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Tuesday, April 8, 1980

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The Rayburn Building  
Third Floor Hearing Room  
Washington, D.C.

Whereupon, the Tribunal convened at 10:00 a.m.,  
pursuant to notice.

PRESENT:

MARY LOU BURG, Chairwoman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

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1 CHAIRWOMAN BURG: Good morning. First of all, what  
2 I would like to do before we commence the proceedings is to  
3 swear in all the witnesses at one time.

4 Mr. Scheiner, are your witnesses here?

5 MR. SCHEINER: Yes, they are.

6 CHAIRWOMAN BURG: Would you all stand up, please.

7 (All witnesses sworn.)

8 I have some news that you may or may not be interest-  
9 ed in. As of May 29, the royalty fees available for distribu-  
10 tion total \$14,337, 778. As of May 20, 1980. It has been  
11 invested through that period. At that point, we will make  
12 another determination.

13 MR. HOCKPERG: For calendar year 1978.

14 CHAIRWOMAN BURG: Yes.

15 Mr. Scheiner.

16 MR. SCHEINER: Madaam Chairman, members of the  
17 Tribunal, my name is Arthur Scheiner. I represent the program  
18 Producers and Syndicators. With me is counsel Fritz E.  
19 Attaway and Richard Waysdorf. Our direct case will be submit-  
20 ted through the testimony of four witnesses.

21 They are Jack Valenti, president of the Motion  
22 Picture Association; Robert Hadl, vice president of MCA  
23 Television, Incorporated; Allen R. Cooper, vice president of  
24 the Motion Picture Association; and Alexander Korn, broadcast  
25 economist of Robert R. Nathan Associates, Incorporated.

1           At issue in this proceeding is the allocation and  
2 distribution of the royalty fees paid by cable television sys-  
3 tems for the retransmission of broadcast signals. We think  
4 that there are two essential elements or factors which must be  
5 put on the record and evaluated by the Tribunal in order to  
6 arrive at a fair and equitable distribution to the copyright  
7 claimants.

8           First is the element of time. The number duration,  
9 the amount of time that cable television systems utilized in  
10 the retransmission of the copyright programs of the various  
11 groups of claimants.

12           Our evidence will establish that based on time only  
13 the program producers and syndicators programs were utilized  
14 in excess of 80 percent by cable television systems. You can-  
15 not stop with time, however. It is necessary also to determine  
16 the amount paid by cable for the retransmission of those pro-  
17 grams. The statute provides a rather complex formula to deter-  
18 mine what cable paid for.

19           The relationship of payment to time we have labeled  
20 as fee generated and is basic to the methodology that we em-  
21 ploy. Our witnesses will explain the fee generated method-  
22 ology. In applying that methodology time weighted by fee  
23 generated, the amount that the program producers and syndica-  
24 tors are entitled to receive out of the royalty fund will  
25 range from in excess of 79 percent to some 83 percent depending

1 upon a number of factors which the witnesses will address.

2           There is a third factor which we think is appropriate  
3 for the Tribunal to consider and evaluate in its overall judg-  
4 ment. That third factor is ratings popularity, attractiveness,  
5 value if you will of the programs.

6           We fully agree with the testimony of Dr. Fagan who  
7 appeared on behalf of ASCAP who said that just plain common  
8 sense establishes that a local program consisting of local  
9 news, local public affairs when transmitted to a distant market  
10 will get a lower rating, will have less value and will have  
11 less popularity than sports and most certainly of feature  
12 movies and syndicated series programs.

13           I submit to you that it is very difficult to quanti-  
14 fy plain common sense. I submit to you that the Tribunal must  
15 deal with competent evidence, with hard facts, with probative  
16 facts which you can quantify in some fashion.

17           Sports has made an attempt to do that. To the ex-  
18 tent that the sports interests have established a competent,  
19 probative basis for evaluating ratings, popularity, we will  
20 endorse and subscribe to that position.

21           Finally Madaam Chairman, at the conclusion of our  
22 last session, the point was made by you that the Tribunal is  
23 faced with the allocation and distribution of 100 percent of  
24 the pot. You have to make an allocation to each of the groups  
25 of claimants before you.

1           You made the point that each of the parties has come  
2 in with a showing with respect to its own case. That is true.  
3 We have done the same thing. But I would trust that at the  
4 conclusion of the evidentiary portion of the proceeding an  
5 opportunity will be afforded to all the parties to come in  
6 with their own overall recommendation based on the record  
7 before you, your rulings on proffered evidence, and that we be  
8 permitted to do so in the form of proposed, typically proposed  
9 findings of facts and conclusions of law which in effect  
10 amount to the submission by the parties of their recommended  
11 decision.

12           This is on the allocation of the entire royalty  
13 fund.

14           CHAIRWOMAN BURG: Mr. Scheiner, not only will you be  
15 permitted, that is precisely what I asked.

16           MR. SCHEINER: With that, Madaam Chairman, I would  
17 like to call our first witness, Mr. Valenti.

18           MR. VALENTI: Thank you very much, Madaam Chairman.  
19 Whereupon,

20                                   JACK VALENTI  
21 was called as a witness, and having been previously sworn, was  
22 examined and testified as follows:

23                                   DIRECT EXAMINATION

24           BY MR. SCHEINER:

25           Q   For the record, will you please state your full name

1 and your title with your Motion Picture Association.

2 A Jack Valenti, president and chief executive officer  
3 of the Motion Picture Association of America.

4 Q How long have you held that position?

5 A Some 13 years.

6 Q Mr. Valenti, your written statement is in evidence in  
7 this proceeding. Would you be good enough to summarize that  
8 statement and the position which you urge on the Tribunal.

9 A Well, I am very grateful for this Commission letting  
10 me and my colleagues come here today. I want to assert a  
11 maxim, a very durable maxim. Everybody in the television cable  
12 program business, those who try to probe the mind and con-  
13 science of the American family understand all too well.

14 It is this. It is not site lights, not fiber optics  
15 or cable wires, nor the way that light and sound travel from  
16 site light through these wires to a home that the American  
17 family is purchasing. They want programs.

18 They really don't care how it gets there or the con-  
19 tractual arrangements that brought them there. They want to  
20 see programs. I believe that without programs there would be  
21 almost no television industry. There would be no cable indus-  
22 try, no arena in which all this magical knowledge to  
23 interpret and be useful.

24 That is the level I come before you today. Program-  
25 ming. I want to see that the program suppliers are accorded

1 justice and that we get our fair share, fair share of this  
2 copyright royalty pool. We ask no less, want no less, and we  
3 think we deserve no less.

4           Some of the points I am going to make are predicated.  
5 We the programmer suppliers differ markedly and significantly  
6 from these other claimants in ways that I think will profoundly  
7 affect your decision.

8           It has got to be recognized that ours is based on  
9 cable carriage of syndicated programs which really represent  
10 the vast majority of all programs that cable presents to its  
11 paying subscriber.

12           Second, I think that we differ from other claimants  
13 by nature of syndicated programming. The programs that we  
14 market have universal and national appeal. Happy Days and  
15 Kojak are as popular and well received in Wichita Falls, Texas  
16 as well as these are in Grand Rapids, Michigan.

17           Local programs as we all no rationally and sensibly  
18 have their appeal in the local communities in which they ori-  
19 ginate. I don't believe while I admire the city of Atlanta or  
20 my home town of Houston, Texas, I don't believe that news pro-  
21 grams of local shows in Atlanta and Houston let's say are go-  
22 ing to be very useful in Denver.

23           I don't think the Dallas soccer or bowling teams are  
24 going to be of much concern in Tacoma, Washington. Unlike  
25 sports teams, we do not have exclusive franchises; and unlike

1 broadcast stations we don't have exclusive use to the spectrum  
2 of the air.

3 We are engaged in a hot competitive battle in the  
4 marketplace for the attention of the eye of the viewer. Our  
5 fortunes rise or fall depending on the relative, the qualita-  
6 tive and the capital we invest in these efforts. That is the  
7 name of the creative game.

8 The claims of the program suppliers I submit to you  
9 are based on programs produced and distributed by them to tele-  
10 vision broadcast stations. As anybody in this business knows,  
11 the production and distribution of these programs is high risk.

12 It is a dicy forum. It is capital intensive. You  
13 put up millions of dollars before you see one millimeter of  
14 film. Huge financial investments. The expenditure of time and  
15 energy. Most important, creative talent.

16 I tell you in all my time in this business the one  
17 element that you simply cannot do without -- You may be able  
18 to raise money. You may be able to get cameras. You may be  
19 able to get all things that have to do with material and sub-  
20 stantive things.

21 But the essential weaving is this fragile thing  
22 called creativity on which this whole maze of super structure  
23 called television is made today. This was mentioned by the  
24 President's Task Force on Communication. I think it is mighty  
25 relative.

1           Ultimately what is at issue is not economics or the  
2 market of the electric age, but the content of the conduits,  
3 the products of a small band of creators on which the rest of  
4 the system feeds and on which the public consumes.

5           I am going to utter what has become a cliché. You  
6 are faced with a complex task. We all know that of trying to  
7 determine the claims respective shares. I understand what is  
8 to be determined is the percentage of the copyright pool appli-  
9 cable to each group of claimants.

10           This is phase one of your deliberations. In order  
11 for you to do that, I will take a few minutes to try to des-  
12 cribe to you as simply as I can what is really a complex and  
13 volatile web called the syndication process.

14           A syndicated program is a program licensed directly  
15 to individual television stations for exhibition in their  
16 local viewing market. These are programs that may have previ-  
17 ously been shown on a national network prime time, or they  
18 could be first-run, syndicated programs.

19           That is, programs developed exclusively for the use  
20 of the syndication market and will never appear on television  
21 prime time as well as feature theatrical films and what we call  
22 made-for-television movies.

23           How does it all start? It starts with a commitment  
24 by a producer or director to invest his or borrowed capital in  
25 the production of a particular program. A creative idea comes

1 forth and a commitment is made to bring this to vibrant life  
2 on film or tape.

3           These ideas which find some favor are then subjected  
4 to a series of rigorous tests. They start with the preparation  
5 of the story line. Maybe after you prepare it, you don't want  
6 to use it anymore. Then, the next step is a completed script  
7 and finally the production of what is called a pilot.

8           At each stage of the process, the great majority of  
9 these proposals are pulled out. The failure or the death rate  
10 is extraordinarily high. We have estimated for each 1,000  
11 concepts or ideas only some 35 programs may be produced from  
12 this vast alternative choosing that you have.

13           Out of those 35, only one program will make it to  
14 syndication. That is the law of television. It is also a  
15 sword that hangs over everybody's head.

16           The license fees we also know for netowrk prime time  
17 exhibition seldom cover the entire cost of the creative invest-  
18 ment in the production and distribution process. The relative-  
19 ly few shows which survive this whole process now are faced  
20 with the high suicide rate on prime time.

21           Read the trade press and you know some new show has  
22 been poll axed after exhibition. This makes the potential  
23 syndication investment recruitment for those few successful  
24 network shows both hazardous and critical.

25           If you are going to continue the function of the

1 syndicated process, you have got to have the program. Unless  
2 a series runs a minimum of three or four years and accumulates  
3 about 90 episodes, it cannot enter the syndication market and  
4 will have little value.

5 Another thing you should understand is it has become  
6 harder and harder to syndicate programs in the marketplace.  
7 The number of shows that were exhibited on network television  
8 and later successfully syndicated has declined dramatically and  
9 I must say painfully.

10 In 1965, 16 programs entered the syndication program  
11 market. In the '70s and the '80s, that number has gone down  
12 until today an average of four, not 16, are entering the syn-  
13 dicated marketplace each year.

14 Now, it is the syndication -- and you have to keep  
15 this in mind -- of these relatively few programs that emerge  
16 from this very narrow funnel which holds out the possibility  
17 of reward to the producer and the director and to the  
18 creative community.

19 Because it is the reward that is some profit, re-  
20 cruitment allows you to continue the process all over again.  
21 This law of risk and reward which everyone in this business  
22 understands as you understand the ten commandments is far more  
23 powerful than any parliamentary command.

24 I think it is clear at lease to us in the business  
25 that the carriage of these programs by cable television is

1 having a serious adverse effect on the syndication process and  
2 on creators and producers and distributors of programs that  
3 make that process work.

4 As cable penetrates more, the injury becomes more  
5 severe.

6 COMMISSIONER BRENNAN: Mr. Valenti, do you intend to  
7 present evidence in this area during this proceeding?

8 THE WITNESS: It is difficult to present specifics  
9 because the excluding rules are still in effect. I am clanging  
10 the alarm bell more than anything else.

11 What happens if some of the barriers to wide spread  
12 and wholesale disposal of programs by cable becomes real?

13 COMMISSIONER BRENNAN: You realize we must make a  
14 decision based on the record made in this proceeding?

15 THE WITNESS: I understand that. I am only suggest-  
16 ing that you are operating in a wide spectrum. For you to  
17 make a small decision, you also have to see the entire picture  
18 as it were so the small nook and crany becomes more illuminated  
19 to you and it is not as dark as it might have been.

20 I can only suggest that the House Subcommittee on  
21 Communications issued a staff report. I might add no one is  
22 more familiar with this than you. Your background is more  
23 basic than anybody I know.

24 In this report by the House in its subcommittee,  
25 there is one line. Mind you, this is what the House of

1 Representatives have said, not the motion picture, importation  
2 of a copyright owners program for market A into market B serio  
3 seriously affects his efforts to market that program in B.

4 The FCC has recognized as do we the importance of  
5 the program production industry as fundamental to the continued  
6 functioning of the broadcast and cable television industry  
7 alike.

8 You are also aware, Mr. Brennan, -- and I am sure  
9 your colleagues are -- that that same conclusion was arrived  
10 at by Stanley Besen who is working with the FCC and Mr.  
11 Manning and Mr. Mitchell. They prepared this for the Rand  
12 Corporation.

13 I cite this because it is not tainted with the bias  
14 of suppliers or whomever else. There is an important paragraph  
15 that I hope you will take heed of. It is scarred in my mind.

16 "The most significant difficulty with the cable pro-  
17 visions of the new law, the Copyright Act of 1976, is a detri-  
18 mental impact on program supply markets. Since the fees generat-  
19 ed by the fees schedule are likely to fall short of the value  
20 consumers place on the imported signal, the aggregate earnings  
21 of program suppliers will be too low..

22 "At first, the gap between actual and efficient  
23 revenues will be relatively small because distant signals now  
24 offer only limited competition to local stations."

25 That is one in five. This is a key line. I think

1 it is relevant to the question you asked. "However, as cable  
2 penetration and distant signal importation increases, the  
3 ability of program suppliers to capture the full value of their  
4 programs will decline."

5 So when I say it is clear beyond any doubt, it is  
6 possible I am saying it is clear to us that the carriage by  
7 cable of syndicated programs diminishes the value of the pro-  
8 gram to the injury of the program supplier.

9 Let me come to the question. How does this Tribunal  
10 really decide what percentage is really applicable to each  
11 group of claimants? How do you come about that decision?  
12 First, there are some methods. My counsellor pilfered part of  
13 my remarks, but I am going to embrace him manfully anyway.

14 First, there is the time method. How much time does  
15 each claimant occupy on each cable program? Second is the fee  
16 generated method. How much cable systems under the copyright  
17 fee schedule pay on DSE for various distant signals carried.

18 Third, there is popularity. That is, what do cable  
19 subscribers most want to see? That which is most popular in  
20 the television and cable market. Ratings are used to determine  
21 this.

22 You don't have to search out data or go to catalog  
23 books or call in experts to know what programs are most wanted  
24 by subscribers or people who view television. We know that.  
25 Movies. Theatrical movies and made for television. Sports

1 events of all kinds and continuing series. Those now on prime  
2 time and those in syndication.

3           These are the most watched programs. By any criteria  
4 you use to employ or gauge or choose to lay down, what I am  
5 saying can be confirmed.

6           Let's consider Washington if they had a cable system.  
7 A program coming into Washington from Houston or Chicago which  
8 has Mayor Jane Byrne talking about a sewer tax or a talk show  
9 discussing how the Houston skyline is advancing and how Chicago  
10 is refurbishing the inner city I dare say -- and this is my  
11 opinion -- would not have a whole lot of interest to people in  
12 Washington, D.C.

13           I don't think Washington viewers would have much  
14 interest in Channel 13 in Houston, Texas, its news show. I  
15 really don't believe that. I think the news shows in distant  
16 cities are very important in local communities, but the fact  
17 is like fish they don't travel well.

18           As you will discover, we in the program suppliers  
19 have tracked two methods, time and fee generated. Both of  
20 these methods either singly or in tandem will show that we  
21 are entitled to 80 percent plus of the copyright pool.

22           In its presentation to the Tribunal, the Sports  
23 people tracked another element, popularity. They did it  
24 basically on Nielsen ratings from a number of television sta-  
25 tions' distant signals and the ratings achieved by those

1 programs on cable.

2           This research data showed by the time method, sports  
3 had five percent of the time occupied. But by popularity, they  
4 had more than ten percent of the audience.

5           Local program had 13 percent by time only. Less than  
6 seven by popularity. In contrast, the Sports presentation, not  
7 ours, -- this is the Sports presentation -- revealed that syn-  
8 dicated programs, movies and syndicated series had 81 percent  
9 by the time method and 83 percent by popularity.

10           In the data presented by the music people, again  
11 certainly not our presentation, they employed yet another  
12 method. That is the amount of money spent by individual tele-  
13 vision stations and groups of stations, the amount of money  
14 they spent on buying copyrighted material.

15           Under this method that part applicable to syndicated  
16 program by the Music compilation was 80 percent plus. So, what  
17 I am saying is by whatever method you choose to employ to gauge  
18 this percent, time occupied by programs, fee generated popu-  
19 larity, the programs people most want to see or how much money  
20 spent by individual television stations for copyrighted ma-  
21 terials, by any of these methods, by all of them or by any  
22 combination of them, we come out to 80 percent plus.

23           All of you are professionals. To me, that means pro-  
24 fessionals look at some wisely and rationally, and they don't  
25 decide whimsically or something that has no relationship to

1 rationality. I am confident this Tribunal is going to act  
2 wisely and rationally to do the right thing.

3 By using economic data, using the marketplace, using  
4 market price facts and ratings that will stand the tests of  
5 rebuttal.

6 I come before you really to say that using the mea-  
7 suring guides which are available to you, time, fee generated,  
8 popularity, funds spent for copyrighted materials, the percent-  
9 age applicable to allocated programs, by any or all, it is over  
10 80 percent. I leave that with you.

11 That is the summary of our presentation. Mr. Cooper,  
12 Mr. Hadl, and Mr. Korn will follow me with the detailed, con-  
13 crete specifics of how we came to our conclusion via the time  
14 and the fee generated methodology. I thank you very much.

15 CHAIRWOMAN BURG: Do any commissioners wish to speak?

16 COMMISSIONER BRENNAN: You mentioned time and fee  
17 generated and possible use of ratings, but you did not mention  
18 quality or creative factors. Could you comment on the possible  
19 relevance, if any, of those elements to our discussion?

20 THE WITNESS: The word quality is an effervescent  
21 word. Each one defines it through its own prison. It is very  
22 subjective. I happen to believe that quality is available in-  
23 deed indispensable element in how you gauge entertainment or  
24 education or anything else.

25 But because there is no settled measure on how one

1 weighs it, it is not subject to the rigid inflexibility.  
2 Bourg's law of gas and Benutes' theorum. Quality. Everybody  
3 has their own formula for it.

4 The only measure or gauge you can place by quality  
5 is what is it most Americans want to see or read? For example,  
6 books published or plays produced, theatrical movies put in  
7 the marketplace or television programs.

8 The only measure I think that you can gauge, Mr.  
9 Brennan, is a box office or ratings or how many people want to  
10 view is a certain thing. I happen to believe that the vast  
11 majority of the American people are intelligent and wise.

12 I am not one to turn aside when they make some judg-  
13 ment based on what they want to see. That is a long-winded  
14 way of saying quality is such a subjective word that one can  
15 only place his own personal gauge along side it.

16 CHAIRWOMAN BURG: Mr. Valenti, I have just one  
17 question. It is a rather obvious one. You said a couple of  
18 times in your statement that you thought your interest should  
19 receive at least 80 percent of the allocation. In your state-  
20 ment at the end, you formally ask for 75 percent.

21 Why if you believe strongly that it should be 80 do  
22 you shave it down five points?

23 THE WITNESS: We filed a complaint in July of 1979,  
24 Madaam Chairman, over a year ago in which our minimum -- I  
25 underscore minimum -- was 75 percent. As you well might

1 surmise, at the time of the filing of that claim -- and this  
2 very hour we have done an enormous amount of work -- we have  
3 tracked the data, the facts, the arithmetic, the economics.

4 We have determined by our own arithmetic and analysis  
5 that that 75 is just too low. In truth, we have an accurate  
6 claim to more than that. I left that in my own original pre-  
7 sentation only because it tracked the July 1979 claim that we  
8 put before you which now has been superceded.

9 We are just a lot smarter than we were in 1979.

10 CHAIRWOMAN BURG: Thank you.

11 Does anyone else have questions for Mr. Valenti?

12 MR. BECHTEL: If other counsel wish to go first, I  
13 have just a couple of questions.

14 MR. LLOYD: We have some questions. I am David Lloyd  
15 with Mr. Fitzpatrick, Mr. Hockperg, and Mr. Garrett. We  
16 represent the joint Sports claimants.

17 CROSS-EXAMINATION

18 BY MR. LLOYD:

19 Q Mr. Valenti, as president of the Motion Picture  
20 Association of America, you are speaking today for a number of  
21 different corporations which have claims to portions of the  
22 copyright pool, are you not?

23 A Yes, sir. I am speaking essentially for program  
24 syndicators.

25 Q You have used the term syndicators in your written

1 statement and in your address today. You encompass within  
2 that term those people who do what, sell to television stations  
3 both movies and what we call programming series?

4 A Yes, sir.

5 Q Does it also include people who produce occasional  
6 programs, one-shot kind of deals?

7 A It includes anyone who is in the syndication busi-  
8 ness.

9 Q Well, what is the membership of the Motion Picture  
10 Association of America? Is that anybody in the syndication  
11 business?

12 A All of the members of the Motion Picture Association  
13 in varying degrees are engaged in the syndication of their  
14 programming material.

15 Q Are there program material syndicators who are not  
16 members of the association?

17 A Yes, sir.

18 Q Do you speak for them today?

19 A I speak for the relevant majority of them that make  
20 an impact. Grant Tickers and Norman Lears as well as other  
21 syndicators.

22 Q You speak for Norman Lear today?

23 A Yes, sir.

24 Q Are you also associated with an organization known as  
25 the Association of Motion Picture and Television Producers?

1 A Yes, sir.

2 Q You are president of that organization?

3 A Yes, sir.

4 Q Does that have the same membership as the Motion  
5 Picture Association of America?

6 A No. The AMPTP which is the acronym, is an associ-  
7 ation organized under the National Labor Relations Act. It is  
8 a labor bargaining unit of producers of theatrical and tele-  
9 vision material. It bargains with craft unions and guilds.

10 Q Who are the members?

11 A People who produce material for television and  
12 theaters who deal with unions as part of the production  
13 process.

14 Q Are there program originators, producers and syndica-  
15 tors who are members of that association?

16 A There are about 71 to 72 members. These are people  
17 whose business it is to produce material for theaters and for  
18 television.

19 Q Are there programming syndicators who are members of  
20 that organization?

21 A Yes.

22 Q Are there program syndicators who are members of that  
23 organization who are not a member of the Motion Picture  
24 Association of America?

25 A Since there are 71 and only ten in the other, the

1 answer would be yes.

2 Q Have all of the ten members of the Motion Picture  
3 Association of America filed claims with the Copyright Tribunal  
4 for all of the programming which they distribute and which is  
5 carried as distant signal television material by cable systems?

6 A I believe they have.

7 Q Has your organization made a determination based on  
8 either of the studies that your other witnesses have offered  
9 to us today of how much of the syndicated programming that you  
10 say is carried on cable systems as distant signal has been  
11 claimed?

12 A I don't have a ready answer for that.

13 Q I understand you might not, sir. But has your organ-  
14 ization made that determination?

15 A I would have to seek out somebody in my organization  
16 to find that out.

17 Q If you were seeking out that information, who would  
18 you ask initially?

19 A I would probably check the records in our associa-  
20 tion. I would see what it says. I don't have that informa-  
21 tion in front of me. I can get it for you.

22 Q Do you know whether or not Mr. Cooper would have  
23 that information?

24 A I have no idea.

25 Q Is it your understanding, sir, that nobody in your

1 organization knows the answer to the question that I have  
2 asked?

3 MR. SCHEINER: I object to the question on the  
4 grounds it is beyond the scope of direct. It does not accurately  
5 ly reflect the witness' testimony. For Mr. Lloyd's benefit,  
6 Mr. Allen Cooper will appear and testify in this proceeding.

7 He is prepared to furnish an answer to the question  
8 if indeed it is relevant to phase one.

9 CHAIRWOMAN BURG: Sustained.

10 BY MR. LLOYD:

11 Q Mr. Valenti, you testified in response to questions  
12 that Commissioner Brennan put to you about your views on  
13 quality. It comes down basically as a subjective judgment. I  
14 believe it is your written statement that does reflect differ-  
15 ence in the quality for the cable subscribers between a locally  
16 produced news program from some distant market and a show such  
17 as Kojak, would you not?

18 A Yes.

19 Q Within the types of programs for which your organiza-  
20 tion is laying claim, do you recognize that there are  
21 differences in quality?

22 A I recognize that. I am not sure the producer does.

23 Q Let me ask you this, sir. Maybe we can cut through  
24 a lot of this. Has your organization -- The initial question  
25 is only what you have done, not what the information is.

1           Have you made any effort to arrive at an intra-organ-  
2 ization understanding as to how whatever award is made to your  
3 organization will be distributed among the members?

4           MR. SCHEINER: I object to the question. It is  
5 beyond the scope of this proceeding.

6           CHAIRWOMAN BURG: It is sustained.

7           BY MR. LLOYD:

8           Q     You have reflected familiarity with the testimony  
9 that Mr. Cooper is bringing to us today, have you not?

10          A     Yes.

11          Q     Have you seen the studies that Mr. Kooper is bring-  
12 ing here today, Mr. Valenti?

13          A     Yes.

14          Q     Are you familiar with a study that he refers to  
15 which is -- and I want to be sure to get his own description  
16 of it -- the syndicators, owners, distributors data base?

17          A     Counsel, let me just say if you are going to query  
18 me on the details of Mr. Cooper's testimony, he is here, and  
19 he can give you specific details and relevant answers. I am  
20 not prepared to respond to you on specifics of Mr. Cooper's  
21 testimony. But Mr. Cooper is here and will be pleased to do  
22 so.

23          Q     My question simply is are you familiar with the  
24 syndicators, owners, distributors data base, and if you are  
25 not say so.

1 A I am not that familiar with it.

2 Q Do you know why it is put together?

3 MR. SCHEINER: I object.

4 CHAIRWOMAN BURG: It is sustained.

5 BY MR. LLOYD:

6 Q Do you have any information, Mr. Valenti? You testi-  
7 fied earlier to bring us to a point of reference that the vast  
8 majority of programming on television at lease that carried as  
9 distant signal syndicated programming.

10 I guess your definition is encompassing both movies  
11 and syndicated series, does it not?

12 A I have so testified.

13 Q Do you have any information, sir, or does your  
14 association have any data on which we might determine or di-  
15 vide the amount of programming into the two categories, if I  
16 may use the two categories, of syndicated serials and movies?

17 A I think that we do. Again, Mr. Cooper is going to  
18 be available to you for the specifics of such data.

19 Q I want to make sure that we are clear on one other  
20 point that Commissioner Brennan asked you about. He asked you  
21 if you were bringing with you today any hard data or any evi-  
22 dence on the deleterious effect that cable carriage has had on  
23 your organization's commercial endeavors?

24 I believe that you testified to the effect that you  
25 were sounding an alarm bell for what might happen in the

1 future. Do you have any reference to the FCC's consideration  
2 of amendments to the program exclusivity rules?

3 A That is one of the reasons. They are also the  
4 absolute and inpenetratable props that identifies the market.  
5 These rules are difficult to understand and difficult to comply  
6 with. As cable penetration increase, I think the dangers are  
7 going to increase expeditiously.

8 Q I understand that. I am more interested in having  
9 you address yourself specifically to whether you are speaking  
10 of a concern for the future in light of developments on the  
11 horizon as you see them or the actual situation as it existed  
12 in 1978.

13 A Counsel, there is no way to make a judgment. If you  
14 are putting a new series into the marketplace, marketplace  
15 worth is determined by an open bargaining between the licensor  
16 and the licensee.

17 If a cable has been penetrated severely into a  
18 specific marketplace, it may be that this new series going on  
19 is getting X dollars when if there had been no cable or no  
20 rules about exclusivity, it might get X plus dollars.

21 It is difficult to determine that. It is fair to  
22 say the professionals in our business believe that the market-  
23 place No. 1 is being hurt; and No. 2, it is going to be hurt  
24 more severely in the future as cable penetration increases.

25 I think if you would want to pose that question to

1 men like the Norman Lear's, the Grant Tinkers, and the Allen  
2 Cortneys and Bud Yorkeys, you would find that ready answer.

3 Q You are not simply sounding an alarm for the future?  
4 It is your view and that of your association that although  
5 percent is not measurable that the carriage of programming in  
6 1978 is ---

7 A Yes. Very definitely so.

8 MR. LLOYD: That is all I have.

9 CHAIRWOMAN BURG: Thank you, Mr. Lloyd.

10 Mr. Eldridge.

11 CROSS-EXAMINATION

12 BY MR. ELDRIDGE:

13 Q Mr. Valenti, my name is Carl Eldridge. I am  
14 accounting for the local commercial broadcasters. As I under-  
15 stand your presentation, basically, through all of the studies  
16 and the monies you poured into studies, you reached a conclu-  
17 sion fundamentally that the amount of time each of the major  
18 calimants have on the air in the distant signal market should  
19 fundamentally be the fair and equitable criteria for determin-  
20 ing the allocation of the sum \$14 million our Chairman has  
21 mentioned today?

22 Is that fundamentally correct?

23 A No, sir. It is not fundamentally correct. I was  
24 going by time and fee generated as far as our presentation was  
25 concerned. I mentioned two other gauges one of which I think

1 is specifically relevant and one presented by the sports  
2 people which is popularity i.e. ratings.

3 Q How did you arrive at your claim for 75 percent or  
4 80 percent of the pool?

5 A Time plus fee generated. A combination.

6 Q Fee generated is a concept that you plugged into  
7 your formula whereby you rate at a full point distant carriage  
8 from an independent station? It it is a network affiliate to  
9 the same CATV system, you rated it a quarter of a percent; is  
10 that right?

11 A I think that is part of the ---

12 MR. SCHEINER: May the witness be permitted to fini  
13 finish his answer?

14 THE WITNESS: As our presentation points out, when  
15 the Congress was the architect of the Copyright Act, they as-  
16 cribed one-fourth of the DSE to a network station.

17 Under the suposition that only 25 percent more or  
18 less, no specific lineage given, would be syndicated material.  
19 That is why under the architecture of the act it is one-fourth  
20 of a DSE for a network station.

21 BY MR. ELDRIDGE:

22 Q That is how the cable systems pay into the pool; is  
23 it not?

24 A Yes, sir.

25 Q Is there some place in the Copyright Act that you

1 located that suggest that the payout of the pool should be  
2 based upon giving a network affiliated only a quarter point and  
3 an independent station a full point?

4 MR. SCHEINER: Madaam Chairman, this is well beyond  
5 the scope of direct. There will be two other witnesses who  
6 will offer direct testimony on the structure of the act and  
7 the application of the fee generated methodology.

8 CHAIRWOMAN BURG: Mr. Scheiner, I am going to over-  
9 rule that objection.

10 Continue please.

11 BY MR. ELDRIDGE:

12 Q Do you have me question in mind?

13 A Would you mind repeating it?

14 Q Not at all. Based on the premise that you gave for  
15 my appearance here ---

16 A We are working together in a cooperative effort.

17 Q I know we are. I can see it from here.

18 I suggest to you that the Copyright Act use of DSE's  
19 suggested that the monies that went into the pool that are  
20 paid by the cable systems' carriage of distant signals that the  
21 Copyright Act provided for the money to be paid in on a formu-  
22 la basis by the use of DSE, correct?

23 A Yes.

24 Q We are discussing in this Tribunal not how the money,  
25 the \$14 million got there. We are interested in the value of

1 the program material. I am asking you if you found somewhere  
2 in the Copyright Act a statement that the money should be paid  
3 out on a basis of DSE equivalents?

4 A You have to go to what the legislative process calls  
5 intent of the act.

6 Q Could you answer whether you located some language  
7 in the act that payout should be that way?

8 A I am trying to answer your question.

9 Q I would like to get the act in front of me.

10 A May I answer the question?

11 Q Yes.

12 A I do not know that the act specifically laid out  
13 every detail and every specific anymore than the Constitution  
14 defines what due process is. But it is fair to say that if one  
15 says that 25 percent is ascribable to the way it is paid in,  
16 one does not have to use Aristotelian logic that it might have  
17 a meager connection to what is paid out.

18 It is a logical connection to what the Congress was  
19 doing. If you asked me specifically does the act lay out in  
20 chapter and verse, the answer is no. There is an intent. One  
21 has to derive from what the act says certain logical intent on  
22 the part of the Congress.

23 Q We are in accord. I could not find anything in the  
24 act that suggests they would pay out the \$14 million by uti-  
25 lizing DSE's somewhat. We are in agreement there. I think we

1 are in agreement that we are trying to find the value in a fair  
2 and equitable way of the materials that are being carried on  
3 these distant signals so that the distribution now collected  
4 can be made and allocated among the various claimants, correct?

5 A Yes, sir.

6 Q What struct me in terms of trying to find a value is  
7 if you envisaged a local independent station that had been  
8 licensed to broadcast *Gone With The Wind*.

9 One of the famous motion pictures. It was picked up  
10 on a distant signal. The motion picture person would get one  
11 full point on the DSE scale for that particular carriage with-  
12 in your formula.

13 If you looked at the network affiliate who certainly  
14 also could be licensed to broadcast the same motion picture,  
15 the fee or the value to the producer of that motion picture is  
16 only one quarter of one. That is correct; isn't it?

17 A Yes.

18 Q How does that enable me and the Tribunal to get to a  
19 concept of fair value to compensate your client based upon the  
20 source only of the carriage?

21 A It is a tortured question, counsel. I am not sure  
22 I am going to follow your weavings, but I will do the best I  
23 can. When you build any case the rostrum on which it sits is  
24 logic consist of connecting tissue.

25 The only way you can build any kind of logic is to go

1 to the act itself and extract from it all that which is speci-  
2 fic. In order to build up the concept of fee generated the  
3 Congress said a network station got 25 percent of the DSE.

4 They did not do that out of whimsy. They did it be-  
5 cause by some application of data they assumed that no more  
6 than 25 percent would be syndicated material. Local stations  
7 do not perform a DSE, and 75 percent of the network signal does  
8 not form a DSE.

9 Thereafter we took that Congress act fact of 25 per-  
10 cent and applied that in our fee generated formula. We could  
11 have said 50 percent. That would be kind of a weird extrac-  
12 tion because it has no basis. We are going back to bed rock.

13 That is what is in the act? The act said 25 percent  
14 of a network station is all that is ascribable to a DSE. Ergo  
15 one-fourth of a DSE. We said what the Congress said is far  
16 more relevant to what anybody else said. We are using this  
17 congressional imposition of a figure as the base structure of  
18 our formula.

19 Q I remember that that is the basis of collecting  
20 money from the cable systems as opposed to the paying out from  
21 the fund collected.

22 Just think for a moment in terms of my example.  
23 Wouldn't it be fair since you like to use time as certainly a  
24 part of your evaluation of your claim to use purchase time to  
25 pay for the value to your clients for the licensing of the

1 identical wonderful motion picture purchase Gone With The Wind  
2 regardless of the source of station?

3 MR. SCHEINER: I object on the ground that the  
4 question has been asked and answered at least twice, and I  
5 think more than that.

6 MR. ELDRIDGE: I don't think it has. I have not had  
7 that question answered.

8 CHAIRWOMAN BURG: Mr. Eldridge, I am going to over-  
9 rule that.

10 THE WITNESS: I don't want to assume something that  
11 is not correct, counsellor. Are you suggesting that time alone  
12 ought to be a reasonable criterion?

13 BY MR. ELDRIDGE:

14 Q I am suggesting in my example that I posed to you,  
15 you have that in mind, the motion picture Gone With The Wind  
16 being carried on a distant signal one case from an independent  
17 station, one case from a network affiliate.

18 You have in your formula suggested that your client  
19 should get we will call it the dollar bill or 25 percent de-  
20 pending upon the source from which the cable system picked up  
21 that particular motion picture.

22 I asked you within your judgment in considering your  
23 own clients, whether it would not be fairer to pay equally for  
24 the distant signal carriage of Gone With The Wind.

25 A I can only refer you to our presentation. Obviously,

1 we believe the fair way to do it is time plus fee generated.  
2 I will also suggest that a popularity and Nielsen study would  
3 also have a bearing on this.

4 We have not computed that. We believe the correct  
5 formula is time plus fee generated, a combination. Mr. Cooper,  
6 is going to go into vivid detail on both the concept, the  
7 substance and the conclusions.

8 Q You yourself think it is fair to pay your motion  
9 picture producer of Gone With The Wind a different amount for  
10 a distant signal carriage regardless of the source?

11 A I think it is fair to pay on time, fee generated,  
12 and the Nielsen rating.

13 Q I will drop the subject. I don't think you are  
14 being too responsive.

15 MR. SCHEINER: I move that that comment be stricken.

16 BY MR. ELDRIDGE:

17 Q In your presentation to arrive at your claim of 75  
18 percent or the new claim of 80 percent representing your  
19 greater knowledge within the passage of time, if that claim is  
20 based not upon ratings, is it sir?

21 A Our claim, again for the third time I will tell you  
22 is based on time plus fee generated. Mr. Cooper will go into  
23 some detail on that.

24 Q It is not based upon the popularity of your product,  
25 is it?

1 A No, it is not.

2 Q Thank you.

3 Why is it not? Why didn't you use popularity and  
4 factor into your formula so you could achieve for your clients  
5 an even greater percentage?

6 A I will give you an honest answer, counsellor.

7 Q I would hope so.

8 A If you give me an honest question, I will give you  
9 an honest answer.

10 We looked at this carefully. I decided not to do it  
11 because of the kind of money we would have to spend to bring  
12 to this Commission. That kind of data, I did not want to spend  
13 on it at this time. It was a horrendous amount of money to  
14 get that kind of data.

15 My own feeling is that if I had to do all over again,  
16 I would probably have spent the money. That is the honest  
17 answer. I think by the Sports presentation it proves what we  
18 have always believed. By the small studies, I think we can  
19 prove our programs are both the ones most viewed and most  
20 liked.

21 Q At page four, Mr. Cooper made the following statement  
22 with respect to widespread appeal, audience acceptance, quali-  
23 ty and so forth of your programming. I will ask you whether  
24 you agree with his statement.

25 "Despite these major qualitative differences, we

1 were obliged to conclude that it was not possible to introduce  
2 weighting factors based on perceived quality due primarily to  
3 the unavailability of reliable and probative, research-based  
4 empirical data to allow the assignment of quality differentials  
5 on a program-by-program basis."

6 Do you agree with that statement?

7 A May I see the statement please? I would like to read  
8 it over.

9 CHAIRWOMAN BURG: What page was that?

10 MR. ELDRIDGE: Page four at the bottom. The last  
11 paragraph. It is relating to the paragraph preceding.

12 THE WITNESS: I am not the author of every line of  
13 a 700-page document, counsellor.

14 BY MR. ELDRIDGE:

15 Q I know that. I asked if you agreed with him.

16 A Excuse me?

17 Q Go ahead. I merely asked you if you agreed with it.

18 A I am not familiar with every line here. This is the  
19 first time that I really read this line carefully. My judg-  
20 ment is it is due to what I consider to be the reason why we  
21 would introduce any factors of popularity because of the  
22 amount of money to gather what is called reliable, probative,  
23 research-based empirical data. That is my answer.

24 Q You say the reason is dollars and the unwillingness  
25 to spend dollars to achieve a result that would incorporate

1 popularity into your presentation; is that correct?

2 A I am saying to you that I made a determination that  
3 the amount of money necessary to bring this data to the  
4 Commission was I thought prohibitive. I made a command deci-  
5 sion that that kind of money simply could not be paid at this  
6 time.

7 Q May I interpret that as a statement of disagreement  
8 with Mr. Cooper's statement?

9 MR. SCHEINER: I object to the form of the question.  
10 He can interpret it any way he likes.

11 CHAIRWOMAN BURG: The objection is sustained.

12 BY MR. ELDRIDGE:

13 Q Do you agree with this statement? "We have con-  
14 structed a massive project of data gathering extracting all  
15 that is possible and relevant to this Tribunal's charge so that  
16 you may make reasonable judgments on how each claimant's share  
17 should be formed."

18 MR. SCHEINER: May I ask where that statement comes  
19 from?

20 MR. ELDRIDGE: Page 12 of Mr. Valenti's presentation.

21 MR. SCHEINER: Page 12 of Mr. Valenti's statement?

22 MR. ELDRIDGE: At the bottom.

23 THE WITNESS: If I said it, I stand by it. I know  
24 there could be added another element of popularity, but what  
25 we have presented we think is relevant and conclusive.

1 BY ELDRIDGE:

2 Q The massive project of data gathering that you have  
3 presented here is predicated upon time and fee generated,  
4 correct?

5 A That is correct.

6 Q That is all to quote you that is "possible and rele-  
7 vant to this Tribunal's charge"? You agree with that and  
8 stand by it?

9 A Let me repeat. I said I stand by everything that is  
10 in this statement. I said that I think it is possible to add  
11 popularity to that.

12 Q But your group elected for one reason or another not  
13 to make such a presentation to the Tribunal; am I correct?

14 MR. SCHEINER: I object.

15 CHAIRWOMAN BURG: I am going to overrule that  
16 objection.

17 THE WITNESS: Repeat your question.

18 MR. ELDRIDGE: Would the reporter read the question  
19 back.

20 (The question was read by the reporter.)

21 THE WITNESS: Yes, sir.

22 BY MR. ELDRIDGE:

23 Q Mr. Valenti, you said in your statement if I under-  
24 stood you correctly in your testimony this morning that it is  
25 with distant signal carriage more difficult to market

1 syndicated programming?

2 A More difficult to market?

3 Q It is more difficult to market your syndicated pro-  
4 gramming you stated to us.

5 COMMISSIONER BRENNAN: I think it was because of the  
6 compulsory license. The problem arose because of the compul-  
7 sory license. I think that was the answer.

8 CHAIRWOMAN BURG: You gave an example of market A  
9 and market B.

10 THE WITNESS: That is right, Mr. Brennan.

11 BY MR. ELDRIDGE:

12 Q If you had a syndicated show and somebody took it  
13 off a local broadcast area you had licensed and took it under  
14 distant signal, I gather you say it would be difficult to  
15 sell into the marketplace of the distant signal; is that right?

16 A I am not sure I follow what you are trying to say,  
17 counsellor. I quoted the Rand Corporation which is a paradigm  
18 of what has happened in the marketplace.

19 If you are selling All In The Family and you sold it  
20 to WTBS, WTBS goes on satellite and beams it to 50 million  
21 cable homes, it is difficult to sell All In The Family in the  
22 local community where All In The Family is being shown by  
23 satellite by lifting it off the Atlanta station.

24 The answer is of course it is more difficult to sell.  
25 You may not sell it. If you sell it, it is going to be

1 reduced amount of money than you think is compatible.

2 Q Seventy-six point one five one of the communications  
3 to the Title 47 of the Telecommunications Act affords you a  
4 year's protection against that within the 50 major markets?

5 A I did not specify any specific market. This bottom  
6 market, yes. We have protection in the top 50 markets. If I  
7 may answer your question to give you the whole spacious view,  
8 first there are grandfather systems.

9 In '78, I think there were 843 cable systems grand-  
10 fathered. Thirty-two percent of all systems in '78 were  
11 grandfathered. Syndicated only applies to the 35-mile zone.  
12 The rules are terribly complicated in the second 50 market.

13 Frequently, there is no compliance by the cable  
14 system. I happened to bring with me the efforts of WCIX-TV,  
15 Channel 6, Miami, Florida to obtain syndicated exclusivity from  
16 the American Video Corporation, operator of cable system in  
17 Pompano Beach, Florida. That is the top 50 market.

18 This petition was filed in 1977, March 15. It was  
19 opposed by the cable system. The pleadings are about six feet  
20 high. The Commission has not resolved it. There is no black-  
21 out. The cable system is still using programs that ought to  
22 be blacked out.

23 The point I am making is it does not work. I would  
24 guess according to NCTA there are only 65 cable systems in the  
25 top 50 markets that are liable for the exclusivity blackouts.

1 The others are exempt because they serve less than 1,000 sub-  
2 sscribers.

3           While there is a rule there, it is a rule that has  
4 some leaks to it. Sometimes it drains away its effectiveness.  
5 As a result, it becomes difficult to get the true value of the  
6 program even in some of the top 100 markets which are governed  
7 in varying degrees by some exclusivity rule.

8           Q     Your Pompano Beach example that you happened to bring  
9 with you today. That is a grievance in terms of the slowness  
10 of the "judicial system."

11           A     It is part of the marketplace. That is all part of  
12 how the marketplace operates. Whatever source it comes from,  
13 it makes it difficult. It is a thicket of frustration and tor-  
14 ment for program suppliers.

15           Q     Did you bring with you additional examples which are  
16 the same as that you told us about with respect to the Pompano  
17 Beach station?

18           A     I am sure I could get others. I just brought this  
19 as an example.

20           Q     That is the only one you bothered to bring, is that  
21 it?

22           A     Yes.

23           Q     You noted in your presentation I think from 1965 to  
24 1978 there was a drop from 16 to four of syndicated shows  
25 entering the marketplace?

1 A That is correct.

2 Q Why is that? Do you know?

3 A Because this is a volatile and a fragile based  
4 business. Competition is harder and tougher. Costs are high-  
5 er. Risks are higher. The tendency is not to stay with a  
6 program to give it time to grow. That is a decision by the  
7 networks, but to ax it early and try to put something else in  
8 its place to see if that might catch on quickly.

9 These are decisions made I must say not by program  
10 suppliers but by the three networks. These series are expiring  
11 with more swiftness than they did previously. It is a tougher  
12 business.

13 Q But it is basically attributable to the network rat-  
14 ing wars?

15 A You would have to go to the networks to find out how  
16 they make these decisions, but it is made by the networks.

17 Q It has nothing to do with the local stations, does  
18 it?

19 A No. I am talking about network prime time.

20 Q That is what I thought you were talking about.

21 Do you know whether independent stations as opposed  
22 to network affiliates broadcast more of your product, which  
23 one broadcasts the most of your product?

24 A You say your product. How do you specify it?

25 Q Your clients' programs, syndicated film shows and so  
forth

1 forth.

2 A Counsellor, you have to define what you mean by your  
3 product. It falls into several categories.

4 Q I thought you said you represented the motion picture  
5 people and the television film series?

6 A Syndicators I am representing here today. Is that  
7 what you are referring to, syndicated products?

8 Q Yes.

9 A That is different. Motion pictures may not be syn-  
10 dicated if they are shown on network prime time. That is not  
11 considered syndicated products.

12 Q When they are license whether it be a film series  
13 or a motion picture for broadcast to a local station. That is  
14 done, isn't it?

15 A When you say license, it can be licensed to a net-  
16 work for network prime time. That is considered to be network  
17 programming. When it leaves the network, then it goes into  
18 syndication.

19 Q Some programs go into syndication immediately,  
20 don't they?

21 A Do you have anyone in mind?

22 Q No. I thought your people did.

23 A I don't know of any that go into syndication immedi-  
24 ately unless you have some to put forward.

25 Q I don't have one in mind myself.

1 A I don't know of any.

2 Q What I want to know is when an independent station  
3 receives your product whether it is played on the network first  
4 or not. Does the independent station or the network affiliate  
5 use more of your program materials? That is, licensed  
6 directly?

7 A I think syndicated material is probably used more on  
8 independent stations than it is on network stations because  
9 there is the network prime time which is not syndicated.

10 Q So, the independents would use in terms of directly  
11 licensing of film product, more of it than a network affiliate  
12 would use in terms of directly licensing?

13 A I think that is correct. Yes, sir.

14 Q Did that factor have anything to do, if you know,  
15 with your assignment of one point for an independent station  
16 and one-quarter point for a network affiliated station?

17 A I think that is what the Congress made that judgment.

18 Q Do you have my question in mind?

19 A May I answer?

20 Madaam Chairman, can I answer the question in my own  
21 way?

22 CHAIRWOMAN BURG: Please do.

23 THE WITNESS: Thank you. We use the one-fourth be-  
24 cause the Congress used it initially as part of the architec-  
25 ture of the act and the design of this act. They used it

1 because of the reasons that you yourself have just explained  
2 counsel. That is, they assumed that network stations use less  
3 syndicated material than independent stations. Ergo, they  
4 assigned them one-quarter of the DSE.

5 We have ceased on that arithmetic and logic of the  
6 Congress to expatiate at length to the fee generated concept.

7 BY MR. ELDRIDGE:

8 Q So, you did consider the assignment of one point to  
9 an independent station and a quarter point to a network affili-  
10 ated station in terms of distant signal carriage, is that  
11 right?

12 A Would you mind reading the question back.

13 (The question was read by the reporter.)

14 MR. ELDRIDGE: I withdraw the question. I think I  
15 would be going over the point again. I don't want to take any  
16 more of your time.

17 CHAIRWOMAN BURG: Mr. Eldridge, I am going to call a  
18 five-minute recess. You may continue with your questioning  
19 after the recess. Mr. Valenti has been on the stand for an  
20 hour and a half.

21 (A five-minute recess was taken.)

22 CHAIRWOMAN BURG: Back on the record.

23 Mr. Eldridge, you may resume.

24 MR. ELDRIDGE: I have no further questions.

25 CHAIRWOMAN BURG: Thank you.

1 Mr. Bechtel.

2 MR. BECHTEL: I am Gene Bechtel, counsel for PBS.

3 CROSS-EXAMINATION

4 BY MR. BECHTEL:

5 Q On page three, sir, towards the bottom of the page,  
6 you have the words fair share in all capital letters. I  
7 believe that is the only place in your written testimony where  
8 this occurred. Is there any particular reason for that?

9 A I think that is really the bone and muscle of the  
10 hearing is fair share. It has no conspiratorial meaning,  
11 counsel, I assure you.

12 Q I am certain it does not. Webster's Dictionary  
13 defines fair as free from favor towards either or any side.

14 A I will buy that. I will engage with you in support-  
15 ing that definition.

16 Q Thank you. Now if you will turn to page seven, I  
17 am interested, sir, in your discussion of the syndication  
18 business and the harm to the syndication business by the dis-  
19 tant carriage of television programs.

20 You make reference, sir, to two types of syndication.  
21 One is programs that have been previously shown on a national  
22 network; CBS, NBC, or ABC. Secondly, the so-called first run  
23 syndicated programs never before on television.

24 Let's start with the first one. In the syndication  
25 of a program that has been on national television before, let

1 us assume for illustration a motion picture. The network has  
2 paid the producer a substantial sum of money for the network  
3 exhibition of that motion picture; is that correct?

4 A Yes, sir. For a specified number of runs.

5 Q I believe somewhere in your testimony you indicated  
6 that it is rare that a program producer can recover its entire  
7 cost from a network exhibition?

8 A Excuse me. I was referring there to a continuing  
9 series. I was not referring to a theatrical motion picture.  
10 That is a different breed of cat. I was referring to the kind  
11 of material most often shown on network prime time which is  
12 the continuing series.

13 Q Thank you for that correction.

14 Taking the motion picture, the motion picture is  
15 first shown in the local theater as a rule unless it is made  
16 for television?

17 A That is correct.

18 Q Then, it goes to the national television networks for  
19 exhibition there typically?

20 A Typically, there might be some ancillary markets  
21 that are just beginning to emerge now but are very small. But  
22 essentially, yes. From a television standpoint, theatrical  
23 exhibition and then network television.

24 Q If it does make it to network television, there is  
25 a substantial payment of money to the producer by the network

1 for that exhibition right.

2 A Are you referring to the theatrical film?

3 Q Yes, sir.

4 A That is a payment of money for the right to exhibit  
5 that film two or three or four times or whatever the contract  
6 calls for.

7 Q At the time of your testimony in 1975 before the  
8 House committee, I believe you indicated the average payment  
9 was \$800,000 per motion picture; is that correct?

10 A Yes. I think that is correct. I got that in the  
11 trade magazine. We don't collect that from our companies, but  
12 one trade magazine had that in, and I used it.

13 Q Since then, inflation has taken place, of course.  
14 Do you have current figures?

15 A I really don't. Variety usually comes out with some  
16 continuing and sometimes the Hollywood Reporter. They do a  
17 survey, but I don't have current data on that.

18 Q As I understand the harm to your association and its  
19 members and the industry you represent, if a television sta-  
20 tion in Baltimore purchases a motion picture and that motion  
21 picture is carried in Richmond let us say by the cable system,  
22 it is more difficult for you to sell that motion picture or a  
23 syndicated network show to the Richmond television station; is  
24 that correct?

25 A That is correct. On the first time run of that show,

1 it would only show on network television. In most cable mar-  
2 kets, they don't import network stations except under varying  
3 conditions. It might be beyond the 35-mile zone.

4 It could be contoured. They do it generally in the  
5 distant signals top 100 market. They don't import a network  
6 station. That picture would stand alone in that city. Shall  
7 I continue?

8 Q Yes. Please do.

9 A It is when that motion picture is then syndicated  
10 that is sold to WPIX in New York for example or WTBS in  
11 Atlanta, and then it is brought into the Richmond cable system.  
12 It would make it more difficult if indeed you could do it, to  
13 sell that same show to a Richmond television station.

14 Q One adverse effect is you could not sell the program  
15 at all to a Richmond station. If you do, another adverse  
16 effect would be your price is reduced?

17 A That is right. The whole problem is if there were  
18 no compulsory license, there would be none of these problems.  
19 Everyone would bargain for the product with the owner of the  
20 product.

21 There would be an arm's length negotiation. They  
22 would settle on a price. If you had shown that picture, if  
23 that picture showed two weeks before and somebody wanted to  
24 purchase it two weeks later, that previous showing would be  
25 part of the value that is in that program. That is negative

1 value. They would work that out in the price that is agreed  
2 upon.

3 Q Thank you.

4 Now, let's go to the subject matter of so-called  
5 first-run syndication. Here, you don't have an initial sale of  
6 the product to the network; is that correct?

7 A That is correct.

8 Q In this instance, you have to rely on for the  
9 economic viability of the program sales to a lineup of indivi-  
10 dual stations purely and simply; is that correct?

11 A Yes, sir. That is correct.

12 Q In your testimony, written testimony and also your  
13 summation, you made reference to the fact from 1965 until the  
14 present time the number of programs going into syndication has  
15 dwindled from 16 a year in 1965 to four at the present time.  
16 Do you recall that testimony?

17 A Yes, sir.

18 Q Are you referring to first-run syndication or are you  
19 referring to all kinds of series?

20 A I am referring there to a continuing series that is  
21 exhibited on network prime time and go on later into  
22 syndication.

23 Q It strikes me, Mr. Valenti, that when you are dealing  
24 with first-run syndication, it is even more difficult. It is  
25 an even more difficult struggle to have a viable syndication

1 practice in industry without the advantages of selling it first  
2 to the network; is that correct?

3 A I think there is no question about it. It is harder  
4 to do first-run syndication as an operation prime time which  
5 is a creature of MCA's Norman Lear's Mary Hartman, Mary  
6 Hartman and other evidences of what we call first-run syndica-  
7 tion.

8 You have not only began a lineup of individual sta-  
9 tions but put together market by market coverage. Get network  
10 stations to present their program in order to show this first-  
11 run syndication. It is not easy to do.

12 Q Do you have any idea as to the number of first-run  
13 syndication series or specials that go into the marketplace  
14 successfully each year currently?

15 A I don't have current data on that.

16 Q I would like to show you and your counsel to assist  
17 you in that regard comments filed by your association with the  
18 FCC dated September 17, 1970.

19 It is 20 to 22, part B, first-run syndication.

20 MR. BECHTEL: Maddam Chairman, what I have furnished  
21 to the witness and now to Mr. Palmer, the court reporter, and  
22 members of the Tribunal and the counsel are pages from comments  
23 of Motion Picture Association of America in FCC docket 20988,  
24 September 17, 1979.

25 I have included the table of contents. Then, I have

1 included after the initial page of the comments, pages 11  
2 through 32 and the signature page of Mr. Attaway on page 50.  
3 I am principally interested in material on pages 20 through 22  
4 having to do with first-run syndication.

5           However, I thought I ought to include the entire sub-  
6 jet matter within which that was discussed for purposes of  
7 completeness.

8           BY MR. BECHTEL:

9           Q     Mr. Valenti, does this assist you, sir, in answering  
10 my questions about the number of frequency of first-run syndi-  
11 cated materials that are the nature of the specials or series  
12 or either one?

13           Mr. Valenti, would you subscribe to the accuracy of  
14 the information set forth in pages 20 through 22 in that  
15 regard?

16           A     Yes. What I suggest is I don't know if this is all.  
17 I certainly subscribe to the accuracy of what is in here. I  
18 thought you asked me if I had data on specific numbers going  
19 into exhibition on television? We may have in our office, but  
20 I do not believe that this might be all that is available.

21           It is certainly among the major shows being  
22 contemplated.

23           Q     It is clear it is very difficult to establish the  
24 economic viability of first-run syndication?

25           A     Yes, sir.

1 Q More so than syndication that is off the network; is  
2 that correct?

3 A Well, a matter of degrees. Suffice to say it is  
4 difficult to do first-run syndication in a competitive way.

5 Q To go back to the illustration of Baltimore and  
6 Richmond which was your illustration in testimony before  
7 Congress, as I recall.

8 If you sold a first-run syndicated program in  
9 Baltimore and if that program were carried on the cable system  
10 in Richmond, it would make it more difficult for you to then  
11 sell that first-run syndicated program in Richmond; is that  
12 correct?

13 A I think there is no question about that. On network  
14 prime time, you are protected by the same day non-duplication  
15 rule. What this paper cohorts the Commission to do is recog-  
16 nize the expensibility of syndicated exclusivity in the  
17 syndication market. Without exclusivity, you are dead before  
18 you get out of the water.

19 Q Is it possible or even likely that if there is  
20 enough distant carriage of the type mentioned, this could mean  
21 the difference between an economic viable first-run syndica-  
22 tion and one which is not economically viable?

23 A I think that is a fair statement.

24 MR. BECHTEL: That is all I have. PTV Exhibit 4,  
25 PTV Exhibit 1, 2 and 3 have previously been used for our

1 direct case. I would like the document made PTV Exhibit 4.

2 CHAIRWOMAN BURG: Without objection, so ordered.

3 (The document referred to was  
4 marked PTV Exhibit No. 4 for  
5 identification.)

6 Janice Hill.

7 MS. HILL: I am Janice Hill, with National Public  
8 Radio.

9 CROSS-EXAMINATION

10 BY MS. HILL:

11 Q I want to get your response. You mention in using  
12 the DSE, the distant signal equivalent you were looking at the  
13 act itself. You were looking at the paying-in portion of the  
14 act. Would you admit, sir, that the portion of the act that  
15 deals with payout would override that part of the act or  
16 should override that part of the act in the Tribunal's  
17 consideration?

18 I am referring specifically to the section that says  
19 who should receive the royalty fees thus deposited shall in  
20 accordance with the procedures provided by clause five be  
21 distributed to those among the following copyright owners who  
22 claim that their works were the subject of secondary trans-  
23 missions by cable systems during the relevant semi-annual  
24 period.

25 Any such owner whose work was included in a

1 secondary transmission made by a cable system of a non-network  
2 exclusive of the aural signals carried by ---

3 A I can answer by saying that this Tribunal has the  
4 authority to make these judgments. I am not for one more to  
5 suggest that they do not.

6 Q Using the act, I would like you to. It is a legal  
7 construction,

8 A That is an existential leap you are making. I merely  
9 am responding to counsel, to NAB, and how we came to structure  
10 the concept of fee generated. All I can answer is I think this  
11 Tribunal has sufficient authority to make judgments as to who  
12 gets money and why and how much.

13 Q But I was bringing it to your attention that DSE does  
14 not include radio. Radio cable systems can be up all bands  
15 without going into paying in. The act states that non aural  
16 signals should receive payment out. I was not sure you were  
17 aware of that nor should you be.

18 A I had not given much thought to that. I think what-  
19 ever criteria is employed by the Tribunal of time, fee generat-  
20 ed, popularity, and what people want to view on cable televi-  
21 sion, I must say in all honesty when I think of cable televi-  
22 sion, I think of something on a television screen.

23 When I think of a radio, I think of a radio. I  
24 don't think of the two. I don't think how many people sub-  
25 scribe to cable system to get radio. I don't know. That is a

1 judgment this Tribunal would have to make, not me.

2 MS. HILL: Thank you.

3 CHAIRWOMAN BURG: Fred Koenigsberg, counsel for  
4 ASCAP.

5 CROSS-EXAMINATION

6 BY MR. KOENIGSBERG:

7 Q First, you testified that your people should get a  
8 minimum of 75 percent. You will recall that there was a ques-  
9 tion from the Chairman as to why you had said at least 75 per-  
10 cent. You explained that 75 percent was the number you had  
11 put in your claim of 1979 as a minimum.

12 Now, you feel that you are entitled to more; is that  
13 correct, sir?

14 A Yes, sir.

15 Q In your statement of July 27, 1979. The claim filed,  
16 does the word minimum appear to your recollection?

17 A I don't know, counsellor.

18 Q Mr. Valenti, it will be I think four lawyers who are  
19 here to argue before the Tribunal as to whether you can or  
20 cannot increase your claim over and above the 75 percent. It  
21 is not for you to comment on.

22 I ask you, sir, to assume that the Tribunal is going  
23 to decide that the motion picture and program syndicators can-  
24 not get more than 75 percent. If we make that assumption,  
25 would it be correct to state that there is an additional five

1 percent plus that you feel your people are entitled to that  
2 they will not receive?

3 A You pose an assumption I am not prepared to make.  
4 You may make it. I cannot obstruct you from doing that. I  
5 cannot make such an assumption.

6 Q You were not here on the days of the previous hear-  
7 ings, sir?

8 A No, sir. I was not.

9 Q Were you told that Commissioner Coulter stated that  
10 the Tribunal has the responsibility to distribute 100 percent  
11 of the royalty pool?

12 A If the Commissioner Coulter said that, I subscribe  
13 to it. I am not going to argue with that at all.

14 Q If the motion picture and syndicated program claim-  
15 ants would be entitled to 80 percent based on your analysis  
16 but would not be able to get more than 75 percent because of  
17 some legal impediment, the additional five percent would have  
18 to be distributed to other claimants?

19 A Did Commissioner Coulter say that?

20 Q No, sir. He did not.

21 A I am prepared to argue with you. That is an assump-  
22 tion. President Roosevelt called it an ify question. We are  
23 not dealing in assumptions. I feel perfectly content that this  
24 Tribunal is going to decide on substantive data, economic data,  
25 market data, arithmetic, ratings.

1           They are not going to pull something out of the air.  
2 I am confident of that. Therefore, I believe when they examine  
3 the facts and by whatever combination of value they give to  
4 those facts, we are going to come out with 80 percent plus.

5           I am not willing to engage in speculation to you  
6 what if. That is a supposition that I don't think that I want  
7 to deal in. I don't think this Tribunal is going to deal in  
8 suppositions. I think they are going to deal in hard facts to  
9 the extent that they can.

10          Q     Mr. Valenti, your statement does not account for any  
11 share of the royalty pool to be distributed to copyright owners  
12 whose works are carried on radio stations imported by cable  
13 systems, does it?

14          A     I don't believe that it does.

15          Q     Mr. Valenti, you testified that you have been presi-  
16 dent of the MPAA for 13 years. You made many statements about  
17 the marketplace. There is hot, competitive, persistent battle  
18 in the marketplace.

19                 Sir, do you have general familiarity for the market-  
20 place for selling motion pictures and other programs in the  
21 syndication arena?

22          A     I have some knowledge of it. Yes.

23          Q     Sir, are motion pictures or other syndicated programs  
24 sold by the pound in that marketplace? That is, a broadcaster  
25 for example comes to a syndicator and says I have two hours of

1 time. I have to fill. Give me anything for those two hours?

2 A I am not aware of such events.

3 Q Are all copyrighted motion pictures or other syndi-  
4 cated programs spongible?

5 A Do you mean capable of being replaced?

6 Q No. I mean exactly of the same value.

7 A Of course not.

8 Q Sir, you mentioned some toher criteria for the  
9 Tribunal to consider other than the time and fee generated  
10 approaches that are embodied in your papers. Do you believe,  
11 sir, that the Tribunal in making this provision in distribution  
12 of royalty plus apply uniform criteria for all claimants?

13 A Again, I cannot instruct nor would I instruct this  
14 Tribunal. But I do believe that a decision whether it is a  
15 legal decision or a moral decision or a family decision or a  
16 business decision has to emerge from some superstructure, some  
17 rostrum of facts.

18 Logic. Something that has a connection with reality.  
19 That is all I am suggesting. I think this Tribunal will  
20 examine that which is tangible and real and with a possibility  
21 of being measured rather than something that is obscure, dimly  
22 lighted, and not easily graspable.

23 Q Sir, you stated I believe in response to a question  
24 by Mr. Lloyd. I think it was a follow-up on your statement  
25 about the marketplace worth is determined by operators

1 bargaining between the licensor and the licensee?

2 A Yes, sir.

3 Q That is the measure of the value of the copyrighted  
4 materials that are being sold; is that correct?

5 A That is correct more or less.

6 Q Would you have any unhappiness about a Tribunal  
7 decision that would say that if we look at analogous market-  
8 places to determine what is paid for different types of pro-  
9 gramming and copyrighted materials, that that should be the  
10 uniform criterion that the Tribunal should apply?

11 Would that make you unhappy at all?

12 A You would have to explain that more. I have said  
13 from time to time that I think it is very difficult for human  
14 beings no matter how ably equipped to become marketplace  
15 arbiters because the marketplace is so volatile and so  
16 resistant to this kind of thing.

17 If you took it market by market, every market is  
18 different. Tulsa is different from Denver. Houston is differ-  
19 ent than Savannah. Therefore, I don't know how you would make  
20 a certain criteria that would be rigid.

21 I am saying using overall judgments, measuring sticks  
22 and I have cited several in my testimony. But none of those  
23 are substitutes for marketplace bargaining or true marketplace  
24 worth.

25 MR. KOENIGSBERG: I have no further questions.

1 CHAIRWOMANY BURG: Mr. Harrington.

2 MR. HARRINGTON: I am Clifford Harrington represent-  
3 ing the Christian Broadcasting Network.

4 CROSS-EXAMINATION

5 BY MR. HARRINGTON:

6 Q You testified you would not necessarily disagree  
7 with Sports to use popularity in a factor in the distribution  
8 process. On the other hand, you have also testified the dis-  
9 tribution should be tied in some way or another to the manner in  
10 which copyright royalty fees are paid into the fund.

11 Let me ask you this. Do the ratings of a station  
12 carried by cable systems affect the amount of royalty fees  
13 paid by the cable system into the fund?

14 A With all due respect, counsellor, you may have heard  
15 that, but I did not suggest to you that I wanted to use the 25  
16 percent anyway it would have to do of how it would construct  
17 a percentage that is applicable.

18 I was trying to respond to the learned counsellor  
19 from NAB about the concept of fee generated. I probably did it  
20 in -- I rumbled around in that area for awhile. I am not sure  
21 I explained it.

22 I am suggesting there are several methods you can  
23 link together for a Tribunal to make some decisions about per-  
24 centage applicable about percentage. I have cited them; time,  
25 fee generated, popularity.

1           To answer your question, cable systems of course  
2 have a compulsory license which in no way is linked. The mar-  
3 ket value, bargaining or ratings or anything else.

4           Q     You would agree with me in terms of a particular  
5 cable system one DSE is one DSE whether it is a popular sta-  
6 tion or an unpopular station?

7           A     That is a fact of the Copyright Act. Yes.

8           MR. HARRINGTON: I have no further questions.

9           CHAIRWOMAN BURG: Are there any other questions?

10          COMMISSIONER JAMES: Mr. Valenti, back in 75 I  
11 believe, most of the first-run movies that generally end up  
12 on television now are being spun off to pay cable television  
13 systems before they are shown on network for private? Is that  
14 your understanding?

15          THE WITNESS: Yes. There is no specific sequential  
16 marketing design, but most producers and distributors of  
17 theatrical motion pictures have inserted the pay cable market  
18 before it goes on network television for valid business  
19 reasons obviously.

20          The answer is yes. That insertion is before network  
21 television sales.

22          COMMISSIONER JAMES: So, they are getting some of the  
23 their profit back prior to the time it enters the national  
24 television market?

25          THE WITNESS: You are recouping some of your

1 expenses. I might add for example in 1972, Mr. Commissioner,  
2 the average price of a motion picture, negative cost, that is  
3 to the time you are ready to strike your first print, is 1.9.

4 Today it is \$8.5 million. When I say your are re-  
5 coupling some expenses, it is not as bright as you might think.  
6 You are getting some money back to go to investment recoupment  
7 because there are only \$4 million plus pay cable homes. That  
8 does not become a significant factor in the cost recoupment.

9 It is very helpful, but it is not significant.

10 COMMISSIONER JAMES: Thank you.

11 CHAIRWOMANY BURG: Mr. Valenti, I have one question.  
12 It is really a follow-up to the question the gentleman asked  
13 just a few minutes ago.

14 You answered that compulsory license does not make  
15 a distinction in terms of the ratings of various stations. My  
16 question is at one time at lease when movies were sold to a  
17 local television station, they were sold as a group.

18 There were a number of titles, a number of pictures  
19 in a package that was purchased by the station. In order to  
20 get a couple or several good first-run type. Not first-run.  
21 Movies that would not be B or C movies. You had to take many  
22 of those others with it.

23 So, my question has two parts. No. 1, is that  
24 practice still going on that you sell a package and the station  
25 pays for the package having to take many undesirable pictures

1 along with several desirable ones?

2           Secondly, obviously then there are some rating differ-  
3 ences between those pictures. Is that still done?

4           THE WITNESS: Block booking in the theatrical world  
5 is illegal. I suspect it is also illegal in television.  
6 Package sales are made, but there is a price put on each pic-  
7 ture. You might sell ten titles, and each of them has a price.

8           You also have residuals and partners and participat-  
9 ing actors, directors, writers who participate in funds gained  
10 from the licensing of a picture in which they have what we call  
11 points.

12           While you might have licensed ten titles to ABC,  
13 each has a specific price.

14           CHAIRWOMAN BURG: I am talking not to a network.

15           THE WITNESS: The same thing. You have to account  
16 for participatory residuals. Each title has a specific price  
17 tag. You might bargain. You will say I pay you more for Hud,  
18 but I don't want to pay you for Creature in the Blue Lagoon.

19           I will not pay \$15,000 for this one. I will pay you  
20 \$15,000 for something else. That bargaining goes on all the  
21 time. There is a specific license fee per picture.

22           CHAIRWOMAN. BURG: Obviously, some pictures have a  
23 better draw?

24           THE WITNESS: Certainly. Some draw higher licnese  
25 fees than others. There is no question about that. Gone With

1 The Wind will do more than Beach Baby Bikini. It is a fact of  
2 life that some pictures have a far more audience attraction  
3 than others. That is related to license fees.

4 CHAIRWOMAN BURG: Thank you.

5 COMMISSIONER BRENNAN: Getting back to Mr.  
6 Koenigsberg's question, is it not possible the Tribunal could  
7 accord the claimants a larger share than the claimants  
8 requested?

9 THE WITNESS: I am not a lawyer. I am going on what  
10 I think is my background in a political world. I would assume  
11 that a regulatory body as I read authority has power to do  
12 that. I would think that you would. I don't know that you  
13 are bound by anything at all.

14 COMMISSIONER BRENNAN: It is very helpful to this  
15 party to having all these issues.

16 CHAIRWOMAN BURG: Mr. Scheiner.

17 MR. SCHEINER: Briefly, there were references to a  
18 study done by the Rand Corporation. I have marked it as  
19 Program Producers and Syndicators' Exhibit 1. I put the pre-  
20 face of a (D) before Exhibit 1 to indicate direct. I earlier  
21 had a cross-examination exhibit.

22 I would like to hand a copy to the reporter and  
23 circulate additional copies to the parties and the Tribunal.

24 COMMISSIONER JAMES: Mr. Scheiner, is this a new  
25 Rand report or the same one?

1 MR. SCHEINER: The same one. I am particularly  
2 referring to page 41. For completeness, I have furnished a  
3 copy of the entire report.

4 CHAIRWOMAN BURG: Without objection, so ordered.

5 (The document referred to as  
6 Program Producers & Syndica-  
7 tors' Exhibit No. D-1 was  
8 marked for identification.)

9 MR. SCHEINER: Next, there were references by Mr.  
10 Valenti to the attempts of WCIX-TV Channel 6 Miami, Florida  
11 to obtain and exercise its exclusive rights. The history of  
12 those attempts has been summarized and set forth in a separate  
13 exhibit which I designate as Program Producers and Syndicators'  
14 Exhibit D-2. I would like to offer that for the record.

15 I would note on the face of that exhibit the first  
16 request for syndicated exclusive in that situation was filed  
17 on March 15, 1977. The Commission directed that, the Federal  
18 Communications Commission directed that such exclusivity be  
19 granted about a year ago.

20 It has not yet been granted and is pending reconsi-  
21 deration by the Commission some several years later. Finally,  
22 I would like to put just one question in redirect to Mr.  
23 Valenti.

24 CHAIRWOMAN BURG: Without objection, so ordered.

25 (The document referred to was

1 Program Producers & Syndicators'  
2 Exhibit No. D-2 was marked for  
3 identification.)

4 REDIRECT EXAMINATION

5 BY MR. SCHEINER:

6 Q In response to Mr. Bechtel, you testified as to the  
7 importance of exclusivity for first-run syndicated material.  
8 Is it correct, sir, that your answers were based upon the im-  
9 portance in the commercial arena and the difficulty of making  
10 sales of that first-run syndication in the commercial arena?

11 A Yes.

12 MR. SCHEINER: I have no further questions.

13 CHAIRWOMAN BURG: Thank you.

14 MR. SCHEINER: If it meets the condition of the  
15 Tribunal and other parties, may we continue with our second  
16 witness at this point.

17 CHAIRWOMAN BURG: Mr. Hadl?

18 MR. SCHEINER: His direct testimony will certainly  
19 not take 15 minutes. I cannot estimate the amount of time on  
20 cross, however.

21 CHAIRWOMAN BURG: We will recess for lunch now until  
22 1:30.

23 (Whereupon, at 12:15 p.m. a recess was taken until  
24 1:30 p.m.)

25

1 CHAIRWOMAN BURG: Mr. Scheiner, would you call your  
2 next witness, please.

3 MR. SCHEINER: Mr. Hadl.

4 CHAIRWOMAN BURG: While Mr. Hadl is taking his chair,  
5 I will make one announcement. Mr. King told me and I guess  
6 BMI is not here, that they were waiving their right to cross-  
7 examine Dr. Link. We will pass that on to the BMI people.  
8 Thank you.

9 Whereupon,

10 ROBERT D. HADL

11 was called as a witness, and having been previously sworn was  
12 examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. SCHEINER:

15 Q Would you state your full name?

16 A Robert D. Hadl.

17 Q Your present position?

18 A I am the vice president of MCA Television

19 Incorporated.

20 Q Mr. Hadl, I know you have had very considerably copy-  
21 right experience. Would you summarize for us your background  
22 and experience and particularly as it relates to the copyright  
23 area.

24 A Well, I have served from a period of time from 1969  
25 to 1972 as an assistant to the registrant of copyrights. I am

1 a past chairman of the American Bar Association, secretary of  
2 the Copyright Division of Patent, Trademark and Copyright.  
3 I am a member of the Board of Trustees of the Copyrights  
4 Society.

5 I worked for two years at World Intellectual Property  
6 Organization of Geneva, Switzerland, an agency of the United  
7 Nations and International Copyright. I have also had experi-  
8 ence in the communications area.

9 I worked for three years as a lawyer at the Federal  
10 Communications Commission during which time I was involved in  
11 early efforts to revise the copyrights law. From '72 to '78,  
12 I was in private practice here in Washington representing  
13 among others the Motion Picture Association.

14 I was heavily involved in the drafting and various  
15 negotiations on the 1976 revision of the Copyright Act.

16 Q Thank you.

17 Your written testimony is in evidence in this pro-  
18 cedure. Would you please summarize that testimony for the  
19 benefit of the Tribunal.

20 A Well, I think the testimony can really be briefly  
21 summarized particularly in light of the testimony of Mr.  
22 Valenti gave this morning and the questions put to him. The  
23 first part of the testimony was generally a review of the  
24 structure of the Section 111 in the compulsory license and  
25 from the questioning it seems to me that the Tribunal and all

1 the people present are very familiar with that.

2 I don't know that we need to go over that in great  
3 depth. I think an important to make clear, and I think every-  
4 one is aware of is that there was no payments under the act  
5 for either the local or network programs.

6 By local to take the example that has been used in  
7 Seattle, Washington. If there is a cable system there carry-  
8 ing local stations, there is no payment for the local stations  
9 carried. It is rather only payments carried for products  
10 brought into Seattle on a distant signal.

11 You pay for local programming in a sense of the news  
12 program from Atlanta which is taken to Seattle, and carried in  
13 Seattle by a cable system. But you did not have any payment  
14 when a payment in Seattle in carrying local stations in  
15 Seattle in a local area.

16 There is no payment for network programs either.  
17 The basic principle underlying the act is payment for distant,  
18 non-network programs. That is the first point.

19 The second point, I think and it is the one which  
20 was asked quite a bit about this morning is the basis of the  
21 MPAA approach; namely, time and fee generated. I think the  
22 best way to deal with the fee generated question is to again  
23 say that it is our view that Congress when it established the  
24 act very clearly created a distinction in the payments that  
25 would be made by cable systems for the carriage of different

1 types of stations. Independent stations were given a value of  
2 one, and network affiliated stations and noncommercial educa-  
3 tional stations were given a value of a quarter.

4 To use the example that is in my testimony if you had  
5 a cable system that was carrying just two stations an indepen-  
6 dent station and a network affiliated station, it would have a  
7 DSE computation of one and a quarter. One for the independent  
8 and one quarter for the network affiliated station.

9 Therefore, if that cable system paid a fee of let's  
10 say \$10,000 for the carriage of those two signals, it is our  
11 position that the fee should be divided in the same ratio as  
12 the ratio in which it is paid in. Namely, if you look at one  
13 to one and a quarter is a ratio of 80 to 100.

14 It is a ratio of four to five. If there was a  
15 \$10,000 fee paid, it should not be split 5,000 and 5,000 for  
16 each of the two signals. Rather based on the way that Congress  
17 created the statutory scheme, it should be split \$8,000 for the  
18 independent station and \$2,000 for the network affiliated  
19 station.

20 That to me is the essence of the fee generated  
21 approach. I think what was being discussed here this morning.  
22 We think that Congress clearly in the act made it clear that  
23 different types of stations would be valued differently. A  
24 cable system would pay differently for those stations.

25 I would think that is a guiding principle and one

1 that should be given controlling weight by the Tribunal in  
2 distributing the fees. I think that is the essence of what it  
3 was I was trying to demonstrate in the testimony that I had  
4 prepared.

5 I think some of the same material was gone over this  
6 morning. Rather than prolong the discussion, I would at this  
7 point be happy to answer any questions.

8 MR. SCHEINER: I have no further direct.

9 COMMISSIONER COULTER: Mr. Hadl, two categories of  
10 claimants have raised the issue of the distributable royalties  
11 according to claims which have been filed. In the current  
12 phase of this proceedings, we are trying to determine the per-  
13 centage by category.

14 The question is whether you are dealing with total  
15 industry category or whether in taking into account the fact  
16 that some claimants within the category may not have filed.  
17 So the claim technically at least would not be 100 percent  
18 filed for that category. Would you care to make comments on  
19 that, please? How would you address that problem? It is a  
20 very real problem for us.

21 THE WITNESS: I think it is a very real problem for  
22 you. I think it is one that you are going to have to face. I  
23 don't think you may have to face it in phase one, but maybe  
24 phase two. I would like to respond to it.

25 Let's take another example. I think examples in that

1 area are sometimes best. They give you a chance to focus.  
2 Take a number. If it were decided that the broadcaster claim-  
3 ants in this proceeding were entitled to ten percent of the  
4 royalty pot and it were further proven that only 50 percent of  
5 the broadcasters eligible had filed claims in the proceeding,  
6 you would then have a question posed as I think the one you are  
7 asking me as to what you should do with the other five percent  
8 of the money assuming 50 percent had claimed and you could  
9 justify claims for five percent.

10 What would you do with the other five percent? Am  
11 I on target with the question you are asking?

12 COMMISSIONER COULTER: You are outlining vividly the  
13 problem. Go on. In other words, you are saying you would  
14 feel that this phase would have to determine a percentage in-  
15 dependent of the claims filed and that issue has to be raised,  
16 handled at a later phase.

17 Is that what you are saying?

18 THE WITNESS: It was my understanding that that was  
19 the procedure that the Tribunal had outlined. If I am wrong  
20 on that, I can be corrected. I was trying to tell you further  
21 if I may.

22 COMMISSIONER COULTER: Go on.

23 THE WITNESS: It seems to me you are going to  
24 basically presented with two kinds of arguments. One is the  
25 argument that that remaining five percent should be somehow

1 distributed over the entire group of claimants, the major  
2 groups and divided in some allocable way or that that extra five  
3 percent is nevertheless to be given to the broadcaster group  
4 for somehow payment to the remaining only five percent people  
5 that did claim.

6 I think I can suggest to you that you will probably  
7 faced with positions in this matter based on the fact that  
8 the Sports people and the performing rights societies largely  
9 represent the entire or close to 100 percent of the claimant.

10 Therefore, they will have a particular interest in  
11 trying to suggest that that extra five percent be divided  
12 among all the groups.

13 Whereas if the motion picture industry and the broad-  
14 cast industry find that whatever reason less than 100 percent  
15 of their group claimed, they will be trying to argue I think  
16 focally that the money should rather be given whatever is re-  
17 maining to each one of their own groups and not split over the  
18 four groups.

19 I think it is a difficult question and one that you  
20 will have to confront; namely, on one side if a group repre-  
21 sents 100 percent of it class, and you decide that the perform-  
22 ing rights societies.

23 Suppose you decide they are entitled to five percent  
24 and they represent all the performing rights societies, and  
25 you give them five percent. Is there some basis on which they

1 should get a greater sum? If there is an excess that is not  
2 claimed by some other group.

3 I am sure they will have an answer to that, an argu-  
4 ment as to why she should. I think that is the situation if I  
5 understand your question. That is a problem you are going to  
6 have to address. I think it is a problem that comes up in  
7 phase two.

8 COMMISSIONER COULTER: One last question is MPAA is  
9 overall approach is based upon fee generated and time. You  
10 make no mention of the music claimant before us which nobody  
11 disputes. Obviously, you and they or you and broadcasters also  
12 but you and they are claiming for overlapping time.

13 How would you deal with that problem?

14 THE WITNESS: Well, I don't think it is really over-  
15 lapping time in this sense. I think that one really has to go  
16 back to how the industry is structured. Music is an area  
17 which I think has to be considered on its own.

18 When a program is licensed to a television station by  
19 a syndicator, the music in that program is not licensed by the  
20 syndicator. The music is licensed separately. I think while  
21 we do not believe that separate elements in a program should  
22 be considered differently, separately by the Tribunal, never-  
23 theless music is the oen area which historically and based on  
24 long practice and custom has been licensed separately.

25 The performing rights societies do have licensing

1 licensing agreements with all the television stations. I think  
2 for that reason it is proper to continue to view them in the  
3 same way that they normally have been viewed in the market-  
4 place which is generating a separate amount.

5 Not that it is inclusive let's say of both the local  
6 programs to the broadcasters to the extent and the music and  
7 syndicated and programs to the motion picture come to the  
8 extent they also utilize music.

9 I think it has been our view in the discussions we  
10 have had that music is basically an amount that came off the  
11 top. It was an amount which was decided upon separately.

12 COMMISSIONER COULTER: I assume you subscribe gen-  
13 erally to percentages in Mr. Cooper's statement?

14 THE WITNESS: Yes, I do.

15 COMMISSIONER COULTER: That does not talk about what  
16 might come off the top, but internally to those numbers, do  
17 you all contemplate allowing some percentage in there?

18 THE WITNESS: I think the answer is yes. I think  
19 music one has to look at the overall amounts and decide the  
20 amount appropriate for music. I think you heard testimony  
21 about that last week or the week before.

22 COMMISSIONER COULTER: Then, there is implicit in  
23 that remark you would have to get a little less than 80 percent  
24 and the local programming would have to get less than 20  
25 percent?

1 THE WITNESS: I think that is correct.

2 COMMISSIONER COULTER: Thank you.

3 CHAIRWOMAN BURG: Does anyone wish to question Mr.  
4 Hadl? Mr. Lloyd.

5 MR. LLOYD: We led off the last time. I don't have  
6 questions at this time. I would like to see what develops.

7 Let me say something for the record. Mr. Hadl's  
8 understanding that certain issues were to be deferred until  
9 phase two came up during the testimony of the music witnesses.  
10 Mr. Scheiner objected to the testimony by Dr. Fagan which took  
11 account of the prospect that some of the claimants or some of  
12 the group of claimants did not represent the totality of the  
13 potential claimants.

14 I am not going to purport to say what the Copyright  
15 Tribunal intended by the ruling at that time, but Mr.  
16 Scheiner's objections were overruled. That ruling seems to me  
17 to be directly relevant to Mr. Hadl's understanding. I will  
18 let it go for the moment.

19 The questions I have to bear on this have already  
20 by Mr. Valenti been deferred to Mr. Cooper's testimony.

21 MR. SCHEINER: May I make a comment in response. As  
22 I understand it, the Tribunal did rule that this proceeding  
23 would go forward in two phases. Mr. Lloyd is absolutely cor-  
24 rect. The objection that I raised was overruled.

25 As I recall, it was overruled on the basis of Mr.

1 Fitzpatrick's point that while the Tribunal ruled that no  
2 group of claimants was required to go forward in phase one of  
3 the proceeding with an analysis of the number of claimants  
4 within the potential of claimants, that it was nevertheless  
5 within, permissible for an adversary party to raise questions  
6 of the proponent as to the number claimants that were before  
7 the Tribunal in this phase of the proceeding.

8 CHAIRWOMAN BURG: The proviso of witnesses who have  
9 knowledge to that particular subject matter?

10 MR. SCHEINER: Yes.

11 CHAIRWOMAN BURG: Mr. Eldridge.

12 MR. ELDRIDGE: Is this whether someone has questions  
13 of Mr. Hadl, or are you on the same subject?

14 CHAIRWOMAN BURG: We are now back to Mr. Hadl.

15 MR. ELDRIDGE: May I ask him a few questions?

16 CHAIRWOMAN BURG: Please.

17 CROSS-EXAMINATION

18 BY MR. ELDRIDGE:

19 Q Mr. Hadl, in response to Commissioner Coulter's  
20 question about music representing a good part of your film  
21 product, you suggested some of the broadcasters local origina-  
22 tions used music which I think is correct.

23 I gather that with respect to the Cartoon claimants  
24 that you would be surrendering part of your 75 percent claim  
25 here to them; is that correct?

1 MR. SCHEINER: May I please. That is a misstatement  
2 of the Character claimant's position before this Tribunal. I  
3 defer to Mr. Dannay on that score.

4 MR. ELDRIDGE: I am merely asking in view of the line  
5 of questioning that there is an overlapping concept and the  
6 film product includes cartoons.

7 CHAIRWOMAN BURG: Mr. Hadl, are you familiar with  
8 the Cartoon's position?

9 THE WITNESS: I think I can answer the question. I  
10 think the answer to the question is no. The reason is that as  
11 I try to respond when you asked me the question about music I  
12 said that historically.

13 There is one area in which when a program is licensed  
14 to a television station as I understand it, not all the ele-  
15 ments in the program are individually licensed. That is in  
16 respect to music.

17 As I recall the license agreements, it is usually  
18 warranted if the station has a license from ASCAP, BMI or  
19 SESAC which is the third performing rights society. The pro-  
20 gram supplier warrants that the station will be covered in  
21 terms of having to worry about a copyright infringement are of  
22 playing a program with that music.

23 I do not believe that it was ever our position, the  
24 MPAA. In fact, the position has been to the contrary, that  
25 this Tribunal should get to the problem of making an award of

1 more than one payment per program; namely, trying to divide up  
2 that program in any way to separately award money to what might  
3 be called different elements.

4           Whether it be cartoons, whether it be the effort of  
5 the performing artists, whether it be the efforts of the  
6 writer or director or anyone like that, I don't think that  
7 would be right. I think therefore that we would not take the  
8 view that the Cartoon claimants should have a separate award  
9 which would be part of the MPAA, part of the MPAA claim.

10           BY MR. ELDRIDGE:

11           Q     I thought you said that the reason you felt music  
12 should not be a part or subtracted from your claim was because  
13 the stations paid for it separately in terms of the station  
14 blanket license, is that right?

15           A     No. I think what I said that music should come off  
16 the top. To that extent Commissioner Coulter said to me part  
17 of your claim would be reduced somewhat as to the claim of the  
18 broadcaster, and I guess to some extent the Sports people. I  
19 would stand by that answer.

20           Q     To your knowledge, local stations don't pay to some  
21 organization separate for cartoon rights, do they, other than  
22 getting the license from your clients, right?

23           A     Yes. They do not pay to some other organization.

24           Q     Going back to the subject we were discussing, I was  
25 discussing with Mr. Valenti this morning your concept of using

1 a DSE concept as a part of your fee generated approach, I  
2 gather you find nothing specific in the act that directs the  
3 Commission to utilize such a formula; is that correct?

4 A That is correct.

5 Q Do you propose to the Commission that the DSE formula  
6 be used for stations that are not subject, systems not subject  
7 to reporting on a DSE basis? Such as form two and form one  
8 stations.

9 A Let me respond to that question this way. It was  
10 part of my testimony. Perhaps I should elaborate on it a  
11 little further.

12 The numbers we have generated in reviewing the so-  
13 called form one, form two and form three forms which are filed  
14 in the Copyright office, those are the forms underwhich the  
15 cable systems pay.

16 The form one is relating to the system revenues up  
17 to \$80,000 on a semi-annual basis. Form two is the system  
18 revenues between 80,000 and \$160,000. Form three are the  
19 larger systems paying on a DSE basis.

20 We in calculating those numbers and as Allen Cooper  
21 will testify found that the form three systems pay approximately  
22 87 percent -- if I have the number correct -- of the total  
23 fees. They represent a small number of cable systems.

24 I am not sure it may be no more than 20 percent,  
25 within 20 percent of all the systems. You have the two smaller

1 system categories which account for 70 percent of the cable  
2 systems filing by somewhere in the area of 37 percent of the  
3 fees.

4 If I understand our data correctly, we are saying  
5 that we believe that the 87 percent, the systems representing  
6 87 percent of the money do represent. That is a fair sample  
7 of all the systems. We think that is representative of the  
8 kind of signals which would be carried by the other smaller  
9 systems.

10 We do believe that the money should generate and be  
11 divided in that way.

12 Q The justification if I understand for your fee gen-  
13 erated approach is that you should pay out on the same basis  
14 as a pay in. That only relates to form three stations, is  
15 that right?

16 A Could I have the question again?

17 (The question was read by the reporter.)

18 Yes. As I said, that relates to form three stations.  
19 They account for 87 percent of the money generated.

20 Q So even though there is no enactment, justification  
21 if I may suggest for 13 percent of the dollars in the Tribunal,  
22 you would still urge upon the Tribunal that they use DSEs with  
23 respect to 13 percent of the dollars in the pool?

24 A No. I have not said that. I think that you would  
25 have to look at the way in which the signals were paid, the

1 stations, the cable systems in the two smaller system categor-  
2 ies. The total amount of dollars they pay, and the total  
3 amount of signals that they carry.

4 I think what we are saying is that that rough  
5 approximation of the DSEs for the independents and the network  
6 affiliates for the form three systems is probably a good rough  
7 judgment of what should be done in terms of the independent  
8 and network affiliated stations also carried by the smaller  
9 systems.

10 Also, that you can use those numbers as a rough  
11 approximation of what you would arrive at in that area.

12 Q Regardless of the fact there is no legislative basis  
13 as you seem to suggest to the Tribunal for the form three sys-  
14 systems?

15 MR. SCHEINER: I object to the form of the question.

16 THE WITNESS: I think that my testimony made clear  
17 at the outset in the written statement that I am quite pre-  
18 pared to concede that the statute gives the Tribunal a rather  
19 far-reaching discretion in terms of looking at all the standard  
20 standards and the claims that may be made before it in terms of  
21 the judgments you will make as to the formula you will arrive at  
22 in dividing this money.

23 It is our position that in doing that the Tribunal  
24 should be guided, and we think it is a controlling principle.  
25 That is our point of view. The Tribunal should be guided by

1 the fact that Congress did establish a particular scheme in  
2 determining the way in which the money should be paid in. We  
3 think that scheme should be given great weight by the Tribunal  
4 in determining how the money would be paid out.

5 Q It would be logical to suggest at least 13 percent  
6 of those monies should be paid on a time basis without a fee  
7 generated basis of DSEs. That tends to penalize a network  
8 affiliated station.

9 A I am not sure that the way you characterized it is  
10 appropriate. The small systems pay in as I recall a percent-  
11 age of gross the systems between 80 and 160,000 and a special  
12 limitation for systems under 80 in which they first reduce if  
13 they are at 20,000 or 30,000.

14 They take the 20 or 30 off the 80 and then apply a  
15 percentage of one half and one percent. They have a rather  
16 complex formula. It is not clear to me the way you have put  
17 the question is correct at all.

18 Q I was merely trying to explore your justification  
19 for 13 percent of the royalties. You feel what is good for  
20 from three is good for form two and form one because of the  
21 large percent of dollars in the form three systems? Is that  
22 about it?

23 A I think in part this is probably a question in part  
24 that Mr. Cooper can answer better. As I understand Mr. Cooper  
25 Cooper's testimony -- and he can certainly correct me if I am

1 wrong -- we are taking the position that 87 percent is a  
2 pretty good sample. We think that that same kind of criteria  
3 ought to apply for the remaining 13 percent.

4 Q You do subscribe to the fact that the Commission is  
5 charged with the responsibility of trying to place a fair  
6 value upon the copyrighted programs and materials that are  
7 here and which generated this money; isn't that correct?

8 A This is for purposes of distribution.

9 A I am not sure what you mean by fair value, but I  
10 think their job is to determine a reasonable and proper  
11 distribution formula.

12 Q I used this morning an example with Mr. Valenti  
13 about Gone With The Wind. I found it difficult to figure out  
14 why you should get a full hundred percent and only 25 percent  
15 solely dependent upon the source as to whether it is an  
16 independent station or a network affiliated station if the  
17 distant signal is carrying the same program let's say at a  
18 different date within the year.

19 Why does that seem a fair basis of distribution of  
20 the royalties? You suggest to me that you place different  
21 values on Gone With The Wind depending upon the source from  
22 which the distant system picks up the signal. Is that your  
23 approach?

24 A Well, I heard your question this morning. I was  
25 here. I am not sure I really totally understand it. I think

1 Congress determined and the legislative history so states that  
2 the reason for the difference in the valuation of network sig-  
3 nals, network affiliation station signals and independent  
4 signals was because of the ratio of what Congress determined  
5 was roughly the non-network time on a network affiliated  
6 station.

7 I think we all note a network station carriage in  
8 prime time in the evening and in the day time and in other  
9 parts if it is the Tonight Show on NBC carries a lot of net-  
10 work programming.

11 The rough approximation that Congress made was there  
12 are fewer hours devoted to non-network programming on the  
13 network affiliated stations. Therefore, they created a  
14 ratio in which they felt the money should be paid in one for  
15 independent and one quarter for a network affiliated station.

16 What we are saying in that example I am trying to  
17 give is it strikes me that they were applying a ratio which  
18 we think should be utilized here; namely, if a series pays  
19 \$10,000 and carries one independent and one network affiliated  
20 stations the programming, all the programming which may be 20,  
21 22 hours a day on the independent station should be calculated  
22 on the basis of \$8,000.

23 The four or five hours on the network affiliated  
24 station should be characterized on the basis of the \$2,000.  
25 Not that the money should be divided evenly so that the

1 independent is given only 5,000 and the network affiliated  
2 station only 5,000. We think that is a judgment Congress  
3 made.

4 That is why we are here urging the Tribunal to uti-  
5 lize that principle in dividing the money.

6 Q We understand that is a judgment Congress made in  
7 terms of how they would pay into the pool. We are not arguing  
8 about that. You seem to fall back on that.

9 I am suggesting to you that in one of your own pro-  
10 grams -- and we are only talking about local time. We are  
11 not talking about network time that you value four to one  
12 higher depending on the source from which the distant system  
13 picks it up. What is justification to that?

14 A I am not sure we are valuing four to one higher.

15 Q You are giving credits under your system to a net-  
16 work affiliated station of one quarter, and you are giving a  
17 full point to an independent station in terms of distribution.

18 It was said this morning by Mr. Valenti that the  
19 independents used more products from your clients than the  
20 network affiliates do. I am suggesting to you that one single  
21 copyrighted work that you are not with your fee generated  
22 approach, not in effect valuing the worth of the copyrighted  
23 materials.

24 This is particularly in the case your claim as a  
25 copyright owner.

1 MR. SCHEINER: That is hardly a question. It is  
2 clearly argumentative in the extreme and exceedingly  
3 repetitious. I object.

4 CHAIRWOMAN BURG: The objection is sustained.

5 BY MR. ELDRIDGE:

6 Q Do you have a basis other than your suggestion that  
7 the act itself suggests a one and one quarter payment in the  
8 form three stations for the pay in as a basis of utilizing  
9 DSEs in the payout? Do you have a basis other than that?

10 A No.

11 Q There is nothing in the legislative history that  
12 suggests that that payout should be one and one quarter?

13 A Now, we are going over old territory.

14 Q You are the one that went back.

15 MR. SCHEINER: Madaam Chairman, I renew my objection.

16 CHAIRWOMAN BURG: It is sustained.

17 MR. ELDRIDGE: He brought it up voluntarily. I move  
18 to strike it from the record.

19 CHAIRWOMAN BURG: You want to strike what?

20 MR. ELDRIDGE: His voluntary statement, if I am not  
21 allowed to ask a question.

22 CHAIRWOMAN BURG: So ordered.

23 MR. ELDRIDGE: I have no further questions.

24 CHAIRWOMAN BURG: Mr. Dannay.

25 MR. DANNAY: I have a few brief questions. I am

1 Richard Dannay representing Cartoon and other character  
2 claimants.

3 CROSS-EXAMINATION

4 BY MR. DANNAY:

5 Q Mr. Hadl, I believe you stated in response to Mr.  
6 Eldridge's cross-examination it is your contention that music  
7 aside that it was your belief that the Tribunal should not get  
8 into the question of payments of more than one payment per  
9 program and should not get into the question of paying for  
10 different elements included in programs.

11 Is that accurately summarizing your comment?

12 A When you say not get into, I am not sure what you  
13 mean.

14 Q I thought your statement was that it was your belief,  
15 it was your contention that the Tribunal in ultimately to make  
16 the allocation of fees among the various claimants should not  
17 award any payment to the different elements included in the  
18 program as distinguished from those in the programs themselves  
19 music aside.

20 A The answer is yes. One man, one vote. One program,  
21 one payment.

22 Q I direct your attention, if I may, to a section you  
23 are familiar with, Section 111(d)4(a) which is the critical  
24 section before us.

25 Am I correct in Section 111(d)4 that the statute as

1 it reads. The language of the statute in talking about the  
2 royalty fees to be distributed says "to be distributed to those  
3 among the following copyright owners who claim that their works  
4 were the subject of secondary transmissions by cable systems."

5 MR. SCHEINER: Madaam Chairman, I would regretfully  
6 interpose an objection. I would remind the Tribunal that we  
7 had extensive briefing, oral argument on the question of  
8 entitlement, if any, of the Cartoon Character claimants.

9 After the initial ground of briefing, the Program  
10 Producers and Syndicators filed a supplementary motion asking  
11 the Tribunal to issue a ruling. That matter is pending before  
12 the Tribunal.

13 I submit to you that the questions now put to Mr.  
14 Hadl invite a legal argument and are therefore inappropriate  
15 in an evidentiary proceeding.

16 CHAIRWOMAN BURG: Allow me to ask the question to  
17 help me make a decision.

18 You were the one that introduced the subject before,  
19 were you not?

20 THE WITNESS: I think I was asked a question by Mr.  
21 Eldridge.

22 MR. ELDRIDGE: It started with Mr. Coulter, and I  
23 followed with cartoon characters as another element.

24 COMMISSIONER COULTER: I believe I was mentioning  
25 music.

1 CHAIRWOMAN BURG: I am going to sustain that ob  
2 objection.

3 MR. DANNAY: May I be heard?

4 CHAIRWOMAN BURG: Yes.

5 MR. DANNAY: The questions were asked to Mr. Hadl  
6 whatever the apportionment seems to be the question. Answers  
7 were given by Mr. Hadl. I would like to address a few  
8 questions to clarify matters that Mr. Hadl has already testi-  
9 fied to.

10 I am not asking for his legal opinion, but his  
11 opinion as to the legal statutes.

12 CHAIRWOMAN BURG: Mr. Dannay, I am going to request  
13 a two-minute recess.

14 (A two-minute recess was taken.)

15 CHAIRWOMAN BURG: Mr. Dannay, continue with your  
16 questioning.

17 MR. DANNAY: Thank you.

18 BY MR. DANNAY:

19 Q Mr. Hadl, is it correct in focusing on the language  
20 of Section 111(d)4 to begin with that the statute reads that  
21 royalty fees collected under the statute shall be "distributed  
22 to those among the following coypright owners who claim that  
23 their works were the subject of secondary transmissions by  
24 cable systems"?

25 Is that the correct language in the statute?

1           A       That is the way the statute reads.

2           Q       Following through, directing your attention to sub-  
3 section (a) of 111(d)4 in analyzing the description of the  
4 term the following copyright owners that the statute reads  
5 "Any such owner whose work was included in a secondary trans-  
6 mission made by a cable system of a non-network television  
7 program."

8                   Is that the way the statute reads?

9           CHAIRWOMAN BURG: I am going to object to that, Mr.  
10 Dannay.

11                   BY MR. DANNAY:

12           Q       Am I correct that the statute on its face refers  
13 only to the language of the statute and does not refer to pay-  
14 ments or distributions to copyright owners whose "programs"  
15 are included?

16                   MR. SCHEINER: Same objection.

17                   CHAIRWOMAN BURG: The objection is sustained.

18           MR. DANNAY: With all due respect, I thought in our  
19 discussions ---

20                   CHAIRWOMAN BURG: You are getting farther afield  
21 than we asked.

22           MR. DANNAY: All I said to do was correct the impli-  
23 cation that Mr. Hadl's testimony as a lawyer was interpreting  
24 the statute to read that payments should be made to "programs"  
25 as opposed to owners of works. I have no objection frankly in

1 waiving those questions as long as I can put on the record the  
2 specific language of the statute. So, it is abundantly clear  
3 that that statute does not say on its face leaving aside  
4 different contentions payments should be ---

5 MR. SCHEINER: I will stipulate to what the statute  
6 says.

7 MR. DANNAY: I wish your witness had as well.  
8 Thank you.

9 CHAIRWOMAN BURG: Judith Semo.

10 MS. SEMO: I am Judith Semo representing the NCAA.  
11 I have questions concerning the point Mr. Eldridge addressed  
12 as to the one quarter and one distinction.

13 CROSS-EXAMINATION

14 BY MS. SEMO:

15 Q On page five of your statement -- Excuse me. On  
16 page seven in footnote five of your statement you say the  
17 different values were assigned to independent, network and  
18 educational stations because of the different amounts of view-  
19 ing of non-network programming carried by such stations.

20 Then on page 12, you say that the different weights  
21 reflect a congressional determination of the relative value  
22 to be accorded these signals.

23 I am wondering if you can reconcile for me at the  
24 risk of going over what Mr. Eldridge has done what you are  
25 saying. Are you saying that the scheme reflects the

1 determination as to amount of programming?

2 A I think the best thing to do would be to take a look  
3 at the House Report if somebody has it. I think that is where  
4 you will find that is what the testimony refers to.

5 I am having a little trouble finding the exact pro-  
6 vision at the moment. But I think the footnote five is taken  
7 from the House Report. I just can't find the place. Maybe  
8 somebody else knows it better than I.

9 Q Let me go forward with another question.

10 A As to where it is, I think that is the response to  
11 your question. I think I was not trying to say anything other  
12 than what judgment Congress made.

13 Q Taking what you said on page 12 that the scheme  
14 reflects a congressional determination of the relative value  
15 to be accorded signals so that network affiliate signals would  
16 be valued at one quarter, the value of independent signals,  
17 wouldn't the royalty payment formula have to value network  
18 stations at 1/16th of that of independent stations taking one  
19 quarter value times one quarter amount and coming to a 1/16th  
20 formulation?

21 A Now, I am getting --- I am not sure how you worked  
22 that out. It is page 90 of the House Report, the last full  
23 paragraph which says different values are assigned to indepen-  
24 dent networks and educational stations because of the differ-  
25 ent amounts of viewing of non-network programming carried by

1 such stations.

2 For example, the viewing of non-network programs on  
3 network stations is considered to approximate 25 percent.  
4 These values are then combined on a scale of percentages  
5 applied to the cumulative total.

6 What Congress was saying in effect was the amount of  
7 for example the viewing of non-network programs on network  
8 stations is viewing 25 percent of the total. Therefore, one  
9 quarter is applied.

10 I don't know how you get to 1/16th.

11 Q What I am saying is I was trying to figure out  
12 whether or not you are saying Congress by setting up this  
13 scheme meant to value the different programming or whether it  
14 meant to simply set up the scheme in order to reflect the  
15 different amounts of non-network programming on the two differ-  
16 ent kinds of stations.

17 A We are talking more about a time value than a time  
18 factor.

19 Q You say the scheme, the four to one scheme reflects  
20 a congressional determination on the relative value to be  
21 accorded these signals both for payment and in our view distri-  
22 bution purposes.

23 A By value in that, I mean time. By value, precisely  
24 that. What Congress was saying. The amount of non-network  
25 programming on a network affiliated station roughly

1 approximately one quarter of the time on that station's  
2 program.

3 In terms of the way the money is paid in and out, t  
4 that same proportion should be kept. That same ratio should  
5 be maintained.

6 Q You are saying the ratio should be maintained. You  
7 are not saying the programming should be valued based on that  
8 scheme?

9 A If I understand your question, yes.

10 Q Would it be your position then the network program-  
11 ming of a network affiliate and non-network programming of an  
12 independent station would be valued similarly?

13 A If I understand your question, I think you are  
14 really asking me the same question Mr. Eldridge did about Gone  
15 With The Wind. I think the answer to it is that I think we  
16 have to subject to the scheme Congress adopted.

17 I don't think that there was any attempt to value  
18 programming differently except to recognize that certain  
19 amounts of programming are carried in different quantities on  
20 the different stations and to work with those numbers that way.

21 Coming back to the example I gave, I still think if  
22 a cable system is paying \$10,000 and it carries two signals  
23 one independent and one a network affiliated station, you  
24 should not divide that money if that is what you mean by  
25 valuing assigning \$5,000 to the independent and \$5,000 to the

1 network affiliated station.

2 I think the Congress scheme suggests and indeed re-  
3 quires in our view that you divide that 80 percent-20 percent  
4 with 80 percent going to the independents and 20 percent to the  
5 network affiliate. You would then take the programming.

6 You have to recognize these different amounts of  
7 programming. At different independent stations virtually all  
8 programming on those stations are payable. All the program  
9 owners of programs on the independent station are going to be  
10 eligible to claim about not all the program owners on the net-  
11 work affiliated stations are going to be able to claim.

12 Network programs don't claim. They are not  
13 entitled to any money. You have a much smaller group. When  
14 you put those two things together, you should come out pretty  
15 even. There may be discrepancies. They may result from the  
16 fact different stations are on different times.

17 Not all are on 24 hours a day. Some are on 22.  
18 Some are on 18. The general tendency, the independent sta-  
19 tions are probably on a bit longer than the network affiliated  
20 stations as a group. I think all of these things work into  
21 the mix.

22 Q So, your position which I think is clear in terms  
23 that that pay-in schedule should determine the pay-out  
24 schedule.

25 That aside, are you saying that the congressional

1 scheme, the four to one scheme was not intended to value, to  
2 set a value on the programming?

3 A Again, yes, if I understand your question correctly.

4 Q Can you state for the record what the four to one  
5 scheme setup by Congress was meant to do with respect to the  
6 programming?

7 A I think I can do no better than I said before, what  
8 I read from the House Report and the statute. The four to one  
9 scheme was designed to reflect the amount of programming on a  
10 time basis of an independent, of the non-network programming.

11 Non-network programming on an independent station is  
12 virtually the entirety versus the affiliate which Congress  
13 said is roughly 25 percent. That is where the four to one  
14 ratio comes from.

15 MS. SEMO: No further questions.

16 CROSS-EXAMINATION

17 BY MR. HARRINGTON:

18 Q On page nine, you refer to the payment of copyright  
19 DSE fees for the part-time carriage in programming including  
20 part-time carriage of special programs. Am I correct in saying  
21 that specialty programming consists of primarily religious  
22 or foreign language programming?

23 A Well, I am not an expert to answer that question.  
24 I think we are dealing when talking about specialty stations  
25 rules and regulations of the Federal Communications Commission.

1 I will certainly accept if you tell me that that is what they  
2 mean.

3 Q You have no personal knowledge of what constitutes  
4 specialty station or specialty programming?

5 A As I recall when the act was drafted, what specialty  
6 stations meant referred to existing FCC rules. I think you  
7 would have to look to those rules to find out what precisely  
8 is meant. I am not familiar with those rules.

9 MR. HARRINGTON: Thank you. That is all.

10 CHAIRWOMAN BURG: Are there any other questions?

11 CROSS-EXAMINATION

12 BY MR. LLOYD:

13 Q Mr. Hadl, this may be a question properly put to Mr.  
14 Cooper, but I don't want you to get away. Would you give your  
15 judgment that the 25 percent DSE value assigned a network  
16 affiliate reflects a congressional determination, the non-net-  
17 work time.

18 When you made the adjustment in the study, this is  
19 based on FCC data for the programming of network stations to  
20 ascertain the compensable amount of such programming? Did you  
21 not use the 25 percent factor but rather used the 33.5 percent  
22 factor?

23 A I think that is a question which is more properly  
24 addressed to Mr. Cooper.

25 Q Fine. If that is the case, we will address it to

1 Mr. Cooper.

2 CHAIRWOMAN BURG: Are there any other questions of  
3 Mr. Hadl? Mr. Koenigsberg.

4 CROSS-EXAMINATION

5 BY MR. KOENIGSBERG:

6 Q Just two questions. Do you agree with the thrust of  
7 Mr. Valenti's statement this morning -- and I am paraphrasing  
8 -- that a formula based on the market analogy drawn by license  
9 fee payments to copyright owners is A one of several valid and  
10 reasonable measures for the Tribunal to weigh in assessing this  
11 distribution question?

12 I would add parenthetically that that formula would  
13 yield about the same percentage to your group as the formula  
14 you proposed.

15 CHAIRWOMAN BURG: I would think he would answer the  
16 question.

17 THE WITNESS: I was going to start out by saying I  
18 had not recalled that response by Mr. Valenti, but as you  
19 qualified it, yes.

20 BY MR. KOENIGSBERG:

21 Q Mr. Hadl if the problems -- and I use the word  
22 advisedly and put it in quotes -- that Mr. Eldridge raised and  
23 the so-called problems that the young lady from NCAA raised  
24 are in fact problems with the fee generated approach. Those  
25 problems would be solved would they not with the using of the

1 to the Tribunal in future years.

2 MR. SCHEINER: I have no further questions.

3 CHAIRWOMAN BURG: Thank you. Thank you, Mr. Hadl.  
4 Would you call your next witness, please.

5 MR. SCHEINER: I call Mr. Cooper.

6 Whereupon,

7 ALLEN R. COOPER

8 was called as a witness, and after having been previously  
9 sworn was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SCHEINER:

12 Q Mr. Cooper, would you please state your full name?

13 A Allen Robert Cooper.

14 Q What is your position at the motion picture  
15 association?

16 A I am a vice president of the MPAA.

17 Q Would you describe briefly your background experi-  
18 ence and qualifications?

19 A During the past 30 years, I have been an executive  
20 associated and involved primarily with market media and adver-  
21 tising, research and corporate planning. Twenty of those years  
22 were spent with the National Broadcasting Company, at that  
23 organization was vice president of the planning.

24 Subsequent to leaving NBC, I was partner in a con-  
25 sulting firm of the James B. Koback, Incorporated.

1           A     To the best of my knowledge, it is, sir.

2           Q     Would you explain your objective in the studies  
3 described in the statement?

4           A     Our objective with respect to studies A and B des-  
5 cribed in my statement is to devise a fair and equitable basis  
6 for determining the share of the copyright pool that should be  
7 awarded to program producers and syndicators.

8           Q     In order to make that study, you require certain type  
9 of information. What are those types of information?

10          A     First, we had to determine how much cable paid in  
11 1978 for the retransmission of television programs. Secondly,  
12 we had to determine the programs carried or transmitted as  
13 distant signals by cable systems.

14                     Third, we had to classify these programs which were  
15 transmitted as distant signals with respect to typology whether  
16 or not they were a network program. Specifically a network  
17 program distributed by NBC, CBS or NBC were syndicated, local-  
18 ly produced program and whether or not they were a sports  
19 event type of program.

20          Q     With respect to the first type of information; name-  
21 ly, the amount paid by cable, what sources did you use and  
22 rely upon?

23          A     We used the statements of account in the public  
24 files at the Copyright office.

25          Q     Is it true, Mr. Cooper, that cable systems are or can

1 be classified on the basis of gross receipts from basic cable  
2 service during the accounting period?

3 A Yes, sir.

4 Q How are they so classified?

5 A The cable systems are classified into three groups.  
6 Separate forms have been created for the cable systems in each  
7 group to file their statement of account. There is a short  
8 form, an intermediate form, and a long form.

9 The short form is applicable to cable systems with  
10 semi-annual gross receipts of \$41,500 or less. These systems  
11 pay a flat fee of \$15 for the semi-annual period for complete  
12 compulsory license with respect to retransmission of distant  
13 signals.

14 The intermediate form which is also known as form  
15 two is filed by systems which semi-annual gross receipts  
16 ranging from \$41,500 up to \$160,000.

17 Q The largest cable systems file a form three statement  
18 of account. These are systems with semi-annual gross receipts  
19 of \$160,000 or more.

20 Q Is it true that you analyzed only the larger systems  
21 which filed form three statements?

22 A That is true.

23 Q Would you explain why you so limited your analysis?

24 A The principle reason was cost effectiveness.

25 Approximately, 4,000 statements of account were filed by the

1 cable systems. Four thousand statements of account were filed  
2 by cable systems. Of those, nearly 50 percent were filed on  
3 form one statements of account which involved a payment of 15  
4 percent per semi-annual period.

5 The overall sum of money of the copyright pool repre-  
6 sented by these 50 percent of the statements was 0.4 percent  
7 of the total. The second group. This left the form two and  
8 form three statements of account.

9 Early in our work in this connection, we determined  
10 that we would be developing a method of handling data that  
11 would take into account the proration of the royalties fee  
12 paid for each of the distant signals carried by a cable system.  
13 These data are available only in the form three statements of  
14 account.

15 Therefore, we relied and dealt exclusively with the  
16 form three statements.

17 Q Mr. Cooper, so much for the source of data used for  
18 cable television systems. Your study makes reference, your  
19 statement includes two studies. They are studies A and B.

20 With respect to study A, what source was relied upon  
21 for the other two types of information you required; namely,  
22 the program information?

23 A With respect to study A, the program information we  
24 developed for each station carried as a distant signal by  
25 these form three systems was the television guide listing.

1 marketplace analogy. Would you not have to worry about DSE  
2 weightings at all?

3 A Well, I am not so sure where that takes us. I don't  
4 know if I can really say.

5 Q If you can't answer, the answer is I don't know?

6 A I don't know.

7 MR. KOENIGSBERG: Thank you.

8 CHAIRWOMAN BURG: Are there other questions?

9 REDIRECT EXAMINATION

10 BY MR. SCHEINER:

11 Q Mr. Hadl, some questions were put to you on cross  
12 based on the premise that the Program Producers and Syndicators  
13 had before this Tribunal less than all of the potential claim-  
14 ants within that group.

15 Let me ask you this. Suppose that the producer-  
16 syndicator group were represented by only 90 percent of the  
17 potential claimants. Would you nevertheless consider it  
18 desirable or necessary for this Tribunal to make an allocation  
19 to the group of potential claimants of Program Producers and  
20 Syndicators?

21 A I would. I think this proceeding is going to have  
22 precedential effects for future years even though, of course,  
23 each year different claims will be filed by different people.  
24 I think certainly it would be useful to have that kind of  
25 decision. I think it might tend to obviate the need to return

1 TV Guide publishes 110 different editions of the magazine  
2 weekly each of which lists in detail from sign on to sign off  
3 the schedules of a number of television stations which serve  
4 the particular market.

5           These TV guides to which we subscribed which we now  
6 have so many boxes and containers of them that we required  
7 extra storage space were the source of information we used to  
8 determine which programs were carried by each of the stations  
9 that were subsequently carried as a distant signal by form  
10 three cable systems.

11           The second phase of this work involved the classifi-  
12 cation procedure to determination as to whether these pro-  
13 grams were network programs, syndicated programs, sports  
14 events or locally produced programs.

15           This is an extremely complicated procedure. There  
16 are sources which were helpful in terms of making these defini-  
17 tions. With respect to determining whether the programs were,  
18 programs distributed by NBC, CBS or ABC, we have subscribed  
19 to Nielsen Television Index.

20           The Nielsen Television Index published on a biweekly  
21 basis the listing of all programs scheduled to be transmitted  
22 by a network during a two-week period. We compiled from these  
23 Nielsen reports for each of the weeks, for any day, the names  
24 of the network programs broadcasted by NBC, CBS or ABC.

25           With respect to syndicated programs, the largest bulk

1 of them are listed in one of two publications called the BIB  
2 Source Book. BIB is Broadcasters Information Bureau. They  
3 publish these two books which are primarily designed for the  
4 sale of the syndicated programs to stations in the United  
5 States.

6 One book lists feature films available for syndica-  
7 tion, and the other was thousands of television series and  
8 television programs which were available for syndication.

9 We have these books and we also obtained from BIB a  
10 special computer tape which contained this information. This  
11 information with respect to syndicated programs were supple-  
12 mented with data from other sources.

13 For example, we also used the Nielsen report on syn-  
14 dicated programs which is a listing of all syndicated programs  
15 carried by five or more commercial stations during February  
16 and or November of a particular year.

17 We also had recourse to a book published by a reli-  
18 gious organization or organizations that listed syndicated  
19 religious programs. Other sources of information concerning  
20 that.

21 With respect to sports events as we define them, the  
22 baseball games or basketball games, the full events, the play-  
23 by-play. These were clearly set forth in the television guide  
24 magazine listings.

25 With respect to local programs and other types of

1 Subsequently, it was the Public Broadcaster Services, director  
2 of program research for three years and joined the motion  
3 picture association in December 1977.

4 Q I refer you to your statement which has been intro-  
5 duced in evidence in this proceeding. Was this statement  
6 prepared by you?

7 A It was prepared by me with the help of associates.  
8 I stand fully responsible for the full statement.

9 Q Are there any corrections or changes you wish to  
10 make in your statement?

11 A There are a few typographical misstatements which  
12 I would like to correct. On page three of my testimony, the  
13 third line of the second paragraph says by any of the 688  
14 largest cable system.

15 The correct number there should be 833. On page six,  
16 there is a small error. The number 865 is inadvertantly  
17 presented as 856.

18 CHAIRWOMAN BURG: Where?

19 THE WITNESS: On page six at the bottom of the page.  
20 The next to the last line on the second full paragraph. It  
21 should be 865 rather than 856. There are other small typo-  
22 graphical errors.

23 BY MR. SCHEINER:

24 Q With the noted changes, is your statement true and  
25 correct?

1 programs, we generally relied upon the descriptions contained  
2 in TV Guide. News when it was not network news was considered  
3 by us to be local programs.

4 Public affairs programs were similarly identifiable  
5 by the subject matter or the people involved. We attempted to  
6 interpret, to classify these programs as to local on the basis  
7 of the TV Guide listing; but there were ambiguities.

8 Q How did you handle the ambiguities?

9 A In connection with study A contained in my testimony,  
10 when we came across programs where we were not certain that  
11 they were local or syndicated, the station manager or station  
12 program manager was called and asked whether or not the  
13 program was local or syndicated.

14 Q Is it correct that again with respect to the study  
15 A that you relied upon the seven days? You utilized the seven  
16 days of the FCC's composite week?

17 A The 1978 composite week. Yes, sir.

18 Q Turning for a moment to study B, what source did you  
19 rely upon for the program information that you acquired?

20 A All of the programming information used in the study  
21 B is contained in an FCC annual programming report.

22 Q We will get into studies A and B particularly. But  
23 as a preliminary matter, Mr. Cooper, is it not correct that  
24 the method which you adopted is based upon an analysis of the  
25 amount paid by cable for the retransmission of programs of the

1 various groups of copyright owners?

2 A That is correct.

3 Q You have termed this analysis as time weighted by  
4 fee generated?

5 A Yes.

6 MR. SCHEINER: There has been a great deal of dis-  
7 cussion of that methodology. For this purpose, I would ask  
8 you to illustrate how it operates.

9 To assist the Tribunal and others, I will distribute  
10 a document entitled, "Calculation Of Fee Generated." I hand  
11 a copy to the witness and a copy to the commissioners, and the  
12 court reporter.

13 I trust that members of the Tribunal, the reporter,  
14 and others have before them the sheet bearing the title  
15 Calculation of Fee Generated by Distant Signal Carriage of  
16 TV Stations. The first line is cable system, Sherman, Texas.

17 BY MR. SCHEINER:

18 Q Do you have a copy before you, Mr. Cooper?

19 A Yes, I do.

20 Q By reference to this sheet, would you please explain  
21 and slowly how fee generated works?

22 A Yes. This is a page extracted from what we call our  
23 cable system data base. It relates to a system in Sherman,  
24 Texas which is the Ada-Ardmore market. The growth semi-  
25 annual receipts of this cable system for the first reporting

1 period were \$327,109.

2 It reported that it carried 2.5 distant signal  
3 equivalents with respect to signals carried from non-local  
4 stations carried. The gross payable for 2.5 DSE is 1.2 percent  
5 of gross.

6 Q Could you slow down the pace, please. This can be  
7 difficult on the first reading.

8 A The percentage of gross payable for the 2.5 distant  
9 signal equivalent is 1.2 percent of gross, and 1.2 percent of  
10 the \$327,109 is \$4,292. The royalty fee paid.

11 COMMISSIONER JAMES: Can I stop you there. How did  
12 you get the 1.3, 1.2?

13 THE WITNESS: This is based on statutory percentage  
14 which involved .675 percent for the first DSE and a .425  
15 percent.

16 BY MR. SCHEINER:

17 Q Would you slow it down, please. The Commission is  
18 trying to make notes on this rate.

19 A I was going to submit for the record a copy of a  
20 form three copy of account. I have one I can present to you.

21 COMMISSIONER JAMES: We have a blank form.

22 THE WITNESS: The form three system of accounts lists  
23 the formula for converting DSE to percentage of gross. The  
24 formula applicable at this level of DSE is .675 for the first  
25 DSE and .425 for each additional DSE.

1           Since we are dealing here with 2.5 DSEs, you have  
2 .675 and .425 and half of a .425. The total is 1.312.

3           MR. SCHEINER: Is it clear so far?

4           COMMISSIONER JAMES: Yes.

5           MR. SCHEINER: I wish he would slow up for my  
6 benefit.

7           THE WITNESS: It is a complicated situation. We  
8 have developed a table like this that converts the figures, the  
9 multiple figures from the form three statements and the formu-  
10 la in the statute to make this conversion.

11           Actually, these percentages are included in the form  
12 three statements. It is not our calculation. The Sherman,  
13 Texas system carried four distant signals. These are KXTX  
14 from Dallas, owned by the Christian Broadcasting Network; KTVT,  
15 an independent station for Fort Worth; KERS, an educational  
16 station in Dallas; KAUZ which is a network affiliated station  
17 in Wichita Falls, Texas, affiliated with CBS.

18           The carriage code as shown on the exhibit you have is  
19 D in every case. This indicates that each of these signals  
20 was carried on a full-time basis. Since it was carried on a  
21 full-time basis, the DSEs applicable to an independent station  
22 which are the first two listed is 1.0, a full DSE for each of  
23 those.

24           For the other two stations, the educational station  
25 and the network affiliated station, the figure is one quarter

1 of a DSE. The total DSEs is therefore 2.5 as shown there.

2 The next column merely indicates the percentage of  
3 total DSEs applicable to each of these signals. One point  
4 zero is 40.0 percent of 2.5. Likewise ten percent of 2.5 is  
5 .25 which is the DSE for KERA and KAUZ.

6 We took these percents of total DSEs applied that to  
7 the royalty fee \$4,292. Forty percent of \$4,292 is \$1,717  
8 which is therefore the fee generated by the carriage of KXTX  
9 as a distant signal by this cable system.

10 The same figure applies to KTVT, \$429 is the figure  
11 applicable to KERA and KAUZ. The total of the four figures in  
12 the fee generated column is \$4,292 which is the royalty fee  
13 paid.

14 Going beyond the exhibit but staying with these  
15 stations to illustrate the next step. The same process was  
16 applied with every one of the cable systems. The form three  
17 cable systems that we, the data from which we had compiled  
18 from the statements of account in the Copyright Office.

19 You may more than for curiosity be interested to  
20 know KXTX in Dallas we found was carried by 37 of the form  
21 three systems. It generated a total of \$86,557 in copyright  
22 fees.

23 Following the same procedure for the 37 cable systems  
24 that carried KXTX Dallas. KERA the educational station was  
25 carried by 23 systems. The form three systems. It generated

1 \$14,847 in copyright fees.

2 KAUZ, the next work affiliate station was carried by  
3 two systems in addition to Sherman a total of three systems a  
4 and generated a total of \$1,205 and copyright fees during the  
5 first reporting period of 1978.

6 KTVT was carried by 34 systems and generate \$86,728  
7 in copyright fees totally. I hope Mr. Scheiner that explains  
8 the beginning of the fee generated formula.

9 MR. SCHEINER: I would like to stop at this point  
10 before I continue with further direct to ask the members of the  
11 Tribunal whether there are any particular questions which you  
12 may have with respect to this illustrative example?

13 BY MR. SCHEINER:

14 Q Mr. Cooper, I refer you to page 20 of your testimony.  
15 You describe study A. I note that in study A your fee generat-  
16 ed methodology is applied to 29 stations; is that correct?

17 A That is correct, sir.

18 Q Would you please describe the basis for the selec-  
19 tion of the 29 station sample?

20 A We sought to develop a representational group of  
21 stations that could be used for the development of all of the  
22 data that were necessary to develop. We had for each of those  
23 stations to develop the data from TV Guide magazine and the  
24 analysis of the type of program and so forth.

25 On the cost basis, this is an enormous thing.

1 Therefore, we had to limit the stations. With respect to  
2 selecting the particular stations involved in this group, we  
3 took into account the proportion of copyright fees generated  
4 by each of the three major types of stations.

5 Network affiliated stations, independent stations  
6 and the educational station.

7 Q Would it be helpful to refer at this point to  
8 schedule 12 in your testimony?

9 A I have schedule 12 which shows on the upper half of  
10 this table if you have it. The breakout on the total data  
11 base of 650 stations with respect to how they divide between  
12 commercial network affiliation, non-commercial PBS stations.

13 For the purpose of developing the 29 station sample,  
14 the critical figure is the second one under the total data  
15 base number, the percent of total. If you will note, the fee  
16 generated by the 650 stations 19.6 percent was generated by  
17 commercial network affiliates.

18 Q What column are you reading?

19 A Percent of total under the total data base heading  
20 on schedule 20. The first figure on that reading across is  
21 100.0 under all types. The second is 19.6 under commercial  
22 network affiliate. Third, 4.8 on non-commercial PBS, and  
23 75.6 under independent stations.

24 We sought to develop a smaller representative number  
25 of stations representative in terms of geography. In

1 connection with network affiliates representing NBC, CBS, and  
2 NBC stations in proper order.

3 In connection with PBS stations, a proper represen-  
4 tation of universities and university controlled stations,  
5 major producing stations, and the stations that are under  
6 community interest. The lower part of schedule 12 analyzes  
7 the 29 station sample.

8 It shows that if you will look at the last line, the  
9 29 station figure includes 16 commercial network affiliates,  
10 five non-commercial ETV stations, and eight independent  
11 stations.

12 The percentage of the total fee generated by these  
13 29 stations distributed among these three groups is 19.2.5.4  
14 percent, and 75.4 percent respectively. The 19.2 percent for  
15 the 29 stations should be compared to the 19.6 percent in the  
16 total data base.

17 The 5.4 percent for PBS is 4.8 in the total data base  
18 and 75.4 percent for independent stations among the 29. The  
19 75.6 in the total independent group.

20 Q In terms of the composition of the 29 stations  
21 sample would you refer please to schedule 11 attached to your  
22 testimony?

23 A I have it, sir. That is a listing of the 29 stations  
24 with more detail. It shows the location. In the case of  
25 network affiliates, the network affiliation. The specific fee

1 generated by each of these stations over, among all form three  
2 cable systems and the percentage each stations' fee is  
3 representative of the total fee generated by the 29 stations  
4 collectively.

5           These figures the total figures under each group are  
6 comparable exactly comparable to the figure shown in schedule  
7 12. The eight independents generated \$714,000 in fees which  
8 is 75.4 percent of the \$946,000 total.

9           I have indicated with respect to the independents  
10 that two of them are specialty stations. One is a special  
11 language station KMUV and WNAX is licensed to the Christian  
12 Broadcasting Network.

13           In the commercial network affiliates, you will see  
14 the mission of NBC, CBS, and ABC stations and the non-commer-  
15 cial stations. We have also succeeded to the extent possible  
16 to provide the representation of different types of ETV  
17 station ownership.

18           Q     Sir, would you now turn to page 22 of your written  
19 statement. With particular reference to the last paragraph  
20 on that page. Would you please tell us what your analysis  
21 yielded for the three types of programs; syndicated programs,  
22 locally produced programs, and sports events?

23           In replying to my question if it is helpful and  
24 instructive to refer to schedule 13, would you do so as well?

25           The pending question, Mr. Cooper, is what did your

1 analysis yield for the three types of programs; syndicated,  
2 locally produced, and sports events?

3 A Our analysis of the schedules of these 29 stations  
4 during the composite week in '78 disclosed to us that 83.4  
5 percent of the total revenue, of the total copyright fees  
6 generated by these stations was related to syndicated programs.

7 CHAIRWOMAN BURG: Excuse me. Did you say 88.4?

8 THE WITNESS: 83.4. This is the lower part on page  
9 22.

10 CHAIRWOMAN BURG: Fine.

11 BY MR. SCHEINER:

12 Q The last paragraph, page 22 of the statements.

13 A 30,381 or 83.4 percent of the total. Locally pro-  
14 duced programs accounted for \$5,292 or 14.5 percent. Sports  
15 events for the balance of \$746 or 2.1 percent.

16 COMMISSIONER JAMES: Your locally produced programs,  
17 does that include public broadcasting?

18 THE WITNESS: The total here includes all public  
19 broadcasting programs. Schedule 13, if you will, refers to  
20 it. The top page of schedule 13 is the summary of the data  
21 for the composite week from study A.

22 The column of figures I just read to you is the one  
23 that is headed total 29 stations. There you will see the  
24 83.4 percent for syndicated programs and 14.5 percent for  
25 locally produced programs and 2.1 percent for sports events.

1           The column to the right of it deals with PBS special  
2 circumstances relating to the schedules of the five non-  
3 commercial ETV stations. We have segregated the programs that  
4 were distributed by PBS, by Public Broadcasting Service, to  
5 the stations associated with that service.

6           They are included in the first total as syndicated  
7 programs. In the second total, we have removed the PBS pro-  
8 grams. Likewise, the locally produced total of 14.5 percent  
9 includes instructional television programs that were broad-  
10 casted or transmitted by these five ETV stations.

11           We have deleted these ITV programs in the column to  
12 the right of that. The effect of that change is De minimis as  
13 you can see with the syndicated total including PBS as syndi-  
14 cated 83.4 percent excluding PBS, 83.3 percent.

15           The locally produced share including ITV is 14.5.  
16 Excluded is 14.4. The sports figure goes from 2.1 to 2.3  
17 percent.

18           BY MR. SCHEINER:

19           Q     Would you now turn please to page 23 of your state-  
20 ment where you discuss the analysis based upon 502 commercial  
21 stations for the FCC composite week for 1978. Is it correct,  
22 Mr. Cooper, that for this analysis you used the same cable  
23 data base for information concerning the royalty sums paid by  
24 cable?

25           A     Yes. That is correct.

1 Q Is it also correct that the source of the program  
2 data is the FCC television programming report for 1978 for the  
3 same 502 stations?

4 A Yes, it is.

5 Q What information does that FCC television programming  
6 report furnish us to enable you to classify programs in terms  
7 of program types?

8 A There are two basic items of information given for  
9 each station in the annual programming report. The first item  
10 is called total operating minutes. That is the total time  
11 that a station is on the air from sign on to sign off.

12 The second figures that was pertinent to study B is  
13 the percent locally produced. The percentage of operating  
14 time that is represented by locally produced programs  
15 exclusive of the commercials in those programs.

16 Q Does that report also enable you to arrive at a per-  
17 centage for syndicated programs?

18 A Yes. Knowing the percentage ---

19 Q Excuse me, sir. For this purpose, would you divide  
20 your answer into two parts. Let's first look at independent  
21 stations.

22 A For independent stations assuming that all of the  
23 programming is subject to copyright royalty, knowing the  
24 amount of operating time represented by locally produced pro-  
25 grams, the balance is syndicated programs. It should be noted

1 there is a small exception to that simplistic statement.  
2 Sports events produced by the local station originated by the  
3 local station should be included within the local total.

4 Sports event programs originated by other stations  
5 would be included in the other or what we would consider the  
6 syndicated portion of the total.

7 Q Is there a somewhat different analysis required for  
8 network affiliated stations?

9 A Yes, sir.

10 Q Would you explain that please?

11 A Before you can determine what the residual is for  
12 syndicated programs, it is necessary to subtract from the total  
13 operating minutes the time occupied by network programming.

14 Q How did you make that determination?

15 A On the basis of my experience at NBC and elsewhere  
16 and analysis of Nielsen Television Index reports. We  
17 estimated that 66.5 percent of all of the programming time on  
18 network affiliated stations is occupied by network programs.

19 Q Does it follow that the resulting figure or the  
20 difference of 33.5 percent would constitute all other programs?

21 A It would constitute the combination of locally  
22 produced and syndicated programs.

23 Q Is it correct that for study B you used two sources  
24 of information or data, the amount of time that different  
25 types of programs were broadcast by television stations as you

1 have explained it, and second the amount of money paid by cable  
2 television systems for the carriage of those stations as  
3 distant signals?

4 A That is correct, sir.

5 Q Did you relate those to sources of data by applying  
6 your fee generated methodology to the 502 stations?

7 A Yes, sir.

8 Q Would you now refer to page 25 of your statement.  
9 What does your analysis show for syndicated programs?

10 A Our data indicated that 16.047 percent of the total  
11 generated by the 502 stations is attributable to local pro-  
12 gramming. The balance 83.953 percent is therefore attributable  
13 to syndicated programming including syndicated sports.

14 Q That total of 83.9 percent, does it require some  
15 adjustment?

16 A Yes. As I indicated earlier, the locally produced  
17 percentage that is given in the annual programming report is  
18 exclusive of commercials. Whereas, the total operating  
19 minutes is inclusive of commercial materials.

20 It was therefore necessary to make some adjustment  
21 to in effect put the total operating minutes on a non-  
22 commercial basis in order to get the proper percentages.

23 Q What factor do you use in making that adjustment?

24 A We assuming that 12 minutes out of each hour or 20  
25 percent of the total operating minutes were used for commercial

1 advertising.

2 Q With that adjustment, what would the share of syndi-  
3 cated programming amount to?

4 A It would be 79.94 percent.

5 Q With the same adjustment, what would the share of  
6 locally originated programs be?

7 A Twenty point zero six percent. I should say ---

8 Q Is that six or one?

9 A If my eyes don't deceive me, I see a six.

10 Q It is rounded off.

11 A Twenty point one, if you will. Seventy-nine point  
12 nine, and 20.1 with the decimals carried three. The 20.06  
13 includes locally originated sports events, programming and the  
14 79.94 percent includes sports events programming originated  
15 by other stations.

16 Q Mr. Cooper, does your analysis make any provision  
17 for the carriage by cable of radio signals?

18 A No, sir.

19 Q Why not?

20 A The data is not contained in the statements of  
21 account that we analyzed.

22 MR. SCHEINER: I have no further questions on  
23 direct.

24 CHAIRWOMAN BURG: Commissioner Coulter.

25 COMMISSIONER COULTER: Mr. Cooper, there has been a

1 lot of emphasis in the MPAA testimony upon the value of the  
2 independent signals, programs on independent stations.

3 THE WITNESS: That is correct.

4 COMMISSIONER COULTER: On page 17 of your testimony  
5 here and what you have just ---

6 THE WITNESS: Incidentally, when I answered correct,  
7 I did not mean to imply that we placed more value on the pro-  
8 grams of independent stations than on non-independent stations.  
9 But we do place value on the programs of independent stations.

10 COMMISSIONER COULTER: Nevertheless according to the  
11 fee generated approach, the bulk of the fees in your analysis  
12 or according to your formula is generated by independent  
13 stations?

14 THE WITNESS: There is no question of that, sir.

15 COMMISSIONER COULTER: I don't know how to phrase  
16 it. Isn't it curious in your sample the vast majority you  
17 have chosen to make a sample from are your network affiliates?

18 THE WITNESS: In terms of numerical grouping. The  
19 effort we made, Commissioner, was to have the network affili-  
20 ated group, the total fees generated by the network affiliated  
21 group be representative of the fees generated by all network  
22 affiliates in the total data base.

23 You must recall in the United States there are  
24 currently approximately 1,000 television stations in operation.  
25 Of those, fewer than 100 are independent stations.

1           COMMISSIONER COULTER: I understand, but you are  
2 claiming 75 percent of your fees are generated by those hun-  
3 dred stations. You are drawing a sample where those stations  
4 constitute about less than a third of your sample.

5           THE WITNESS: They do account for the percentage of  
6 the fees generated by the 29 stations combined. It would have  
7 been possible, Commissioner, to draw this sample with one or  
8 two independent stations to account for this amount of funds  
9 relative to all of the 16 network affiliated stations and the  
10 non-commercial stations.

11           The fees generated by independent stations are so  
12 much higher for a variety of reasons. One of the reasons is  
13 the 1.0 DSEs allocated to independent stations. But the major  
14 reason that the independent is high in fee generated is that  
15 they are carried extensively by cable systems around the  
16 country.

17           COMMISSIONER COULTER: I still don't understand. I  
18 did not follow your reasoning. I don't understand if that  
19 constitutes the bulk of the programming carried and certainly  
20 the bulk of the fees generated.

21           How do you feel you can draw a proper analysis of  
22 them when they constitute such a small portion relative to  
23 your sample?

24           THE WITNESS: You mean eight stations?

25           COMMISSIONER COULTER: As opposed to 16 affiliates.

1 THE WITNESS: These eight stations each of which  
2 generated on an average of over nine percent of the total fees  
3 generated by the total. In comparison, the network affiliated  
4 stations each generated about one percent of the fees generated  
5 by the total.

6 Our goal was to get the total fees generated by  
7 each of the three groups to reflect the proportion of the  
8 fees generated in the total sample. In other words, we wanted  
9 not the number of stations, but the fees generated to be  
10 equivalent in the sample as they were in the universe.

11 COMMISSIONER COULTER: I don't know. All I can  
12 state is obviously the universe reflects, universe independent  
13 of compulsory licensing reflects a much higher proportion of  
14 network affiliates.

15 The only trouble is here we are concerned with a  
16 program affected by compulsory licensing.

17 THE WITNESS: The pertinency is getting a represen-  
18 tation of the total cable system data base with respect to the  
19 fees paid by each of these three groups of stations.

20 The number of stations that were involved in each  
21 group is really not pertinent to the goal of getting a quote,  
22 if you would, based on the percentage of totals in each group.

23 Actually, we sought to get a fair representation of  
24 a number of stations in each one of the groups so we could have  
25 this analysis in terms of program content on a geographically

1 dispersed network, network dispersed type arrangement.

2 As I indicated, this same kind of figures could have  
3 been developed by a sample that would use only two independent  
4 stations rather than eight. It would still have produced a  
5 quota, but it would not have produced a geographic dispersion  
6 and the other kinds of information we sought.

7 COMMISSIONER COULTER: Back to this dead horse once  
8 more. On your schedule 12 when simply you say 19 percent of  
9 the fees, you have 16 stations and for 75 percent of the  
10 stations you have eight stations.

11 THE WITNESS: If you look at the bottom figures on  
12 the network affiliates on the top, you have six times as much  
13 commercial and independent stations in the total sample. Yet,  
14 those six times as many, the 449 produced 97 percent of the  
15 revenue.

16 This is what is produced by the 16 stations and net-  
17 work affiliated stations among the 29 stations in the  
18 subsample.

19 COMMISSIONER COULTER: When you speak of carriage by  
20 network affiliates, is there any syndicated? What is meant  
21 normally in the context of these proceedings local programming  
22 and sports, local news and things like that?

23 Are there any instances of syndicated programs that  
24 have not been transmitted by the network? Any cases of syndi-  
25 cated programs transmitted by network affiliates that they

1 have not gotten through the network?

2 THE WITNESS: Syndicated programs are never by net-  
3 work. They are by definition. Network affiliates use syndi-  
4 cated programs extensively.

5 COMMISSIONER COULTER: Then, the percentage on page  
6 13 ---

7 THE WITNESS: Schedule or page?

8 COMMISSIONER COULTER: Page 13. The syndicated pro-  
9 gramming you are alluding to carried by the network affiliate  
10 is just what you said?

11 THE WITNESS: Series you were responsible for or  
12 motion picture.

13 COMMISSIONER COULTER: It is not transmitted by the  
14 network by definition?

15 THE WITNESS: Yes, sir.

16 COMMISSIONER COULTER: According to your sample in  
17 both your sample survey and according to the figures you use  
18 from the FCC survey, you make the distinction between the  
19 quantity of syndicated programming carried on network affili-  
20 ates and that carried on independents.

21 Here, it is six to 20?

22 THE WITNESS: Yes.

23 COMMISSIONER COULTER: That reflects the relevant  
24 programming in both instances according to different studies?

25 THE WITNESS: Yes, sir.

1           COMMISSIONER COULTER: When the cable operators pay  
2 into the fund, the reason that they only pay a quarter of net-  
3 work signals is because it is felt that everything else, the  
4 copyright question, is eliminated because it is transmitted  
5 nationwide; isn't that correct?

6           Only one quarter of that signal is not covered by  
7 copyright?

8           THE WITNESS: I think Mr. Hadl testified prior to  
9 me that the statute related to the amount of viewing time to  
10 programs of secondary distributions of non-network programming  
11 on the two types of stations.

12           COMMISSIONER COULTER: I understand that. My  
13 question is the reason for that beyond the question of rela-  
14 tive viewing time is that one instance a quarter of the programs  
15 you have copyright liability on the compulsory license, and  
16 three-quarters of the programs you do not because the  
17 copyright question is eliminated?

18           THE WITNESS: I don't want to nitpick. It is not  
19 a quarter of the programs or all of the programs. It is  
20 essentially the programs that represent 75 percent of the  
21 viewing on network affiliated stations.

22           These are the programs that produce that amount of  
23 viewing. They are programs obtained from a network source.

24           COMMISSIONER COULTER: There is no copyright  
25 liability?

1 THE WITNESS: There is no copyright liability.

2 COMMISSIONER COULTER: I am having trouble phrasing  
3 this. My question is if the percentage in your study reflects  
4 the relative amount of programming between networks and network  
5 affiliates and independents, how then and would you say ---

6 Let's put it differently. A syndicated program  
7 carried by a network affiliate or a syndicated program carried  
8 by an independent as far as its value to the cable operator  
9 is all the same? Would you agree with that?

10 THE WITNESS: My answer is yes.

11 COMMISSIONER COULTER: The usage of this percentage  
12 one to one quarter only relates to the question of copyright  
13 liability as it concerns the cable operator? Is that correct?

14 THE WITNESS: The cable operator's liability in  
15 terms of computing the fee?

16 COMMISSIONER COULTER: Exactly.

17 THE WITNESS: It is based on the one and a quarter  
18 levels. Yes, sir.

19 COMMISSIONER COULTER: Say you have a syndicated  
20 program. It is this probably would not occur, but it is  
21 transmitted. The same program is a signal from an independent  
22 and a signal from a network affiliate.

23 Would you say that in one case that program is worth  
24 four times as much and in one case it is worth one?

25 THE WITNESS: Depending on the cable system that

1 receives it and how much that cable system is paying for the  
2 carriage of that signal. If in general, the same program  
3 whether it originates from an independent station or originates  
4 from a network affiliated station carried on a cable system,  
5 it merits exactly the same value from a copyright standpoint.

6 It does not make any difference on that cable system  
7 whether or not the signal originated with an independent  
8 station or the station originated it with a network affiliated  
9 station.

10 COMMISSIONER COULTER: The percentages that you have  
11 here indicated by both study A and study B reflect relative  
12 performance, relative carriage of programs. It strikes me  
13 that you have produced a double factor in there.

14 In using the differences as applies to levying the  
15 fee on the cable operator and at the same time inserting, in-  
16 jecting the difference of the programming. You have in  
17 effect done the same thing twice?

18 THE WITNESS: Commissioner Coulter, you have put  
19 your finger on the thing. Hopefully, you are going to save us  
20 a lot of time in the future. That is a miscomprehension of  
21 the fee generated system that we are employing. That is, when  
22 we are determining.

23 The fee generated system that we worked out is used  
24 only to determine the total fees generated by the carriage of  
25 a television station by cable systems. That is the last time

1 time we used the .25, the 1.0 or the big reason we got into the  
2 fee generated.

3 COMMISSIONER COULTER: I will have to interrupt you.  
4 I am sorry. I don't think that is true. It has a huge impact  
5 later on when you apply the percentages of programs carried to  
6 the fees generated. Those fees generated are heavily influenc-  
7 ed by that factor.

8 THE WITNESS: I don't believe so, sir. May I go  
9 through the explanation? It seems to be the heart of a lot of  
10 misunderstanding around here. We used the 1.0, the .25 and  
11 whatever other fractions there were of distant signal equiva-  
12 lents to the total DSEs carried by a cable system on which a  
13 copyright fee was determined merely to establish a fee generat-  
14 ed total for each television station. Okay?

15 Once that fee generated was determined, every eli-  
16 gible program unit on those stations were counted equally  
17 regardless of whether there was no longer any need for going  
18 to a .25 or 1.0 or any other fraction.

19 The fee generated by a network affiliated station  
20 was \$1,000 and we came across ten hours of programming. Each  
21 hour of programming would have a value of \$100.

22 If the fee generated by an independent station was  
23 \$4,000 and that station carried 40 hours of programming eli-  
24 gible for the division, then the fee per hour 40 into 4,000  
25 would again be \$100. We are no longer concerned with a .25 or

1 the 1.25 or the other fractions involved.

2 COMMISSIONER COULTER: You are because there is a  
3 fundamental body of your formula. According to that, you  
4 could have the same syndicated program carried on an indepen-  
5 dent that would be worth four times as much as the same program  
6 carried on a network affiliate. That is according to your  
7 arithmetic.

8 THE WITNESS: According to my arithmetic, sir, the  
9 fee should be the same.

10 COMMISSIONER COULTER: I don't see how it would be.

11 THE WITNESS: Let's take Gone With The Wind. It  
12 seems to be the popular program. Assuming we dealt with a  
13 network affiliated station and an independent station, on the  
14 basis of the fee generated calculations we have talked about  
15 before, we have concluded that the independent generated  
16 \$4,000 in fees and the network affiliated station \$1,000 in  
17 fees.

18 Now, let's go into something rather practical. That  
19 is to say in the period of time that the network affiliated  
20 station had 50 eligible hours, 50 non-network hours, and the  
21 independent had 200 non-network hours. That is a net ratio  
22 of one to four or thereabouts.

23 The fee per hour in both cases would be \$20. Are  
24 you with me at that point?

25 COMMISSIONER COULTER: No.

1 THE WITNESS: I have 50 hours on the network affili-  
2 ate. A thousand dollars in fee generated. So, the fee per  
3 hour was \$20.

4 On the independent, I have had 200 hours of program-  
5 ming. It is \$4,000 in fees. Therefore, the fee per hour is  
6 also \$20. I now have both the independent and the affiliated  
7 station carried four hours of Gone With The Wind.

8 The four hours of Gone With The Wind on network  
9 affiliated stations is valued at four times \$20 per hour or  
10 \$80. Gone With The Wind carried on the independent station is  
11 four hours times \$20. It is \$80.

12 So even though I have started with a four to one  
13 differential in terms of the fee generated, I have started with  
14 four to one differential in terms of the hours of programming  
15 that is subject to copyright, I end up in both instances with  
16 the same copyright fee earned for the same program.

17 COMMISSIONER COULTER: I will not waste everybody's  
18 time by going over this.

19 THE WITNESS: It is not a waste of time. It is a  
20 difficult one.

21 COMMISSIONER COULTER: The fee generated neverthe-  
22 less in the instance of the independent is valued at four times  
23 times.

24 MR. SCHEINER: Commissioner, we have an example  
25 here which is responsive to your line of questions. If it is

1 not inappropriate, it might be helpful at this point in the  
2 record to put some additional questions to the witness which  
3 may clarify this. May I do that?

4 COMMISSIONER COULTER: Certainly. With the indul-  
5 gence of my colleagues, I would like to pursue this, if I may.

6 MR. SCHEINER: I defer to counsel at this point who  
7 has worked out illustrative numbers which we will put to Mr.  
8 Cooper. Thank you for your dispensation, but because I think  
9 this issue is the crux of the misunderstanding with respect to  
10 the fee generated concept that we have used, I think it is  
11 very important to make this clear.

12 BY MR. ATTAWAY:

13 Q I direct the attention of the Tribunal and Mr. Cooper  
14 to the calculation of fee generated by distant signal carriage  
15 by TV stations. We did not have an exhibit number for it.

16 A Sherman, Texas.

17 Q Mr. Cooper, if you will look at the line for KXTX  
18 and if you were to insert another column in this table and  
19 that column were hours of non-network programs broadcasted, I  
20 think it would serve to illustrate our fee generated concept  
21 a little bit better.

22 Mr. Cooper, would it be reasonable an assumption to  
23 say that KXTX is an independent station might broadcast 24  
24 hours a day?

25 A Approximately, yes. Twenty to 24 hours. Twenty-four

1 I would say.

2 Q Although I don't know for sure, if we make the  
3 assumption it broadcasted 24 hours a day and you divide the 24  
4 hours that it broadcasted by the fee generated, one gets a  
5 fee generated per hour.

6 COMMISSIONER COULTER: It is that division that  
7 causes me my problems. That is what Mr. Cooper did before.

8 MR. ATTAWAY: I hope I can show there is no discre-  
9 pancy in an hour broadcasted by an independent and an hour  
10 broadcasted by an affiliate.

11 BY MR. ATTAWAY:

12 Q Did you make that calculation?

13 A It is \$71.54 per hour.

14 Q Now, let's go down to KAUZ. What would be the typi-  
15 cal number of hours, total hours broadcasted by an affiliated  
16 stations?

17 A Probably 18 hours.

18 Q Of that 18 hours, approximately how many hours would  
19 be non-network programming for which royalties are paid?

20 A About one-third of that which would be six.

21 Q Would you then divide the six hours of non-network  
22 programming broadcasted by KAUZ into the total fee generated  
23 by KAUZ on the Sherman, Texas cable system?

24 A I have done so.

25 Q What is the result?

1           A       It is \$71.50.

2                   MR. ATTAWAY: I think that demonstrates that when  
3 you factor in the very important fact that independent sta-  
4 tions broadcast on the average more hours per day and also  
5 factor in the percentage of the total programming broadcast  
6 by an affiliated station which is non-network programming and  
7 for which royalty fees are being paid, under our methodology  
8 of fee generated, we are not in fact discriminating as between  
9 network affiliated stations and independent stations.

10                   In fact, this is the very consideration that  
11 Congress had in mind when it devised the 1.0 DSEs for inde-  
12 pendent stations and the .25 DSEs for network affiliated sta-  
13 tions to form the basis of payments made by cable systems.

14                   I hope that has been helpful. I thank you for your  
15 indulgence.

16                   COMMISSIONER COULTER: I already spoke to Mr. Hadl  
17 about the question of handling music. Mr. Cooper, would your  
18 answers be similar to his?

19                   THE WITNESS: I am not competent to discuss the  
20 music situation.

21                   COMMISSIONER COULTER: The fact that they are owed  
22 some royalties is not in dispute. At the end of your studies,  
23 you come up with various percentages none of which would  
24 include music. Would it be fair to say this percentage would  
25 have to come out of your percentages somewhere?

1 THE WITNESS: I think Mr. Hadl's response was off  
2 the top. It would seem that would be the way it would be  
3 derived.

4 COMMISSIONER COULTER: You would agree with his  
5 assessment?

6 THE WITNESS: I would not disagree with him.

7 COMMISSIONER COULTER: It was mentioned earlier this  
8 morning I believe Mr. Valenti said ---

9 THE WITNESS: I would not disagree with him, either.

10 COMMISSIONER COULTER: The way the Sports have  
11 approached the question while not similar to yours was never-  
12 theless a plausible approach.

13 Given your percentages, would you anticipate that a  
14 new factor could be introduced to the equation you have devel-  
15 oped to accommodate the concept that Sports has developed?

16 THE WITNESS: I don't know why a number formula to  
17 accommodate the Sports methodology, the Nielsen methodology on  
18 sports, has to be developed for sports.

19 COMMISSIONER COULTER: You would then stick with  
20 your assessment in your schedule 13?

21 THE WITNESS: I believe there is virtually, the  
22 difference between our figures and the figures contained in  
23 that study submitted by Sports which is De minimis. We stay  
24 with 83 percent. That is the figure we developed to begin  
25 with. The adjustment to just under 80 percent seems to be

1 a valid one also for consieration as far as our study.

2 COMMISSIONER COULTER: I ma talking about Sports.

3 The amounts you give sports in schedule 13 ---

4 THE WITNESS: In study A?

5 COMMISSIONER COULTER: Yes.

6 THE WITNESS: The only place is in study A. I would  
7 nto alter that figure. I think our figure with respect to the  
8 percentage of time on a fee generated basis by sports on  
9 representative stations is quite accurate.

10 COMMISSIONER COULTER: I thank my colleagues for  
11 indulging me. I would like to ask you to explain your calcu-  
12 lations on page 24. The second paragraph. Perhaps we can  
13 start with the illustration.

14 THE WITNESS: The paragraph below that. To illus-  
15 trate, KABC Los Angeles reported that 16.1 percent of its  
16 total operating time was locally produced programming. We want  
17 to adjust that 16.1 percent, increase it to reflects the fact  
18 that the total operating time includes commercials.

19 While the 16.1 percent does not. So, what we have  
20 done is divide the 16.1 percent by 33.5 percent. That is the  
21 non-local residual per our estimate. We estimate at 66.5  
22 percent.

23 COMMISSIONER COULTER: Wait a second. The 33 percent  
24 is somehow related to commercials?

25 THE WITNESS: The 33.5 percent is our estimate of the

1 non-network time.

2 COMMISSIONER COULTER: That is non-network time.

3 You have local programming which is 16 percent?

4 THE WITNESS: That is correct.

5 COMMISSIONER COULTER: Why are you dividing it by  
6 non-network time, are synonymous or not necessarily synonymous.  
7 Certainly, non-network time certainly embraces local  
8 programming.

9 THE WITNESS: It also includes other types of  
10 programs.

11 COMMISSIONER COULTER: I don't understand the divi-  
12 sion for the division.

13 THE WITNESS: The reason is representative of the  
14 percentage of locally produced programs are of total non-  
15 network time. The 16.1 percent represents the percentage lo-  
16 cally produced programs are of total operating time. Network  
17 time and non-network time.

18 We now want to determine what the 16 percent is just  
19 of the programs eligible to share in the copyright fee.

20 COMMISSIONER COULTER: Thank you.

21 CHAIRWOMAN BURG: Mr. Scheiner, I am going to  
22 recess and carry over until tomorrow morning. I am sure there  
23 will be additional questions for this gentleman of some dura-  
24 tion. We will meet tomorrow morning in the Postal Rate  
25 Hearing Room at 2000 L, room 500 at 10 o'clock in the morning.

1 (Whereupon, at 4:00 p.m. the hearing recessed, to  
2 reconvene at 10:00 a.m. the next day.)  
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