BEFORE THE

COPYRIGHT ROYALTY TRIBUNAL

WASHINGTON, D.C. 20036

MEMORANDUM OF THE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPLICATION FOR A STAY AND A CONTINUANCE

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BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL

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

Preliminary Statement

The National Association of Broadcasters ("NAB"), for and on behalf of various broadcasting stations claiming compulsory royalty fees, hereby requests a stay of the December 19, 1979 decision of the Copyright Royalty Tribunal ("Tribunal"), 44 Fed. Reg. 75201, pending an appeal of that decision to the United States Court of Appeals pursuant to 5 U.S.C. §705 and Rule 301.50(c) of this Tribunal, 43 Fed. Reg. 53725. NAB further requests that all proceedings scheduled in the aforesaid decision be postponed to a date three weeks after a final decision on this application has been published in the Federal Register.

Prior Proceedings

Pursuant to this Tribunal's directive, 44 Fed. Reg. 59930, dated October 17,1979, interested parties submitted briefs on November 15, 1979 and reply briefs on November 28, 1979 addressing the following issues:

1) The broadcasting stations' claims based upon secondary transmission of their broadcast day compilations;
2) The stations' claims based upon secondary transmission of syndicated programming held by them under exclusive exhibition licenses from program producers;
3) The stations' claims based upon secondary transmission of sports programming; and
4) Any other claims or questions affecting royalty distribution proceedings.

Oral arguments before this Tribunal on these issues commenced December 5, 1979 and were completed December 6, 1979.

On December 19, 1979, a final decision on the above claims was published in the Federal Register (44 Fed. Reg. 75201). That decision, effective as of January 18, 1980, denied the stations' claims for royalties for secondary transmission of their sports programming, compilation programming and syndicated programming. The December 19, 1979 final decision also set forth a schedule requiring claimants to submit pre-hearing memoranda with respect to royalty claims still before the Tribunal by January 31, 1980.

On January 17, 1980, NAB, on behalf of various stations claiming cable royalties, filed a Petition for Review of the December 19, 1979 decision with the United States Court of Appeals for the District of Columbia. Pending that review, NAB now seeks a stay of the December 1979 final decision (i.e., 44 Fed. Reg. 75201) and all further cable royalty distribution proceedings, and further requests that all proceedings scheduled in the December 1979 decision be postponed until three weeks following publication of the Tribunal's decision on this application.

POINT I

The Broadcasters Have Clearly Met The Standards Required For Issuance Of A Continuance And A Stay

The relief requested herein is governed by Section 705 of the Administrative Procedure Act, Title 5, Chapter 7 of the United States Code ("APA") and Rule 301.50(c) of this Tribunal.* Section 705 of the APA permits an agency to "postpone the effective date of action taken by it, pending judicial

* According to Section 810 of the Copyright Act, judicial review of "any final decision of the Tribunal" shall be in accordance with the Administrative Procedure Act.

review" when it finds that "justice so requires." 5 U.S.C. §705. This standard has been adopted by Rule 301.50(c) of this Tribunal, 43 Fed. Reg. 53725, which authorizes the Tribunal to "postpone the effective date of any action taken by it pending judicial review, and if, in the Tribunal's opinion, justice so requires."

The factors considered by the courts in determining whether justice requires that administrative action be stayed pending judicial review are summarized in Virginia Petroleum Jobbers Association v. FPC, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958), cited with approval, Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). These factors are, in brief, whether petitioner will suffer irreparable damage if the stay is not granted, whether the public interest calls for denial of the stay, whether substantial harm will be caused other interested parties, and whether there is a likelihood of probable success on the merits. None of these factors is in itself dispositive; each must be balanced against the other equitable considerations which Virginia Petroleum requires the court to consider. See American Home Products Corporation v. Finch, 303 F.Supp. 448 (D.C.Del. 1960). In addition, the Tribunal may exercise its discretion, and grant a stay for other reasons if justice requires.

Applying this balancing test to the agency action at issue here, it is readily apparent for several reasons that justice requires a stay of the December 1979 decision and a continuance of all further distribution proceedings pending appeal of the decision to the Court of Appeals. On its face, the December 1979 decision precludes further consideration of the broadcasters' claims based on their broadcast day compilations and the syndicated programming exclusively licensed to them, and denies many, if not all, of the broadcasters' claims based on their sports programming. Obviously, the decision to preclude these claims prior to hearing represents a definitive and final position by the Tribunal - one which has an immediate and devastating impact on the broadcasters, as well as all the other claimants to the fund, should the ensuing proceedings have to be repeated on court order. Indeed, without the prophylactic effect of a stay, it if virtually impossible to calculate the full extent to which the Tribunal's decision puts the broadcasters at an economic and competitive disadvantage. Given these considerations, and the lack of any public interest calling for denial of a stay, the interim relief now requested is without doubt both appropriate and necessary at this juncture.

POINT II

The Tribunal's December 19, 1979 Decision Should Be Stayed Pending Review Since There Is A Substantial Likelihood That It Will Be Reversed On Appeal

The required showing of probable success on the merits is twofold. First, the administrative decision under scrutiny must be final and ripe for review. Second, assuming the decision sought to be stayed is immediately appealable, it must appear from the record that the petitioner is likely to succeed on the merits. Virginia Petroleum Jobbers Association v. FPC, supra at 259 F.2d 925. Both of these criteria are presented here.

(a) The Tribunal's Decision Is Ripe for Review

At the outset, it should be noted that agency rules are susceptible to judicial review. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976), cert. denied, 429 U.S. 862 (1976); Toilet Goods Association v. Gardner, 360 F.2d 677, 684 (2d Cir. 1966), aff'd, 387 U.S. 153 (1967). Thus, the fact that the Tribunal's December 1979 decision does not take the form of an order promulgated at the conclusion of adjudicatory proceedings does not defeat its immediate judicial review.

Under Section 810 of the Copyright Act, "any final decision of the Tribunal" may be reviewed by a court of appeals in accordance with the Administrative Procedure Act. Section 704 of the APA goes on to provide not only for review of "[a]gency action reviewable by statute," but also for review of any "final agency action for which there is no other adequate remedy in a court." Within this context, "agency action" not only includes formal orders promulgated after adjudication, but also the type of "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. §§551(4), 551(13). <u>See</u> <u>Abbott Laboratories</u> v. <u>Gardner</u>, <u>supra</u> at 387 U.S. 149 (1967). Since the December 1979 decision reflects the Tribunal's interpretation of its governing statute, it falls squarely within this definition of reviewable agency action.

The cases dealing with judicial review of agency action follow the "flexible" and "pragmatic" interpretation of "finality" expressly approved by the Supreme Court in <u>Abbott Laboratories</u> v. <u>Gardner</u>, <u>supra</u> at 387 U.S. 136. <u>See</u> <u>Independent Bankers Association of America</u> v. <u>Smith</u>, <u>supra</u> at 534 F.2d 929.

In reaching its holding in favor of reviewability the Court in Abbott Laboratories announced a two-prong test for ripeness, requiring evaluation of both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". 387 U.S. 149. Writing for the Court, Justice Harlan found that the FDA regulation under review was "fit for judicial review" because: (a) the regulation involved purely legal issues; (b) it was promulgated in a formal manner after notice-and-comment proceedings; and (c) immediate review of the action would avoid multiplicity of litigation. These same factors emphasize the necessity for a stay of the Tribunal's December 1979 decision.

As in Abbott Laboratories, the issues tendered here are purely legal ones, dependent solely upon whether Section 111 of the Copyright Act was properly construed by the Tribunal. See Abbott Laboratories v. Gardner, supra at 387 U.S. 149. See also, Toilet Goods Association v. Gardner, supra at 387 U.S. 153, 163 (1967); Citizens Communications Center v. FCC, 145 U.S. App. D.C. 32, 447 F.2d 1201, 1205 (1971); Independent Bankers Association of America v. Smith, supra at 534 F.2d 927 (1967). Like the FDA in Abbott Laboratories, the Tribunal promulgated the challenged statutory interpretion on the basis of its understanding of Congressional intent and made no effort to justify its decision in factual terms. See Abbott Laboratories v. Gardner, supra at 387 U.S. 149. As such, the challenge presented herein "raises a clearcut legal issue susceptible of judicial solution." Toilet Goods Association v. Gardner, supra at 360 F.2d 684; National Motor Freight Traffic Association v. United States, 268 F.Supp. 90 (D.D.C. 1967), aff'd, 393 U.S. 18 (1968).

Moreover, the Tribunal's decision is as "definitive" as the FDA regulation encountered in the Abbott Laboratories case. The Court's reasoning with respect to that issue controls the present action as well: "The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative. It was made effective upon publication, and...compliance was expected." Abbott Laboratories v. Gardner, supra at 387 U.S. 151 (footnote and citations omitted).

Here, too, the Tribunal's decision was issued after formal notice-and-comment proceedings. Although the Tribunal labeled its decision "procedural", the ruling quite clearly represents a "definitive position" by the Tribunal, i.e., there has been no indication that administrative reconsideration of the ruling is likely, or even contemplated. Accordingly, the process of rulemaking is complete and the decision qualifies as final agency action within the meaning of the Administrative Procedure Act. See e.g., United States v. Storer Broadcasting Company, 351 U.S. 192 (1956); Frozen Food Express v. United States, 351 U.S. 40 (1956).

In Abbott Laboratories, immediate review was "calculated to speed enforcement." The Court reasoned that "[i]f the Government prevail[ed], a large part of the industry [was] bound by the decree; if the Government [lost], it [could] more quickly revise its regulation." Abbott Laboratories v. Gardner, supra at 387 U.S. 154. In other words, the Court found that immediate review best serves efficient judicial administration whenever legal issues were sharply defined and vital to ensuing proceedings. Independent Bankers Association of America v. Smith, supra at 534 F.2d 928.

Likewise, judicial economy requires a finding of ripeness in the present case, since proceedings scheduled by the December 1979 decision would have to be repeated in the event that the Tribunal's interpretation of 17 U.S.C. Section

111(d)(4) is reversed on appeal. Indeed, since the costs of such proceedings are deducted from the cable royalty fund and are ultimately borne by successful claimants, judicial economy is particularly crucial in this case.

The second prong of the Abbott ripeness test entails balancing "the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, supra at 387 U.S. 149. As the Circuit Court of Appeals noted in Independent Bankers Association of America v. Smith, supra at 534 F.2d 929, "[t]he ultimate question is whether the immediate harm to plaintiffs caused by the [agency's] ruling outweighs the advantage of allowing the [agency] to consider the problem more fully and the disadvantage of having a court decide issues which might otherwise become more sharply defined."

Simply stated, there is no sound reason why the Tribunal's ruling should not be tested at this time. For obvious reasons, the Tribunal, as well as the claimants to the fund, can only profit from prompt judicial resolution of the uncertainties surrounding ownership of cable royalties. Moreover, as previously demonstrated, the legal issues in this case are sharply defined and the Tribunal's interpretation of 17 U.S.C. §111(d)(4) represents a definitive and final position, which is in no respect tentative.

Accordingly, there is little, if any, hardship weighing against immediate review.

On the other side of the scale, the legal uncertainties generated by the Tribunal's decision create extreme hardships for the broadcasters, and the industry as a whole. Beyond the obvious loss of cable royalties made available to the broadcasters by the decision, absent immediate appeal, stations would be forced into an acute competitive disadvantage in renegotiation of their contracts with program suppliers and sports teams pending completion of distribution proceedings. Since such hardships, coupled with those discussed below, obviously greatly outweigh any hardship caused by immediate review, the December 1979 decision is clearly ripe for appeal at this time.

(b) The Broadcasters Are Likely To Succeed On The Merits

It is not necessary for a petitioner seeking a stay to demonstrate that his ultimate success on appeal is wholly without doubt; a petitioner must merely show that there is a reasonable probability that he will succeed on the merits. Oburn v.

Shapp, 521 F.2d 142, 159 (3rd Cir. 1975).

This states the broadcasters' burden in its extreme, for as indicated above, none of the criteria required by the Virginia Petroleum case is dispositive; determination of an application for a stay rests ultimately on weighing each equitable consideration against the others. Virginia Petroleum Jobbers Association v. FPC, supra at 259 F.2d 925; American Home Products Corporation v. Finch, supra at 303 F.Supp. 456. This is also obviously the case where, as here, the issues on appeal are complex legally and have not been tested by any court.

(1) The Validity Of The Tribunal's Decision Regarding Sports Programming

In its December 1979 decision, the Tribunal rejected the broadcasters' claims for royalties based on cable use of sports programming in which the broadcasters own and retain copyright. That part of the decision reads as follows:

> "The Copyright Act provides that cable royalty fees awarded for the secondary transmission of certain sporting events shall be distributed to the sports claimants except when contractual arrangements specifically provide that such royalties shall be distributed to broadcaster claimants." At 44 Fed. Reg. 75202.

The record before the Tribunal, we respectfully submit, not only affords no basis for this decision, but contradicts the position taken by sports claimants that the contracts between the stations and the teams ultimately govern copyright ownership and require evaluation at a full evidentiary hearing (R.II-49, 51-2, 57). Moreover, this conclusion, like those reached elsewhere in the decision with respect to syndicated programming and broadcast day compilations, rests on the Tribunal's interpretation of Section 111(d)(4)(A) of the Copyright Act.*

As we demonstrated in the proceedings below, copyright under the new Act initially vests in the "author" of the work, i.e., the creator of the work who adequately "fixes" it in some tangible form. Accordingly, the copyright in any sports programming created, produced and recorded by the stations vests in the stations, not the teams. See 17 U.S.C. §102(a); H.R.Rep.No. 1476, 94th Cong., 2d Sess. 52 (1976).

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* Section 111(d)(4)(A) of the Copyright Act reads in pertinent part:

> "(4) The royalty fees...shall...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 semi-annual period:
>
> (A) Any such owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part..."

Consistent with these principles, teams would be eligible to file claims for royalties as the copyright owners of the sports programming at stake only where: (a) they produced and recorded broadcast coverage of their games themselves; or (b) they obtained copyright ownership by way of contract with the station which broadcast and recorded the programming.

Despite the fact that nothing in the language of Section 111(d)(4)(A) in any way alters or changes the status of the broadcasters as copyright owners of the sports programming they create, this Tribunal relied heavily upon the so-called "legislative history" offered by opposing claimants to determine which claimants qualified as "copyright owners" eligible for cable royalties. This,we submit,was clearly reversible error for several reasons.

First, it is well-settled that legislative history can never be used to alter or defeat the rights plainly granted by the language of the statute itself. See e.g., United States v. Public Utilities Commission of California, 345 U.S. 295 (1953); Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563, 589 (1922). See also, 2A Sutherland On

Statutory Construction, §48.6 - 48.16 (1973). According to the unambiguous language of the Copyright Act, the broadcasters are the copyright owners of the sports programming. Therefore, so long as they do not relinquish their copyright by contract, they, not the teams, are entitled to cable royalties.

Second, taken to its logical conclusion, the Tribunal's decision with respect to sports programming means that copyright initially vests in the teams rather than the broadcasters which author and fix the programming. This conclusion is inconsistent with the fact that the teams contribute nothing to the sports programming which even remotely resembles the type of creative endeavor constituting "authorship" under the Copyright Act. As the record indicates, it is the stations, not the teams, who create and "fix" the sports programming, i.e., sports coverage is carried out by station personnel using station equipment and facilities. In most, if not all cases, the only contribution made by the teams is their performance of the game itself, which is not a contribution that rises to the standard of copyrightability. See Russell v. Northeastern Publishing Co., 7 F.Supp. 571 (D.C.Mass. 1934); Whist Club v. Foster, 42 F.2d 782 (S.D.N.Y. 1929); see also, 1 Nimmer on Copyright, § 2.18[H][3], fn. 70. Indeed, the teams themselves were unable to demonstrate on the record that they, rather than the stations, "fixed" the sports programming in issue. (R.II-55-56).

Third, it is apparent from the record that, for the most part, the teams claim copyright ownership in the sports programming based on what they allege to be a "work for hire" relationship with the stations. As we demonstrated below, however, this contention has no basis in law or fact. Section 101 of the Copyright Act makes it abundantly clear that a "work for hire" relationship consists either of "a work prepared by an employee within the scope of his or her employment" or of certain works specially ordered or commissioned. Specially ordered or commissioned works will not be considered "works made for hire", however, unless "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire". 17 U.S.C. §101.

The stations' relationship with the teams falls in neither of these categories. Common sense dictates that the stations and teams do not have an employment relationship given that the teams do not supervise, control or compensate the stations' production and recording of their games. As the record indicates, the contracts between the stations and teams confirm that (R.II-61) no employment relationship exists between them. There are no "written instruments signed by the parties" stating that the sports programming is a "work made for hire" as required by 17 U.S.C. §101.

The teams themselves recognized many of these points when they conceded that the contracts between the stations and the teams would determine copyright ownership of the sports programming. (R.II-52). Contrary to the Tribunal's decision, however, the teams are eligible for cable royalties only if they can demonstrate that they themselves created and fixed the programming or secured copyright by way of contract with the stations which did so.

These considerations raise significant and real questions with respect to the validity of the December 19, 1979 decision and justify a stay of that decision pending review.

(2) The Validity of the Tribunal's Decision Regarding the Stations' Broadcast Day Compilations.

With respect to the broadcasters' claims for royalties based on cable use of their broadcast day, the Tribunal wrote:

> "The Copyright Act does not provide for the payment of cable royalty fees to broadcast claimants for the secondary transmission of the broadcast day as a compilation." At 44 Fed. Reg. 75202.

This interpretation ignores the plain language of Section 101 of the Copyright Act, which states that compilations are fully protectible "works" within the meaning of the Act, separate and apart from the underlying materials assembled and the language and policy of Section 111(d)(4)(A) which requires that the broadcasters, as copyright owners of those works, be compensated by cable royalties along with all other owners of works included in non-network secondary transmissions. See 2 Nimmer On Copyright §8.18 [E] at 223.

The latter approach is entirely consistent with, and indeed, is apparently the basis for the Tribunal's finding that the Music Societies are proper claimants, and its failure to reject the claims of the character owners.

We submit that the Tribunal's failure to adopt the same approach with respect to the broadcasters' compilation programming is arbitrary and capricious, and grounds for reversal.

This unfair result stems largely from the Tribunal's reliance on the "legislative history" advanced by claimants represented by the Motion Pictures Association of America (MPAA) comprised solely of remarks by various NAB lobbyists misinterpreted and quoted out-of-context.

We submit that the NAB's participation in the legislative process is totally irrelevant to a proper interpretation of Section 111(d)(4)(A). As we demonstrated in our discussion of the Tribunal's decision regarding sports programming, the legislative history of a statute never overrides the plain meaning of the statutory language. Moreover, the precise issues raised by the broadcasters' claims, and for that matter, the claims of the character owners, were never "grappled with" by the legislature of the subcommittee in charge of revising the Act. Clearly, ignoring the lack of support in the legislative history for the cartoon claimants' position, while finding it determinative of the broadcasters' claims is reversible error*.

The same holds true with respect to the Tribunal's interpretation of "program" as that word is used in Section 111(d)(4)(A). Apparently the Tribunal accepted the MPAA's argument that compensation for cable use of the station's daily compilation of programming was not contemplated by the Act, i.e., only the creators of "programs" were entitled to claim cable royalties under Section 111(d)(4)(A). If this interpretation were consistently applied, however, neither the Music Societies, nor the character claimants would have standing to claim royalties, since neither group claims copyright ownership of a "program".

Given the inconsistencies inherent in the Tribunal's position here, a stay of the decision is fully justified.

(3) The Validity of the Tribunal's Decision Regarding the Broadcasters' Claims Based on the Syndicated Programming Held Under Exclusive Licenses by the Stations

The Tribunal rejected the broadcasters' claims for royalties based on the exclusive exhibition licenses with

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*This is not intended to suggest that the NAB's claims stand or fall with the position taken by the character claimants. Rather, the thrust of this argument is that the Tribunal is without authority to reject the claims of one group for reasons it chooses to ignore when accepting similar claims from other groups.

programming producers with the following language:

> "The Copyright Act does not provide for the payment of cable royalty fees to broadcaster claimants who have acquired rights to syndicated programming in a market, which rights are exclusive against other broadcasters in that market, when the syndicated programming is included in distant broadcasts which are retransmitted into the broadcaster's market."

This decision completely distorts the Copyright Act's definition of copyright ownership set forth in Section 201(d)(2).

Contrary to this Tribunal's decision, the statutory language and legislative history of that section can only be interpreted to mean that local broadcasting stations holding exclusive licenses to transmit a particular work in a particular geographical area for a particular period of time are the copyright owners of the work, entitled to all of the rights, protection and remedies accorded all other copyright owners by the Act, including the right to receive cable royalty fees. See 17 U.S.C. §201(d)(2); H. R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976). As was fully demonstrated in the proceedings below, the broadcasters' right to royalties based upon their exclusive licenses is entirely independent of any rights they may have under the FCC's syndicated exclusivity rules (i.e., to force cable systems to delete syndicated programming from its distant signal). See, e.g., 122 Cong. Rec. 31984, 32013 (cum. ed., September 22, 1976). Moreover, it was also shown below that the broadcasters' rights as exclusive licensees of syndicated programming are not limited to bringing an infringement action under Section 501(c). See generally, 4 Nimmer On Copyright §12.02 (1979). The Tribunal's decision totally ignores this, and misses the mark of the central substantive issue here: whether a station which purchased an exclusive license to transmit a particular program within a particular geographical area from the program's producer automatically succeeds to the producer's copyright ownership in that program with respect to those rights, and is therefore entitled to cable royalties.

We submit, that on the law and the facts, it follows inevitably that the station and not the program producer is the copyright owner of that program within the areas covered by its exclusive license with the program producer. Significantly, the record indicates that program suppliers may be presently renegotiating their contracts with the stations to include specific language granting the suppliers cable royalties for the programs exclusively licensed to stations (R. II-152, 153). It is absolutely clear that if the arguments asserted by the MPAA were dispositive of the issues raised by the stations, there would be no need for any such contract revision.

Given that this case is one of first impression and involves the complex issues summarized above, there is a reasonable probability that the broadcasters will succeed on the merits.

Point III

Absent The Relief Requested, The Broadcasters And Countless Other Regulated Parties Will Suffer Irreparable Harm

A controlling factor in determining whether justice requires that administrative action be stayed pending review is the extent to which the petitioner will suffer irreparable harm if the stay is not granted. *See*, *e.g.*, *Independent Bankers Association of America* v. *Smith*, *supra* at 534 F.2d 950; *Virginia Petroleum Jobbers Association* v. *FPC*, *supra* at 259 F.2d 773 (10th Cir. 1960); *Hamlin Testing Laboratories, Inc*. v. *U.S. Atomic Energy Commission*, 337 F.2d 221 (7th Cir. 1964).

The type of harm sufficient to justify a stay of administrative action has been characterized as "real, immediate and incalculable harm." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 351 U.S. 123 (1951) (concurring opinion of Justice Douglas) *cited with approval in* *Isbrandtsen Co*. v. *United States*, 93 U.S. App. D.C. 294, 211 F.2d 51 (1954), *cert*. *denied*, 347 U.S. 990 (1955). Thus, even if petitioners could recover some measure of monetary damages, the uncertainty of the adequacy of such relief, coupled with immediate injury to their day-to-day business relationships, establishes irreparable harm. See Isbrandtsen Co. v. United States, supra at 211 F.2d 51 and Independent Bankers Association of America v. Smith, supra at 534 F.2d 950.

In Independent Bankers Association of America v. Smith, the U.S. Court of Appeals for the District of Columbia upheld the District Court's stay of an interpretive ruling of the Comptroller of the Currency which construed the National Bank Act as permitting national banks to establish customer-bank communications terminals ("CBCT's") apart from their main offices and branches. The Comptroller's ruling that CBCT's were not "branches" within the meaning of that statute permitted national banks to install and operate CBCT's without reference to or limitation by state laws regulating or prohibiting branching by state-chartered banks.

In upholding the District Court's stay of the Comptroller's ruling, the Court of Appeals in the Independent Bankers case found that state-chartered banks challenging the ruling suffered irreparable injury because: (a) the ruling placed them at an "acute competitive disadvantage";

and (b) they were forced to rely on a ruling surrounded by a "cloud of uncertainty." Independent Bankers Associations of America v. Smith, supra at 534 F.2d 929-930. Accord: Isbrandtsen Co. v. United States, supra at 211 F.2d 55.

The same considerations apply in the present action. As indicated earlier, the Tribunal's decision virtually impacts the whole fabric of the cable television industry. There is every indication that the regulated parties will conduct their day-to-day business affairs with reliance upon the Tribunal's interpretation of Section 111(d)(4) of the Copyright Act. The reality of this situation puts the broadcasters at an extreme economic and competitive disadvantage in their business relationships with program suppliers and sports teams, as well as countless third parties who will interpret the decision to mean that broadcasters do not own the copyright in much of their own programming.

These considerations make it clear that the broadcasters' injury is totally unsusceptible of adequate measurement. Indeed, since there is a substantial likelihood that the ensuing distribution proceedings will have to be repeated _de novo_ as a result of the broadcasters' pending appeal, and the costs of these proceedings are deducted from the cable royalty fund, absent a stay broadcasters, as well as all other successful claimants, have no adequate remedy at law.

Point IV

Other Interested Parties Suffer Little, If Any, Harm From Issuance Of A Stay

The _Virginia Petroleum_ case also requires petitioners to show that the issuance of a stay will not substantially harm other parties interested in the proceedings. _Virginia Petroleum Jobbers Association_ v. _FPC_, _supra_ at 259 F.2d 925. Since the Tribunal, as well as all other claimants to the fund, can only profit from an early judicial resolution of the uncertainties surrounding cable royalty ownership, this is not a particularly difficult balancing task.

As the United States Court of Appeals noted in _Independent Bankers Association of America_ v. _Smith_, _supra_ at 534 F.2d 929-930, either way the Court decides the issue of broadcasters' cable royalty claims, "[t]he affected parties are notified _before_ they have detrimentally relied to any great extent on the [agency's] ruling and, if necessary, the [agency] can quickly revise [its regulations] to conform with the court's decision. The basic point is that under these circumstances it [is] unfair to require [petitioners] to suffer competitive disadvantages...in order to challenge the legality of the [agency's] action." (Emphasis added).

Moreover, as we have emphasized throughout this application, the time, money and effort which would have to be expended relitigating the distribution proceedings _de novo_ obviously would have an adverse effect on every claimant and would undoubtedly burden the Tribunal with unnecessary proceedings, the costs of which are deducted from the fund and are totally unrecoupable by the parties.

In contrast, there is little, if any, harm to interested parties if a stay is granted. The only conceivable adverse effect of a stay is a short delay in the proceedings pending the broadcasters' appeal. As we have demonstrated, however, there is a substantial likelihood that the broadcasters will succeed on appeal and that the ensuing distribution proceedings will have to be repeated unless a stay is issued pending review. Consequently, rather than causing delay, issuance of a stay in all probability expedites orderly distribution proceedings.

Point V

Issuance Of A Stay Best
Serves The Public Interest

Parties aggrieved by administrative agency action act as representatives of the public interest in seeking review. Virginia Petroleum Jobbers Association v. FPC, supra at 259 F.2d 925. This is particularly the case whenever constitutional issues are raised and the case is one of first impression. Cf. Abbott Laboratories v. Gardner, supra at 387 U.S. 136. As the United States Court of Appeals for the District of Columbia wrote in Virginia Petroleum Jobbers Association v. FPC, supra at 259 F.2d 925:

> "The interest of private litigants must give way to the realization of public purposes. Public interest may, of course, have many faces - favoring at once both

> the rapid expansion of [industry] and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative action and preserving orderly procedure. We must determine, these many facets considered how the court's action serves the public best."

A stay of the December 1979 decision comports with this standard, by preventing multiplicity of litigation, expediting resolution of the issues, fostering administrative efficiency and avoiding enormous economic waste.

Point VI

A Stay Should Be Entered In The Discretion Of The Tribunal

Separate and apart from the four considerations just discussed is the inherent power of this Tribunal to enter a stay if, in its discretion, the interests of justice will best be served. Tribunal Rules of Procedure §301.50(c). This Tribunal, as indeed all administrative agencies, has broad discretion to fix and postpone dates of hearings, grant continuances, etc., and generally to regulate the business before it, 1 Davis, Administrative Law §8.08. Administrative agencies are free to fashion their own procedure and pursue methods best calculated to permit them to discharge their duties. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

The Tribunal, in the exercise of discretion, should grant a stay. Absent such relief the parties will commence preparation for, and participate in, full evidentiary hearings, which in all likelihood will have to begin *de novo* upon compilation of the appellate process. A stay, therefore, works to the best interests of all parties.

Moreover, the costs of proceeding will be assessed against the available royalty pool and there seems little reason for the claimants to suffer the additional costs to be incurred should the hearings go forward at this time.

Finally, we think it best serves the end of a negotiated compromise of the controversy if the parties are not forced to hearings while the matter is on appeal.

CONCLUSION

For all the foregoing reasons, the NAB respectfully requests that the Tribunal, on the law and in the exercise of its discretion, grant a stay of its December 19, 1979 decision and all further cable royalty distribution proceedings pending an appeal of that decision to the United States Court of Appeals, and further that all proceedings scheduled in the aforesaid decision be postponed to a date three weeks after a final decision on this application has been published in the Federal Register.

Dated: January 17, 1980

Respectfully submitted,

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