

10
JAN 31 1980 tCO

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

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

MEMORANDUM OF THE JOINT
SPORTS CLAIMANTS IN RESPONSE
TO THE TRIBUNAL'S
DECEMBER 19, 1979 NOTICE

Major League Baseball, the National Basketball Association, the National Hockey League and the North American Soccer League ("Joint Sports Claimants"), by their attorneys, submit this memorandum in response to the Copyright Royalty Tribunal's request for comments on the following subjects:

- 1) The amount of time, number of witnesses and general identification of studies or other exhibits to be required in the presentation of claimants' cases.
- 2) Recommendations concerning the form and timing of submissions by claimants of the written statement of their direct cases.
- 3) Identification of matters requiring the production of additional information or claim justification from other claimants.

- 4) Identification of any subjects that require determination by the Tribunal prior to the commencement of the evidentiary hearing.
- 5) Recommendations concerning the conduct of the evidentiary hearing including possible division of the hearing into specific phases.

See 44 Fed. Reg. 75201 (December 19, 1979).

I. THE AMOUNT OF TIME, NUMBER OF WITNESSES AND GENERAL IDENTIFICATION OF STUDIES AND OTHER EXHIBITS TO BE REQUIRED IN THE PRESENTATION OF THE JOINT SPORTS CLAIMANTS' DIRECT CASE.

As the Tribunal is aware, Congress did not provide it with specific guidance concerning distribution criteria, but instructed it to "consider all pertinent data and considerations presented by the claimants." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 97 (1976) ("House Report"). In determining what is "pertinent," the Tribunal must, however, be guided by Congress' conclusion that each CATV system is required to pay royalties because

"the retransmission of distant non-network programming causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also

of direct benefit to the cable system
by enhancing its ability to attract
subscribers and increase revenues."
House Report at 90.

The role of the Tribunal is, therefore, to ascertain how great a "benefit" each claimant's programming is to the CATV system "in attracting subscribers and increasing revenues." The Tribunal must, in other words, act as a surrogate for the marketplace and determine how the cable industry would have spent its royalty dollars if it had been required to bargain in the marketplace for the claimants' programming.^{1/}

To assist the Tribunal in making this marketplace judgment the Joint Sports Claimants expect to present

^{1/} The NAB, of course, has improperly suggested that the Tribunal ignore that portion of the Act's legislative history quoted above and distribute royalties based solely upon the bulk amount of time occupied by each claimant's programming without regard to the value of this programming to CATV systems. It is interesting to note that a number of broadcaster-claimants, recognizing the need for the Tribunal's making a marketplace judgment, apparently do not agree with the notion advanced by the trade association which purports to represent them. For example, the licensee of Stations KFDM-TV (Beaumont, Texas) and WFAA-TV (Dallas, Texas) has justified its claim for royalties solely on the basis of the "relative popularity of [KFDM-TV and WFAA-TV] copyrighted programs in relation to the copyrighted programs of other stations carried as secondary transmissions by royalty-paying cable systems." See Claim Nos. 1 and 2 (filed July 9, 1979). Similarly, Station KOAM-TV (Pittsburg, Kansas) has attempted to justify its claim on the basis of the audience which its local programming has attracted. See Claim No. 3 (filed July 10, 1979).

approximately five witnesses from within the cable and sports industries who will testify as to the paramount value of sports programming to CATV systems. Their testimony will be confirmed by a variety of documentary material. In addition, the Joint Sports Claimants intend to present two or three expert witnesses and their studies. The first study will demonstrate that the non-network programming of the Joint Sports Claimants attracts a substantially greater average audience in distant CATV households than does the programming of any of the other claimant groups. The second will demonstrate that more viewers subscribe to CATV because of distant signal sports programming than because of the distant signal programming presented by any other claimant group.

In order to establish their right to receive royalties, the Joint Sports Claimants will also introduce exhibits which: 1) identify the specific programming for which they are claiming; 2) identify the television signals on which this programming was broadcast; and 3) establish that these signals were carried by distant CATV systems.

The Joint Sports Claimants believe that their direct case can be presented in approximately three days. The full

time occupied by sports witnesses may vary depending upon the nature and length of the questioning from the Tribunal and other parties.

II. THE FORM AND TIMING OF SUBMISSIONS BY CLAIMANTS OF THE WRITTEN STATEMENT OF THEIR DIRECT CASES.

Each claimant, either individually or through its authorized representative, should be required to submit prior to the evidentiary hearing a statement which --

- Identifies by name the specific claimant or claimants who have authorized the filing of this statement;
- Identifies the name of the specific programs for which royalties are being sought;
- Identifies the television station or stations on which each of these programs was broadcast during 1978;
- Establishes copyright ownership of the programming for which a claim is being made;
- States, and explains in precise terms the basis for, the share of the royalty pool being claimed;
- Sets forth summaries of any direct testimony to be presented at the hearing;
- Includes copies of any studies, exhibits or documents to be introduced at the hearing.

No claimant should be permitted to present any evidence except that specified in these statements. And no royalties should be distributed for any programming not identified in these statements. Following the submission of the prehearing statement, the Tribunal should conduct a prehearing conference. The purpose of this conference would be to consider and resolve any issues raised by the prehearing memoranda and to establish an orderly schedule for the hearing. Matters to be considered would include order of presentation; stipulation of facts; objections to proposed evidence.

With respect to timing, the Joint Sports Claimants can comply with any reasonable schedule established by the Tribunal. However, the Joint Sports Claimants are aware that the Tribunal currently has the following schedule of hearings:

| | |
|----------------|--|
| April 1, 1980 | Commencement of Section 116 Rate Adjustment Hearing |
| April 28, 1980 | Commencement of Section 115 Rate Adjustment Hearing |
| June 17, 1980 | Commencement of Section 111 Rate Adjustment Hearing |

It would appear from the foregoing that the Tribunal will be preoccupied with rate adjustment hearings throughout the Spring and, therefore, that the only extended period which can be devoted to the CATV distribution evidentiary hearing would come at the conclusion of the Section 111 Rate Adjustment Proceeding. Accordingly, the Joint Sports Claimants would propose that the CATV evidentiary hearing commence promptly upon the conclusion of the Section 111 rate proceeding in mid-June. The prehearing statements could be submitted and the prehearing conference conducted prior to the commencement of the Section 111 rate proceeding.

III. MATTERS REQUIRING THE PRODUCTION OF
ADDITIONAL INFORMATION AND CLAIM
JUSTIFICATION FROM OTHER CLAIMANTS.

The nature of the additional information and claim justification which should be produced by claimants is set forth in the discussion above concerning the form of the pre-hearing memorandum. While the need for all of this information should be indisputable, it is perhaps important to underscore the several reasons for requiring the claimants to identify their programming and the stations broadcasting it and to establish their copyright ownership of this programming.

First, compensation is paid under Section 111 of the Copyright Revision Act only for specific, identifiable copyrighted programming carried by cable on a distant signal basis. No claimant is entitled to royalties simply on the basis of an assertion that it is associated in some way with some amorphous class of programming, such as "movies" or "local programming". It is equally inadequate for a claimant to do no more than to make unsupported allegations that it is the copyright owner of programming which CATV systems imported.^{2/}

Second, the Copyright Act requires the Tribunal to distribute the royalty fees among the actual -- not potential -- claimants. The Tribunal must, we submit, determine how the CATV would have spent its royalty dollars for the programming properly claimed -- not all programming. While the parties have theories as to, for example, the amount of time occupied by all movies and syndicated programs, a review

^{2/} Certainly, there is no need for such a precise record if the claimants can agree as to a proper distribution. However, if the royalties are to be distributed pursuant to a litigated proceeding subject to appellate review, it is elemental that the record must establish each claimant's entitlement to receive compensation under the standards set forth in the Copyright Revision Act.

of the claims filed reveals that no claim has been made for a great deal of this time. Indeed, only 40% of the over 700 commercial television stations and less than 4% of all radio stations have actually filed claims for 1978 royalties; fewer than 50 of the over 500 movie and syndicated programming producers and distributors listed in the 1978 Broadcast Yearbook have done the same.^{3/}

3/ See "Statement of Jack Valenti, President of Motion Picture Association of America, Inc., on Cable Retransmission of Copyrighted Programming" Before the House Subcomm. on Courts, Civil Liberties and the Administration of Justice at 8 (Nov. 26, 1979):

"[T]he syndication market is not dominated by 'Hollywood Giants' but is the route taken by hundreds of small independent production companies who seek a share of the \$500 million syndication market. . . ."

The A.C. Nielsen Company reported that in November 1978, there were 307 syndicated series each being transmitted by five or more television stations. These programs were being offered by 150 different syndicators, or an average of two series per syndicator. This 'Report on Syndicated Programs' indicates that 98 of the 150 syndicators were distributing only one series."

The 1978 A.C. Nielsen Report referred to in Mr. Valenti's Statement discloses that, of the 307 syndicated programs being televised in 5 or more markets, 178 or 58% were syndicated by persons who did not file royalty claims. It is, of course, not even clear whether the syndicators who did file claims actually owned the copyright in the remaining 129 programs or whether the copyright was owned by some other party, such as the program producers, who did not file.

In contrast, all of the professional baseball, basketball, hockey and soccer teams have filed for their programming. Only by requiring the parties to actually identify their programming can the Tribunal evaluate what portion of the overall program categories have actually been claimed.

Third, identification of programming will disclose, and thereby permit resolution of, any instances of conflicting claims to programs.^{4/} This will ensure that the Tribunal does not inadvertently provide multiple compensation for the same programming, to the detriment of other claimants.

We believe, finally, that not only is this information essential to establish a proper record for distribution, but also that it can be compiled without undue problems and that MPAA's prior allegations of undue burden are over exaggerated, unsupported and misleading.

^{4/} For example, as noted in the past, the Joint Sports Claimants believe they are entitled to know which -- if any -- of the stations carrying their telecasts are claiming royalties attributable to these telecasts.

During the October 11, 1979 conference the MPAA advised the Tribunal that it would cost "\$5 million" to identify the movies and syndicated programming for which they are claiming and that "47,123,325 bits of information" would have to be produced. Transcript of Oct. 11, 1979 Hearing at 32-34. While the basis of the \$5 million estimation remains a mystery, the "facts" upon which the 47,123,325 calculation are based, as set forth in the MPAA document first surfaced at the October 11 conference, demonstrate rather clearly that the MPAA has completely misunderstood what basic information must be supplied. Contrary to the representations suggested in the MPAA document, no one has asserted that claimants must identify each CATV system which carries each episode of each program on each station. The Joint Sports Claimants submit only that, in order to establish a right to compensation, each claimant must:

- 1) Provide the names of the copyrighted works for which it is seeking compensation, e.g., "10 o'clock news," "The Lawrence Welk Show." Certainly this will not be a very difficult task for those syndicators who claim royalties attributable to program series since, as the President of the MPAA pointed out, most syndicators distribute only one series. See note 3 supra. Nor will this be a burdensome task for any other party. It is, in fact, inconceivable that any broadcaster, syndicator,

producer or other party does not know and cannot easily list the names of the programs for which it is claiming compensation.

- 2) Identify the television stations on which this programming was broadcast during 1978. This should not be a formidable task for broadcasters. And, again, it is simply inconceivable that the copyright owner of syndicated programming does not know the identity of the stations with which it has contracted to televise its programming. Furthermore, by reviewing the statements of account submitted by CATV systems to the Copyright Office, the MPAA has already developed a list of all stations which CATV systems stated were carried on a distant signal basis. Obviously, if the claimant identifies the stations to which the programming has been licensed, a simple reference to this list can establish whether and to what extent that programming has been carried on a distant signal basis.^{5/}
- 3) Establishes copyright ownership of this programming. In the "Comments of Motion Picture Association, Inc." (filed March 15, 1978) the MPAA explained, at page 13, that copyright owners of television films can easily establish copyright ownership by submitting the registration certificates issued for each film by the Copyright Office.

^{5/} At the October 10 hearing, counsel for the MPAA explained that the requested identification of programs and stations had "relevance or probative value" only if it were "related to the carriage of cable systems." Transcript at 40. For this reason, the MPAA apparently went through the process of multiplying each program episode carried by CATV systems on a daily basis by the nearly 4,000 CATV systems in order to arrive at its figure of 47,123,325. As noted above, this is wholly unnecessary to establish the "relevance" to which counsel referred -- given the list of stations which the MPAA has already prepared.

In short, it is fully understandable why certain claimant groups urge the Tribunal not to require identification and establishment of copyright ownership of the programming claimed; such a showing would illustrate beyond any doubt that these groups represent a significantly smaller share of eligible programming than they claim to represent. But, as discussed above, it is simply misleading to raise the spectre of undue burden as a reason for not requiring the necessary identifying information. Indeed, certain claimants have already provided this information to the Tribunal. See e.g., excerpts of Claim No. 314, filed August 1, 1979 by Metromedia Producers Corporation. (Attachment 1 hereto.)

IV. IDENTIFICATION OF ANY SUBJECTS THAT
REQUIRE DETERMINATION BY THE TRIBUNAL
PRIOR TO THE COMMENCEMENT OF THE
EVIDENTIARY HEARING.

The Joint Sports Claimants submit that there are no additional issues that the Tribunal must or should decide at this time. As explained in their Response to the Tribunal's October 17, 1979 Notice, there are a number of unresolved matters with respect to the entitlement of various claimants to the royalties they have sought. These

issues, however, cannot be resolved and indeed, fully identified until the claimants actually identify in their prehearing statement the programming for which they are claiming; establish copyright ownership of this programming; and explain the basis for their claims. The necessary arguments can then be presented to the Tribunal during the course of the evidentiary hearing, and resolved by the Tribunal in its final distribution order.^{6/}

V. CONDUCT OF EVIDENTIARY HEARING.

The Tribunal has, of course, already established general procedures in its rules to govern the conduct of the evidentiary hearing. The applicable provisions of the Administrative Procedure Act will also define the procedures to be followed during this hearing. In addition, the Joint Sports Claimants would recommend the following:

First, as suggested above, the Tribunal should conduct a pre-hearing conference at least one week before the

^{6/} As the Tribunal observed in its recent order denying the NAB's motion for stay:

"We believe that consideration of any underlying legal issues will be facilitated on review if they are examined in the context of a specific application to the claims being adjudicated."

evidentiary hearing to consider such matters as order of proof during the evidentiary hearing; stipulations and objections to evidence, etc.

Second, as also suggested above, no claimant should be permitted to present witnesses or offer evidence during its direct case except as identified in its prehearing statement.

Third, the claimants should be permitted to present both a direct case and a rebuttal.

Finally, claimants with coincident interests should be encouraged to designate a single representative to participate in the proceeding on their behalf.^{7/} Consistent with Section 302.2 of the Tribunal's Rules, these persons should possess specific authorization from the claimants to represent them. Furthermore, where a claimant has designated a representative, the claimant should not,

^{7/} This is consistent with Section 301.53(c) of the Tribunal Rules, which encourages claimants to designate representatives for purposes of examination and cross-examination of witnesses during the hearing. There is, however, no reason to limit the representative's role to this singular aspect of the proceeding.

absent good cause, be allowed to duplicate or to supplement the representative's participation in the proceeding.

Respectfully submitted,


James F. Fitzpatrick

David H. Lloyd

Robert Alan Garrett

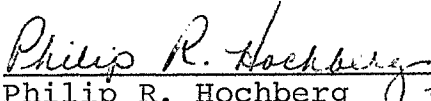
Vicki J. Divoll

ARNOLD & PORTER

1229 Nineteenth Street, N.W.

Washington, D.C. 20036

- and -


Philip R. Hochberg

VORYS, SATER, SEYMOUR & PEASE

1800 M Street, N.W.

Suite 800 South

Washington, D.C. 20036

Attorneys for the Joint
Sports Claimants

Of Counsel:

Alexander H. Hadden
Office of the Commis-
sioner of Baseball
15 West 51st Street
New York, New York 10019

Date: January 31, 1980

MV METROMEDIA, INC.
1111 WISCONSIN AVE. N.W.
WASHINGTON, D.C. 20036
TEL. 202 244-8151

July 31, 1979

Copyright Royalty Tribunal
1111 20th Street, Northwest
Washington, D.C. 20036

Re: Metromedia Producers Corporation
Claim for Cable Compulsory
License Fees.

Gentlemen:

Metromedia Producers Corporation ("MPC"), pursuant to Section 302.2 of the Tribunal's Rules, 37 C.F.R. §302.2, submits its claim for compulsory license fees for secondary transmissions of broadcast signals by cable systems during the period July 1 through December 31, 1978.

I.

Identification of Claimant

MPC is a wholly-owned subsidiary of Metromedia, Inc., with principal offices at 5746 Sunset Boulevard, Los Angeles, California 90028.

II.

Supplemental Claim Information

The following programs* were licensed by MPC to television stations for broadcast during the last six months of 1978.

| <u>Program</u> | <u>Primary</u> | <u>Secondary Transmission**</u> |
|------------------|----------------|---------------------------------|
| That Girl | KTTV | A |
| Premium Packages | KTTV | A |

* As defined in 17 U.S.C. §102(a)(6), programs as used herein refer to motion pictures and audio-visual works.

** See Attachment No. 1 for a key to the names and addresses of the cable systems.

| <u>Program</u> | <u>Primary</u> | <u>Secondary Transmission**</u> |
|---|----------------|-------------------------------------|
| The Undersea World of Jacques Cousteau | WTTG | B |
| Mayberry R. F. D. | KMBC-TV | C |
| My Favorite Martian | KMBC-TV | C |
| The National Geographic Specials | KTTV-WTTG | B |
| The Time of Man | KTTV | A |
| The Groovie Goolies | WNEW-TV | D |
| Donna Fargo | KTTV | A |
| The Cross-Wits | KTTV | A |
| The Merv Griffin Show | WNEW-TV | D |
| Truth or Consequences | WNEW-TV | D |
| Vaudeville | WFTV | E |
| The Honeymooners | KTTV | A |
| Guinness Book | KTTV | A |
| The Jackie Gleason Christmas Specials | WTCN-TV | F |
| The Sleeping Beauty | KRIV-TV | G |
| The Untamed World | WFTV | E |

The broadcasts of these programs were secondarily transmitted on a distant basis by cable television systems.

The copyright owners of motion pictures and television program material intend to file a joint claim for 75% of the moneys paid into the copyright pool by the CATV systems, which is

available for distribution for calendar year 1978. With the 75% figure of the total pool as a universe, MPC claims 3.75% of that universe. This figure has been arrived at by tabulating notations of distant signal carriage of stations carrying MPC syndicated programming as a percentage of the grand total of distant signal carriage notations as filed by all cable systems for their compulsory license. An adjustment was made for distant signal notations made by network-affiliated stations. These were computed as 1/4 of a Distant Signal Equivalent.

A list of the stations which carried MPC programs is also attached.

MPC reserves the right to amend, supplement and/or correct its claims to conform to any agreement reached among the major claimant groups or to incorporate additional and/or revised justification theories and data.

III.

Identification of Instances
Of Distant Cable Carriage

See preceding page.

IV.

Mailing and Service Address

Any and all notices or correspondence relating to the cable copyright claims of MPC should be directed to Thomas J. Dougherty, Esq., at 5151 Wisconsin Avenue, Northwest, Washington, D.C. 20016.

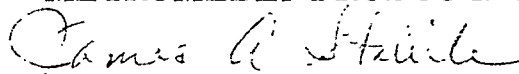
V.

Filing Certification

MPC certifies that this claim was mailed via First Class mail to the Copyright Royalty Tribunal, 1111 20th Street, Northwest, Washington, D.C. 20036, on July 31, 1979.

Respectfully submitted,

METROMEDIA PRODUCERS CORPORATION



James A. Stabile
Vice President

Enclosures.

| <u>Primary Transmitter</u> | <u>Cable System Identifier</u> | <u>Name</u> | <u>Location</u> |
|----------------------------|--------------------------------|---|---|
| KTTV | A | Cobra Valley Cablevision | Miami, Florida |
| WTTG | B | Virginia Television Co., Inc. | P.O. Box 6597, Charlottesville, Virginia 22901 |
| KMBC-TV | C | American Television/Cablevision of Emporia | Emporia, Kansas |
| WNEW-TV | D | Atlantic Coast TV Cable Corp. | 3805 Ventnor Avenue, Atlantic City, New Jersey |
| WFTV | E | Cox Cablevision d/b/a Highlands Cable TV | Avon Park, Florida |
| WTCN-TV | F | Midcontinent Cable/Winner Cable TV Service | P.O. Box 999 Aberdeen, So. Dakota 57401 |
| KRIV-TV | G | TV Cable of Trinity, Inc. | P.O. Box 1571 Trinity, Texas 75862 |
| WXIX-TV | H | American Television and Communications Corp. | Westerville, Ohio |

CABLE TV (HONEYMOONERS --- 1978) BREAK-OUT

1 Hour

| STATION | MARKET | runs 1/78-6/78 | runs 7/78-12/78 | Total No. Runs |
|---------|-------------------|-------------------|--------------------|----------------|
| KCRA | SACRAMENTO | 3 | 1 | 4 |
| KDBC | EL PASO | 0 | 3 | 3 |
| KGTV | SAN DIEGO | 5 | 0 | 5 |
| KGUN | TUCSON | 0 | 8 | 8 |
| KIEM | EUREKA | 4 | 4 | 8 |
| KIMA | YAKIMA | 2 | 1 | 3 |
| KITV | HONOLULU | 0 | 1 | 1 |
| KLAS | LAS VEGAS | 0 | 5 | 5 |
| KOED | OKLAHOMA CITY | 0 | 1 | 1 |
| KOSA | ODESSA | 0 | 1 | 1 |
| KRCR | REDDING | 3 | 0 | 3 |
| KSBW | SALINAS | 1 | 0 | 1 |
| KTAR | PHOENIX | 2 | 1 | 3 |
| KTTV | LOS ANGELES | 0 | 1 | 1 |
| KTVB | BOISE | 1 | 8 | 9 |
| KTVN | RENO | 4 | 0 | 4 |
| KTVU | OAKLAND | 0 | 0 | 0 |
| KUTV | SALT LAKE CITY | 5 | 3 | 8 |
| KVAL | EUGENE | 4 | 4 | 8 |
| KREM | SPOKANE | 2 | 8 | 10 |
| KGW | PORTLAND, ORE. | 6 | 4 | 10 |
| WBAL | BALTIMORE | 2 | 0 | 2 |
| WBNS | COLUMBUS | 0 | 10 | 10 |
| WCCB | CHARLOTTE | 0 | 10 | 10 |
| WCSH | PORTLAND, ME. | 0 | 1 | 1 |
| WFAA | DALLAS | 6 | 4 | 10 |
| WICS | SPRINGFIELD, ILL. | 0 | 10 | 10 |
| WJKW | CLEVELAND | 0 | 10 | 10 |
| WLEX | LEXINGTON | 1 | 0 | 1 |
| WNEP | SCRANTON | 7 | 4 | 11 |
| WNEW | NEW YORK | 1 | 0 | 1 |
| WOWT | OMAHA | 0 | 10 | 10 |
| WRAL | RALEIGH | 0 | 1 | 1 |
| WRAU | PEORIA | 0 | 2 | 2 |
| WRCB | CHATTANOOGA | 0 | 6 | 6 |
| WRDW | AUGUSTA | 1 | 2 | 3 |
| WSAU | WASSAU | 0 | 6 | 6 |
| WSBK | BOSTON | 0 | 1 | 1 |
| WTCN | MINNEAPOLIS | 2 | 5 | 7 |
| WTOG | ST. PETERSBURG | 4 | 2 | 6 |
| WTVJ | MIAMI | 0 | 1 | 1 |
| WXIX | CINCINNATI | 4 | 10 | 14 |
| XRIO | McALLEN | 10 | 0 | 10 |