

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

In the Matter of )  
Distribution of )  
Cable Royalty Fees )

BRIEF OF THE  
MOTION PICTURE ASSOCIATION OF AMERICA, INC.,  
ITS MEMBER COMPANIES, AND OTHER  
PROGRAM PRODUCERS AND DISTRIBUTORS

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The Motion Picture Association of America, Inc. ("MPAA"), its member companies, and other companies engaged in the production and/or distribution of programming exhibited by television broadcast stations ("Program Syndicators")<sup>1/</sup> submit the following in response to the directive of the Copyright Royalty Tribunal ("Tribunal") that interested parties or their duly authorized representatives submit briefs on specified legal issues to the Tribunal no later than November 15, 1979 (44 Fed. Reg. 59930, October 17, 1979).

The Tribunal requested submissions from the parties on the following:

- 1) concerning the issue of the broadcast day as a copyright compilation;
- 2) concerning the issue of programming of which a broadcast station is an exclusive licensee;
- 3) concerning the objections raised as to the standing of certain or all sports claimants;

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<sup>1/</sup> The member companies and other program producer/distributor companies are listed in Attachment "A".

- 4) concerning any other question of copyright ownership as it affects a claim or right to any of the cable television royalties.

In this brief, the Program Syndicators will address the first two noted issues, the broadcast day as a compilation, and programming of which a television station is an "exclusive" licensee for broadcast exhibition. Program Syndicators do not address the issue of the standing of certain sports claimants and leave discussion of that issue to those parties primarily involved with it.

I. PRELIMINARY STATEMENT

This current stage of the Tribunal's proceedings arises from the claims of National Association of Broadcasters (NAB) that television broadcast stations' right to share in the copyright royalty fund is not limited to programs which they produce and own. Rather, NAB contends that the broadcast day is to be considered separate from the copyright in local programs produced by stations and programs licensed to stations for broadcast. Specifically, the claim is made that stations "... may be considered the copyright owners of their entire broadcast days as 'compilations' provided their entire broadcast days or the separate elements thereof were recorded."<sup>2/</sup> NAB also claims that broadcast stations have a right to cable royalties where they are

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<sup>2/</sup> NAB Suggested Broadcaster's Justification, filed with the Copyright Royalty Tribunal July 31, 1979, pp. 24-27 (hereafter cited as "NAB Justification") (emphasis added).

the "exclusive" licensees of broadcast exhibition rights in a particular area.<sup>3/</sup>

(a) NAB's Claims Are Directly Contrary  
To The History Of Cable  
Copyright Liability.

NAB's claims are squarely at odds with the history of the Copyright Law Revision. Section 111 of the Copyright Act was not conceived, was not designed, nor was it written, to provide copyright royalty payments to television stations for the "compilation" of a broadcast day or for "exclusive" contracts for broadcast exhibition. The purpose of that section -- as it explicitly provides -- was to compensate program producers and distributors for the retransmission of their works by cable systems. A Program Syndicator first sought to assert its claims in the courts on the grounds that cable's use of its works was in violation of their rights under the Copyright Act of 1909. In Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), the Court focused on the rights of a syndicator to the "... overall uses of his copyrighted work" and whether the unauthorized retransmission by cable of copyrighted programs constituted a performance which infringed the rights of that copyright owner. In denying the relief sought by the copyright owner the Court stated:

We have been invited by the Solicitor General in an amicus curiae brief to render a compromise

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<sup>3/</sup> Id. at pp. 20-24.

decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. We take the Copyright Act of 1909 as we find it.

392 U.S. at 401-02 (emphasis added, footnote omitted). In Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974), the claim of infringement was renewed by other creators and producers of televised programs copyrighted under the provisions of the Copyright Act of 1909. In its denial of that claim the Court stated:

These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.

415 U.S. at 414 (emphasis added, footnote omitted).

Thus, the Supreme Court made it clear that relief for creators and producers from the unauthorized retransmission of their copyrighted works by cable could not be obtained by judicial action under the Copyright Act of 1909, and that such relief could only be obtained by Congressional action in the enactment of a new statute. Section 111 of the Copyright Act

of 1976 was the direct response of Congress, and that section, by design and by its terms, was crafted to provide the relief which the Supreme Court was unable to grant under the old law. Indeed, the 1975 Senate Report on the Copyright Law Revision directly recognized the problems that the Program Syndicators faced:

Cable systems are commercial enterprises [whose] operations are based upon the carriage of copyrighted program material for the use of which no royalties are currently being paid by cable operators to the creators of such programs. 4/

The 1976 House Report also recognized these problems and stated that relieving these inequities was the prime purpose of Section 111's compulsory license:

By contrast, the retransmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976) (emphasis added) (hereafter cited as "1976 House Report").

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4/ S. Rep. No. 94-473, 94th Cong., 1st Sess. 81 (1975) (hereafter cited as "1975 Senate Report").

This direct relationship between the decisions in Teleprompter and Fortnightly, and the development of a system for compensating copyright owners was specifically noted by Ms. Barbara Ringer, the Register of Copyrights, in her testimony before the House Subcommittee:

Early in 1974, the Supreme Court handed down the Teleprompter decision, which as we all know, expanded the Fortnightly decision in favor of cable systems to cover distant signals and made clear that other cable activities such as origination and commercials and networking were not to be considered as changing their lack of liability under the 1909 law. In 1974, the bill took off again - I think I testified to this before - as a result of the Teleprompter decision.

(Footnote continued on following page)

Broadcast stations do have a stake in the relief provided -- but that stake is limited by the extent to which they are the producers of local programs. As Congressman Railsback, the ranking Minority member of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, stated in floor debate:

Section 111 primarily covers cable television. The subcommittee completely rewrote this section to reflect a compromise between Motion Picture Association of America and National Cable Television Association, the primary parties of interest. ... All parties are now satisfied with section 111, except the National Association of Broadcasters. They were not a party to the compromise because they are not a major party of interest ...

122 Cong. Rec. H10879 (daily ed. September 22, 1976) (emphasis added). Congressman Railsback anticipated NAB's dissatisfaction with the 1976 Act: their fabrication and submission of wholly specious copyright claims to this Tribunal cannot change the intent or purpose of the law with respect to the distribution of cable royalties.

Equally relevant are the actions of broadcast industry representatives hard upon passage and implementation of the 1976 Copyright Act. It is clear from the records of both this Tribunal and the Copyright Office that the broadcast industry did not then

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4/ (Footnote continued from preceding page)

The bill immediately resumed its momentum, and on April 9, 1974, the Senate Judiciary Subcommittee reported the bill to the full committee with certain amendments, including radical changes in section 111.

Copyright Law Revision: Hearings Before The Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, Serial No. 36, Part 3, p. 1820 (1975). See also, 122 Cong. Rec. H10903, H10904 (daily ed. Sept. 22, 1976) (remarks of Rep. Danielson); 1976 House Report at 88-89.

understand or consider the Act to provide royalties for anything other than its locally produced programs.<sup>5/</sup> For example, in comments made to the Tribunal during 1978 proceedings, NAB and other broadcast representatives asserted only that they were copyright owners of locally produced programs. Thus NAB based its comments on such locally produced programs and stated as follows:

A great number of NAB's member stations are copyright owners of broadcast programming which is retransmitted by cable systems beyond the stations' local service areas. For example, the Research Staff of the Cable Television Bureau of the Federal Communications Commission (FCC) estimated recently that 13.1% of a network affiliated television station's programming was locally originated (i.e., produced by the local station). Similarly, industry-wide data compiled by the FCC's Broadcast Bureau indicates that the average amount of locally originated programming among all television stations was 9.2%. Assuming an 18 hour broadcast day, 7 days a week, these figures indicate that the "average" television station broadcasts 11.5 hours of locally produced programming per week. If the program is pre-recorded or recorded simultaneously with its broadcast, a copyright in that program exists and the station generally would be considered the copyright owner. Therefore, the station would be entitled to make a claim for cable royalty fees for distant retransmission of that program. <sup>6/</sup>

CBS was in accord -- and on June 12, 1978, CBS argued before this Tribunal:

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<sup>5/</sup> NAB first advanced the "broadcast day" theory to the Tribunal on April 19, 1979, when it forwarded to Chairman Coulter the Report and Proposals of the NAB Ad Hoc Committee on Copyright Royalties. Letter from David H. Polinger, Chairman, NAB Ad Hoc Committee, to Hon. Douglas Coulter, April 19, 1979.

<sup>6/</sup> Comments of National Association of Broadcasters to Copyright Royalty Tribunal in response to February 14, 1978, Advance Notice (undated) (emphasis added).

The National Association of Broadcasters on page 2 of its comments in response to the Copyright Royalty Tribunal's Advance Notice of Proposed Rulemaking, 43 Fed. Reg. 6263 (February 14, 1978) indicated that the "average television station broadcasts approximately 11.5 hours of local programming produced by the station per week. There are 727 commercial television stations in the United States. So, each year there are approximately 434,746 hours of local programming produced by commercial television stations which, as a general rule, would be the copyright owners of the programming.

Comments of CBS, Inc. to Copyright Royalty Tribunal, June 12, 1978 (Proof of Fixation) (footnotes omitted) (emphasis added). Similarly in comments made to the Copyright Office during its 1977 formulation of cable regulations, a large number of broadcast stations argued that they needed more complete information in order to assess the degree to which Section 111 compensated them for retransmission of their local programs:

With a readily available and comprehensive record of cable systems retransmitting its "distant" signal, each broadcast station will have at least a rough basis on which to determine, on an individual market-by-market basis, whether it would be worthwhile to copyright its locally produced programming.

Comment Letter No. 10, filed on behalf of various television station owners by McKenna, Wilkinson and Kittner, Copyright Office Docket RM-77-1, February 18, 1977. See also, Comment Letter No. 9 in the same proceeding. These were expressions by and on behalf of broadcast groups closely involved with the development of the new law. They represent the broadcast industry's clear understanding of the limits to their participation in Section 111 royalties. Most important, these comments were made in contexts that

did not invite contrivance to increase that participation.<sup>7/</sup>

As the Supreme Court has noted:

... substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who were probably active in the drafting of the statute. As such they are entitled to serious consideration ... .

White v. Winchester Country Club, 315 U.S. 32, 41 (1941) (emphasis added).

It is clear that NAB's more recent and qualified<sup>8/</sup> assertion of other claims based upon fanciful theories prompted only by hopeful afterthought has no basis in the language or history of the Act. If legitimate, it should have been expressed to Congress before October of 1976; it should not have been created for the Tribunal in 1979.

(b) NAB's Legal Claims For Cable Royalties Are Based On Factual Assumptions Which Would Require Proof In Evidentiary Proceeding.

In advancing its position, NAB asserted only that stations "may be considered" as valid claimants on these bases, and that

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<sup>7/</sup> The quoted comments to the Tribunal were made during its inquiry into preservation and proof of fixations. It is obvious that it will be more expensive for broadcasters to regularly fix and preserve their entire broadcast days than to record individual local programs. It is very difficult to believe that the broadcasters considered the statute to provide royalties for their broadcast days, but did not refer to the burden of preserving broadcast day fixations during their arguments.

<sup>8/</sup> See pp. 9-10 below.

its purported justification was designed only "... to establish a bona fide colorable claim ...".<sup>9/</sup> NAB stated further that it recognized (and quite rightly so) that the other major interests do not share NAB's assertions. It also stated that:

In the event NAB and the other claimant groups are unable to reach an agreement on the distribution of royalties, the ownership of these various types of programming will constitute disputed legal issues which the Tribunal must resolve for purposes of royalty distribution. Nonetheless, for immediate purposes, NAB sees little reason to submit an exhaustive legal brief in support of its position. NAB assumes that the Tribunal will designate the issues upon which it requires additional evidence or legal argumentation at the appropriate stages of a royalty distribution proceeding. 10/

Thus NAB explicitly recognized that the novel claims it advanced would require supporting evidence in addition to legal argument at appropriate stages of the royalty distribution proceeding.

Further, in view of the Tribunal's Order designating these claims for briefing and argument on legal questions only, we have limited our response to a legal discussion and omitted any discussion of evidentiary disputes. Thus, while we believe that there is no merit to either NAB's asserted "compilation" or "exclusivity" claims and that both should be dismissed by the Tribunal, Program Syndicators submit that even if the Tribunal were to recognize either claim, substantial evidentiary questions would still remain. For example, the claim based upon "compilation"

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9/ NAB Justification at p. 15.

10/ Id.

of the broadcast day is based on the factual assumption that the station recorded the entire broadcast day. Failing such "fixation," no right could be asserted. Thus, the number of stations that could demonstrate "fixation" for each and every broadcast day during 1978 is certainly subject to proof and scrutiny in an evidentiary hearing. The compilation claim is also dependent upon evidentiary proof of the crucial element of "originality," which is also outside the scope of this proceeding. For example, it would have to be shown that the "compilation" represents substantial intellectual labor and judgment.

Even if in the presence of the compulsory license a copyright owner were able to grant an "exclusive license" under copyright to a local station covering cable retransmission of distant signals, a number of factual questions would remain to be resolved in each particular situation. For example, it would have to be shown among other things that: (1) each station's contract provides for exclusivity as against cable systems located in the market;<sup>11/</sup> (2) the station's contractual exclusivity right

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<sup>11/</sup> The syndication license agreements between the Programmers and licensee broadcasters vary as to the nature of the right conveyed. Thus the contract provisions for each separate show and for each licensee would have to be individually proven. For example, several contracts currently in use convey only a limited license or an exclusive license only for television broadcast and local cable origination but not as against distant signal importation by cable systems. Additionally, contracts typically expressly reserve in the licensor every right not expressly and specifically conveyed to the licensee by the terms of the contract, so that the terms of each conveyance become relevant under NAB's claim.

is one which is also recognized under the FCC rules; (3) the station asserted its exclusivity right in a timely and appropriate request directed to the cable system; and (4) the cable system refused to comply with that request. Thus while all these above-noted facts must be assumed for the purposes of the present argument, an evidentiary proceeding would have to be held at a later date to address them in the event that the Tribunal agrees with NAB's claims.

II. TELEVISION STATIONS ARE NOT ENTITLED TO ROYALTIES UNDER SECTION 111 FOR THE SECONDARY TRANSMISSION OF THEIR "BROADCAST DAYS"

The NAB Justification asserts that television stations "may be considered the copyright owner of their entire broadcast days as compilations," based on the arrangement of "programs, advertisements, announcements and other broadcast matter into an attractive daily package."<sup>12/</sup> NAB concludes that such stations are therefore entitled to royalties as "copyright owners" under Section 111(d)(4)(A) of the Copyright Act of 1976.

Program Syndicators submit that this claim to royalties is entirely baseless: It is contrary to the plain meaning of Section 111; it is not supported by the legislative history of the Act. Also, the recording of a station's broadcast day simultaneous with its transmission -- as a basis for "fixation" under the Act -- involves systematic and unlawful use of copyrighted programs

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<sup>12/</sup> NAB Justification, pp. 24, 26.

licensed to the station for broadcast purposes only. In no event may such unauthorized recording support an award of royalties for compilation at the expense of the very copyright owners whose works are used without their permission.

- (a) Section 111(d)(4)(A) Of The Copyright Act Provides Royalties For The Cable Retransmission Of Individual Programs And Not For The Compilation Of A "Broadcast Day."

As noted in the relevant legislative report, the Copyright Act specifically enumerates the classes of persons entitled to share in Section 111 royalties: "The copyright owners entitled to participate in the distribution of the royalty fees paid by cable systems ... are specified in Section 111(d)(4)." 1976 House Report at 97. In pertinent part, that section provides:

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed 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 ... . (emphasis added).

The introductory clause of paragraph (d)(4) does not authorize distribution to all "copyright owners who claim that their works were the subject of secondary transmission by cable systems;" it permits distribution only to "those" copyright owners of works specifically enumerated in the "following" sub-paragraphs. The NAB

"broadcast day" claim for television stations is based on sub-paragraph "(A)." NAB Justification, p. 27.

Sub-paragraph (A) of Section 111(d)(4) provides for distribution to a copyright owner of a program only, that is, a particular "show." Thus, Section 111(d)(4)(A) does provide royalties to a television station for its copyright ownership of a particular show, such as a local newscast, public affairs program, or other production of the station; but it clearly does not authorize an additional distribution for the station's entire daily schedule. That conclusion follows logically from the plain language of the Act:

- o Royalties are to be paid for a work "included in the secondary transmission of a nonnetwork television program";
- o A "broadcast day," made up of a daily combination of programs and other matter, cannot be considered a "work" "included in" the retransmission of any of these programs.<sup>13/</sup>

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<sup>13/</sup> The fact that the station's "compilation" or broadcast day includes a retransmitted program does not entitle the station to royalties. The copyright on a compilation does not give the proprietor any ownership right in the component parts. 17 U.S.C. § 103(b); 1976 House Report at 57; 1975 Senate Report at 55; Axelbank v. Rony, 277 F.2d 314 (9th Cir. 1960).

That a television "program" means a particular show or discrete presentation in a station's broadcast schedule, and the corollary that a "program" is not the same as the combination of programs and related material making up a "broadcast day," are amply supported in the NAB Justification itself. Throughout that document "program" is used in the sense we have described.<sup>14/</sup> This limited meaning of a television "program" is also evident from many other sources. By way of a few examples only, these include:

- o Dictionary definitions of "program" in a broadcast context: for example, "a scheduled radio or television show." American Heritage Dictionary of the English Language, 1045 (1973).
- o Copyright Act provisions, other than Section 111(d)(4)(A): see 17 U.S.C. §§111(c)(3), (d)(2)(A), (e)(1)(A) and (B), (e)(2), (f); 108(f)(3); 114; 801(b)(2)(C). Indeed, when the Copyright Act intends to refer to the "broadcast day" of a

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<sup>14/</sup> See NAB Justification, pp. 8, 14-16, 20-24, 26, 27. The "broadcast day" is even defined by the NAB as something including, but different from, a "program." NAB Justification, pp. 4, 26.

station, it specifically uses that term -- it does not use the word "program." See 17 U.S.C. § 111(f) (definition of network station).

- o The regulations of this Tribunal: see 37 C.F.R. §302.9 (proof of fixation).
- o The regulations and forms of the Copyright Office: see 37 C.F.R. §§201.17(b) (7), 201.17(e) (11); Cable Forms of Account CS/SA-1, -2, and -3 [instructions pp. (ii) and (iv); form, p. 5].
- o The regulations of the Federal Communications Commission: see, e.g., 47 C.F.R. §§73.582(b), 76.670(b), 76.5(p) and (t), 76.94, 76.95. As does the Copyright Act, FCC regulations expressly distinguish between a "program" and the over-all "broadcast day" in which it is presented. 47 C.F.R. §§73.582, 73.760, 73.9.

In sum: a television station's broadcast of a "program" is not the broadcast of its entire schedule; a cable system's retransmission of that "program" is not a secondary transmission of other programs and related material broadcast by the station; a viewer watching that "program" is not viewing the station's full day's output; and statutory authorization of royalties for that "program" does not thereby provide royalties for the station's

broadcast day. It is significant that the only commentator who has considered the question acknowledges that the Act does not provide royalties for cable retransmission of the broadcast day as a compilation. Simon, Local Television Versus Cable: A Copyright Theory of Protection, 31 Fed. Comm. L.J. 51, 62-64 (1978).

- (b) The History Of The Copyright Act Does Not Support NAB's Claim To Royalties For The "Broadcast Day"; To The Contrary, That History Confirms That The Act Does Not Provide Such Royalties.

Program Syndicators submit that the Tribunal need not go beyond the language of Section 111(d)(4)(A) to dispose of NAB's claim to royalties for a television station's broadcast day. The plain meaning of the section precludes such royalties -- the statute itself leaves "no ambiguity and therefore nothing to construe."<sup>15/</sup> The Tribunal, no less than the courts, "must assume that the legislative purpose is expressed by the ordinary meaning of the words used in the statute."<sup>16/</sup>

If, however, the Tribunal believes it appropriate to look behind the language of the statute, it must conclude that NAB's broadcast day claim remains unsupported. There is simply not

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<sup>15/</sup> National Home v. Wood, 299 U.S. 211, 216 (1936).

<sup>16/</sup> Green v. King Edward Employees Federal Credit Union, 373 F.2d 613, 615 (5th Cir. 1967); see also, e.g., Heli-Coil Corporation v. Webster, 352 F.2d 156, 167 (3rd Cir. 1965).

one shred of evidence in the legislative history that Congress intended to provide royalties to a television station for the cable retransmission of its entire broadcast schedule; there is not the slightest suggestion that Congress "meant" anything other than what it "said" in Section 111(d)(4)(A).

What the legislative history does unmistakably show is that the broadcast industry did not consider or portray a "broadcast day" as a copyrighted work, considered separate from the copyrights in local programs produced by stations and programs licensed to stations for broadcast. For example, the Association of Maximum Service Telecasters described the "copyrightable materials" carried by stations and limited such materials to the following categories only: (1) "locally created programs owned by the station"; (2) "locally created programs owned by others and produced by the station on television under exclusive territorial license" (i.e., sports events); (3) "recorded nonnetwork programs"; and (4) "national, regional, and special network programming". Copyright Law Revision: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Part 2 at 1223, 1224 (1965).<sup>17/</sup> Mr. Douglas A. Anello, General Counsel of the NAB,

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<sup>17/</sup> It is also significant that during this period, broadcast stations sought judicial relief against cable retransmission in actions for unfair competition. These actions were based, in part, on the industry's position that the "blending of locally produced programs with rented films, network shows and other programs" was not subject of copyright. E.g., Intermountain Broadcasting & Television Corporation v. Idaho Microwave, Inc., 196 F.Supp. 315 (D. Idaho 1961). The Courts refused (Footnote continued on following page)

stated that "[t]he interests of broadcasters in copyright is primarily that of a user of copyrighted material rather than as a creator."<sup>18/</sup>

In sum, throughout the history of copyright revision, the broadcast industry did not claim, request, or expect to receive payment for the secondary transmission of a "broadcast day" by cable systems. For example, Mr. Vincent Wasilewski, President of NAB, said:

... the broadcasters are not per se in that proposed legislation, asking for payments to them for the use of their signal per se. They are asking for payment to the copyright proprietor for the use of that programming material by the CATV, by the copyright proprietor a motion picture producer, special sports interest, or what have you. <sup>19/</sup>

As noted at pages 3-9 supra, Congress intended in Section 111 to provide compensation only for individual programs; broadcasters were fully aware of that intent at every stage of the legislative history.

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<sup>17/</sup> (Footnote continued from preceding page) relief and held that stations could prevent retransmission, if at all, only on the basis of copyright in "individual programs." Id. It is clear that the industry maintained its position before Congress.

<sup>18/</sup> Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Part 3 at 1719, 1720 (1965). See also, Copyright Law Revision - CATV: Hearings on S. 1006 Before The Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 109 (1966).

<sup>19/</sup> Copyright Law Revision: Hearings on H.R. 2223 Before The Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1366, at 1377 (1975) (emphasis added).

See also the proposal for an "Automatic License" made by Westinghouse Broadcasting Company, Inc. in Copyright Law Revision - CATV: Hearings on S. 1006 Before The Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 251-52 (1966). Under this proposal a broadcast station would receive a "television payment" from certain cable systems, but would retain only a sum calculated on the basis of its carriage of locally produced programs. The rest of the "television payment" would be passed on to the networks and program (Footnote continued on following page)

(c) A Television Station's Simultaneous Recording Of Its Broadcast Day Is An Unlawful Use Of Programs Licensed To The Station For Broadcast Purposes Only.

The foregoing is dispositive of NAB's compilation claim. That claim is subject to the further infirmity that it is based on the unlawful recordation of the entire broadcast day, including programs licensed for broadcast exhibition only. To qualify for copyright protection a work must be "fixed in any tangible medium of expression ... from which [it] can be perceived, reproduced, or otherwise communicated ..." 17 U.S.C. §102(a).<sup>20/</sup> The Tribunal's regulation permitting cable claims without preservation and submission of fixations does not, and could not, dispense with the requirement that a work be fixed to qualify for royalties under Section 111. 37 CFR §302.9 (Final Rule); Federal Register, May 5, 1978 at 19424 (Preamble to Inquiry).<sup>21/</sup>

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<sup>19/</sup> (Footnote continued from preceding page) syndicators. The station could retain an additional small portion of the "television payment," not for its "broadcast day," but "as reimbursement for overhead costs incurred" in collecting and distributing the moneys. Under this proposal it is clear that the broadcast representatives did not consider themselves entitled to compensation over and above that amount allocated to their local programs.

<sup>20/</sup> Under Section 101 of the Copyright Act: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."

<sup>21/</sup> The requirement of fixation is not met by the appearance of a work on a television screen, or by broadcast. 1976 House Report at 52, 53; 1975 Senate Report at 51. However, a recording made simultaneous with a broadcast (for example, off the screen or monitor) does fix the work represented in the broadcast. 17 U.S.C. §101.

(Footnote continued on following page)

After acknowledging the requirement of fixation, the NAB Justification totally ignores the threshold question, namely, have the stations lawfully recorded their broadcast days?

The significance of this initial question was recently underscored by the Federal Courts in the case of Heilman v. Bell. The District Court said in that case:

The issue is not whether the plaintiffs are original or creative in their arrangement of record anthologies ... The issue is whether plaintiffs in the first instance have the right to copy [musical compositions embodied in] sound recordings fixed prior to February 15, 1972 without the authority of the composition copyright holder. This court finds no relevance to the plaintiff's later arrangement of the duplicated songs. Originality of the anthologized arrangement, that is, of the sequence of the various recordings does not negate the requirement of first obtaining authorized permission from the copyright holder before duplicating the recording. Whether, once the anthologizer has obtained the requisite permission to copy the various recordings contained in the anthology, he is then entitled to copyright protection as to the arrangement of the anthology is a separate matter that need not be considered here.

Heilman v. Bell, 434 F.Supp. 564, 566, (E.D.Wis.1977) aff'd, 583 F.2d 373 (7th Cir. 1978), cert. denied, 99 S.Ct. 1499 (1979) (emphasis added). See also, e.g., National Geographic Society v. Classified Geographic, Inc., 27 F.Supp. 655 (D. Mass. 1939) (use of

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21/ (Footnote continued from preceding page)

For the purposes of this proceeding only, we will assume that television stations making a compilation claim to royalties have "fixed" their entire broadcast day by recording simultaneously with their transmission. See NAB Justification, p. 24. If the Tribunal, contrary to our arguments, believes that there is a legal basis for the compilation claim and that it should award royalties to stations on that basis, actual proof of fixation will be required.

plaintiff's work to create collective work held infringing).

In order to record its broadcast day, a station would be reproducing, on film or on tape, each program broadcast during that day. However, the right to reproduce or record a program is one of the exclusive rights given to the producer or other copyright owner of each such program by Section 106(a) of the Copyright Act. Moreover, Section 112 of the Copyright Act expressly prohibits a broadcaster from making a recording of "motion pictures and other audiovisual works" that it has been licensed to broadcast. Indeed, during the copyright revision hearings, the Motion Picture Association of America pointed out that broadcasters do not acquire any recording rights under their licenses to exhibit motion pictures and did not need such a right. The broadcast industry then conceded that it had no intent, purpose, or contractual right to simultaneously record such works, and proposed what became the specific exclusion of motion pictures from the recording privilege of Section 112.<sup>22/</sup>

Similarly, as noted above, contracts between program suppliers and broadcast stations for syndicated programs typically give the station a very limited right to broadcast the program. They generally do not give the station a right to record or otherwise

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<sup>22/</sup> See Copyright Law Revision - Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary, House of Representatives, 89th Cong., 1st Sess. Part 2 at 1029-30, 1049, 1063, 1069-71 (1965) (Statements of MPAA); Part 3 at 1881 (Statement of ABC) and 1721-22 (Statement of NAB).

reproduce the program in whole or in part.<sup>23/</sup> Thus, a station's recording of a copyrighted program as part of its claim to compilation of an entire broadcast day is done without permission and is unlawful.<sup>24/</sup> Indeed, a television station's simultaneous recording of its broadcast day, if done at all, may involve regular, systematic copyright infringement of syndicated television programming.

The importance of this conclusion for the present proceeding is that no claim for a compilation can be made for any part of the compilation where material is used unlawfully. Thus, Section 103(a) of the Copyright Act provides that protection "does not extend to any part of [a compilation] in which [copyrighted] material has been used unlawfully." It is clear that after the selection and arrangement of unlawfully recorded programs have been excluded from the broadcast day of a television station, no meaningful "original" work of compilation remains to be "protected" -- i.e., accorded royalties under Section 111. All that is left to the station, albeit by an unnecessarily tortuous route, is what Congress intended: the recovery of royalties for

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<sup>23/</sup> Thus, for example, agreements for syndicated programs give stations the right or license "to broadcast," "to telecast," or "to exhibit" the work, reserving all rights not expressly granted. Such agreements typically do not grant permission to the station to "copy," "duplicate," or "transcribe" the programs, films, or tapes supplied. Indeed some agreements expressly prohibit such copying.

<sup>24/</sup> Some stations are given limited permission to record a particular program for a specific purpose, e.g., off a network feed to accommodate time zone differences or for technical reasons to facilitate transmission. Such authorizations are expressly limited to their stated purpose and do not permit "fixing" a broadcast day.

the secondary transmission of their locally produced programs. Indeed, any other conclusion would result in the Tribunal countenancing and rewarding unlawful activity. Acceptance of a broadcast day distribution claim will reward stations for infringing copyrights, will work to the detriment of the very program owners whose rights are infringed by reducing the royalties to which they are legitimately entitled, and will force program copyright owners to enter repeated court proceedings to protect their rights.

III. TELEVISION STATIONS WITH LIMITED OVER-THE-AIR EXHIBITION RIGHTS ARE NOT ENTITLED TO CABLE ROYALTIES WHEN DISTANT BROADCASTS OF THOSE PROGRAMS ARE RETRANSMITTED INTO THE LOCAL MARKET

NAB also asserts that broadcast stations which have a limited license for over-the-air exhibition<sup>25/</sup> of syndicated programs are entitled to cable copyright royalties when distant broadcasts of those programs are retransmitted into the local markets.<sup>26/</sup> As noted above, in advancing its claims it stated that "... for immediate purposes NAB sees little reason to submit an exhaustive legal brief in support of its position."<sup>27/</sup> As a consequence Program Syndicators must reserve a full statement

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<sup>25/</sup> NAB claims that such licenses are "exclusive." In Section III(b) below, at pp. 31-35, we consider the nature of the broadcast exhibition right and submit for the reasons set forth that such licenses are not "exclusive" within the meaning of the Copyright Act.

<sup>26/</sup> NAB Justification at pp. 20-24.

<sup>27/</sup> Id. at p. 15.

of their position until the submission of such a brief by NAB. It does appear from its limited submission that NAB's second claim is based on the purported transfer to stations of exclusive cable retransmission rights in a particular television market. The claim, if we understand it correctly, requires some explanation. Under FCC rules, certain television stations, depending on their market size and location, have the right to request non-duplication protection for their programs from distant markets. For example, if WTTG (Channel 5) in Washington has non-network program rights to broadcast the program "MASH," it would have the right under FCC rules, and provided its license agreement so stated, to prevent a cable system in the Washington market from retransmitting "MASH" on a distant signal (e.g., as part of WPIX's signal from New York).

Significantly, and assuming again that we understand the NAB claim correctly, it is not the valid exercise of a stations' exclusivity rights under FCC rules (i.e., serving the required notice on a cable system which then deletes the program) which forms the basis of the royalty claim. For, if a program is "blacked out" by a cable system on notice from a local television station, no royalty can be paid to the copyright owner of that work because the work is not the subject of a secondary transmission in the market. Rather, it is the non-exercise of a stations' exclusivity rights under FCC rules that apparently forms the basis of NAB's claim here. Thus, where a station has the right to nonduplication protection,

but refuses to exercise its right, the same program may be imported into the local market and a royalty paid. Consequently, NAB's claim appears to be bottomed on a refusal or failure of stations to exercise their alleged exclusivity rights rather than upon the valid exercise of exclusivity rights by television stations or an alleged violation thereof by cable systems.<sup>28/</sup>

We demonstrate below that this contorted claim of exclusivity concocted by NAB is baseless, that television stations are not copyright owners entitled to claim royalties under the circumstances outlined, and that Congress never intended to countenance such claims under Section III. Moreover, we submit that a claim based on a purported transfer of exclusive cable rights to stations cannot be justified by the non-exercise of those rights.

- (a) The Provisions Of Section 111 And Its Legislative History Are Clear And Explicit: Television Stations Share In Cable Royalties Only For Locally Produced Programs And Not By Reason Of Broadcast Exhibition Licenses.

Section 111(d) (4) of the 1976 Act provides in its relevant passages that the royalty fees paid under compulsory licenses by cable systems should:

... be distributed 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

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28/ If a television station serves the required Notice under FCC rules and the cable system refuses to respect the Notice, the station has the right to sue for infringement of copyright (see discussion of Section 501(c) infra pp. 33-35) and there is no basis or support for the contention that in such circumstances Congress also intended to grant stations recovery of cables' compulsory license royalties.

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account ... .

It is noteworthy that NAB avoided any discussion of these provisions which control the distribution of the cable royalty fund, since it provides no conceivable basis to support even a "colorable claim".

The intent of Congress in the enactment of Section 111 is clearly spelled out in the legislative history, namely, to compensate Program Syndicators for the compulsory license which authorized distant retransmission of their programs by cable systems.

The history of this provision, as it unfolded in the course of Congressional hearings, conclusively demonstrates that Congress intended that the royalties for these programs be distributed to the Program Syndicators and not to local stations. The testimony of Mr. Vincent Wasilewski, President of NAB, set forth above at p. 19, is a prime example and merits repetition in this context. He stated:

... the broadcasters are not per se in that proposed legislation, asking for payments to them for the use of their signal per se. They are asking for payment to the copyright proprietor for the use of that programming material by the CATV, by the copyright proprietor a motion picture producer, special sports interest, or what have you. 29/

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29/ Copyright Law Revision: Hearings on H.R. 2223 Before The Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1366, at 1377 (1975) (emphasis added).  
(Footnote continued on the following page)

The 1976 House Report on the Copyright Law Revision also clearly indicates that Congress did not intend the cable royalties to go to the local station into whose market a cable system has retransmitted a program licensed to that station:

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. 30/

Further, on the Senate floor, Senator Tunney stated the following in urging support for the payment of cable royalties to the Program Syndicators under Section 111:

Section 111 provides for a very modest royalty for the copyright owner - the average cable subscriber would have his subscription increased by less than 10 cents per month. No reasonable person, in my mind, could argue that the creative

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29/ (Footnote continued from preceding page)  
See also Simon, Local Television Versus Cable in 31 Fed. Comm. L.J. 51 at 62, 63 (1978):

Under the compulsory licensing provision of the 1976 Act, compensation is made from the license fee pool only to holders of copyright in non-network television programs, which are imported into distant markets by cable systems.

... A broadcaster receives royalty payments only where it acts as a producer of a non-network program that is retransmitted by a cable system outside of the broadcaster's local service area. The 1976 Act regards the broadcast station as a mere seller of the attention of its audience rather than as the seller of a copyrighted product.

Simon, id. at p. 62, urges that the "1976 Act should be amended to provide for payment of compulsory license fees to local broadcasters."

30/ 1976 House Report at 89. See also Id. at 90-91; 1975 Senate Report at 81.

persons who are most responsible for the programs that the [cable] subscribers see should not be compensated for their efforts. 31/

Throughout the years when the Program Syndicators presented their arguments at the various hearings before Congressional committees, neither NAB nor any other group of broadcasters ever claimed that television stations should be entitled to cable copyright royalties, except for programs actually produced by them. See discussion at pp. 3-6, 18-19, supra. And, as noted at pp. 6-9, supra, soon after the Act was passed, the broadcasters interpreted their interests to be limited to local programs. No suggestion was ever submitted by any broadcaster to the effect that a local station holding a license to telecast a program should receive copyright fees from the cable system importing distant signals into its area under a compulsory license. In contrast to this silence, representatives of the Program Syndicators submitted literally thousands of pages of testimony documenting their claim to compensation for the secondary transmission of syndicated programs. 32/ NAB's present exclusivity claim is

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31/ 122 Cong. Rec. S1608-09 (daily ed. February 16, 1976).

32/ See, e.g., Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Serial No. 8, 983-1051 (1965) (statement of Adolph Schimel, MPAA); Id., at 1051-71 (Statement of Edward A. Sargoy, MPAA Copyright Committee); Id. at 1332-53 (Statements of Arthur B. Krim and John Sinn, United Artists Corp.); Id. at 1353-78 (Statement of Louis Nizer, MPAA); Id. at 1542-48 (Statement of Spencer C. Olin, Walt Disney Productions); Copyright Law Revision: Hearings on H.R. 2223 Before The Subcomm. on Courts, Civil Liberties and the Administration of (Footnote continued on following page)

clearly a recent contrivance with no support in the statute or its legislative history.

Indeed, as recently as March 1979, NAB filed a "Petition for Rule Making" in the FCC's Cable Television Syndicated Program Exclusivity Rules proceeding, Docket No. 20988, in which it stated unequivocally that program suppliers, as specifically opposed to broadcast stations, are to receive the compulsory license royalties under the new Copyright Act. NAB's Petition stated, for example, at pp. 24-30, the following:

The combination of miniscule compulsory license payments to program suppliers under the revised copyright law and the limited and seldom enforced provisions of the Commission's syndicated program exclusivity rules (Section 76.151 et seq.), have placed program suppliers in the most vulnerable position imaginable -- a position made even more unenviable in the era of superstations.

Basically, the advent of superstations has magnified, by geometric proportions, the degree to which program suppliers have lost control over their product once it is sold to a station and then carried by cable ... . Sale of a program or package

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<sup>32/</sup> (Footnote continued from preceding page)  
Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., Serial No. 36, 704-64, 1731-35 (1975) (Statement of Jack Valenti, MPAA); Id. at 698-704 (Statement of William K. Howard, Hollywood Film Council); Id. at 1731 (Statement of Edward Cooper, MPAA); Copyright Law Revision - CATV: Hearings on S. 1006 Before The Subcomm. on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 167-191 (1966) (Statement of Arthur Krim, United Artists Corp.); Id. at 191-204 (Statement of Louis Nizer, MPAA); Copyright Law Revision: Hearings on S. 1361 Before The Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 278-316, 606-17 (Statements of Jack Valenti, et al., MPAA). This is only a fraction of the witnesses who expressed their views on behalf of Program Syndicators.

to a station in one city can set into play a chain of events which easily can result in the loss of entire markets to the syndicator. When a super-station broadcasts the program suppliers' product and is then cable-carried in a distant signal market, the potential for subsequent sale, let alone exclusive sale, to that market simply evaporates. Instead of having the ability to make an exclusive sale to a station in that second market -- an ability which the traditional marketplace should not only allow but encourage -- the program supplier is left with the hardly compensatory prospect of enjoying a virtual drop-in-the-bucket payment in the form of a cable compulsory license fee. (Emphasis added).

In the present forum, however, NAB's reading of the royalty distribution provision has completely reversed. NAB would now even take away from the Program Syndicators the "drop-in-the-bucket" royalties NAB had only a few months earlier determined, quite rightly, are due the Program Syndicators.

In sum, the legislative history is conclusive: It was the clear intent of the Congress to compensate program suppliers for the use of their product by cable systems. It was not the intent of Congress to provide cable royalty payments to broadcast stations for cable's retransmission of program suppliers' programs. And it is incontrovertible in light of all of the foregoing that broadcast stations and their representatives, including NAB, so understood the statutory scheme.

(b) As Against Cable Retransmissions, The Local Television Station Is Not Even An "Exclusive Licensee" Under The Copyright Act.

NAB's claim that a station is entitled to cable royalties as an "exclusive licensee" is also without merit because stations do not

hold and cannot acquire an exclusive cable retransmission right within the meaning of the Copyright Act. That conclusion follows because the cable retransmission takes place by virtue of the compulsory license of Section 111, and under this section, the owner of the copyright is not capable of granting to a station an exclusive right of performance in its market that would be effective against cable systems in the market.

Section 106, which generally provides for the owner's exclusive right to authorize public performances and, by implication, to withhold such authorization, is specifically made subject to the provisions of Section 107 through 118. And Section 111 makes the performance of copyrighted works by cable systems (under the circumstances relevant here, i.e., by importation of distant signals) subject to a compulsory license and thereby removes this specific right of performance from the bundle of exclusive rights conferred upon the owner by Section 106.

Whatever exclusivity the licensee station enjoys against cable systems in its market is conferred upon it by the Regulations of the Federal Communications Commission and may be curtailed or even eliminated by the FCC.<sup>33/</sup> Moreover, that exclusivity conferred upon the local station by FCC regulation is currently subject to many substantial limitations and is also

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<sup>33/</sup> See Notice of Proposed Rule Making re: Cable Television Syndicated Exclusivity Rules, FCC Docket No. 20988, FCC 79-243, released May 7, 1979.

totally inapplicable to many cable systems. Thus, exclusivity does not apply:

- (1) to cable systems which were "grandfathered" because they were in operation prior to the FCC's issuance of its exclusivity rules (47 CFR §76.159);
- (2) to cable systems outside of the 35-mile zone of the licensee station's market (47 CFR §76.91);
- (3) to cable systems located in television markets below the top 100 markets (47 CFR §76.151); and
- (4) to cable systems which have fewer than 1,000 subscribers (47 CFR §76.161).

In all of these situations the local station licensee has no exclusive performance rights against cable systems. Moreover, the station is entitled to its limited exclusivity only if it gives timely notice to the cable system by requesting it to eliminate the program in accordance with a set of complex requirements. See 47 CFR §§76.153 and 76.155.

Accordingly, the licensee station, as against local cable systems, is not even an owner of an exclusive right. The right for limited exclusivity which the local television station acquires from the program supplier pursuant to the FCC's cable retransmission rules (47 CFR §§76.153(c) and 76.157) is not a license of an "exclusive right" within the meaning of the Copyright Act.

The limited and special status of the local station which

reduces its right to less than an exclusive license is also clear from the remedies granted to a broadcast station program licensee under the Act. Section 501(b) of the Act states the general rule that the "legal or beneficial owner of an exclusive right under copyright is entitled ... to institute an action for any infringement of that particular right committed while he or she is the owner of it ...". But subsection (c) of Section 501 recognizes that the local television station licensee is in a wholly separate category: for "any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of Section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of [instituting an action for infringement against a cable system] be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station." (Emphasis added). In other words, the station is "treated" as if it were an owner of an exclusive right, but it is so treated only for the purpose of instituting an action for infringement and nothing else. If the station were truly a legal or beneficial owner of an exclusive right under copyright, it could have brought such an infringement action directly under Section 501(b). It would not have been necessary to "treat [it] as a legal or beneficial owner" for the limited purpose of bringing suit, and to insert a special provision, subsection (c), to grant

the station that limited right of enforcement.<sup>34/</sup>

Accordingly, it must be concluded that as against the cable system, the station's license to exhibit the program does not constitute an exclusive license to perform the work publicly as contemplated by the Copyright Act. The limited exclusivity protection against retransmission of distant broadcasts by cable systems, which is not even part of the statutory license, is a product of FCC regulation and subject to continuing review and revision by that agency. This type of exclusivity, which can be given and taken away by the administrative agency as a matter of communications policy, does not rise to the status of "exclusive license" under the copyright law.<sup>35/</sup> In no event could the local station qualify for sharing in the cable royalties under Section 111(d)(4) on this basis.

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<sup>34/</sup> Moreover, if it had been the intention of Congress to give the local station the right to share in the cable royalties, then a specific grant, similar to that provided in Section 501(c), could have been provided in Section 111(d)(4). Thus the royalty distribution provision could have stated (to parallel the language of Section 501(c)) that a local station holding an "exclusive" license shall "for the purposes of subsection (d)(4) of Section 111, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station." The failure of Section 111 to so provide further confirms that the local station is not entitled to share in the cable royalties.

<sup>35/</sup> Accord, A. Latman, The Copyright Law: Howell's Copyright Law Revised and the 1976 Act 230 (5th Ed.).

(c) Logic And Economic Common Sense Support The Conclusion That Only Program Syndicators Are Entitled To Share In The Cable Royalties For Syndicated Programs Retransmitted By Cable Systems.

The provisions of the Copyright Act not only are clear but are fully supported as a matter of logic and economic necessity. It would be absurd to allocate a share in the cable royalties to the local station for programs owned by Program Syndicators. If that station enjoys "exclusivity" protection for a program as the result of the combined effect of its contract, the copyright statute, and FCC regulations, the cable system at the station's request must black out the program if it comes from a distant station. In that case there is no reason to allocate royalties to the local station for a retransmission which did not take place; or, if the station does not have a right to cause a black out (e.g., because it does not have "exclusivity" rights under its contract or FCC rules) the local station could not claim to be the owner of an exclusive right, because with respect to the cable system the station would be merely a non-exclusive licensee and therefore not a copyright owner. (See the definition of "copyright owner" in §101 of the statute). On the other hand, if it does have the right to cause a black out of the distant signal, but chooses not to exercise that right, it cannot rely on its own failure to support a claim to share in the royalty fund.

Finally, acceptance of NAB's position regarding exclusivity would render the mechanics of royalty distribution so difficult as to be impossible to effectuate. The Tribunal would be faced with the task of determining how much of the cable royalties were attributable to cable carriage within the local station's 35-mile exclusive market and how much were attributable to carriage beyond that area, for each of the television stations making a claim. Such determinations are simply not readily ascertainable from statistics currently available, and we submit that the absurdity of the task further shows that such an approach could not have been intended by Congress in drafting Section 111 of the Copyright Act.

The text of the statute itself, its legislative history, and common sense analysis of the purpose of the royalty paid under the compulsory license all point to the identical, inescapable conclusion: Program Syndicators of the programs carried by cable systems beyond the local service areas of the licensee primary transmitters are entitled to the royalties and not broadcasters, based on some ill-conceived notion of their claimed exclusive license status.

#### IV. CONCLUSION

For the reasons stated above, the Copyright Royalty Tribunal should reject the contentions of NAB and find that local television stations are entitled to share in the cable television royalty

fund only for the local programs which they produce and own and not for (1) the distant cable carriage of the "compilation" of their broadcast day; or (2) the local cable carriage of syndicated programs for which the station holds limited over-the-air exhibition licenses in the market.

Respectfully submitted,

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Member Companies of Motion Picture Association of America, Inc.

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