
BEFORE THE
Copyright Royalty Tribunal
WASHINGTON, D.C. 20036

Docket No. CRT 79-1

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In the matter of
DISTRIBUTION OF
CABLE ROYALTY FEES

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
OF THE JOINT SPORTS CLAIMANTS**

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Major League Baseball, the National Basketball Association, the National Hockey League, and the North American Soccer League ("Joint Sports Claimants"), on behalf of their 89 member professional sports' clubs, submit the following Proposed Findings of Fact and Conclusions of Law in Phase I of this proceeding.¹

¹ The citation forms used in these findings are as follows: the hearing transcript references are by date and page number (*e.g.*, Tr. 3/31 at 1); references to the written statements of the witnesses are by name and page number (*e.g.*, Kuhn Statement at 3); references to exhibits are by party and whatever other designation was used at the time of its identification (*e.g.*, MPAA Exhibit XX2); and references to other documents are by name (*e.g.*, Nielsen Report).

SUMMARY OF PROPOSED FINDINGS AND CONCLUSIONS

Basis of Distribution

Congress mandated cable royalty payments for the cable retransmission of distant non-network programming because such retransmission (1) is of "direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues;" and (2) "causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976). Consistent with this congressional determination, each claimant's case must be evaluated in terms of the marketplace criteria of "benefit" and "harm." The Tribunal must, based upon the record before it, determine how the cable industry would have allocated its royalty dollars had it been required to bargain in the marketplace for distant signal non-network programming.

The Tribunal must use its expert judgment, and cannot rely upon any mechanistic formula which fails to take account of marketplace realities. The rote application of a formula would not only be inconsistent with legislative intent, but would also find no support in the record. Not one of the several formulas advanced by the MPAA, NAB, PBS, BMI, ASCAP/SESAC, cartoon character claimants has been shown to be reliable and free from serious and prejudicial error.

There are three forms of television programming—sports; movies and syndicated series; and the originations of local broadcasters. As the following chart illustrates, each of the claimant groups recognized by the Tribunal comes within one or more of these categories:

<i>Program Category</i>	<i>Claimants</i>
Sports	Joint Sports Claimants NCAA
Local Origination	NAB PBS CBC Music
Movies/Syndication	MPAA PBS Music Cartoon Characters

Each of the claimant groups must derive its share of the royalty pool from the sum allocated to the program category in which its works are included.²

Proposed Distribution³

Sports Programming

Based upon marketplace considerations, sports programming is entitled to between 25% and 30% of the royalty pool. As the record unmistakably demonstrates, distant signal sports programming has a marketplace value which is disproportionately greater than either its share of time or audience.

Sports programming is unique among all televised fare. It is live, current, ephemeral and nonrepetitive; unlike a particular movie or syndicated series which may be shown many

² These program categories do not include radio because, as discussed below, the radio claimants (NAB and NPR) have failed to prove their entitlement to *any* portion of the royalty pool. As also discussed in detail below, any royalties awarded to the performing rights societies (ASCAP, BMI and SESAC) cannot, as a matter of law and of fact, be taken from the sports share because of the nature and infinitesimal amount of music in sports programming.

³ As required by the Tribunal, the following allocations are predicated on the *arguendo* assumption that claims for *all* distant signal programming have been perfected.

different times on many different media (and thus compensated repeatedly), there is but a single opportunity to reap any reward from a live sports telecast—and that is when the game is played. Because of its unique characteristics, distant signal sports programming is an essential ingredient to any successful cable operation and has an immense value to cable operators. This is dramatically revealed by the BBDO survey of the nation's largest cable system operators which revealed that they would allocate 27% of each distant signal dollar for live professional sports programming.

Furthermore, the unrestricted cable retransmission of this programming adversely impacts upon the economic determinants of any sports league's success—the gate, broadcast revenues and home town fan loyalty of each of its member clubs. The unconsented retransmission of this programming also deprives the clubs of a tremendous economic opportunity to market a product for which, unlike other types of distant signal programming, there has been a proven demand in the cable marketplace.

Consistent with the Tribunal's rulings as to the scope of Phase I, the Joint Sports Claimants have presented a great variety of data and research as to the value of all qualifying sports programming. The focus of the evidence, however, is on the overwhelming marketplace value of the distant signal telecasts of the 89 professional sports clubs represented by the Joint Sports Claimants.

As for the NCAA, it must be recognized that this group does *not* represent copyright owners of all collegiate telecasts. To the contrary, as its filings with the Tribunal make clear, the NCAA is authorized to claim solely for those unspecified number of telecasts the copyright in which is owned either by itself or only 2 of its 862 member institutions. *The value which the NCAA has placed on this claim (approximately \$3,400) gives an excellent indication of the negligible interest which it is authorized to represent.*

The NCAA, apparently hoping to slide in under the umbrella of the evidence presented by the Joint Sports Claimants, chose not to present any direct evidence during the

hearings. As a result, there is nothing in the record which establishes the independent value of either collegiate telecasts generally, or the telecasts claimed by the NCAA in particular; seen in the light most favorable to the NCAA, the record simply establishes that their telecasts form some unidentifiable part of the sports programming category. Under all of the circumstances, the record will not support an award to NCAA larger than the \$3,400 which it claimed.

Broadcasters' Local Origination

Based upon marketplace considerations, broadcasters' locally originated programming is entitled to no more than a token award of between 2% and 5% of the royalty pool. The record is clear that cable systems place no value on that locally originated programming, such as community news and public affairs, which appears on distant television stations. The record is equally clear that a broadcaster suffers no harm when its programming is retransmitted into a distant market by cable.

NAB, PBS and CBC each sponsored a time-based formula which, if adopted by the Tribunal, would entitle these three groups to over 50% of the royalty pool. Their formula, however, is dependent upon the Wagner/bi Associates data base, which was shown to be entirely unreliable. Indeed, as one of the members of the Tribunal observed, the sample pages of the Wagner/bi Associates computer runs provided to the Tribunal strongly suggest that there may well be literally thousands of errors in the data base.

There is nothing in the record establishing that local programming of any one broadcaster is more or less valuable than the programming of any other broadcaster. Accordingly, it would appear appropriate to divide the local origination royalties among NAB, PBS and CBC in the same proportion that cable operators paid royalties for importing commercial, educational and Canadian stations. As disclosed by the MPAA's review of "Form 3" cable system statements of account, this ratio would be 90:5:5 (or 18:1:1) for the NAB, PBS and CBC respectively. Music would then receive its share

(as discussed below) from the royalties awarded to each of these three claimant groups.

Movies/Syndication

Based upon marketplace considerations, movies/syndication is entitled to the remaining portion of the royalty pool, which would amount to between 65% and 73%. The record establishes that distant signal movies (like sports) have a marketplace value disproportionately greater than the amount of time which they occupy. The reverse, however, is true for distantly televised syndicated series which often duplicate locally available series and must be deleted by the cable systems pursuant to the FCC's syndicated exclusivity rules. Collectively, movies/syndication has a value slightly less than either its proportionate share of time or audience.

Although it has asserted that the Tribunal must look to the marketplace factors of value and harm, the MPAA has presented the Tribunal with no more than a time-based distributional formula. The original studies on which this formula is based were more comprehensive than those finally submitted to the Tribunal. The original studies showed that the movies/syndication share (which necessarily includes the entire shares of the MPAA and cartoon characters and the greatest portion of the shares of PBS and music) was 73%—the maximum award to which this category would be entitled under a marketplace approach. Only through successive modifications of the original studies was the MPAA able to push this 73% share upwards to its current plateau.

The movies/syndication share must initially be divided between the two syndicator representatives—PBS and MPAA. Regardless of one's feelings as to the *intrinsic quality* of educational programming, it is quite clear, from the record, that the *commercial marketplace value* of distant signal educational programming is minimal at best. Again, a reasonable allocation of the royalties between the MPAA (on behalf of syndicators to commercial stations) and PBS (on behalf of syndicators to educational stations) can be derived

from the amount of royalty fees generated by commercial and educational stations—that is, according to the MPAA analysis, approximately 95:5 or 19:1. This would result in PBS receiving about the same percentage of the movies/syndication share (something less than 4%) as it would receive under its time-based distributional formula (when one properly excludes from consideration the PBS-distributed programming which is nonqualifying network programming).

With respect to the performing rights societies, the ASCAP/SESAC “marketplace” formula (when it takes account of all relevant factors rather than the few which ASCAP/SESAC have selectively chosen) shows that music is entitled to no more than 4% of the royalty pool. The performing rights societies should, therefore, receive the same percentage share of the local origination category and the movies/syndication category for a total of no more than 4%.

Concerning the cartoon character claimants, no portion of the royalty pool may be awarded to them. As a matter of law, and consistent with marketplace realities, the cartoon character claimants must receive any compensation, not from the Tribunal, but from the producers or syndicators of those shows of which their characters are but one element. Aside from the legal issues which have already been briefed, the character claimants have simply failed to prove their requested claim.

Radio

The radio claimants, NAB and NPR, failed to prove that their programming was carried on a distant signal basis by cable in 1978 or, even assuming it was, that it had any marketplace value to cable operators. Furthermore, NAB and NPR have not provided the Tribunal with any reasonable basis upon which a share of the royalty pool may be awarded to them. In short, the radio claimants have been unable to prove that they are entitled to any share of the 1978 royalty pool and, accordingly, *the record will not support any allocation of the funds to them.*

I. INTRODUCTION

The purpose of Phase I is to determine the relative shares of the 1978 CATV royalty pool to which the broad groupings of claimants recognized by the Tribunal are entitled. This task, the Tribunal has ruled, is to be undertaken as though all qualifying programming had actually been claimed. In Phase II the Tribunal will resolve those controversies which may exist respecting the shares within each of these groups. The Tribunal must also determine how it will treat those portions of a share for which there are no claimants.⁴

The Tribunal has been confronted with a wide range of theories about how its Phase I mission should be accomplished. On the one hand, the National Association of Broadcasters ("NAB") has argued that the Tribunal need only serve a computing function and mechanically allocate shares based essentially upon time. The Motion Picture Association of America ("MPAA") presented another time-based approach, but conceded that an assessment of "popularity" of programming might appropriately be made, provided it were limited to an assessment of audience as disclosed by the Joint Sports Claimants' evidence.

The Joint Sports Claimants, on the other hand, have urged that the Tribunal must serve as a surrogate for the marketplace and distribute the funds in accordance with its

⁴ For example, in Phase I, the Tribunal will determine how much of the pool should be awarded commercial television stations on the assumption that all locally originated programming carried on a distant signal basis had been claimed. Indications are, of course, that something like only 50 percent of that programming has been claimed. The question is therefore presented whether that half of the commercial broadcasters' share should go to the other commercial broadcasters or be reallocated to the claimants generally, as the Joint Sports Claimants have urged. The same issue arises respecting other of the claimant groups. The Tribunal received briefs on this question from the interested parties on May 23, 1980.

expert appraisal of the economic value of the various forms of distant signal programming.⁵

In the sections which follow we discuss the critical aspects of the various cases, to the extent necessary to explain the disposition of the issues. As noted, our view is that the Tribunal must make judgments which would be made in the marketplace absent the compulsory licensing for which Congress has provided. Of course, if cable systems confronted copyright liability without the benefit of a compulsory license, the payments actually made, if the programming were licensed for CATV use at all or to the same extent it is used under the present statutory structure, could be substantially different. It is for this reason that a *comparative* assessment of the economic value accorded the various categories of programming by cable operators becomes important.

Our evidence goes directly to this end and deals with the distribution of the royalty pool to the major groupings of TV programs representing all distant station television program-

⁵ The evidence pertaining to these theories was presented in the March 24, 1980 prehearing submission of the parties, all of which the Tribunal admitted as part of the record (*see* Tr. 3/31 at 61); during the 19 days of hearings which ran from March 31, 1980 to May 29, 1980; and in various other material received by the Tribunal both during and after the hearings. Evidence was presented during Phase I by the MPAA as representative of the movie and program series syndicators; the NAB as representative of the U.S. commercial broadcaster interests; the Public Broadcasting Service ("PBS") on behalf of noncommercial educational stations and their program suppliers; National Public Radio ("NPR") for the programming it distributes and on behalf of some of its member stations; ASCAP, BMI and SESAC for copyright owners of music; the Joint Sports Claimants on behalf of the participating professional sports leagues; and representatives of a group which came to be known as the Cartoon Character Claimants. Christian Broadcasting Network ("CBN"), Canadian Broadcasting Corporation ("CBC"), and the National Collegiate Athletic Association ("NCAA") made prehearing submissions to the Tribunal, but presented no evidence during the Phase I hearings.

ming carried by cable systems—movies and syndicated series, sports and the originations of local broadcasters. From these basic allocations must then come the shares of all of the other claimants.⁶

Because the marketplace approach is taken, it is unnecessary to dwell at length on the problems which are encountered in the data which arguably backs up the theories of the various parties, and of NAB and MPAA in particular. Suffice it to say that if the Tribunal were to embrace a formula relating the shares of the pool strictly to time occupied in the form urged by either NAB or MPAA, the Tribunal would confront a total lack of reliable, probative, and objective evidence to support any such allocation.

⁶ PBS, for example, has local programming, syndicated programming, and sports programming among its qualifying programming. (See Cooper Statement (MPAA), Schedule XIII; Tr. 4/25 at 70-72.) Music is utilized primarily in syndicated programs and movies, but to a lesser degree in local broadcasts as well. The record establishes that its use in sports programs is *de minimis* and no portion of the sports share should, therefore, be allocated to music. NCAA, to the extent it has claimed, is claiming for telecasts of sports events and is clearly within the sports group. The CBC represents commercial broadcasters. The copyright owners of cartoon characters, to the extent they have a separate claim, have advised that their characters are shown only in syndicated programs and thus they are subclaimants of the movie/syndication share.

The radio claimants (NAB and NPR) do not have copyrighted works which come within these three categories of television programming. However, as discussed below, the radio claimants have failed to establish their entitlement to any portion of the royalty pool.

II. PROPOSED FINDINGS OF FACT

A. The Evidence of the Joint Sports Claimants

1. The Joint Sports Claimants urged the Tribunal to allocate the cable royalties in a manner which best approximates marketplace realities. The marketplace value of any product is, of course, a function of the perceptions of the buyer and seller. Thus, the evidence of the Joint Sports Claimants focused upon the comparative value of the different types of distant signal programming from the standpoint of the “*buyer*” (the cable operator) and the “*seller*” (the copyright owner).

1. The Buyer's Viewpoint

2. The comparative value which cable operators place upon the categories of distant signal programming—and the critical importance which they attach to live professional sports programming in particular—is perhaps most dramatically illustrated in the study undertaken by Batten, Barton, Durstine & Osborn, Inc. (“BBDO”), one of the nation's leading and most respected advertising agencies.⁷ At the request of the Joint Sports Claimants, BBDO designed a survey to gauge the attitudes of the country's largest cable operators towards the various types of distant signal programming. Interviews were completed with executives from 16 of the top 20 cable system operators in the United States. These 16 cable operators represented over 40% of the U.S. cable subscribers, and were,

⁷ This study, entitled “Cable System Operators' Attitudes Toward Distant Signal Programming” (hereinafter “BBDO Study”), was submitted to the Tribunal on March 24, 1980. In addition, Dr. Thomas Neman, Vice President and Director of Research at BBDO, testified concerning the methodology and results of the BBDO Study. (See Tr. 4/24 at 88-168.) As Dr. Neman explained, BBDO utilized the same procedures in this study that it regularly employs for research which is relied upon by businessmen daily in making important marketplace judgments. (Tr. 4/24 at 93, 95, 100.)

in the opinion of BBDO, the "industry leaders."⁸ (Tr. 4/24 at 94.) In each case the person interviewed was the cable system operator's senior marketing and/or programming executive. (Tr. 4/24 at 99.)

3. When asked by BBDO how they would divide a specific sum to purchase live professional sports, movies, syndicated programs and local news and public affairs, the cable operators responded that their program dollars would be allocated as follows:

Live Professional Sports.....	27%
Movies.....	66%
Syndicated TV Shows.....	5%
Local News and Public Affairs.....	2%

Significantly, more than 80% of the respondents stated that they would spend between 20% and 50% of each dollar for distant live professional sports programming.⁹ On the other hand, nearly 80% concluded that they would spend *nothing* to obtain distant signal local programming and 5% or less to obtain distant signal syndicated TV shows. This is illustrated in the following table:

⁸ Dr. Neman testified that research of this type is typically conducted with a small sample of individuals who "are expected to be opinion and behavior leaders in a particular industry." (Tr. 4/24 at 94.)

⁹ The question posed by BBDO did not distinguish between network and non-network sports, movies and other programming. As Mr. Bowen explained during cross-examination, it is unlikely that in the "real world" a cable operator responding to this question would have thought he was being asked about distant network sports. Since it is available over local affiliates, cable operators are not apt to spend any money to import this programming. (Tr. 4/25 at 6-7, 75-76.)

“superstations.” As illustrated in the following table, each of these superstations is the “flagship” station¹² of one or more professional sports teams. (KBA Report at 9-11.)

Sports Teams on
Superstations

<i>Superstations</i>	<i>Teams</i>
WOR-TV (New York)	Mets (Baseball) Knicks (Basketball) Nets (Basketball) Islanders (Hockey) Rangers (Hockey) Cosmos (Soccer)
WPIX (New York)	Yankees (Baseball)
KTTV (Los Angeles)	Dodgers (Baseball) Aztecs (Soccer) Sockers (Soccer)
WGN-TV (Chicago)	Cubs (Baseball) Bulls (Basketball) Sting (Soccer)
WTCG (Atlanta)	Braves (Baseball) Hawks (Basketball) Flames (Hockey)
WSBK-TV (Boston)	Red Sox (Baseball) Bruins (Hockey)
KTVU (San Francisco)	Giants (Baseball) Warriors (Basketball)

7. *Second*, the cable television royalties attributable to professional sports stations are disproportionately greater than

¹² A team's flagship station is that television station which originates the team's telecasts. In addition, many of the flagship stations' telecasts are rebroadcast simultaneously in the region by other television stations. (KBA Report at 10.)

those attributable to nonprofessional sports stations. For example, while fewer than one-tenth of all television stations are the "flagship" stations of professional sports teams, these stations accounted for over 52% of the royalty pool. (KBA Report at 12.) Moreover, of the top 20 royalty producers, 16 carry the telecasts of one or more professional sports teams. (KBA Report at 12-13.) And, as MPAA Exhibit XX2 graphically discloses, a professional sports station is responsible for a contribution to the royalty pool which is, on an average, more than 6 times greater than is a nonprofessional sports station. (Tr. 4/28 at 77-78.)

8. *Third*, cable operators have consistently promoted their distant signal offerings by featuring sports and movies, and have generally said nothing in their promotional campaigns about the locally produced programming on these signals. Those who market distant signals to cable operators have done the same in their promotional campaigns. (KBA Report at 15-17, Appendices C and D; Tr. 4/25 at 79-81.)

9. *Fourth*, as demonstrated by the growth of cablecast sports packages, cable operators want more of, and are willing to pay for, the very same type of live professional sports programming which is offered on distant signals. The marketplace, however, has not shown that cable operators want or are willing to pay for more of the other types of nonsports programming available on distant signals. (KBA Report at 24-26.)

10. *Fifth*, a 1978 survey conducted by VideoProbeIndex ("VPI"), a cable research firm, disclosed that twice as many households were motivated to subscribe to basic cable because of distant signal sports offerings than because of distant signal movies. That study further disclosed that a statistically insignificant number of households subscribe to cable because of a desire to view locally produced programming on the

also repeatedly emphasized in proceedings before the FCC and elsewhere that distant signal sports programming is most important to their overall successful operation. For example, some have represented that up to 25% of their subscribers became subscribers because of distant signal sports offerings. (KBA Report at 20-22; Official Notice Request at 1-4.) There was no evidence presented to the Tribunal which demonstrated that cable operators have ever made similar representations with respect to any other types of programming.

12. *Finally*, the Joint Sports Claimants commissioned the A. C. Nielsen Company to provide measurements of cable audience viewing of distant signal programming in 1978. Nielsen, of course, is one of the nation's two major audience ratings services. And its reports of viewing are a television industry standard, accepted and relied upon in the marketplace by broadcasters, advertisers, syndicators and producers in making daily business judgments. (KBA Report at 33; Tr. 4/25 at 9.) The study which Nielsen produced for the Tribunal is based upon data collected as part of Nielsen's regular audience surveys conducted in 1978—specifically, the "Nielsen Station Index" or "NSI."¹⁵

¹⁵ The methodology underlying the NSI was described by Mr. David Harkness, Marketing Manager of Nielsen Home Video Index (*see* Tr. 4/28 at 80-91), and Dr. Peter Lemieux of Kalba Bowen (*see* Tr. 4/25 at 7-24). It is important to note that the NSI measures the viewing of a particular station's programming throughout the country during the "sweep" periods of February, May, July and November (a total of 15 weeks). (Tr. 4/28 at 82-83.)

Dr. Lemieux and Mr. Harkness also described the methodology underlying the study submitted to the Tribunal on March 24, 1980. This study presents data for 24 separate stations which were chosen by Dr. Lemieux using accepted random sampling procedures. The sample of stations was selected randomly from the universe of 650 United States television signals whose carriage generated cable royalty payments; each signal was weighted to reflect the shares of the royalty pool attributed to it. (KBA Report at 33; Tr. 4/25 at 10.) As Dr. Lemieux testified:

"We believe that the royalty fees are the best available objective measure of the carriage of distant signals to cable subscribers. In

distant signals.¹³ (KBA Report at 27-28.) A 1979 survey conducted for the National Cable Television Association further disclosed that 54% of the respondents (all of whom were potential cable subscribers residing in large urban markets where nonnetwork sports telecasts are generally available off-the-air) thought it "extremely" or "quite" important for cable systems to offer "imported professional and collegiate sports." (KBA Report at 28.)

11. *Sixth*, cable operators have initiated a number of special relief proceedings at the Federal Communications Commission ("FCC") seeking waivers of the FCC rules solely or primarily in order to bring their subscribers the professional sports programming offered on distant signals.¹⁴ They have

13 The methodology and results of the VPI survey are further discussed in the "Statement of Robert Schultz, President, Video-ProbeIndex" submitted to the Tribunal on March 24, 1980 and in the testimony of Mr. Schultz. (See Tr. 4/28 at 116-63.) As the cross-examination of Mr. Schultz by counsel for PBS confirmed, VPI was not hired by any of the claimants to conduct its survey; indeed, Mr. Schultz was not even aware of the cable royalty proceeding at the time the survey was conducted. (Tr. 4/28 at 162-63. See also Tr. 4/28 at 121.)

14 (KBA Report at 22-23; Joint Sports Claimants "Request for the Tribunal to Take Official Notice of Material Contained in the Files of the FCC" at 4-11 (hereinafter "Official Notice Request").) It should be noted that the Tribunal admitted into the record all of the material contained in the Official Notice Request. (See Tr. 3/31 at 61.) Thus, while it denied the Official Notice Request, it also denied the MPAA's motion to strike this material.

Furthermore, Kalba Bowen relied upon this material in forming its conclusions. (Kalba Bowen report at 14-15, 20-23 & 29-30.) Thus, it is properly before the Tribunal. See Fed. R. Evid. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence".)

Percentage Allocation of Distant Signal
Dollars—Individual BBDO Respondents

<i>Respondent Number</i>	<i>Movies</i>	<i>Syndicated T.V. Shows</i>	<i>Live Professional Sports</i>	<i>Local News/ Public Affairs</i>
1	40	10	40	10
2	70	0	30	0
3	*	*	*	*
4	50	5	40	5
5	100	0	0	0
6	*	*	*	*
7	100	0	0	0
8	*	*	*	*
9	70	0	30	0
10	50	0	50	0
11	*	*	*	*
12	70	10	20	0
13	50	5	40	5
14	50	25	25	0
15	75	0	25	0
16	*	*	*	*
Mean Allocation (\$)	66	5	27	2
Median Allocation (\$)	70	0	30	0
Range	40-100	0-25	0-50	0-10

*Refused/No answer

4. As Dr. Neman testified, the BBDO research disclosed that:

“[C]able operators value highly the movies and the sports which they receive from distant stations; and it appears that they would pay for both of these. On the other hand, the syndicated series and the local programming which they receive from the distant signal stations does not seem to be something which they would pay for.”
(Tr. 4/24 at 101.)

This conclusion is fully confirmed in the report prepared by Kalba Bowen Associates, Inc., a communications research firm with considerable experience in the field of cable television. At the request of the Joint Sports Claimants, Kalba Bowen designed, supervised and analyzed, during a two-year

period, a vast amount of research on the comparative values of distant signal programming.¹⁰ Based upon this research, Kalba Bowen concluded that the results of the BBDO Study reflected a fair, objective assessment of the manner in which the cable industry would be willing to allocate its distant signal dollars.¹¹ As Kalba Bowen found, distant signal *sports* programming has a value to cable operators which is *substantially greater* than either its proportionate share of total hours broadcast or total audience; distant signal *local* programming has a value which is *substantially less* than either its proportionate share of time or audience; distant signal *movies and syndicated* programming combined have a value *somewhat less* than their proportionate share of time and audience. (KBA Report at 47-48; Tr. 4/25 at 72-74.)

5. The conclusions of BBDO and Kalba Bowen are fully supported by the following facts, discussed in greater detail in the KBA Report, and during the testimony presented by each of the witnesses for the Joint Sports Claimants:

6. *First*, television stations with professional sports programming packages are imported by cable systems to a disproportionately greater extent than are nonprofessional sports stations. For example, the television stations with the most widespread appeal to cable operators are the so-called

¹⁰ The report of Kalba Bowen, entitled "The Comparative Value of Nonnetwork Distant Signal Sports Programming on Cable Television" (hereinafter "KBA Report"), was submitted to the Tribunal on March 24, 1980. The individuals responsible for this report, Mr. Carroll G. Bowen and Dr. Peter H. Lemieux, also presented testimony to the Tribunal. (See Tr. 4/25 at 7-150; Tr. 4/28 at 4-80.)

¹¹ Mr. Bowen, in fact, testified that he found the results of the BBDO study

"unexpectedly low vis-a-vis sports. I would have guessed on the basis of our experience with the industry . . . that sports and movies would have shared—let's say, granted \$100, would have shared \$40 or \$45 each, and perhaps, \$10 would have been left over for local programming and for syndication." (Tr. 4/25 at 74.)

13. The Nielsen study shows that sports programming is the most popular type of distant signal programming in cable households. During an average quarter hour, twice as many cable households view distant signal sports programming as view movies and syndicated programming; and four times as many cable households view distant signal sports programming as view the locally-produced programming on distant signals. Furthermore, distant signal sports programming garners a share of total audience "viewing"¹⁶ (11%) which is more than twice its share of time (5%); distant signal movies and syndicated programming have a viewing share (82%) which is virtually identical to their time share (81%); and distant signal locally produced programming obtains a viewing share (7%) which is one-half of its time share (14%). (See Revised Table 4.1 to KBA Report; Tr. 4/25 at 19-21.)¹⁷

14. The same conclusion as to the immense comparative popularity of sports telecasts is apparent when one analyzes the viewing of programming in comparable time slots. For example, Revised JSC Exhibit 6, which is derived from the Nielsen Study, shows that the average number of households viewing each of the programming categories during the time period Monday-Friday, 7:00-11:00 p.m. only, is as follows:

other words, the size of the royalty fee depends upon the number of subscribers that can view a particular signal and the availability of qualifying programming on that signal. As a result, we believe our study is an accurate measurement of the viewing patterns of qualifying distant signal programming by cable subscribers." (Tr. 4/25 at 11.)

16 "Viewing" is a product of the amount of time that a program occupies during the broadcast day and the size of the audience that that program attracts during an average quarter hour. (Tr. 4/25 at 16.)

17 Audience, of course, is an important element of marketplace value, but it is not the sole measure of that value. For the cable operator, the value of any programming ultimately relates to its ability to attract and to retain subscribers. (KBA Report at 4-7, 44-48; Tr. 4/25 at 9, 39 and 83.)

Average Households Per Quarter Hour—
Entire Sample (Weekday Prime Time Hours Only)

<i>Program Category</i>	<i>Average Households (000)</i>
Sports	34
Movies/Syndication	16
Local Programming	14

As this illustrates, sports programming presented during weekday prime time hours has an average audience more than twice that of either movies and syndication or local programming presented during the same time period. (Tr. 5/28 at 31-33. *See also* KBA Report at 41-43.)¹⁸ With respect to the share of time versus share of viewing, Revised JSC Exhibit 6 reveals:

Share of Viewing vs Share of Time—
Entire Sample (Weekday Prime Time Hours Only)

<i>Program Category</i>	<i>Share of Time (%)</i>	<i>Share of Viewing (%)</i>
Sports	10	20
Movies/Syndication	78	71
Local Programming	12	9

¹⁸ During its rebuttal testimony the MPAA offered certain audience comparisons of sports and syndicated series based upon the Nielsen "ROSP" for February 1978. As JSC Exhibits XX4-9 illustrate, the MPAA's comparisons prove absolutely nothing.

Indeed, because of the structure of the ROSP, sports programs with ratings several times higher than syndicated series may never be listed. (Tr. 5/28 at 6.) Furthermore, MPAA's few, isolated comparisons were selective and apparently ignored numerous instances where sports had higher ratings. (See Tr. 5/28 at 7.) Finally, the only comparisons made with professional sports telecasts covered a few afternoon network hockey and basketball telecasts not encompassed by the claim of the Joint Sports Claimants. (See Tr. 5/28 at 7-9.)

15. *In sum*, sports programming is unique among all televised fare. It is live, current, ephemeral and nonrepetitive; it generates intense viewer loyalty. Because of its unique characteristics, distant signal sports programming, and particularly the live telecasts of the four major professional sports leagues, is an essential ingredient to any successful cable operation and has an immense value to cable operators. This conclusion is inescapable from a fair consideration of the wide variety of data on marketplace value which the Joint Sports Claimants have assembled from a number of different sources. Indeed, as the National Cable Television Association itself concluded, “‘*sports coverage has become cable TV’s . . . most popular program category.*’” (Quoted in KBA Report at 18.)

2. The Seller's Viewpoint

16. The second critical factor deals with the seller's attitude toward the marketplace decision to sell his copyrighted product to cable systems. In this regard, the Joint Sports Claimants presented the written statements and testimony of several representatives of the sports leagues regarding the factors that would influence copyright owners of sports programming in negotiations for the sale of their programming to cable operators.¹⁹ The testimony of Bowie K. Kuhn, the Commissioner of Baseball, and David J. Stern, General Counsel of the National Basketball Association, established *three critical points* relevant to the marketplace determination facing the Tribunal, confirming that these sellers would place an extremely high value on their product.

17. *First*, the cable retransmission of distant signal sports programming into any club's home territory can have a

¹⁹ The written statements submitted to the Tribunal on March 24, 1980, by representatives of the National Hockey League, the National Basketball Association and the North American Soccer League generally adopted the views expressed by Commissioner Kuhn in his written statement.

significant adverse impact on the determinants of that club's economic success—the following of its hometown fans, the size of its gate, and the value of its broadcast rights. This, in turn, can affect the competitive stability of each of the leagues as a whole. (Kuhn Statement at 4-11; Stern Statement at 8-12; Tr. 4/24 at 20-28; Tr. 4/28 at 166-71.) As the Senate Subcommittee on Patents, Trademarks and Copyrights noted in 1969, when it initially exempted sports programming from the compulsory licensing provisions of the copyright revision legislation:

“Unrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmission of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games.” Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., *Draft Report to Accompany S. 543* at 29 (1969).

18. As Commissioner Kuhn explained, the sports leagues are like “partnerships” in that each club prospers most if all do as well as possible.²⁰ The indiscriminate carriage of sports telecasts by cable impacts upon each club; it thus threatens the partnership and the competitive stability of the entire league. (Tr. 4/24 at 21-22.) All of the clubs would have to take the harm to their leagues, and ultimately to themselves, into account if they were negotiating in the marketplace with cable operators for distant signal retransmission of their telecasts.

²⁰ Commissioner Kuhn testified that “working as a league we try to take into consideration the need to preserve the league as a competitive entity. . . .” (Tr. 4/24 at 31.) Explaining that the clubs generally do not license the telecasts of their home games and generally do not license any telecasts in other clubs' markets, Commissioner Kuhn noted that “we practice what we preach.” (Tr. 4/24 at 31-33.)

They would have to demand a significant premium to offset that harm. (Kuhn Statement at 9-10.)

19. *Second*, these problems are unique to the sports clubs because of the ephemeral quality of sports telecasts. Once a sports event has been telecast, it is, in virtually all cases, worthless to the copyright owner. Mr. Stern testified that "we put on our live perishable game at that moment in time; and at that moment, we are seeking to derive the maximum revenues that we need to defray our expenses . . . if we don't get it then . . . we'll never make it up." (Tr. 4/28 at 171-72.) This situation is unlike, for example, the situation of movies and syndicated programming which can reap revenues for the copyright owner over and over again in many types of market situations.²¹ (Stern Statement at 8-12; Tr. 4/28 at 172-73.) If sports clubs were negotiating with cable, they would have to take into account the fact that they have only one opportunity to collect revenue for their telecasts.

20. *Third*, based on their experience with UA-Columbia Satellite Service, Inc., all of the individual clubs are well aware of the high value of their telecasts to cable operators. As Commissioner Kuhn's testimony illustrates, the baseball clubs have negotiated a very successful contract with UA-Columbia for cablecasts of a number of games;²² applying the UA-

²¹ The MPAA, for example, seeks royalties attributable to the retransmission of movies. Any particular movie is likely to have been televised at several different times by several different stations. Thus, that movie is eligible for multiple compensation from the cable royalty pool alone. This compensation, however, is *in addition* to that received by the copyright owner of the movie from several other sources, such as theatre exhibition rights, TV network rights, syndication rights, pay cable rights, subscription television rights, video cassettes, video discs, etc. (See Tr. 4/8 at 48-51; 4/28 at 172.)

²² Acting consistently with their concern about harm to home gate revenue, the clubs, with one exception explained by Commissioner Kuhn, did not grant retransmission rights in any of their home territories. (Kuhn Statement at 8; Tr. 4/24 at 27-28.)

Columbia rights formula just to the distant signal retransmission of the baseball games televised over the superstations would result in the clubs receiving millions of dollars. (Kuhn Statement at 8; Tr. 4/24 at 20-21.) Thus, absent compulsory licensing, the clubs would come to the bargaining table fully prepared to demand the high price for their product that they know from experience cable systems are ready and willing to pay.²³

B. The Evidence of the Motion Picture Association of America

21. The program series and movie suppliers, represented by MPAA,²⁴ advocated what they termed a fee-generated/time-based formula for the distribution of the royalty pool. By this approach, MPAA sought to trace royalties to the television stations carried distantly by cable systems and then to assign such royalties among the owners of qualifying programs on those stations in the proportion that an owner's program bore to any particular station's total qualifying time. Thus, every quarter-hour segment of qualifying programming on a particular station was assigned exactly the same value for this purpose by the MPAA, whether it was carried at four in the morning and viewed by a few insomniacs or at prime time in the evening and seen by thousands, or hundreds of thousands, of viewers.

23 The bargaining position of the sports clubs is thus dramatically different than that of other claimants in this proceeding; there is no evidence that any of these claimants has been able to market profitably to cable systems their very product which is imported on a distant signal basis.

24 Mr. Cooper testified that his analysis of the programming televised by the 29 stations disclosed that the claimants represented by MPAA either "syndicated, owned or distributed" 95% of the feature films and 85% of the series and specials. (Tr. 4/9 at 27.) It should be clear that only *copyright owners* can claim a share of the pool. Mr. Cooper's testimony does not disclose what percentage of his "85%" and "95%" are copyright owners, and what percentage are simply syndicators or producers who do not own the copyright.

22. The syndicators readily acknowledged distinctions in the economic value to cable operators of various types of programming, and of programs within those types. They advocated the proposition as well that copyright owners differently situated sustain varying degrees of harm as a consequence of the mandatory licenses which cable systems have to distribute their programs in distant markets. (*E.g.*, Valenti Statement at 2-3, 6.) Indeed, the syndicators' chief spokesman, Jack Valenti, President of MPAA, acknowledged that the *marketplace concerns* of benefit to the cable system and harm to the copyright owner were the decisional factors: "[T]he ultimate decision in this proceeding is controlled by two criteria—namely, damage to the copyright owner and benefit to the cable system." (Valenti Statement at 6.)

23. Having underscored the importance of the benefit/harm considerations, the motion picture interests nevertheless structured their case solely to show the time devoted to distant signal carriage of movies and syndicated presentations (without distinguishing between these two classes of programs), weighted by royalty fees which MPAA claimed were attributable to such programs. Two different studies were presented by MPAA, both of which had as their starting point MPAA's assignment of royalties to television stations carried distantly. In "Study A" MPAA used programming carried by 29 stations chosen from among various types of stations during a seven-day "composite week" and projected the results of that study to the entire universe of distantly carried signals to claim 83.4% of the pool. (Cooper Statement at 16-18, 22.) In "Study B," rather than using a 29-station sample, MPAA borrowed from an FCC report showing *local* programming of television stations to argue for a 79.94% share of the pool. (Cooper Statement at 18-19, 26.)

24. Neither study even attempted to assess the economic value of the MPAA programming. This is particularly surprising in light of the MPAA acknowledgment that it would be desirable to judge programs "on the basis of their relative values to cable systems." (Cooper Statement at 4.)

The syndicators even conceded the obvious: Different types of programming and programs within each type have far greater appeal than other programming. (*E.g.*, Tr. 4/8 at 15-18.) The syndicators, however, made no effort to deal with the matter of real economic value. (Cooper Statement at 4.)

25. Some of what the syndicators did to support their grasp for the lion's share of the pool is helpful. Recognizing (1) that Congress elected only to compensate distantly carried, nonnetwork (qualifying) programs, (2) that Congress also assigned to different types of television stations different weight in the generation of royalty fees, and (3) that some television stations are carried by a large number of cable systems while most are carried by only a few, if at all, MPAA traced the dollars in the royalty pool to each television station carried distantly by cable systems. (Hadl Statement at 10-13; Cooper Statement at 7-9; MPAA Exhibit XX2.)

26. The process is not exact, and MPAA acknowledged as much.²⁵ There are areas where more precise information might have been derived. MPAA's analysis, for example, was limited to the larger ("Form 3") cable systems for reasons which MPAA fully explained. (Cooper Statement at 5-9.) *See also* p. 28, below. This aspect of MPAA's work, nevertheless, reflects a diligent and conscientious effort, with a substantial degree of reliability, to trace royalty fees to particular television stations.²⁶

25 Part of the problem lay with errors in the Statements of Account filed by cable systems, and part of the problem is found in elections—based on cost effectiveness—not to pursue finite detail. (Cooper Statement at 5-9.) NAB attempted to pursue such detail, it might be noted, with somewhat tragic results. *See* pp. 37-42, below.

26 No party demonstrated that this aspect of the work was seriously to be doubted. It shows essentially what is obvious: Major market independent stations with attractive programming line-ups are the most widely carried stations by far. NAB, which made its own stab at the same sort of study without ever presenting the results of its effort, conceded that any listing which it might make of television stations ranked by fee generation would closely parallel the list resulting from the MPAA work. (Tr. 4/29 at 126-30.)

27. The MPAA analysis shows that major market independent television stations—particularly those which feature live professional sports events—account significantly for the revenues generated by distant signal programming.²⁷ (MPAA Exhibit XX2.) For example, of the 688 distantly carried television stations, 20 accounted for approximately half of the entire pool; all of these 20 stations are independents; it is not until number 33 on the list that a network affiliate is encountered; and it is not until number 52 on the list that one reaches the first distantly carried educational station.²⁸ (MPAA Exhibit XX2; KBA Report at 12.)

28. A great deal of hearing time was consumed over the methodologies employed by MPAA and NAB in their respective efforts to show fee generation.²⁹ That effort hardly finds justification in the rewards since both of these claimant representatives ultimately contend for a formula-derived award of royalties which accounts not at all for the benefit/harm factors acknowledged by Mr. Valenti and others as most significant. Moreover, both of the studies show essentially the same thing to the extent that they are relevant: Certain television stations are much more widely carried—and therefore the programming carried by them is much more valuable—than other stations. The heart of the dispute over

27 NAB's fee-generated approach was of a somewhat different nature than the syndicators. Whereas MPAA sought to relate royalties to particular television stations and then to qualifying programming of those stations, NAB sought to relate royalties paid by the particular system itself equally among qualifying programming—whatever the source—carried by each system. *See* p. 38, below.

28 By way of comparison, of the 735 currently operating commercial television stations in the United States, over 80% are network affiliates. There are also some 277 noncommercial educational stations. (KBA Report at 12.)

29 Also, there was extensive inquiry into the methodology since NAB disclosed little and altered its case on the day it was presented. (*See e.g.*, Shosteck Statement, Figure 3 (revised orally, Tr. 4/29 at 21-22.))

their approaches lies in the fact that network programming is not qualifying programming and that Congress prescribed different values for different types of stations in their generation of royalty fees.

29. The MPAA study started with analysis of each Form 3 Statement of Account. From those reports, the royalty fee paid and the stations distantly carried (which go into the royalty calculation) are readily ascertainable for each filing cable system. For Form 3 systems, the royalty paid flows from a formula based on the signals distantly carried and involves the calculation of "distant signal equivalents," or DSEs. To simplify the analysis, it need only be said that each independent television station carried distantly on a full-time basis is counted as a full DSE (or for analytical purposes, as four DSE units), and each network-affiliated and educational station is counted as a .25 DSE (or one DSE unit.)³⁰ (Cooper Statement at 5-9.) MPAA then totaled the DSE units for each system, divided those units into the royalty fees paid by that system to get a royalty paid per DSE unit, and finally assigned the royalty per unit to the stations based on their DSE units as established for them by Congress. (Cooper Statement at 8-9; Tr. 4/8 at 111-115.)

30. The MPAA approach is illustrated by this hypothetical example: A CATV system carries distantly and on a full-time

30 The Statement of Account includes also, in the DSE computation, signals carried on a part-time basis, an occasional basis, and on a substituted basis (where the substitution is voluntary rather than attributable to the syndicated exclusivity rules). These refinements were hardly taken fair account of by either MPAA or NAB in their studies. (See, e.g., Tr. 4/29 at 136-42.) The fact is, however, the assignment of royalties is not something which can be undertaken with mathematical precision since economic value is the critical element, and the studies proffered by MPAA and NAB do not account for such value. The deficiencies in the studies with respect to the special carriage situations only point up the lack of probative evidence to implement a formula which the Tribunal would confront should it elect to use one of the formulas advocated by either of these parties.

basis New York Stations WPIX (Ind.), WOR (Ind.), WCBS (Net.), and WNYC (Ed.). Based on the four-to-one relationship established by Congress for independent and network stations, the carriage of these stations represents ten distant signal units—four for each of the two independent stations, and one each for the network and educational stations. The system paid royalties of \$4,000. Each DSE unit is thus valued at \$400. MPAA would attribute \$400 each in royalties to WCBS and WNYC, and \$1,600 each to WPIX and WOR. This task is performed for each Form 3 system, and the royalties for every system carrying WOR, for example, are totaled (with a projection being made to take account of the fact that only Form 3 systems actually were analyzed).³¹ The resulting sum, derived strictly on a time basis, is the amount which MPAA would assign to the copyright owners of qualifying programming carried by WOR.

31. It is fairly simple to describe the objective of MPAA as reflected by this part of its proof: MPAA sought to show by two different approaches, both utilizing the fees generated by the distantly carried stations, the royalties attributed to syndicated programming appearing on those stations. The MPAA studies seek to determine the amount (on a time basis) of independent station WOR's syndicated programming as a percentage of WOR's total qualifying time, and to place in the MPAA column that percentage of the royalties generated by WOR. For example, since all of WOR's programming is qualifying, if 60% of it were syndicated, 60% of the total royalty generated by WOR would be placed in MPAA's column. For network affiliated stations, in contrast, MPAA first identified the amount of qualifying programming and then assigned the resulting royalties among that programming only.³²

31 The results for all distantly carried stations is shown by MPAA Exhibit XX2.

32 There was a great deal of discussion during the hearings as to the fairness of this approach. The fact is that this adjustment is necessary if the owners of qualifying programming on network affiliates are to

32. To describe how MPAA made this showing with the two studies proffered is much more complex. If the Tribunal were to embark upon finding a formula which would be applied to immutable facts to distribute the pool, it might be appropriate to analyze at length the MPAA approach in order simply to conclude that neither Study A nor Study B affords the "objective, reliable, representative and provable data" for distribution of the pool that MPAA would have us believe. (Cooper Statement at 2.) Under the circumstances, however, it is necessary only to note some of the more fundamental flaws in their studies.

33. Study A was not based on a randomly selected sampling of stations; indeed, MPAA's Vice President Cooper, who designed the study, "played around" with the stations which might have been a part of the study until he found a mix of 29 stations suited to his purposes. (Tr. 4/9 at 50-59; Cooper Statement at 16-17.) Such an approach is rife with opportunities for manipulation and must be discounted entirely. Study B, on the other hand, is a quite tortured method selected by MPAA which provides only a partial answer to the Tribunal's mission. That study—based on an FCC report dealing with *local* programming—sought to divide the pool between local broadcasters and the syndicated/movies. (Cooper Statement 23-26.) In doing so, they put into the NAB column live sports events originated by flagship stations and into MPAA's column the considerable amount of nonnetwork sports events carried by the professional sports clubs' over 200 non-flagship stations. (Tr. 4/9 at 76, 88.)

be adequately compensated. Both MPAA and NAB made an adjustment to account for this requirement, using a fixed percentage with no regard for the *actual* division between network and nonnetwork programming on particular distantly carried network affiliates. The somewhat arbitrary guess as to a figure is not a problem as an estimate, but it points up another deficiency in studies which are advocated as allowing a mathematically precise distribution of the pool.

34. Another issue that merits comment is MPAA's failure to proffer evidence it had compiled—probably of a quality superior to what it did proffer—which reflected a smaller share for its interests and a larger share for the interests of other parties. MPAA initially undertook an ambitious approach to the problem which it later abandoned in favor of Study A and Study B. By the initial study, MPAA sought to allocate the royalties based on the actual programs carried by some 108 television stations over a 6-month period. (Tr. 4/9 at 42.) When MPAA saw that this approach was too much for it to achieve, Mr. Cooper placed the 108 stations into 4 different categories (independent, educational, specialty, and network) from which he then selected, subjectively, the 29 stations which became a part of Study A.³³ (Cooper Statement at 15-17; Tr. 4/8 at 115-117; Tr. 4/9 at 50-59.)

35. For these 29 stations, however, MPAA did a complete analysis programming over an actual 6-month period in 1978—in contrast to the 7 days of programming reflected in Study A and Study B.³⁴ (Tr. 4/9 at 27.) It is obvious that

³³ Stations were selected such that the stations in each category contributed, as a portion of the sample, the same proportionate contribution of that category of stations to the total pool. For example, according to MPAA's fee-generation analysis, independent stations contributed about 76% of the royalty pool. Thus, Mr. Cooper wanted the independents in his sample to contribute the same proportion of the total contribution made by all of the stations in the sample. The same was true for educational stations (at about 5%) and network stations (at about 19%). (Tr. 4/9 at 56.) The two specialty stations were included by Mr. Cooper in the Study A sample because they were specialty stations, but they were counted as independents in Mr. Cooper's evaluation of their revenue contribution and in determining whether his sample selection goals had been achieved. (Tr. 4/9 at 54-55.)

³⁴ The effect of the use of this 7-day sample illustrates the dramatic contrast between the MPAA time-based approach and an approach which takes account of true marketplace factors. From a marketplace standpoint it seems fair to conclude that the telecasts of the New York Yankees, which are presented over one of the top 3 fee-generating

when the programming data for the 6 months for each of these 29 stations was keypunched and available for data processing, MPAA made various computer runs utilizing that data. *In contrast to its claim for roughly 80% of the pool which MPAA says evolves from Study A and Study B, the more ambitious study produced for MPAA a share (based on MPAA theory) as low as 73%; and, in contrast to the 2% share which MPAA would ascribe to professional sports under Study A, the broader work reflected a share for professional sports (again, based on MPAA's own theory) more than twice that number.* (Tr. 4/9 at 35-36.)

36. MPAA was justifiably concerned with the probative value of Study A when it turned to Study B.³⁵ It sought the endorsement of Alexander Korn, a former FCC economist, for what it had done. MPAA purchased Mr. Korn's "expert"

stations (WPIX), are most valuable to cable operators. But because none of the approximately 100 Yankees telecasts was presented on one of the 7 days studied, the MPAA approach would assign the Yankees \$0 for the cable carriage of their telecasts. (Tr. 4/9 at 64-67.)

35 Study B sought to relate FCC programming data to MPAA's fee-generation study to support a claim for 80% of the pool. (Cooper Statement at 23-26; Tr. 4/8 at 120-124.) Each commercial television station files with the FCC a report which shows its locally originated programming. The report does not show how much sports programming, how much syndicated programming, how many movies, or how much network programming a station carries. The FCC programming report is based on a mere seven days spread throughout most of the year (about ten weeks of the year are precluded by the FCC). The "composite week" consists of one Sunday, one Monday, and so forth. (Shosteck Statement at 8-13.) MPAA itself expressed concern with the propriety of a single week of programming selected in the manner of the FCC composite week being used for this purpose. (Tr. 4/9 at 65-67.) In any event, through a series of adjustments, MPAA sought to extract for each station filing a programming report the amount of the revenues in the royalty pool accounted for by each station which could be attributed to syndicated programming. Even then, MPAA acknowledged that its resulting claim included royalties fairly attributable to telecasts of live professional sports events. (Tr. 4/9 at 88.)

endorsement literally hours before its testimony in this respect was presented to the Tribunal.³⁶ Korn's endorsement adds nothing to MPAA's Study B. Mr. Korn had nothing to do with the survey design or with its execution. (Tr. 4/10 at 96.) The fact that Mr. Korn, under the circumstances, found Study B to be "reasonable" hardly merits its adoption by the Tribunal.

37. There can be no question, whatever the quality of MPAA's proof, that in the last analysis (1) movies and syndicated program series occupy the majority of the programming time of television stations; and (2) this is true even when the universe is confined to the qualifying programming of television stations most widely carried by cable systems on a distant signal basis. Moreover, the record developed by the sports interests does permit an assessment of the economic value of programming for which MPAA is claiming. It is important in making that assessment, however, to keep in mind that the two groups of programs represented by MPAA are not valued equally by CATV operators.

38. Cable operators distinguish quite clearly the values to them of distant signal *movies* and distant signal *program series*. The BBDO survey showed that, on the average, syndicated programming would command only 5% of cable operators' programming dollar, while motion pictures would be worth 66%. (BBDO Report at 2.) The reason for this is obvious. The CATV systems which serve the vast portion of the cable households and which generate the bulk of the royalties are located in areas where the signals of local stations with a full line-up of typical syndicated television fare is available to potential subscribers. It is the quality of the major

36 Mr. Korn reviewed a Cooper draft in Florida on a weekend and called in to MPAA's counsel his endorsement of the study. Mr. Korn stated that, at the time he phoned in his statement, he did not know that the economic consulting firm with which he was associated was also blessing ASCAP's claim for a large share of the pool. (Tr. 4/10 at 96-100.)

market *movie and sports* packages which the cable operator values most highly in his quest to acquire, hold, and charge compensable rates to cable subscribers. In contrast, the syndicated series which those distant stations carry typically duplicate what is *already* available locally and must in fact be "blacked out" in many cases pursuant to the rules of the FCC.³⁷ Therefore, it is no surprise that the BBDO study demonstrated that if cable operators were paying their royalty dollars based on their assessment of value, nearly all of those dollars would go to movies and live professional sports.

39. Thus, the evidence of record which best supports a substantial share of the pool being assigned to MPAA (based on the Phase I assumption that all distantly carried movie and syndicated programming has been claimed) is found in the evidence of the Joint Sports Claimants. The studies presented by Kalba Bowen Associates, A.C. Nielsen and BBDO, the details of which have been discussed above, show that (1) syndicated programming, including movies, occupies a considerable portion of the time on which the television stations accounting for the bulk of the royalty pool are on the air; (2) such programming has audience appeal far greater than local programming (but significantly less than sports); (3) movies, which constitute about 20% of such stations' programming, are quite valuable to cable operations because of their attractiveness to subscribers; (4) syndicated programming series, because they duplicate locally available programs and must generally be "blacked out" pursuant to FCC rules, have far less value to the cable operator; and (5) if all such programs had been claimed for, movies and syndicated programming should be awarded approximately 70% of the pool, with the great bulk of that award (66% of the total) attributable to the value which cable operators and their subscribers place upon movies.

40. MPAA suggested, in its examination of the Joint Sports Claimants' evidence, that such evidence lacked

³⁷ See Tr. 4/9 at 95-96.

for the maximum share it could without regard for logic, clarity, or correctness in the manner in which it constructed its claim.

48. NAB's sources were the Wagner/bi Associates data base and the FCC report of local programming of television stations in 1978. The latter was also used by MPAA. The FCC report shows clearly and unequivocally that the local programming of television broadcast stations during 1978 constituted about 9% of total television programming. (Wagner Statement, Addendum D at 2.) Through a series of defensible adjustments (*e.g.*, accounting for nonprogramming material and eliminating network programming from the base) and a series of totally indefensible maneuvers (*e.g.*, including nearly all Canadian station programming, live sports, off-network syndicated series, and movies as "local" in the formulation of its claim), NAB builds this 9% figure into a claim for 21% of the pool.

49. The NAB approach and the MPAA approach, while possessing common elements, differ in one material respect. NAB did not employ the DSEs, which are critical in the royalty calculation. NAB reduced the distant qualifying programming carried by each system to a cost per programming segment, defined the part of those minutes to which it wanted to lay claim as local, took the resulting dollar figure for each system, claimed the total dollars as NAB's share, and compared the dollars claimed to dollars in the pool to produce a figure of 21%. (Wagner Statement at 6-8; Tr. 4/29 at 83.) The 21% figure, it must be emphasized, is a figure derived from a calculation which NAB makes on the basis of dollars; NAB merely sought to define a dollar figure for local programming carried by each cable system. The 21% figure is not to be confused with, for example, the Nielsen data included with the Joint Sports Claimants' case which shows that local programming occupied 14% of the total broadcast time, without resort to any adjustments whatsoever.⁴⁴

⁴⁴ The individual station figures for local programming—based on actual program schedules carried for 15 weeks spread throughout the

presentation about how, if at all, cable operators benefit from the carriage of programming that is structured to the local conditions in other markets. There was no direct testimony presented about the harm, if any, a broadcaster faces if its own news and other local programming is carried by cable in distant regions.⁴³

46. NAB claimed to be arguing for a distribution on a "purely time" basis. (Tr. 4/29 at 12.) NAB never showed, however, what the distant qualifying local programming time amounted to as a percentage of the total because, in fact, examination disclosed that NAB was not advocating a "purely time" based theory at all. (Tr. 5/2 at 56, 62; Tr. 5/28 at 105-06.)

47. NAB argued that each minute of qualifying programming carried by a particular CATV system should be compensated by that system's royalties equally with each other minute. Thus, whereas MPAA sought to relate royalties to television signals and, in turn, to the programs carried by those stations, NAB sought only to construct a royalty contribution per program segment *for each CATV system* and to do so only for the local programming carried by each system. The record reflects that NAB's effort was to request

43 The issue of harm, as that question was deemed pertinent by Congress, is not the competitive harm which a *broadcaster* allegedly faces when a cable system in his market brings in distant stations with attractive sports and movie packages. Congress was concerned with harm to *copyright owners* from the unconsented and compulsory licensed distant carriage of the copyright owners' programs. Thus, an argument that high-quality locally produced news from New York City brought into cable homes in Erie might harm Erie television stations is irrelevant. Congress was concerned with harm to copyright owners. In the example, that is the harm, if any, to the New York station which owns the distantly distributed programming. NAB's counsel addressed the former issue in argument; the relevant issue was not addressed at all for the obvious reason that it would have been futile for NAB to do so. Nevertheless, it is quite clear that the television station/copyright owner receives benefit, rather than suffers harm, from such distant signal carriage.

50. NAB's theory is totally lacking in any reliable, probative factual base to allow conclusions, even remotely reliable, to be made as to what that theory, correctly applied, would produce. As NAB has articulated its theory it is entitled to royalties based on a "purely time" basis. (Tr. 4/29 at 12.) In fact, NAB's statistical model factors in the royalties paid—and it does so in a woefully deficient fashion. Nowhere does NAB say what percentage of the qualifying programming is represented by local productions. If the Tribunal were to accept NAB's articulated theory, or the time-weighted-by-royalty approach actually used, there would remain a total absence of probative evidence from which conclusions could be drawn.⁴⁵

51. NAB did not, in its evidentiary presentation, disclose anything other than the bottom-line figure derived by its computations. (Shosteck Statement, Figure 3 (revised orally,

year—range from 3 to 28% of local programming within the group of 24 stations reflected in the Nielsen work. (Nielsen Report.)

⁴⁵ The Nielsen data which is part of the Joint Sports Claimants' presentation shows that, on a purely time basis, 14% of the programming was local programming. This was based on a survey of 24 stations selected from the 650 stations that, according to MPAA's analysis, contributed to the royalty pool. MPAA's Study A showed that about 14% of the programming on its sample of 29 stations, when weighted by fees generated, to be local. (Cooper Statement, Schedule XIII.) MPAA's Study B showed that flagship stations' live professional sports programming *and* local programming combined were about 20% of the total qualifying programming for some 500 stations. (Cooper Statement at 26.)

It is fair to find, therefore, that *local* programming carried distantly constitutes from 13 to 16% of the total qualifying programming. This figure relates realistically to the FCC report. Although that study indicates that all television stations in 1978 carried about 9% local programming, one must properly adjust that figure to eliminate network programming from the base against which local programming is measured and to factor into the local portion of the broadcast day the commercial matter which is otherwise missing from the FCC's presentation of the data.

Tr. 4/29 at 21-22).) That is, NAB did not show on a system-by-system basis what the royalties it ascribed to local programming were, nor did it show how those royalties related to the particular television stations which were NAB's constituency in the proceedings. Rather, NAB gave a total dollar figure for its "local programming" and, from that dollar figure and the royalty pool itself, formulated the claim in terms of a percentage. (Shosteck Statement at 20.)

52. Operating within the broad framework of the described approach, it must be said that it simply is not clear what NAB did. When NAB submitted its direct case on March 24, it included sample pages from its various research efforts, some of which were replaced three times during the course of its case. How educational stations, Canadian stations, sports flagship stations, and other types of stations—and their programming—were actually treated in the calculation by NAB remains today shrouded in the mystique of the bi Associates' computer. (See, e.g., Tr. 4/29 at 110-13; 119-22.) It is not necessary for the Tribunal to dwell at greater length on the individual problems with NAB's case or with Wagner/bi Associates' work, which is central to NAB's case. A review of the transcript compiled during Mr. Wagner's extended appearance quickly occasions the finding that the NAB work is totally unreliable.

53. The Wagner work, for example, was rife with error. Sample pages—which one would reasonably expect to be "clean"—accompanying Wagner's direct statement were shown, by Commissioner James in particular, to be plagued with error.⁴⁶ (E.g., Tr. at 104-16.) For example, explanations were required of:

— why what was represented as a calculation of 80% of one figure was actually 85% of it (Tr. 4/30 at 23-24);

46 Commissioner James noted that, based on a number of errors in this sample page, the total number of errors could be somewhat greater than the 80 acknowledged by Mr. Wagner—perhaps closer to 3,600. (Tr. 4/30 at 107.)

- why a station listed as a distant signal in one place was not carried through to what were intended as the relevant calculations (Tr. 4/30 at 105-07);
- why adjustments which were said to have been made were not made (Tr. 4/29 at 143-45);
- what things the CATV system reported in its Statement of Account were not reflected in the data (Tr. 4/30 at 59-62);
- and on and on.

54. The Wagner/bi Associates' approach was substantively deficient as well. For example, virtually all Canadian programming carried by CATV systems—whether as distant signals or otherwise—was claimed by NAB to be *local programming contributing to NAB's share* (Tr. 4/30 at 98), even though CBC had not authorized NAB to assert a claim for it and was, at the same time, asserting a claim for that programming itself. Indeed, in one of the few examples available in the record on the basis of which one could ascertain what NAB had done, it could be seen that 95% of the revenues NAB was claiming for itself from the royalty paid by a particular system was the result of NAB's inflated claim for Canadian programming. (Tr. 4/30 at 93.)

55. The greater flaw in NAB's approach, however, lies in the theory behind it. In the preceding discussions, it has been made clear that approaches such as NAB's have no relevance here because such proposals totally ignore marketplace reality. There is no effort on NAB's part to explain what *value* there is to the cable operator when it picks up and delivers to its subscribers the local programming fare of a distant television station. And, as noted, there is no effort by NAB to define any *harm* which the copyright owning television station sustains when its news programming is carried in a market hundreds of miles away.

56. The Joint Sports Claimants' analysis of the comparative economic values of the three broad categories of programming which encompass 100% of distant signal programming—sports, syndicated, and local—demonstrates the lack of economic value of the local programming as an element of distant signal carriage. Kalba Bowen, for example, examined viewing data, promotional literature, cable operators' statements, and a special research report prepared by BBDO and concluded that cable operators place no value at all on the local programming carried distantly. (KBA Report at 47; Tr. 4/25 at 72-73.) The BBDO study, based upon and reflective of the views of marketing executives of the largest CATV system operators in the country, disclosed that *most* CATV operators would *pay nothing* at all for such programming if given a choice. Even the few that would pay anything, would pay no more than a token amount of their royalties to carry such programming fare (the mean allocation was 2%); indeed, 10% was the *highest* value assigned to such programming by any multi-system cable operator. See p. 13 above.

57. The uncontroverted facts of record are, therefore, that (1) there is no harm to the television station copyright owner when its local news and public affairs programs are carried distantly; (2) there is at most nominal benefit to the cable operators from carrying such programming distantly; (3) NAB's efforts to claim that 21% of cable royalties are attributable to local programming because that is reflective of time is totally lacking in probative value;⁴⁷ and (4) such programming should be compensated only nominally from the pool.

⁴⁷ Indications are that, on a time basis, from 13 to 16 percent of distant signal programming is locally originated (in contrast to the 21 percent suggested by the NAB). See p. 39, n.45, above.

predicated does not make provision for the marketplace factors that are critical to the Tribunal's determination.⁵³ (Tr. 5/5 at 134.) PBS' proper time share, which at most is between 3 and 4%, must be adjusted downwards to take account of these factors.

64. PBS presented no relevant evidence on the issues of the economic value of its distant signal programming to cable TV operators or the harm of this programming from its distant retransmission.⁵⁴ Presumably in lieu of such evidence, the PBS witnesses testified at length regarding their views of the "quality" of PBS programming and sympathized with the difficult task facing the Tribunal of measuring it. (Tr. 5/1 at 24, 30-36.) Fortunately, the Tribunal will be spared that difficulty since it is not distributing Peabody awards in this proceeding. Rather, the Tribunal's task is to distribute dollars paid by cable operators for programming that, in their business judgment, they believe will attract subscribers. The *economic* value and the *intrinsic* value of a program, however measured, often bear no relationship to one another.

53 It is perhaps pertinent to note that, in response to a question from Commissioner Brennan, PBS' own witness, Mr. Rhodes, endorsed "an approach that would seek to distribute the royalties on the basis of a combination of factors, rather than to select just one factor which would be expressed in some mathematical formula." (Tr. 5/5 at 116-17.)

54 There is absolutely nothing in the written prehearing submission which deals with the marketplace value of distant signal educational programming to cable operators. (Tr. 5/5 at 24-26; 138.) During the evidentiary hearings, however, PBS sought to adduce evidence, for the first time, on the "appeal" of PBS programming in distant markets. (See Tr. 5/5 at 90-102.) The PBS witness expressed his opinion that this programming did not lose any "appeal" from market to market. But since he never established what this appeal might be in the first place, his observations are not only without foundation, but are meaningless as well. Moreover, the issue before the Tribunal must necessarily relate to *comparative* values of distant signal programming. There is nothing in the PBS case which addresses this issue.

that PBS is not like the three commercial networks in a number of ways and that it is quite similar to a program syndicator in various respects. (PTV Exhibit 1; Tr. 5/1 at 9-36.) All of this information might be relevant if the Tribunal's task were to determine whether PBS is a network or a syndicator. The Tribunal's mission, however, is quite different; it must determine whether the programming distributed by PBS is "network programming" within the meaning of the Copyright Act, for such programming is clearly not compensable. See pp. 61-62, below. Mr. Grossman's distinctions between PBS and the commercial networks simply do not relate to whether a *program* distributed by PBS is "network," as contemplated by Congress. (See Tr. 5/1 at 66-72.)

62. The Joint Sports Claimants introduced an exhibit during the cross-examination of Mr. Rhodes that showed the adjustment of the 12% share claimed by PBS to eliminate the noncompensable PBS-distributed programming.⁵² (JSC Exhibit XX1, Tr. 5/5 at 158-161.) *The result is that, using PBS' own time-based approach, PBS' share is reduced to 3.9% for the first half of 1978 and 3.8% for the second half.* If the time occupied by instructional programming, which is noncompensable (see 17 U.S.C. § 110), and by programming for which PBS cannot properly claim are also eliminated, PBS' time share is reduced even further. (Tr. 5/5 at 80-83; 176-177.)

63. *Finally*, the PBS 12% share cannot be adopted by the Tribunal because the mechanical formula upon which it is

52 There is some dispute in the record as to how much of PBS' claim is attributable to the PBS-distributed programming. PBS argues, based on their selectively chosen sample of only 2 weeks and 20 stations (see PTV Exhibit 3 at 3, 7; Tr. 5/5 at 119), that 60 percent of the noncommercial television broadcast hours are occupied by PBS-distributed programming. However, the Corporation for Public Broadcasting's figure for 1978, used in the calculation in JSC Exhibit XX1, is 71.6 percent for all PBS Stations. (Tr. 5/5 at 159.) The MPAA's Study A produced a figure even higher than that. (See Cooper Statement, Schedule XIII.)

the meaning of the Copyright Act and is thus not entitled to any compensation. This is perfectly clear from an examination of the legislative history of the Act and the record in this proceeding.⁵¹

61. A large part of the testimony presented to the Tribunal by PBS was directed to the issue of whether PBS is a network. For example, the President of PBS, Mr. Grossman, testified

51 The term "network programming" is not specifically defined in the Copyright Act. However, in the provision of the Act which sets forth the method for computing "distant signal equivalents," Congress assigned a value of *one* to independent stations and a value of *one-quarter* to both network and noncommercial educational stations. 17 U.S.C. § 111(f). In support of this valuation, Congress drew upon its rationale for requiring compensation for only non-network programming:

"Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programming carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976) (hereinafter "House Report").

By assigning the DSE value of one-quarter to noncommercial educational stations, Congress could not have been clearer in expressing its view that, like network affiliates, non-network programming on educational stations approximates 25%.

Furthermore, Congress justified its refusal to require royalty payment for retransmission of network programming on the basis that it was not necessary for the fair compensation of copyright owners. By selling the program to the network, the copyright owner negotiates away, and is compensated for, the broadcast of his work throughout the area served by the network. Cable carriage of this programming does not, therefore, alter the amount of compensation the copyright owner receives. (House Report at 98-99.)

The testimony of the PBS witness confirms that the producers of the programming distributed by PBS, like the producers of programming for the three commercial networks, receive the same general compensation regardless of the number of stations that ultimately carry their programs. (Tr. 5/1 at 64-74; Tr. 5/5 at 29-42.) Thus, cable retransmission of a noncommercial station with PBS-distributed programming or a network affiliate with NBC-distributed programming has no impact on the original copyright owner's fee.

D. The Evidence of the Public Broadcasting Service

58. The Public Broadcasting Service ("PBS") has claimed for the portion of the royalties paid by cable systems for the distant signal retransmission of (1) programming owned and distributed by PBS; (2) local programming owned by 183 of the approximately 275 noncommercial educational stations operating in 1978; and (3) programming owned by various other entities, such as certain of the regional noncommercial networks and program suppliers. (PTV Exhibit 3, Appendix A; Tr. 5/5 at 71, 140-43.) By applying a strictly *time-based* formula, PBS claimed more than 12% of the pool.⁴⁸ PBS' 12% claim is unsupportable for at least three reasons:

59. *First*, the formula applied by PBS to reach its 12% plateau is dependent upon the thoroughly discredited Wagner/NAB data.⁴⁹ (Tr. 5/1 at 102-04.) Thus, the formula is plainly unreliable. *See* pp. 40-41, above.

60. *Second*, the 12% share claimed by PBS includes programming distributed by PBS to its stations.⁵⁰ This programming, however, is "network programming" within

48 According to PBS, the exact share would depend upon whether it was to be compensated for programming in which its claimants clearly or possibly did not own the copyright. If this programming is excluded, the PBS share is reduced to between 7.0% and 7.6%. (*See* PTV Exhibit 3 at 9-11; Tr. 5/5 at 80-83.)

49 According to PBS research and the Wagner/NAB data base, there were 2,007,000 hours of distant signal carriage of public television stations during the first half 1978 sample week chosen by PBS; this represented 12.5% of the 16,056,000 hours of distant signal carriage of all television stations during that week. PBS used the same approach to arrive at a figure of 12.2% for the second half 1978. (*See* PTV Exhibits 3 & 8.) Unlike the NAB and MPAA, PBS made no attempt to relate the hours its programming was carried to the fees paid by the cable system. (Tr. 5/5 at 163.)

50 The noncommercial educational stations carry programming that is either locally produced, distributed by state or regional networks, or distributed by PBS. (Tr. 5/5 at 29.)

65. PBS' effort to demonstrate the harm that its witnesses believe program producers and individual stations may suffer as a result of distant signal retransmission by cable systems is also unavailing. First, Mr. Rhodes surmised that noncommercial stations may lose viewer contributions if they are forced to compete with other noncommercial stations imported by cable. (Tr. 5/5 at 103-07.) As discussed above with respect to NAB's case, the relevant consideration is injury to the copyright owner by retransmission in distant markets, not harm to the stations in those distant markets by the importation of a competing station. *See* p. 37, n. 43, above. Second, as we have also discussed with respect to NAB, local stations are not harmed by retransmission of their programming in distant markets. *See* pp. 36-37, above. Finally, the harm to the program producers of PBS-distributed programming, to which Mr. Rhodes testified, cannot be considered by the Tribunal because this programming, as we have already shown, is noncompensable "network programming."

66. Despite PBS' failure to present relevant marketplace data, there is evidence in the record which will help the Tribunal to take account of those considerations. For example, MPAA's data shows that only one out of every three cable systems imports any distant signal PBS programming. (Tr. 5/5 at 144-48; MPAA Exhibit XX2; Shosteck Statement, Addendum B.) The MPAA data also reveals that only 81 of the over 270 noncommercial educational stations were carried as distant signals by any of the Form 3 cable systems; these 81 stations generated a total of no more than 4.5% of the total royalty pool. (*See* Cooper Statement, Schedule X.) Only 3 of the 277 noncommercial educational stations were, in fact, among the top 70 stations which accounted for 74% of the pool. (KBA Report at 12.)

67. The Joint Sports Claimants also introduced Nielsen data for two of the noncommercial educational stations which were imported by cable to an extent greater than virtually all

other noncommercial educational stations.⁵⁵ (JSC Exhibits 4 and 5.) That study shows that the programming on noncommercial educational stations has virtually no audience appeal in distant cable households.

68. Indeed, a review of JSC Exhibit 4, which identifies the distant cable household audiences for each program televised on the two stations during the four "sweep periods," shows that these programs have either no audience whatsoever or only a negligible audience. The average number of households per quarter hour viewing all of these programs, as illustrated in JSC Exhibit 5, is only 1,000—that is, during an average quarter hour only 1,000 distant cable households throughout the United States view the programming presented on these educational stations. (Tr. 5/28 at 21.) In stark contrast, the other Nielsen data submitted by the Joint Sports Claimants (*see pp. 18-20, above*) disclosed an average audience of 24,000 households for sports, 12,000 for movies/syndication and 6,000 for local origination. (KBA Report at 37.) When one compares the audiences of these top noncommercial stations to the audiences of the most widely carried commercial stations—the superstations—the contrast is even more dramatic. For example, the average households per quarter hour for sports on the superstations range from 28,000 households (KTTV) to 62,000 households (WTCG). (Kalba Bowen Report

⁵⁵ The two stations selected were KERA-TV (Dallas, Texas) and WNET-TV (New York, New York). According to Dr. Lemieux,

"KERA could be viewed by more distant signal cable subscribers than any other noncommercial educational station in the country. And WNET ranked fourth in subscribers but third in the amount of royalty fees generated. Only two stations ranked above WNET in terms of subscribers, one in Chicago and one in Detroit. And only the one in Chicago ranked above it in terms of the amount of royalty fees that it generated.

"As a result, we believe that these stations represent in some way the potential ceiling on viewing of noncommercial educational stations, since they are the ones that had the broadest number of subscribers available to be viewed." (Tr. 5/28 at 16.)

at 40.) These data confirm the observation of one of PBS' own witnesses, Mr. Rhodes, that the "public broadcasting . . . Niensens aren't overwhelming" (Tr. 5/5 at 115.)

E. The Evidence of the Performing Rights Societies

69. The three music performing rights societies—BMI, ASCAP and SESAC—advocated widely divergent theories of distribution to the Tribunal. Under the BMI approach the three societies would receive 17% of the royalty pool—15% for the music on distantly carried television programs and 2% for the music on distantly carried radio programs. Under the ASCAP/SESAC approach, the three groups would receive 13.5%—7.0% for TV; 3.8% for radio; and 2.7% for unclaimed royalties.⁵⁶

1. BMI

70. The BMI approach is time-based. Through the merger of two surveys which he had designed, Dr. Richard Link, the BMI consultant, concluded that "music constitutes 15% of distant cable television retransmissions." (Link Statement at 4.) The expert cross-examination of Dr. Link by counsel for the MPAA revealed several defects in the Link methodology. (See Tr. 3/31 at 16-33.) The most fundamental flaw, however, is the assumption that the performing rights societies are entitled to all royalties attributable to each portion of distant-signal programming in which music is heard.

71. As Dr. Link conceded to Commissioner Coulter, no distinction was made between "feature" and "background" usage. (Tr. 3/31 at 15-16.) Having failed to make that distinction, BMI's claim constituted one for all of the time that music was being used (Tr. 3/31 at 41) as if no other

⁵⁶ The Tribunal, of course, has not yet determined how it will treat unclaimed royalties. Thus, the ASCAP/SESAC Phase I claim is more properly seen as one for 10.8%.

elements were involved. Using Dr. Link's methodology, it is quite clear, therefore, that if music had been included in 100% of the qualifying programming hours, the performing rights societies would be entitled to 100% of the cable royalties. (Tr. 3/31 at 17-18.) Such an approach—that music is entitled to all compulsory license fees generated for each portion of a program in which music is used to any degree (Tr. 3/31 at 41-42)—is, of course, absurd.

2. ASCAP/SESAC

72. ASCAP and SESAC, on the other hand, urged a "marketplace" approach, but the "marketplace" they chose had nothing to do with the cable industry.⁵⁷ (See Tr. 3/31 at 113-14.) ASCAP/SESAC obtained data from FCC financial reports which disclosed the total amount of music license fees paid by television stations and radio stations to the performing rights societies. They then calculated the relationship of these sums to the total dollars paid by the stations for *certain*, but not all, other programming expenses. (See ASCAP/SESAC Statement at 1-6.)

73. The FCC report upon which ASCAP/SESAC relied lists a total of 9 items of broadcaster programming expenses. ASCAP/SESAC, however, selectively and unjustifiably utilized only 3 of these items. (See Tr. 3/31 at 68-71.) *When the music payments are calculated as a percentage of all programming expenses, rather than just the three categories of expenses isolated by ASCAP/SESAC, the "TV share" of the performing rights societies is reduced to 3.99%.*⁵⁸ (Tr. 3/31 at 84.)

57 The ASCAP/SESAC witness, Dr. Paul Fagan, confirmed that the performing rights societies do not collect any royalties for the use of music in cable-originated nonpay programming. (Tr. 3/31 at 90.)

58 ASCAP/SESAC assumed, without any support whatsoever, that the share of the cable royalty pool attributable to radio programming was 5% and the share attributable to TV programming was 95%. (ASCAP/SESAC Statement at 8.) They suggested only that this was a

74. The ASCAP/SESAC theory is that music should receive the same share of cable television expenses for distant signal programming (*i.e.*, the cable royalty pool) as it does of the conventional broadcasters' programming expenses. If this theory is accepted, there is simply no basis for calculating music's share by including some expenses and excluding others which broadcasters and the FCC appropriately consider to be programming expenses; all nine items of programming expenses listed by the FCC must be taken into account.

75. Aside from their methodological deficiencies, the formulas offered by the performing rights societies fail to consider what must be a central element of any marketplace solution—in the language of the legislative history accompanying the Copyright Act, the “damage to the copyright owner [caused by cable’s] distributing the program in an area beyond which it has been licensed.” *See* p. 62, below. BMI, ASCAP and SESAC’s avoidance of this issue is fully understandable, since it is impossible to discern any damage suffered by the copyright owner of music which receives added exposure from cable carriage. As correctly observed by Commissioner Brennan:

“[T]he performing rights societies are not concerned with an exclusive license and are not concerned with protecting marketing positions. Therefore, it could be argued that the cable compulsory license does considerably less

“reasonable approximation” of radio’s share. *Id.* ASCAP/SESAC then calculated, using the methodology described above, that the music share was 76.7% of this 5%, or 3.8%.

The radio share of 5% conjured by ASCAP/SESAC, however, is over 200% higher than what NAB itself claimed on behalf of radio stations. *See* p. 59, n. 71, below. (Radio share is 7.9% of share for locally originated television programming, which NAB has claimed to be 21.7%.) Furthermore, as discussed below, radio’s share is in fact zero since, among other things, there is no evidence in the record establishing distant signal carriage of radio programming. *See* pp. 58-59 below. Thus, the share of the performing rights societies may not properly include anything for the use of music in radio.

damage to musical copyright owners than to other claimants in this proceeding." (Tr. 3/31 at 14.)

76. One final point should be mentioned with respect to music. The performing rights societies have asserted that music is included in all qualifying programming; thus, its share of the royalty pool should "come off the top." This assertion, however, insofar as it relates to sports programming, is without any support in the record⁵⁹ and, in fact, is plainly contradicted by the record.

77. Baseball Commissioner Kuhn explained, during his testimony, that his staff had reviewed the tapes of some 50 major league baseball telecasts presented during a week in the 1980 season. (Tr. 4/24 at 29.)⁶⁰ This review disclosed that "some music" could be heard in only about 1% of the total broadcast hours. Virtually all of this music consisted of a few, unidentifiable bars emanating from an organ in the stadium and incidentally picked up by the crowd microphone; indeed, only 4% of that 1% or .04% consisted of music where one could actually identify the tune. As Commissioner Kuhn further explained, most identifiable music that one hears on a baseball telecast (other than the National Anthem) is the theme song of a club, the rights in which are typically owned by the club or licensed to the club on a royalty-free basis. (Tr. 4/24 at 29-30.)⁶¹ This evidence stands uncontradicted by any credible evidence.

59 The only attempt by the performing rights societies to address this matter came in the form of Dr. Fagan's self-serving conclusions, unaccompanied by any supporting data. (See Tr. 3/31 at 129-30.)

60 The transcript reference to "15" telecasts is a typographical error. As counsel for ASCAP noted during cross-examination of Commissioner Kuhn, the correct number is "50." (Tr. 4/24 at 77.)

61 Commissioner Kuhn further noted:

"So, I do think that while music may well have a legitimate claim before the Tribunal, I cannot see any basis for making that claim through the sports segment, and I think I can say without fear of

F. The Lack of Evidence of the National Collegiate Athletic Association

78. In a memorandum filed with the Tribunal on November 15, 1979, the NCAA stated that it is comprised of 725 four-year colleges and universities, 71 "allied collegiate conferences" and 66 "associated and affiliated institutions and organizations." The NCAA further noted that in some cases it is the copyright owner of collegiate sports telecasts; in other cases, one of its 862-member institutions is the copyright owner.

79. In July of 1978, the NCAA filed a claim for royalties attributable to those first-half 1978 telecasts in which it, as opposed to its member institutions, owned the copyright. In July of 1979, it presented a claim with respect to the second-half 1978 telecasts in which it owned the copyright as well as a claim on behalf of only 2 of its 862 members—Boston College and the University of Kentucky.⁶² In these filings the NCAA placed a value of \$1,428.89 on its second-half 1978 claim and \$1,953.90 on its first-half 1978 claim.

80. During the evidentiary hearings, counsel for the NCAA spoke broadly in terms of all collegiate telecasts. However, as the foregoing makes clear, the NCAA has absolutely no authority to claim for those first-half 1978 telecasts the copyright in which is owned by any of its 862-member institutions. As for second-half 1978, those telecasts copyrighted by 860 of the 862 NCAA members are also not encompassed within the NCAA's claim.

any contradiction that if you took basketball, hockey and soccer and made the same kind of analysis that I've just described for baseball, you would not find a different pattern emerging in those sports." (Tr. 4/24 at 30.)

⁶² See also "Statement of the NCAA, Boston College Athletic Association and the University of Kentucky Athletics Association Pursuant to Paragraph 4 of the Tribunal Directive of May 7, 1980" (filed June 6, 1980).

81. The NCAA has never made any effort to establish the actual scope of its claim. The record, for example, does not show whether the NCAA owns the copyright in any more than the two telecasts identified in its first-half 1978 claim (no NCAA-copyrighted telecasts were identified in its second-half claim). Nor is there any evidence as to the proportion of qualifying collegiate telecasts which are owned by those 860 of 862-member institutions for which no claim has been filed. The fact that NCAA has specifically claimed only about \$3,400 of the royalty pool, however, gives an excellent indication of the *de minimis* nature of the interest it is authorized to represent.

82. The NCAA's allocation theory is precisely the same as the Joint Sports Claimants'—it has urged that the distribution "reflect the relative values which cable systems and program sellers would assign to the programming at issue if negotiating freely for copyright licenses" ⁶³ The NCAA concluded that, based upon marketplace considerations, "at least 20% of the royalty pool should be allocated to sports claimants." ⁶⁴

83. The NCAA, however, did not present a single witness during the evidentiary hearings. ⁶⁵ It offered no evidence as to the value of collegiate programming in general or the programming for which it is authorized to claim in particular.

⁶³ "Pretrial Statement of the National Collegiate Athletic Association" at 6 (March 24, 1980) ("NCAA Pretrial Statement").

⁶⁴ NCAA Pretrial Statement at 1. The NCAA defined "sports claimants" as the NCAA and the Joint Sports Claimants. *Id.*

⁶⁵ The NCAA did file its Pretrial Statement which contained (1) letters to counsel for the NCAA from cable operators; (2) cable promotional announcements; and (3) the survey discussed in KBA Report at 28. Virtually all of this material deals with the nonbroadcast programming packages offered to cable systems by "ESPN" and "Madison Square Garden," and not with distant signal sports. In those few cases where the material relates to distant signal offerings, both professional and collegiate sports are involved.

And, as explained to Commissioner Coulter, the NCAA offered nothing which would permit a basis for assessing the relative values of all qualifying professional and collegiate sports programming, let alone its programming and that of the Joint Sports Claimants. (See Tr. 4/28 at 191.) Rather than present evidence directly, which could then have been tested through cross-examination, the NCAA attempted to construct a case solely through cross-examination of the witnesses of other parties. Specifically, it sought to slide in under the umbrella of the evidence of the Joint Sports Claimants by establishing that this evidence, in certain instances, encompassed collegiate sports telecasts.

84. Consistent with the rulings of the Tribunal as to the scope of Phase I, the Joint Sports Claimants offered evidence which dealt broadly with the value of all qualifying sports programming. Nevertheless, a close review of this evidence will show that its focus is upon the telecasts of the clubs represented by the Joint Sports Claimants, and not upon collegiate sports. For example, the Nielsen Study reveals that the "overwhelming" amount of distant cable viewing of sports programming is attributable to professional baseball, basketball, hockey and soccer. (Tr. 4/25 at 18.) The Official Notice Request details those numerous cases where cable operators sought special relief from the FCC to obtain this same professional sports programming. And the Kalba Bowen Report concludes that it is those stations with professional sports telecasts which are carried by cable to a disproportionately greater extent and account for a disproportionately greater portion of the royalty than non-professional sports stations. (KBA Report at 9-15).

85. In short, the sports programming share of 25%-30% of the royalty pool encompasses all qualifying sports programming, including such events as collegiate water polo and motorcross. There is, however, nothing in the record which establishes, within the sports programming category, the independent or comparative value of collegiate sports telecasts or the telecasts for which the NCAA is authorized to claim;

these telecasts are simply an unidentifiable and unquantifiable element of *some* of the evidence presented by the Joint Sports Claimants. On the other hand, there is substantial evidence in the record establishing the independent and overwhelming marketplace value of the distant signal telecasts of the four major professional sports leagues (Baseball, NBA, NHL and NASL).

G. The Evidence of the Cartoon Character Claimants

86. The cartoon character claimants are comprised of the owners of the copyright in certain (but not all) cartoon characters. These characters, most of which are identified in the prehearing submission of the cartoon character claimants, are an element of "animated" syndicated television shows only. (Tr. 4/10 at 14, 27-29.)

87. The issue of whether the cartoon character claimants are entitled, as a matter of law, to a share of the royalty pool was briefed and argued to the Tribunal last fall. To date, there has been no ruling by the Tribunal on this matter. Aside from the purely legal considerations, it would be most anomalous, from a marketplace perspective, to hold that these claimants are entitled to compensation from any source other than the producers or syndicators of the television shows of which they are a part. As their consultant, Dr. Vivian Horner, testified, when a cable system desires to present the made-for-cable animated children's shows ("Nickelodeon"), it pays a rights fee solely to the syndicator of those shows (Warner Amex)—and not to the copyright owners of the cartoon characters appearing in those shows. (Tr. 4/10 at 41-43.)

88. Nevertheless, the cartoon character claimants have demanded a share of the royalty pool, and have offered yet another time-based distribution formula. Dr. Horner determined that all animated or cartoon character programming (including programming in which characters other than the claimants appeared) accounted for some 7% of "all programming from syndicated sources in 1978." (Summary Statement of the Direct Case of the Character Claimants at 6-

7, 11 (hereinafter "Character Statement"); Tr. 4/10 at 21-23.) Asserting that characters are (1) like music in that they are both only elements of programming, but (2) different in that music is supposedly included in all programming, the cartoon character claimants argued that they are entitled to a share which is equal to 7% of whatever royalties are awarded music.⁶⁶ (Character Statement at 11.)

89. During the cross-examination of Dr. Horner it was established that the 7% time figure was both without foundation and impermissibly high. Among other things, it was based upon the improper assumption that there was only one television station in each of the 52 television markets which constitute the sample that was measured. (Tr. 4/10 at 46-47, 51.) As Dr. Horner subsequently remarked concerning her 7% calculation "more extensive data would have to be made available to make a really accurate figure." (Tr. 4/10 at 42.)

90. Despite their reliance upon a time-based formula, the cartoon character claimants apparently attempted to present evidence of what they considered to be "value." (Tr. 4/10 at 14-21.) A review of Dr. Horner's testimony will reveal that the cartoon character claimants must rely only upon the subjective impressions of Dr. Horner, and that they have no supporting data as to the marketplace value of animated cartoons or characters to cable operators.⁶⁷ Moreover, nothing whatsoever was said about the economic value of animated cartoons or characters to cable operators in *comparison* to other distant

⁶⁶ To illustrate, if music is awarded 4%, see p. 50, above, the cartoon character claimants would, under their theory, receive .28% (.04 x .07) of the pool.

⁶⁷ The cartoon character claimants also presented an executive of Licensing Corporation of America, Mr. Robert Bell. Referring to, among other things, a pair of Superman pajamas (Tr. 4/10 at 144), Mr. Bell testified as to the value of characters in merchandising products. However, as explained to Commissioner Coulter, Mr. Bell had no knowledge of the use of characters in syndicated programs. (Tr. 4/10 at 149-52.)

signal programming. (Tr. 4/10 at 48.) It is, of course, this relative value which is at issue in these proceedings.

H. The Evidence of the Radio Claimants—NAB and NPR

91. NAB and National Public Radio ("NPR") have claimed that they are entitled to royalties on the basis of cable carriage of radio stations.⁶⁸ There is, however, no evidentiary basis for *any* award to radio. Neither NAB nor NPR presented any evidence as to (1) whether, and to what extent, their stations were carried as distant signals; and (2) whether, even if carried, their radio programming has any economic value to cable operators as *distant* signals.

92. In order to qualify for a share of the royalty pool, a claimant must make the threshold showing that his programming was carried into distant markets by cable systems in 1978.⁶⁹ NAB never attempted to prove distant carriage of its radio stations. NPR relied upon two sources of data from the Federal Communications Commission rulemaking proceeding on cable carriage of radio signals, Docket No. 19418. These sources were a 1975 survey conducted by the NAB Cable Radio Committee and the FCC's Cable Television Annual Reports. The data from these sources failed to demonstrate, however, the extent to which radio stations in general, or NPR stations in particular, were carried as distant signals by cable

68 Presumably, the NAB is representing each of the radio stations which claimed for royalties. A review of these claims discloses that only about 3% of all radio stations licensed in the United States have filed claims. NPR is claiming for the local programming of 61 of the 900 noncommercial FM radio stations operating in 1978; and for the NPR-distributed programming carried by its member stations in 1978. (Moody Statement (NPR) at 1, 5; Tr. 5/6 at 64-66.)

69 A comparison of the lists of sports stations to MPAA's list of the fee-generating stations establishes that Joint Sports Claimants have made this threshold jurisdictional showing. (See Witness Statements of Representatives of Major League Baseball, National Basketball Association, National Hockey League, and North American Soccer League; MPAA Exhibit XX2.)

in 1978. (Tr. 5/6 at 122-28.) Indeed, the FCC, in its report and order, interpreted the data from the Annual Reports as showing that 78% of the cable systems carried *no distant radio signals* at all.⁷⁰ (Tr. 5/6 at 125-128; NPR Exhibit E at 14 ¶ 20.)

93. Even if one could take it as a matter of faith that some NAB and NPR radio stations were carried by some cable systems as distant signals in 1978, there is no evidence in the record relevant to the marketplace value of this programming. Again, NAB did not even attempt to make this showing. The NPR witnesses followed PBS' lead and testified regarding the "quality" of their programming and the harm to their stations. (Tr. 5/6 at 78-79; 135-36.) As the discussion of PBS' case shows, this evidence is not relevant to the kind of marketplace factors which must be considered by the Tribunal. *See pp. 46-47, above.*

94. Finally, the Tribunal has not been given any reasonable basis upon which to award a share of the royalty pool to radio. NAB has performed a characteristically bizarre computation based on a comparison of television and radio expenses that bears no relationship to any of the factors which the Tribunal may properly consider in reaching its distribution decision.⁷¹ NPR on the other hand, has thrown up its hands and admitted that it cannot quantify its claim for the Tribunal. (Tr. 5/6 at 62-64.)

70 As for the remaining 22% of the cable systems, it was unclear whether, and to what extent, they carried distant radio signals. There was no evidence that they carried any NPR stations on a distant signal basis.

71 Mr. Shosteck admitted the unavailability of "direct data" on radio carriage by cable. (Shosteck Statement (Second) at 1; Tr. 5/2 at 15.) His "indirect approach" compared the expenses of operating a commercial radio station to the expenses of operating a television station—a ratio of 7.9 to 100. This, he concluded, justifies awarding the commercial radio stations 7.9% of whatever share the broadcasters receive. (Shosteck Statement (Second) at 3; Tr. 5/2 at 15-16.) Thus, if NAB is awarded 2% (the marketplace value of its members' locally originated television programming), the commercial radio claimants would, under the NAB's theory, receive about .16% of the royalty pool. (*See Tr. 5/2 at 16.*)

III. PROPOSED CONCLUSIONS OF LAW

A. Cable Systems Are Required To Pay Royalties For the Privilege of Retransmitting Distant Non-Network Television Programming

Section 111(c) of the Copyright Revision Act, 17 U.S.C. § 111(c), gives cable systems a compulsory license to carry any broadcast signals permitted under the rules of the Federal Communications Commission ("FCC"). To be eligible for compulsory licensing, the cable system must, among other things, deposit with the Copyright Office on a semiannual basis the royalty fees computed in accordance with Sections 111(d)(2)(B)-(D) of the Act, 17 U.S.C. §§ 111(d)(2)(B)-(D).

The amount of the royalty fee paid by a cable system with less than \$160,000 in semiannual "gross receipts" ("Forms 1 and 2" systems) is a specific percentage of the system's gross receipts, subject to a certain minimum. (See 17 U.S.C. §§ 111(d)(2)(C)-(D).) For a system with more than \$160,000 in semiannual gross receipts ("Form 3" systems), the fee is a function of both (1) the amount of the system's gross receipts; and (2) its number of "distant-signal equivalents."⁷² (See 17 U.S.C. § 111(d)(2)(B).) In 1978 the Form 3 systems accounted for approximately 90% of the royalty pool while the Form 1 and 2 systems accounted for the remainder. (See Cooper Statement at 7.)

The term "distant signal equivalents" ("DSE") is defined in Section 111(f) of the Act, 17 U.S.C. § 111(f). This section provides that a DSE is "the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming."⁷³ Subject to certain modifications for "substituted,"

⁷² As the above implies, royalty payments are in no way dependent upon the number of radio signals carried by cable systems.

⁷³ Section 111(f) defines "local service area of a primary transmitter" by reference to the rules of the FCC.

“late night,” and “speciality” programming, the DSE is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station carried by the cable system. 17 U.S.C. § 111(f).

Different values are assigned to network, educational and independent stations

“because of the different amounts of viewing of non-network programming carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent.” H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976) (hereafter “House Report”).

Congress’ decision to require greater royalty payments for the privilege of carrying independent, as opposed to network and educational, stations is thus tied to its conclusion that: “[T]he copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.” (House Report at 90.)

B. The Tribunal Must Distribute the Cable Royalty Fees to Eligible Copyright Owners In a Manner Which Best Approximates Marketplace Realities

Section 111(d)(4) of the Copyright Act, 17 U.S.C. § 111(d)(4), provides that the cable royalty fees shall be distributed to those “among” specified “copyright owners who claim that their works were the subject of secondary transmissions by cable systems.” The eligible copyright owners are:

“(A) any such owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter; and

“(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under [Section 111(d)(2)(A)]; and

“(C) any such owner whose work was included in non-network programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.”

Congress underscored that the royalty fees shall be distributed only to those copyright owners who may “*validly* claim that their works were the subject of distant non-network retransmissions by cable systems.” (House Report at 91 (emphasis added).)

In accordance with Section 111(d)(5)(A) of the Act, 17 U.S.C. § 111(d)(5)(A), claimants may agree among themselves as to the proportionate division of cable royalty fees. If they fail to do so, the Tribunal is required to declare a “controversy” over the disputed funds and to initiate a distribution proceeding. (See 17 U.S.C. § 111(d)(5)(B).)

Congress did not provide the Tribunal with specific guidance concerning distribution criteria, but instructed it to “consider all pertinent data and considerations presented by the claimants.” (House Report at 97.) In determining what is “pertinent,” the Tribunal must be guided by Congress’ conclusion that cable systems are 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 (emphasis added).)

Congress recognized, in other words, the relationship between cable royalty payments and the value of the copyright owner's program to the cable operator (in the language of the House Report, the "benefit" of this programming "in attracting subscribers and increasing revenues"). It also recognized the relationship between these royalties and the value which the copyright owners would place upon the programming that the cable operator sought to import (again, in the language of the House Report, the "damage to the copyright owner by distributing the program beyond the area in which it had been licensed").⁷⁴ Quite clearly, therefore, the considerations which prompted Congress to require cable royalty payments for distant signal programming are marketplace concerns which relate to the value of that programming.

Furthermore, it is important to understand that the Copyright Revision Act imposed copyright liability on cable systems for the first time.⁷⁵ Congress concluded that:

"[c]able systems are commercial enterprises whose basic retransmission operations are based upon the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs." (House Report at 89.)

74 The need to consider the impact of cable importation upon sports in the royalty distribution process was underscored by the staff of the House Subcommittee on Communications. In its report entitled "Cable Television: Promise Versus Regulatory Performance" at 50 n.46 (1976), the staff stated: "[T]he distribution of copyright payments . . . would have to take into account both the loss to the national or regional sports telecaster and the loss suffered by the local entrepreneur."

75 The Supreme Court had held that the retransmission of broadcast signals by cable systems was not a "performance" within the meaning of the 1909 Copyright Act; thus, cable systems were not subject to copyright liability for such retransmission. See *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 382 U.S. 390 (1968).

Thus, absent any further action by Congress, copyright owners would have received payments from cable operators which were based upon true marketplace considerations.

Congress, of course, went on to grant cable systems a compulsory license to retransmit broadcast programming. But it did so solely on the theory that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." (House Report at 89.) There is simply nothing in the Act or its legislative history even suggesting that the purpose or effect of compulsory licensing should be to deprive affected copyright owners of the *relative* copyright payments which they would have received in a free marketplace.

There is no scientific formula that can assign shares of the royalty pool in a manner which takes account of the considerations which Congress thought important. To the contrary, the Tribunal must evaluate all of the evidence submitted by the claimants and then apply its expert judgment to allocate the funds in a manner which best approximates marketplace realities. The Tribunal must, in other words, act as a surrogate for the marketplace, and determine how the cable industry would have allocated its royalty dollars if it had been required to bargain for that programming for which proper claims have been filed.⁷⁶ In this sense, the Tribunal's function is more of an art than a science.

⁷⁶ Special payments are also required to be made to the copyright owner of live programs, such as sports telecasts, when these programs are carried pursuant to the FCC's permissive substitution rules. Congress noted that:

"Should disputes arise . . . between the different classes of copyright claimants, the Committee believes that the Copyright Royalty Commission should consider that with respect to copyright owners of 'live' programs identified by the special statement of account deposited under Section 111(d)(2)(A), a special payment is provided in Section 111(f)." (House Report at 97.)

Throughout these proceedings the NAB and others have advanced the notion that the Tribunal's role should be reduced to nothing more than the counting of hours during which programs have been televised.⁷⁷ That position is understandable coming from the broadcasters, because only such an approach—one which ignores the marketplace and, therefore, considerations of economic value—can produce for the broadcasters more than the token payment which they deserve. Indeed, the record convincingly demonstrates that cable operators—those who pay the royalties for which the parties are contending—place virtually no value on the distant signal programming product of the local broadcaster.

If Congress had intended the distribution process to be as simplistic and mechanical as that urged by the NAB, there would have been no need to entrust this responsibility to the Tribunal. But rather than prescribe a precise formula and require its rote application, Congress recognized that distribution should be left to an expert body which could study the "pertinent data" and weigh the "considerations presented by the claimants." Further, it underscored the relationship between royalty payments and the marketplace concerns of value both to the buyer and seller. Congress has, in short, carved out a role for the Tribunal far more central and demanding than the NAB's theory would allow. Operating

⁷⁷ 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).

within the guidelines set by Congress, the Tribunal must make a judgment as to how the marketplace, if functioning in the typical buyer-seller framework, would allocate the royalty pool.

Aside from these legislative considerations, any decision to distribute the royalty fees on the basis of some mechanical formula would find absolutely no support in the record of this proceeding. Indeed, each and every such formula offered was shown to be tainted with serious and prejudicial error. Reliance on such a formula would, therefore, mandate the return of the parties to the hearing room following any judicial review of the Tribunal's final decision.

C. Based Upon Marketplace Considerations, Sports Programming Is Entitled to Between 25-30% of the Royalty Pool; Local Programming Is Entitled to Only a Token Payment of Perhaps 2% and Certainly No More Than 5%; Movies and Syndicated Programming Are Entitled to the Remainder

The Tribunal declared a "controversy" concerning the distribution of the 1978 cable royalty fees on September 12, 1979. The Tribunal then determined that this distribution proceeding would be conducted in two phases. As noted, the purpose of Phase I is to determine the shares of the royalty pool to which the particular groups of claimants recognized by the Tribunal are entitled. Each of these groups comes within one or more of the three categories of television programming—sports, movies/syndication and local origination. See pp. 2-3, 10, above.

In the preceding sections, we have discussed the evidence presented by the parties in this proceeding. As this discussion demonstrates, the only credible evidence of record concerning the marketplace value of the three categories of distant signal programming is that offered by the Joint Sports Claimants. This evidence establishes that sports programming is entitled

to between 25-30% of the royalty pool;⁷⁸ locally produced programming is entitled to only a token payment of perhaps 2% and certainly no more than 5%; and movies/syndication are entitled to the remainder.

The Tribunal, of course, has requested the parties to specify the share which should be allocated to each of the groups which it has recognized. The Tribunal ruled:

“[A]ll parties must give a division for the following: . . . motion picture, or MPAA, and program syndicators, that’s one; broadcasters, with a separate breakout for the Canadian Broadcasting Corporation; sports, with a separate breakout for NCAA; number four, music; number five, PBS; number six, NPR; number seven, cartoon characters; number eight, radio in general, and if you can think of anything else, that would fall under number nine, miscellaneous.” (Tr. 5/29 at 123-24.)

In the sections which follow, we discuss what the law and the record establish concerning the entitlement of these groups to the sports, local origination and movies/syndication royalties.

1. Sports Royalties

The Tribunal has requested the parties to identify the share of the royalty pool which should be allocated to “sports, with a separate breakout for NCAA.” (Tr. 5/29 at 124.) As discussed, the sports share of the royalty pool should be between 25% and 30%. The remaining question, therefore, concerns the share of this 25-30% which should be awarded the NCAA.

⁷⁸ This figure represents the comparative value distant-signal programming would have in a free marketplace. It does not include the special payments which the Tribunal must allocate to the copyright owners of live substituted programming. See n.76, above.

In evaluating the NCAA's entitlement to royalties, it must be remembered that the NCAA is not authorized to claim the royalties attributable to all qualifying collegiate telecasts. Indeed, 860 of its 862 member institutions have not given the NCAA authorization to file on their behalf. The NCAA's rights with respect to the unclaimed collegiate programming are thus no greater than those of the Joint Sports Claimants. The record is silent as to the scope of the NCAA's claim, which is limited to certain of the telecasts in which it or one of 2 of its 862 member institutions owns the copyright. Significantly, however, the precise value which NCAA placed upon its claim was only about \$3,400. *See* p. 53, above.

Furthermore, the NCAA chose not to present any direct evidence during the hearings, thereby precluding cross-examination designed to test the factual basis of its claims. Instead, the NCAA attempted to piggy-back upon the case presented by the Joint Sports Claimants. Aside from its fundamental unfairness to all parties, the result of these tactics is that the NCAA has failed to produce a record which could support anything but the most minimal allocation for all collegiate sports programming, and virtually nothing for the presumably few telecasts covered by the NCAA's claim. *See* pp. 54-56, above. The approximately \$3,400 which the NCAA claimed would appear to set the ceiling of any reasonable award to this group.

The NAB, of course, has claimed that certain broadcasters are entitled to some undefined share of the sports royalties.⁷⁹ In an order dated December 15, 1980, the Tribunal concluded that, absent specific contractual language to the contrary, the

⁷⁹ The NAB has asserted that it represents only 27 of the 66 flagship stations which carried the telecasts of the professional sports clubs represented by the Joint Sports Claimants. The NAB has also advised that each of these 27 stations is claiming the royalties attributable to the club's telecasts. (*See* letter from counsel for the Joint Sports Claimants to counsel for NAB (July 2, 1980), a copy of which was filed with the Tribunal.)

sports clubs are entitled to the cable royalties attributable to their telecasts. For the reasons set forth in the briefs filed by the Joint Sports Claimants on this issue last fall, the Tribunal's ruling was correct, and thus the issue need not be reargued here.⁸⁰

Finally, the performing rights societies have suggested that their award should be taken in part from the sports share. The record, however, demonstrates that the music which might be heard during a professional sports telecast occupies approximately 1% of the total telecast time; furthermore, identifiable music accounts for only about 4% of this 1% or .04%. See p. 52, above. Thus, virtually all of the music heard on these telecasts (which is *de minimis* to begin with) represents nothing more than a few non-recognizable bars played in the stadium and, like crowd noises, picked up in the background of the telecasts. Under these circumstances, the performing rights societies, both as a matter of law and fact, have no valid claim to any share of the sports royalties.⁸¹

80 On May 22, 1980 the NAB was permitted to put into the record any evidence which would allegedly support its claim for a share of the sports royalties. The NAB presented one witness, an attorney for Metromedia, who testified for approximately 30 minutes as to what he considered were the two different types of contractual arrangements concerning sports telecasts. The NAB also introduced two contracts that Metromedia had, not with a sports club, but with a savings and loan association; these contracts were silent on copyright ownership. (See Tr. 5/22 at 162.) In short, there was nothing in the NAB's presentation which requires a reversal of the Tribunal's December 15 conclusion on entitlement to sports royalties.

81 To hold otherwise would mean that every copyright owner of a work which was incidentally included in a telecast might be entitled to royalties. This is plainly not the intent of Section 111 of the Copyright Act.

2. Broadcasters' Local Origination Royalties

There are three groups who represent the broadcasters' claims for locally originated television programming⁸²—the NAB, PBS⁸³ and CBC; in addition, the performing rights societies claim entitlement to the music included within local origination. As discussed, this programming (if it had all been claimed) would be entitled to no more than a token award of between 2% and 5% since, on a distant-signal basis, it would be absolutely valueless in the cable marketplace. The Tribunal must decide how this sum should be divided among the three broadcaster representatives and the performing rights societies.

The record is silent as to whether the local programming of any broadcaster is more or less valuable than the programming of any other broadcaster. Furthermore, the NAB, PBS and CBC each relied upon the Wagner/bi Associates time-oriented data base in support of its claims. This plainly unreliable study provides no basis whatsoever for distributing the entire royalty pool. However, it would seem appropriate and unobjectionable for the Tribunal to determine the relative shares of these parties by reference to the data base which they have sponsored.

82 The NAB has not limited its claim to locally produced programming. Early in the proceedings NAB devised several theories—sports ownership, syndicated exclusivity and compilation—to support a more exaggerated claim. The issues raised by the NAB were fully briefed and argued. And on December 15, 1980, the Tribunal entered an order in which it concluded that the Copyright Act does not provide for an award of cable royalties to broadcasters on any of these theories. The NAB was given an opportunity to present evidence during the hearings on its novel theories but offered nothing which would support a reversal of the Tribunal's December 15 ruling. Under these circumstances the discussion of the broadcasters' entitlement to royalties focuses solely upon their claims for local programming.

83 PBS also represents claimants who come within the movies/syndication group. The share of these claimants is discussed in the following section.

A proper accounting based upon the Wagner/bi Associates data base is perhaps not possible on the current state of the record. Among other matters, the CBC has made the rather untenable claim that it owns the copyright in every program televised over CBC stations; thus, Mr. Wagner has identified all such programs as "local" and credited it to CBC. *See* p. 40, above.

A good indication of the relative shares of the broadcaster representatives can, however, be gleaned from the MPAA's fee-generated data base. More specifically, the MPAA has concluded (based upon its analysis of Form 3 statements of account) that commercial stations account for approximately 89.4% of the royalty fees; educational stations, approximately 4.5%; and Canadian/Mexican stations, approximately 5.5%. (Cooper Statement, Schedule X.) This would suggest that the local origination share be divided among the NAB, PBS and CBC in a ratio of approximately 90:5:5 or 18:1:1, respectively. Music would then receive its share (as discussed below) from the royalties awarded to each of these claimant groups.

3. Movies/Syndication Royalties

Based upon marketplace considerations, movies/syndication is entitled to the remaining portion of the royalty pool, which would amount to between 65% and 73%.⁸⁴ There are four claimant groups which have sought a share of this sum: (1) the MPAA (on behalf of several claimants of movies and syndicated series); (2) PBS (on behalf of several claimants of movies and syndicated series televised on noncommercial educational stations);⁸⁵ (3) the performing rights societies (on

84 The 73% figure also represents the share of time occupied by movies and syndicated series, as disclosed by one of MPAA's original studies. The MPAA, of course, was later able to push this figure upwards through successive revisions in its original studies. *See* pp. 31-32, above.

85 The great majority of syndicated programming which appears on noncommercial educational stations, the PBS-distributed program-

behalf of the copyright owners of music included in movies and syndicated programming); and (4) the cartoon characters claimants (on behalf of the cartoon characters included in movies and syndicated programming).⁸⁶

The movies/syndication share must initially be divided between the two syndicator representatives—PBS and MPAA. Regardless of one's feelings as to the *intrinsic quality* of educational programming, it is quite clear, from the record, that the *commercial marketplace value* of distant signal educational programming is minimal at best. Again, a reasonable allocation of the royalties between the MPAA (on behalf of syndicators to commercial stations) and PBS (on behalf of syndicators to educational stations) can be derived from the amount of royalty fees generated by commercial and educational stations—that is, according to the MPAA analysis, approximately 95:5 or 19:1. This would result in PBS receiving about the same percentage of the movies/syndication share (something less than 4%) as it would receive under its time-based distributional formula (when one properly excludes

ming, is non-qualifying network programming. See pp. 43-45, above. Thus, the claimants of this programming requested by PBS are not, as a matter of law, entitled to any share of the pool.

86 A fifth group, the Christian Broadcasting Network ("CBN"), has also claimed a share as a syndicator of 15 religious programs; for these 15 programs, the CBN has sought precisely 4.69% of the royalty pool. See "Direct Case of the Christian Broadcasting Network, Inc." (filed March 24, 1980). The Tribunal has not requested in Phase I any identification of a separate allocation to this group. See p. 67, above. Presumably this matter will be left to Phase II.

Like the NCAA, the CBN has sought a share of the royalty pool solely on the basis that its counsel was present in the hearing room. Rather than offer any direct evidence explaining or supporting its formula, CBN simply questioned the witnesses of other parties. One such line of questioning established that CBN offers its programming to cable operators without its imposing any charge for this programming. (Tr. 4/28 at 58-59.) This perhaps most clearly demonstrates the "value" of CBN's programming in the cable marketplace—or, more precisely, the lack of such marketplace value.

from consideration the PBS-distributed programming which is nonqualifying network programming).

With respect to the performing rights societies, the ASCAP/SESAC "marketplace" formula (when it takes account of all relevant factors rather than the few which ASCAP/SESAC have selectively chosen) shows that music is entitled to no more than 4% of the royalty pool. The performing rights societies should, therefore, receive the same percentage share of the local origination category and the movies/syndication category for a total of no more than 4%.⁸⁷

Concerning the cartoon character claimants, no portion of the royalty pool may be awarded to them. As a matter of law, and consistent with marketplace realities, the cartoon character claimants must receive any compensation, not from the Tribunal, but from the producers or syndicators of those shows of which their characters are but one element. Aside from the legal issues which have already been briefed, the character claimants have simply failed to prove their requested claim.

4. Radio

The Copyright Act provides for compensation only to the copyright owners of nonnetwork television and radio programming carried into distant markets by cable systems. 17 U.S.C. § 111(d)(4) (1976). The radio claimants, NAB and NPR, failed to prove that their programming was carried on a distant signal basis by cable in 1978 or, even assuming it was, that it had any marketplace value to cable operators. Furthermore, NAB and NPR have not provided the Tribunal with any reasonable basis upon which a share of the royalty

⁸⁷ For example, assume that local origination received its maximum entitlement of 5% and movies/syndication received 70%, and music was determined to be entitled to 4%. Music's share of local origination would then come to approximately .3%, and its share of movies/syndication would come to about 3.7%.

pool may be awarded to them. See pp. 58-59, above. In short, the radio claimants have to establish that they are entitled to any share of the 1978 royalty pool and, accordingly, the record will not support any allocation of the funds to them.

Respectfully submitted,

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July 7, 1980

BY HAND

Mary Lou Burg, Chairman
Copyright Royalty Tribunal
1111 20th Street
Washington, D.C. 20036

Re: Distribution of Cable Royalty Fees
Docket No. CRT 79-1

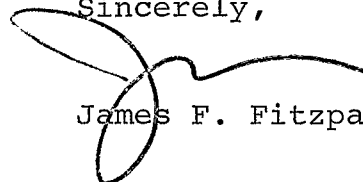
Dear Ms. Burg:

Enclosed are an original and 6 copies of the "Proposed Findings of Fact and Conclusions of Law of the Joint Sports Claimants."

As explained in our motion for a two-day extension of time, which the Tribunal denied, our law firm moved to a new office building during the past weekend. Because of the unanticipated disruption caused by this move, we found that it would not be possible to have our proposed findings and conclusions produced over the weekend using the firm's facilities. Accordingly, we contracted to have the proposed findings and conclusions printed by an outside firm.

As a result of the short notice and holiday weekend, the printer was unable to have the brief in final form to meet the Tribunal's deadline. We are, therefore, filing with the Tribunal the enclosed galleys. While the galleys are complete in all substantive respects, there are some typographical errors and missing cross-references. These matters will be corrected and copies of the final brief will be filed with the Tribunal and served upon counsel tomorrow afternoon.

Sincerely,



James F. Fitzpatrick

Enclosures

cc: Counsel on Attached List