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CHAIRMAN BURG: Good morning. Good morning, Mr. Wagner. As I recall yesterday I interrupted counsel from pursuing another point at the time that we recessed. So, Mr. Lloyd, you may proceed.

MR. LLOYD: May I ask the Tribunal's indulgence just a minute while I try to make a point.

MR. ELDRIDGE: Could I mark as an exhibit the errata sheet as part of the record that has been distributed. I think it would be NAB M.

(NAB Exhibit M was marked for identification.)

MR. LLOYD: I came into the hearing room yesterday in the belief, but perhaps it was only a hope, that my interrogation of Mr. Wagner would consume perhaps a couple of hours of the Tribunal's time. This was in part because I had made an effort to understand the case and had proceeded from the representation made by NAB on page one of the direct statement that a full statement of their direct proof, including all documentary evidence, exhibits, studies, etc., had been submitted.

We did not pick up Mr. Wagner for cross-examination until some time slightly past 2:30 in the afternoon. In the hours between 10:00 and 2:30, excluding the lunch recess, which was called a bit early under the circumstances which you all will recall, a great many bits of what are purported to be

1 documentary evidence, a great many elements of the direct proof
2 of the NAB, indeed such substantive matters as a revision of
3 their claim from 23.7 to 21 per cent was introduced.

4 A revision in the manner in which network programming
5 was extracted from the calculations was produced. We have now
6 seen from NAB beginning with their submission last July when
7 they said that 35 per cent of the network affiliates broadcast
8 day was not network to the direct case when they said 36.3 on
9 March 24, to yesterday's presentation when it becomes 37.3.

10 I am reminded of our pretrial conference in February
11 when counsel for NAB said "Well," and I don't recall the pre-
12 cise procedural dates that were established then and were later
13 shifted so I'll speak in terms of the present date -- "eventhough
14 everybody else has to exchange their cases on March 24th, since
15 we're not going on until late April, why don't you give us a
16 later date." And I recall Commissioner Coulter said, "Well,
17 wouldn't that be unfair? You would then have an opportunity
18 to hear everybody else's case and load your guns accordingly."
19 And I submit that's precisely what NAB did yesterday. It pre-
20 sented a new case, loading it's guns against MPAA, against the
21 Sports Interest, as a consequence of everything they had heard
22 before.

23 Now, I understand that the Tribunal has ruled into
24 evidence the entire March 24th submission of the NAB. That is
25 fine. That was their case on March 24th. I submit that should

1 be their case. If they want to change their case at some later
2 time when everybody has an opportunity to change their case,
3 perhaps, but I have to say from the perspective of an advocate
4 representing a client's interest, what happened yesterday is
5 extraordinary. It is highly prejudicial, it is unfair, and I
6 could attach a number of other adjectives to it. Now, I would
7 like to move -- what I would like to do, what I think would be
8 fair, I would like to move to rule out NAB's case but I'm
9 afraid that that doesn't do anything but complicate your task,
10 and I'm not going to ask you to do that, although I think under
11 the circumstances it would be fair.

12 I will ask that you rule out of order, not accept into
13 evidence, reject every piece of paper of a substantive nature
14 that was offered yesterday by NAB. It's new material and it
15 should not be permitted to be introduced into this proceeding
16 at this time.

17 Now, I apologize to the Tribunal for two things. I
18 apologize for presenting this to you because I know that your
19 task is a difficult one, but I feel that it's the only fair
20 approach. I apologize for my performance which was rude at
21 times yesterday afternoon. I can only explain that it was out
22 of a sense of frustration of coming in to confront one case and
23 being forced to confront another. And I would ask a ruling at
24 this time that the material that was marked as new material
25 yesterday be specifically said not to be a part of the evidentiary

1 record in this case. It clearly will be a part of the record
2 because there are question that may be asked about documents
3 that are marked and those documents, having been marked have to
4 be a part of the record. But what I am saying is they should
5 not be received as evidence.

6 MR. SCHEINER: Madam Chairman --

7 MR. ELDRIDGE: May I be heard in response to that.

8 MR. SCHEINER: Madam Chairman.

9 CHAIRMAN BURG: Mr. Eldridge first, I'm sorry.

10 MR. SCHEINER: I'd like to speak in support of the
11 motion very briefly.

12 CHAIRMAN BURG: All right.

13 MR. SCHEINER: I join in all of the comments made by
14 Mr. Lloyd. I would only add that it is not only unfair to the
15 parties but in my view, it is contemptuous of the explicit
16 directions of this Tribunal and the care that it took in solicit-
17 ing comments from the parties on how to structure and conduct
18 the evidentiary hearing, following which very precise guidelines
19 and directives were issued to the parties and to come in and to
20 be faced with the performance that we encountered yesterday, I
21 repeat, is contemptuous of your considered decisions as to how
22 we proceed in this matter.

23 CHAIRMAN BURG: Mr. Eldridge.

24 MR. ELDRIDGE: Madam Chairman, I'm a little surprised
25 to hear remarks of fellow counsel to the effect of the motion

1 that was presented. In effect, all we did was because of two
2 factors reduce our share from 23.7 to 21 percent. I don't know
3 why any counsel can object to our doing and making that reduc-
4 tion in the belief that it was warranted as a reduction, spe-
5 cifically we had not taken out the commercial minutes. We
6 felt, as MPAA did, that we should take them out, and we did
7 that and we ran the run to do it. We also felt that the posi-
8 tion in terms of flagship stations that we had not included
9 all flagship stations. We believed when we ran the run we
10 added all 66.

11 Mr. Lloyd and I have talked, and for reasons unknown
12 because it was inconsistent with the direction of my office, it's
13 either two or three, David I forget which, Canadians and one --
14 is it one Mexican?

15 MR. LLOYD: I believe it's four Canadians, one Mexican
16 and two PBS. But I'm not sure about the PBS because we haven't
17 clarified it yet. But it's in that range.

18 MR. ELDRIDGE: At least, we do know because of the
19 initial letters that the C and X were not there and were not
20 done so that when I said all 66 were plugged in, which served
21 to increase my friend's share and reduce our share substance,
22 why there is an argument about that. There is basically no new
23 material. Indeed, Mr. Scheiner, I'm a little surprised that
24 he would suggest that the Tribunal should not receive a new piece
25 of paper. I was shocked when in redirect the Commission allowed

1 a new document in that I obviously could not cross-examine. You
2 suggested that I could reserve my position for my own direct
3 case in comparing the methodologies.

4 Our methodology has not changed one iota. We do
5 exactly what we say we do. We've made the basic changes. There
6 is no new material. There's nothing in the slides that's new
7 material. All of this information was available and I really
8 can't understand why in the guise of advocacy someone should
9 suggest that we should not, being, I submit, completely honest
10 with the Tribunal, and make two changes that reduce our share,
11 and that's all that has happened.

12 And I submit the motion should be denied out of hand.

13 CHAIRMAN BURG: The Tribunal will take a brief recess
14 to consider this matter.

15 (A short recess was taken.)

16 CHAIRMAN BURG: Mr. Lloyd, we deny your motion. Please
17 proceed..

18 MR. ELDRIDGE: Thank you, Madam Chairman.

19 Whereupon,

20 ROGER WAGNER

21 resumed as the witness and, still under oath, was examined and
22 testified further as follows:

23 FURTHER CROSS-EXAMINATION

24 BY MR. LLOYD:

25 Q. After we recessed last evening, Mr. Wagner -- good

1 morning, by the way.

2 A. Good morning.

3 Q. You and I with your counsel present, had a discussion,
4 did we not?

5 A. Yes.

6 Q. And during the course of the discussion, you explained
7 to me, did you not, that Exhibit J contained data which, with
8 one exception, which I will duly note, flowed through and is a
9 part of the NAB calculation?

10 A. Yes, sir.

11 Q. And that that exception is that Exhibit J does not
12 reflect any adjustment downwards in the local programming claim
13 by NAB to take account of flagship station carriage sports?

14 A. That is correct.

15 Q. And you stated also during the course of our discus-
16 sion that you would provide me, in one form or another, with
17 information on the basis of which I could determine the scope
18 of the adjustment that was being made in the case of each of
19 the flagships, did you not?

20 A. Yes, that is correct.

21 Q. And is it not also true that you have not yet provided
22 me with that data?

23 A. I have it in hand here, sir.

24 Q. You do have it in hand?

25 A. Yes. Mr. Lloyd, may I ask you a question back? I

1 also come in toward us now, by messenger, the complete list of
2 the Sports flagship stations that you looked over last night.
3 It happens to have been an original. I didn't realize that.
4 So I think that that also should be a part of what is handed
5 over today. 30 copies of that list are coming to you now.

6 Q. Is it the case, Mr. Wagner, that you have or will have
7 in hand shortly to distribute to the people who should desire
8 to see it, information showing the extent of adjustments in the
9 local programming flagship stations to take account of their
10 sports carriage.

11 MS. GARCIA: Mr. Lloyd, could you please speak up
12 please?

13 BY MR. LLOYD:

14 Q. -- to take account of their sports carriage?

15 A. Yes, sir, from the list provided by NAB.

16 Q. Now, when we actually recessed yesterday afternoon, I
17 was being a bit contentious, I'm afraid, with Mr. Eldridge when
18 he sought to elicit from you whether your list was a complete
19 list of the 66 flagship stations referred to in the Sports pre-
20 sentation, and I believe it is correct, sir, and I will ask you
21 the question. Is it not true that you did make adjustments in
22 your program to take account of flagship carriage of sports?
23 You have done that?

24 A. I would like to answer that with an explanation.

25 Q. I didn't say the number of flagships, now.

1 A. Okay. The question, sir -- if I may, the answer
2 should be couched on the exact terms of what transpired. You
3 have just asked me a question concerning the program, the answer
4 to that question is, no, sir. The question should be said, is
5 there an adjustment in the local percentage downward in that
6 file which I described to you last night within the program
7 itself, you access the file, okay. That file is made up of the
8 percentages of local programming according to the FCC material.
9 That file has now been and was downward adjusted for reference
10 on a station-by-station, system-by-system run, okay.

11 The difference is when you said "Did you adjust the
12 program," no, I did not. Yes, I adjusted the individual figures
13 per station to reflect the difference between the FCC provided
14 material from the composit week to reflect those flagship sta-
15 tion percentages given me by NAB.

16 Q. When I refer to program, I was referring to your com-
17 puter program. Did you understand that?

18 A. Yes.

19 Q. But the adjustment was not made with respect to 66
20 stations, was it?

21 A. I believe the count is less than 66, yes, sir.

22 MR. ELDRIDGE: I think we noted that we, for some
23 reason there was an error at least with the Canadian and one
24 Mexican, which I think would be four. If there was some other
25 error, his list would show it but that is, I think, as I said

1 before, a problem of communication and somehow and for some
2 reason we did not have any C's or X's on the list of 66. So, I
3 believe I said that before and I say it again.

4 BY MR. LLOYD:

5 Q. The PBS stations which are carried on a distant signal
6 basis programming minutes are taken into account in the gross
7 number against which you apply the NAB programming, is it not?

8 A. For gross totals only, yes sir.

9 Q. That is correct. But, for example, if you have five
10 stations carried distantly on a CATV system, your approach for
11 that system is to identify the qualifying programming of those
12 five distant signals, identify the local programming component
13 of the commercial broadcasters, which is a component of that
14 total, and use that to derive the NAB share, correct?

15 A. On an hour's basis to equal the share, yes.

16 Q. Yes, on an hour's basis to equal the share. And if
17 PBS stations are among the five in the example given, your pro-
18 gramming for NAB includes every minute of PBS programming as
19 qualifying programming, correct?

20 A. From the list given me, yes, sir.

21 Q. Now, I want to return, if we may, Mr. Wagner, just
22 for --

23 A. Excuse me, one second, sir. My associate is coming
24 forward with the rest of the material you asked for.

25 Q. -- to Squeedunk Falls, you gave us an example of a CATV

1 system which had generated -- excuse me -- had paid a royalty
2 fee of \$10,000 on the basis of it's carriage of three different
3 signals?

4 A. Correct.

5 Q. One educational station, one independent station and
6 one network station. And in the example which you gave under
7 the MPAA analysis, and I'll speak in rough terms, 66 per cent
8 of the \$10,000 would go or be assigned by it to the independent
9 television station and 16 per cent or 16-1/2 per cent of the
10 royalties would be assigned by MPAA to the educational station
11 and the same to the network station?

12 A. Correct.

13 Q. In the analysis that you have presented a different
14 approach is taken from that, correct, from the MPAA?

15 A. The MT approach is different, yes, sir.

16 Q. But your approach does involve, the NAB approach does
17 involve, although it's not a part of the presentation, the
18 assignment of royalties paid by CATV systems to particular
19 television stations?

20 A. It is a part of the presentation for NAB, yes, sir.

21 Q. So, for example, the NAB data would disclose how much
22 of the royalty fee is attributable to -- how much of the total
23 royalty fund is attributable to WCBS TV, a network affiliate
24 operating on Channel 2, I believe, in New York City, to that
25 station, correct?

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A. Yes.

Q. Take this example, and please take notes, because I think it is important to point up the different approaches as you have sought to do. Let's take a CATV system that carries three -- the same CATV system pays a royalty of \$10,000. It carries independent network and educational on a distant basis. All right, we know that under the MPAA analysis 66.6 per cent goes to the independent. 66.6 to the independent -- to the independent, sir?

A. Yes, but I think the figure is wrong.

Q. We know under the MPAA analysis as you presented it in the case of Squeedunk Falls that 66.6 per cent of the \$10,000 goes to the independent. 16.6 to the educational and 16.6 to the network affiliate. All right, now, make this assumption with me, sir, that each of these three stations during the week that we regard as typical for this purpose broadcast 8400 minutes, or 20 hours a day, but 8400 minutes, let's do it on that basis.

A. Okay.

Q. Now, under your analysis, you would qualify -- you have changed the numbers on me -- you would qualify 37.3 per cent of the network hours, network stations hours, would you not?

A. I am sorry, sir, I don't understand your question.

Q. We are going to figure what share each of those stations

1 gets of the qualifying programming, all right?

2 A. Okay.

3 Q. You would start by taking out 62.7 per cent of that
4 number. Would you take your calculator and figure that?

5 A. My answer, Mr. Lloyd, is 3,133.

6 Q. All right, so you have in terms of qualifying hours,
7 you have the sum of 3133, 8400 and 8400. Is that correct?

8 A. If those are the --

9 Q. All of the independent programs qualify.

10 A. Okay.

11 Q. Correct?

12 A. Okay.

13 Q. And all of the educational programs qualify.

14 A. All right.

15 Q. You have said that's a part of your base?

16 A. Yes.

17 Q. Now, based on the NAB programming, how would the
18 \$10,000 be assigned back to the TV station?

19 A. The sum of 8400, 8400, 3133 and then on the pro rata
20 share against the \$10,000 deposited.

21 Q. All right. Would you do the calculations, please?

22 A. Sure. 19,933.

23 Q. So 19 per cent under your analysis would go to the
24 network affiliate, is that correct?

25 A. If the sum of the total minutes is 19,933 --

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Q. Oh, I'm sorry, okay. You are giving me the total?

A. Yes.

Q. All right. Now, how, since you don't use PBS -- excuse me -- I'll ask a question. -- allocate the shares back to the three TV stations as the NAB program does it.

A. That's out (indicating). This is 8400 plus 3133, which is the net of the combination of the independent station and the network which should be the affective hours for distributional purposes since NAB has cut out the educational station entirely.

Q. All right, go ahead, finish your calculation.

A. Which leaves a net of 11,533 hours.

Q. All right, your aggregate qualifying programming is the sum of the qualifying program of the independent and of the network?

A. Yes.

Q. You have eliminated as qualifying programming the educational entire program schedule?

A. Yes.

Q. All right. Now, figure the respective percentages then of the qualifying programming of the remaining two stations, the independent would get --

A. Yes.

Q. So is it correct, Mr. Wagner, that when you trace the royalties paid by the CATV systems back to the stations, based

1 on your analysis of qualifying programming, the independent
2 would get 73 per cent, and the network affiliate 27 per cent?

3 A. Yes.

4 Q. In that example.

5 Now, on this particular CATV system, which we used as
6 an example, we have left one distant signal which broadcasts
7 qualifying programming for 8400 hours behind.

8 A. Yes.

9 Q. Now, have you backed out of the system as well the
10 revenues for that 8400 minutes of programming?

11 A. No.

12 Q. You split the revenue up between the network affili-
13 ate and the local broadcasters?

14 A. Yes.

15 Q. Now, you have said, I gather somewhere along the line
16 to PBS that 12-1/2 per cent of all distant signal programming
17 carried time is carried by PBS stations, have you not?

18 A. I gotta look it up, Mr. Lloyd, I'm sorry, I can't --

19 Q. Look it up.

20 (Witness perusing documents.)

21 CHAIRMAN BURG: Mr. Lloyd, I think the witness is
22 ready.

23 BY MR. LLOYD:

24 Q. Yes, sir.

25 A. The answer to the question is no. Your question was --

1 let the Court Reporter repeat the question. I think we have
2 lost it.

3 Q. Well, if the answer is no, I understand it. I know
4 what the question was.

5 You have taken for the nation as a whole the number,
6 an aggregate number of distant signal programming hours, correct?

7 A. Correct.

8 Q. You have such a figure. You have a second figure
9 which we will call aggregate qualifying hours, correct?

10 A. Correct.

11 Q. The aggregate qualifying hours includes all hours of
12 PBS stations which were carried on a distant signal basis on
13 television, CATV systems throughout the country?

14 A. Correct.

15 Q. You have also separately the aggregate number of
16 qualifying hours of PBS programming carried on a distant signal
17 basis by CATV systems throughout the country?

18 A. Correct.

19 Q. What percentage does the last figure bear to the first,
20 that is, of what percentage of aggregate distant signal car-
21 riage is the qualifying programming of PBS as you have it?

22 A. I do not.

23 Q. All right. Well, PBS, we'll talk to it when it's
24 case gets on, but they say that based on data you provided it's
25 12.5 and that was the nature of my question.

1 A. Do you have a specific hours figure within that pre-
2 sentation, sir? I have not read it.

3 Q. Yes, I do.

4 A. May I have it?

5 Q. This is a matter of record, so I don't believe it's
6 improper to refer to it. This is the PTV Exhibit 3, specifically
7 Appendix F.

8 MR. BECHTEL: May I show him a copy, Mr. Lloyd?

9 MR. LLOYD: Yes. And I was also referring to a narra-
10 tive discussion on page eight of that.

11 MR. BECHTEL: Do you want the first or second account-
12 ing period?

13 MR. LLOYD: Well, it really doesn't make any difference.

14 MR. BECHTEL: It does to his relation to his figures,
15 I believe.

16 MR. LLOYD: He can reconcile the figures any way he
17 wants. The statement is made on page eight as to what -- I am
18 addressing myself to the conclusion stated on page eight of PTV
19 Exhibit 3, which I understand to be supported by Appendix F,
20 which is represented to be based on data provided by bi Associ-
21 ates.

22 MR. BECHTEL: That is correct, but you have figures
23 on page eight and nine for the first half and the second half.

24 MR. LLOYD: I am referring to figures on page eight,
25 Mr. Bechtel.

1 MR. BECHTEL: That's the first half.

2 THE WITNESS: Okay. The aggregate total of 2,007,000
3 hours. Is that the number you were referring to, Mr. Lloyd.

4 BY MR. LLOYD:

5 Q. What I am trying in my own fashion to establish,
6 because I truly don't know the answer, is how PBS is handled
7 in your presentation for NAB. Now, at this point I believe the
8 record reflects that in the assignment of revenues in the roy-
9 alty fund as between Broadcasters and all other claimants,
10 the broadcasters take the percentage of local programming as a
11 part of all qualifying programming, which does not include PBS
12 programming.

13 A. Correct.

14 Q. Yet PBS programming, as I understand from data you
15 assembled -- I understand from PTV Exhibit 3 is 12.5 per cent
16 of distant signal cable carriage in the first half of 1978
17 based on data that your company generated.

18 A. The letter part of the statement is correct. I did
19 supply the data that is in here, yes.

20 Q. Okay.

21 A. Now, may I answer your question?

22 Q. I don't really know what it was but if you have some-
23 thing to say, I'd welcome the opportunity to hear it.

24 A. The material that you asked me to cite from is the
25 example drawn for MPAA by bi Associates in an attempt to explain

1 the differences between the NAB formula and the MPAA formula.
2 This is only material on an example. Let us now talk about the
3 specificness of what you requested that I bring into replace
4 Exhibit J with which I think we should deal directly rather
5 than this example.

6 Q. Fine. Forgive me, but I prepared my cross-examination
7 today with a specific case.

8 A. Okay.

9 Q. And since I'm prepared to deal with a specific case,
10 I would prefer to do it my way and then you'll have an oppor-
11 tunity to do it your way. I won't cut you off.

12 Let's go to your Exhibit J.

13 A. Okay.

14 Q. You got your calculator in your hand?

15 A. Yes, sir.

16 COMMISSIONER JAMES: Is this the new one or the old
17 one?

18 MR. LLOYD: The only one I know about.

19 BY MR. LLOYD:

20 Q. Let me ask you one thing about this Exhibit J. I kind
21 of looked at these numbers last night and every time you have
22 a line entry for a network affiliate, let's take for example the
23 first one on the page is WCSH TV, you move over to the total
24 program minutes, then you got your sign local percentage. You
25 got the figure. Then you reflect that there is a network affiliate

1 so you're bringing 3139 in this example out of the total minutes
2 as qualifying minutes, correct?

3 A. Yes.

4 Q. Then you multiply that by .80. Now --

5 A. No.

6 Q. In each case like this --

7 A. No, Mr. Lloyd.

8 Q. Well, according to this Exhibit J, that's what's
9 happening. But in each case the result, that is the total in
10 this example, 2668, is in fact, the total as if you had multi-
11 plied by .85.

12 A. That is correct. Are you asking a question, Mr.
13 Lloyd, I'd like to give an answer?

14 Q. No, I'm wondering what question I'm going to ask,
15 Mr. Wagner.

16 A. Okay.

17 Q. I'm sorry that I can't move at the pace you might like.
18 Why is that?

19 A. The answer to your question, sir, is the materials
20 included in Item J are the result of, as demonstrated last night
21 to you, the material sent to a file called "Printer" within the
22 program. That material was selected from an example of a pre-
23 vious run run by direction of NAB in which a different factor
24 for commercial allocated time was used. That is, before I was
25 instructed to run an 80 per cent factor there were previous

1 runs not here submitted at 85. It's that simple. And this is
2 one of the end-products of one of those runs for network affili-
3 ates only but not for independent stations.

4 Q Well, I'm afraid that we've got at this point a ter-
5 ribly, terribly confused record because at the outset of today's
6 examination you answered a series of questions which might leave
7 the impression that Exhibit J contains data, except for the
8 adjustment respecting Sports, flowed through and as a part of
9 the NAB presentation. What you have just --

10 A My error, Mr. Lloyd. I did not realize that that was
11 the only qualifier in your question of what was wrong with that
12 printout. I'm sorry. That is my absolute error and that is
13 why I came in here with a set of documents to replace it, which
14 includes the handling of that particular area which you brought
15 up yesterday afternoon and which at that point I could not sat-
16 isfactorily explain.

17 May I go on, sir, and say to you that I am not a pro-
18 fessional witness. You are an attorney used to all of this. I
19 am not and I'm trying to answer all your questions as best I can.
20 However, I'm not -- I don't have the whole data base memorized.
21 I really don't and that's why my associates are here to assist
22 me with research and that's why I have got all these printouts.
23 Given the opportunity to rerun this over night at your direction
24 and after our conversation, I do have in hand proper materials.

25 MR. ELDRIDGE: May the witness be permitted to present

1 the material Mr. Lloyd requested him to run last night?

2 MR. LLOYD: In due time, Mr. Eldridge. In due time.
3 I'm not going to keep anybody, even if I wanted to I'm sure I
4 wouldn't be permitted to, from presenting new material. But
5 I have quite enough to deal with what I have got in hand.

6 MR. ELDRIDGE: Well, you requested it is the point.

7 MR. LLOYD: I guess I did request material which
8 actually reflects data that went into the calculations rather
9 than now a second example which did not.

10 THE WITNESS: Correct.

11 CHAIRMAN BURG: You particularly asked for the
12 example in Exhibit J of WCSH with regard to that network factor?

13 MR. LLOYD: Yes. The witness told me last night and
14 he confirmed again under oath this morning that the only dif-
15 ference in Exhibit J, the only -- that Exhibit J flowed through
16 into the NAB program and now he's introduced a whole new thing.
17 But I have --

18 MR. ELDRIDGE: Madam Chairman, he's just said that
19 he made an error at a request where he ran an 85 per cent figure
20 which was on Exhibit J and that we at NAB felt that it should be
21 20 per cent. We asked him to correct it to 20. And that is
22 why the mat there and his response was completely proper, when
23 adversary counsel, he took out his calculator and got 15 per
24 cent. The true run is done at 20 per cent and he has it. Mr.
25 Lloyd asked to see it and it's here. I don't know why he hesi-
tates.

1 MR. LLOYD: All right, Mr. Eldridge, I'll tell you
2 quite specifically. I asked to see it last night so I could
3 prepare the examination today so I wouldn't occupy --

4 MR. ELDRIDGE: You asked him last night --

5 MR. LLOYD: Be quiet. I'm talking.

6 CHAIRMAN BURG: Now listen. Life is just too short
7 and I'm not going to tolerate this kind of contentiousness.
8 Now you have a job to do, I understand that, Mr. Lloyd, and so do
9 you, Mr. Eldridge, but let's keep it within the bounds of some
10 civility. Now, that applies to both of you and I'm getting
11 quite upset with this kind of display.

12 MR. LLOYD: I understand that. I was interrupted
13 twice and I do rile a bit when I'm interrupted.

14 CHAIRMAN BURG: You're interrupting me I say, so let's
15 keep what I say in mind.

16 MR. LLOYD: Okay. Now, I asked for the data last
17 night; I did not get it. I am trying to illustrate a point to
18 the Tribunal which I think is an important point. I am pre-
19 pared to do it with the exhibit I have in hand. That is pre-
20 cisely why I do not want to introduce right now new paper. I
21 had to deal with new paper all day yesterday. I don't want to
22 deal with it right now. May I proceed.

23 CHAIRMAN BURG: Please do.

24 BY MR. LLOYD:

25 Q. All right. Let us take the CATV system that appears

1 on Exhibit J which is located in Lansing, Michigan, and which
2 generated a revenue pool in the first half of the year of
3 nearly \$16,000. This would be the third system depicted on
4 Exhibit J, would it not?

5 A. Yes, sir. I have it in hand.

6 Q. Now, the reason I picked this system, quite frankly,
7 is that it is the first of those depicted that has three dif-
8 ferent types of television stations. It has a PBS. It has two
9 PBS stations, two independent and one network station.

10 A. Yes, sir.

11 Q. Now, under the MPAA approach, as you understand it, if
12 we assume that each DSE consists of four units, and you under-
13 stand why I put it that way, don't you?

14 A. Why the DSE consists of four units?

15 Q. Each whole DSE consists of four units.

16 A. Four one-quarters, yes, sir.

17 Q. This system generates 2.75 DSE's does it not, or a
18 sum of 11 DSE units, if I may use that term.

19 A. Yes, sir. Four plus three, yes, sir.

20 Q. Now, under the MPAA approach it would assign, would it
21 not, 4/11 to each of the independent stations or 36.36 per cent
22 and 1/11 to the other three stations or 9.09 per cent. Is that
23 not correct? And you can check my numbers because I'm not a
24 witness. One is a network.

25 A. Okay. Network to educationals each of which get --

1 Q One DSE unit or .25 which would be 9.09 per cent or
2 .909, if you please.

3 A I'm sorry, sir, I don't understand where that comes
4 from.

5 Q Well, it's 1/11.

6 A Each.

7 Q Yeah. Each gets 1/11.

8 A Which is your your decimal, please?

9 Q 9 per cent roughly for each of them. 09 the way you
10 are doing it for each of them. Is that not correct?

11 Just in rough terms, MPAA's analysis of this Lansing
12 system would have assigned 36 per cent of the royalties to
13 each of the independents for a total of 72 per cent and 9 per
14 cent of the royalties to each of the educationals and the net-
15 work, correct?

16 A Okay, yes.

17 Q Do you agree?

18 A (Witness nods head affirmatively.)

19 Q Now, going to your Exhibit J, sir, you calculate the
20 qualifying programming of this system by taking the sum of total
21 programming with an adjustment -- if we may to simplify let's
22 forget about the commercial time adjustment just for the moment
23 because I think it's a wash.

24 A Certainly.

25 Q You take the sum of the total minutes carried, do you

1 not, and factor out the non-qualifying network minutes?

2 A. Yes.

3 Q. Okay. So that your qualifying programming base would
4 be made up of this column of numbers (indicating)?

5 A. The qualifying would be the total, yes, sir.

6 Q. That result right there. This column here (indicat-
7 ing) where he has taken out with respect to WUHQ the network
8 programming.

9 MR. ELDRIDGE: Madam Chairman, could we have Mr.
10 Lloyd point out for the record on the exhibit the line he was
11 physically pointing to?

12 MR. LLOYD: I'm dealing with WUHQ and in the example,
13 the sixth set of numbers or digits over, correct?

14 MS. GARCIA: Which is 2848.

15 MR. LLOYD: Yeah, the 2848 number.

16 BY MR. LLOYD:

17 Q. All right. The sum of that --

18 THE WITNESS: Excuse me. I'm lost. Where's the 2848,
19 sir?

20 MR. LLOYD: That is the qualifying minutes on WUHQ.

21 CHAIRMAN BURG: Directly under NAB on the top.

22 COMMISSIONER JAMES: Do you want some help?

23 THE WITNESS: Thank you, Commissioner. I appreciate
24 that. I have it. 2848. Excuse me. I'm sorry, Mr. Lloyd.

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BY MR. LLOYD:

Q. Now, as I total those numbers, I get a total of, and I know that you deal in hours, but that's 30,485 qualifying minutes.

A. Your number, sir, again?

Q. 30,485.

A. Yes.

Q. Now, here again, I guess I have to depart from the point of my preparation because I'm not altogether clear yet how you handled the educational broadcasting or PBS stations. They have in the case of WGBC, 6,750 qualifying minutes which is 22 per cent of the total qualifying minutes and PBS station number two, WTVS, has 7200 qualifying minutes, which is 23.61 per cent of the total. Putting to one side my percentage calculations, it is correct that those are the qualifying minutes of each of those stations?

A. Correct.

Q. The independent stations have roughly the same number of qualifying minutes and therefore get shares approximating 22 per cent of the qualifying minutes, correct?

A. Correct.

Q. And the network, which has a smaller number of qualifying minutes, 2,848, 9 per cent of the qualifying minutes?

A. Yes.

Q. Now, it's fairly easy for me to align all five stations

1 in the percentage of qualifying minutes. I cannot, because I
2 still don't understand how you handled the PBS stations, align
3 them with respect to their respective shares in the NAB program
4 of the \$15,930.69 in royalties paid by this system. So would
5 you do so?

6 A. Yes, sir. Continuing across the line of the example
7 WKBD, the total number of qualifying minutes, and in this case
8 it did include the reduction for commercial time, although mis-
9 stated -- no, that was correctly stated -- in any case, after
10 that reduction came down to a total of 2,354 hours. That is,
11 5,431 total minutes divided by 60 to get hours. That number
12 then multiplied by 26 to get the accounting period gave us a
13 total of 2,354 qualifying hours for that station.

14 Q. All right.

15 A. The same held true for WUHQ, which would up with
16 the thousand and 49 qualifying hours.

17 Q. Okay.

18 A. The Canadian station at 2,989 qualifying hours.

19 Q. Correct.

20 A. And the PBS station at 2,925 and 3,120, which sum is
21 located on the second line down, the second number over, the line
22 commences "Royalty 15 K" total distant hours is the sum of the
23 figures which I just outlined, meaning 12,437.

24 Q. All right.

25 A. Now, to determine the NAB share of the total royalties

1 paid by this system, the qualifying -- the total minutes times
2 the stated local percentage, that is, the two far left-hand
3 figures on each line, WKBD, 6,789 times their local percentage
4 yielded a net of 326, which starts immediatly after the column
5 headed "LOCMI," L-O-C-M-I, that is the identifier now for
6 local minutes. Do you wish me to continue?

7 Q. I'm not going to cut you off.

8 A. Okay. That total divided by 60 to yield total number
9 of hours times the number of weeks in the accounting period for
10 each one of the three under the NAB material. Those totals
11 then go to the local hours which is directly adjacent on that
12 bottom line, which is the total, and that number is then shown
13 as a percentage of the total, meaning .256 and .256 times the
14 total royalties equals the figure shown as \$4,078.25.

15 Q. No, no, sir. I have not made the thrust of my ques-
16 tion clear.

17 A. I'm sorry.

18 Q. I understand very well, because of the explanation
19 in your testimony on direct, oral direct, written, how you
20 calculated the local share.

21 A. Okay.

22 Q. What I am trying to ascertain is not how you calcu-
23 late the local share it is how you assign, as you are equipped
24 to do, the \$15,930 in royalties among the five television sta-
25 tions which were carried on a distant signal basis. Now, I

1 understand --

2 A. I understand your question.

3 Q. Do you understand the point of the inquiry?

4 A. Yes, sir, I did not.

5 Q. You did not?

6 A. I did not.

7 Q. But you do now?

8 A. Yes, I do.

9 No assignment to any other station except NAB utilized
10 stations, meaning commercial U.S. broadcasters and the Canadian
11 stations is included in any of the material tendered to NAB.

12 Q. All right. Question No. 1: The entire \$15,930 is
13 spread therefore over the three stations, WKBD, WUHQ and CBET?

14 A. No, sir. Only \$4,000 is spread --

15 Q. No, no, no. I'm talking about the total. You said,
16 Mr. Wagner, and you have said it on more than one occasion, that
17 based on the work you did you can allocate and have allocated,
18 indeed, royalties again rated by particular TV stations. That
19 is, that you can look at WCBS TV and identify how many dollars
20 of royalties it's distant signal carriage again rated.

21 A. Yes, sir.

22 Q. Correct?

23 A. Yes, sir.

24 Q. Now, what I'm trying to figure out is how this \$15,930
25 is spread among the five TV stations that were carried on a

1 distant signal basis? I know how you got the local shares but
2 the point of my inquiry, Mr. Wagner, is NAB told us last summer
3 that there approach would involve me as someone who has claims
4 to particular programming first in identifying the amount of
5 royalty that the station that my program was on has, okay?

6 A. Okay.

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Q. Now, we have under the MPAA approach allocated this \$15,930 we've established. 36 per cent to each of the independents and 9 per cent to each of the others. We can apply those percentages. Under your approach I simply want to know how the dollars break out over the TV stations. How we get to that number?

A. It requires a run following what you are looking at. That is, once the hours of stations -- hours per stations are established as part of the total you can --

Q. Does that include PBS?

A. Yes, because the split is now established as to how many hours for each individual station and then how many hours for the aggregate total. So you now have a percentage stated per station as a conclusion of this report. I don't think I'm making myself clear, am I?

Q. Let's take it a step at a time.

We have the aggregate qualifying minutes on this system.

A. Correct.

Q. That includes something approximating 15,000 -- excuse me -- 14,000 minutes of PBS programming.

A. Okay.

Q. All right, that is the qualifying programming.

A. Yes.

Q. Now, my understanding of your earlier testimony is

2 1 that we cannot take as a percentage of total qualifying pro-
3 gramming the individual components of that qualifying program-
4 ming, that is, for example, we have 30,000 minutes in quali-
5 fying programming, 7,000 of them were broadcast by an indepen-
dent. Okay?

6 A. Sure.

7 Q. We can't take the percentage reflected by 7/30ths
8 and do it that way, can we?

9 A. No.

10 Q. And that's because PBS is in there?

11 A. Correct.

12 Q. So how are we going to do it?

13 A. How are we going to do it?

14 Q. Yeah, how do you do it?

15 A. How do I do it?

16 Q. How do you do it? You're going to assign, based on
17 your earlier testimony -- how are you going to do it? How
18 do you do it?

19 A. Staying with the same example, same page?

20 Q. Yes.

21 A. The total number of distant hours which qualified
22 is total distant hours or 12,437.

23 Q. Okay.

24 A. We know that the PBS station, which I believe is the
25 subject of your question, how is money assigned to the PBS
station?

1 Q No, my question is, how is money assigned to all
2 stations?

3 A Okay. We already have demonstrated in this print
4 the part set aside at this point for local broadcasters in
5 combination.

6 Q No.

7 A Yes.

8 Q I want to know station by station how much in terms
9 of a percentage of the \$15,930 each of them gets.

10 A The first fraction, sir, would be 2,354, which is
11 the total number of qualifying hours over the total distant
12 hours for all the stations.

13 Q All right, that's WKBD. I see that.

14 A And the same arrangement for each station. Do you
15 want me to write them out? I will be glad to if you prefer.

16 Q Go on. Okay, you're giving the example. Would you
17 like them all out?

18 MR. JAMES: I sure would.

19 MR. LLOYD: So would I.

20 THE WITNESS: May I have a minute to do the cal-
21 culations without standing up crosswise? I can make them
22 legible.

23 MR. LLOYD: Sure.

24 THE WITNESS: These are very rough and very fast,
25 but, the total number of qualifying hours over the total

1 yielding a percentage times the total paid in for a net
2 dollar figure for a station. The same holds true for each one
3 of the stations based upon their total qualifying hours as a
4 percentage of the total of total qualifying hours times the
5 money. This figure here should equal -- I don't know whether it
6 does -- but it should equal 100 per cent. Therefore, this
7 figure should also equal 100 per cent of this. My math is
8 off slightly, but I believe -- unless you want me to send
9 somebody out to do it -- I'm trying to do it in a hurry. The
10 total dollars are then assigned to all the stations, and the
11 NAB materials thus far presented for this particular example
12 would deduct from that the sum of \$4,078.25 which is their
13 claimed share of the total.

14 Q All right, in the example that you have given, you
15 have traced royalty dollars to the two educational television
16 stations. Indeed, your conclusion is with respect to the
17 Lansing, Michigan system that 48.6 of the royalty pool gene-
18 rated is attributable to the qualifying programming of PBS?

19 A By the material submitted, yes.

20 Q And the qualifying programming of the network
21 affiliate is slightly under 9 per cent?

22 A Yes.

23 Q The smaller number of hours reflected in WKBD's
24 programming in relation to CBET gives it approximately 19 per
25 cent as opposed to CBET's 24 per cent?

5 1 A. Correct.

2 Q. Now, if you will recall, the MPAA figures that we
3 started with would have assigned the two independents 36 per
4 cent and each of the others 9 per cent, correct? The MPAA
5 approach.

6 A. Roughly, yes, sir.

7 Q. Roughly, yes, sir. And in this particular example,
8 the network affiliate insofar as its programming, its overall
9 program schedule is concerned, does no better under the NAB
10 analysis but there is a wide shift in funds from the indepen-
11 dents to the PBS stations, correct?

12 A. That is where the biggest change occurs.

13 Q. And that occurs because 100 per cent of the PBS
14 programming is regarded as qualifying programming, correct?

15 A. Yes.

16 Q. And because there is no distinction made in the
17 valuation of signals in terms of DSE's as there is in the case
18 of the MPAA analysis?

19 A. Correct.

20 Q. Each independent station is one full DSE in the case
21 of MPAA and .25 in the case of a PBS station, correct?

22 A. Yes, sir.

23 Q. The reason why there is not as substantial a shift
24 with the network affiliate is because only roughly 1/3 of its
25 programming is qualifying?

1 A. Yes.

2 Q. Now, I had understood you to say in dealing with
3 the hypothetical of Squeedunk Falls as opposed to the reality
4 of Lansing, Michigan that although the total qualifying
5 programming of PBS stations was taken into account, when you
6 came to divide the revenue among the stations, you did not take
7 it into account. I misunderstood you, I take it, Mr. Wagner.

8 A. The example included the following, sir, in my
9 direct testimony, that WAAF, the affiliates qualified pro-
10 gramming was 2,000 hours; WIIN, the independent was 5,000, and
11 WPPS in the example was 3,000.

12 Q. And that was an educational station, correct?

13 A. Yes, sir. In the assignment of dollars by the
14 MPAA formula on yet another exhibit, we used the figures that
15 you had me use here, that is, 1667 for the two quarter DSE's
16 and 6666 for the four DSE independent station. Continuing
17 through with material already submitted the WPPS, which stood
18 for the educational -- or the public broadcast service station,
19 we did use the entire 3,000 hours of qualifying programming
20 in order to establish the fraction for that specific program,
21 the National Geographic Specials, and the one over 3,000
22 yielded 3/100ths of a per cent of the total fees generated,
23 to use the MPAA terminology, using the DSE formula, which got
24 us to the net of 50 cents.

25 Q. In your formulation for NAB, go to Lansing again,

1 you figure the per cent of local programming, qualifying
2 local programming against the base of aggregate qualifying
3 programming and that base includes PBS programming, correct?

4 A. Mr. Lloyd, I'm sorry, please repeat the question.

5 Q. In your analysis for NAB, you take the amount of
6 local qualifying programming of the commercial broadcasters as
7 a percentage of an aggregate number of qualifying programming
8 hours and the aggregate includes PBS?

9 A. For the aggregate, yes.

10 Q. The local part that you extract does not include PBS?

11 A. Correct.

12 Q. Yet, your program also assigns ultimately copyright
13 royalties to particular television stations and in that assign-
14 ment you do make an assignment to PBS?

15 A. Yes, sir.

16 Q. And in the Lansing example we have given, roughly
17 50 per cent of the revenue pool would go to PBS, correct?

18 A. Yes, sir.

19 Q. The relative standing of WUHQ throughout was designed
20 by me to try to illustrate to the Tribunal the following point,
21 and I want you to agree or disagree with me. The point is that
22 the -- let's take Lansing one step further. Of course, if you
23 take all the Lansing's of the world you're going to get a
24 different mix of stations and WKBD will show up on a certain
25 number of Lansings and CBET on a certain number and entirely

1 new stations. That is, the television stations are carried
2 differently in terms of the amount of carriage by the CATV
3 systems.

4 A. With relationship to all the other stations that
5 appear on an individual CATV, yes, sir.

6 Q. You might, for example in the case of Atlanta,
7 Georgia, have a station that is carried by 2 to 300 CATV
8 systems, and a station in a network affiliate in another
9 community might be carried by only one.

10 A. Correct.

11 Q. Which is a big factor in the relative rankings of
12 the stations in terms of revenue contributions?

13 A. Yes.

14 Q. Correct?

15 A. Yes.

16 Q. But to point up the distinction between an indepen-
17 dent in the MPAA analysis and the network affiliate in the
18 MPAA analysis, vis-à-vis the NAB?

19 A. Vis-à-vis what, sir?

20 Q. The NAB's approach.

21 A. Yes.

22 Q. In this case, 100 per cent of WKBD, the independents
23 programming is qualifying programming, correct?

24 A. Yes.

25 Q. And roughly 37.3 per cent of the networks programming

9. 1 is qualifying?

2 A. Yes, sir.

3 Q. So, if they broadcast an equal number of hours
4 overall, the independent would get a greater percentage of
5 revenue than the network affiliate assigned to it from the
6 CATV system?

7 A. Go ahead.

8 Q. Correct?

9 A. Yes.

10 Q. 3.73 per cent as much as the independent would
11 have assigned to it?

12 A. All right.

13 Q. Correct? If they broadcast the same number of
14 minutes?

15 A. Yes.

16 Q. From that CATV system. In the MPAA analysis it
17 would be -- the network affiliate would get .25 per cent of the
18 allocation of revenues that the independent would get, correct?

19 A. I don't like that last figure because I don't
20 understand it.

21 Q. Well, the MPAA approach will speak for itself and
22 I will withdraw the question.

23 A. Okay. I'm sorry, sir, I truly didn't understand it.

24 Q. I'm sure it wasn't very well formulated at this
25 stage of the game, sir.

1 Have you presented to the NAB among other things,
2 any presentation of data which shows television station by
3 television station, how much of the revenue pool that station's
4 programming accounts for?

5 A. No.

6 Q. Have you presented that to anybody? Do you have it?

7 A. I have it.

8 Q. You have it. Is it for sale?

9 A. Yes.

10 MR. JAMES: Mr. Lloyd, may I interrupt you for a
11 minute?

12 MR. LLOYD: Surely.

13 MR. JAMES: I was just wondering, the last figure
14 over there is dollars, is it right?

15 THE WITNESS: Yes, sir.

16 MR. JAMES: You come up with 13,725?

17 THE WITNESS: Because my math was in a hurry trying
18 to do the fractions quickly, sir.

19 MR. JAMES: That should be 13 --

20 THE WITNESS: That should be the total deposit, yes,
21 sir.

22 MR. JAMES: Okay.

23 THE WITNESS: I'm sorry I didn't take the time to
24 do it line by line.

25 MR. JAMES: That figure should be the total?

1 THE WITNESS: The total that was deposited of
2 15,000, yes, sir. Actually, I think my final math is more in
3 error than the individual math since 4 times 3 are 12, 13, 14,
4 it looks to me like the 15,000 is already there. I just mis-
5 stated the figure as 13,000 in trying to do it in a hurry.

6 MR. JAMES: One last question. I believe you asked
7 Mr. Lloyd earlier, could he compute what PBS's share would be
8 using the NAB?

9 MR. LLOYD: Yes.

10 MR. JAMES: As I understand it the last two figures
11 over there would be Public Broadcasting's share?

12 THE WITNESS: For the two PBS stations, yes, sir,
13 GBC and TVS are the last two mentioned.

14 MR. JAMES: Thank you.

15 BY MR. LLOYD:

16 Q Let me return to Canada, if I may, Mr. Wagner.

17 A Yes, sir.

18 Q My colleague, Mr. Garrett, says we now move from
19 Squeedunk to Canada.

20 A May I ask a question first, sir? If you're going to
21 return to Canada, you asked a question of me yesterday con-
22 cerning the assignment of Canadian hours and mentioned a
23 particular television station which I was not at that point
24 prepared to answer other than, "I don't know." I do have in
25 hand a public record document submitted to the Tribunal which

1 I think should be my answer. May I continue my answer to that
2 question or should that be done on redirect?

3 Q No, because if you do it on redirect I probably
4 won't get a chance to ask you about your answer so you might
5 as well tell us now.

6 A All right, sir.

7 This material which I will have marked properly --
8 may I describe it first before I do that?

9 Q Yes.

10 A It's a copy of a letter sent to the Honorable Mary Lou
11 Burg on the 30th day of January, 1980 from the Canadian Broad-
12 casting Corporation and has to do with their material submitted
13 on November 14th, 1979, which concerns the exclusive rights
14 under copyright at -- I'll read the paragraph.

15 "CBC demonstrated that when CBC acquires an
16 exclusive license to broadcast a program, CBC becomes the
17 owner of that exclusive right under the Copyright Act at the
18 time it is acquired for exclusive license. Accordingly, as
19 copyright owner, CBC is entitled to claim a share of the copy-
20 right royalties paid by the cable systems pursuant to 17 USC
21 111D when CBC signals containing the said exclusively licensed
22 program are given simultaneous secondary transmission within
23 the compulsory licensed zone."

24 That, therefore, became the materials that were
25 tendered to me which I also could not answer your question on

1 yesterday afternoon, concerning the total number of minutes of
2 noncommercial local time which CBC gave me for the calculations
3 for NAB.

4 MR. ELDRIDGE: Madam Chairman, may we, in view of
5 the fact that we're reading from documents and so forth, may we
6 have the document that was prepared by the witness in response
7 to a question from which he has been reading from, which is on
8 the easel, marked as an exhibit, otherwise it will be very
9 difficult for anybody reading the record to know what that
10 document will look like?

11 CHAIRMAN BURG: All right.

12 MR. ELDRIDGE: If I may, that document I would ask
13 to be marked as NAB Exhibit N. Thank you.

14 (NAB's Exhibit N was marked for identification.)

15 MR. ELDRIDGE: And I also feel that it should be
16 marked -- the document the witness just read from which, I
17 believe, is the Canadian submission which refers to their claim
18 of copyright and exclusive market. If that document would be
19 marked as O, I believe.

20 (NAB's Exhibit O was marked for identification.)

21 BY MR. LLOYD:

22 Q Mr. Wagner, when did you first see Exhibit O?

23 A I would say about three days after it arrived in my
24 office, which would be somewhere -- it's dated January 30th,
25 so I would say the beginning of February.

1 Q When you testified yesterday that you had received
2 documentation from the CBC in March, what were you referring to?

3 A These two documents, sir, which give the number of
4 claimed minutes of broadcasting.

5 Q That's two documents you referred to which you have
6 in your hand which are not part of the record, is that correct?

7 A Yes, sir, they are -- yes, sir.

8 Q Now, did you review as a part of this process of
9 accounting for the Canadian broadcasting programming, the
10 material filed by CBC on March 14, 1980?

11 A I did not feel qualified to review it in any other
12 sense than to read it. I am not an attorney.

13 Q And what work did you do -- Mr. Wagner, of course,
14 I don't want to overly personalize that, I mean bi Associates,
15 what did you do which was a part of the Canadian Broadcasting
16 Corporation filing of March 14, 1980?

17 A Completed a run through the computerized base for
18 both the first and second accounting periods of 1978 in a
19 manner which CBC directed me so to do.

20 Q And do you know what the result of that enterprise
21 was, sir?

22 A I have it with me, if I may refer to it.

23 Q Well then, your answer is you don't know without
24 referring to other materials.

25 A I don't have the numbers memorized, no, sir.

1 Q Well, those materials I think are a record with the
2 Tribunal.

3 A Yes.

4 Q And rather than delay today's proceedings further,
5 I'll let them speak for themselves.

6 Now, the letter of January, is it your testimony,
7 sir, was the sole basis for your conclusion to include all
8 CBET programming as local programming?

9 A No, sir.

10 Q What other bases were there?

11 Those two documents that you held up a moment ago?

12 A Yes, sir, but I believe I would prefer to answer
13 your question with some detail.

14 Q May I see them?

15 A Sure.

16 (Witness handing documents to counsel.)

17 Q These documents appear to me that they were sent via
18 facimile transmission means?

19 A Correct.

20 Q When did that happen?

21 A As I stated earlier, sometime in early March, I
22 would think or somewhere around there. I'm not sure when. We
23 don't mark things when they come in as to the date of their
24 arrival.

25 Q Did you get this data which I hope to get marked so

1 we can identify it for the record -- did you get this data for
2 your NAB case or your CBC case?

3 A. I believe this data was for both.

4 Q. You wanted to provide a detailed explanation, you go
5 right ahead.

6 A. I beg your pardon?

7 Q. You told me a moment ago that you wanted to answer
8 and say something in some detail and I said, "Go ahead."

9 A. That was the matter which I presented previously
10 and these two documents which I believe answer your question of
11 yesterday, "Where did I get the numbers to run with?"

12 Q. Are you aware, sir, that NAB took the position at an
13 earlier phase of this proceeding -- and I'm sure it would adhere
14 to the proceeding of today -- that it has the copyright and
15 programming of which it is the exclusive licensee?

16 A. I'm sorry, I can't answer your question. I don't
17 understand it.

18 Q. Are you aware that NAB has taken the position in
19 these proceedings that it is the proper copyright claimant of
20 programming of which its stations are exclusive licensees?

21 A. I'm not qualified to answer that question, sir.

22 Q. You don't know?

23 A. I do not know.

24 Q. Okay. But your use of 100 per cent of CBET's
25 programming as local programming in your calculations of the

1 revenues to which NAB claims it is entitled was based on what
2 you understand to be a position stated by CBC in January of
3 1978, that it is the proper claimant of programming of which
4 it is the exclusive licensee?

5 A. Yes, sir.

6 Q. That much is clear?

7 A. Yes, sir.

8 Q. Now, I gather that you have -- well, it is correct,
9 sir, that since the session yesterday, you have given some
10 thought to the Canadian question, if I may refer to it as
11 that, then you came in with a letter dated January 10 and you
12 got a couple of facsimile --

13 A. Yes, sir. An associate at my direction is taking
14 notes on those questions which I cannot properly answer and
15 that was one of the matters that was brought to my attention
16 last night.

17 Q. And do you recall that yesterday you said among
18 the documents that you had received and examined in that con-
19 clusion was a CBC filing in March?

20 A. Yes, sir.

21 Q. You do recall that. Now, did anybody look at that
22 material over the recess between last night and today?

23 A. No, sir.

24 Q. So, you didn't check out the actual CBET schedule
25 that is a part of this material?

18

1 A. No, sir.

2 Q. Didn't ascertain that "I Dream of Jeannie" is
3 carried in the local programming of CBET or the like?

4 A. No, sir.

5 Q. Now, let me ask you this.

6 I have seen now data generated by your company which
7 NAB has used to support its claim, which PBS has used to sup-
8 port its claim, and which CBC has used to support its claim,
9 and just so I don't miss any when I come around and try to
10 reconcile all this stuff, is there anybody else whose claim
11 you have data in on as far as you know?

12 A. Are you referring to this specific hearing or are
13 you referring to all matters supplied to the Tribunal?

14 Q. No, I'm referring to these proceedings which involve
15 the distribution of the 1978 Cable Royalty Fund.

16 A. I would say that the materials you have just out-
17 lined with one addition of the extent of which I am not aware.

18 Q. Okay. What's the addition?

19 A. Major League Baseball.

20 Q. Well, we bought your first half library.

21 A. Yes, sir.

22 Q. Did you mean that we have done anything more than
23 that?

24 A. I don't know.

25 Q. Did you mean to suggest that we had done anything

1 more with you than that?

2 A. No, what I meant to suggest was I don't know if you
3 have done anything with it.

4 Q. Okay. Has anybody else bought your library since
5 you singled us out as having bought it? Did music buy your
6 library?

7 A. No.

8 Q. Did Christian Broadcasting?

9 A. No.

10 Q. Did NCAA?

11 A. No.

12 Q. Did any program producers or supplier individually?

13 A. Yes, but they're not present at this hearing and
14 that's why I asked for the qualification.

15 Q. Did MPAA buy it?

16 A. No.

17 CHAIRMAN BURG: Let's take a very brief recess,
18 please.

19 (A short recess was taken.)

20 MR. ELDRIDGE: Madam Chairman, I notice that while
21 we were in recess, another sheet of paper has been placed upon,
22 I presume, all of our desks. Maybe the witness could identify
23 what he has handed to everyone and we could have it marked.
24 Would you do so?

25 THE WITNESS: Yes, sir. Madam Chairman, Mr. Lloyd

1 had requested that during the recess that we distribute the
2 replacement for Exhibit J so that everyone might have a chance
3 to look at it before this part of the hearing began. I would
4 like to ask a question of Mr. Lloyd at this point.

5 MR. ELDRIDGE: May the document be marked the next
6 exhibit or should it be J-1?

7 CHAIRMAN BURG: I was wondering about it. Perhaps
8 for clarity, would it be J-2, wouldn't it?

9 MR. ELDRIDGE: Well, there is J and the next one
10 which is the replacement would be J-1, I believe.

11 (NAB's Exhibit J-1 was marked for
12 identification.)

13 THE WITNESS: Madam Chairman, during the recess,
14 Commissioner James asked if the specific figures used in the
15 last example which we worked up with Mr. Lloyd labeled Exhibit
16 N could have the exact figures put to them rather than my
17 rough estimates. I am not conscious of court protocol and took
18 it off the board to hand to one of my associates to do the
19 figures. May it be taken off the board and handed to an
20 associate to do the figures as Commissioner James requested?

21 CHAIRMAN BURG: Yes, I think that is permissible.

22 Mr. Lloyd, are you ready? Can we proceed? I did
23 gavel, the recess is over.

24 MR. LLOYD: I thought we had been on the record. I
25 was answering a question for Mr. Scheiner.

1 THE WITNESS: Mr. Lloyd, one other point. The
2 other materials which I mentioned earlier is coming in. The
3 copies of the list as supplied by NAB are also available if
4 you would like them distributed. I didn't know what you wanted
5 us to do.

6 MR. LLOYD: Yesterday, members of the Tribunal, I
7 suggested that rather than argue with the witness over the
8 programming schedule of CBET, which operates on Channel 9,
9 Windsor, Ontario, I would prepare an exhibit showing the pro-
10 gramming schedule of that station. I do believe that the pro-
11 gramming schedule of that station is contained in material which
12 is a matter of record in this Tribunal. It is not the easiest
13 material in the world to follow but the basic order of it is
14 that CBC has shown its network schedule, that is, what pro-
15 gramming it sends out in a typical week on a network basis.
16 Included in that are blocks of time which are marked off as
17 local and then the local affiliates, such as CBET in Windsor
18 show what they carried in that block of local time. In this
19 typical week, for example, CBET carried among other things,
20 "My Three Son" and "The Odd Couple" in the local time allocated
21 by the CBC network.

22 Now, I don't know what the status of this document
23 is insofar as the record is concerned. I gather it was a filing
24 that was geared to the March 24 deadline that we all had and I
25 am proceeding, unless I am corrected, on the basis that the

1 Canadian Broadcasting Corporation submission is a matter of
2 record here. If that is the case, then I will not burden the
3 record with newspapers, program schedules and the like.

4 THE WITNESS: It is in the record.

5 MR. LLOYD: All right. Thank you very much.

6 Exhibit J, I will simply note for the record and the
7 record otherwise will be clear on this, does not reflect data
8 for the same CATV systems that were reflected in Addendum C to
9 the direct testimony that was exchanged on March 24. It's
10 different data. Although the request that we initially made
11 yesterday was that we could have comparable data to try to
12 follow it through. It is the case, though, Mr. Wagner -- well,
13 I know what was requested yesterday, Mr. Wagner.

14 BY MR. LLOYD:

15 Q It is the case, is it not, Mr. Wagner, that Exhibit
16 E which you brought into the hearing yesterday --

17 A Which one is that, sir?

18 Q Exhibit E is the film library.

19 A Right.

20 Q -- for the -- the film library, what am I saying, is
21 your library for the CATV systems that show up on Exhibit J
22 and J-1. Exhibit E was a two-page computer printout distribu-
23 ted yesterday during the direct case of NAB.

24 Do you have it?

25 A I must confess, Mr. Lloyd, I can't find it at the

1 moment.

2 Q Here is a copy.

3 The pending question, sir, is, is it not, Exhibit E
4 an extract from your library for the particular CATV systems
5 that show up on Exhibits J and J-1?

6 A I believe so, yes, sir.

7 Q Just one question so I can understand how this
8 system works that you have. The first CATV system which
9 appears on Exhibit E and appears on Exhibit J and which appears
10 on Exhibit J-1, is one located in Norwalk, Ohio and other areas,
11 is it not?

12 A Yes, sir.

13 Q And from your library, Exhibit E, we can identify
14 four distant television stations carried on that system?

15 A Correct.

16 Q CBET, WKBD, WGTE, and WPHO, correct?

17 A Correct.

18 Q And when we go to Exhibit J, we find WPHO left
19 behind, and my question, sir, is why is that?

20 A Left on a preceding page, I'm afraid.

21 Q Oh, I believe not.

22 A Well, it should be there and I don't understand why
23 it is not.

24 Q Well, you can check your hours and ascertain that,
25 can't you?

24

1 MR. JAMES: Mr. Lloyd, I'm having trouble following
2 your question.

3 MR. LLOYD: I'm sorry, sir. The film library,
4 Exhibit E, lists the TV stations which are carried. The
5 distant ones will be the ones with the D's on them. Those
6 are distant full-time carriage stations. All right, now,
7 only the distant stations are pulled from the library and
8 transmitted on the NAB data which refers to J. You see. It's
9 in here, my point is, they have picked up CBET, WKBD, WGTE but
10 not WBHO.

11 MR. JAMES: Okay. I'm with you.

12 MR. LLOYD: And I want to know why.

13 THE WITNESS: Excuse me, Mr. Lloyd. I believe, on
14 your table yesterday there was a reference manual which I do
15 not have with me which will answer your question. It was --
16 and I'm sorry I don't have it with me -- it was a listing of
17 all the television stations in the United States. It is
18 included in -- it's a big thick book with an orange and green
19 color on it, put out by TV Digest.

20 BY MR. LLOYD:

21 Q. Okay. Go on with your point substantively. I want
22 to know why it's left behind. It's not because I had a book
23 on the table.

24 A. I was going to reference the book. And I believe,
25 the book will indicate -- the book, I believe, will indicate

1 that the station was not on the air during '78 or something.
2 I'm not sure if there was some item that came up in our cal-
3 culations about WPHO.

4 Q Well, your film library shows that the CATV system
5 reported when it filed its statement of account for the first
6 six months of 1978, that it carried on a distant signal station
7 a network affiliated station, WPHO?

8 A Right.

9 Q Okay. And it is the case that in your calculations
10 for the NAB when we move away from your library you did not
11 do anything involving WPHO for this particular CATV system in
12 Norwalk, Ohio?

13 A Correct.

14 Q And at the moment, as you sit here, you don't have
15 any explanation?

16 A I believe the explanation is in the material in
17 front of you.

18 Q What do you want, a list of the call letters?

19 A Yes, WPHO call letters.

20 Q Well, it's not here. What does that mean?

21 A That means, sir, that the material submitted by
22 the cable system at the time of its filing lists a station not
23 in evidence, that is, that we could not do a cross-match
24 against in order to come up with an assignable amount of hours
25 or local programming percentage.

1 Q You don't suppose, do you, that these key stroke
2 operators that you employ could have made a mistake, do you?

3 A Of course.

4 Q They could have?

5 A Yes.

6 Q Let's see. They put WPHO -- do you suppose it could
7 have been WDHO?

8 A It is possible, sir.

9 Q Dayton, Ohio?

10 A It is possible.

11 MR. LLOYD: Well, I will have offered for the
12 Tribunal the actual statement of account that the CATV system
13 filed. I will have it reproduced over the noon recess and offer
14 it as an exhibit.

15 BY MR. LLOYD:

16 Q You apparently have in your library extracted from
17 the statement of accounts the information regarding radio
18 station carriage?

19 A That is correct.

20 Q Now, I have looked at the codes that you use for
21 television stations and you clearly reflect what are distant
22 television stations and what are not, correct?

23 A As reported by the systems, yes, sir.

24 Q But I can't puzzle through in your library and
25 figure out what radio stations are distant and what are not.

1 A. There is no indication within the forms filed to
2 determine what the cable system operator -- to have any
3 indication from the cable system operator of what is a distant
4 or local radio station.

5 MR. JAMES: Mr. Lloyd, may I interrupt you?

6 MR. LLOYD: By all means.

7 MR. JAMES: Mr. Wagner, this WPHO, which was on a
8 form filed by the cable system indicating that they had paid
9 money in it based on that distant signal, how frequently did
10 you find in your total run that this incident occurred?

11 THE WITNESS: Mr. James, the point made by Mr.
12 Lloyd was that the material submitted by the cable system
13 showed WDHO and that our pickup WPHO --

14 MR. JAMES: I heard that. That's not my question.

15 THE WITNESS: Oh, okay. Excuse me, sir, your
16 question.

17 MR. JAMES: My question is, evidently this may have
18 happened or presumably this could have happened more than once.
19 I'm just asking what frequency in your total run is it possible
20 that this could have happened?

21 THE WITNESS: That kind of error or --

22 MR. JAMES: An error where a cable system says that
23 they took a distant signal and you couldn't find it and
24 ignored it.

25 THE WITNESS: 75, maybe 80 times in a run. Somewhere

1 around that, sir. I would say approximately -- what we call
2 flags, an extra printout occurs which indicates that the call
3 letters do not match anything that was on the air according to
4 the FCC.

5 MR. JAMES: What did your company do to try to
6 answer that flagged position?

7 THE WITNESS: In as many instances as we could, we
8 came back to the US Copyright Office with a list of things
9 which we had found.

10 MR. JAMES: And what was the end result of that?

11 THE WITNESS: There have been substantial changes
12 not due only in any way, manner, shape or form to that material
13 but there have been substantial changes within the filings
14 since they occurred.

15 MR. JAMES: So of 80 stations that might have been
16 flagged, how many now have been clarified?

17 THE WITNESS: I'm sorry, Commissioner, I can't
18 answer that question at this moment.

19 MR. JAMES: But there is evidently one that hasn't been
20 found yet. WPHO.

21 THE WITNESS: There is one that still stands, yes.

22 MR. JAMES: Thank you. Thank you, Mr. Lloyd.

23 BY MR. LLOYD:

24 Q One can look at your library for each CATV system
25 and ascertain from the library how many distant signals were

1 carried, just in terms of numbers, and it can ascertain from
2 your library the identity of those, correct?

3 A. Yes, sir.

4 Q. What cross-checks did you use to the NAB data that
5 you compiled to insure that you had picked up all of the distant
6 signals reflected in your library, if any?

7 A. If you will note at the top of Page J -- and J-1,
8 and for each cable system there is a listout under the initials
9 KTVENA et cetera. Then each individual cable system as a
10 conclusion shows the total numbers of those carriages found
11 during computation so that that total versus a totally separate
12 counter which simply counts As, Bs, Cs and Ds operating simul-
13 taneously gives us an end-count printout of both the cable by
14 cable basis and a total aggregate. It's a cross-check.

15 Q. In the case of Norwalk, Ohio, your library reported
16 four distant signals being carried and then when you came to
17 put the data together for NAB, you came up with three?

18 A. Correct.

19 Q. Was any bell rung or anything to alert you to that
20 fact?

21 A. Amongst others, yes.

22 Q. What?

23 A. Amongst others, yes.

24 Q. Can you look at Addendum C which was with your
25 testimony as it was exchanged on March 24?

1 A. Library, sir?

2 Q. No, no, Addendum C, NAB approach.

3 A. Pardon me?

4 Q. Your NAB report.

5 A. Don't have it in hand.

6 MR. LLOYD: Does his counsel have his direct
7 testimony that they can provide him with a copy? I have got
8 notes all over mine.

9 CHAIRMAN BURG: We have it.

10 BY MR. LLOYD:

11 Q. Can you ascertain for me -- and I really don't know
12 if this is the case or not -- whether the first system there
13 is that same Norwalk, Ohio system?

14 A. I cannot.

15 Q. You cannot?

16 A. I beg your pardon. If the royalties were the same
17 then it should be the same system, sir.

18 Q. No, because it's for a different reporting period.

19 A. Is it the same one?

20 Q. Yes. That's my question.

21 A. By the identification Continental Cable, dash, I
22 would say yes.

23 Q. Okay, but here again we don't have WPHO or WDHO, do
24 we?

25 A. No.

1 Q. And this Attachment C would have been based on the
2 second half report, correct?

3 A. '78, yes, sir.

4 Q. Of '78, whereas, Exhibit E and Exhibit J were based
5 on the first half?

6 A. Yes.

7 MR. LLOYD: I will also have presented for the record
8 the second half report for the Norwalk, Ohio cable system.

9 BY MR. LLOYD:

10 Q. Now, the charges which cable systems make for the
11 various services which they provide which are a part of your
12 library as well are not reflected in the NAB calculation of
13 the claim for the local television programming in any way, are
14 they?

15 A. No, sir.

16 Q. No way at all?

17 A. No.

18 Q. Not taken into account -- thank you. That's all.

19 CHAIRMAN BURG: Given the hour I think it's
20 advisable now to adjourn until 1:30 this afternoon.

21 (Whereupon, at 12:15 p.m., the proceedings
22 adjourned, to reconvene at 1:30 p.m., the
23 same day.)
24
25

AFTERNOON SESSION

1
2 CHAIRPERSON BURG: Now, if my memory serves me
3 correctly, Mr. Lloyd, you finished with your cross examination.

4 MR. LLOYD: I have. That is correct.

5 CHAIRPERSON BURG: So, Mr. Scheiner, you will be
6 next.

7 THE WITNESS: Madam Chairman, at the end of the last
8 session of cross examination, Commissioner James made the
9 request that we do the specific figures on this exhibit, which
10 I would now like to return and pass through the material to
11 the rest of the people who are here.

12 MR. ELDRIGE: See, he has not changed, it appears
13 to me, the results.

14 THE WITNESS: It is the exact and explicit figures
15 which Commissioner James requested.

16 MR. ELDRIGE: I understand that, but Exhibit N, this
17 really should be an N-1, pursuant to the request of, I believe,
18 Commissioner James.

19 COMMISSIONER JAMES: He can number it any way he
20 wants to. N is what was on the board.

21 MR. ELDRIGE: N is what was on the board.

22 CHAIRPERSON BURG: So this would be N-1.

23 (Whereupon, NAB Exhibit N-1 was marked for identifi-
24 cation.)

25 CHAIRPERSON BURG: Mr. Scheiner.

CROSS EXAMINATION

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BY MR. SCHEINER:

Q Mr. Wagner, good afternoon, sir.

A Good afternoon, sir.

Q I am going to ask your indulgence, Mr. Wagner. These computer printouts are written in kind of a foreign language, as far as I'm concerned.

A Yes, sir.

Q Preliminarily, sir, turn to Exhibit J. Do you have that? J.

A Yes, sir.

Q That is a computer printout; is it not?

A Yes, sir.

Q Mr. Lloyd put a number of questions to you with respect to the multiplication of 3,139 times 80 percent. This is in the column under WCSH T.V.

A Yes, sir, I follow you. The second item down, yes, sir.

Q Explain to me, sir, how the computer can multiply those two numbers and come up with the wrong answer.

A As I stated to Mr. Lloyd in that cross examination, that was a part of a previous run done for the National Association of Broadcasters before they had decided to accept the NAB numbers as far as the total discount for commercial time, so that the numbers were multiplied by .85 rather than 80.

MR. ELDRIGE: NAB. I think you mean MPAA.

THE WITNESS: I beg your pardon.

1 BY MR. SCHEINER:

2 Q Sir, my question is is the document in Exhibit J a
3 computer printout, or is it something else?

4 A Sir, it is a computer printout as -- I am sorry that
5 you were not present for the after-hearing conference last
6 night between Mr. Lloyd and the people from Coudert Brothers,
7 and I. The basic program itself creates two separate files.
8 File 1 is called "Printer". On a file marked "Printer", the
9 programmer, myself, puts in all of the writing that you see
10 that is fixed. That is, when the same line keeps appearing
11 over and over again. TMINS / 60 equals HR, is a fixed thing
12 that I drop in. What occurs in the file marked "Printer", which
13 produces the output, is totally separate and different from
14 the working file that is created. In this case, as we demon-
15 strated to Mr. Lloyd last night, in this particular computer
16 program, that file is called "Report". You build up this file
17 out on the computer and then access it to do all of your totals.
18 When creating a file like this with all the punctuation put in
19 and the spacing and all of these individual characteristics
20 to show line by line counts, if you were -- if I were to store
21 this on the computer as it was generated, I would use up too
22 much of the space involved when you are talking about 7,000
23 cable systems, and all of the attendant data that go along with
24 it. So, what goes into the file marked "Report" from which
25 J-1 appeared, as we tendered this morning --

1 Q I am looking at J.

2 A Okay. I will stay with J. And the material that was
3 in fact submitted as a final end product set of numbers, i.e.,
4 21 percent by NAB, came from the file end product marked
5 report, not from this printout.

6 COMMISSIONER JAMES: He's lost me, Mr. Scheiner.

7 MR. SCHEINER: Sir?

8 COMMISSIONER JAMES: I say he has lost me.

9 MR. SCHEINER: He lost me, too, sir.

10 BY MR. SCHEINER:

11 Q Let me tell you what my difficulty is, and perhaps
12 Commissioner James shares the same difficulty.

13 My rudimentary understanding of a computer is that
14 all the information is stored, you punch a button, and you get
15 a readout. Now, I understood you to say this was a computer
16 printout, but at the tail end of your answer, you indicated
17 otherwise. This was not a printout. It was something else.

18 MR. SCHEINER: Is that the difficulty, Commissioner?

19 COMMISSIONER JAMES: Yes.

20 A I am accepting the Webster's Dictionary definition
21 of the word "printout" to mean generated by a computer. Okay?
22 That's where it came from.

23 Now, the program created by BI Associates for all
24 claimant clients, including the the NAB presentation, named
25 FICHPK. There are a whole different set of files which are

1 accessed by the computer. I will print them out. The first
2 one is called "Printer", which makes reference to a specific
3 device attached directly to the computer. It actually strikes
4 the paper with characters. The second one is called "Fiche",
5 which you would call library. The reason I term it "Fiche" is
6 one of the products that we generate instead of all these piles
7 of paper that we are all weeding our way through, is computer
8 output microfilm which literally is a fiche, a record of every-
9 thing that's on the computer in the library file. The third
10 file which is accessed is called "Data". Data has in it the
11 FCC materials including the total minutes -- the total minutes
12 of broadcast and the relevant percentage as reported by the FCC.
13 It is this section of this file only which was changed by
14 NAB's instructions away from the original FCC documentation
15 to reduce it by total entertainment minutes, which they said
16 equals sports. And the final field -- the final file in this
17 program is called by this program "Report".

18 Now, for the file named "Printer" only, I produce,
19 literally lay out in computer language the exact words which
20 will appear on these documents, J and J-1, in order to show you
21 exactly what transpired. That's the only use for the file marked
22 "Printer". That's the output of "Printer" only. In the file
23 marked "Report", none of the following material occurs: the
24 second 6789 --

25 Q What?

1 A On the top of the page on J. As you come across the
2 line WKBD, the first time it comes up, it does appear in the
3 file named "Report". 6789 is stated once, .048 is stated once.
4 IND is compressed by the computer program into a different
5 character to make that representation. None of the rest of the
6 material that you see in that, or any other line on this
7 printout occurs until you get to the number 2,354. The computer,
8 via the program, does all the calculations without reproducing
9 that line in the file marked "Report".

10 Next, the expression "LOCFI" or "LOCFIN" if there is
11 room, also does not appear, nor does the 326 / 60 equals hour,
12 543 or X26. The only other thing that goes out into the file
13 is the number 141, or whatever else appears in that register.
14 In addition, one additional portion is put in there, which
15 includes from the royalty line the total royalties deposited by
16 that system and the total distant hours. Also, the local hours.
17 Those three digits only. So that what I have taken is 132-
18 character printout line, and I have all the relevant data
19 necessary for further calculations in Mr. Lloyd's questions
20 concerning can you do a station-by-station analysis, answer is
21 yes, because every line for every station includes its identify-
22 ing call letters, the total given hours, the local percentage,
23 the net program hours, the net local hours, the total royalties
24 deposited for that system's carriage of all stations on that
25 system, the total distant hours, and the total local hours.

1 So that the whole thing compresses down to an area of approx-
 2 imately 37 characters in length. So what have I done? I've
 3 reduced this from 132 characters, which is the breadth of this
 4 line. I can put 132 letters or numbers or whatever, including
 5 signs, across this page, but out on my computer -- let's call
 6 it 40 for round numbers -- I have created a 40-place file,
 7 meaning I have saved two-thirds of the room for future calcu-
 8 lations from this new file referred to as "Report".

9 What these fixed characters are, and it's a simplified
 10 computer word, it's called constants. You make the same thing
 11 appear at the same time every line.

12 Now, when the changeover occurred from the 85 to 80,
 13 in trying to run this off in a hurry, I did not take the time
 14 or trouble to check to make sure that the calcs, calculations,
 15 were doing the 80 calc, even though the file marked "Printer"
 16 said 80. Unfortunately, 85 was still running from another run
 17 done the previous night.

18 I know it's complicated, Mr. Scheiner. Honestly, I
 19 am trying my best to explain it in layman's terms.

20 Q Let's refer once again to Exhibit J.

21 A Okay.

22 Q The first system listed there is Norwalk, Ohio, is it
 23 not?

24 A Yes, sir.

25 Q And the last item noted is the number 4. Do you see

1 that?

2 A Yes, sir.

3 Q What does 4 indicate?

4 A Those are the number of distant television stations
5 noted for that system using the EABC, NABC, and IABCD, which
6 are directly adjacent to it.

7 Q And if I refer to the green portion immediately above
8 it, how many listed stations do I find?

9 A Green portion immediately above it. 1-E, are you
10 referring to, sir?

11 Q I see WKBD, WGTE, and CBET T. V., do I not?

12 A Yes, sir.

13 Q What happened to the fourth station?

14 A That matter, sir, was covered in my testimony as
15 questioned by Mr. Lloyd. I apologize to the Tribunal for the
16 fact that WPHO may not have been what was indicated within that
17 file, that is, at the U. S. Copyright Office. But I think it
18 should lend some further credence to the fact that I didn't
19 set this. I just grabbed a page and came with it. No complete
20 file of this size is totally error-free. You do your best to
21 find them all, and somewhere in there, there's going to be some
22 errors. We have generated in excess of 200,000 computerized
23 pages of report for various clients and various test runs. All
24 of those clients have gone over our data repeatedly, looking for
25 such errors. I apologize for the fact we missed this one.

1 Q All right. Would you refer to the last system noted
2 on Exhibit J. Again, referring to the same column, I find the
3 number 3, and I take it that that, too, indicates three distant
4 stations; is that right, sir?

5 A Yes, sir,

6 Q Now, when I look at the comparable column listing the
7 stations, I find 2, do I not?

8 A Yes, sir.

9 Q Can you explain that discrepancy?

10 A I don't know what the station is, sir, so I can't tell
11 you.

12 Q But it is quite clearly an error, is it not?

13 A On someone's part, yes, sir.

14 Q Sir?

15 A On someone's part, yes, sir.

16 Q What do you mean by that?

17 A I don't have the original documentation in hand as to
18 what station was supposed to have been keyed, nor do I know if
19 the total hours appeared in the FCC file marked "Data", et
20 cetera. I freely admit that there is a 3 there, and there are
21 only two stations showing, yes, sir.

22 Q Mr. Wagner, in your direct testimony, you described
23 the initiation and development of your relationship with NAB.
24 Do you recall that testimony?

25 A The initiation?

1 Q Well, there came a time when you did some work for
2 NAB.

3 A Yes, sir.

4 Q And if I recall your testimony, you undertook a
5 feasibility study.

6 A No, sir, that was not for NAB. That was on our own
7 long before our relationship with NAB had been developed.

8 Q What did that feasibility study consist of?

9 A At the strong urging of a claimant not here, but who
10 has filed with the Copyright Royalty Tribunal, people in
11 association with, I went to the U. S. Copyright Office to look
12 over the materials that were on file there, came back to that
13 attorney and said what we thought the possibility of putting this
14 thing together in one logical file which could be accessed as
15 required in his estimation plus our own attorney's estimation
16 of what the law required; that is, could we come down to the
17 fine point of the duration of individual copyrighted programs
18 per station, per system with any of a whole series of multiple
19 formulas for the disbursement of funds by the Tribunal through
20 computer printouts that we would provide to the claimants.
21 The answer to the question was yes.

22 Q When did you complete that feasibility study?

23 A I would say somewhere in the neighborhood of mid-July
24 of 1978.

25 Q And sometime thereafter, am I correct, that you

1 organized the BI computer data base?

2 A Yes, sometimes after, yes.

3 Q When did you do so?

4 A I believe the first letter sent to the claimants who
5 had filed claims with the Tribunal on July 31st, probably
6 went out in early August. We had a cutoff date of September
7 15, for the funding of the project, which we insisted on being
8 in front. At that point, I would say it was roughly October
9 or November or somewhere in there when we began getting this
10 data base together.

11 Q Of what year?

12 A That was '78, sir.

13 Q At some point, BI Associates prepared a document
14 entitled compilation of television carriage, "Copyright Royalty
15 Report Data Base", did it not?

16 A Yes.

17 Q Was the information derived from that report -- con-
18 tained in that report derived from the BI Associates data base?

19 A Yes, sir.

20 Q Sir, I hand you a copy of the NAB suggested broadcasters
21 justification, and I invite your attention to Exhibit E in that
22 report.

23 A Yes, sir.

24 Q The first station listed on that report is KATV, is it
25 not?

1 A My copy would indicate either KATV or KIV. I can't
2 really tell, Mr. Scheiner. One of the two, yes, sir.

3 Q And that is in the grouping of distant independent
4 stations, is it not?

5 A Yes.

6 Q Would you tell me whether such a station exists?

7 A I cannot tell you that, sir. This printout was drawn
8 up from all of the filings made by the Copyright -- I beg your
9 pardon, by the cable systems to the Copyright Office, and was a
10 compilation of each and every notation that we had found
11 throughout this filing in, I would say, approximately April,
12 perhaps March of 1979.

13 Q Would you turn to the fourth page of that report.

14 A Upper left, WJTF?

15 Q No. WJKS. Do you have it there, sir?

16 A No, sir. Upper left. What are the first call letters
17 that you see?

18 Q I'm sorry. Try the second one, please.

19 A WJKS, yes, sir, I have it.

20 Q Skip down five stations, and you will find the fifth
21 and the sixth listed as WLOL and the next one, WLVK.

22 A Yes, sir.

23 Q Do such stations exist?

24 A I really don't know, sir.

25 Q If I were to furnish you with a copy of the television

1 digest of station listings, could you tell me whether such
2 a station existed?

3 A Of course, I could, but that wasn't the point of this
4 printout. The point of this printout, as I testified earlier,
5 was to identify any and all stations listed by the cable systems
6 as being carried distantly, split into independent network and
7 educational groups as a report for the National Association of
8 Broadcasters.

9 Q And if the stations listed by you do not exist, then
10 the report is erroneous; is that right?

11 A Or the filing before the U. S. Copyright Office is
12 erroneous. One or the other.

13 Q What use was made of the listings to which we have
14 been referring?

15 A Sir, I believe that the National Association of Broad-
16 casters informed me at the time of ordering of that document
17 that they wished to, "get a handle on the total number of
18 stations which had filed in all three of those areas". There
19 is also a fourth document which was, I believe, a part of this
20 same material, which was completed under contract at that time,
21 which also listed all of the radio stations carried and also
22 gave counts for that.

23 Q But it in fact was used as a product of BI Associates
24 for the purposes of establishing the broadcasters justification
25 and claims, was it not?

1 A It was tendered to NAB for their use, yes, sir.

2 Q What I will now do is mark for identification as
3 Producer MPAA Cross Examination Exhibit 4, and it consists of
4 three separate documents. The first is a Xerox copy of the
5 1978 edition of television fact book, stations volumes which
6 list U. S. television stations by call letters.

7 The second document in this group bears the caption,
8 "Errors in Exhibit E, prepared by BI Associates". And the
9 third bears the caption, "NAB-BI Compilation Discrepancies".

10 (Whereupon, MPAA Exhibit 4 was marked for identifi-
11 cation.)

12 BY MR. SCHEINER:

13 Q Mr. Wagner, let me alert you, sir, in my view, and I
14 hope we will establish it on the record, there are a couple of
15 hundred mistakes in your BI listings, a couple of hundred. Has
16 anyone previously called your attention to errors in these
17 listings of stations in the three categories that you have set
18 them out?

19 A From this particular set of documents?

20 Q Well, let's, for the moment, limit it to this document,
21 yes.

22 A The answer, sir, is no. This was a one-use document
23 tendered to NAB. Nobody else has had reference to it at all.

24 Q I thought I heard you testify earlier that your clients
25 had subjected your work product to a meticulous review, and with

1 no or relatively few errors. Did I misunderstand you?

2 A You did not. The question at hand is money.

3 Q Sir?

4 A The question at hand is money. In the 200,000 pages
5 of reports which I alluded to previously, we are talking about
6 potential distributional formulas from the Copyright Royalty
7 Tribunal, a matter of very high impact on BI Associates' claim-
8 ant clients. The National Association of Broadcasters' pur-
9 chase of this document, these documents, as I stated previously,
10 was to get a fast overview of the situation, period.

11 Q All right. Let's take a look at the MPAA Exhibit XX4,
12 and particularly the document -- that portion of the document
13 which reads, "Errors in Exhibit E". For your benefit and the
14 benefit of the Tribunal, I have underscored with a solid line the
15 erroneous listings. Do you see that?

16 A Yes, sir.

17 Q On the first page, I note 70 erroneous listings. On
18 the second page, 41 such erroneous listings. On the third, 46;
19 on the next, 44; on the next, 46; for a total of 250 erroneous
20 entries.

21 A Uh-huh.

22 Q I refer you to your written testimony at Pages 2 and 5,
23 where you claim a very high degree of reliability, --

24 A Yes, sir.

25 Q -- for your data base. My notes indicate that the
reliability is something like one one-thousandth of one percent

1 error of key strokes.

2 A Uh-huh.

3 Q The summary that I have just referred you to is hardly
4 consistent with that high degree of error-free key strokes; is
5 it not?

6 A Absolutely.

7 Q Could it be, sir, that the errors are the result of
8 or the misclassification for the erroneous listings are the
9 result of some other type of error than key stroke error?

10 A I would say there is a possibility of some few percent
11 having to do with the material submitted by the cable systems.
12 But I would suggest that the majority of them have to do with
13 an unverified file.

14 Q With what?

15 A An unverified file.

16 Q I'm sorry. I didn't understand the last word.

17 A File. Unverified file. Where you key it the second
18 time and hunt for errors.

19 Q Understand that I don't know practically anything about
20 computer operations. But earlier you testified the flags going
21 up when errors were committed, did you not?

22 A In certain programs, yes, sir.

23 Q You can have 250 errors out of that listing, and no
24 flags go up?

25 A When the program does not call for them, that is correct,

1 sir.

2 Q Well, when you are representing the accuracy of this
3 data to this Tribunal, a document filed with this Tribunal,
4 and to the clients who have purchased your product, are you
5 suggesting that this kind of error is acceptable?

6 A No.

7 Q Well, what are you suggesting?

8 A I'm suggesting that for filings that contain that kind
9 of relevant material which includes the disbursement of money,
10 which is the high-impact point before this Tribunal, that such
11 flags and such checking is rigorously and carefully done, that
12 when we are directed by a client to give them a fast overview
13 of the situation, we provide that data in a hurry without
14 bothering to check it. Because, as I testified earlier, Mr.
15 Scheiner, this is a one-use document, a run it and walk, you
16 go on to the next project at hand.

17 Q And you made no further use of this material?

18 a No, sir.

19 Q Well, we'll get back to that in a minute. But let me
20 conclude the rundown of the kinds of errors that were made.
21 I now refer you to the document which bears the caption, "NABI
22 compilation discrepancies, page 2. Multiple listings of
23 stations, and for a page and a half, I note that you have listed
24 the same station as both network and educational, as independent
25 network and educational and so on. Do you see that, sir?

1 A Yes, I do.

2 Q And you regard that as an error of no consequence for
3 our purposes?

4 A For this purpose here in the disbursement of money,
5 no, Mr. Scheiner. As a matter of fact, it is a matter of record
6 before this Tribunal concerning the filings of other claimant
7 clients with a special attachment that there are, in fact,
8 multiple indications within the cable filings at the Copyright
9 Office, for the same station after their verification, which
10 indicate them as a number of different kinds of signals, even
11 though they are only the same station.

12 COMMISSIONER COULTER: I would like some clarification
13 of that. Can I tell you what I think you said, and you tell me
14 if I am right?

15 Are you saying that in the statement of account of
16 the Copyright Office, a given cable operator or, say, maybe
17 what you are saying is several different cable operators would
18 list the same signal under different categories?

19 THE WITNESS: Yes, sir. That material is on file with
20 the Copyright Office -- I beg your pardon -- that material is
21 on file with the Copyright Royalty Tribunal.

22 COMMISSIONER COULTER: Yes, the Copyright Office.

23 THE WITNESS: No, sir, on file with you in filings that
24 have been previously made in source that indicated as to the
25 cable systems, which show a specific station as either indepen-
dent, network, or educational in variance with any other listing

1 for the rest of the systems which included them. Let me give
2 you a specific example.

3 COMMISSIONER COULTER: Wait just a second, What file
4 is that, now?

5 THE WITNESS: What file is that?

6 COMMISSIONER COULTER: What file are you talking about?

7 THE WITNESS: The material file in July, on or about
8 July 31, 1979.

9 COMMISSIONER COULTER: Okay. Are these claims filed
10 with us?

11 THE WITNESS: Yes, sir.

12 COMMISSIONER COULTER: Claims filed with us?

13 THE WITNESS: Yes, sir, in claims filed, yes, sir.

14 COMMISSIONER COULTER: And then different claims --

15 THE WITNESS: Different cable systems list the same
16 station different ways.

17 COMMISSIONER COULTER: Who is giving us a listing of
18 the -- cable systems haven't made claims with us.

19 THE WITNESS: I'm sorry, sir. The claimants who have
20 made filings for the July 31 deadline have included errata
21 data from the filings sourced from the cable filings at the
22 Copyright Office in their request for disbursement of funds.

23 COMMISSIONER COULTER: Okay. don't go into all the
24 stuff. Could you go into your example now?

25 THE WITNESS: Sure.

1 COMMISSIONER COULTER: Example of a claim where that's
2 done.

3 THE WITNESS: CBC for one.

4 COMMISSIONER COULTER: What do they say on the claim?

5 THE WITNESS: They say that they are listed as
6 educational and as independent and as network.

7 COMMISSIONER COULTER: CBC said this about their own
8 signals?

9 THE WITNESS: Said this about the filings of the
10 cable systems to the Copyright Office.

11 COMMISSIONER COULTER: About how their signals were
12 listed by those cable operators?

13 THE WITNESS: Yes, sir.

14 CHAIRPERSON BURG: So, are you saying in effect, Mr.
15 Wagner, that the cable operators have made the original or
16 initial mistake? They have identified the station improperly?

17 THE WITNESS: They have in some instances, yes, ma'am.

18 COMMISSIONER COULTER: Why is that turning up in your
19 stuff. Why are you dealing with that?

20 THE WITNESS: Because what we do is we do no editing,
21 as I originally testified, of the material supplied by the
22 cable system, unless we are asked to do so for one purpose or
23 another.

24 COMMISSIONER COULTER: How would our claims be any
25 use to you in your program, in your system?

21

1 THE WITNESS: Because we do it by call letters, and
2 if the claimant says to us for the proper filing before the
3 Tribunal, as the case of CBC, we are an independent station,
4 or in the case of WPIX, we are an independent station, and
5 make the proper adjustments in the filing before the Tribunal,
6 it doesn't matter what the cable system called us as long as
7 they have correctly identified our call letters.

8 COMMISSIONER COULTER: Excuse me. I am afraid that
9 doesn't answer my question. The information on signals comes
10 from the statements of account; is that correct?

11 THE WITNESS: Yes, sir.

12 COMMISSIONER COULTER: How do the claims filed with
13 us, which are simply from television stations, have anything
14 to do with information that would be useful to you?

15 COMMISSIONER JAMES: May I rephrase that for you?

16 COMMISSIONER COULTER: Sure.

17 COMMISSIONER JAMES: Are you saying that you have
18 taken the claims that were filed with the Tribunal and pro-
19 grammed them into your computer?

20 THE WITNESS: No, sir. The opposite. The claims --
21 many of the claims on file with the Tribunal came from our
22 computer. The claimants came to us, and said, "Look, we are
23 WPIX," for example. "We wish to make a proper claim before the
24 Copyright Royalty Tribunal. Make a pass through your entire
25 data base. Any time WPIX shows up, indicate the system where
our station appeared. Use the following formula disbursement

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1 of funds as the claimants wish to do."

2 COMMISSIONER JAMES: Well, stop right there. At that
3 point in time, you know what classification the station is,
4 don't you?

5 THE WITNESS: We do from the claimant station, yes,
6 sir.

7 COMMISSIONER JAMES: All right. So how do you come up
8 and you get IN and E on some of these stations, or INN?

9 THE WITNESS: Because the material that we are quoting
10 is directly from the statement of account. In some cases, as
11 I have indicated, --

12 COMMISSIONER COULTER: So, that is where the errors
13 occurred, not in the claims with us?

14 THE WITNESS: That is correct. It may show up that
15 way, but it is claimed on a system-by-system basis. I'm sorry.
16 I don't have a copy of a claim with me.

17 COMMISSIONER COULTER: The claim, though, is irrele-
18 vant to the subject matter.

19 COMMISSIONER JAMES: I don't see why you brought
20 that up at all.

21 COMMISSIONER COULTER: What you are saying is that in
22 the statements of account, different cable operators have
23 listed the same signal differently?

24 THE WITNESS: Yes, sir.

25 COMMISSIONER COULTER: And that's all you are saying?

1 THE WITNESS: That's all I am saying.

2 COMMISSIONER COULTER: And you have run that through
3 your whole program, as Mr. Scheiner says, without checking
4 it out?

5 THE WITNESS: Without changing it, yes, sir. Unless
6 the Copyright Office has. They are the people who are in charge
7 of making such changes. We do not feel that we are authorized
8 to make such changes without the way the Copyright Office
9 has changed their material.

10 COMMISSIONER COULTER: Excuse me, Mr. Scheiner. I'm
11 sorry.

12 MR. SCHEINER: That's all right, sir.

13 BY MR. SCHEINER:

14 Q Let's pursue this a little bit. The one example that
15 you gave of multiple listings was CBC; is that right? Multiple
16 and erroneous listings. CBC?

17 A Okay.

18 Q It's not contained in any of these reports, so let's
19 pass that. Okay?

20 Would you refer to the same exhibit bearing that -- that
21 portion bearing the caption, "Errors in Exhibit E", and look at
22 the fourth page of station listings. The last one in the first
23 column, WYUR. What is the numeral 11, what does it mean, after
24 YUR?

25 A The number of times the station was noted in this

1 run as having been listed.

2 Q By different cable systems?

3 A Total listings, sir. They may have been on the same
4 form for multiple substitute programs, multiple part-time
5 carriages.

6 Q Would you refer to the first page of the document,
7 "Compilation Discrepancies", and under "Multiple Listings of
8 Stations". I am referring particularly to WPIX. Do you know
9 whether that station is an independent or a network station?

10 A I happen to know that WPIX is an independent station.

11 Q Can you explain how your report carries it as both
12 an independent and a network station?

13 A As I have previously indicated, Mr. Scheiner, the
14 material either appeared on the cable systems filing with the
15 U. S. Copyright Office with that material on it, or it was
16 a key stroke error which was not corrected for the purposes
17 of putting out this particular report.

18 Q Would you refer to Page 2 of your testimony, your
19 written direct testimony.

20 And I am referring particularly to the last full para-
21 graph on that page.

22 CHAIRPERSON BURG: Which page, Mr. Scheiner?

23 MR. SCHEINER: Page 2 of Mr. Wagner's written direct
24 testimony.

25 BY MR. SCHEINER:

1 Q And more particularly, the sentence, "These claimants
2 have gone over our reports repeatedly with a fine-tooth comb
3 to verify the accuracy of our data and conclusions -- data
4 base and conclusions".

5 Can you square that statement with the couple of
6 hundred errors that we have noted in Exhibit XX4?

7 A Once again, I will reiterate, Mr. Scheiner, that the
8 purposes of this specific report requested, ordered, and paid
9 for by the National Association of Broadcasters, was a quick
10 overview. There was no attempt made by us to sit down and
11 straighten up any errors, whether they were the cable filings --

12 MR. ELDRIGE: Madam Chairman, could the witness
13 state when he says "this report", it's not clear from the record
14 point of view of which one he's addressing those remarks. Would
15 you state what exhibit it is you were just talking about?

16 THE WITNESS: I'm sorry -- "Errors in Exhibit E",
17 prepared by BI Associates, from the Copyright Royalty report
18 data base, NAB suggested broadcaster justification before the
19 Copyright Royalty Tribunal, in July of 1979".

20 BY MR. SCHEINER:

21 Q Would you repeat your answer, sir.

22 A The total amount of errors in a given printout is
23 dependent upon how much checking is done. In this case, it is
24 obvious that none was done. There was no attempt on our part
25 to present a piece of material to the National Association of

1 Broadcasters on a claim-by-claim or station-by-station basis
2 for the disbursement of money. We did not correct any errors.

3 Q Is it not the case that the material that we have been
4 discussing was appended to NAB's report to the broadcasters
5 setting forth the bases for their claims to this Tribunal, and
6 that that report, together with your attachments, were filed
7 with this Tribunal in purported support for the broadcasters'
8 claim?

9 A I believe so. I have no -- I didn't do it.

10 Q Would you turn to Page 6 of your written direct
11 testimony. And I am referring to the last paragraph on that
12 page, the paragraph which starts with the phrase, "The program-
13 ming report".

14 A Right.

15 Q And it says, "The programming report enabled us to
16 identify operating time as network on network. Stations were
17 designated as network affiliates on the basis of their entry
18 in the broadcasting yearbook. Is that true, sir?

19 A Amongst other sources, Mr. Scheiner.

20 Q What other sources?

21 A The material that I referred to that was on Mr. Lloyd's
22 desk yesterday, which is from another publisher -- I'm sorry.
23 I can't recall the name of it. It was a large fact book
24 containing the listings of all the television stations in the
25 country and their coverage patterns, and once we began working

1 with the FCC material, we also used that in part.

2 Q You are not suggesting that these couple of hundred
3 errors appeared in Broadcasting Yearbook and the FCC Programming
4 Reports that you relied on, are you?

5 A Mr. Scheiner, the material that you are referring to
6 in one filing has little or no reference to the filing that
7 you are now quoting at me.

8 Q Let's pursue that a bit. Can you and I agree, sir,
9 that you have furnished us and the Tribunal with very few
10 so-called representative examples of your underlying data base,
11 as compared with the total data base that you assert you rely
12 on; is that true?

13 A Yes, sir.

14 Q You have given us, what, five or six cable systems?

15 A Yes.

16 Q Out of how many?

17 A 4300.

18 Q Out of how many?

19 A 4300.

20 Q A considerable amount of time was spent in trying to
21 straighten out the status of -- and I think the call letters
22 are WPHO.

23 A Yes.

24 Q And that was in and out of J, J-1, C, and the rest of
25 them; is that right?

1 A Yes, sir.

2 Q Would you refer to, once again, the document, "Errors
3 in Exhibit B", the fourth page of station listings, last column.

4 COMMISSIONER JAMES: Where are you, Mr. Scheiner?

5 MR. SCHEINER: Sir?

6 COMMISSIONER JAMES: Where are you? I'm sorry.

7 MR. SCHEINER: The document entitled --

8 COMMISSIONER JAMES: I have got the document. What
9 page?

10 MR. SCHEINER: The last column of the page I referred
11 to, which lists WPHO N.Y., about the 13th station down, on the
12 right-hand column.

13 COMMISSIONER JAMES: Okay. I have it.

14 BY MR. SCHEINER:

15 Q That listing of WPHO is an error, is it not?

16 A Yes, sir.

17 Q And why is it an error? There is no such thing, is
18 there?

19 A That is correct.

20 Q And that error carried over to Addendum C, and there-
21 after to Exhibit -- I'm sorry, Addendum A, Addendum C, and
22 Exhibit J, did it not?

23 A Yes, sir.

24 Q Does that not suggest that this material that was
25 appended to the original NAB report was relied upon and carried

1 forward in your ongoing work before the Tribunal in connection
2 with this very proceeding on the distribution of moneys?

3 A Without the full printout sitting in front of me, I
4 would have to hazard a guess and say yes, without proof.

5 Q I did ask you for, did I not, for last week, the
6 week before, for the underlying data, I asked you through
7 counsel, for the underlying data in support of your direct
8 statement, did I not?

9 A The statement as related to me by counsel, Mr. Scheiner,
10 was a matter of legalities -- I am not a lawyer -- between you
11 and them. At their direction, I was ready, willing, and able
12 to provide whatever it is that is required for this hearing.
13 I so stated to them, then, and nothing has changed. We got
14 to the point, Mr. Scheiner --

15 Q Are you telling me that you advised --

16 A -- in the conversation that when the question was
17 asked of me as a matter of fact, they asked me to indicate how
18 many pages there were in a given report. I have no further
19 requests from them to provide such a thing.

20 Q Is it your sworn testimony that you advised counsel
21 in this room, who represents you, that you were ready, willing,
22 and able to comply with my request that you furnish me with
23 the underlying materials for your written statement and exhibits?

24 A If that was their agreement and their assignment to me,
25 yes, sir.

1 Q I don't understand the qualification. Are you telling
2 me --

3 A I don't have it laying around in piles waiting to
4 spread out. If somebody orders it, I'll run it. It's that
5 simple.

6 Q All right. I will drop this.

7 Sir, would you turn to Page 4 of your written testimony.

8 MR. ELDRIGE: Do you have it, Roger?

9 THE WITNESS: No, I do not.
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1 THE WITNESS: Yes, sir.

2 BY MR. SCHEINER:

3 Q. Do you have it before you, sir?

4 A. Yes, I do.

5 Q. I'm referring particularly to the paragraph
6 which bears the designation, 80-89.

7 A. Right.

8 Q. Would you explain the text for me, please?

9 Well, perhaps we can do it quicker if I tell you
10 what I think it means, and tell me whether I'm right.
11 You have entered into your computer data base, in the code
12 taken by those lines 80-89, information concerning all
13 substitute program carriage, listing the information that's
14 set out in that paragraph, is that right?

15 A. That's right.

16 Q. And did you obtain such information? Did you
17 obtain such information? Is it entered into your data
18 base?

19 A. Yes, sir.

20 Q. And what use did you make of it?

21 A. I fail to understand you.

22 Q. You have -- let me give you a hypothetical -- a
23 cable system is carrying Station XYZ, and that station is a
24 distant station, and that station is carrying a very exciting
25 program dealing with local sewage problems, and XYZ is in

1 Skwedunk (ph.). Maybe they've got a two-hour PTA meeting
2 on the tube, in your hypothetical community of Skwedunk.
3 And the distant CATV operator says, I don't think that
4 program is of much interest to my viewers in Podunk, so
5 I'm just plain going to delete it, okay --

6 A. Mm-hmm.

7 Q. And, if you will forgive the expression, he
8 substitutes that PTA meeting with "Gone With the Wind" from
9 a different station. How did you handle that information?

10 A. Provided the cable system operator listed it,
11 it should appear in the b i Associates computerized data
12 base, if listed as a substitute program, with the proper
13 identification parameters.

14 Q. And who would have been credited for the time
15 or fee generated by that substitute program?

16 A. The classification in the NAB report, sir? It
17 would be under remainder.

18 Q. Sir?

19 A. It would be under remainder.

20 Q. What does that mean?

21 A. You're referring here to the materials submitted
22 for the National Association of Broadcasters, are you not?

23 Q. No.

24 A. Oh, I beg your pardon. I misunderstood you.

25 Q. Well, maybe we're talking about different things.

1 What I'm trying to find out is, when a station substituted
2 -- I'm sorry, when a system substituted "Gone With the
3 Wind" from one station, substituted a PTA meeting, or a
4 local sewage problem, from one station, or "Gone With the
5 Wind" from another station --

6 A. Yes, sir.

7 Q. -- how did you handle that in your analysis?
8 What did you do with it?

9 A. The hours and days of such substitute program are
10 in the computer, and at this point, due to the following
11 paragraph in Forms 3 statement of account, are not in
12 fact taken into account. The paragraph says, give only
13 the facts existing on the last day of the accounting
14 period, having to do with the total monies and other
15 materials that are submitted along with the complete form.

16 No legal counsel has yet come forth to us with --
17 I beg your pardon, strike that -- no client has come
18 forward to b i Associates thus far, and said that the
19 cable systems have split their -- split DSE's, on the basis
20 of individual programs that were aired on this substitute
21 basis.

22 We have continued to hold it. We continue to
23 ignore it -- that is, it is not a part of this computerized
24 program called FISHBACK, which did in fact move the
25 materials forward for the NAB presentation at this hearing.

1 Q Sir, I don't want to belabor this. Tell me whe-
2 ther I understood you correctly. Now, my hypothetical -- as
3 I understand your analysis, the station in Skwedunk, carry-
4 ing a local sewage program, would be credited for the
5 time, and not the station in Podunk, carrying "Gone With
6 the Wind"?

7 A That is correct.

8 Q If that's the case, may I ask you what is the
9 significance of lines 80 to 89 in your computer analysis,
10 and the reliance you place on it in your written state-
11 ment, if you in fact ignored it?

12 A What is the significance of it?

13 Q Yes, why is it there? Are you wasting valuable
14 computer time?

15 A When you build a file, you build the whole file,
16 Mr. Scheiner. If someone has the material in hand before
17 them at the U. S. Copyright Office, making the proper
18 notations on the forms that we provide for those employees,
19 it is the best business practice to take all of the pos-
20 sibly required information for future use. Some of these
21 filings, as I think you may be aware, go on for hundreds
22 of pages at a time. We got it. We're not certain yet
23 what the legal ramifications are, as far as use of it is
24 concerned, and it appeared to us, for this filing for the
25 National Association of Broadcasters, that such substitute

1 programming occupied such an infinitesimal amount of
2 total broadcast time for most systems that it was not
3 factored in.

4 Q You are aware, are you not, that under the rules
5 of the FCC, a cable television system has the right to
6 substitute a distant program, distant local program, which
7 in its view is of interest only to the distant community.

8 A Yes, sir.

9 Q And to replace that with a different program
10 that would be of greater interest to its cable subscribers.

11 A Yes, sir.

12 Q I think it's clear, but I would like to get it
13 underscored and italicized -- you have absolutely ignored
14 the impact of such substitute programming in your analysis.

15 A Yes, sir.

16 Q It's interesting. Look at Exhibit E.

17 COMMISSIONER JAMES: Can I ask the witness a
18 question about that exhibit? I was going to come back --
19 this might be a good time. Do you have the next sheet
20 down from this?

21 THE WITNESS: Which exhibit, sir?

22 COMMISSIONER JAMES: This is E. Do you have
23 the next one?

24 THE WITNESS: With me, no, sir.

25 COMMISSIONER JAMES: Go ahead, Mr. Scheiner.

1 THE WITNESS: Excuse me, Mr. Scheiner, which one
2 is Exhibit E?

3 BY MR. SCHEINER:

4 Q E is your library that was marked for identifica-
5 tion -- new library, marked for identification yesterday.

6 A Continental-Cablevision of Ohio, Inc.?

7 Q Yeah. Look at the last system noted, and as I've
8 told you much earlier, I have great trouble reading this
9 foreign text, but it appears to have a listing of sub-
10 stitute programs.

11 A Yes, sir.

12 Q In light of your testimony, what is the rele-
13 vance of this, any?

14 A It's there. It is usable, it is available upon
15 direction, and it is noted that it is within the body of
16 the material on our computer. It does not enter into any
17 of the calculations as substitute programming. Part-time
18 carriage is substitute -- is not. It would tend to be --
19 it would tend to be noted from an overview, and I do not
20 have the explicits on it, that part-time carriage occu-
21 pies real large amounts of duration of total broadcast
22 amongst the cable systems, whereas in this particular case
23 you are looking at 15 half-hours of programming over a
24 26-week period, which means seven and a half hours, which
25 isn't much when you're talking about a full year of program

1 time.

2 Q Well, look at the Lansing system on the same
3 exhibit. There, too, you list two substitute -- no, you
4 list "Family Feud" and "Treasure Hunt," and "Wild, Wild
5 World." Any significance to that whatsoever?

6 A It is listed as the cable system gave it to us,
7 I believe, sir.

8 Q Now, looking at the statement of account for that
9 system, I note that two other substitute programs were
10 listed, namely, "Treasure Hunt" and "All-Star Anything
11 Goes." Can you explain why you listed three substitute pro-
12 grams and not the other two?

13 A "Treasure Hunt" is listed, sir.

14 Q I'm sorry, two out of the five are not listed.

15 A "Family Feud" is; "\$100,000 Name That Tune" is
16 not.

17 Q Why did you leave that out?

18 A I can't answer that question, sir.

19 Q Is that an error in your computer?

20 A I doubt it -- I withdraw that answer. I don't --
21 I cannot answer the question, because I don't know.

22 Q Would not a flag have gone up at that oversight?

23 A No, sir. There is no flag attached to anything
24 having to do with substitute programming.

25 Q Again, back to page 4 of your written direct

1 testimony, line 99, and the test which follows. Do you
2 have that before you?

3 A. No, sir. May I have my written direct testimony
4 back, please, Carl?

5 MR. ELDRIDGE: Yes.

6 BY MR. SCHEINER:

7 Q. You represent that your analysis covers Form 2
8 cable systems, do you not?

9 A. Yes, sir.

10 Q. Have you furnished us with any example, or any
11 data, on your utilization of a Form 2 cable system?

12 A. No.

13 Q. Why not?

14 A. Wasn't asked for -- didn't provide them.

15 MR. SCHEINER: May I have two or three minutes to
16 organize my notes?

17 CHAIRPERSON BURG: Why don't we take a -- oh,
18 excuse me one second, please.

19 COMMISSIONER JAMES: Mr. Wagner, let me start off
20 this way. You made a computer run to ascertain how the
21 National Association of Broadcasters came up with the 21
22 percent, right?

23 THE WITNESS: We ran the computer run, and
24 that's where we got the 21 percent, yes, sir.

25 COMMISSIONER JAMES: Okay, and how many sheets is

1 that? Roughly, approximately -- 1,000?

2 THE WITNESS: Yes, 1,800 -- 1,200.

3 COMMISSIONER JAMES: And is this J-1 an actual
4 copy of something that would be in that run; am I correct?

5 THE WITNESS: It is data taken from that run,
6 but is not necessarily one of the pages from the run.

7 COMMISSIONER JAMES: Explain that to me, then.

8 THE WITNESS: Well, when you do a computer run,
9 Commissioner, the body of data which is within the run --
10 this doesn't have to be what you're requesting, unfortunately

11 COMMISSIONER JAMES: Well, my question is, of
12 the run that you made to -- that ended in the end result
13 of coming up with the NAB's 21 percent, J-1 is not -- is or
14 is not a part of that total documentation?

15 MR. ELDRIDGE: Do you have J-1 in front of you,
16 Roger?

17 THE WITNESS: Yes, I have J-1 in front of me,
18 and the answer to your question is, the material which is
19 in there is, yes, all of the data which is in your hands
20 in J-1, was used for the run, which built the National
21 Association of Broadcasters' percent to 21 percent.

22 COMMISSIONER JAMES: Okay, now, you previously
23 stated that there may have been 80 mistakes throughout the
24 run.

25 THE WITNESS: Yes, sir.

1 COMMISSIONER JAMES: And on one page, we find
2 two mistakes, right?

3 THE WITNESS: WPHO -- what was the other one, sir?

4 COMMISSIONER JAMES: Well, I have been trying
5 to compare E and J, and --

6 CHAIRPERSON BURG: The second mistake was the
7 listing for WGN and another station.

8 COMMISSIONER JAMES: Down at the bottom of the
9 page on -- let's go to J. You have -- the question, Mr.
10 Scheiner, over in the right-hand corner, you said three.
11 There are only two stations listed. Now, unfortunately,
12 on J-1, it got pushed down, but the numbers seem to be the
13 same, so that on one page, there is two mistakes, am I
14 correct?

15 THE WITNESS: Yes, sir. There were three.

16 COMMISSIONER JAMES: Three mistakes?

17 THE WITNESS: Yes, sir, the 27.7 for WGN as a
18 local percentage.

19 COMMISSIONER JAMES: What form are we talking about?
20 J-1?

21 THE WITNESS: J.

22 COMMISSIONER JAMES: No, J-1 --

23 THE WITNESS: On J-1, that error does not exist.
24 Now, we look at --

25 COMMISSIONER JAMES: J-1, that's all I'm interested

1 in. Are there two mistakes on J-1?

2 THE WITNESS: I believe there is one, sir. I
3 can't tell, because the darn paper ripped off, and I beg
4 your pardon.

5 COMMISSIONER JAMES: Well, that's why I went back
6 and referred you to J, because I compared the numbers,
7 and it looks like it's the same.

8 THE WITNESS: I don't know if there's a third
9 station down on the next page. I'm sorry, sir. I can
10 rerun it again.

11 COMMISSIONER JAMES: I will be willing to doubt
12 that you can come up with it, although the figures are the
13 same, aren't they?

14 THE WITNESS: No, because the references to the
15 cable system below it, sir, the total show after the list-
16 ing. What we need is the summary figures for Continental-
17 Cable P, which is the next line down on J.

18 COMMISSIONER JAMES: Well, first of all, if I
19 understood you right, the royalty is going to be the
20 same, right?

21 THE WITNESS: Total royalty, yes, sir.

22 COMMISSIONER JAMES: Total royalty, okay. Are
23 you saying that the next line down may have a total distant
24 hour?

25 THE WITNESS: I'm sorry, Commissioner, I do not

1 understand your question. A total distant -- do you mean --

2 COMMISSIONER JAMES: Counsel, if you want to
3 come up here, maybe you all can help me, too. Trying to
4 verify your J-1, now, it's cut off here, right?

5 THE WITNESS: Right. That WGN, the bottom line
6 here.

7 COMMISSIONER JAMES: You're missing a station
8 here.

9 THE WITNESS: That is correct. Now, the question
10 is, in the real data run, which is J-1, this one here
11 doesn't show. Standing here, I cannot answer your --

12 COMMISSIONER JAMES: Can you have somebody go and
13 call and let us know, because I want to know that answer,
14 because if you're saying -- make a phone call, because if
15 you're telling me that there are 80 mistakes throughout, and
16 I see one page that has two, and I multiply that times
17 1,800 --

18 THE WITNESS: That's 3,600 errors.

19 COMMISSIONER JAMES: Yes. I mean, is this pro-
20 gram error-rigged? I think that's what counsel has been
21 trying to ascertain. I think this is what we need to know,
22 if we're to place any validity on what you're coming out
23 with.

24 THE WITNESS: To be delivered here as soon as
25 possible, sir.

1 COMMISSIONER JAMES: You don't have to give me a
2 piece of paper, just get the information.

3 THE WITNESS: I would not attempt to rely on
4 anything else for this Tribunal hearing, other than some-
5 thing solidly in writing, sir. I don't want to take that on.

6 MR. SCHEINER: Commissioner, I'm sorry, sir -- I
7 think I interrupted you.

8 COMMISSIONER JAMES: I'm through.

9 CHAIRPERSON BURG: You're requesting that infor-
10 mation?

11 MR. SCHEINER: Just so that we can be clear on
12 which of these versions we're talking about.

13 COMMISSIONER JAMES: I'm dealing with J-1,
14 because that evidently now -- and I tried to preface my
15 remark -- what is in J-1, because everything has been correc-
16 ted? Yes, Mr. Lloyd?

17 MR. LLOYD: Commissioner, may I make a comment? I
18 just want to remind the Tribunal of the earlier testimony
19 today about J-1, where the witness described differences
20 between J-1 and J, and, Mr. Commissioner, with all respect
21 to the witness, if you want to assume, based on that
22 testimony this morning, or not assume, but to take his
23 testimony at its word, and to conclude that the same error
24 that appears on J, respecting the last listing, is also
25 reflected on J-1, his testimony will bear that out.

1 He described the differences between the two,
2 and that error which shows up in J was not described as
3 having been corrected on the piece of paper that he said
4 was J-1.

5 THE WITNESS: Madam Chairman, I'd like to respond
6 to that.

7 MR. LLOYD: I'm telling what the testimony is.

8 MR. ELDRIDGE: The witness can respond, Madam
9 Chairman, if he's made a statement that the witness
10 feels is inconsistent with -- it's his testimony --

11 CHAIRPERSON BURG: And you want this information?

12 COMMISSIONER JAMES: Yeah, I do recall that
13 testimony, so there's no problem there, and that's why I'm
14 directing -- maybe I'm just on a fishing expedition, I don't
15 know. It looks like directly will relate to the validity
16 of how you have computed your 21 percent. I think I would
17 like to know if there is over 3,000 errors.

18 THE WITNESS: I would too, sir. I definitely
19 would.

20 CHAIRPERSON BURG: Just a minute -- let me
21 recapitulate here. You have made your request, you will
22 grant that request --

23 THE WITNESS: Absolutely.

24 CHAIRPERSON BURG: Do you recall the testimony to
25 which Mr. Lloyd was referring, so there is no need to go

1 back into that? I'm recessing for five minutes.

2 (A short recess was taken.)

3 CHAIRPERSON BURG: On the record.

4 MR. SCHEINER: Madam Chairman -- I'm sorry, sir.

5 COMMISSIONER JAMES: Go ahead.

6 MR. SCHEINER: A little bit of housekeeping. Mr.

7 Lloyd reminds me that earlier today he said that he would
8 make multiple copies of the statements of accounts for
9 WBHO, for Continental-Cablevision of Ohio, Inc., reflect-
10 ing the carriage of WBHO.

11 They are, for the first and second accounting
12 periods -- I've marked the first accounting period XX-5,
13 and I hand a copy to the reporter. I've marked the second
14 one XX-6, and I'd like to distribute copies at this time.

15 (Exhibits XX-5 and XX-6 were marked for identi-
16 fication.)

17 MR. SCHEINER: Would the reporter please note
18 that that's MPAA Exhibits 5 and 6?

19 CHAIRPERSON BURG: One moment, please, Mr.
20 Scheiner. Commissioner James has a question.

21 COMMISSIONER JAMES: I hate to keep interrupting
22 you, Mr. Scheiner.

23 MR. SCHEINER: I don't mind at all, Commissioner.

24 COMMISSIONER JAMES: I guess the only way I can
25 present this, Mr. Wagner, is to use what everybody else has

1 been using, a hypothetical, that WPHO, or whatever station
2 that is, and the one that may be missing here, down at
3 the bottom of the page on Exhibit J-1 -- am I correct
4 that, if the hours increased, and it's a network or inde-
5 pendent or educational station, that it will have an effect
6 on the total distant hours, and consequently your per-
7 centage then would reflect up or down substantially the
8 amount of money that your client, NAB, would be claiming,
9 from which they placed their 21 percent figure on -- am
10 I correct in that? Do you understand my question?

11 THE WITNESS: I understand the question, sir.
12 Give me one second. The total number of distant signal
13 citations, in the course of the total of Forms 3 and Forms
14 2, all different distant station individual citations, is
15 in the order of magnitude of around 6,000 -- 6,000
16 different stations were cited, at one time or another, as
17 being distantly carried.

18 If, in fact, the material brought in at your
19 request can further identify the total error percentage
20 as being anything less than 1 percent of the total, then
21 the 1 percent of five or six thousand is going to have an
22 effect out about ten places to the right of the decimal
23 place, as far as the total amounts of dollars and hours
24 that we're talking about. The gross totals are so huge
25 that it would take a mighty change of either incorrectly --

1 non-identified call letters and/or tremendous amounts of
2 substitute program time, not included in this material
3 submitted by NAB, to materially affect the 21 percent.

4 COMMISSIONER JAMES: Walk through another example
5 with me, though. Let's take WPHO, say they had 7,000
6 minutes, and it's -- WPHO has been determined to be what,
7 a network?

8 THE WITNESS: Mr. Scheiner has the --

9 COMMISSIONER JAMES: Well, let's do it as a net-
10 work, with 6,000 more hours or minutes.

11 THE WITNESS: Minutes, yes.

12 May I suggest, Commissioner, that you use the
13 number as one of the other network stations that appears
14 on printouts, both J and J-1?

15 COMMISSIONER JAMES: Okay.

16 THE WITNESS: Why don't you take the -- if I may
17 suggest, sir, WCSH from the second indicated --

18 COMMISSIONER JAMES: I have it.

19 THE WITNESS: Okay, so we're at 8,416 minutes,
20 which reduces on down to something in the order of magnitude
21 of 1,200, for round numbers, total hours, which reduces
22 further, as a network full-time distant signal, to approxi-
23 mately 300 -- well, exactly 314 hours.

24 When you compare the 314 against the total local
25 hours of that specific cable system, you're saying 314, as

1 a percentage of 2,880, which is the local hours.

2 COMMISSIONER JAMES: Well, your total distant
3 hours are going to increase by roughly 1,200, right?

4 THE WITNESS: Yes.

5 COMMISSIONER JAMES: So now it will become almost
6 10,000, right?

7 THE WITNESS: It will go upward, sir, from 10,420
8 to approximately 11,200.

9 COMMISSIONER JAMES: Then your local hours would
10 remain the same, right?

11 THE WITNESS: No, sir, there would be an addi-
12 tion to it, as there was with WCSH.

13 COMMISSIONER JAMES: What's the addition?

14 THE WITNESS: 314. So you've got 2,880, plus
15 314, which yields 3,194.

16 COMMISSIONER JAMES: Okay.

17 THE WITNESS: Now, if you say that this is the
18 new equation, as far as the distribution is concerned,
19 that is, 3,194, divide 11,200, the percentage for the
20 local broadcasters comes out to 28.5, relevant to --

21 COMMISSIONER JAMES: That's .285, right?

22 THE WITNESS: .285, yes, sir.

23 COMMISSIONER JAMES: Okay, instead of .390?

24 THE WITNESS: No, sir, instead of .276. Total
25 distant hours, Continental-Cable A, royalties, 6,636, is the

1 summary line for the information contained in the listing,
2 WCSH. So that the change from the total percentage has
3 gone up, sir, not down.

4 COMMISSIONER JAMES: You've lost me.

5 THE WITNESS: Okay, one more.

6 COMMISSIONER JAMES: No, let's stick with this one.

7 THE WITNESS: Yeah, CSH, the same way coming
8 across. Now --

9 COMMISSIONER JAMES: Hold it.

10 THE WITNESS: Excuse me.

11 COMMISSIONER JAMES: I'm on the line, Continental-
12 Cable, 29 East Main Street -- right under that. The
13 total distant hours of 7,852 --

14 THE WITNESS: That refers to the previous sys-
15 tem, Commissioner. You want to use that one for the example?
16 I beg your pardon -- I understand.

17 COMMISSIONER JAMES: Well, wait a minute. Let's
18 go back. Continental-Cable had four systems, and only
19 listed three, right?

20 THE WITNESS: Yes, sir.

21 COMMISSIONER JAMES: My question is, if you add
22 the fourth one, and I thought that was what you were doing,
23 taking WCSH as being carried by Continental-Cable at 29
24 East Main Street.

25 THE WITNESS: Right.

1 COMMISSIONER JAMES: What would be the effect
2 of that increase in hours?

3 THE WITNESS: Yes, sir. I moved down a total -- I
4 beg your pardon. We're starting, then, with the number
5 7,852, as total distant hours.

6 COMMISSIONER JAMES: Yes, but you've got to add
7 to it, not only add one more station, right?

8 THE WITNESS: Right. We're going to add the
9 figures for WCSH, the next listing down, which is 8,416 for
10 a starter, carried all the way across the line to 1,156,
11 which is the total hours after the reductions -- 1,156,
12 809 -- pardon me, the total is 8,908, total distant hours.

13 We've added one station, so our total hours
14 moved up.

15 COMMISSIONER JAMES: Right. Well, aren't you
16 adding 1,088?

17 THE WITNESS: The number I used, sir, was 1,156.

18 COMMISSIONER GARCIA: Well, he's looking at J-1,
19 and you're looking at J. That's where the problem is.

20 THE WITNESS: Excuse me, I'm sorry.

21 COMMISSIONER JAMES: I thought I said it clearly.
22 I wanted J-1.

23 THE WITNESS: Thank you, Commissioner Garcia.
24 I'm sorry. That's why we got lost here.

25 One more -- total hours, 7,852 from WCSH -- the total

1 is 1,088.

2 COMMISSIONER JAMES: Okay. Now we're together.

3 THE WITNESS: Our new total is 8,940. The pre-
4 vious balance of local hours was 3,060. We will now add
5 to that, from the WCSH total, 314.

6 COMMISSIONER JAMES: All right.

7 THE WITNESS: Okay, now, 3,374, divide 8,940,
8 equals 37.7 percent -- .377.

9 COMMISSIONER JAMES: So that's a decrease.

10 THE WITNESS: That is a decrease, yes, sir. You
11 multiply that by the --

12 COMMISSIONER JAMES: Now, my question is, if your
13 run shows that you have 3,000 more mistakes --

14 THE WITNESS: We're all in trouble.

15 COMMISSIONER JAMES: Thank you, no further ques-
16 tions.

17 CHAIRPERSON BURG: Mr. Scheiner?

18 MR. SCHEINER: Yes.

19 BY MR. SCHEINER:

20 Q. Mr. Wagner, let's start with a little bit of house-
21 keeping. Would you put Addendum C and Exhibit J in front of
22 you, please?

23 A. Yes, sir.

24 Q. In the hope of expediting this a little bit, my
25 notes indicate that Addendum C reports on the following

1 cable systems: Norwalk, Ohio, Lansing, Michigan, Sacco,
2 Maine, Tiffin, Ohio, Finley, Ohio, and Jackson, Michigan.

3 A. I'm sorry, sir, I have Dover, New Hampshire on
4 mine.

5 Q. On Addendum C?

6 A. Yes, sir.

7 Q. Okay. It's reported differently, but I'll accept
8 that. On Exhibit J, we have Norwalk, Ohio, Lansing, Michi-
9 gan, and Dover, right?

10 A. We're looking at something different, sir. Mine
11 is Norwalk, Ohio, Dover, New Hampshire --

12 Q. Hold it a second, please. You're looking at J
13 now?

14 A. Yes, sir.

15 Q. And what do you have?

16 A. I have Norwalk, Ohio, Dover, New Hampshire, Lan-
17 sing, Michigan, Dover, New Hampshire --

18 Q. That's where I stop.

19 A. Okay.

20 Q. Okay, now, three of the six systems covered in
21 Addendum C are covered in J, right?

22 A. Yes, sir.

23 Q. You just listed them. Now, we have three other
24 systems in J, not covered in C, is that right? We have
25 another listing for Dover, we have one for Springfield, Ohio,

1 and one for Quincy, Illinois. Is that right?

2 A. Yes, okay -- Springfield and Quincy. I follow
3 you, sir.

4 Q. Okay, so we want to make a correlation between C
5 -- Addendum C and Exhibit J, we're limited to three cable
6 systems only, is that right?

7 A. You're further limited, sir.

8 Q. In what respect?

9 A. The material submitted in J-1 is the correction
10 for J. The material in J-1 has the changes.

11 Q. But still, three systems only that appear in
12 Addendum C?

13 A. Yes, sir.

14 Q. So, once again, in order to make any checks
15 between the two, we're limited to three systems out of a uni-
16 verse of some 4,000, did you say?

17 A. Yes, sir.

18 CHAIRPERSON BURG: Now, Mr. Scheiner, I have a
19 question. It's been my impression that Addendum C repre-
20 sented the second half, and that Exhibit J represented
21 the first half.

22 MR. SCHEINER: It turns out that there is no
23 correlation.

24 CHAIRPERSON BURG: Continue.

25 THE WITNESS: Correct.

1 BY MR. SCHEINER:

2 Q It may make -- this is by way of apology to the
3 Tribunal -- it may be that a couple of these points have
4 been covered by Mr. Lloyd, and in any event I will go through
5 them very quickly, because I'm looking for a summary tab,
6 and what I consider to be errors in Addendum C.

7 Turn first, sir, to the Norwalk, Ohio system.

8 A Yes, sir.

9 Q And that is based on a statement of account for
10 July -- December, 1978, is it not?

11 A Yes.

12 Q WGTE-TV -- what is the source of the total
13 operating time and percentage of local time for WGTE?

14 Let me withdraw that question. You struck an
15 average for percentage of local time. You did not compute
16 it yourself, is that right?

17 A No. No, sir, it is not right.

18 Q Would you correct my statement?

19 A Yes, sir. The materials submitted to us by PBS
20 included averages for certain stations and specific numbers
21 for other stations. We did not do any of the work on this.
22 We were handed a document which I have tendered back to Mr.
23 Bechtel, I understood, for your use.

24 Q Is it not correct that you have used the average
25 figure of 14.4 percent for non-commercial educational

1 television stations, local time?

2 A. For those that we were directed so to do, yes,
3 sir.

4 Q. That's an average figure?

5 A. I can't answer that question, because I don't know.

6 Q. The figure furnished to you, and you made no
7 computation of your own?

8 A. I did not make that computation, yes, sir.

9 Q. Next, the source of the 100 percent local time
10 for CBET -- that was covered by Mr. Lloyd.

11 A. Yes, sir.

12 Q. While we're at that, let me turn to another
13 Canadian station, CBLT, in Toronto. I am referring to
14 material furnished to us by Canadian Broadcasting Corpora-
15 tion. To facilitate this, let me describe very briefly
16 -- this is a schedule of -- a normal weekly schedule for
17 CBLT, Toronto.

18 MR. ELDRIDGE: May we know, Madam Chairman, whether
19 CBLT is on J, or someplace, or doesn't it exist on there?

20 CHAIRPERSON BURG: It's my impression that it
21 does not.

22 MR. SCHEINER: Let me ask the witness.

23 BY MR. SCHEINER:

24 Q. Am I not correct that CBLT is one of the stations,
25 Canadian stations, included in your library?

1 A. Can I answer the question in one second, Mr.
2 Scheiner?

3 (The witness examined the documents.)

4 A. CBLT, yes, sir.

5 Q. Okay, now, to facilitate matters, I have checked
6 off those programs broadcast by CBLT which are in fact
7 network programs, and would you be good enough to read
8 into the record those that I have checked as network pro-
9 grams?

10 A. Mr. Scheiner, I believe you're asking me to
11 testify to something that I have no knowledge of. You
12 have asked me to read a list, which I'll be glad to read,
13 but I don't know what I'm reading.

14 MR. SCHEINER: Would the Tribunal take official
15 notice that such programs as "Mary Tyler Moore," "Barney
16 Miller," "All in the Family," are network programs?

17 MR. ELDRIDGE: I don't know how that could be
18 done, if I may be heard on that, Madam Chairman.

19 CHAIRPERSON BURG: I agree with Mr. Eldridge. I
20 think we can't accommodate you on that request.

21 MR. SCHEINER: May I withdraw that request, and
22 make a different request? Will the Tribunal take official
23 notice that they are not Canadian locally-originated pro-
24 grams?

25 CHAIRPERSON BURG: Yes, we will do that.

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MR. ELDRIDGE: Those three.

MR. SCHEINER: As a representative sample.

BY MR. SCHEINER:

Q. In light of the fact, which has been officially noted, that the programs that I have listed are not locally originated programs in Canada, may I ask first whether in your computations you have allocated 100 percent of the time of CBLT to locally originated programs?

A. I am unable to answer the question, other than the following: from the materials submitted to me by CBC, which I have in hand, all hours indicated in the material supplied to me, we were directed to use as local programming.

I don't know what their total broadcast day is, Mr. Scheiner, versus some of the figures that are here in front of me.

Q. I don't mean to argue with you, sir, but let's proceed on the factual premise that included within the CBLT, the program fare, are a number of programs that are not locally originated in Canada. Have you got that premise?

A. I understand it.

Q. On that premise, what is your justification for attributing all of the CBLT programs to locally originated, and crediting them in that fashion?

1 A. I am not an attorney, nor do I make judgments on
2 materials supplied to me by my clients. I am a data source,
3 and I run the computer programs that I have originated
4 against my data base, based upon what it is that I am in-
5 structed to do.

6 Q. Are you telling me that you're not in a position
7 to justify the designation of those programs as locally
8 originated, and that attributing them to NAB claimants --
9 is that what you're telling me?

10 A. That is correct, sir.

11 MR. KING: I would object, if I may.

12 MR. SCHEINER: The question has been answered.

13 MR. ELDRIDGE: I move to have it stricken, Madam
14 Chairman.

15 CHAIRPERSON BURG: I'm going to overrule that,
16 and let me ask a question of the witness. Did you tell --
17 did you say just a few moments ago that the materials
18 submitted to you by CBC represented a certain thing, that
19 representation being that everything they have claimed
20 there was in fact local programming, but they had factored
21 out anything that was not local programming?

22 MR. ELDRIDGE: Madam Chairman, could I be heard
23 on that? That was a point, I think it was in the letter
24 that you -- in the Canadian claim, and there are represen-
25 tatives here -- and in their claim, they made a claim for

1 exclusivity within the marketplace. They also instructed,
2 in terms of their claim, not the NAB claim, that where
3 they had an exclusive license in a marketplace, and believ-
4 ing, as NAB did -- does, that that is a right of copyright,
5 they, the Canadians, suggested that Roger plug into his
6 data base the information that would support their exclu-
7 sivity of market claim, and hence, "I Love Jeannie" (sic)
8 would go into the Canadian thing.

9 That's not true of NAB. We did not plug that
10 into the commercial stations for the U. S., but the Cana-
11 dians, in their own filing, stated that they did, and I
12 think that's correct, isn't it, Bob?

13 THE WITNESS: May I be heard, please?

14 CHAIRPERSON BURG: Well --

15 MR. ELDRIDGE: It wouldn't serve to change our
16 share. It might change the Canadians' share.

17 CHAIRPERSON BURG: But, in effect, my question --
18 the answer to my question, Mr. Wagner, is that that was a
19 representation to you, and you made no further computa-
20 tions; that you took what CBC submitted, in other words.

21 THE WITNESS: I wish to answer you directly,
22 Madam Chairman, but I need more than a yes, no. May I
23 explain?

24 CHAIRPERSON BURG: Yes.

25 THE WITNESS: Yes, I accepted at face value that

1 material which was given to me by the CBC. I note, how-
2 ever, that the claimed duration of minutes, in the material
3 submitted, is not all one flat figure, meaning a total
4 broadcast day.

5 For example, in the case of CBLT, which Mr.
6 Scheiner has referred to specifically --

7 MR. SCHEINER: Sixteen hours a day.

8 THE WITNESS: Okay -- which varies down to CKSH
9 at 3,300 minutes -- there's all kinds of different numbers
10 here, and I believe, Madam Chairman, that the differentia-
11 tion between what was presented to me and Mr. Scheiner's
12 statement, revolves around the word "local."

13 Mr. Scheiner's question to me seemed to refer
14 to the title of programming as being local. Their -- the
15 CBC's material tendered to me was "claimable." There's a
16 rather large difference in this particular case.

17 MR. SCHEINER: Madam Chairman, I respectfully
18 suggest that we're somewhat off-target at the moment.
19 The question is, what amount of programming did Mr. Wagner
20 factor in in support of the NAB claim for local programming?
21 It's as simple as that.

22 He has testified that he included 100 percent
23 of Canadian programs. Now, I don't care whether, as a legal
24 matter, the claim was based on exclusivity, compilation
25 or copyright ownership of the sports. That's irrelevant.

1 He factored in all of their programming as local,
2 and he relied upon that for determining the amount of time
3 that NAB claimants are entitled to compensation for, and
4 I'm simply trying to establish the very simple fact that
5 U. S. network programs re-released or syndicated in Canada
6 just ain't local programs.

7 It's a very simple point. I put the question;
8 it's been answered. You have a pending motion to strike.
9 I submit that the motion is completely without merit.

10 CHAIRPERSON BURG: It has been overruled.

11 MR. SCHEINER: Then strike my remarks.

12 CHAIRPERSON BURG: Please, Mr. Scheiner, lead us
13 gently into the net.

14 MR. SCHEINER: Madam Chairman, I have marked for
15 identification as MPAA Cross-Examination Exhibit Number 7,
16 a document bearing the caption, "Errors of Omission and
17 Commission in Addendum C, Direct Testimony of Roger
18 Wagner." I've done in the hopes that we could move forward
19 very quickly.

20 (MPAA Exhibit Number XX-7 was marked for
21 identification.)

22 BY MR. SCHEINER:

23 Q. If you would turn to the first page of the text,
24 note that I have covered, first, two items in parentheses.
25 I'm now on the third item. Is it not correct, sir, that you

1 listed two distant signal stations, and omitted two others,
2 WKBD and WDHO?

3 A. In that filing, yes.

4 Q. Okay, turn to the next page, sir. We're now in
5 Lansing, Michigan, item 1. Is it not true that the annual
6 programming report shows .048 for WKBD, not .024, for per-
7 cent of local programming?

8 A. I can't answer that question without reference
9 to the FCC documents and the changes ascribed to for the
10 sports programming by NAB.

11 Q. I now hand you the annual program --

12 A. I have one, sir, thank you.

13 COMMISSIONER JAMES: Mr. Scheiner, as you carried
14 through with this question, if you can -- I know you're
15 dealing with Addendum C, but can you also take it over to
16 J-1 for that mistake also?

17 MR. SCHEINER: Can't do it -- no correlation at
18 all. Different accounting periods.

19 COMMISSIONER JAMES: I see, all right.

20 THE WITNESS: Yes, sir, your question?

21 BY MR. SCHEINER:

22 Q. Is that not an error?

23 A. No, sir, it is not.

24 Q. Do you want to explain that?

25 A. Yes, sir. In the listing for Detroit, Michigan,

1 according to the Federal Communications Commission, on
2 page 58, the number noted as 4.8 -- that's right, I have
3 .24, because that was adjusted downward to reflect the
4 sports flagship carriage.

5 Q Okay, item 2 we have previously covered.

6 A I do not believe that an error, sir.

7 Q Item 3, we have -- back to item 2, CBLT.

8 A CBET, sir.

9 Q That has to be the same question -- strike that
10 question.

11 Three, we have previously covered.

12 A That is not an error, sir.

13 Q You don't know whether it's correct, though, do
14 you?

15 A I know it to be correct from the PBS data given
16 to me. I would like the opportunity to access that data
17 which you yourself have in hand, sir -- I beg your pardon,
18 I don't know that for a fact. I believe the data is here
19 present with the Public Broadcast Service people.

20 Q I think the record is clear on this. I will
21 not pursue it.

22 Item 4 was covered in Mr. Lloyd's examination,
23 and you concede that to be an error, do you not?

24 A No, sir. I refer you to the statement of account,
25 and the specific wording from that statement of account,

1 having to do with the facts and conditions which exist
2 on the last day of the accounting period.

3 Q. Sir, in your view, does that mean that the
4 station will be credited for 26 weeks of programming when
5 indeed it was only carried for 17 weeks?

6 A. Sir, I believe that is a matter for the Copy-
7 right Royalty Tribunal to decide, from the wording that is
8 here before me. Again, sir, I must say I'm not an attorney,
9 but it appears that this is a direct conflict, or con-
10 trast, with the other methodology which you are ascribing
11 to it.

12 Q. Next page, I have it listed as Sacco, Maine.
13 Did you say that the proper designation was Dover? Is that
14 Sacco correct?

15 A. I'm sorry, sir, I don't know where we are.

16 Q. Sacco, Maine.

17 A. My next page is Jackson, Michigan.

18 Q. All right, let's go to Jackson, Michigan. Item
19 1 has been covered, and so has item 2 been covered. Look
20 at item 3. Is that an error, sir?

21 A. I can't answer it without going into the print.

22 Q. We'll furnish it to you.

23 A. Okay.

24 Q. Well, look at the -- look at the exhibit I fur-
25 nished to you. You list six --

1 A. Yes, sir.

2 Q -- in your printout, and only five distant
3 signal stations are listed, so it is an error?

4 A. There are six by one count, and five by a raw
5 count. I would say there is a discrepancy, yes, sir.

6 Q I hand you this statement of account, and put
7 the question to you again, is not the omission of the
8 six stations an error?

9 A. There is an error, yes, sir.

10 Q Okay. What is the next system you have in your
11 order?

12 A. Findlay, Ohio.

13 Q Items 1 and 2 have been covered. Would you look
14 at item 3? Is it not true that -- the annual program
15 report will speak for itself; skip that. Look at item 4.
16 Is not the actual number of distant signal stations nine,
17 and not eight?

18 A. Is the number of distant signal stations nine and
19 not eight?

20 Q Well, if you'll look at your computer printout,
21 the last item is a number 8, right?

22 A. Yes.

23 Q And I'm asking you, first, as noted in item 4,
24 did you not list only three stations?

25 A. Yes.

1 Q. And is that not an error?

2 A. I have no idea, sir. I don't know what it is.

3 Q. I will furnish you with a statement of account.

4 A. The statement of account doesn't tell me how it
5 looks on the computer, sir.

6 Q. Well, is not your computer in error?

7 A. The computer is never in error, Mr. Scheiner.

8 It may be my error, but it's not the computer. There is a
9 discrepancy here, yes, sir.

10 MR. SCHEINER: Madam Chairman, in the interests
11 of time, I will forego the pursuit of this exhibit. I
12 think it speaks for itself, and I am prepared to pass at
13 this point and hopefully pick up some time.

14 COMMISSIONER JAMES: One question. On your Findlay,
15 Ohio system, on the exhibit that Mr. Scheiner was just
16 referring to, that "8" over in the corner -- how did that
17 get in there?

18 THE WITNESS: Supposed to be calculated by the --
19 it is calculated during the course of the run, sir.

20 COMMISSIONER JAMES: All right, now, going back
21 to my earlier question, before lunch, if you're only
22 listing three, and it has eight, where does this flag go off,
23 that you have been telling me about?

24 THE WITNESS: I'll bring it in -- it's easier. It
25 will take me 20 minutes to go through it, sir, and it's not

1 worth it. Let me show you what happens --

2 COMMISSIONER JAMES: Well, I want to leave here
3 today, understanding that there are now more than 80 mis-
4 takes, right? Originally you said there were 80 mistakes.

5 THE WITNESS: I believe, sir, that my testimony
6 was there are 80 mistakes in the call letters from the
7 materials submitted to us from the Copyright Office. What
8 I intend to come in with tomorrow, sir, since it's obvious
9 I'm going to still be on the witness stand, is a proof
10 copy of the entire printout, so that we can all look at
11 it together, at the same time, and resolve this question
12 concerning errors.

13 I think trying to have me answer off the seat of
14 my pants to eight or ten different printouts, all with
15 different time frames involved, to everyone's great con-
16 fusion, is not accomplishing much.

17 COMMISSIONER COULTER: Mr. Scheiner, are you
18 finished?

19 MR. SCHEINER: No.

20 CHAIRPERSON BURG: I'm sorry, Mr. Scheiner, I
21 misunderstood you. I thought you were finished.

22 MR. SCHEINER: No, I was quite unclear, I recognize
23 it now.

24 COMMISSIONER JAMES: Madam Chairman, this is
25 Exhibit 8?

1 CHAIRPERSON BURG: I presume you're going to
2 call this MPAA XX-8?

3 (Exhibit MPAA XX-8 was marked for
4 identification.)

5 BY MR. SCHEINER:

6 Q Mr. Wagner, I have marked for the record as MPAA
7 XX-8, an exhibit which was introduced by you, which was
8 purported to show a number of discrepancies in the MPAA
9 analysis in Schedule XIV.

10 First, the errors noted by you are set out on
11 the second page, and there are a total of 12 claimed
12 errors, is that right, sir?

13 A Yes, sir.

14 Q And that is out of a total of 502 stations
15 analyzed, is that right?

16 A I don't recall the number, sir. I accept yours.

17 Q How many of those alleged errors are typos, can
18 you tell?

19 A That's a have you stopped beating your wife ques-
20 tion, counselor. How many of those alleged errors, how
21 many of the differences between what I reported in this
22 particular exhibit are possibly typos? You have so indica-
23 ted.

24 Q It is conceded on the face of the exhibit that
25 there were two errors. In the case of WBNS-TV, incorrect

1 data was entered for the local percentage, in the order
2 of 10 percent, as against 10.3, and in the case of WINK-TV,
3 there was 8.1, as opposed to 18.1. Do you note that?

4 A. Yes, sir.

5 Q. In the next page, you make the statement that,
6 "The following stations appear on the statement of account
7 Forms 2, but do not appear on MPAA's Schedule XIV," and
8 did I understand correctly that you are asserting that
9 these omissions were erroneous?

10 A. I believe the material stands on its own face.
11 Furthermore, sir, it stands on its own appearance, I guess
12 -- furthermore, sir, at the specific request of Madam
13 Chairman, we specifically sat down and covered those
14 stations which did or did not appear on Forms 1, versus
15 Forms 2, and have already turned that in.

16 CHAIRPERSON BURG: No, sir, that's not correct.
17 As I recall my question, it was Forms 2 versus Forms 3.

18 MR. ELDRIDGE: Two against three.

19 CHAIRPERSON BURG: Right. You said one.

20 THE WITNESS: Oh, I beg your pardon. I'm terribly
21 sorry. Please accept the correction -- three versus two.

22 BY MR. SCHEINER:

23 Q. All right, follow me, would you, Mr. Wagner,
24 please. I'm now on page -- look in the lower left-hand
25 corner, page 2 -- do you see that?

1 A. Yes, sir.

2 Q. The first group of stations, I've X'ed out as
3 Canadian stations which do not appear on the annual program
4 report.

5 A. Annual program report for the FCC, yes, sir.

6 Q. Next, if you refer to page 3, I have X'ed out, in
7 addition, 141 non-commercial stations. Am I right that they
8 too do not appear in the FCC's annual program report?

9 A. I found a couple, but I will accept your point.
10 I was able to zap two of them, just by accident.

11 Q. Now, you're talking about WNYC-TV, which is --

12 A. WNYC, someone pointed out.

13 Q. -- which is on a commercial channel, but with
14 that exception --

15 A. I don't know of any others offhand.

16 Q. You do not know of any others?

17 A. No, sir.

18 Q. And since the analysis of 502 stations was based
19 on the FCC annual programming report, do you still -- which
20 does not cover non-commercial stations, do you claim that
21 the omission of the stations listed and crossed out on
22 page 3 was an error?

23 A. Mr. Scheiner, I believe the statement at the
24 top of the page said, "Stations that appear on statement of
25 accounts Form 2 do not appear on MPAA Schedule XIV." I don't

1 believe that I said anything else, did I?

2 Q. Something about discrepancies in your charac-
3 terization of this? "Summary of Discrepancies," first
4 page of your exhibit -- are there discrepancies?

5 A. Since your witness, Mr. Korn, stated that there
6 were two specific sets of claimants here present, one of
7 them being the National Association of Broadcasters and the
8 second one being MPAA, and since you include a schedule of
9 fee disbursements on a station by station basis, it would
10 appear from my perspective, in making this material up
11 for my presentation for NAB, that these are in fact dis-
12 crepancies.

13 Q. Yes, sir. You are asserting -- this is my last
14 question on this score -- you are asserting that an analy-
15 sis of television broadcast stations listed in the FCC
16 annual programming report, which covers commercial broad-
17 cast stations only, and that analysis does not include
18 non-commercial stations, constitutes a discrepancy? Is
19 that what you're saying?

20 A. In the context of dollar disbursement, yes, sir.

21 Q. Would you turn to page 4? Look at the footnotes.
22 Was the omission of WKBM an error?

23 (Pause.)

24 Q. Past that, do you note that WKBS was included in
25 Schedule XIV?

1 A. I don't know, sir.

2 Q. All right, note number 4, WPTY appears to be an
3 invalid call letter. There is no such station. Would you
4 accept that as an error on your part?

5 A. If it was not included in Schedule 14?

6 Q. Yes, sir.

7 A. Yes, sir.

8 Q. Now, WPTY appears to be an invalid call letter
9 -- it doesn't exist.

10 A. Okay. I hear you.

11 Q. If we didn't include it, we didn't commit an error,
12 did we?

13 A. If not included -- you did not commit the error, we
14 did, yes.

15 Q. Any comment on number 5?

16 A. I don't know what the law says concerning the
17 distribution of monies in the Trust Territories. I know
18 that they have reported it.

19 MR. SCHEINER: Madam Chairman, I will not go through
20 the balance of this exhibit. I believe it speaks for it-
21 self. I would like to turn to another matter.

22 CHAIRPERSON BURG: But you are conceding that
23 MPAA erred with respect to two stations, is that correct?

24 MR. SCHEINER: Yes, out of 502.

25 MR. LLOYD: Before we go on, the witness said that

1 he turned something in and I gather he turned it in to the
2 Tribunal, which would be the list of stations that showed
3 up on Form 2 filings that did not show up on Form 3 filings.
4 That was not, as far as I know, distributed.

5 CHAIRPERSON BURG: No, it was not. It was given
6 to me. We can have it Xeroxed. Nobody has made the re-
7 quest before, Mr. Lloyd. I'd be happy to do it, but you're
8 right, there is only one copy of this, to my knowledge,
9 and I have it.

10 THE WITNESS: Madam Chairman, may I point out
11 that, as each of these requests have been made, including
12 that one, using available manpower here, by taking people
13 out of my shop, we have attempted to answer yours, Commis-
14 sioner James', and the other questions being asked, and
15 before making that an official document of the Tribunal, I
16 would most assuredly like to have someone make absolutely
17 certain of everything that's on that.

18 We did our level best to get it to you as soon
19 as your request was made. I will stand on what my people
20 have done, then; if it is to become an official document of
21 the Copyright Royalty Tribunal, I would respectfully
22 request a Xerox so we can check that work. That was just
23 dashed off in a hurry in the back of the room.

24 MR. LLOYD: Madam Chairman, I really don't think,
25 and I don't want to put any cast on this at all -- that

1 material should be generated by a witness or by a party,
2 myself included, and passed to the Chair, or to any mem-
3 ber of the Panel, without having copies available to
4 everybody who is a party to this proceeding. And I would
5 urge that the witness be instructed to make copies avail-
6 able to all counsel.

7 I'm not suggesting it needs to be made a part
8 of the record, but I do think that what goes to the
9 decision-makers should be distributed to everyone.

10 CHAIRPERSON BURG: Certainly, I have no objec-
11 tions to that. This was the response to my question, and
12 I did not go beyond that, but we will have a copy -- would
13 you make a copy of this?

14 MR. LLOYD: Thank you, Madam Chairman.

15 MR. SCHEINER: An exhibit was introduced yester-
16 day, and Carl, would you check it, please? I think it
17 was your Exhibit 10.

18 CHAIRPERSON BURG: Speak up, Mr. Scheiner.

19 MR. SCHEINER: It had to do with WCNH, Lansing.

20 CHAIRPERSON BURG: Their exhibit? It went alpha-
21 betically. WGN, is that it?

22 MR. SCHEINER: WCNH?

23 BY MR. SCHEINER:

24 Q. In any event, Mr. Wagner, sir, I refer you to NAB's
25 Exhibit F. The statement is made on page 2 of the exhibit,

bd 45

1 "MPAA lists WCNH. There is no such station, and it is not
2 on the original statement of accounts."

3 A. Yes, sir.

4 Q. I now hand you the original statement of
5 account, and ask you to refer to the listing in the third
6 line.

7 A. Yes, sir.

8 Q. What does that listing show?

9 A. It shows a blank, a 4, a blank, a "no", a blank,
10 and a "local."

11 Q. So it does designate the channel number of a sta-
12 tion, does it not?

13 A. Yes, sir.

14 Q. And it also indicates that channel 4 was a local
15 station, and -- does it not?

16 A. Yes, sir.

17 Q. Do you still claim that an error was made in
18 the listing, and if so, what is its significance?

19 A. As previously covered in testimony, under cross-
20 examination by Mr. Lloyd, a part of trying to establish
21 who is entitled to what dollars, on a station by station
22 basis, one has to have the call letters as actually
23 supplied by the cable systems.

24 For us to take the notation, blank, 4, blank, no,
25 blank, and assume from that that is it -- I really still don't

1 know to this day -- on your listing it says that it's a
2 network station. I am not aware that the cable system so
3 stated. They also indicated that it was local -- that is,
4 they did not indicate the location of the station.

5 The listing's final line says local -- local for what?

6 All the other listings and locations of stations
7 say, Dayton, Ohio, Fort Wayne, Indiana -- the local for
8 this blank listing -- Lima, whatever it is, Bowling Green,
9 Dayton, et cetera. We have gone under the -- we have
10 followed the specific nature of the material in the copy-
11 right office, and do not substitute in material. You
12 have identified keypunch errors -- any data base has key-
13 punch errors, but I submit, sir, we do not edit in material
14 that we cannot identify, and I believe that -- to continue
15 with that same statement, that I made in the material,
16 that to list a station in there is an error.

17 Q. Very good, Mr. Wagner. Let's turn to another
18 matter.

19 COMMISSIONER JAMES: Mr. Scheiner, you have a
20 second part. What is the significance of it?

21 MR. SCHEINER: I'm aware of that.

22 BY MR. SCHEINER:

23 Q. What is the significance, if it's a local sta-
24 tion, to that cable system?

25 A. None.

1 Q Thank you, sir.

2 Yesterday, in your testimony, you were rather
3 critical, as I understood you, of MPAA's reliance on TV
4 Guide. Is that a fair statement?

5 A Yes, sir.

6 Q You are aware, I presume -- strike that, please.
7 Are you aware that the MPAA presentation contained two
8 studies?

9 A Yes, sir.

10 Q And that Study A was a 29-station sample, based
11 on the TV Guide, is that right?

12 A The sample was based on TV Guide?

13 Q Is that what I said? I'm sorry, I misspoke. The
14 data for -- the program data for the 29 stations was derived
15 from TV Guide and other sources as well.

16 A Yes, sir.

17 Q The second study was a 502-station sample, based
18 upon the FCC's annual program report for 1978?

19 A Yes, sir.

20 Q To the extent that your comments or criticism
21 has any merit whatsoever, it was not directed to the 502
22 station sample, was it?

23 A In which you used FCC data as part of the base?

24 Q Yes.

25 A The answer is, not to that portion of the

1 construction of the sample. My criticism had to do with
2 the sample itself, and what it contains.

3 Q. In your analysis, sir, you made a rather major
4 adjustment in the material that was originally submitted
5 by making provision for 20 percent reduction of total
6 time in light of -- to account for commercials and other
7 non-program material, did you not?

8 A. For the purposes of the NAB run, yes. For the
9 construction of a sample purporting to represent the
10 whole of the universe, no.

11 You brought up the subject of the sample, and I
12 thought that was what you were talking about.

13 Q. We're changing the sample.

14 A. Excuse me.

15 Q. The 20 percent adjustment had nothing to do
16 with the sample, did it?

17 A. No.

18 Q. What did it have to do with?

19 A. Commercial time allocation as originally sub-
20 mitted by MPAA.

21 Q. Was not that adjustment made in the analysis
22 submitted by NAB?

23 A. The original analysis did not contain it, sir.
24 And as I've previously indicated, one of the considerations,
25 and one of the causes of the errors that Commissioner

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1 James and I have been discussing, was the fact that in
2 previous runs, National Association of Broadcasters tended
3 to --I was a part of the discussion, as to whether a 15
4 percent figure, stating that all the commercial availa-
5 bilities had not been sold under the NAB Code, which allows
6 you 20 percent, approximately, of all broadcast time for
7 commercials, should be used.

8 Q. Sir, I'm not talking about the difference between
9 a 15 percent adjustment or a 20 percent adjustment.

10 A. But that's -- I'm trying to answer your ques-
11 tion -- that's why the adjustment --

12 Q. You did make a 20 percent adjustment in the analy-
13 sis submitted to the Tribunal?

14 A. Yes, sir.

15 Q. The failure to make that adjustment, in your
16 initial showing, was a rather serious error, was it not?

17 A. I can't comment on that, since I run what I was
18 told to run. There was no mention made of any write-down
19 for commercials.

20 Q. And is it not the case that you were alerted
21 to that serious error in your own methodology by reason
22 of the MPAA direct case?

23 A. I believe that is true, sir. I did not have the
24 voice -- a voice in the decision-making, but it was
25 stated in front of me, yes.

1 MR. ELDRIDGE: Do you refer, Arthur, to the
2 movement from 15 to 20?

3 THE WITNESS: No, from 0 to 20.

4 MR. ELDRIDGE: The adjustment from 15 was before.
5 We moved to 20 because they used 20, and it seemed fairer.

6 MR. SCHEINER: The point I'm making if it hasn't
7 already been made is that the failure to make any adjustment
8 was a very serious oversight. It was a basic error, and
9 it was only corrected in the light of the MPAA methodology.

10 BY MR. SCHEINER:

11 Q. Yesterday, sir, you had a visual presentation
12 relating to Mr. Valenti's testimony. Do you recall that?

13 A. Yes, sir.

14 Q. Is it correct that -- is it a fair summary of
15 your testimony to say that Mr. -- that it was Mr. Valenti's
16 position that an allocation of the royalty fund should be
17 made without regard to ratings or popularity? Is that
18 the thrust of your testimony?

19 A. The statement that I directly quoted from Mr.
20 Valenti comes from his written material, which said -- I
21 believe Carl has the visual there, sir -- any and all
22 materials relevant to a decision by the Tribunal -- I
23 believe it's a quote, it's on the visual.

24 Q. I understand, and I will stipulate, that that
25 portion, that limited portion, of Mr. Valenti's written

1 testimony was accurately depicted on the screen? No
2 problem?

3 A. Okay.

4 Q. Now, my question is, was it the thrust of your
5 testimony that Mr. Valenti was rejecting, as a criterion
6 for consideration by this Tribunal, the value and the
7 popularity, relative value and popularity, of programming.

8 A. I made no such reference as concerns Mr.
9 Valenti's testimony. I merely pointed out, if I recall, the
10 chronology of events, that was the statement that Mr.
11 Valenti had made which you have stipulated I quoted accu-
12 rately in the visual, and then I immediately thereafter
13 followed it with a slide of what we call the whole universe
14 in library, including Forms 3 and 2.

15 Q. All right, now, let me refresh your recollec-
16 tion. I put before you the testimony of Mr. Valenti, at
17 page 18 of the transcript, where he is addressing the
18 Tribunal, and says, in part, "I come before you really to
19 say that using the measuring guides which are available
20 to you, time, fee-generated, popularity," and so on -- did I
21 read that correctly?

22 A. Yes, sir.

23 Q. And indeed that is the position that Mr. Valenti
24 urged on the Tribunal?

25 A. Yes, sir, and I believe I did not go to counteract

1 that.

2 MR. ELDRIDGE: May I interrupt, Madam Chairman? I
3 think that came when you brought up that I had made, in
4 the opening statement, a statement that there was a rejec-
5 tion of --

6 COMMISSIONER BRENNAN: That was in response to
7 a question.

8 MR. ELDRIDGE: That was what Arthur did after I
9 had finished my opening statement, and we -- I pointed out
10 that I referred to the direct written case, which is in
11 Mr. Cooper's statement, where he rejects the use of a
12 popularity measurement, because of the defects in it.

13 I pointed out that I wasn't talking about Mr.
14 Valenti. It's the case, as presented by the Motion Picture
15 Association. That's where it came up. I don't think it
16 was involved with him.

17 CHAIRPERSON BURG: That was in response to Com-
18 missioner Brennan's question, wasn't it?

19 MR. SCHEINER: Madam Chairman --

20 COMMISSIONER BRENNAN: I think the record speaks
21 for itself, and I would suggest, Madam Chairman, that
22 counsel go on to another subject.

23 MR. SCHEINER: I'm prepared to go on. There
24 were a number of inaccuracies in the statement. I don't
25 want to take up the time to address them.

1 BY MR. SCHEINER:

2 Q. You went on at some length, Mr. Wagner, as I
3 understood it, you were critical of the MPAA methodology
4 for distribution of the royalty fund. Is that right?

5 A. Yes, sir.

6 Q. Let me examine your methodology for a moment,
7 and let me put you a completely hypothetical case. You
8 won't need the blackboard, please -- very simple. Suppose
9 that a cable system were carrying one television station
10 only, and that that station, as a distant signal, generated
11 \$1,000.

12 Under your methodology, that \$1,000 would be
13 provided on a time basis among all of the copyright owners
14 whose programs were broadcast on those stations.

15 A. Yes, sir. We are speaking, sir, of non-network --

16 Q. Non-network, non-exempt programs.

17 A. Yes, sir.

18 Q. Now, let's say that the cable system now picks
19 up a second television station. Under your methodology,
20 the copyright owners who contributed, whose programs
21 were broadcast, on the first station, could get more or less
22 than they would have received if theirs was the only sta-
23 tion carried by the cable system, is that right? You do
24 not understand that?

25 A. No, sir. I can't see the more part. I could see

1 less, but I can't see more.

2 MR. SCHEINER: I'm not going to mark this exhibit
3 at the moment. I will withhold it.

4 BY MR. SCHEINER:

5 Q. Let me go back to my example of the \$1,000.
6 You said you understood the less but not the more.

7 A. Yes, sir.

8 Q. Can you explain that answer?

9 A. Your request, sir, if I understood your question
10 correctly -- and I may be in error -- you said there was
11 one signal on the station, generating \$1,000, that is,
12 the total payments of that cable system, which I took to
13 mean -- is that correct?

14 Q. Right.

15 A. Okay, now, you add a second signal. Payments
16 for the copyrighted programs for that system, for that --
17 because of the addition of that second signal, I under-
18 stood you to say, could mean more or less money for claim-
19 ants from the first station? I could not understand
20 the "more" part. I could understand the "less."

21 Q. Well, suppose that the second station were an
22 independent station.

23 A. What was the first one, sir?

24 Q. Well, an educational station, or an affiliate --
25 an educational or an affiliate.

1 A. Okay.

2 Q. The addition of the second station, under your
3 methodology, might add more dollars, as compared with
4 the situation where there was only one station.

5 A. Yes, sir.

6 Q. Okay, that's right, is it not?

7 A. Yes, sir.

8 Q. And how might it wind up with less, though?

9 A. Okay, that a claimant -- I did not know that this
10 second station was going to be an independent station, since
11 we had not previously identified it. That was the reason
12 for my less -- if there were two stations of similar
13 weight, i.e., two one-quarter DSE stations, instead of one
14 at a quarter, and one at one, and the second one at one --
15 I guess is clearer, counselor, I'm trying to follow you.

16 Q. Under the NAB methodology?

17 A. Yes, sir.

18 Q. You would take the total dollars generated by
19 whatever stations contributed to the cable royalty fund,
20 and divide that among all claimants without regard to the
21 amount of money generated by the programs, without regard
22 to the amount of money generated by the station carried by
23 the cable system, is that right?

24 A. Yes.

25 MR. SCHEINER: I have no further questions of the

1 witness.

2 COMMISSIONER COULTER: Mr. Wagner, I would like
3 to just ask a couple of questions of you, and I'm doing
4 it now simply because it relates to something Mr. Scheiner
5 brought up. You just identified a piece of paper -- if
6 we could deal with J-1 --

7 THE WITNESS: Yes, sir.

8 COMMISSIONER COULTER: You mentioned, at an
9 earlier point this afternoon -- you explained that there
10 are some columns here, talking about vertical columns,
11 that you simply print automatically, and others that you
12 plug into the specific data.

13 THE WITNESS: Yes, sir.

14 COMMISSIONER COULTER: And I assume that some
15 of those that you plug specific data into, automatically
16 produce a calculation?

17 THE WITNESS: If you so order it to do in the
18 program.

19 COMMISSIONER COULTER: Okay, when you have a net-
20 work affiliate, since there is automatically that fraction
21 30.373, does that automatically entail a multiplication
22 times the hours?

23 THE WITNESS: Yes, sir.

24 COMMISSIONER COULTER: As soon as you plug it in?

25 THE WITNESS: Yes, sir.

1 COMMISSIONER COULTER: Is it correct that the
2 origin -- and the same when you've got a PBS station,
3 that it automatically wipes out the last part?

4 THE WITNESS: Yes, sir.

5 COMMISSIONER COULTER: On J-1 and any of the
6 other programs, is it correct that the -- your denomina-
7 tion of a particular station as either network affiliate or
8 a PBS station or an independent, comes from the statement
9 of accounts, is that correct?

10 THE WITNESS: Yes.

11 COMMISSIONER COULTER: So these errors that Mr.
12 Scheiner was alluding to, of stations being labeled either
13 as a network affiliate, a PBS station, independent station
14 -- and he indicated that there were substantial numbers
15 of them, and if I recall, it's about -- the calculation
16 is about 250 out of about 1,200, so that is about 20 per-
17 cent.

18 That would have a substantial effect upon the
19 time produced by your study.

20 THE WITNESS: It would have a substantial effect
21 upon an individual station by station allocation.

22 COMMISSIONER COULTER: Well, sure, but the
23 aggregate -- excuse me, I'm sorry.

24 THE WITNESS: Well, in the theory of whatever
25 it is, God knows what the theory is -- but if all the errors

1 from the copyright forms are of equal proportion, then
2 the errors would wash out, as far as the NAB information
3 is concerned, with reference to independent and network,
4 being a factor of two, and educational stations being a
5 factor of one. So, yes, sir, there could be some consider-
6 able difference between the two. You don't come out to a
7 break-even point, because you have got three factors,
8 two weighted out on one side, one on the other.

9 COMMISSIONER COULTER: All right, I'm not sure --

10 THE WITNESS: Let's say there's 250 errors out
11 there, sir -- I accept --

12 COMMISSIONER COULTER: No, wait just a second.
13 I don't think the end of your answer there was specifically
14 related to what I asked, or at least I didn't perceive
15 it as such.

16 THE WITNESS: Excuse me.

17 COMMISSIONER COULTER: You have the same station,
18 as it's reported to you by different cable systems -- could
19 either be an independent, a network affiliate, or PBS
20 station.

21 THE WITNESS: Depends on what they put down.

22 COMMISSIONER COULTER: Exactly, but that's obviously
23 -- it's either one or the other. That isn't accurate for
24 the same station to be listed three different ways.

25 THE WITNESS: Right, sir.

1 COMMISSIONER COULTER: As a result of putting
2 that into your program, you nevertheless have a calcula-
3 tion.

4 THE WITNESS: Yes, sir.

5 COMMISSIONER COULTER: And that calculation can
6 be in error, depending upon what the cable system said.

7 THE WITNESS: I now understand your question.
8 The answer to your question, sir, is it is based upon --
9 I have to go back to the chart, if I may -- the chart is one
10 that we used previously.

11 COMMISSIONER COULTER: Please, I'd really prefer
12 not to.

13 THE WITNESS: The information of whether it is
14 a network, an affiliate, an independent station, or an
15 educational station, comes only in reference to its call
16 letters. So if its call letters are correctly stated in the
17 NAB runs, then the total hours of programming and the
18 correct percentage application, takes place without
19 reference to the material at Copyright.

20 Let me rephrase it --

21 COMMISSIONER COULTER: So you're saying, then,
22 that the "N" here in the printout doesn't come from the
23 statements of account?

24 THE WITNESS: No, sir. That is part of a pickup
25 against the coding per station, not from the statements of

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1 account, but as a separate file, and I've lost you. Oh,
2 God -- if you take the entire material submitted by the
3 FCC -- just regard that, if you will, sir, as a file, okay?
4 That's a file all by itself.

5 NAB has slightly modified that file downward
6 for sports flagship stations, to compensate for local
7 sports origination.

8 COMMISSIONER COULTER: Yes, I know that.

9 THE WITNESS: Okay, now, over here, you've got a
10 file named "FISH" -- a library. Let's call it library --
11 the whole thing out here. Now, you want --

12 COMMISSIONER COULTER: Please, Mr. Wagner --

13 THE WITNESS: It's the only way I can do it.

14 COMMISSIONER COULTER: No, I'm grateful. I don't
15 mean to cut you short, but the real question hangs on
16 whether or not your denomination in your statement here,
17 comes from the statement of accounts, or comes from
18 the FCC, as you have now said.

19 THE WITNESS: The FCC for numbers.

20 COMMISSIONER COULTER: And you say the call sign,
21 then, produces this "N," and not the statement of account?

22 THE WITNESS: Yes, sir.

23 COMMISSIONER COULTER: Okay, all right.

24 THE WITNESS: As long as the call letters are
25 accurate, we have got it.

1 COMMISSIONER COULTER: But, then, what here has
2 come from the statement of account?

3 THE WITNESS: On J-1, starting with line WKVE,
4 the call letters themselves --

5 COMMISSIONER COULTER: Came from the statement
6 of account?

7 THE WITNESS: Yes, sir. That's the only reference
8 we have. The IND --

9 COMMISSIONER COULTER: Came from the statement of
10 account?

11 THE WITNESS: Yes, sir. That is the total upon
12 that line, only those two items.

13 COMMISSIONER COULTER: Okay, and then the royalty
14 fee down at the bottom?

15 THE WITNESS: Yes, sir. Okay, just the royalty
16 fee, the name and the address -- not total distant hours,
17 which are calculated, not local hours nor remainders --
18 nothing else on that line except royalties.

19 COMMISSIONER COULTER: You've just said that the
20 call letters and the IND, or the PBS, come -- jumping
21 down the next line, I see it's again the call sign and the
22 PBS come from the statement of account, and then just a
23 little while ago, you said it didn't.

24 THE WITNESS: Oh, no -- I said it wrong, I'm
25 sorry. IND, PBS, IND, and if you'll drop down to the

1 next one, .373 N, referring to that 37 percent from the
2 network stations, are generated by the computer, the actual
3 IYD, or EYD, coming from the statement of account, is on
4 the very far right-hand side. The statement of account
5 does not -- I guess someone indicated -- but the statement
6 of account does indicate distant carriage, and the para-
7 meters, in those three cases, the IYE, or independent yes,
8 and full-time distant -- the very far right-hand column,
9 sir.

10 COMMISSIONER COULTER: I see that.

11 THE WITNESS: Whereas the notation of independent
12 PBS, or .373 N, is computer-generated for that specific
13 station.

14 COMMISSIONER COULTER: When you say computer-
15 generated, I mean, it's got to come from someplace. Where
16 does it come from?

17 THE WITNESS: It's sitting in a file marked -- in
18 a little parameter marked IND, and whenever the data file
19 from something says it's an independent station, it turns
20 on a counter, and it moves it in there.

21 COMMISSIONER COULTER: And the data file is
22 triggered to come up with an independent?

23 THE WITNESS: Yes, sir, by the call letters that
24 are out there in the cable file.

25 COMMISSIONER COULTER: But the call letters are

1 picked up from the statement of account?

2 THE WITNESS: Yes, sir.

3 COMMISSIONER COULTER: Well, I don't want to take
4 up any more time.

5 COMMISSIONER JAMES: I have a question. I want
6 to go back to a question Mr. Scheiner asked. On your
7 exhibit, Addendum C, just to clear up the record, you did
8 not, on this exhibit, take into consideration commercial
9 time, right?

10 THE WITNESS: That is correct, sir.

11 COMMISSIONER JAMES: So at that point, it was
12 zero?

13 THE WITNESS: That is correct, sir.

14 COMMISSIONER JAMES: Thank you.

15 CHAIRPERSON BURG: Let me ask how many others of
16 you wish to cross-examine Mr. Wagner.

17 I'll start with you, Mr. Bechtel. How long do
18 you think your questioning will take?

19 MR. BECHTEL: Ten or fifteen minutes.

20 CHAIRPERSON BURG: Mr. Duncan?

21 MR. DUNCAN: One minute.

22 CHAIRPERSON BURG: Mr. Koenigsberg?

23 MR. KOENIGSBERG: Three or four minutes at most.

24 CHAIRPERSON BURG: Ms. Semo?

25 MS. SEMO: Fifteen minutes.

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1 MR. ELDRIDGE: Madam Chairman, if I may make a
2 comment, the witness is going to return pursuant to the
3 request, tomorrow, to bring the run that was requested.

4 CHAIRPERSON BURG: Yes, I understand that, and
5 that's what I was really trying to get to. I think that,
6 given that those are probably hopeful estimates on your
7 part, and given the track record of how this has gone, we
8 will adjourn until tomorrow -- let me make this caveat.

9 At 10:00 in the morning, PBS will present one
10 of its witnesses, Mr. Grossman, and we will dispense with
11 his direct testimony, and cross, of course, and then
12 come back to Mr. Wagner and proceed again.

13 Thank you very much.

14 (Whereupon, at 4:40 p.m., the hearing was adjourned,
15 to reconvene at 10 a.m., Thursday, May 1, 1980.)
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