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C O N T E N T S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
FRITZ E. ATTAWAY				
By Mr. Scheiner	5		58	
By Mr. Lloyd		19		
By Mr. King		34		
By Ms. Semo		55		
By Mr. Koenigsberg		57		

P R O C E E D I N G S

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2 CHAIRMAN BURG: We are going to follow essentially  
3 the same order when getting the direct cases in. We find that  
4 ASCAP will not have any witnesses; BMI will not have any  
5 witnesses; Sports has requested a delay until tomorrow because  
6 of scheduling problems with their witnesses. So, the motion  
7 picture people, Mr. Attaway, are you prepared to proceed?

8 MR. ATTAWAY: Yes, Ma'am.

9 MR. SCHEINER: Madam Chairman and members of the  
10 Tribunal, the rebuttal case of MPAA, et al., will be presented  
11 through one witness, Mr. Attaway. His testimony will relate to  
12 two points, namely the fee methodology proposed by NAB as  
13 contrasted with the methodology proposed by MPAA, and,  
14 secondly, his testimony will relate to the evidence and  
15 testimony adduced by the Sports interests with respect to  
16 ratings or popularity.

17 On the first point, the methodology, Mr. Attaway  
18 will explain the two approaches recommended and urged by NAB and  
19 MPAA. It will be pointed out that both approaches are based on  
20 a concept of fee generated, and both approaches use the  
21 statutory formula for payments by cable systems. The essential  
22 difference between the two methodologies is that MPAA would  
23 allocate fees paid by cable on a station basis, and that is a  
24 fee paid by cable by carriage of a station is to be divided  
25 among the copyright owners whose programs were broadcast by that

1 station.

2 In contrast, NAB would allocate fees on a cable  
3 system basis. It would aggregate payment made by cable for  
4 all stations and divide among copyright owners without regard to  
5 the source of programs or payments made for the programs.

6 Mr. Attaway will establish or attempt to establish  
7 for you that the MPAA system or methodology results in a fair,  
8 equitable distribution of cable royalty payments and is  
9 consistent with the provisions of the Copyright Act.

10 Whereupon,

11 FRITZ E. ATTAWAY

12 was called as a witness and, having been first duly sworn, was  
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SCHEINER:

16 Q Mr. Attaway, would you for the record, sir, please  
17 state your full name and present position?

18 A My name is Fritz E. Attaway. I am vice president  
19 of the Motion Picture Association of America. I have been with  
20 the MPAA for four and a half years, and prior to that I was with  
21 the Federal Communications Commission.

22 Q Sir, would you refer to MPAA Rebuttal Exhibit Nos.  
23 1, 2 and 3 and tell me whether there are any corrections to be  
24 made in those Exhibits?

25 A There are two typos on page 4 of Exhibit 1, the

1 comparison of the MPAA and NAB methodologies. In the second  
2 paragraph, line 2, it should read "Table 2" rather than  
3 "Table 3" as presented in the paper.

4 Further down in that paragraph the title  
5 "Hee Haw" should read "Movie Matinee," and, to the best of my  
6 knowledge, those are the only corrections.

7 Q. Mr. Attaway, do you agree with my summary state-  
8 ment to the essential differences between the NAB and MPAA  
9 methodologies on the allocation of fees?

10 A. Yes, I do.

11 Q. Is it true, sir, that under the NAB approach, it  
12 would value all programming equally and without regard to the  
13 source of the programming?

14 A. Yes, for any particular cable system.

15 Q. And, in your view, is such a methodology of  
16 allocation consistent with the legislative history and the  
17 purposes of the Act?

18 A. No. I don't think it is consistent with the  
19 purpose of the Act or the intent of Congress as it was drafting  
20 this statute. The legislative history of Section 111, and,  
21 particularly, as reflected on page 90 of the House report,  
22 clearly shows that compensation to copyright owners from cable  
23 systems was to be based upon two criteria, damage to the  
24 copyright owner and benefit to the cable system.

25 Now, as far as I know, the NAB has presented no

1 evidence whatsoever that program owners of local programs,  
2 that is, local stations, are harmed by the retransmission of  
3 their programs by distant cable systems or that distant cable  
4 systems benefit from the carriage of those programs.

5 Now, NAB did not, and, in fact, cannot show that  
6 local program owners are harmed by cable, and Congress knew this  
7 fact in drafting Section 111.

8 Referring again to page 90 of the House report in  
9 the second full paragraph, it reads, and I quote, "There was no  
10 evidence that the retransmission of local broadcast signals by a  
11 cable operator threatens the existing market for copyright  
12 program owners. Similarly, that retransmission of network  
13 programming, including network programming which is broadcast in  
14 distant markets, does not injure the copyright owner."

15 In the next paragraph the House report says, "By  
16 contrast, transmission of distant non-network programming by  
17 cable systems causes damage to the copyright owner by  
18 distributing the program in an area beyond which it has been  
19 licensed."

20 Note the use of the term "licensed." Use of this  
21 word is a clear indication that Congress was concerned with  
22 syndicators who must license their programs in many different  
23 markets throughout the United States. Local programs are not  
24 licensed. They are shown only in the market of the originating  
25 station. That Congress was primarily concerned with providing

1 compensation to owners of syndicated programs and not local  
2 programs is clearly shown in the next sentence of the House  
3 report, which reads, "Such retransmission adversely affects the  
4 ability of the copyright owner to exploit the work in the distant  
5 market."

6 Now, again, only syndicators exploit their works in  
7 distant markets. The owners of local programs are not concerned  
8 with the exploitation of their programs in distant markets.

9 It is abundantly clear, in my opinion, from this  
10 legislative history that Congress was not concerned with  
11 payment to local program owners, because they are not harmed  
12 by the use of their works by cable systems.

13 Q Sir, would you turn to MPAA Rebuttal Exhibit No. 1,  
14 and could you explain the content and thrust of that Exhibit?

15 A Well, the point to be made in reference to MPAA  
16 Exhibit 1 is that significant differences do exist between the  
17 two methodologies, the MPAA and the NAB, but the differences do  
18 not result in as great a difference in allocation of fees  
19 between syndicators and local program owners as may have been  
20 reflected in the NAB testimony.

21 Now, if you will turn to MPAA Exhibit 1, I will  
22 briefly summarize the Exhibit without reading the entire  
23 material, and if at any time there are any questions from the  
24 Tribunal, please interrupt me.

25 Both the MPAA and the NAB methodologies seek to

1 divide the fees generated by the carriage of stations as distant  
2 signals among the owners of non-exempt broadcast programs -- the  
3 owners of non-exempt programs broadcast by those stations.

4 MPAA does on a station-by-station basis. NAB combines the fees  
5 and program time for all distant signals retransmitted by a  
6 cable system and divides the royalty fee on a cable system-by-  
7 cable system basis.

8 Q Mr. Attaway, let me interrupt you, if I may, at this  
9 point.

10 Does NAB as well as MPAA rely and use the distant  
11 signal equivalents provided by the Copyright Act?

12 A Yes. Any system must take into account the DSE's  
13 because that's how the royalty payment is computed. So, whatever  
14 one system uses, in the final analysis one is reflecting the  
15 DSE's as provided by Congress, because that is what the cable  
16 system uses in computing the fee, which is then divided among  
17 program owners.

18 Q In the last sentence of the second paragraph you  
19 make the statement, "For individual copyright owners, the net  
20 result can be substantially different, depending upon the  
21 methodology, keeping all other factors constant."

22 Could you explain that sentence by reference to the  
23 payments that would be made to copyright owners whose programs  
24 appear on noncommercial educational television stations?

25 A Yes. Each cable system carrying an educational

1 station pays .25 of a DSE for carriage of that station as  
2 provided for by Congress.

3 Now, let's assume a hypothetical. If a cable  
4 system is carrying one independent and one educational station  
5 and the .25 DSE for carriage of the educational station works  
6 out to be \$100, under the MPAA methodology that \$100 paid for  
7 the carriage of that educational station is divided among all  
8 of the copyright owners of programs broadcast by that educational  
9 station. They receive exactly what was paid in by the cable  
10 system for carriage of the station. Under the NAB methodology  
11 the copyright owners of programs broadcast by that station may  
12 receive more or less than \$100, depending upon the number of  
13 hours of non-exempt programs carried by the educational station  
14 as compared with the independent station that was carried,  
15 because all the programs are mixed together, and what is paid  
16 out to copyright owners does not reflect what was paid in.

17 Q Thank you. Would you continue, sir?

18 A To demonstrate the difference between the MPAA and  
19 NAB methodologies, we have constructed a universe consisting of  
20 six programs, six stations and six cable systems. It should be  
21 recognized that this universe is hypothetical. However, every  
22 effort has been made to use reasonable data and reflect what  
23 could be a real life situation. References to specific programs,  
24 stations or cable systems are presented for illustrative  
25 purposes only and do not imply actual conditions.

1                   Now, if you will turn to Table 1, page 3, that  
2 sets forth the six syndicated programs used in this Exhibit,  
3 which are carried by six stations, the number of hours per week  
4 that each station broadcasts those programs, and in the next  
5 table it shows the type of stations, the total number of non-  
6 exempt total program hours broadcast by that station and the  
7 number of non-exempt hours broadcast by that station in a  
8 26-week period.

9                   Are there any questions from the Tribunal on this  
10 Table?

11                   (No response.)

12                   THE WITNESS: All right, moving on to the  
13 conclusions of what we found in doing this exercise. Using those  
14 specifications just referred to, copyright royalty payments for  
15 each of the six programs and each of the six stations were  
16 calculated using the two methodologies. For individual programs  
17 the differences as shown on Table 2 were slight, but in five of  
18 the six instances, copyright owners of the listed syndicated  
19 programs are shown to be entitled to higher payments using the  
20 MPAA rather than the NAB methodology.

21                   At this point let me say that all of the programs  
22 that we have listed are syndicated shows. However, we could  
23 have inserted local programs and it would have had the same  
24 effect, except that we would have had to have a different local  
25 program for each station. Obviously a local program is not

1 carried by one or more stations. For instance, the New Bedford  
2 cable -- no, they're all broadcast by more than one station,  
3 but we could have used local programs. It would not affect the  
4 result because the MPAA methodology does not distinguish in any  
5 way between local programs and syndicated programs.

6 On a station-by-station basis as shown by Table 3,  
7 the overall difference is even smaller than the difference by  
8 different types of programs. Copyright owners of the listed  
9 programs broadcast by the three independent stations would have  
10 received more compensation, ranging from 1.5 percent to 23.7  
11 percent using the MPAA rather than the NAB methodology, but on  
12 the network affiliates and the educational station, using the  
13 NAB methodology the copyright owners would share greater  
14 revenues than were generated by the cable system fees for the  
15 carriage of these stations and that reflects the educational  
16 station hypothetical that I referred to a few minutes ago.  
17 They received more than what was actually paid by cable systems  
18 for the carriage of those programs.

19 In every instance the fee paid out to non-  
20 independents, using the NAB methodology, is greater than the  
21 fee paid. Again, note that the MPAA methodology distinguishes  
22 as between stations, not programs. Every program under the  
23 MPAA methodology is treated exactly like every other program  
24 broadcast by a particular station. We do, however, distinguish  
25 as between stations, because the legislative history of

jsl 1 Section 111 in our view says that we must.

2 Turning again to page 90 of the House Report, in  
3 the last full paragraph it states, "the royalty fee is  
4 determined by a two-step computation. First, a value called  
5 a distant signal equivalent is assigned to all distant signals."  
6 Skipping a line it goes on to state, "Different values are  
7 assigned to independent, network and educational stations  
8 because of the different amounts of viewing of programming  
9 carried by such stations. For example, the viewing of non-  
10 network programs on network stations is considered to approxi-  
11 mate 25 percent."

12 It is clear that Congress equated DSE values with  
13 viewing values. The DSE value is relevant to the pay-in.  
14 However, it's also relevant to the payout, because DSEs reflect  
15 viewing and viewing is a measure of the value of distant  
16 programs to cable systems. Thus, in the preceding paragraph  
17 the House Report states that copyright owners of programs  
18 retransmitted by cable systems must be compensated because such  
19 retransmissions are "of direct benefit to the cable system by  
20 enhancing its ability to attract subscribers and increase  
21 revenues."

22 Surely the programs of most benefit to cable  
23 systems are the programs most viewed by cable subscribers.  
24 Therefore, the MPAA regenerated methodology follows this  
25 reasoning, and in our view it is a true implementation of  
congressional intent.

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BY MR. SCHEINER:

Q Does that complete your testimony with respect to the two methodologies?

A Yes, it does.

Q If there are no questions from the Tribunal, I would like at this point to turn to the second matter that Mr. Attaway will address; namely --

CHAIRMAN BURG: Just a moment, Mr. Scheiner.

COMMISSIONER COULTER: Mr. Scheiner, just one question.

Mr. Attaway, could you please explain how a distant signal equivalent measures viewing?

THE WITNESS: Congress in establishing the DSEs, the relative values of independent stations, network-affiliated stations, and educational stations, came to the values of 1 and .25 on the basis of its information with respect to the viewing of nonnetwork programming broadcast by those types of stations.

As it says in the House Report in the passage I read, viewing of the nonnetwork programming on an affiliated stations is 25 percent of total viewing. So, it gave a value of that affiliated station 25 percent and the value of an independent station, all of whose programming is nonnetwork, 1, a ratio of 1-to-4 which reflects the viewing of nonnetwork programming on those two types of stations. Twenty-five percent of the viewing on an affiliated station is to nonnetwork

js3

1 programs while a hundred percent of the viewing of an  
2 independent station is to nonnetwork programming.

3 COMMISSIONER COULTER: This isn't a measure of  
4 real viewing, though. That would be some other figure, what-  
5 ever it is?

6 THE WITNESS: I'm sorry. I don't know what you  
7 mean by "real."

8 COMMISSIONER COULTER: That one to a quarter  
9 is not a measure of real viewing. In other words, what  
10 actually transpires in a real universe. It was an arbitrary  
11 ratio set by Congress.

12 THE WITNESS: Well, no. It was based upon the  
13 best information that Congress had available to it at the  
14 time on the average viewing of affiliated stations and  
15 independent stations. It does have a basis in fact. It was  
16 not picked out of the air like .675 and .25 was.

17 COMMISSIONER COULTER: I understand. But still  
18 for this year it wouldn't necessarily be the real viewing.

19 THE WITNESS: Not necessarily.

20 COMMISSIONER COULTER: The reason I'm asking that  
21 is because the sports in their presentation, obviously, attempt  
22 in some sense to calculate what they consider real viewing  
23 rather than a --

24 THE WITNESS: Well, I don't recall that in the  
25 sports testimony they attempted to aggregate all of the  
viewing to nonnetwork programs on affiliated stations and

js4 1 express that as a percentage of total viewing. So, it may  
2 work out to 25 percent today. It maybe slightly different.

3 I would assume that the viewing habits have not  
4 changed that much since 1976, at least with respect to network  
5 and nonnetwork programming on affiliated stations.

6 COMMISSIONER COULTER: Thank you.

7 BY MR. SCHEINER:

8 Q Turning to the second point in Mr. Attaway's  
9 testimony, namely, the Joint Sports claim based on popularity.  
10 As a predicate, I think it important to remind the Tribunal  
11 that based upon sports own showing, MPAA's share of time is  
12 approximately 80 percent. The share of time of NAB is  
13 approximately 15 percent. And the share of time of sports  
14 for all programs under its showing is 5 percent only.

15 But the claim is made by Sports that it's time  
16 only of 5 percent is not a fair measure of compensation for  
17 sports programs because sports programs enjoy great popularity  
18 and very high ratings. And it made the claim that based upon  
19 Nielsen data it enjoyed a superiority in the order of 2-to-1  
20 over syndicated programs.

21 It will be recalled that our position during the  
22 course of the sports presentation was that that analysis was  
23 somewhat skewed for the reason that it did not compare  
24 syndicated programs and sports programs in the same or  
25 comparable time segments or same day parts.

I would like to stress that MPAA fully agrees with

js5

1 the basic Sport position that ratings and popularity when  
2 properly measured are a valuable, important and perhaps  
3 essential ingredient for evaluating and determining the  
4 allocable shares to different groups of claimants. And in  
5 that respect we differ from NAB and join with Sports.

6 But the purpose of Mr. Attaway's further testimony  
7 will be to establish that when sports programs and syndicated  
8 programs are compared in the same and comparable time periods,  
9 sports does not enjoy a 2-to-1 advantage over syndicated  
10 programs. On the contrary, syndicated programs enjoy a  
11 superiority over sports programs when measured in terms of  
12 ratings and popularity.

13 Now, with that preliminary statement, I return  
14 to the witness. Mr. Attaway, would you refer, please, to  
15 MPAA Rebuttal Exhibit No. 2?

16 Would you explain that exhibit for us, please?

17 A Yes. This exhibit is a summary of data obtained  
18 from this volume. It's the Nielsen on Syndicated Programs,  
19 a market-by-market analysis of syndicated program audiences,  
20 February, 1978.

21 I might interject at this point that Nielsen also  
22 prints this volume for November. There's one for November of  
23 '78 as well. We did not use the November data because we  
24 found that sports during that month are predominantly network  
25 originated and, therefore, we could not obtain a valid

js6

1 comparison of syndicated shows and nonnetwork sporting events.  
2 So we only used the February, 1978 data.

3 And that data, among other things, shows two  
4 factors of relevance here. First, it lists for each syndicated  
5 program broadcast by a particular station the program leading  
6 in to that syndicated show, broadcast by the same station. So  
7 what we did in this first table is to list each syndicated  
8 series and the station that broadcast that series that was  
9 led into by a sporting event. So we would have a direct  
10 comparison of viewing of the sport event and the subsequent  
11 syndicated show, both within the same time period. The two  
12 shows were broadcast back to back.

13 And the table on page 1 of this exhibit contains  
14 our findings. You'll note the summary on page 3 that  
15 syndicated programs achieve higher ratings than sports, 72  
16 times or 56.7 percent of the time. Syndicated programs achieve  
17 the same rating as the sports lead-in program 22 times or  
18 17.3 percent. Syndicated programs achieved a lower rating  
19 than the lead-in sports program only 33 times or 26 percent of  
20 the total.

21 Now, this shows that the sporting events that when  
22 they preceded a syndicated show, more often than not received a  
23 lower rating than the syndicated show that came on after the  
24 sporting event. It conflicts rather dramatically with the  
25 evidence contained in the data presented by the Sports group  
which purported to show that on the average syndicated shows

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1 received a lower rating than sporting events.

2 Now, the second table contains a similar com-  
3 parison but instead of comparing a syndicated program with a  
4 sporting event preceding that show on the same station, it  
5 compares syndicated programs when a sporting event was broad-  
6 cast on a different station in that market at the same time.  
7 This is head-to-head competition, the syndicated show on one  
8 channel, the sporting event on another channel.

9 And in that table we found that a comparison of the  
10 ratings revealed that syndicated shows had a higher rating  
11 in head-to-head competition with sporting events 27 times,  
12 sports had a higher rating than the syndicated show with which  
13 it was competing only 7 times, and the syndicated show and  
14 the sporting event had equal ratings in four of the cases.

15 Again, the syndicated show in most cases received  
16 a higher rating than the sports show.

17 Q Does that complete your testimony?

18 A Yes, it does.

19 MR. SCHEINER: I have no further questions of  
20 Mr. Attaway.

21 CHAIRMAN BURG: Mr. Lloyd?

22 CROSS-EXAMINATION

23 BY MR. LLOYD:

24 Q Let me pause for a moment, because I think that  
25 when other counsel repeatedly mischaracterize one's own case  
it sometimes is desirable to restate what that case is. I

js8 1 don't think that our case is fairly characterized as advocating  
2 that this is a popularity contest. We have quite clearly  
3 advocated that what the Tribunal must do is determine  
4 economic value, economic value to the cable system for various  
5 classes of programs. And that value or that determination has  
6 to take account of a variety of factors, including time,  
7 including ratings.

8 A second element of the equation is the harm to  
9 the program copyright owner. And given Mr. Scheiner's  
10 characterization of our case or mischaracterization of our  
11 case, excuse me, but I thought it pertinent to point that out.

12 Mr. Attaway, my interest this morning is in your  
13 so-called comparison of sports programming and syndicated  
14 programming. Did you prepare these tables yourself?

15 A No.

16 Q Who prepared them?

17 A The actual computations, the extracting of the  
18 information from this book was done by Allen Cooper and our  
19 secretarial staff under my direction and supervision.

20 Q And what steps did you take to ensure its accuracy,  
21 Mr. Attaway?

22 A I reviewed, spot-checked the data with the Nielsen  
23 table. Certainly not in every case, but I relied on the  
24 competence of Mr. Cooper and our staff and I've very good  
25 reason for feeling comfortable with their work.

js9

1 Q In terms of your personal involvement in ensuring  
2 the accuracy, that is, the steps that you personally took,  
3 in addition to reflecting confidence in Mr. Cooper and members  
4 of your staff, you spot-checked the data; is that correct?

5 A Yes.

6 Q Did you also engage in the review of the November  
7 ROSP report of Nielsen?

8 A No, I did not.

9 Q So, to the extent that you testified today about  
10 sports programming in November as reflected in the ROSP, you  
11 are -- what? -- parroting something someone else told you?

12 A I'm reflecting the advice given to me by our  
13 in-house experts on this type of material.

14 Q Now, in your testimony, you've offered data from  
15 a February, 1978 ROSP report and you've also reflected that  
16 there is in existence a November, 1978 ROSP report.

17 Did you make any effort to ascertain whether  
18 Nielsen also published in 1978 an ROSP report for the sweep  
19 period of March?

20 A I made no effort. I'm not aware that they did.

21 Q Are you aware that they do not? Or you just  
22 don't know one way or another?

23 A I'm not aware either way.

24 Q You don't know?

25 A I do not know.

js10

1 Q Do you know whether Nielsen puts out an ROSP  
2 report for the month of July?

3 A I do not know. I don't think they do. My under-  
4 standing is that they only put out two reports each year, one  
5 in February and one in November.

6 Q My understanding, sir, is that they put out three  
7 a year and they exclude the July sweep period. But we'll get  
8 into that.

9 I intended to say May when I said March. The  
10 sweep periods are February where we have the ROSP, May where  
11 we do not, July where it's my understanding that we have none,  
12 and November that you referred to earlier.

13 Q What is your understanding, sir, of what the ROSP  
14 report reflects?

15 A It reflects the viewing achieved by syndicated  
16 programs in various television markets throughout the country.

17 Q And you indicated in your direct testimony that  
18 the ROSP report gives data for the shows that precede those  
19 programs, is that correct?

20 A That's correct.

21 Q And it is the data for shows preceding the syndi-  
22 cated shows that is the source of the information conveyed  
23 as to sports programming on page 1 of your Exhibit 2, is that  
24 correct?

25 A That's correct.

jsll

1 Q Where in the ROSP reports do we have the ratings  
2 for the sports programming which appears on page 3?

3 A That -- it's difficult to explain without the book  
4 in front of everyone here. But there is listing across the  
5 front of the page the first column shows the lead-in program  
6 and then the last column down the page is the competing  
7 program, with the listing of the name of the program and the  
8 ratings.

9 Q So you've taken the competing programming in that  
10 instance?

11 A For Table 2, yes, sir.

12 Q Where you have found sports?

13 A Yes, only where we found sports.

14 Q Now, there were other competing programs in each  
15 instance, where there not?

16 A Yes, sir.

17 Q But you didn't take that data?

18 A No, we were only interested in the comparison of  
19 syndicated programs and sports programs.

20 Q Does the ROSP report give rating data for the  
21 average period that a particular program is carried or does it  
22 provide quarter-hour data?

23 A It provides quarter-hour data.

24 Q So that the lead-in ratings that you've depicted  
25 in the first part of your exhibit are for the last quarter hour

jsl2

1 of the sports programming that you are presenting to the  
2 Tribunal; is that correct?

3 A That I'm not sure of.

4 Q Who would be?

5 A Mr. Cooper.

6 Q You don't know?

7 A I do not know for a fact.

8 Q Now, you suggested in your direct testimony that  
9 the reason, or one reason that you have not provided data  
10 from the November RO SP was that the sports programming carried  
11 during that month was predominantly network programming, is  
12 that essentially correct, sir?

13 A That is the information as given to me.

14 Q Now, with reference to page 3 of, I believe it's  
15 your Exhibit 2, Mr. Attaway, there is a comparison -- no,  
16 excuse me -- I'm interested in Exhibit No. 3. There is a  
17 comparison of a series called "FBI" carried on WGR with some-  
18 thing called "NBA Basketball" carried on WIVB; correct?

19 A I'm sorry, I'm not with you.

20 Q Exhibit 3, first entry. You are purporting to  
21 compare the rating, are you not, of a program called "FBI"  
22 carried on WGR with a program called "NBA Basketball" on WIVB.

23 A Yes, sir.

24 Q And in that instance, the sports event got a DMA  
25 rating of 7 and "FBI" a DMA rating of 5. Am I interpreting

jsl3

1 the data that you have presented correctly, sir?

2 A Yes, sir.

3 Q All right. Now, here again, sir, as I asked in  
4 the case of the other table, are the ratings information you  
5 have given for the last quarter hour at which those two  
6 programs ran head-to-head or are they for some other period?

7 A I do not know.

8 Q Do you know what market we are talking about in  
9 the case of WGR and WIVB?

10 A I'd have to look it up in the book. I don't  
11 know.

12 Q Do you know what time of day we're talking about  
13 with these particular programs?

14 A I would have to look that up as well. I can't  
15 recall that in my head.

16 Q Do you know what day of the week we are talking  
17 about in the case of these particular programs?

18 A Mr. Lloyd, all I know is that the two programs  
19 were broadcast simultaneously by two separate stations in the  
20 same market. Any other information I would have to look up in  
21 this book.

22 Q All right. Do you know what network WIVB is  
23 associated with?

24 A No, I do not.

25 Q Do you know whether WIVB is associated with a CBS  
television network?

jsl4

1 A I do not know.

2 Q Do you know whether WIVB carries NBA basketball on  
3 a network basis?

4 A No, I do not.

5 Q Do you know that you are not comparing here net-  
6 work programming versus syndicated programming, in this case?

7 A I do know to the best of my knowledge that I am  
8 not comparing network sports with syndicated programming.  
9 Yes is the answer to that question.

10 Q How, sir, do you know that? How do you know that?

11 A Because to the best of my knowledge the NBA  
12 basketball game broadcast by WIVB was not a network game.

13 Q Well, now, what basketball team's games are carried  
14 on a nonnetwork basis by Station WIVB, the CBS affiliate in  
15 Buffalo, New York?

16 A I'm sorry. Would you repeat your question?

17 Q Yes, I would. What professional NBA basketball  
18 team's games are carried on a nonnetwork basis by Station  
19 WIVB which is the CBS Television Network affiliate in Buffalo,  
20 New York?

21 A Mr. Lloyd, I have no idea. I do not carry in my  
22 head each program broadcast by every station in this country.

23 Q Oh, I thought maybe you would carry with you when  
24 you are testifying before the Tribunal today the information  
25 underlying the conclusions that you would like the Tribunal  
to draw from your testimony.

jsl5

1 MR. SCHEINER: I submit that this type of  
2 badgering --

3 MR. LLOYD: Would you turn --

4 MR. SCHEINER: I have an objection.

5 MR. LLOYD: Oh, excuse me, Arthur.

6 MR. SCHEINER: I submit that this type of badgering  
7 questions does not advance the ball at all.

8 CHAIRMAN BURG: I'm going to sustain that  
9 objection.

10 MR. LLOYD: Very good.

11 BY MR. LLOYD:

12 Q The next entry on your Exhibit 3 involving the  
13 professional sports interest in which I have an interest,  
14 Mr. Attaway, is a game, an NBA basketball program carried by  
15 WGAN, which ran head-to-head with "FBI" carried by WMTW;  
16 is that correct?

17 A Yes, sir.

18 Q And there "FBI" did a little better. Do you know,  
19 sir, of your personal knowledge, or do you have information  
20 that you could consult to confirm for the record that these  
21 are stations located in Portland, Maine and that WGAN is an  
22 affiliate of the CBS Television Network?

23 MR. SCHEINER: Madam Chairman, I, gain, object.  
24 In the interest of an informative record, if Mr. Lloyd has any  
25 information that the particular basketball game reported here

js16

1 was a network game carried by a network, let's put it on the  
2 table and furnish it to the witness. But to put questions  
3 which leave the strong inference that he has such information,  
4 that such information is accurate, and to harass the witness  
5 with this line of questioning, I think is quite improper.

6 MR. LLOYD: Well, I am not harassing the witness.  
7 I am asking about the data that he has presented. And in  
8 response to Mr. Scheiner's inquiry, I received this exhibit  
9 late on Friday, and I'm not casting any criticism by any means.  
10 That was the schedule that we set. We had an intervening  
11 three-day weekend.

12 I confirmed that only using the source material  
13 immediately at hand, that this particular exhibit reflects some  
14 NBA basketball, in every case it's NBA basketball that was  
15 carried by a CBS affiliate. We have no information that these  
16 particular games were or were not network presentations, only  
17 a suspicion that they were.

18 MR. SCHEINER: I think my point is made, Madam  
19 Chairman. It turns out that Mr. Lloyd does not have such  
20 information and any inference that the facts reported are wrong  
21 are now thoroughly dispelled in the light of this exchange.

22 MR. LLOYD: What do you mean, they are thoroughly  
23 dispelled? This man said he was comparing nonnetwork sports  
24 programming with syndicated programming.

25 CHAIRMAN BURG: Mr. Lloyd, would you just go ahead  
with the next question, please?

jsl7

1 MR. LLOYD: Yes.

2 BY MR. LLOYD:

3 Q Do you have -- the question that is pending,  
4 Madam Chairman, was whether he had information available on  
5 the basis of which he could confirm that Station WGAN is a  
6 CBS affiliate in Portland, Maine?

7 A Yes, I could determine that quite easily, not  
8 here at this table. But any questions you have with respect  
9 to the accuracy of this information, I would be glad to check  
10 out for you and if there are inaccuracies -- well, I will  
11 submit my findings in the record of this proceeding to  
12 demonstrate that the data here is or is not accurate. But I  
13 cannot check in each individual case sitting right here.

14 Q All right, Mr. Attaway, what I'm interested in  
15 in the case of each of the comparisons which are made in MPAA  
16 Rebuttal Exhibit 2 and in MPAA Rebuttal Exhibit 3, where the  
17 comparison purports to be with the programming of a professional  
18 sports league, that is, in one case, I believe, the NBA, and  
19 in other cases the national hockey game, whether your compari-  
20 son is with national network presentations or something other  
21 than national network presentations.

22 A To the best of any knowledge --

23 MR. SCHEINER: Excuse me, Mr. Attaway.

24 Madam Chairman, I have just been furnished with  
25 some information which may be helpful to Mr. Lloyd. I would

jsl8

1 like to offer this as a stipulation and thus cut through this  
2 line of cross-examination.

3 I am advised that with respect to Exhibit 3, no  
4 effort was made to distinguish between network and nonnetwork  
5 games in February. Second, I am advised that it differs from  
6 Exhibit 2 in that the problem with November was that virtually  
7 all sports network games were football, and for that reason  
8 November was not used.

9 Does that help you?

10 MR. LLOYD: Was there any effort in Exhibit 2 to  
11 distinguish between network and nonnetwork programming?

12 MR. SCHEINER: I'm advised that no such effort  
13 was made.

14 THE WITNESS: Mr. Lloyd?

15 MR. LLOYD: Excuse me a minute, Mr. Attaway.

16 BY MR. LLOYD:

17 Q Did you make any effort in the presentation of  
18 these various stations which carried sports programming with  
19 respect to which you make a comparison to determine which, if  
20 any of them, were flagship stations?

21 A No.

22 Q Do you know if any of them at all are on either of  
23 the lists?

24 A No.

25 MR. LLOYD: I think that my effort to go through

jsl9

1 entry by entry, given the representations made about this  
2 exhibit, is appropriate. However, I can appreciate that all  
3 I would do is establish the lack of specific information on  
4 the part of this witness.

5 I would like the opportunity over this evening  
6 simply to put together a list that reflects that none of these  
7 stations were flagship stations, where they are located, and  
8 if I can ascertain this from the ROSP data which I am trying  
9 to obtain today, that this is a comparison of certain network  
10 programming rather than a comparison of the programming in  
11 which our clients possess copyright, if I may do that, then  
12 I'll defer.

13 CHAIRMAN BURG: Please.

14 MR. LLOYD: I have no further questions.

15 THE WITNESS: Excuse me, Madam Chairman. May I  
16 respond to the inference here that this data -- that the  
17 conclusions reached from this data are inaccurate if none of  
18 these stations are sports flagship stations or some of these  
19 sports programs are network programs?

20 My response is that that was not the point of  
21 this exercise, and whether they are or not makes no difference  
22 whatsoever to the conclusions. The fact is that when  
23 syndicated shows ran head to head with these sports programs,  
24 whether they are network, nonnetwork or whatever, the ratings  
25 are as you see in the right-hand column and I do not see the  
relevance of the inaccuracies or what is purported to be

js20

1 inaccuracies with respect to whether they are network or  
2 nonnetwork sports shows. That has nothing to do with our  
3 attempt to compare two types of programming and the ratings  
4 that they achieved when they competed head to head in these  
5 markets.

6 BY MR. LLOYD:

7 Q Did you instruct the people who prepared this  
8 information to pull from the ROSP reports every comparison  
9 available on the basis that you've depicted here? That is,  
10 for example, you've taken from the ROSP report a comparison  
11 of a program carried by KARK-TV Nashville, "On The Road," with  
12 the audience of a NCAA telecast of one sort or another network  
13 perhaps which preceded that program.

14 Now are there instances where there was a  
15 syndicated show preceded by a sports event on KARK which  
16 appears in the ROSP data for February of 1978 which you didn't  
17 bring to us today?

18 A To the best of my knowledge, we identified all  
19 of the instances of where a sports program lead into a  
20 syndicated show and where a sports program ran head to head  
21 with a syndicated show on the basis of the material contained  
22 in this book.

23 Q This book meaning what, sir?

24 A The Nielsen ROSP book for February, '78.

25 Q That was your instructions?

js21

1 A Yes.

2 Q Now, the ROSP report gives data for every  
3 television market in the country, does it not?

4 A Yes, it does.

5 Q And what we're talking about is the Nielsen ROSP  
6 report for February which depicts four weeks of programming,  
7 does it not?

8 A Yes.

9 Q And it was your intent to present to us every  
10 instance from that ROSP report where a sports program led in  
11 to a syndicated program?

12 A That we could identify given the short time.

13 Q Short time.

14 A That we had to prepare this exhibit.

15 Q And on the other hand, every instance where you  
16 could identify a sports event running head to head with a  
17 syndicated program.

18 A That's my understanding.

19 Q There was no selectivity about the task at all.  
20 You took it all and let the chips fall where they may.21 A That is my understanding. That was certainly my  
22 instruction.23 MR. LLOYD: I've nothing further of Mr. Attaway  
24 at this time.

25 CHAIRMAN BURG: Mr. King.

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## CROSS-EXAMINATION

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BY MR. KING:

Q Mr. Attaway, is there one person who has or had principal responsibility for developing the MPAA methodology?

A No. Our methodology was developed over a period of time commencing early in 1977 when we first started working on a formula to divide the royalties that we knew we would -- that cable systems would be paying in 1978. There were many people involved in this process.

Q Were any of the witnesses who testified on behalf of MPAA involved in the process of developing a methodology?

A Mr. Cooper was involved in the later stages.

Q Mr. Hadl?

A Mr. Hadl was involved in the earlier stages, yes, sir.

Q And were there any other parties who had principal responsibility for developing the methodology?

A I don't think it would be fair to say that anyone had principal responsibility. The methodology is a result of the work of a committee consisting of a number of people over several years.

Q Did Mr. Valenti play a role in developing the methodology?

A No.

Q I want to focus on just a couple of aspects of

js23

1 your testimony. And I want to talk in the first instance  
2 about DSEs, and I want to talk about the 4-to-1 ratio and,  
3 more specifically, why it is a 4-to-1 ratio.

4 Would you tell the Tribunal and myself why the  
5 DSE ratio is 4-to-1?

6 A Mr. King, the only way I can answer that question  
7 is to quote again from the House Report, which I think explains  
8 it quite succinctly.

9 Q If you can do it without reading the House Report,  
10 I'd appreciate it. Let me cut through some of this and tell  
11 you what I'm trying to get at.

12 Is it more than strict time?

13 A It is not time at all.

14 Q Well, let me put it this way: The ratio of network  
15 -- excuse me, nonnetwork programming on a network affiliate  
16 to the qualifying programming on an independent in terms of  
17 time was considered by Congress to be, or assumed by Congress  
18 to be roughly in the ratio of 1-to-4; isn't that correct?

19 A No, sir.

20 Q Now, what is your basis for saying "no, sir"?

21 A Because as is stated in the House Report, they  
22 were concerned with viewing, not time. And that ratio of  
23 viewing to nonnetwork programs is 4-to-1 or at least was  
24 thought to be at that time by Congress.

25 Q So you're saying that it's the ratio of programming

js24

1 in terms of time and viewership?

2 A I'm saying that it is viewing, the number of  
3 hours of viewing; ratings, if you will.

4 Q All right. But that has not been the position  
5 of the MPAA from the inception of these hearings, has it?  
6 I mean, haven't you had Mr. Hadl, for example, testify that  
7 it was strictly time?

8 A Our division of royalties among program owners  
9 whose programs were broadcast by a particular station reflects  
10 time only, because we did not have at our disposal sufficient  
11 data to develop a formula for discerning differences in view-  
12 ing or popularity between programs broadcast by each individual  
13 station that we studied.

14 Q I understand, but we're talking about two different  
15 things. You're telling me that the concept of rating entered  
16 the 4-to-1 DSE ratio and what I'm suggesting to you is that  
17 as these hearings commenced back in April that concept was  
18 specifically rejected by witnesses who testified on behalf of  
19 MPAA.

20 MR. SCHEINER: I object to that characterization  
21 for the record. It is simply not supported.

22 BY MR. KING:

23 Q I am going to read, if I may, from a transcript  
24 of the proceedings conducted on April 8 and I'm going to be  
25 reading from page 87 and then I will be reading from page 99,

js25

1 and then page 96. And this is the testimony of Mr. Hadl..

2 Mr. Scheiner, do you have a copy of the transcript?

3 MR. SCHEINER: No.

4 MR. KING: I'll be reading, Mr. Scheiner, page 87,  
5 roughly lines 10 through 16.

6 CHAIRMAN BURG: That was April 8, Mr. King?

7 MR. KING: Yes.

8 MR. SCHEINER: Excuse me. I now have a copy of  
9 the transcript and I'll furnish it to the witness. Is it  
10 necessary to read it into the record again?

11 MR. KING: Well, I want to refresh the witness'  
12 recollection.

13 MR. SCHEINER: Well, he has it before him now.

14 MR. KING: All right, fine. But I want to read  
15 it into the record, and I will start, Mr. Attaway, at page 86,  
16 line 24, Mr. Hadl's response to a question by Mr. Eldridge.

17 "Well, I heard your question this morning. I was  
18 here. I am not sure I really totally understood it. I think  
19 Congress determined and the legislative history so states that  
20 the reason for the difference in the valuation of network  
21 signals, network affiliate station signals, and independent  
22 signals was because of the ratio of what Congress determined  
23 was roughly the nonnetwork time on a network affiliated  
24 station.

25 "I think we all know a network station carriage

js26

1 in prime time in the evening and in the daytime and in other  
2 parts of it, if it is the "Tonight Show" on NBC, carries a  
3 lot of network programming.

4 "The rough approximation that Congress made was  
5 there are fewer hours devoted to nonnetwork programming on  
6 the network affiliated stations, therefore they created a  
7 ratio in which they felt the money should be paid in for  
8 independent and one-quarter for network affiliated stations."

9 BY MR. KING:

10 Q Now, when Mr. Hadl was testifying at that point  
11 it was strictly on the basis of time, wasn't it?

12 A That seems to be correct.

13 Q Now, I now am going to read from page 99. And  
14 this answer is in response to questions by Ms. Semo.

15 Question: "Can you state for the record what the  
16 4-to-1 scheme set up by Congress was meant to do with respect  
17 to the programming?"

18 Answer: "I think I can do no better than I said  
19 before, what I read from the House Report and the statute. The  
20 4-to-1 scheme was designed to reflect the amount of program-  
21 ming on a time basis of an independent of the nonnetwork  
22 programming. Nonnetwork programming of an independent station  
23 is virtually the entirety versus the affiliate which Congress  
24 said is roughly 25 percent; that is where the 4-to-1 ratio  
25 comes from."

js27...

1 Now, again, Mr. Hadl made no reference to  
2 evaluation for viewing, did he?

3 A If he did read from the House Report, then he read  
4 that the determination was made on the basis of viewing and  
5 he obviously misspoke in referring to time in the passages  
6 that you've read to me.

7 Q Now, when Mr. Hadl was through testifying, and  
8 you were in the room when he testified, no one asked Mr. Hadl  
9 to correct that, did they? That stayed right on the record,  
10 true?

11 I mean you were there. You heard him. And if  
12 you thought he misspoke, you had the opportunity to do some-  
13 thing about it; true?

14 A I suppose so.

15 Q And you did nothing?

16 MR. SCHEINER: That is not the case. Subsequent  
17 witnesses, Mr. Korn and Mr. Cooper, each testified to the very  
18 same House Report and I think the record will reflect their  
19 testimony.

20 MR. KING: I think that if I recall, and I really  
21 don't want to argue about this, but Mr. Hadl was represented to  
22 be a legal copyright expert, not Mr. Cooper or Mr. Korn. What  
23 we are talking about now was peculiarly within Mr. Hadl's  
24 area of expertise.  
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BY MR. KING:

Q Now, I want to again read from another portion of Mr. Hadl's testimony. Again, I believe these are questions by Ms. Semo.

Question: "What I am saying is, I was trying to figure out whether or not you are saying Congress by setting up this scheme" -- and this is the 4-to-1 thing -- "meant to value the different programming or whether it meant to simply set up the scheme in order to reflect the different amounts of nonnetwork programming on the two different kinds of stations."

Answer: "We are talking more about a time value than a time factor."

Question: "You say the scheme, the 4-to-1 scheme reflects a congressional determination on the relative value to be accorded these signals both for payment and in our distribution purposes."

"By valuing that I mean time. By value precisely that. What Congress was saying, the amount of nonnetwork programming on a network affiliated station roughly approximately one-quarter of the time on that station's program."

That very specifically rejects value in terms of anything other than time, does it not?

A It seems to.

Q Now the other thing -- actually a couple of other

js29

1 things, but one of the things I want to turn my attention  
2 to right now is the concept of equal value for equivalent  
3 programming. If recollection is good in your testimony here  
4 today, the MPAA has specifically rejected the idea that on a  
5 given cable system programming will be valued the same in  
6 terms of dollars per hour.

7 A No, we've not rejected it. In fact, the same  
8 program broadcast by two different stations may very well get  
9 the same payment. May get more or may get less. It depends  
10 on the number of hours of programming broadcast by the stations  
11 carried, the type of stations carried, many different factors.

12 Q True. Well, there's really only two different  
13 factors. It's the length of the broadcast day and the type  
14 of station.

15 If you have three independent stations carried  
16 on a system, and they are the only stations that are carried,  
17 each independent has the same broadcast day length, then  
18 there's no doubt that in the distribution process each pro-  
19 gramming on each independent is going to get the same amount  
20 of money; right?

21 A Yes.

22 Q That's clear.

23 A Under both of our methodologies.

24 Q True. But under your methodology if the length  
25 of the broadcast day for any one of those independents differs,

js30

1 the amount of money paid to the copyright owners on that  
2 station will differ as well, true?

3 A Yes. May I illustrate that with another hypo-  
4 thetical?

5 Q I'm afraid of them.

6 A Well, the same hypothetical that you used, a  
7 cable system carrying three independent stations. If each of  
8 those stations, say, the cable system paid \$300 in royalties.  
9 If each of those stations broadcast 20 hours a day of pro-  
10 gramming, both the NAB and the MPAA would give the same number  
11 of dollars to each program owner. Each station would divide  
12 a hundred dollars among 20 hours of programming.

13 However, if one of those stations carried 24  
14 hours of programming and the other two only 20, then MPAA  
15 would divide a hundred dollars among the copyright owners for  
16 all 24 hours of programming on the one station and among the  
17 copyright owners for the 20 hours of programming on the other  
18 two stations.

19 NAB would throw all the programs together so the  
20 copyright owners of programming broadcast by the station that  
21 had 24 hours would receive some of the dollars paid by the  
22 cable system for the other two stations.

23 Q We're going to get into this --

24 MR. SCHEINER: Please let the witness finish.

25 MR. KING: All right. I mean he's --

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MR. SCHEINER: Please, do not interrupt the witness.

MR. KING: He's not answering.

MR. SCHEINER: I have an objection, Madam Chairman.

MR. KING: Fine. I mean this is my question. He's really going off with a speech.

THE WITNESS: Actually I was through, Madam Chairman, so maybe the issue is moot.

CHAIRMAN BURG: All right. That makes it easy.

BY MR. KING:

Q But the point is that if we deal strictly with independent stations, if the broadcast day differs in length under the MPAA methodology, the copyright owners of programming will not be compensated in the same way as they would be on the other stations.

A They would not receive the same amount.

Q Same amount of money. And the only way that there could be a 4-to-1 relationship between the -- well, put it this way, the equality, equal dollars going to the copyright owners of programming on affiliate stations, equal dollars going to the copyright owners of programming on the independent stations, is if you had in the same system a 4-to-1 ratio between independent hours and affiliate hours?

A That's true.

js32

1 Q And if there was any deviation there, there would  
2 not be the same amount of payment.

3 A That's true.

4 Q Now, the program -- excuse me, the methodology  
5 that you are saying that MPAA espouses on this point, likewise  
6 is inconsistent with the position taken by MPAA at the  
7 inception of these proceedings; isn't that correct?

8 A I do not think so. Obviously Mr. Hadl, at least  
9 in the passages that you read, misspoke when he referred to  
10 time. But I think we've made it very clear in the record of  
11 this proceeding, I think the passages of the House Report that  
12 I read today have been read at least five times before. I  
13 think the record is clear that we were trying to reflect the  
14 statutory history and the determination of DSE values was made  
15 on the basis of viewing and not time.

16 Q But we're really talking about something else  
17 now. We're talking about a question that I believe Mr.  
18 Eldridge raised as to whether the same program carried on an  
19 independent or carried on an affiliate would get the same  
20 amount of money under the MPAA methodology. It was clear that  
21 it would under the NAB methodology. And this was a question  
22 that occupied a fair amount of time.

23 And what I want to do is read from the testimony  
24 of Mr. Cooper, and this forms a part of the record of April 8.  
25 I will be reading from page 131 and I will be reading questions  
put by Commissioner Coulter.

js33

1 A Excuse me. Did you say 31?

2 Q I'm sorry. Maybe I made a mistake -- 131.

3 A 131.

4 Q Right.

5 A Thank you.

6 Q Mr. Attaway, I'll be reading starting on page --  
7 excuse me, starting on line 11, page 131. All right.

8 It has been suggested that I start up on line 6.

9 "Commissioner Coulter: Let's put it differently.

10 A syndicated program carried by a network affiliate or a  
11 syndicated program carried by an independent as far as its  
12 value to the cable operator is all the same. Would you agree  
13 with that?"

14 "The Witness: My answer is yes."

15 Question: "The usage of this percentage 1 to  
16 one quarter only relates to the question of copyright  
17 liability as it concerns the cable operator, is that correct?"

18 Answer: "The cable operator's liability in terms  
19 of computing the fee.

20 "Commissioner Coulter: Exactly."

21 "The Witness: It is based on the one and a quarter  
22 levels, yes, sir."

23 Commissioner: "Say you have a syndicated program,  
24 it is this probably would not occur but it is transmitted." --  
25 This is somewhat garbled a little bit. "The same program is

js34

1 a signal from an independent and a signal from a network  
2 affiliate. Would you say that in one case that program is  
3 worth four times as much and in one case it is worth one?"

4 "The Witness: Depending upon the cable system  
5 that receives it, and how much that cable system is paying for  
6 the carriage of that signal. If in general the same program  
7 whether it originates from an independent station or originates  
8 from a network affiliated station carried on a cable system,  
9 it merits exactly the same value from a copyright standpoint.  
10 It does not make any difference on that cable system whether  
11 or not the signal originated with an independent station or  
12 that the station originated it with a network-affiliated  
13 station."

14 Now, that testimony is inconsistent with the  
15 testimony that you have given here today, isn't that true?

16 A In what way?

17 Q Mr. Cooper certainly appears to be saying that  
18 programs in the same cable system are going to be valued the  
19 same regardless of whether they emanate from a network  
20 affiliate or from an independent station. That's the clear  
21 import of the testimony I've just read. You would agree with  
22 that?

23 A Yes, and that is true. That is true under our  
24 methodology --

25 Q Only in two cases.

js35

1           A       No. It is true after the first step is taken of  
2 determining the fee generated by the station. After that step  
3 is taken, then every program is treated exactly like every  
4 other program.

5           Q       That's not true. That obviously is not true.  
6 Let me give you this hypothetical. You have an independent --  
7 two independent stations. One has a 24-hour broadcast day  
8 and the other has a 20-hour broadcast day. And let's assume  
9 that the amount of revenue generated is \$100. So each station  
10 is going to get \$50; right?

11          A       Um, hum.

12          Q       And in one instance the \$50 has to be apportioned  
13 over 24 hours and in the other instance over 20.

14          A       That's right.

15          Q       So you can't possibly say that each hour of pro-  
16 gramming in that instance is going to be valued the same.

17          A       It is not going to receive the same amount of  
18 money but it is going to be valued the same in that the total  
19 number of program hours is divided into the fee generated by  
20 the station, and each program receives whatever result you  
21 obtain from that calculation. So it's treated the same. It's  
22 valued the same but it may receive a different payment.

23          Q       It's treated the same but not the same.

24          A       No, I mean it is treated the same.

25          Q       And in the instance which is important, which is

js36

1 money, which is why we're here, a lot of us are here, it's  
2 going to get less if it's on a 24-hour broadcast day, right?  
3 It's going to get less dollars per hour?

4 A Yes, sir.

5 Q And you think that that is valuing the copyrights  
6 the same?

7 A It's treating them the same. Yes.

8 Q In your rebuttal case you refer to the concept  
9 of robbing Peter to pay Paul, and you alluded to it a bit in  
10 response to a question I put to you but really paid no  
11 attention to it in your opening statement. And I was really  
12 going to ask you if you were withdrawing it, but I gather  
13 you're not. So why don't you inform me and the Tribunal as  
14 to what you mean by robbing Peter to pay Paul? And at the  
15 end of that I'm going to suggest to you that the MPAA  
16 methodology suffers from the same infirmity, if such there be.

17 I don't think it's an infirmity, but why don't  
18 you talk to us about robbing Peter to pay Paul and what it  
19 means to you, and why the NAB methodology is unfair.

20 A Well, I don't believe I testified today that the  
21 NAB methodology is unfair. My point today has been that it  
22 does not reflect congressional intent. If you choose to call  
23 that unfair, maybe it is.

24 Q Excuse me. Are you talking about congressional  
25 intent in terms of the rationale behind the DSE?

js37

1 A Yes.

2 Q And the rationale being that the DSE is to take  
3 into account time and value and ratings and that type of  
4 thing; is that true?

5 A Yes.

6 Q I just want to get back to that point a little bit.  
7 You are aware, are you not, that there is a body of writing  
8 and copyright textbooks which is inconsistent with the position  
9 you're taking? I mean, more specifically, Professor Nemers  
10 work and I will refer to Section 8.18(e) and I will read to  
11 you what Professor Nemers states.

12 MR. SCHEINER: Madam Chairman, I must object. I  
13 have sat by quietly listening to some several arguments and  
14 a half dozen questions and in no respect has the witness been  
15 given the opportunity to respond. The question a couple of  
16 pages back in the transcript, the sense of it was would you  
17 please tell us why you think the NAB methodology is unfair or  
18 inconsistent with the statutory intent. That question remains  
19 pending and I think it would be appropriate for the witness  
20 to address that question.

21 CHAIRMAN BURG: I think that's appropriate but  
22 let's do it after a short recess.

23 (A short recess was taken.)

24 MR. SCHEINER: I think there's a pending question  
25 that the witness will address.

end t2

js38

1 THE WITNESS: As I recall, the question was would  
2 I explain the statement with reference to robbing Peter to pay  
3 Paul. Is that correct?

4 BY MR. KING:

5 Q True.

6 A All right. Using one of the hypotheticals that  
7 we were using earlier, a cable system paying a hundred dollars  
8 of copyright fees and carrying two independent stations. If  
9 one of those stations broadcast 24 hours a day and the other  
10 broadcast 20 hours a day, under the NAB methodology one would  
11 total the number of hours -- and let's just use one day. So  
12 that's 44 hours. Divide that into the total royalty fee paid  
13 and each hour of programming would receive \$2.27.

14 Under the MPAA methodology, we would first divide  
15 the hundred dollars of royalty payment between the two  
16 stations carried. Then we would divide the number of program  
17 hours on each station into the \$50. So the 24-hour station,  
18 the programs on the 24-hour station would each share equally  
19 in that \$50 and receive \$2.08. Similarly, the programs on the  
20 20-hour station would share equally in that \$50 and receive  
21 \$2.50.

22 Now, we say that NAB is robbing Peter to pay Paul  
23 because the copyright owner -- excuse me -- the 20-hour  
24 station received \$50 by the cable system for the privilege of  
25 carrying that signal and the programs on that signal. Now,

js39

1 if each program owner received \$2.27, the program owner on the  
2 20-hour station would receive less than was actually paid for  
3 the carriage of his programming. And the program owners on  
4 the 24-hour a day station would receive more than was actually  
5 paid by the cable system for the privilege of carrying the  
6 programs on that station.

7 I think that describes the reference to robbing  
8 Peter to pay Paul. Under NAB in most cases, program owners  
9 do not receive what was paid for the carriage of their pro-  
10 gramming. Under the MPAA methodology they do receive their  
11 proportionate share of the monies actually paid for the  
12 retransmission of those programs.

13 Q So your complaint in essence is that under the NAB  
14 methodology, one station sort of borrows or gets a benefit  
15 to which it's not entitled?

16 A Yes, I think that's correct.

17 Q I don't think that's an infirmity, but let me show  
18 you that even under your own methodology using the same  
19 hypothetical the same thing happens. The \$100 represent two  
20 DSEs and the first DSE is .675 of gross revenues. And now,  
21 the gross revenues are \$100. So under the MPAA methodology,  
22 the first DSE would be -- the first station would be entitled  
23 to that entire \$100.

24 If you add a second station, that second DSE is  
25 entitled -- is weighted at .425. And so what is happening is

js40

1 one station is entitled to .675, the other station is  
2 entitled to .425, and yet in your methodology each station  
3 gets the same amount of money. So the same thing in effect  
4 is happening, is it not?

5 A Well, in effect there would be a difference if  
6 the station carried only -- if the cable system carried only  
7 one station rather than two. The MPAA methodology does not,  
8 and I think appropriately, equate the percentages, the .675  
9 and the .25 with stations. I don't think you can do that.  
10 You can only equate DSEs with stations, because the percent-  
11 ages vary.

12 If a cable system carries two distant independent  
13 signals, you don't know which one is generating the .675 and  
14 which one the .25. What you do know is that each station is  
15 valued at one DSE. So you assign the payment -- if there are  
16 two DSEs, you assign half the payment to each station.

17 Q But one of the main objections that you had with  
18 our methodology is that we were not distributing funds to  
19 stations in a way in which it came in. And I'm simply sug-  
20 gesting to you that you had the same difficulty. Because that  
21 second station only adds -- it adds a smaller amount than does  
22 the first.

23 MR. SCHEINER: I object. The  
24 question is completely fallacious. It's assume that one  
25 station is first and earns .675, that another station is

js41

1 second and earns .425, I guess, when in fact both stations are  
2 there, both stations are carrying and there is no way of  
3 determining which is first and which is second.

4 My objection is to the question. The assumption  
5 that one comes first and the other comes second. In fact, there  
6 are two stations.

7 MR. KING: Well, I can proceed on that basis.  
8 There are two stations. If there aren't but two stations,  
9 Mr. Attaway, one is responsible for .675 of gross revenues  
10 and another responsible for .425.

11 THE WITNESS: No, I think that's an inaccurate  
12 statement. Each are valued at one DSE. Now, the percentages  
13 applied to those DSEs differ because Congress in its infinite  
14 wisdom gave the cable system a break and provided for a lower  
15 payment per program as the number of distant signals increased.  
16 That's just a fact of life. That's what the statute says.

17 But I don't think it's fair to say that any  
18 particular station generated .675 or any other percent of  
19 revenues, because there is a two-step computation in  
20 determining the payment.

21 The first step is to determine the DSEs. After  
22 that step is made, all of the stations disappear and you deal  
23 only with DSEs, and then you apply these percentages. After  
24 that point, I don't think you can any longer, or you cannot  
25 equate the percentages with particular stations because they

js42

1 are applied to DSEs, not stations.

2 BY MR. KING:

3 Q In the hypothetical we're talking about here,  
4 the DSE in each instance is an independent station; true?

5 A Yes.

6 Q The DSE in each instance is an independent station.  
7 And in each instance, the amount of money for which that station  
8 or DSE is responsible differs. In one instance it's .675;  
9 in another, .425. If you add them up together, you get a  
10 fraction somewhere in the middle. And that's the way  
11 you apportion the money to that station.

12 But the fact is that the money is coming into the  
13 system and put in the royalty pool in different percentages  
14 than the way it goes out to the stations under your methodology;  
15 isn't that true?

16 A Well, I'm afraid the only thing I can do is  
17 repeat myself again and say that the percentages are applied  
18 to DSEs. And we are equating stations with DSEs, not stations  
19 with percentages, because there's no way you can do that.  
20 That's just not the way the computation is made.

21 Q It was brought to my attention that during a portion  
22 of your direct testimony in response to questions by Mr.  
23 Scheiner you were talking about programming that was not  
24 qualifying, and you mentioned network programming and you also,  
25 I believe, used the phrase "local programming."

I'm just trying to clarify something.

js43

1 A Yes.

2 Q You did not mean to imply by local programming,  
3 locally produced programming that was imported into a distant  
4 market, did you?

5 A That's true. Unfortunately the terms that we  
6 are using are ill-defined and often local is used inter-  
7 changeably for programs, all programs broadcast by a local  
8 station and also to refer to programs produced by a local  
9 station. At that point in my testimony I was referring to  
10 all programs broadcast by a local station.

11 Q Bear with me one moment.

12 MR. KING: I have no further questions.

13 CROSS-EXAMINATION

14 BY MS. SEMO:

15 Q Mr. Attaway, when Mr. Lloyd questioned you with  
16 respect to your Exhibit 3, you mentioned that you were not sure  
17 of the time of day that these programs reflected in the exhibits  
18 were broadcast or what day of the week they were broadcast.

19 Do those responses apply with respect to Exhibit 2  
20 as well?

21 A Yes. Yes, the only thing that I meant to reflect  
22 in these tables is that in the case of the first table whatever  
23 time of day it was that the sports program preceded the  
24 syndicated program on the same station, and with respect to  
25 Table 2, that the sports program ran simultaneously with the

js44

1 syndicated program on different stations in the same market.

2 Q I thought it was Table 3 that had the same time,  
3 the head-to-head competition.

4 A Correct me. I don't have the table numbers on  
5 the tables I'm using.

6 MR. SCHEINER: Table 3 is head to head.

7 THE WITNESS: That's correct. Excuse me.

8 BY MS. SEMO:

9 Q So with respect to Table 2 which is where the  
10 sports program is a lead-in program, there would be a gap of  
11 several hours between the rating for the syndicated program  
12 and the rating for the sports program?

13 A I don't see how.

14 Q You mentioned that you were unfamiliar with whether  
15 or not the rating was for the last quarter hour or whether it  
16 was an average rating for the entire sports program. So that  
17 if it's an average for the entire sports program or if it's a  
18 rating for the beginning of the sports program, there could be  
19 a gap of some undetermined time between the rating for the  
20 sports program and the rating for the syndicated program.

21 A I suspect that would be true. I don't see how it  
22 could be several hours but there might be a slight gap.

23 Q In the very beginning of your testimony, when you  
24 were discussing the NAB methodology, you mentioned that and  
25 in that context of local broadcasters, you mentioned that only

js45

1 syndicators exploit their works in distant markets.

2 Now when you mentioned that did you mean to exclude  
3 all of the other claimant groups here and say that only  
4 syndicators are the ones who seek to exploit their works in  
5 distant markets?

6 A I was using the term "syndicator" in the broad  
7 sense of the term and that would include syndicators of sport-  
8 ing events, religious programs, as well as series entertain-  
9 ment. Anyone who seeks to exploit his work by licensing it  
10 to individual stations in more than one market.

11 MS. SEMO: I have no further questions.

12 CHAIRMAN BURG: Mr. Koenigsberg?

13 MR. KOENIGSBERG: Thank you, Madam Chairman.

14 CROSS-EXAMINATION

15 BY MR. KOENIGSBERG:

16 Q Just one or two things, Mr. Attaway. The programs  
17 that you list on Exhibit 2 include "Hee Haw," "Lawrence Welk,"  
18 "Nashville Music," "Nashville On the Road," "Pop Goes Country,"  
19 "Porter Waggoner," "Sha-na-na," "Soul Train." Those programs  
20 feature musical performances, don't they?

21 A Certainly "Lawrence Welk" and "Hee Haw." Yes, I  
22 would say they probably do.

23 Q On Exhibit No. 3, the same thing. Some of those  
24 programs, "Hee Haw," "Lawrence Welk," "Nashville On The Road,"  
25 those feature musical performances, too. Isn't that right?

js46

1 A I would suspect so, although I've never seen  
2 "Nashville On The Road."

3 Q Well, making the assumption that they do, and in  
4 that case, by my quick count, if you take a look at how those  
5 programs stack up against the sports events, you find that  
6 15 of them do better, none of them do the same, and two do  
7 worse in the ratings.

8 Will you accept that count subject to check?

9 A Yes.

10 Q And if you take a look at the other programs,  
11 "FBI," "In Search Of," "Star Trek," "World of Survival,"  
12 again subject to check you find that 12 of them do better,  
13 four do the same, and five do worse.

14 A I'll accept that subject to check.

15 Q Thank you. I've no further questions.

16 MR. KOENIGSBERG: Thank you, Madam Chairman.

17 CHAIRMAN BURG: Mr. Scheiner?

18 MR. SCHEINER: Are we finished with cross.

19 CHAIRMAN BURG: Yes.

20 REDIRECT EXAMINATION

21 BY MR. SCHEINER:

22 Q Let me put to you one question. Under the NAB  
23 methodology, assume that the same program is carried by two  
24 different cable systems and that the cable systems, two systems,  
25 pay the same amount in royalty fees. Might that same program

js47

1 receive different dollars, different amounts of dollars under  
2 the NAB methodology?

3 A Yes.

4 Q How would that come about?

5 A Because when you're dealing with two cable systems  
6 carrying only one station each, then the NAB methodology and  
7 the MPAA methodology achieve the same result and there are  
8 differences in both. If Cable System A is carrying a 20-hour  
9 a day station and is paying \$100 for one DSE and Cable System  
10 B is carrying a 24-hour a day station for which it pays one  
11 DSE or \$100, then under both the NAB formula and under the  
12 MPAA formula the copyright owner of the same program is going  
13 to receive more money from Cable System A because it is  
14 receiving 1/20th of the \$100 and it will receive less on  
15 Cable System B because it will receive 1/24th of the \$100.

16 Both methodologies would operate the same way and  
17 there would be a different payment for the same program carried  
18 by two different cable systems on two different stations.

19 MR. SCHEINER: I have no further questions.

20 CHAIRMAN BURG: Tomorrow we'll have Sports.

21 Mr. Bechtel, other than the material you've  
22 presented that you want to put in the record, are you going to  
23 produce any witnesses?

24 MR. BECHTEL: No, ma'am.

25 CHAIRMAN BURG: And I trust that's true with you,

js48

1 Miss Semo, that you just filed the affidavit?

2 MS. SEMO: That's correct.

3 CHAIRMAN BURG: So we'll have -- yes, Mr. Lloyd?

4 MR. LLOYD: I just wanted to point out, these  
5 things are difficult to predict but I did mention to Mr. King  
6 that I know that our direct examination of our witnesses is  
7 likely to be brief and, in fact, I would predict, using my  
8 best judgment, that it will be only slightly more than a half  
9 a day that our direct and the cross of the other parties  
10 would have. So that if he wants to have additional witnesses  
11 standing by so that we can maximize the use of tomorrow's  
12 time, since I was not prepared to do that day, I thought I'd  
13 pass that along.

14 CHAIRMAN BURG: Mr. King, what are your views on  
15 that?

16 MR. KING: We would be prepared to have someone  
17 available to testify tomorrow afternoon.

18 CHAIRMAN BURG: And then if necessary conclude  
19 on the following day.

20 MR. KING: Yes. We anticipate one witness  
21 tomorrow afternoon whose direct case I suspect will run in the  
22 area of one hour and two witnesses substantially shorter in  
23 time for the first thing the next day.

24 CHAIRMAN BURG: All right. Let's proceed on that  
25 basis, that you'll have someone standing by tomorrow so we can

js49

1 get into it upon the conclusion of the Sports.

2 MR. SCHEINER: Do I understand correctly that  
3 Sports is starting tomorrow morning?

4 MR. LLOYD: Yes.

5 MR. SCHEINER: Point of clarification. I do not  
6 understand the status of Sports' pending request for official  
7 notice of some rather voluminous documents. My understanding  
8 is that my opposition to that request was denied but that the  
9 request remains pending and not acted upon. Is that correct?

10 CHAIRMAN BURG: That's right.

11 MR. SCHEINER: Well, that's the point on which I  
12 would appreciate some clarification. Will there be a ruling on  
13 that pending request and, if so, when? Will it be prior to  
14 the time that they undertake rebuttal or some later time?

15 CHAIRMAN BURG: Mr. Scheiner, it's still, obviously,  
16 as of this minute it's still pending.

17 MR. SCHEINER: I just wanted to call it to your  
18 attention. It's just hanging out in limbo.

19 CHAIRMAN BURG: We'll take care of that before the  
20 rebuttal stage is finished.

21 Tomorrow we will meet in the Postal Rates Building,  
22 2000 L Street, 5th Floor. Until then we are adjourned.

23 (Whereupon, at 12 o'clock noon, the hearing was  
24 recessed, to reconvene on ~~Tuesday, May 27, 1980.~~)

WEDNESDAY, MAY 28, 1980

25