PBS

NOV 9 1992

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November 9, 1992

Honorable Cindy Daub
Chairman
Copyright Royalty Tribunal
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009

Re: 1992 Public Broadcasting Rate Adjustment
Proceeding No. 92-2-PBRA

Dear Chairman Daub:

Attached is the Public Broadcasting's Proposed Findings and Conclusions of Law in the above referenced case filed pursuant to the Tribunal's order dated October 30, 1992.

Sincerely,

Sharon White Senghor
Associate General Counsel

Attachment

Public Broadcasting Service
1320 Braddock Place Alexandria, VA 22314-1698 (703)739-5000

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of	)	
	)	CRT Docket No. 92-2-PBRA
1992 Public Broadcasting	)	
Rate Adjustment Proceeding	)	

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA	)	
	:	ss.:
CITY OF ALEXANDRIA	)	

Sharon Senghor of 1429 Madison Street, N.W., Washington, D.C., being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 9th day of November, 1992, I served a copy of Public Broadcasting's Proposed Findings and Conclusions of Law submitted in the above referenced case, upon the individuals on the attached service list by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City of Alexandria, State of Virginia.

Sworn to before me this
9th day of November, 1992

Carolyn M. Arthur
Notary Public
My Commission expires October 31, 1995

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COPYRIGHT ROYALTY TRIBUNAL
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PROPOSED RATES AND SUPPORTING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PUBLIC BROADCASTING SERVICE AND NATIONAL PUBLIC RADIO

1. Public Broadcasting Service ("PBS") and National Public Radio ("NPR") (collectively, "Public Broadcasting") hereby jointly submit proposed rates and supporting proposed findings of fact and conclusions of law in accordance with the order dated October 30, 1992 issued by the Copyright Royalty Tribunal ("CRT" or "Tribunal").

PROPOSED RATES

2. Attached as Appendices 1 and 2 are proposed amendments of CRT regulations, Part 304, Sections 1-13, reflecting proposed rates and related terms and conditions for the performance and recording of published nondramatic musical compositions by PBS, NPR and other public broadcasting entities, as well as proposed rates and related terms and conditions for the use of published pictorial, graphic and sculptural works by PBS and other public broadcasting entities. Appendix 1 is a version that has been

marked to delineate the proposed changes in the regulations; Appendix 2 is a "clean" version of the regulations after amendment as proposed. The record source of these appendices is 1992 Public Broadcasting Exhibits ("PB Exhs.") 1-2.

PROPOSED FINDINGS OF FACT IN SUPPORT OF PROPOSED RATES

I. Introduction

3. Section 118 of the Copyright Act of 1976, 17 U.S.C. § 118, relates to certain uses of musical and visual works in connection with noncommercial broadcasting. The law encourages copyright owners and public broadcasting entities to negotiate in good faith regarding the terms and rates of royalty payments for such uses. 17 U.S.C. § 118(b). In the absence of voluntary license agreements between copyright owners and public broadcasting entities, the Tribunal is to determine reasonable rates and terms for such uses by public broadcasting. 17 U.S.C. § 118(b). The role of the Tribunal is to determine rates and terms only for uses not covered by voluntary license agreements; and in establishing such rates and terms, the Tribunal may consider -- and in the past has relied upon -- the rates for comparable uses under voluntary license agreements. 17 U.S.C. § 118(b)(3); see infra ¶¶ 5-8.

4. This law generally became effective January 1, 1978. The initial voluntary license agreements and Tribunal-designated

rates and terms were for a five-year period ending December 31, 1982. 17 U.S.C. § 118(b). Such procedure has been and is to be repeated at five year intervals. 17 U.S.C. § 118(c). The Tribunal's proceedings to determine rates and terms are to be concluded during the final six months of each five-year period, and become effective on the following January 1st. 17 U.S.C. § 118(b)(3),(c). Said rates and terms are binding upon publication in the Federal Register. 17 U.S.C. § 118(b)(3).

5. Historically, the Tribunal has set rates and terms for those copyright owners unaffiliated with any of the organizations with which Public Broadcasting has negotiated voluntary agreements that are consistent with and/or correspond to the rates and terms contained in Public Broadcasting's voluntary agreements. For example, for the initial five-year period 1978-1982, the Tribunal established "per composition" rates and terms for the use of music not in the repertories or catalogues of ASCAP, BMI, SESAC or the Harry Fox Agency ("Fox") (entities with which voluntary agreements had been negotiated) that corresponded to the "per composition" rate schedules contained in the license agreements entered into with SESAC and Fox. Terms and Rates of Royalty Payments, 43 F.R. 25068, 25069-70.

6. For the next five-year license period (1983-1987), voluntary license agreements for the use of musical works were negotiated between Public Broadcasting and ASCAP, BMI, SESAC and

Fox, respectively. PBS also entered into an agreement with the American Mechanical Rights Agency ("AMRA"). The Tribunal once again established rates and terms for the use of musical works not included in the repertories or catalogues of these organizations by reference to the per composition rate schedules contained in the voluntary agreements negotiated with SESAC, Fox and AMRA. 1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting; Terms and Rates of Royalty Payments, 47 F.R. 57923, 57926-27.

7. For the most recent five-year period beginning January 1, 1988 and ending December 31, 1992, Public Broadcasting entered into voluntary license agreements for the use of music with ASCAP, BMI, SESAC and Fox, respectively. PBS also negotiated voluntary agreements with AMRA, Bug Music and Copyright Management, Inc. ("CMI"). For the first time, PBS was also able to negotiate a voluntary license agreement in the visual arts field. Agreements for all or part of the 1988-1992 period were negotiated with Artists Rights Society ("ARS") and the Visual Artists and Galleries Association, Inc. ("VAGA"). In setting rates and terms for copyright owners unaffiliated with any of these music or visual rights organizations, the Tribunal relied on the per use or per work rates contained in the SESAC, Fox and ARS agreements and provided, in the CRT regulations, for rates corresponding to those which had been voluntarily negotiated.

1987 Adjustment of the Public Broadcasting Royalty Rates and Terms, 52 F.R. 49010.

8. The current proceeding relates to the forthcoming five-year period beginning January 1, 1993 and ending December 31, 1997. With regard to the use of music, Public Broadcasting has entered into voluntary license agreements with ASCAP, BMI, SESAC and Fox, respectively. 1992 PB Exhs. 3-6. PBS' voluntary license agreements with AMRA, CMI and Bug Music have been extended through December 31, 1997. 1992 PB Exhs. 8-10. PBS' voluntary agreements in the visual arts field, with ARS and VAGA, also have been extended to cover the period through December 31, 1997. 1992 PB Exhs. 11-12. The current proceedings thus require the establishment of rates and terms only for Public Broadcasting's use of musical works that are not contained in the repertories or catalogues of ASCAP, BMI, SESAC, Fox, AMRA, CMI or Bug Music, and its use of visual works that are not represented by ARS or VAGA. Affidavit of Paula A. Jameson, sworn to October 19, 1992 ("Jameson Aff."), ¶¶ 5, 7, 10, 20; Affidavit of Theodore A. Miles, sworn to October 19, 1992 ("Miles Aff."), ¶¶ 2, 5.

9. The current proceeding was initiated by the Tribunal's Notice of Commencement of Proceedings dated June 30, 1992. Certain procedural rules and dates were established by the Tribunal's Order dated September 15, 1992. Written direct cases were filed on October 19, 1992. No party has objected to the

Tribunal's disposition of this proceeding on a "paper" record. The record was closed on October 30, 1992 pursuant to the Tribunal's Order of that date.

II.
Use of Musical Works

10. Public Broadcasting submitted proposed amendments of the CRT regulations relative to the rates and terms for rights to perform and record published nondramatic musical works that are not in the repertories or catalogues of parties with which voluntary license agreements have been reached. See 1992 PB Exhs. 1-2.

11. The proposed amendments to the rate schedules relating to the use of musical works -- one for performance rights (CRT regulation § 304.4) and the other for recording or synchronization rights (CRT regulation § 304.7) -- are premised on the voluntary license agreements negotiated by Public Broadcasting with respect to music performing and recording rights for the 1993-1997 period.

12. Each of the agreements Public Broadcasting has entered into with respect to music performing rights requires equal, flat annual payments to be made to ASCAP, BMI and SESAC, respectively, during the 1993-1997 period. In comparison to the fees payable under the prior license agreement, the new ASCAP agreement for the period 1993-1997 reflects a fifteen percent increase in the fees payable to ASCAP over the term of the license. The new BMI

license agreement is consistent with the ASCAP agreement in terms of the overall level of fee increase from the prior, 1988-1992 BMI-Public Broadcasting agreement. Jameson Aff. ¶ 2-3. The adjustments proposed by Public Broadcasting for the rates contained in Section 304.4 (applicable to copyright owners unaffiliated with the performing rights organizations with which Public Broadcasting has reached voluntary license agreements, whose musical works are performed in PBS or PBS station programming, NPR or NPR station programming) reflect the same structure -- i.e., flat, annual per use rates for each type of use embraced by § 304.4 in each of the next five years -- and the same level of increase accorded those owners of music performance rights who are affiliated with ASCAP or BMI. Jameson Aff. ¶¶ 5-6; Miles Aff. ¶ 3-4.

13. Similarly, with respect to recording rights, Public Broadcasting has negotiated a voluntary agreement with the Harry Fox Agency (by far the largest agency engaged in the licensing of such rights for copyright owners) for the period 1993-1997 (PB Exh. 6) that calls for a fifteen percent rate increase compared to the rates contained in the prior Fox-Public Broadcasting license agreement. The rates for public television (which are applicable to PBS-distributed programming) are expressed as per use fees based on the type of use made of the musical composition; the applicable rate for public radio programming is

expressed as a fee payable in five equal annual installments, in arrears. This agreement forms the basis for Public Broadcasting's proposed amendments to the rates reflected in Section 304.7 for owners of recording rights that are not unaffiliated with Fox (or the other smaller agencies with which voluntary license agreements have been reached). Public Broadcasting proposes to calculate an increase in those rates in precisely the same manner as the Fox increase was calculated, to wit: by averaging the annual rates applicable in each year of the prior, 1988-1992 license period; by then multiplying that amount by 115 percent; and by then applying that new fifteen-percent higher rate throughout the five-year license term beginning on January 1, 1993. Under Public Broadcasting's proposal, the rates provided in Section 304.7 for PBS-distributed and non PBS-distributed programming would in the aggregate equal, as in years past, the single rate provided in the Fox agreement for each specified use category. Jameson Aff. ¶¶ 12-13.

14. The new rates Public Broadcasting proposes to incorporate in Sections 304.4 and 304.7 effectively mirror the rate increases negotiated with music rights organizations at arms' length in the marketplace. These rates provide fair and reasonable remuneration to unaffiliated copyright owners for the use of their works by Public Broadcasting entities.

15. Use of such marketplace rates as a benchmark in the establishment of compulsory license fees is favored by the statute under which the Tribunal operates, as such marketplace rates are by definition an excellent measure of the value of copyrighted music.

16. No party has opposed the proposed rates and terms relative to the use of musical works on public television or public radio programs.

III.
Use of Visual Works

17. Public Broadcasting submitted proposed amendments of the CRT regulations relative to the rates and terms for the use of published pictorial, graphic and sculptural works by PBS and other public broadcasting entities. 1992 PB Exhs. 1-2. Public Broadcasting's additional exhibits with respect to the use of visual works comprise voluntary license agreements with ARS and VAGA, which, pursuant to their terms, have been extended through December 31, 1997. PB Exhs. 11-12.

18. The proposed rates for the use of visual works set forth in Appendices 1 and 2, at § 304.8, consist of a grid of per work rates which correspond to the per work rates to be paid under the ARS and VAGA agreements during the 1993-1997 period.

19. In 1987, the Tribunal adopted per work rates to be paid to unaffiliated owners of copyrights in pictorial, graphic or sculptural works that were directly comparable to the rate

schedules contained in the voluntary license agreement between PBS and ARS. PBS subsequently entered into a voluntary license agreement with VAGA (in 1989), at rates which corresponded to those in the ARS agreement.

20. Although, in the past, PBS has attempted to reach voluntary agreements with the Coalition of Visual Artists ("COVA") and the American Society of Magazine Photographers ("ASMP"), those organizations do not have the power to act on behalf of their members in areas essential to the negotiation of a voluntary license agreement. They do not have the power to bind their members, to receive royalty payments on their behalf or to provide the necessary warranties and indemnities to PBS. 1982 Tr. at 316; 1987 Tr. at 60-61. In meetings with Mr. Tad Crawford, a representative of COVA (which includes ASMP), in 1982 and 1987, he indicated that authority did not exist to bind the members of COVA. Id. The written case presented by COVA in the instant proceeding does not argue to the contrary.

21. As with respect to the determination of rates for "unaffiliated" musical works, the Tribunal, in establishing rates for "unaffiliated" visual works, should be guided by the rates reflected by voluntary license agreements entered into by Public Broadcasting applicable to comparable rights. Accordingly, the Tribunal should use as a benchmark -- as it did in 1987 -- the rates reflected by PBS' voluntary license agreement with ARS

(and, now, VAGA). That, as noted, would support the rates proposed by Public Broadcasting as reflected in Appendices 1 and 2 at § 304.8.

IV.
The previously rejected arguments of COVA should again be rejected by the Tribunal.

22. The written case presented by COVA in the instant proceeding asserts a series of arguments previously advanced by COVA and rejected by the Tribunal in each of the last three Public Broadcasting Rate Adjustment proceedings. Specifically, COVA here argues: (i) that the CRT should recommend repeal of the compulsory license for pictorial, graphic and sculptural works, and (ii) that the CRT should set fees for the use of such works based on stock photo house rates. Such rates are astronomically higher than the rates historically set by the CRT under Section 304.8. For example, the statement submitted by Mr. Crawford on October 19, 1992 ("1992 Crawford Statement") suggests that PBS and other public broadcasting entities should pay $1,500 for the single use of a pictorial image. This is in stark contrast to the highest rate previously set by the CRT, of $120.25, for use of a visual work for program identification or thematic use in a PBS-distributed program. See CRT regulations, Section 304.8(b)(1).

23. The two identical arguments here put forward by COVA have been asserted in past CRT proceedings -- without success.

Since the first Public Broadcasting Rate Adjustment proceeding in 1978, a recurring theme of COVA has been to criticize implementation of Section 118 as it applies to visual works. See Statement of Tad Crawford dated September 18, 1987; 1982 Crawford Statement, Exh. B at pp. 8-9, Exh. C at pp. 7-9; 1978 Tr. at 411-13, 416-17, 429-30. Similarly, since 1978, COVA has consistently proposed the adoption of extraordinarily high rates premised on price quotations from New York City stock photo houses and a booklet of rates published by ASMP. PBS stations and program producers rarely use stock photo houses; indeed, such photo houses deal primarily with the print media and their photos are typically used for commercial advertising purposes. 1982 Tr. 381-82, 422-23; 1982 COVA Exhs. B and C.

24. The positions urged by COVA here have been thrice-rejected by the Tribunal -- in 1978, 1982 and 1987. No new evidence has been submitted by COVA in this proceeding, presumably because it feels, as stated in 1987, that it would be "fruitless" to try and present a different view. 1987 Crawford Statement, p. 10. Certainly, nothing contained in COVA's direct case in the instant proceeding warrants modification of the Tribunal's prior rulings with respect to the efficacy of Section 118 or the rates required thereunder for Public Broadcasting's use of published pictorial, graphic and sculptural works.

25. The proposed conclusions of law which follow (¶ 41 infra) contain case law indicating that an administrative agency should not reverse a previous decision in the absence of changed circumstances that explain and justify such reversal. Here, the Tribunal has made three previous decisions, now spanning the fifteen-year period of operation under the statute, all of which are consistent with each other. No changes in circumstances have occurred warranting a reversal of those decisions. Because COVA has once again asserted these positions, however, we respond to the merits of each briefly below.

A.
Repeal of Section 118 is an issue outside the scope of this proceeding, nor is it warranted.

26. Section 118 does not authorize the Tribunal to generate reports recommending legislative changes, an authority that was granted to the Copyright Office relative to the use of nondramatic literary works. § 17 U.S.C. 118(e)(2). While Tribunal officials clearly have the right to express their views on the subject in response to questions from committees of the Congress, it is exclusively within the province of the Congress to determine whether it is desirable to consider any repeal or modification of the statute in this respect.

27. We respectfully submit that the only function of the Tribunal in this proceeding is to establish, for the period January 1, 1993 to December 31, 1997, reasonable rates and terms

for public television's use of visual works pursuant to the provisions of Section 118 of the Copyright Act as enacted in 1976.

28. Moreover, COVA's arguments with respect to the purported lack of necessity for a compulsory license for visual works (and the value to PBS of such a license) evidence a fundamental misapprehension of the purpose of the compulsory license incorporated in Section 118 of the Copyright Act. See 1992 Crawford Statement at 2-3. Congress intended public television to have access to the nation's visual arts in the pursuit of its mission to provide educational and cultural programming. This access is important as to each individual work of art that might be needed or useful for this national purpose. Such access is vital irrespective of the "volume" of the uses of visual works actually made in any given time period.

29. The value of the compulsory license resides in its availability, not necessarily in the volume of uses made pursuant to its terms. While public broadcasting entities may not always find themselves in a position to use the compulsory license (see ¶ 30 infra), the value of that license for PBS and its producers is that -- when they do need the compulsory license -- it is indisputably there.

30. COVA's alternative assertion -- that the compulsory license serves as a shield for unreported uses by public

broadcasting entities (1992 Crawford Statement at 2-3) -- is equally unwarranted and lacking in evidentiary support. Mr. Crawford's statements with respect to the assertedly "minimal" uses of pictorial, graphic and sculptural works made by Public Broadcasting under the compulsory license both lack supporting evidence and ignore the many uses of such works made and reported by PBS stations which are outside the scope of the compulsory license (and which are thus separately negotiated and paid for). As to the latter point, PBS stations or producers often may need to acquire rights which exceed the scope of the rights granted under Section 118. Certain PBS stations (such as KCET, a major producer of public television programs locally in Los Angeles as well as for PBS distribution), for instance, often negotiate a license when needed to obtain ancillary rights -- such as foreign distribution -- that are not available under Section 118. 1987 Tr. 67-72. In sum, contrary to COVA's assertions, the volume of uses reported under Section 118 says nothing about Public Broadcasting's bona fides in fairly reporting and compensating copyright owners for the use of pictorial, graphic and sculptural works.

31. COVA's related contention that Public Broadcasting engages in inadequate efforts to locate copyright owners is similarly lacking in evidentiary support. See 1992 Crawford Statement at 3-4. Citing the name of a single individual whom

COVA claims to have been "easily locatable" says nothing of the significant efforts consistently made by PBS and its stations to locate copyright owners whose works appear on PBS or PBS station programming. Public Television works hard to administer the program for payment of royalties under both the musical and visual works regulations. In its efforts to locate "unaffiliated" composers and publishers who are entitled to receive payment, PBS has enjoyed cooperation from the music rights organizations, but it has not always received the same degree of cooperation from the visual arts organizations in locating visual artists. See 1982 Tr. 331, 340, 357; 1987 Tr. 50-51, 57-58. If COVA and/or ASMP would like to provide PBS with a current listing of their members, with names and addresses included, PBS would certainly welcome this resource. As it stands, the most recent listing PBS has been able to obtain from either organization dates back to 1982. If COVA/ASMP has a specific proposal for locating and delivering payments to current COVA/ASMP members, or a specific procedure that it would like to suggest be implemented for such purpose (which would, e.g., provide PBS with up-to-date information on copyright proprietors known to these organizations), PBS would be happy to consider any such systemic improvements. Absent such cooperation, PBS puts forth the best effort it can to locate copyright owners with the information it has available.

B.
There is no basis to reconsider
a rate proposal now
thrice-rejected by the Tribunal.

32. As COVA is essentially relying on evidence submitted in past proceedings in support of its contention that rates set by the Tribunal should be comparable to the commercial rates charged by stock photo houses and the published rates of ASMP, we will not here repeat all of the evidence previously submitted by Public Broadcasting in response to such contentions. See Proposed Findings of Fact and Conclusions of Law of Public Broadcasting Service, dated November 6, 1987, at pp. 24-35. We would simply observe, once again, that there is no evidentiary nor rational relationship between COVA's proposed rates and reasonable rates for public television's use of visual works -- as this Tribunal has found three times previously.

33. While museums, archives, historical societies and private collections are a major source of visual works for public television programs, commercial stock photo houses historically have been the least-used source for such program material. 1982 Tr. 356, 379-82; 1982 PB Exh. F, pp. 4-5. Surveys of public television stations confirm that this is the case. 1987 Tr. 51-52; 1987 PB Exh. 6. ASMP's own representatives have admitted that the use of photographs on television is "minimal" and "very rare"; stock photographs of COVA and ASMP members are primarily

used for advertising, corporate/industrial and editorial publishing purposes. 1982 Tr. 422.

34. It was for these reasons, among others, that the Tribunal previously determined:

> We have resolved that the Coalition evidence provides no basis for the establishment of reasonable royalty rates under section 118. In particular, we reject the use of stock photo house rates and rates published by the American Society of Magazine Photographers (ASMP) as the basis for the determination of section 118 rates. We concur in the PBS finding that "There is no clear or creditable evidence linking the New York City stock photo house letters or the ASMP booklet rates to television use of photographs." 1982 Decision, 47 F.R. at 57925.

35. COVA presented no new evidence in this regard in either the 1987 proceeding or in its most recent submission to the Tribunal that would warrant departure from that prior determination.

36. As to COVA's request that the CRT increase the rates for visual works under Section 304.8 of the regulations to reflect cost of living increases over the last five years (1992 Crawford Statement at 5), COVA has made no showing that the voluntarily negotiated market rates in effect with ARS and VAGA for the 1993-1997 period are either unfair or unreflective of the market rate for Public Broadcasting's use of the works of COVA members. Moreover, should the CRT provide rates for unaffiliated artists in Section 304.8 which are higher than the rates paid to

ARS and VAGA members under freely-negotiated agreements, it would: (i) subvert the Tribunal's policy of encouraging voluntary agreements; (ii) discourage future negotiation of voluntary agreements; and (iii) place a significant strain on the relationship between PBS and the two organizations with whom it has negotiated license agreements, with potentially adverse consequences for future cooperative efforts between these parties.

PROPOSED CONCLUSIONS OF LAW IN SUPPORT OF PROPOSED RATES

I. Musical Works

37. It is concluded that the rates and terms set forth in Appendices 1 and 2 at § 304.4 and § 304.7 are reasonable, within the meaning of 17 U.S.C. § 118(b), for the performance and recording of published nondramatic musical compositions by public broadcasting entities pursuant to Section 118. These rates and terms build upon the rates adopted by the Tribunal in 1987, and they are comparable to voluntary license agreements negotiated between Public Broadcasting and music rights organizations, as encouraged by the statute. 17 U.S.C. § 118(b). They are supported by the evidence in the record. No party has opposed these rates and terms.

II.
Visual Works

38. It is concluded that the rates and terms set forth in Appendices 1 and 2 at § 304.8 are reasonable, within the meaning of 17 U.S.C. § 118(b), for the use of published pictorial, graphic and sculptural works by PBS and other public broadcasting entities pursuant to Section 118. These rates and terms are a continuation of rates and terms previously adopted by the Tribunal in 1987. They correspond to the rates incorporated in the voluntary license agreements between PBS and ARS and between PBS and VAGA. Such a result is encouraged by the statute. 17 U.S.C. § 118(b). These rates are supported by the evidence in the record.

39. The only party that has opposed these rates and terms is COVA, which did not offer any new evidence in the record, but submitted a written direct case that makes the following arguments: (a) the Tribunal should recommend repeal of Section 118 as it relates to visual works, and (b) the CRT-designated rates are too low, and should be raised to the level urged by COVA in the 1982 and 1987 proceedings. In the proposed findings, supra, we have addressed each of these subjects. Our related proposed conclusions of law follow.

A.
Repeal of Section 118 is an issue outside the scope of this proceeding.

40. It is concluded that arguments concerning the merits of Section 118 as it relates to visual works are totally extraneous to the duty of the Tribunal in this proceeding. That duty is to carry out the statute by establishing rates and terms for the use of visual works by public broadcasting entities under Section 118. COVA's attempt to inject that issue here is an inappropriate effort to prejudice the Tribunal in dealing with the merits of this proceeding. Those merits relate to fair rates and terms under the statute as enacted by Congress, and nothing more.

B.
There is no basis to reconsider the extraordinarily high rates proposed by COVA that have thrice been rejected by the Tribunal.

41. It is concluded that there is no basis for the Tribunal to reconsider rates here proposed by COVA at levels that have thrice been rejected by the Tribunal. While the principle of stare decisis is not applied in administrative decisions to the same degree as in court decisions, government agencies are not free to change previous decisions arbitrarily or whimsically. They must respect their previous decisions, particularly where the factual circumstances are similar. If previous decisions are to be reversed, this is to be based upon changed circumstances

and conditions which explain and support that reversal. In re Permian Basin Area Rate Cases, 390 U.S. 627, 786, rehearing denied, 392 U.S. 917 (1968); Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977); F.T.C. v. Crowther, 430 F.2d 510, 513-514 (D.C. Cir. 1970); K.C. Davis, Adm. Law Treatise, § 20:9-11 (2d ed 1983).

42. The burden was on COVA to provide compelling evidence of changed circumstances or conditions that would warrant such a stark reversal of three prior Tribunal decisions. In asking the Tribunal, for the fourth time, to adopt extraordinarily high rates, COVA has not provided persuasive or compelling evidence of changed circumstances or conditions. Its direct written presentation simply repeats that which it has said before. All were arguments rejected by the Tribunal.

43. Those arguments were rejected for good reason. While Congress may not have intended, in enacting Section 118, that copyright owners subsidize public television, neither did Congress intend that public television be equated with commercial businesses, recognizing public television's special programming mission and limited financial resources. The House Committee report relative to Section 118 in the form as enacted by the Congress states as follows:

> The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967, that encouragement and support of noncommercial broadcasting is

> in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 117 (1976).

44. The Tribunal's prior decisions have carried out this legislative intent on the part of Congress. The Tribunal has correctly rejected COVA's evidence based upon commercial rates, addressed largely to the print media, at levels which are geared to the volume of circulation enjoyed by the commercial media. That evidence did not address the fair value of visual works to public television, with its more limited financial resources, special program mission and highly different volume of circulation.

45. In the instant proceeding, PBS has offered direct evidence of the fair value of visual works to public television, as reflected by rates voluntarily negotiated and accepted by two organizations representing visual artists.

46. The record in this and prior proceedings suggests that were the rates sought by COVA (or anything like them) ever adopted, the cost would be prohibitive even to the strongest public television producing stations. Such a result would undercut the very purpose of Section 118 to provide access to

works of art in programming to serve the nation's educational and cultural interests.

C.
Conclusion

47. The complaints of COVA about the existence of Section 118, its demonstrated lack of interest in cooperating with PBS to help administer the Section 118 copyright program and the extraordinarily high rates it has proposed evidence a total failure on COVA's part to appreciate the fact that public television is the television home for most visual artists, whose commercial work is almost exclusively in the print media. It is public television that produces cultural and other programs most likely to advance the cause of the visual arts, to create job positions for artists in the production of those programs, to utilize published pictorial, graphic and sculptural works under Section 118 and to utilize such works for ancillary purposes for which additional payments are made. The Tribunal's rates have provided fair payment as to those artists for the use of their works under Section 118, as demonstrated by the fact that copyright owners have agreed to such rates in the marketplace.

48. For all of the foregoing reasons, the proposed rates and terms set forth in Appendices 1 and 2 should be adopted, and the arguments of COVA should be rejected.

Respectfully submitted,

Evie C. Goldstein /sms

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November 9, 1992

APPENDIX 1

PROPOSED AMENDMENTS TO CRT REGULATIONS
PART 304, SECTIONS 1-13

§ 304.1. General

This Part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, ~~1988~~ 1993 and ending on December 31, ~~1992~~ 1997. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity

As used in this Part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3. [Reserved.]

§ 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d)

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d) of

copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by Sections 304.5 and 304.6, and except for compositions which are the subject of voluntary license agreements, such as the PBS/NPR/ASCAP, the PBS/NPR/BMI and the PBS/NPR/SESAC license agreements.

(a) Determination of royalty rate. (1) For the performance of such a work in a feature presentation of PBS:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$166.00~~	~~$175.00~~	~~$184.00~~	$199.18

(2) For the performance of such a work as background or theme music in a PBS program:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 42.00~~	~~$ 44.35~~	~~$ 46.70~~	$ 50.46

(3) For the performance of such a work in a feature presentation of a station of PBS:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 14.00~~	~~$ 15.00~~	~~$ 16.00~~	$ 17.02

(4) For the performance of such a work as background or theme music in a program of a station of PBS:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 3.00~~	~~$ 3.15~~	~~$ 3.30~~	$ 3.59

(5) For the performance of such a work in a feature presentation of NPR:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 16.80~~	~~$ 17.75~~	~~$ 18.70~~	$20.19

(6) For the performance of such a work as background or theme music in an NPR program:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 4.10~~	~~$ 4.30~~	~~$ 4.50~~	$ 4.90

(7) For the performance of such a work in a feature presentation of a station of NPR:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ 1.20~~	~~$ 1.25~~	~~$ 1.30~~	$ 1.43

(8) For the performance of such a work as background or theme music in a program of a station of NPR:

~~1988-89~~	~~1990-91~~	~~1992~~	1993-1997
~~$ .40~~	~~$ .45~~	~~$ .50~~	$ .51

(9) For the purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS

or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) **Payment of royalty rate.** The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) **Records of use.** PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated ~~October 5, 1987~~ October , 1992 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) **Terms of use.** The ~~applicable fee~~ fees provided in this schedule for the performance of a musical work ~~shall be the fee for the time period during which the first performance~~ in a program ~~occurred, and~~ shall cover performances of such work in

such program for a period of three years following the first performance.

§ 304.5. [This section does not apply to PBS, NPR, or their stations.]

§ 304.6. [This section does not apply to PBS, NPR or their stations.]

§ 304.7. Recording rights, rates and terms

(a) Scope. This section establishes rates and terms for the recording of nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) Royalty rate. (1) (i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the

following per-composition rates by the number of different compositions in that PBS-distributed program:

	~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
Feature	~~$83.35~~	~~$87.70~~	~~$92.05~~	$99.85
Concert feature (per minute)	~~24.95~~	~~26.35~~	~~27.75~~	29.98
Background	~~42.00~~	~~44.35~~	~~46.70~~	50.46
Theme:				
Single program or first series program	~~42.00~~	~~44.35~~	~~46.70~~	50.46
Other series program	~~17.05~~	~~18.00~~	~~18.95~~	20.48

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

	~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
Feature	~~$ 6.65~~	~~$ 7.30~~	~~$ 7.95~~	$ 8.25
Concert feature (per minute)	~~1.80~~	~~1.90~~	~~2.00~~	2.17
Background	~~3.00~~	~~3.15~~	~~3.30~~	3.59
Theme:				
Single program or first series program	~~3.00~~	~~3.15~~	~~3.30~~	3.59
Other series program	~~1.20~~	~~1.25~~	~~1.30~~	1.43

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this

section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

	~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
Feature	~~$ 9.00~~	~~$ 9.50~~	~~$10.00~~	$10.81
Concert feature (per minute)	~~13.00~~	~~14.00~~	~~15.00~~	15.87
Background	~~4.50~~	~~4.75~~	~~5.00~~	5.41
Theme:				
Single program or first series program	~~4.50~~	~~4.75~~	~~5.00~~	5.41
Other series program	~~1.80~~	~~1.90~~	~~2.00~~	2.16

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) [This subsection does not apply to PBS, NPR, or their stations.]

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three-year period -- 50 percent; each three-year period thereafter -- 25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, ~~1992~~ 1997 shall be subject to the royalty rates established in this schedule.

(c) Payment of royalty rates. The required royalty rates shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) Records of use. (1) Maintenance of cue sheets. PBS and its stations, NPR, or other television public broadcasting entity shall maintain and make available for examination pursuant to subsection (e) copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) Filing of use reports with the Copyright Royalty Tribunal (CRT).

(1) Deposit of cue sheets or summaries. PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the CRT copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the CRT upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical

composition of such owner has been recorded pursuant to this schedule.

§ 304.8. Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) Scope. This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) Royalty rate. (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

(A) For a featured display of a work.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 55.00~~	~~$ 58.00~~	~~$ 61.00~~	$ 61.00

(B) For background and montage display.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 26.75~~	~~$ 28.25~~	~~$ 29.75~~	$ 29.75

(C) For use of a work for program identification or for thematic use.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$108.25~~	~~$114.25~~	~~$120.25~~	$120.25

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 35.50~~	~~$ 37.50~~	~~$ 39.50~~	$ 39.50

(ii) For such uses in other than PBS-distributed programs:

(A) For a featured display of a work.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 35.50~~	~~$ 37.50~~	~~$ 39.50~~	$ 39.50

(B) For background and montage display.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 18.25~~	~~$ 19.25~~	~~$ 20.25~~	$ 20.25

(C) For use of a work for program identification or for thematic use.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 72.75~~	~~$ 76.75~~	~~$ 80.75~~	$ 80.75

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

~~1988-1989~~	~~1990-1991~~	~~1992~~	1993-1997
~~$ 18.25~~	~~$ 19.25~~	~~$ 20.25~~	$ 20.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full-screen for three seconds or less, is deemed to be a "background or montage display".

(3) "Thematic use" is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine art.

(c) Payment of royalty rate. PBS or other public broadcasting entity shall pay the required royalty fees to each

copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) Records of use. (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) Filing of use reports with the CRT. (1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such

notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) Terms of use. (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule. Succeeding broadcast use periods will require the following additional payment: second three-year period - 50 percent; each three-year period thereafter - 25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, ~~1992~~ 1997 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118 (f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production

of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 304.9. Unknown copyright owners

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this Part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 304.10. [This section does not apply to PBS, NPR, or their stations.]

§ 304.11 Notice of restrictions on use of reproductions of transmission programs

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of no

more than seven days form the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 304.12. Amendment of certain regulations

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this Part adopted pursuant to 17 U.S.C. 118(b)(3) by which "copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities."

§ 304.13. Issuance of interpretative regulations

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretive regulations as may be necessary or useful to the implementation of this Part. Such regulations may not prior to January 1, ~~1993~~ 1998, alter the schedule of rates and terms of royalty payments by this part.

APPENDIX 2

PROPOSED CRT REGULATIONS AS AMENDED
PART 304, SECTIONS 1-13

§ 304.1. General

This Part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 1993 and ending on December 31, 1997. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity

As used in this Part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3. [Reserved.]

§ 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d)

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d) of

copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by Sections 304.5 and 304.6, and except for compositions which are the subject of voluntary license agreements, such as the PBS/NPR/ASCAP, the PBS/NPR/BMI and the PBS/NPR/SESAC license agreements.

(a) Determination of royalty rate. (1) For the performance of such a work in a feature presentation of PBS:

1993-1997

$199.18

(2) For the performance of such a work as background or theme music in a PBS program:

1993-1997

$ 50.46

(3) For the performance of such a work in a feature presentation of a station of PBS:

1993-1997

$ 17.02

(4) For the performance of such a work as background or theme music in a program of a station of PBS:

1993-1997

$ 3.59

(5) For the performance of such a work in a feature presentation of NPR:

1993-1997

$20.19

(6) For the performance of such a work as background or theme music in an NPR program:

1993-1997

$ 4.90

(7) For the performance of such a work in a feature presentation of a station of NPR:

1993-1997

$ 1.43

(8) For the performance of such a work as background or theme music in a program of a station of NPR:

1993-1997

$ .51

(9) For the purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) **Payment of royalty rate.** The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) **Records of use.** PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated October __, 1992 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) **Terms of use.** The fees provided in this schedule for the performance of a musical work in a program shall cover performances of such work in such program for a period of three years following the first performance.

§ 304.5. [This section does not apply to PBS, NPR, or their stations.]

§ 304.6. [This section does not apply to PBS, NPR or their stations.]

§ 304.7. Recording rights, rates and terms

(a) Scope. This section establishes rates and terms for the recording of nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) Royalty rate. (1) (i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in that PBS-distributed program:

	1993-1997
Feature	$99.85
Concert feature (per minute)	29.98
Background	50.46
Theme:	
Single program or first series program	50.46
Other series program	20.48

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

	1993-1997
Feature	$ 8.25
Concert feature (per minute)	2.17
Background	3.59
Theme:	
Single program or first series program	3.59
Other series program	1.43

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

	1993-1997
Feature	$10.81
Concert feature (per minute)	15.87
Background	5.41
Theme:	
Single program or first series program	5.41
Other series program	2.16

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) [This subsection does not apply to PBS, NPR, or their stations.]

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding

broadcast use periods will require the following additional payment: second three-year period -- 50 percent; each three-year period thereafter -- 25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the royalty rates established in this schedule.

(c) Payment of royalty rates. The required royalty rates shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) Records of use. (1) Maintenance of cue sheets. PBS and its stations, NPR, or other television public broadcasting entity shall maintain and make available for examination pursuant to subsection (e) copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) Filing of use reports with the Copyright Royalty Tribunal (CRT).

(1) Deposit of cue sheets or summaries. PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the CRT copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the CRT upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

§ 304.8. Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) Scope. This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) Royalty rate. (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

(A) For a featured display of a work.

1993-1997
$ 61.00

(B) For background and montage display.

1993-1997
$ 29.75

(C) For use of a work for program identification or for thematic use.

1993-1997
$120.25

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine

art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997

$ 39.50

(ii) For such uses in other than PBS-distributed programs:

(A) For a featured display of a work.

1993-1997

$ 39.50

(B) For background and montage display.

1993-1997

$ 20.25

(C) For use of a work for program identification or for thematic use.

1993-1997

$ 80.75

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997

$ 20.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the

single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full-screen for three seconds or less, is deemed to be a "background or montage display".

(3) "Thematic use" is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine art.

(c) Payment of royalty rate. PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not

later than January 31 for uses during the last six months of the preceding calendar year.

(d) Records of use. (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) Filing of use reports with the CRT. (1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description

of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) Terms of use. (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule. Succeeding broadcast use periods will require the following additional payment: second three-year period - 50 percent; each three-year period thereafter - 25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118 (f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 304.9. Unknown copyright owners

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this Part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 304.10. [This section does not apply to PBS, NPR, or their stations.]

§ 304.11 Notice of restrictions on use of reproductions of transmission programs

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of no more than seven days form the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with

these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 304.12. Amendment of certain regulations

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this Part adopted pursuant to 17 U.S.C. 118(b)(3) by which "copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities."

§ 304.13. Issuance of interpretative regulations

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretive regulations as may be necessary or useful to the implementation of this Part. Such regulations may not prior to January 1, 1998, alter the schedule of rates and terms of royalty payments by this part.