these proceedings are hereby consolidated by reference into the 1986 cable distribution proceeding final determination. 47 FR 9879; 48 FR 9552; 49 FR 37653; 51 FR 12792; 52 FR 8408; 53 FR 7133; 53 FR 11895.

The claimants. MPAA is a trade association which represents 99 producers and/or syndicators of syndicated movies, television series and specials. MPAA Ex. 1. Collectively, the 99 claimants seek the cable royalties attributable to 6,229 different syndicated series, movies and specials broadcast on 113 commercial television stations which were retransmitted by cable systems in 1986 and whose viewing was measured by a Nielsen study commissioned by MPAA. MPAA Ex. 6.

Multimedia is the producer and syndicator of the following programs: "Donahue" - 261 hours of news/interview programs, including 210 original programs, and 51 repeat programs; "Sally Jessy Raphael" - 261 half-hours of interview/talk programs, including 236 original programs, and 25 repeat programs; "New Music City U.S.A." - 52 half-hour country music programs,

including 25 original programs, and 27 repeat programs; "Young People's Specials" - 10 half-hour children's features: "Runaway to Glory," "Nicky and the Nerd," "Buddies," "Umbrella Jack," "That Funny Fat Kid," "Molly's Pilgrim," "The Horrible Secret," "My First Swedish Bombshell," "Little Arliss," and "Charlie's Christmas Secret" (four of these were first-run programs in 1986); "Country Music, Entertainment and International Specials" - ten primetime country, music, entertainment and international specials, including, "20th Annual Music City News Country Music Awards," "6th Annual National Song Writers Awards," "Family Affair: Osmonds' 25th Anniversary," "Statlers' Christmas Present," "Public People, Private Lives," Marty Robbins: Super Legend," "Dreesen Street (original and repeat), "New Stars of '86," "Spacesbridge: A Citizens' Summit," and "Citizens' Summit II: Women to Women" (eight of these were first-run programs in 1986). Multimedia-owned broadcast stations also produced and syndicated its own programming including: "Redscene," "Ruth Lyons: Portrait of A Legend," and "Cumberland College Christmas Program." Test. of Richard Thrall, pp. 3-4, 16; Multimedia Ex. 14.

NAB is a trade association which represents 66 television broadcast stations. Collectively, the 66 stations seek the cable royalties attributable to 139 programs which the stations produced and which were syndicated to and broadcast on other stations in 1986. NAB Ex. II-2 (amended). NAB categorized its programs, generally, as coaches shows, specials and series with regional appeal, sports programs, news/talk/public affairs

programs, children's programs, documentary and instructional programs, parades, pageants and special events, and entertainment/talk shows. Test. of Richard Ducey, pp. 6-15.

MPAA's claim. As a part of its case for several distribution proceedings, MPAA has commissioned a special Nielsen study to prove its entitlement. 47 FR 9880; 48 FR 9554; 51 FR 12794; 52 FR 8416; 53 Fr 7133. The study measures the hours of distant signal nonnetwork programming which are viewed by cable households. Id.

For this proceeding, MPAA selected to be included in the Nielsen study all U.S. commercial television broadcast stations which reached a minimum average of 80,000 Form 3 cable subscribers, as determined from the statement of accounts filed by the cable systems as of November, 1987 for the two semiannual accounting periods of 1986. Test. of Allen Cooper, p. 6. A total of 113 commercial stations met MPAA's criteria: 70 network-affiliates and 43 independent stations. MPAA Ex. 3.

Once the sample broadcast stations are selected, the study is based on data compiled by the A.C. Nielsen Company from Nielsen Station Index (NSI) diaries distributed to approximately 950,000 television households, including both cable subscribers (from Form 1, 2, and 3 systems) and non-subscribers, during six four-week measurement periods, or "cycles." During 1986, these cycles encompassed January 2-29, January 30-February 26, May 1-28, July 10-August 6, September 25-October 22 and October 30-November 26. Test. of Allen Cooper. p. 5. For the four principal cycles, February, May, July and November, 436,000

diaries were returned, reviewed by the Nielsen Company and accepted as accurate, and of those, 230,839 or 52.94% were from cable households. Tr. 8.

The scope of the 1986 Nielsen study is greater than the 1985 Nielsen study. MPAA lowered the threshold of those stations which would be included in the study from stations reaching 100,000 subscribers to stations reaching 80,000. Consequently, 113 commercial stations were measured as opposed to 104 commercial stations in 1985. According to MPAA, these 113 stations accounted for more than 95% of all distant cable viewing of U.S. commercial programs by Form 3 cable systems, versus its estimate for 1985 that the 104 commercial stations accounted for 86.5%. Test. of Allen Cooper, pp. 8-9; 1985 Test. of Allen Cooper, pp. 3-4.

The cable household viewing hours found by the MPAA-commissioned Nielsen study attributable to the programs of each of the three Program Suppliers claimants were:

MPAA	2,618,283,918	99.289%
NAB	10,276,176	.390
Multimedia	8,463,698	.321

Test. of Allen Cooper, p. 10; NAB Ex. 9RX; MPAA Ex. 12R.

MPAA and NAB disputed the ownership of 11 programs, three of which had reported cable household viewing hours of 188,231. MPAA Ex. 16R (revised). If NAB were given the credit for those three programs, instead of MPAA, the percentages for each of the three claimants would be: MPAA - 99.282%, NAB - 0.397%, Multimedia - 0.321%.

In the 1984 distribution proceeding, the Nielsen viewing data for the three parties were: MPAA - 99.330%, NAB - 0.404%, Multimedia - 0.266%. 51 FR 8419. In the 1985 distribution proceeding, a proceeding in which NAB did not participate, the relative Nielsen data for MPAA and Multimedia were: MPAA - 99.74%, Multimedia - 0.26%. 53 FR 7133.

When asked by counsel for Multimedia whether the Nielsen viewing data are "pin-point accurate" or yield the "actual number of cable households" that viewed the distant programming, MPAA witness Cooper said that any Nielsen statistic is based upon estimates, and the estimates are subject to error. Tr. 707. Even for the range of probable error to be correct, it would need to assume a perfectly representative sample and that each participant in the sample complied completely with the survey requirements, which, Cooper stated, never happens. Tr. 708. The value of the Nielsen data, Cooper stated, is that they are relied on by stations, programmers and advertisers, and understanding their limitations, "they are fine for the purposes of constructively making decisions." Id.

In the 1985 proceeding, MPAA argued that the Tribunal should employ the Nielsen study as the sole means of determining the allocation among claimants in the Program Suppliers category, because it felt that it provided the only objective standard of measuring the relative values of competing claims. 1985 Test. of Allen Cooper, p. 8. This argument was rejected by the Tribunal. 53 FR 7136. In this proceeding, MPAA argues that the Nielsen study should be the Tribunal's

primary consideration, and that the weight to be afforded the evidence of the other claimants should be so slight as to result in an allocation virtually the same as that which would have obtained from a strict application of the Nielsen data. Test. of Allen Cooper, pp. 3-4, 12.

Responding to the Tribunal's statement in the 1985 proceeding that credit would be given when it is shown that a claimant's programs have been either unmeasured or undermeasured by the Nielsen study, MPAA submitted a list of more than 820 titles (mostly movies and a few series) aired in over 1800 broadcasts which, because the programs were broadcast either by a non-sample station or outside the measurement period, were not measured at all in the Nielsen study. MPAA Ex. 8; Test. of Marsha Kessler, pp. 2-3. MPAA did not attempt to obtain a comprehensive list of all unmeasured MPAA-represented programs. The listed programs were only those which happened to be sent by some program suppliers during the MPAA certification process. Tr. 123. A second list of 21 television series was also submitted by MPAA, which although measured by the Nielsen study, was alleged to have been undermeasured. Both lists were analyzed by MPAA for total subscriber-incidents (that is, the number of broadcasts times the numbers of subscribers reached) outside of the Nielsen measurement periods. MPAA Exs. 9, 10.

NAB's claim. In support of its claim, NAB presented two exhibits. The first exhibit was a copy of a questionnaire on programs syndicated in 1986 which the NAB-represented broadcast stations filled out at NAB's request. NAB Ex. II-1. The second

exhibit was a listing of the syndicated programs which the broadcast stations claim. NAB Ex. II-2 (amended). The listing was based upon the response to the questionnaire. Test. of Richard Ducey, p. 2. To assure the accuracy of the questionnaire data, NAB research assistants re-contacted the stations by telephone to confirm and verify their responses. Tr. 363-64.

Exhibit II-2 listed the titles of the syndicated programs, the station which originated the program, the stations which carried the programs, and whether the program was a series or special. Ex. II-2 (amended). NAB underlined which carrying stations were imported as a distant signal by Form 3 cable systems in 1986. Id. Those stations which were not underlined were confirmed by NAB to have been imported as a distant signal by at least one Form 1 or Form 2 cable system in 1986. Tr. 362-63.

In addition, NAB presented Richard Ducey, senior Vice President and head of the NAB Research and Planning Department to give testimony concerning the marketplace value of the NAB-represented programs. Test. of Richard Ducey. Ducey described 58 of the 139 programs claimed by NAB as sports programs, either actual live sports games, such as state and regional high school or amateur basketball, football, hockey and track and field championships, wrestling matches, bowling tournaments, horse races, and auto races; or programs about sports, such as college or professional coaches' shows. Id., pp. 6-15. In Ducey's opinion, sports programs are especially attractive to subscribers. Tr. 392.

In addition, Ducey emphasized that most of the NAB programs have special interest to cable subscribers within the state or region in which they are retransmitted on a distant signal basis. The type of shows, Ducey stated, which have this kind of appeal are coaches' shows and regional sports programs, news programs, state lotteries, state fairs, and beauty pageants and political programs. Tr. 368-371, 395; Test. of Richard Ducey, pp. 6-15. Finally, Ducey cited one program, "INN Evening News," which had 117 affiliated stations, as a program with national interest. Test. of Richard Ducey, p. 17; NAB Ex. II-2 (amended). Concerning all of NAB's represented programs, whether sports or non-sports, whether regional or national, Ducey described them as timely, fresh and first-run programs having more appeal than reruns. Id.; Tr. 387-89.

MPAA contested NAB's claim to represent 11 programs, asserting that they had been syndicated by MPAA-represented syndicators. Reb. Test. of Marsha Kessler, pp. 8-9. The programs in question were: "The Boy King," claimed by All American Television, "Inday News," claimed by LBS, "Breast Cancer: My Body, My Life," claimed by Twentieth Century-Fox, and "Public Women, Private Men," "Drop Everything and Read," "When I Was Your Age," "Notes To My Parents," "The Crossing," "No Secrets," "Street Shadows," and "Origins," claimed by Group W Westinghouse. Id.

Only three of the eleven programs were measured by the Nielsen study to have measurable cable household viewing hours. MPAA Ex. 16R. According to the settlement agreement among

MPAA-represented program suppliers, those suppliers who sign with MPAA agree to be compensated solely on the basis of the Nielsen study, so that programs they own which receive zero viewing hours, or which were not measured in the Nielsen study will not receive compensation from MPAA from the Tribunal allocation for MPAA-represented program suppliers. Tr. 572, 574, 602.

MPAA witnesses conceded that MPAA's challenge to NAB's right to represent "Breast Cancer; My Body, My Life" might not be correct, that Twentieth Century-Fox's "It's My Body, It's My Life" is a different program than CBS' "Breast Cancer: My Body, My Life." Tr. 604-610, 778-779.

Group W Westinghouse signed to be represented for its programs by both NAB and MPAA. Reb. Test. of Marsha Kessler, p. 9.

MPAA drew concessions from NAB's witness on the issue of diversity programming, by demonstrating that many programs of regional appeal, such as the Hayden Fry Program and the Tom Osborne Show, two coaches shows retransmitted to cable systems in Iowa and Nebraska, respectively, are also available locally from over-the-air broadcast stations. MPAA Ex. 16X; Tr. 430-435. NAB countered with examples where programs are not duplicated by local broadcasts, such as the Montana program, "Face the State," which is available to Kalispell and Williston residents only by means of distant signal importation. Tr. 391.

NAB sought credit for asserted undermeasurement of its specials in the Nielsen study. NAB Prop. Findings, par. 19. Not including the NAB-MPAA contested specials, NAB represented 82

specials for 1986. NAB Ex. II-2 (amended). These 82 specials were broadcast on a total of 395 television stations which were also retransmitted by Form 3 cable systems. 116 of these 395 television stations, or 29.36% were among the selected commercial stations in the Nielsen study. (In the previous two sentences, many stations were counted more than once, because they carried more than one NAB-represented special). Id. This compares to the overall selection rate of 113 commercial stations chosen from 437 stations which were retransmitted by Form 3 systems, or 25.9%. Reb. Test. of Richard Thrall, p. 5; Test. of Allen Cooper, p. 3. 12 of the specials which were on the 116 stations were actually measured by the Nielsen study because they were aired during the sweep period, but it was not made part of the record how many times those 12 specials were measured; MPAA Ex. 16R (revised). MPAA noted that NAB's presentation lacked the frequency of the airings of NAB's programs, and the cable systems which carried them, and their subscribership. MPAA Reply Findings, p. 34; NAB Direct Case.

Multimedia's Claim. Multimedia seeks an increase in its award from 0.825%, which it received in 1985, to 0.975%. Multimedia Prop. Findings, p. 38. Two-thirds of Multimedia's proposed increase is based on what Multimedia claims as changed circumstances. One-third is based on Multimedia's assertion that WTBS already compensates those syndicators who supply programs to it with higher license fees, so that those syndicators incur far less harm to them than do syndicators who do not supply WTBS, such as Multimedia. Id., pp. 4-5.

Changed circumstances - "Donahue." "Donahue" was broadcast on 209 broadcast stations in 1986, as compared to 206 in 1985, 98 of which were retransmitted by Form 3 cable systems on a distant signal basis. Multimedia Exs. 15, 3R. "Donahue" garnered 7,315,294 household viewing hours in the Nielsen study versus 5,872,269 in 1985, an increase of approximately 24.6%. MPAA Ex. 7. "Donahue" received daytime broadcast ratings in 1986 of 8, 7, 7, 7 for the four sweep periods, as compared to daytime ratings of 7, 6, 6, 6 for the same periods in 1985. Multimedia Ex. 5. The daytime share for "Donahue" was 31, 31, 28, 31 for the four sweep periods in 1986, as compared with 28, 30, 27, 28 for the same sweep periods in 1985. Id.

Multimedia performed an advertising analysis comparing how much revenue "Donahue" generates for its affiliates with the total of all nonnetwork, nonlocal news spot sales. Multimedia Ex. 4 (corrected). Multimedia chose 21 selected markets, representing 13.93% of the U.S., and, projecting those markets to the total of all U.S. markets, found that "Donahue" generated 2.18% of all 1986 nonnetwork, nonlocal news spots sales, as compared to 1.61% for 1985. Id. MPAA analyzed the selected 21 markets and found that "Donahue" in those markets had an average share 27.5% higher than the average share for "Donahue" for all television markets. MPAA Ex. 14R. Since advertising revenues are tied to the share a program gets, use of higher share markets tends to distort the advertising study, according to MPAA. Tr. 736. MPAA performed its own analysis using the same format and

group of markets contained in Multimedia's 1985 study and reached an advertising figure of 1.46%. MPAA Ex. 12X; Tr. 287-88.

"Sally Jessy Raphael" - After having its first full year of syndication in 1985, Sally Jessy Raphael increased the number of station affiliates from 70 to 84 in 1986, 46 of which were retransmitted by a cable system on a distant signal basis. Test. of Richard Thrall, p. 9; Multimedia Ex. 3R; Tr. 301. "Sally Jessy Raphael" garnered 839,489 cable household viewing hours, compared to 298,912 in 1985, an increase of 180.85%. MPAA Ex. 7. In 1986, "Sally Jessy Raphael's" average NSI daytime total households and persons increased 90%, ratings rose 17% and audience share increase 7%. Test. of Richard Thrall, p. 3. However, during 1986, daytime total households for "Sally Jessy Raphael" declined from 1,605,000 to 1,395,000 from February to November, despite an increase in the number of stations. Similarly, daytime total persons for "Sally Jessy Raphael" declined from 1,856,000 to 1,533,000 from February to November. Multimedia Ex. 6. Finally, Multimedia offered an advertising study for "Sally Jessy Raphael" similar to the one performed for "Donahue" which yielded 0.38% of all advertising revenues for all nonnetwork, non-local news spots sales. Multimedia Ex. 8 (corrected).

For all other Multimedia programming, Multimedia proposed no finding of changed circumstances, stating, for example, that its country music and entertainment special viewership "held steady."

Test. of Richard Thrall, p. 14. According to the Nielsen study, cable household viewing for all other Multimedia programming rose from 217,256 to 308,915, or 42.19%. MPAA Ex. 12R; MPAA Ex. 7.

The time for all Multimedia country music and entertainment specials on all broadcast stations during 1986 was 45.73 hours, versus 41.1 hours in 1985. Multimedia Ex. 15. Overall, the total hours occupied by all Multimedia programming in a typical week amounted to 1,381.55, representing a 3% increase over 1985. Tr. 241; Test. of Richard Thrall, p. 17. MPAA attempted to rebut Multimedia's time estimate on the ground that Multimedia's estimate relies on all its programs being broadcast the maximum number of times possible throughout the year. MPAA estimated a reduction in total Multimedia time of approximately 100 hours per week based on the number of broadcasts reported by Arbitron SPAs. MPAA Ex. 13R.

Undermeasurement - In addition to asserting changed circumstances, Multimedia renewed its claim from last year that its specials were undermeasured by the Nielsen study, and added this year that its regularly scheduled series, such as "Donahue," and "Sally Jessy Raphael," were also undermeasured. Multimedia Ex. 1R, 2R, 3R.

The Nielsen study measured 113 commercial stations out of 437 commercial stations which were retransmitted by Form 3 cable systems, or 25.9%. Reb. Test. of Richard Thrall, p. 5; Test. of Allen Cooper, p. 6. Of the 98 commercial stations which carried "Donahue," and which were retransmitted by Form 3 cable systems, 25 were stations measured in the Nielsen study, or 25.5%.

Multimedia Ex. 3R. Of the 46 commercial stations which carried "Sally Jessy Raphael," and which were retransmitted by Form 3 cable systems, 11 were stations measured in the Nielsen study, or 23.9%. Id.

Concerning specials, of the 82 commercial stations which carried "My First Swedish Bombshell" and which were retransmitted by Form 3 cable systems, 22 were stations measured by the Nielsen study, or 26.8%. Id. Similarly, "20th Annual Music City News Country Music Awards" was on 22 measured Nielsen stations out of 85 distantly-carried commercial stations, or 25.9%. Id.

In another exhibit, Multimedia presented the number of times its specials aired on all broadcast stations in the U.S., 2,955 and divided that figure by the number of times its specials were on a selected Nielsen station during a measured sweep period, 112, and proposed the resulting figure, 3.8% as a valid indicator of its asserted undermeasurement. Multimedia Ex. 2R. MPAA responded that Multimedia's denominator in the fraction was not the relevant denominator because it included all broadcast stations regardless of whether they were retransmitted by Form 3 cable systems on a distant basis. MPAA Prop. Findings, p. 12. MPAA eliminated nonrelevant broadcasts for two of Multimedia's specials for which there was record evidence, so that "6th Annual Song Writers Award" was measured 7.9% of the time it was broadcast on stations retransmitted by Form 3 cable systems, rather than 5.1%, and "20th Annual Music City News Country Music Awards" was measured 8.25% of the time, rather than 5.17%. Id. p.

13. MPAA did not perform any more analyses of this kind for the other Multimedia specials, nor did it provide an overall percentage.

WTBS - Multimedia introduced statements submitted by TBS to the SEC and the FCC in which TBS states that because of WTBS' special position in the cable market, it typically pays program suppliers a licensing fee significantly in excess of the market rate for programming aimed at the Atlanta market alone. Reb. Test. of Richard Thrall, pp. 11-12. Specific examples of significant increases in the license fees paid for "Three Stooges" and "The Andy Griffith Show" were given. Id. TBS estimated that it pays \$10 million per year more than the average production and news costs of an independent station in the 11-20 television markets. Id., p. 14. It is Multimedia's position that these additional \$10 million fees negate the harm program suppliers to WTBS are alleged to incur, and that those who do not syndicate to WTBS, such as Multimedia, should get a correspondingly higher share of the program suppliers royalties. Multimedia Prop. Findings, pp. 33-36.

MPAA introduced a cross examination exhibit to show that the 297.85% increase from 1978 to 1986 in license fees for WTBS to air "The Andy Griffith Show" was less than the increases independent stations incurred nationwide from 1978 to 1986 (379.3%) and less than independent stations in the 11-20 television markets incurred (612.87%). MPAA Ex. 17RX. Additionally, Multimedia's witness conceded that TBS' statement compared WTBS' costs for 1986 to a typical station's costs for

1983. Tr. 1075-76. When the relevant year's costs were compared, 25% of the independent stations in 1986 had production and news costs of at least \$12 million, compared to WTBS' cost of \$15.2 million. MPAA Ex. 17RX.

MPAA argued that Multimedia's award should be reduced on the harm factor, rather than program suppliers to WTBS, because Multimedia has avoided the harm caused to its programs by distant signal importation by not selling any of its programs to the superstations. MPAA Prop. Findings, p. 15; Tr. 1095-96. MPAA submitted an exhibit analyzing "Donahue," "Sally Jessy Raphael," "20th Annual Music City News Country Music Awards," and "6th Annual Song Writers Awards", showing that although these shows were carried cumulatively by 250 broadcast stations which were retransmitted by cable systems on a distant signal basis, those cable systems accounted for only about \$4 million of the \$118.7 million which were deposited by cable systems. Reb. Test. of Marsha Kessler, p. 2; MPAA Exs. 1R-5R; Tr. 559.

Multimedia also alleged that TBS, knowing that MPAA distributes its royalty shares based strictly on the Nielsen study, can schedule its programs on WTBS during Nielsen sweep periods so it can garner extra income from cable copyright royalties. Multimedia gave the example of the Goodwill Games, which, if scheduled during June, outside of a sweep period, would get no cable royalties, but scheduled as it was during July, would be getting approximately \$2 million in cable royalties. Tr. 968-69. Upon request from the Tribunal, Multimedia submitted

the schedule of all previous summer Olympic Games, which showed that the 1976 and 1980 summer Olympics were scheduled in July. Multimedia submission, dated March 13, 1989.

Conclusions of Law

MPAA, Multimedia and NAB have shown entitlement to 98.5%, 0.825% and 0.675% of the Program Suppliers Phase I allocation, respectively.

Our starting off point in analyzing the three Phase II program suppliers claimants is our award to these claimants from the last previously litigated proceeding. Our awards to these claimants were: MPAA - 98.475%, Multimedia - 0.825%, NAB - 0.7%. These previous awards were arrived at by the Tribunal primarily on the basis of the special Nielsen study of cable household viewing of distant signals and other evidence going to the five factors employed by the Tribunal in analyzing a claimant's claim: harm to the claimants, benefit to the cable operator, marketplace value, and to a lesser degree, quality and time.

In this proceeding, one alleged insufficiency of the Nielsen data, whether the Nielsen study undermeasured any of the three claimants overall programming, was especially contested. The other important issues were whether any claimant could show changed circumstances from 1985; whether the claimants had improved on weaknesses in their cases perceived by the Tribunal; certain programs that were claimed by more than one party; and factors of harm, benefit to cable operators, and marketplace value.

Concerning the Nielsen study, MPAA continued to make improvements in its reliability. It expanded the number of commercial stations in the study, by including stations which reached 80,000 subscribers rather than last year's cut-off of 100,000. This resulted in an increase in the number of commercial stations measured by the study from 104 in 1985 to 113 to 1986. In addition, MPAA cleared up one point of confusion. The Tribunal had accepted Multimedia's criticism that the Nielsen data does not measure the viewing of cable subscribers who subscribe to Form 1 or Form 2 cable systems. MPAA established in this proceeding, however, that while the choice of which broadcast stations should be studied is restricted to their distant signal carriage by Form 3 systems, once that choice is made, the Nielsen study measures the viewing of those broadcast stations by all cable households, including households subscribing to Form 1 or Form 2 systems.

The Nielsen data yielded a relative measure of the programs of the three program suppliers as follows: MPAA - 99.289%; NAB -0.390%; Multimedia - 0.321%. This represented a decrease for NAB from 0.404% to 0.390%, or 3.5%, and an increase for Multimedia from 0.260% to 0.321%, or 23.5%.

To obtain these final Nielsen figures, it was necessary to resolve the question of the ownership of 11 contested programs between MPAA and NAB. One program, "Breast Cancer, My Body, My Life," was resolved at hearing, where it was conceded by MPAA that, in fact, two different programs were being discussed and there was no conflict at all. Concerning the other ten, it was

represented to the Tribunal that MPAA represented the syndicator of the program and NAB represented the producer. As we established in the 1984 cable distribution proceeding, as between the syndicator and the producer, the Tribunal will award the royalties to the syndicator, so here too, the Tribunal has determined these programs belong to MPAA's claim. 1984 Cable Royalty Distribution Proceeding, 52 FR 8408, 8410, 8418 (March 17, 1987).

NAB argued that there existed a difference in this proceeding, that although MPAA sought the credit for these programs, the majority of them would not get any payment from MPAA under its own internal distribution system, whereas if NAB were recognized to be the proper representative for those programs, each one of them would get some compensation from NAB. The Tribunal believes, that although NAB's point has a certain appeal, the seeming inequity stems from a choice the syndicator made when he chose to be represented by MPAA, and to accept MPAA's distribution method. If, however, the syndicator feels penalized by MPAA's system, he can come directly to the Tribunal in Phase II as Multimedia does.

Concerning Group W Westinghouse, the Tribunal is particularly troubled by a circumstance in which Group W could possibly be compensated twice. In this case, Group W is assigned this year by the Tribunal to MPAA for the reason that it has received compensation from MPAA and has agreed to MPAA's distribution formula. This does not preclude Group W from filing with either MPAA or NAB in future proceeding, but it must clearly choose.

Challenges to the Nielsen study in the proceeding were based primarily on allegations of undermeasurement. MPAA argued that the credit the Tribunal has given the other claimants in the past for undermeasurement of their programs was not warranted, because MPAA's programs were equally undermeasured. To advance this argument, MPAA gave examples of how much product its represented group has on the nonmeasured stations, and during the nonmeasured periods of the year. However, the Tribunal always assumed that MPAA had a substantial amount of its programs outside of the Nielsen study, for that was the necessary assumption the Tribunal had to make in order to project the results of MPAA's Nielsen study to the entire year. For MPAA to show that its programs have been undermeasured, it would have to show that its relative share of programming in the unmeasured periods exceeds its 97.5% (excluding unclaimed programs) relative share of programming in the measured period, or to show that the other claimants were overmeasured.

Overall, however, we consider that MPAA has continued to improve the Nielsen study, its claimants maintained their strong standing in the Nielsen data, and has thus demonstrated the marketplace value of its programs.

Concerning Multimedia, the statistical way in which Multimedia set out to demonstrate undermeasurement of its specials in this proceeding is different from the way it attempted to show undermeasurement in the last proceeding, and therefore our analysis has to be different. In the 1985 proceeding, Multimedia's exhibit on undermeasurement included one

factor that has been left out of this year's exhibit - cable subscribership. Cable subscribership is a factor, because not all distant retransmissions of broadcast signals have equal impact.

This year, Multimedia first alleged that its series and specials were undermeasured simply by the fact that 3/4 of their airings took place on broadcast stations not selected to be in the study. However, as our findings demonstrate, the Nielsen study only chose 1/4 of all relevant broadcast stations to measure, so that Multimedia's programs received approximately average treatment.

Multimedia's second exhibit on undermeasurement was misleading because it included many nonrelevant broadcast stations, that is, stations that were not retransmitted by a Form 3 cable system.

It could not be shown from Multimedia's two exhibit whether there was undermeasurement. Our conclusion of the record is that there was not. This is not a contradiction from our finding of last year that there was undermeasurement. The basic criticism advanced by critics of the Nielsen study is that for small claimants it can be capricious. One year, it may undermeasure, the next year, it can overmeasure. Therefore, a claimant must continue to prove undermeasurement in order to get credit for it.

Regarding the other indicia of Multimedia's claim, we perceive two indications of changed circumstances, the improvement in "Sally Jessy Raphael" and the improvement in the Nielsen study. "Sally Jessy Raphael" was syndicated to more stations in 1986, 46 of which were retransmitted by Form 3 cable systems. Improvements for "Sally Jessy Raphael" were reflected in the Nielsen data. Overall, the Nielsen data for all Multimedia programming improved Multimedia's relative share by 23.5%.

We do not consider that there was changed circumstances for "Donahue" or for the other programs belonging to Multimedia. For "Donahue," the changes in ratings tend to prove that "Donahue" remains strong, but are not such as to warrant a finding of changed circumstances. Multimedia's advertising and time exhibits were sufficiently impeached by MPAA to preclude any finding of changed circumstances. The time study included many broadcast stations which were not retransmitted by any cable system on a distant signal basis. So improvements, if there were any, in time on the air might not be so for distant signal cable retransmissions. For the other programming, Multimedia did not allege changed circumstances.

On the issue of WTBS, Multimedia presented submissions by TBS to the SEC and the FCC purporting to show that TBS pays program suppliers a premium for their programs because of the special position station WTBS has in the cable market. However, TBS' submissions were essentially out-of-court statements; Multimedia's witness could not answer for the factual truth of the statements contained in them. MPAA's cross examination

exhibits were successful in impeaching the allegations contained in TBS exhibits, so the Tribunal could not give them credit. Multimedia's argument that the Tribunal should find that program suppliers who syndicate to WTBS incur no harm because of the alleged premiums they get from WTBS was not proved. Nor could we find that WTBS intentionally schedules its programs, such as the Goodwill Games, during sweep periods for cable royalties, because many other Olympics have been scheduled during July.

On the contrary, we are generally persuaded by MPAA's showing that Multimedia has used self-help to avoid harming its distribution of its programs by not selling to the broadcast stations with the most cable retransmissions. To this extent, the Tribunal believes that Multimedia's award should be somewhat closer to its Nielsen figure.

It should be noted that although we have stated numerous times in the past that the Nielsen study is the starting point, it is obvious from a reading of our past Phase II decisions that the awards have never been based upon a strict application of Nielsen figures. In Phase II, both Multimedia and NAB have long received awards which are several times higher than indicated by Nielsen data. At the same time, past increases or decreases in Nielsen have not resulted in the same corresponding percentage of increase or decrease in Multimedia or NAB awards. See, for example, the 1982 and 1984 cable distribution proceedings. Such changes in Nielsen are but one factor in determining changed

circumstances. Similarly, this year the Tribunal declines to apply directly Nielsen gains absent consideration of other factors to elevate changed circumstances.

In conclusion, regarding Multimedia, we believe that Multimedia's 23% improvement in the Nielsen study, which reflect, among other things, the improvement in "Sally Jessy Raphael" is offset by our finding that there was no undermeasurement of Multimedia's specials in 1986, and that Multimedia incurs somewhat less harm than other program suppliers who syndicate to the broadcast stations with greater cable retransmissions. Consequently, the Tribunal has determined to award Multimedia 0.825%, the same as in the last proceeding.

Concerning NAB, NAB has improved on the weaknesses in its case which the Tribunal perceived in the 1984 proceeding. Whereas in the 1984 proceeding, NAB could not represent to the Tribunal that each one of the broadcast stations listed in Exhibit II-2 were retransmitted by at least one cable system on a distant signal basis, this year it was able to. Similarly, NAB took extra steps to confirm and verify the information it had gathered from its represented stations

NAB was also criticized in the 1984 proceeding for offering no proof of the marketplace value of its represented programs. The Tribunal particularly noted that NAB's programs change from year to year so that previously shown marketplace value for other program could not suffice to establish marketplace value for the new programs. NAB produced a witness this year to address the marketplace value of NAB's programs. However, while continuing

to credit NAB for some value to its programs meriting an award higher than its Nielsen share, the Tribunal has determined to adjust NAB's share slightly downward from 0.7% to 0.675%, based primarily on a lack of proof that the regional programs have as special an appeal to particular audiences as NAB's witness said they do, and based upon MPAA's showing that these regional programs are also available over-the-air from regional broadcast networks.

The downward adjustment in NAB's award is not related to any fluctuation in its Nielsen share. As previously noted, the Tribunal has never taken the statistical result of the Nielsen study as having pin-point accuracy. The 3.5% decline for NAB, from 0.404% to 0.390%, was considered by the Tribunal to be de minimis.

Concerning NAB's assertion of undermeasurement of its specials in the Nielsen study, we first analyzed whether the NAB programs were on selected broadcast stations more or less than the statistical average. Since the Nielsen study measured 113 out of 437 stations, or 25.9%, NAB's result of 116 out of 395 stations, or 29.4%, being measured, does not show any undermeasurement.

However, it would be of no help for a special to be on a selected Nielsen station if it was aired outside of the sweep periods. 12 of NAB's programs were actually measured by the Nielsen study, but we do not know if they were measured once or more than once. We are inclined to conclude, however, that NAB's specials were probably undermeasured. To that extent, some

amount of undermeasurement has already been built into NAB's award for the past several proceedings. However, our conclusion is frustrated by a lack of solid evidence. As we said previously on the issue of undermeasurement, to show it requires putting in the record the broadcast stations which aired the programs, when, whether the programs were aired within or outside a Nielsen sweep period, which cable systems carried them, and their subscribership.

Allocations

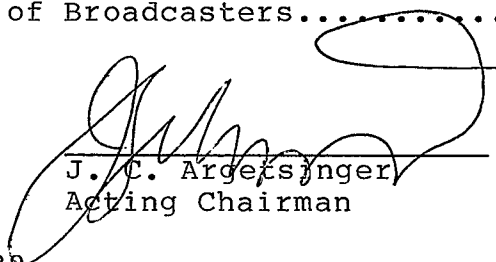
Pursuant to the Phase I settlement, the Tribunal has adopted the following allocation to categories of claimants in Phase I of the 1986 cable copyright royalties fees available for distribution.

After subtracting the stipulated award to National Public Radio of 0.18% of the entire fund,

<u>Category</u>	<u>Basic</u>	<u>3.75%</u>	<u>Syndex</u>
Program Suppliers	67.10	72.00	95.00
Sports	16.35	17.50	0
Noncommercial Television	5.20	0	0
Commercial Television	5.00	5.00	0
Music	4.50	4.50	4.50
Devotional Claimants	1.10	0.75	0
Canadian Claimants	0.75	0.25	0
Commercial Radio	0	0	0

The allocation adopted by the Tribunal under Phase II for the individual claimants in the Program Suppliers category is as follows:

Motion Picture Association of America, Inc.....	98.500%
Multimedia Entertainment, Inc.....	0.825%
National Association of Broadcasters.....	0.675%



J. C. Argetsinger
Acting Chairman

Dated: April 18, 1989

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December 21, 1987

Mr. Mario F. Aguero
Chairman
Copyright Royalty Tribunal
Suite 450
1111 20th Street, N.W.
Washington, D.C. 20036

Re: Docket No. 88-2-86CD

Dear Mr. Aguero:

Please be advised that effective immediately the following individual should be removed from the service list in the above-referenced matter:

Amy R. Doberman, Esq.
Schnader, Harrison, Segal & Lewis
1111 19th Street, N.W., Suite 1000
Washington, D.C. 20009

In addition, the following individual should be added to this service list:

Ronald E. Karam, Esq.
Schnader, Harrison, Segal & Lewis
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Philadelphia, Pennsylvania 19103

Please adjust your records to reflect these changes. If you have any questions, please call me at the above number.

Sincerely yours,


Amy R. Doberman

cc: Robert Cassler, Esq.
Ronald E. Karam, Esq.