

COPYRIGHT ROYALTY TRIBUNAL

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 PREHEARING CONFERENCE :
 :
 1979 CABLE DISTRIBUTION, : CRT DOCKET NO. 80-4
 :
 PHASE II :
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1111 20th Street, Northwest
 Suite 450
 Washington, D.C.

Friday, January 15, 1982

The hearing in the above-entitled matter
 commenced at 2:00 p.m., pursuant to notice;

BEFORE:

FRANCES GARCIA, Chairman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

MARY LOU BURG, Commissioner

ORIGINAL

APPEARANCES:

ARTHUR SCHEINER, Attorney-at-Law
FRITZ ATTAWAY, Attorney-at-Law
Counsel for MPAA & Program Syndicators

JOHN H. MIDLEN, Jr., Attorney-at-Law
Counsel for Old Time Gospel Hour

ARNOLD P. LUTZKER, Attorney-at-Law
Counsel for Multimedia Program Productions, Inc.
Golden West Broadcasters

ROBERT GARRETT, Attorney-at-Law
PHIL HOCHBERG, Attorney-at-Law
Counsel for Joint Sports Claimaints

ANN K. FORD, Attorney-at-Law
CLIFFORD HARRINGTON, Attorney-at-Law
Counsel for Christian Broadcasting Network

VICTOR E. FERRALL, Jr., Attorney-at-Law
ROBERT M. HALPERIN, Attorney-at-Law
Counsel for NAB

EDWINA E. DOWELL, Attorney-at-Law
Counsel for Spanish International Network

JOHN CRIGLER, Attorney-at-Law
Counsel for Great Trails Broadcasting,
Licensee of WHAT TV

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P R O C E E D I N G S

1
2 CHAIRMAN GARCIA: This meeting is called at
3 the request of the Motion Picture Association of America. I
4 believe all of you have a copy of that request. All parties
5 on the 2.7 list were notified of the meeting. Mr.
6 Scheiner's concerns fall in two categories, eligibility and
7 issues.

8 Mr. Scheiner, since you are the person who
9 requested this meeting, would you please proceed? It would
10 be better if you address one issue at a time. When it is
11 over with, the parties concerned may leave if they so
12 desire.

13 MR. SCHEINER: Thank you. I appreciate your
14 calling this meeting at my request. I trust it will be
15 helpful to the Tribunal and to the parties as well.

16 Very briefly, as we approach phase two, I think
17 we can proceed on the basis of a recognition that the statute
18 provides for monetary settlement. This Tribunal, consistent
19 with the statute, has encouraged the parties to seek such
20 settlement.

21 It is the case on behalf of MPAA that we have
22 expended a great amount of time and great effort, and I am
23 pleased to report with considerable success. We have well
24 over 50 program suppliers who have joined with MPAA and its
25 member companies in a voluntary settlement in accordance with

etp2

1 the formula that has been applied equally to each of them.
 2 As you recognize, we have been unable to reach agreement
 3 with some of you, several remaining claimants.

4 First, Golden West, and that is a lovely note
 5 to start on, because I think I can report that since the
 6 last flurry of pleadings we have agreement there as well.
 7 We had moved to dismiss Golden West, essentially, for the
 8 reason Golden West claims that we did not see an appropriate
 9 question for resolution by this Tribunal; namely, there was
 10 a contract dispute only between the producer and syndicator.

11 We note the appropriate hopeful settlement would
 12 produce an end to that controversy, feeling that it was
 13 our expectation, our position, that that question of a
 14 contractual difference were better tried in a civil court
 15 than before this Tribunal.

16 In addition, we pointed out in our pleading that
 17 based upon the application of the MPAA formula, Golden West
 18 had understated its claim. It was not asking enough. In
 19 response to our pleading to the Tribunal, it is now my under-
 20 standing, and I would like counsel for Golden West to
 21 confirm, that they are withdrawing as a separate claimant
 22 and they are joining in the settlement argument proposed
 23 by MPAA.

24 MR. LUTZKER: That is right.

25 MR. SCHEINER: To a less happier note, the NAB,

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1 kicks. We moved to dismiss NAB's claim and we reaffirmed
2 and urged that position on the Tribunal.

3 The Tribunal provided two simple rudimentary
4 requirements for participation in phase two: Tell us who
5 the claimant is and tell us what issues you want to try,
6 simple as that, set forth perhaps in a sentence or two in
7 your order.

8 NAB didn't meet them, and for that reason, we
9 urge that you dismiss their claim.

10 That position has been shored up and reinforced
11 in our view by the subsequent findings which have been made.
12 There is no -- we were urging this in the hearing room, that
13 indeed we do not dismiss its claim. There is no showing
14 of any kind whatsoever that any of the programs belatedly
15 relied upon were ever broadcast, with one exception, which
16 I will get to.

17 There is no showing of any nature whatsoever
18 that that broadcasts were ever carried by cable systems.
19 The one program that does qualify based upon the application
20 of the MPAA formula excepting 50 plus program suppliers,
21 would provide with an entitlement of \$115. And, I think it
22 is rather uneconomic, inefficient and wasteful to spend anymore
23 time than we already have on that claim. So, in light,
24 particularly of NAB to identify any claimant, and tell us
25 what issues are hereto addressed pertinent to this inquire,

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etp4

1 CHAIRMAN GARCIA: Any questions by members of
2 the Commission?

3 (No response.)

4 CHAIRMAN GARCIA: Mr. Ferrall.

5 MR. FERRALL: Well, I certainly don't want to
6 argue to you that this is a simple procedure. But, I think
7 NAB represents the broadcast stations whether syndicated,
8 represents all of the broadcast, U. S. commercial TV
9 stations. That includes the ones who syndicate station
10 programs, which is probably in this phase and the ones who
11 didn't, which was relevant in the last phase.

12 We gave you a list of them and who we represent.
13 There are three exceptions in this phase, WHAT, Multimedia,
14 and Golden West. Our notice of appearance said, gave
15 notice of NAB's desire to participate on the issues were
16 listed, one, portion of royalties allocated to syndicated
17 programming to which they are entitled, and two, to the extent
18 it may be raised by other parties the allocation of royalties
19 awarded by commercial television, or to commercial television
20 as between commercial television claimants.

21 Now, perhaps, I was naive or perhaps I am naive.
22 But it seems to me the issue in this proceeding as set forth
23 in your order was what portion of the money reserved for
24 syndicated programming should go to stations. As far as
25 Art's comments about whether or not -- first of all, Art says

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1 that programs belatedly relied on is the question by NAB.
2 There is a question as to whether they were ever broadcast.
3 We have not put our case on yet. We gave you a list of
4 exhibit from the hearing which discussed programs which
5 we are going to present evidence on.

6 I was struck by Art's observation that in his
7 pleading that we had failed to identify -- that there was
8 a question somehow about whether phase one was relevant
9 here. It seems to me clear it is. There was specific
10 testimony on the sub. We gave you one additional piece of
11 evidence which we plan to rely on, although we have not
12 explained to Art how we are going to do that nor do I think
13 we are required to.

14 The record shows every distant signal that was
15 carried in 1979, every station carried on the distant
16 signal basis, and that is a part of the record.

17 I think Art's final point is the one I would
18 focus your attention on. There is this, I think, unspoken
19 notion that somehow NAB has failed to meet MPAA's formula.
20 I don't understand MPAA's formula for distributing as assumed
21 to be a benchmark for phase two. We don't fit conveniently
22 into Art's model. Art went out, did a survey of 48 stations
23 and counted up all the programs, did behavioral analysis
24 of them. We have 50 stations to deal with. Art's clients
25 are all big. They are few. Our clients are little and they

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1 are many. I will tell you right now we are not going to
2 be able to present to you in our little direct case the kind
3 of 49 station detail that Arthur has been able to give you,
4 just as Arthur conceded, or as Allen conceded in his
5 testimony, they couldn't do five stations if they had tried
6 to do it. We have to try to do it.

7 What we will give you is going to be a number
8 of examples of station programs that were syndicated. The
9 examples won't be challengeable. I mean they will have been
10 syndicated. The question will be how much money should be
11 awarded on the basis of evidence we give you.

12 At the end, I am a little baffled by All this.
13 The issues were clearly stated and our clients clearly
14 identified. I suppose -- if what Art was thinking, that
15 we should have gotten each and every individual station to
16 file a claim, that just would have been impossible, or to
17 file a separate notice. It also would have been useless.

18 I see those objections as terribly technical
19 and really without the spirit or the letter of the Tribunal's
20 orders.

21 COMMISSIONER COULTER: You say that all those
22 stations are already demonstrated as being carried by
23 cable?

24 MR. FERRALL: Yes.

25 COMMISSIONER COULTER: So, Mr. Scheiner, your

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1 claim is that the specific syndicated program has not been
2 filed for, is that correct?

3 MR. SCHEINER: No, sir.

4 COMMISSIONER COULTER: Could you elaborate on
5 that?

6 MR. SCHEINER: Yes. I can appreciate the diffi-
7 culty you have. I, too, had enormous difficulty in fol-
8 lowing what my friend was saying. I don't want to take more
9 time.

10 COMMISSIONER COULTER: I am trying to understand.

11 MR. SCHEINER: My point is very simple. You
12 notice, each claimant comes and stakes out his claim. NAB
13 came in and said NAB is staking out a claim. I don't know
14 who NAB is you can go to.

15 Out of hundreds and hundreds of stations on whose
16 behalf are you making a claim.

17 COMMISSIONER COULTER: Okay.

18 MR. SCHEINER: Later it came in, if I am in
19 error on this I would like to be corrected by Mr. Ferrall,
20 they came in and say we are staking out a claim on behalf
21 of CBS and they designated certain exchange programs of
22 CBS owned and operated by stations only.

23 Let me drop a footnote, if I may. A very sub-
24 stantial number of those programs, if indeed they were ever
25 broadcast, you can't tell that didn't come into being until

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1 after 1979. Is that responsive to your question?

2 COMMISSIONER COULTER: Not entirely. I am
3 interested more in the very technical issue of your claim
4 that they are ineligible because they have not properly filed
5 for the program. I am just trying to clarify whether you
6 mean that. I am not talking about the issue that you
7 mention about the fact that they have not identified clearly
8 their claim. But, I think you raised another issue, the
9 fact they have not even filed with us for the programming
10 involved, and I believe that is what you were saying.

11 MR. SCHEINER: I was trying to make two different
12 points, threshold points. You said, tell us who the
13 claimants are. They didn't do that. The second point, you
14 said tell us what issues are presented. And, they said,
15 we are going to tell you about the share we are entitled
16 to.

17 I don't read that as an issue, okay? That is
18 the ultimate, bottom line. That is the threshold objection
19 to their participation at all. That is really the only,
20 the significantly material part of the argument as to why
21 they should be dismissed at the very outset.

22 In addition, I pointed out to you that if they
23 get over that threshold objection, which I submit is not
24 technical, the very simple requirement which you imposed
25 that they did not comply with. The material that they

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1 furnished us with on the exhibit exchange today is meaning-
2 less. It is something approaching half of these little
3 programs that they rely on didn't come in to being until
4 1980.

5 COMMISSIONER COULTER: I understand all that.
6 None of your objections, then, contains the argument that
7 whatever material they may be claiming for with us as part
8 of their claim is technically invalid because it has not
9 been, that programming has not been filed with us. Am
10 I correct? In other words, in order to be a claimant you
11 have to file. You have to have asserted that you have
12 such , such programming that has been carried by cable.

13 MR. SCHEINER: Yes.

14 COMMISSIONER COULTER: You are not asserting that
15 they have not done that with respect to this program?

16 MR. SCHEINER: They clearly have not. Vic
17 doesn't assert that they have. There have been no showing
18 that any of the programs relied upon has been carried by
19 any cable system, no showing on that. It is a void.

20 COMMISSIONER COULTER: He just said that all
21 of the stations involved have been carried by cable.

22 MR. SCHEINER: I just heard him say it. I tell
23 you there is absolutely nothing in his evidentiary submis-
24 sion in the face of your directive which says, "on January 4
25 the parties shall file with the Tribunal in exchange

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1 with other parties their direct written cases including
2 list of witnesses, prehearing statements, any written
3 witness statements and all documentary evidence." If you
4 ask me whether he has made a showing of cable carries?
5 I answer you, absolutely zero.

6 COMMISSIONER COULTER: I understand that, but
7 if in the absence of that showing in this current docu-
8 mentary evidence, you are not going to claim thought that
9 if programming of a station were carried by cable, that
10 because a specific program has not been field for with us,
11 that is syndicated by a TV station, you are not claiming --

12 MR. SCHEINER: I am not making that argument.

13 COMMISSIONER BURG: I have a question.

14 MR. FERRALL: I just wanted to say one thing or
15 maybe ask Art a question or ask you to as, Art a question.
16 Is it the position that because we are relying on exhibits
17 that are already in the record that somehow e had to exchange
18 them again as part of phase two? They were specifically
19 identified in our case submission there.

20 There is no documentary evidence except what is
21 in the record that we identified in what we exchanged. I
22 have the feeling Art thinks this piece of paper, the only
23 thing in the record, is our case. That is not correct.

24 MR. SCHEINER: I am unaware of any exclusive
25 reliance on any particular documentary evidence that would

1 support NAB's claim on behalf of CBS.

2 COMMISSIONER BURG: This goes to my question.
3 I have some confusion about CBS in your January 7 submission
4 to us. You had several pages of information regarding
5 CBS programming. That was never in the record.

6 MR. FERRALL: No. That is why we put that in.

7 COMMISSIONER BURG: That is why you put that in?

8 MR. FERRALL: Yes.

9 COMMISSIONER BURG: I think you also mentioned
10 in that letter the other documents and some of the other
11 exhibits that were in.

12 MR. FERRALL: And the one witness.

13 COMMISSIONER BURG: So you are taking all that
14 plus what has been because it was not in the record before?

15 MR. FERRALL: Yes.

16 COMMISSIONER BURG: An accumulation of all phase
17 one plus CBS?

18 MR. FERRALL: Yes. I have not put on my case.
19 Arthur is assuming I am using this one piece of paper I put
20 in for CBS as a claim for CBS. I did not give it for that.
21 I gave this document as an example, rather elaborate example
22 of intragroup exchanges of programs, which is an issue we
23 discussed in the first phase of the hearing. It shows how
24 one group goes about making programs and exchanging them.

25 COMMISSIONER BURG: It would have been helpful

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1 if you submitted that.

2 MR. FERRALL: I tried to do that, to submit a
3 prehearing statement to spell our general approach out and
4 make it clear we were going to present examples of this kind.
5 You notice it is our position that the harm and the benefit
6 and all of the factors that you have identified impact on the
7 carriage of programs made by one station on another station.

8 It does not matter whether -- it is not dependent
9 upon whether you are a member of MPAA or not to get there.
10 That is one of the things we will argue to you. And, CBS
11 is an example of that. There are others. We have them.
12 Dr. Patrick will testify about some. There are some dis-
13 cussed in the documents already in the record.

14 You notice, as far as who the claimants are,
15 Commissioner Burg, you notice if I am correct, I may be
16 incorrect on this, and I am sure Mr. Garrett will straighten
17 me out, I think the copyright holders and sports events of
18 the team but the claims are filed by the league. I don't
19 know. I don't mean this as a criticism that you carry MPAA
20 as a syndicator which it is not.

21 It is a confusing area. I have really not thought
22 for a moment there is any question who NAB represents here.

23 MR. SCHEINER: I don't for the moment care to
24 argue further but I have a question. Do I understand cor-
25 rectly that you are purporting to represent in phase two

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1 claimants other than CBS?

2 MR. FERRALL: We filed a list which you have a
3 copy of of everyone of the parties that we represent in this
4 proceeding. It was not limited to phase one. We filed a
5 list of everyone of our companies.

6 MR. SCHEINER: I am absolutely dumbfounded.

7 MR. FERRALL: At the request of Commissioner
8 Burg -- I mean of Commissioner Garcia --

9 MR. SCHEINER: I now understand in January 4,
10 the first time that NAB is purporting to represent some
11 still unadvertised, closed, unnamed parties in phase two.
12 I am just -- I find this incredible.

13 MR. FERRALL: I will give you a copy of the list.
14 I have got the list and the Tribunal has the list.

15 MR. SCHEINER: Filed in response to the directive?

16 MR. FERRALL: Filed in responseto Commissioner
17 Garcia.

18 MR. SCHEINER: Filed in response to November 27,
19 "All claimants will come in, furnish their written cases,
20 documentary evidence," et cetera?

21 MR. FERRALL: It has been filed last August.
22 Maybe I misunderstand. If your idea is each and every little
23 radio, TV station has to file a written case, that you are
24 suggesting that NAB can't represent them?

25 MR. SCHEINER: I don't want to argue this further.

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1 I think it consumed more time than it is worth. I think
2 my position is rather clear.

3 CHAIRMAN GARCIA: Any additional comments from
4 the Commissioners?

5 (No response.)

6 CHAIRMAN GARCIA: Mr. Ferrall, I notice you have
7 another engagement. I will poll the Commissioners later
8 and get back with you. You may wish to leave.

9 MR. FERRALL: Thank you.

10 CHAIRMAN GARCIA: Mr. Scheiner?

11 MR. SCHEINER: The next claimant I would like
12 to address is SIN. Again, I will be brief. As you are
13 aware, SIN entered into an agreement authorizing MPAA to
14 represent it on the basis that MPAA had represented a
15 number of other parties that I mentioned and SIN agreed
16 to a voluntary settlement on the same basis.

17 It, then according to a letter which it filed
18 after some conversations with the Tribunal, purported
19 to exercise a unilateral withdrawal from that agreement,
20 and that is clearly an invalid act. You don't enter an
21 agreement unilaterally, say, I changed my mind and walk
22 away from it. That is what agreements are all about, a
23 binding contractual arrangement.

24 I have a continuing and strong objection to any
25 party attempting to walk away in that fashion from a binding

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1 commitment. Bad enough if it is an oral representation, but,
2 when reduced to formal terms, I think it ought to be binding.
3 I make that position clear in my paper.

4 Let me point out what I consider to be a very
5 significant impact on the Tribunal's processes. As I said
6 earlier, the act does provide for voluntary settlement.
7 The Tribunal in turn consistent with the act has urged
8 parties to go forward.

9 Think of the precedential value of this. We
10 dealt with 50, 60 program suppliers and yet we shake hands,
11 cut a deal. We reduce it to writing and then some party
12 backs off and says, well, I don't think I quite like it.
13 I would like to take another cut at the precedential.

14 This is no loose proposition if you adhere to
15 your ruling. He cut a deal. He has determined all cards
16 are on the table. He says, back off. I have now got some
17 leverage.

18 I backed away. I would strongly urge you to
19 weigh carefully the impact of affording any party such
20 a right. I think it is very bad and a very dangerous
21 precedent.

22 COMMISSIONER BRENNAN: You have not asserted,
23 Mr. Scheiner, that you have sustained some damage because
24 of that change in position, have you?

25 MR. SCHEINER: My clients have. Clearly, my

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1 clients have. We have already spent a considerable amount
2 of time, for instance, transmitted into money. We are going
3 to be facing a hearing which is expensive, diverting and
4 time consuming. I consider that very real damage.

5 I also consider the resulting damage from the
6 very shaky nature of any deal that we may cut on behalf of
7 program suppliers in the future, not only in the phase two
8 proceeding, but, -- let me write a little senario for you.
9 I, personally, fully expect that this Tribunal will be affirmed
10 by the Court of Appeals in its 1978 distribution proceeding.

11 I would fully expect the Tribunal to write
12 its 1979 order completely consistent with the basic criteria
13 and standards that it enunciated in the '78 proceeding
14 and I would hope, and this is only a hope, that with
15 firm rulings from the Tribunal, that we could all save great
16 sums of money down the road by cutting voluntary settlement.

17 I submit to you that a recognition of SIN, SIN's
18 claimed right to back away jeopardizes that whole structure
19 and is quite inconsistent with statutory objectives.

20 CHAIRMAN GARCIA: Any additional comments?

21 MR. SCHEINER: No.

22 CHAIRMAN GARCIA: Ms. Dowell, would you like to
23 respond?

24 MS. DOWELL: I would. On behalf of SIN, I would
25 like to say that for them it is not a no lose situation.

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1 The main principals would make this decision in this matter
2 according to correspondence to the Commission as well as
3 to Mr. Scheiner, indicated those persons who would normally
4 make those decisions were out of the country and were not
5 accessible.

6 With regard to statutory deadlines, SIN did file
7 in July the claim to a share of the monies that would be
8 allocated to the program syndicators category. It has
9 since then before the December 16 deadline, met all other
10 deadlines in the proceeding and has shared its direct
11 case with all the parties on the service list.

12 I can say that the agreement that was signed at
13 the time, again, the parties who were there, were faced
14 with deadlines. They apparently spoke with MPAA. They
15 were told they could take MPAA's formula, they could repre-
16 sent themselves or they could lose out. That is exactly
17 what happened. They at that point did not want to lose
18 out completely.

19 They were not able to contact their president,
20 the person who would automatically make this decision. They
21 believed at that time that they had no other choice but to
22 sign the agreement and to go along with MPAA.

23 When the principals did return to the country
24 and were made aware of the situation, almost a week after
25 they returned, they reviewed the situation and they decided

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1 that the MPAA formula was in fact unfair to SIN. They
2 had made these concerns known to MPAA previously, even the
3 people who stood behind the agreement did not know until
4 last letter received from MPAA less than a week before the
5 deadline for filing notice of intent to participate, they
6 didn't realize, or were not told and the letter didn't
7 express, that the formula to be used by MPAA was going to
8 rely primarily on ratings data, and SIN has had a long
9 standing and very public stance against the rating system.

10 They figure it inaccurately measures the Spanish
11 audience, it is a party related to the other parties in
12 this program category. I would say in that respect, we
13 have done as much as we could to provide the information
14 necessary.

15 We have not missed any deadlines. I don't believe
16 there has been the damage that Mr. Scheiner asserts at
17 this time.

18 CHAIRMAN GARCIA: Let me ask you something. The
19 individuals that signed the agreement, were they in authority
20 to contract on behalf of SIN?

21 MS. DOWELL: Yes.

22 CHAIRMAN GARCIA: Were these the same individuals
23 that signed the agreement last year?

24 MS. DOWELL: No. They were not the same
25 individuals as signed the agreement last year, to my

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1 knowledge. I don't believe so. I don't remember seeing
2 the last year's agreement. But just being advised of the
3 situation at that time, I don't believe the same parties
4 signed the agreement.

5 MR. SCHEINER: I have the signature of the
6 current agreement, not last year. Do you know who signed
7 it this year?

8 MS. DOWELL: Bill, William Styles. I
9 don't believe Mr. Styles signed it last year. I believe
10 it was Mr. Siegal.

11 MR. ATTAWAY: If that is important, I can find
12 that out.

13 CHAIRMAN GARCIA: Any other questions?

14 COMMISSIONER BURG: I have a couple of questions.
15 Ms. Dowell, with respect to the 1978 distribution, you
16 received 132,000 some odd dollars?

17 MS. DOWELL: Yes.

18 COMMISSIONER BURG: You said that represented
19 a certain percentage of \$184,000. What does the \$184,000
20 represent?

21 MS. DOWELL: That figured in the direct case.

22 COMMISSIONER BURG: That is the figure you are
23 asserting for this year.

24 MS. DOWELL: For 1979.

25 COMMISSIONER BURG: Maybe you are going to ask

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1 me. Excuse me.

2 MS. DOWELL: We gathered data from the Copyright
3 royalty to be a statement of account of the stations that
4 we knew at that time that carried the signal TV stations
5 that used SIN programming and calculated for each station,
6 I guess CBS would have had to pay copyright fees for,
7 calculated that percentage attributed to SIN and took the
8 same percentage, applied it to the total.

9 COMMISSIONER BURG: I understand that. Why is
10 the figure the same for both years?

11 MS. DOWELL: I don't think it is the same for
12 both years. The figure we asserted in 1979 on the data we
13 I believe is \$184,000, and we have since made a more
14 thorough search of the Tribunal's records and come up with
15 an additional \$50,000. And, neither the percentage nor the
16 dollar figure for 1978 is that. I believe it was \$121,000.

17 COMMISSIONER BURG: Maybe I am reading it wrong.
18 In your submission, you said, "Therefore, the 1978 formula
19 resulted in the distribution to SIN of \$132,902, representing
20 1.2 percent of the \$184,384 in total fees allocated to the
21 program syndicator category."

22 MR. SCHEINER: I think that is a typo. I do
23 scribble. I think it is 72 rather than 1.2. It is a
24 garbled sentence.

25 COMMISSIONER BURG: Okay.

etp21

1 COMMISSIONER COULTER: I have a question.
2 Your claim, basically, is that last year they did the open
3 fee generation and you accepted that. This year they are
4 doing it on Nielsen surveys. You don't accept that because
5 of the peculiarity of the Hispanic viewers?

6 MS. DOWELL: That is right.

7 COMMISSIONER COULTER: You are still a program
8 syndicator within the program syndicator group?

9 MS. DOWELL: Yes.

10 COMMISSIONER COULTER: You feel that the
11 evidence of uniqueness of the Spanish viewers is fairly
12 obvious and clearly assumed?

13 MS. DOWELL: I think the fact that we program
14 exclusively for purpose in Spanish and for purpose of
15 reaching the Spanish market makes us unique. I think the
16 problem is that there are, and the correspondence that was
17 attached to, I believe the letter that we wrote to the
18 Tribunal to consider this issue, indicated that it is the
19 ratings methodology.

20 COMMISSIONER COULTER: You feel the nature of
21 the Spanish community is such that ratings, very clearly
22 don't represent that, reflect accurately.

23 MS. DOWELL: Not the methodology used by Nielsen.

24 COMMISSIONER COULTER: The issue of the precedent
25 that Mr. Scheiner has mentioned is obviously one that would

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be very important to us. I assume you understand that.

MS. DOWELL: Yes.

COMMISSIONER COULTER: If your evidence on that issue is so clear, why haven't you brought that up with the syndicators, rather than coming to us?

MS. DOWELL: That was brought up at the syndicators. It was raised with the syndicators in previous correspondence. We got one letter subsequent to the communication of those concerns and we were told to take it or leave it.

COMMISSIONER COULTER: I am saying, you can understand our reluctance to want to get emerged.

MS. DOWELL: I do understand it. I can only say if we had not filed, for example, in July of '79, according to your rules and according to the statute, we would be precluded from participating in this proceeding.

In the notice, the December 16 and the January 7 deadlines were stated as procedural deadlines for notice to participate and to file in the direct case.

Had those people, precisely responsible for this particular issue, been there, the notice would have been filed on the 16th. At this point, I understand the concerns of the Tribunal. I can only reiterate that I don't believe damage has been done to MPAA or the other program

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1 syndicators. This particular deadline has been met. I don't
2 believe at this point, as stated in MPAA's direct case,
3 that there are in the program syndicator category any other
4 cliamants who are reconsidering their deal with MPAA who
5 believe it to be fair.

6 They apparently accept. They have voiced, to my
7 knowledge, no problems with this particular methodology
8 previously and SIN had.

9 COMMISSIONER COULTER: The procedural, specific
10 procedural issues completely aside, I am talking about the
11 essence of the queston. If you feel the other program
12 syndicators are accepting Nielsen as a deal and you say,
13 just a second, we are underrepresented by Nielsen ratings
14 by 30 percent, whatever it is, why didn't you say, was
15 there any serious desire to make that fact known to MPAA
16 sit down, deal with them, by definition, would be very,
17 very reluctant to get involved in intragroup settlement.
18 There is nothing we want to encourage more.

19 MS. DOWELL: There were those serious overtures
20 made. I can supply for the Tribunal, if you like, copies of
21 correspondence to MPAA precisely stating SIN's concern for
22 this particular methodology. My understanding is subsequent
23 to raising this issue on the phone, sending the letter and
24 other calls with, I believe Mr. Cooper, they attempted to
25 reach some sort of settlement. That was absolutely

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1 impossible. They were told, the people who carried on the
2 conversations, that there was no way that this formula would
3 be changed to accommodate SIN or accommodate SIN's
4 concern. They believed the formula was fair. There was
5 no room for compromise. Subsequent to that time in con-
6 versations with counsel, there have been overtures once
7 more that the settlement might be possible but the prin-
8 cipales in this instance absolutely refused to make such
9 compromise, if the premise is going to be on the Nielsen
10 ratings.

11 Apparently, the position of MPAA is that that
12 premise will not be changed. As a result, the principals
13 for SIN refused to go further with it.

14 COMMISSIONER COULTER: Excuse me. Do you know
15 the percentage by which Nielsen underrepresents the
16 Spanish community?

17 MS. DOWELL: I cannot give you that precise
18 figure.

19 COMMISSIONER COULTER: That figure is available?

20 MS. DOWELL: I believe it is available, yes.

21 COMMISSIONER COULTER: That figure should be a
22 settlement figure, then. Shouldn't it?

23 MS. DOWELL: It could be.

24 CHAIRMAN GARCIA: Commissioner Burg, did you have
25 a question?

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1 COMMISSIONER BURG: Given the dollar difference
2 between what you claim you are owed and what MPAA has
3 agreed to give you, given that difference, does it entail
4 or does it justify going through this phase two?

5 MS. DOWELL: Simply that it justifies going
6 through phase two. The first reason, I think the prin-
7 ciple used in determining the formula by which MPAA intends
8 to distribute the money. It has been over the past 15
9 years involved with the rating services, attempting to
10 get them to correct it in terms of the Spanish audience.

11 There have been studies and those can be pro-
12 vided as well, that the rating services themselves often
13 come up with significantly varying figures for the Spanish
14 audiences watching particular programs.

15 Secondly, with regard to the disparity in amount,
16 I believe SIN is offered under MPAA's 1979 formula about
17 \$23,000, which is about \$100,000 less, more than \$100,000
18 less than SIN received last year in the settlement. We
19 believe it does justify going forward.

20 CHAIRMAN GARCIA: Mr. Scheiner? Excuse me.
21 Commissioner Brennan?

22 COMMISSIONER BRENNAN: No questions.

23 MR. SCHEINER: I have some brief comments. With
24 a couple of exceptions, I think Ms. Dowell has kind of told
25 it like it is. Some of the characterizations though, I think,

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1 are unfortunate. MPAA is not distributed the money. MPAA
2 made clear throughout this proceeding, every pleading we
3 ever filed, see attachment A, the list of people whom we
4 represent. There are member companies only. What we did,
5 however, is undertake, with really great effort and great
6 expense to achieve accommodation, and when we undertook
7 that effort we made a representation to everyone of the
8 50 and more outfits we talked to, we will treat everybody
9 in precisely the same way.

10 We will not deviate one bit and in any fashion.
11 Indeed, that commitment and that representation explains
12 why we volunteered to Golden West that they didn't ask
13 for enough money. The formula requires that they get
14 more.

15 As a consequence, we cannot compromise. We can't
16 walk away from this. We won't do it, because we will be
17 in breach of an absolute representation to these other
18 people. Hypothetically if we were prepared to do so, you
19 would have 50 plus syndicators in here saying, the MPAA
20 broke their promise to us and now let's have a real hearing.

21 When Ms. Dowell says "take it or leave it," what
22 we really says, we are locked in. We are locked in by a
23 formula, but more importantly, we happen to believe that
24 that formula is the proper, fair and equitable one. Recogn-
25 nize now, that we here are not talking about money. We are

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1 generally talking about principle, and the principle as
2 it affects the Tribunal is the possibility of preserving
3 a firm structure that will enable us to reach a settlement,
4 a voluntary settlement, consistent with the objectives of
5 the act.

6 One final point, we do not accept that Hispanics,
7 other minority groups are underrepresented in the Nielsen
8 formulas. We have been in close touch with them. We
9 have received documentation from them and if you don't
10 grant my motion -- I don't mean for this to sound threatening,
11 but of necessity, we will have to have one of those further
12 extended proceedings, with a challenge of experts as to the
13 methodology pursued. And, Nielsen represents to us, and we
14 believe they are representing on easily and on an informed
15 basis, that they are properly counting the Hispanic and other
16 groups.

17 I revert to my basic point. A deal is a deal
18 and it is not money in our case. The SIN people are
19 genuinely not hurt. If they are, it is by their own doing
20 by executing the deal. Let them come in next year, the
21 year after, the year after that. But, I urge on you don't
22 let them back away from an executed agreement.

23 MS. DOWELL: I have a couple of final comments
24 to make on the points that have been raised here. That is,
25 again, those persons whoever they were in position to take

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1 it or lose everything did not have such knowledge to meet
2 the requirements specified in the December 16 notice, that
3 is specify the existence of dispute, specify the issues
4 involved in that dispute and document that. They were not
5 in position to know what the figures and what information
6 was available at that time.

7 Our cable vice president was out of the country,
8 in addition to the president of the company and they would
9 have handled this thing. They knew where the documentation
10 was. They knew it would not support apportionment of the
11 fees MPAA was proposing.

12 Again, SIN's primary reason for pursuing this is
13 principle, much like that of MPAA. We believe the situation
14 should call for an equal formula where all the parties
15 involved are in equal positions.

16 We have documentation for our case that the
17 Nielsen and the ARBITRON figures often and consistently
18 underrepresent Spanish audiences. In addition to that, we
19 have no intent to drag out this proceeding, to bring in a
20 number of expert witnesses. Our position is according to
21 the notice and the statute in the case, there is no one
22 formula that is to be used or can be used to distribute the
23 monies to all parties. We believe what SIN should receive
24 is what those stations, those cable operators paid for use
25 of SIN's programming and that is the case that we are

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1 interested in making. We do not intend, we will certainly
2 cross-examine the witnesses that MPAA put on, but, we
3 certainly don't intend to drag the proceeding out intermin-
4 ably.

5 MR. SCHEINER: May I take five seconds. more?

6 CHAIRMAN GARCIA: Yes.

7 MR. SCHEINER: Absolutely the last point on this
8 issue. SIN is relying completely and absolutely on fees
9 generated, and I think the pursuit of their objective in
10 reliance on fee generated exclusively is a pointless
11 undertaking in the light of the repeated statement, in light
12 of what you did last year, the repeated statement on the
13 record this year.

14 I will stop with that. It is 100 percent fee
15 generated and nothing else.

16 MS. DOWELL: But that issue is not to be decided
17 at this prehearing conference, I believe.

18 MR. SCHEINER: No. I am sorry. I don't mean
19 to get into an exchange.

20 CHAIRMAN GARCIA: Are you finished with the
21 subject?

22 MR. SCHEINER: Yes.

23 CHAIRMAN GARCIA: If you would like to leave --

24 MR. SCHIENER: I have another point as it relates
25 to SIN.

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1 CHAIRMAN GARCIA: Okay.

2 MR. SCHEINER: It is a continuing interest
3 point. I think I made clear my rather strong feelings that
4 they ought not be permitted to participate. I will
5 reaffirm that if that should be your ruling, if you should
6 rule my way, we are nevertheless still prepared to apply
7 our formula. And, if you are then in agreement to make the
8 distribution in accordance with our formula, but in the
9 event you rule against us, that offer is withdrawn. All
10 bets are off.

11 We are then in an adversary position. I have
12 to say that to you because we will then be undertaking
13 a brand new proceeding. I just want to be clear, okay?

14 The second point: if you rule against me, you
15 will recall in a pleading which we filed with you, we
16 had asked that SIN's claim insofar as it relies on sports
17 events programming, as the basis for a claim to share in
18 the syndicators, be dismissed.

19 We did not claim that in phase one. We, rather,
20 allocated that to the sports interests and it forms no part
21 of their case as it relates to us.

22 In the particular programs are details in our
23 pleadings. That is a continuing interest request in the
24 event they are not dismissed.

25 MS. DOWELL: I would respond to that if I had a

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1 copy of the pleadings.

2 CHAIRMAN GARCIA: I have a copy.

3 MR. SCHEINER: I have one back in the office
4 for you. They are in the mail. This has been a bad couple
5 of days in town. I am sorry for that.

6 CHAIRMAN GARCIA: Mr. Garrett.

7 MR. GARRETT: For the purpose of the record,
8 I am Bob Garrett with my associate Phil Hochberg, represent-
9 ing the Joint Sports Claimants. I would like to make two
10 points on that, Madam Chairman, having received a copy
11 of the pleadings about two hours ago.

12 First of all, the sports interests do not under-
13 stand that SIN has made any valid share for a share of
14 15 percent of the royalties. SIN has never approached the
15 sports interests to discuss sharing in any portion of that
16 15 percent award.

17 More importantly, the direct case, statement
18 that was filed by SIN, specifically and expressly, confines
19 their claim in phase two to a share of the syndicated
20 award, and just for purpose of the record, I will refer here
21 to paragraph four of the direct case of SIN, Inc., for
22 phase two field in those proceedings. Under these circum-
23 stances, I don't believe that there is any issue before
24 the Tribunal as to whether or not SIN is entitled to any
25 portion of the sports award. The second point, going beyond

1 that, I think it would be our position that in the event
2 SIN is in entitled to a share of the sports award, that
3 the programming that Mr. Scheiner has identified in his
4 pleadings does not come within the category of sports
5 programming.

6 I will only say on that, once again, I received
7 the pleading only a couple of hours ago. I have had no
8 opportunity to look at the nature of the programming that
9 has been identified by Mr. Scheiner.

10 It is worthy to note that there is nothing in
11 the direct case statement filed by SIN which would give any
12 identification that this is sports programming.

13 I would also say Mr. Scheiner has not in his
14 motion to dismiss established any facts that this programming
15 is sports programming. The mere fact programming may involve
16 a sports event of some sort does not, in our opinion, make
17 it come within the sports programming category.

18 If it were anything else, all of the record time
19 developed concerning Bowling for Dollars question that
20 would have been spent between Mr. Scheiner and myself and
21 opposed to Mr. Scheiner and the National Association of
22 Broadcasters.

23 CHAIRMAN GARCIA: Thank you.

24 MR. SCHEINER: The source of our representation
25 that it is a sports program is the SIN exhibit which

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1 identifies it as such. Second, we did check our Nielsen
2 data and determined that in our allocations, it was attrib-
3 uted to sports and not to program syndicators.

4 COMMISSIONER COULTER: That is what cropped up
5 in your survey?

6 MR. SCHEINER: No. I checked before. These are
7 live sports events, and going back to our Nielsen survey,
8 as we did this morning or yesterday, we determined that in
9 our computations it was allocated to sports not to the
10 program syndicators in phase one.

11 COMMISSIONER COULTER: You are saying this is
12 part of your survey, the allocation?

13 MR. SCHEINER: Yes.

14 MR. GARRETT: There is nothing in the figures
15 Mr. Scheiner has filed, nothing in the record of this case
16 which identifies this programming clearly enough so the
17 Tribunal can make a determination this programming is
18 indeed sports program.

19 I understand the nature of Mr. Scheiner's
20 representations about this being live programming. I would
21 have thought it was quite to the contrary, syndicated
22 programming, taped programming that was distributed. But,
23 SIN certainly knows more about that programming than I do.
24 The point is there is nothing in the record for us to make
25 any kind of an argument based on that.

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1 Just in closing, Mr. Scheiner is correct. In
2 their survey, the Nielsen survey identified that as main
3 or sports programming, not the programming that we repre-
4 sented in this particular case, and I think a careful
5 reading of the pleadings that Mr. Scheiner filed in his
6 post-hearing findings, consistently avoided giving us credit
7 for any local sports, concentrating instead on major sports,
8 which is indeed what we have represented throughout this
9 case.

10 CHAIRMAN GARCIA: Any other comments?

11 (No response.)

12 CHAIRMAN GARCIA: Excuse me. We have been going
13 about an hour.

14 MR. SCHEINER: Next, local media.

15 It relies on programs in which an outfit named
16 Show Biz owns the copyright. Multimedia acquired Show Biz
17 in 1981. Show Biz did not file for cable royalty fees and
18 because of that, Multimedia has no right whatsoever in Show
19 Biz programs. I could attempt to sell you the Brooklyn
20 Bridge. If I don't own it, I won't pass the title to you.

21 Show Biz had no claim to cable royalties. It
22 did not seek them and a couple of years after the fact when
23 it sells its Biz to Multimedia, it cannot transfer to
24 Multimedia anything which it did not have. The legal author-
25 ities in support of that, virtually self-evident

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1 proposition, are set out in our pleading and I do not argue
2 it further.

3 CHAIRMAN GARCIA: Thank you.

4 MR. LUTZKER: I received a copy of Mr. Scheiner's
5 pleading almost two yearas ago. We tried to communicate
6 about it yesterday. Briefly, as we indicated in our filing,
7 Multimedia files a valid claim in a timely manner covering
8 the 1979 fees. The claim at that time under the statute
9 and under the regulations required identification of only
10 a single program transmitted on a secondary basis by a
11 cable system with the expectation that at a proper time,
12 sometime in the future the Tribunal would require the
13 copyright claimers to present their case and at that time
14 detail information regarding the programs that they owned.

15 Multimedia, on January 7, did that with respect
16 to the programs that it owned. In 1981, in the spring of
17 '81, they acquired the stock of Show Biz, Inc., which as
18 we explain in the pleading is a distributor of a number of
19 principally country western programs thought there is
20 also distributed at least one public affairs proqram.

21 As the owner at the time of the filing in
22 January of these programs, it was clear, I think, that
23 Multimedia, as copyright owner was allowed to make claim
24 for the programs specified that were distributed in 1971
25 that it owns as of the filing.

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I think if the Tribunal or the Congress had required the declaration in July of 1980 with respect to programs covered, that identify each and every program for which a program is being made, Mr. Scheiner's case would be more tenable.

1 I think to the extent the Act only requires
2 identification of the copyright owner and the Tribunal
3 only requires identification of a single transmission, whe-
4 ther the copyright owner identifies more or less at the
5 time of the filing in July of 1980, does not dispose of the
6 entitlement when the claim is presented to the Tribunal.

7 In this case, I can see no harm to the other
8 program syndicators to the extent the Multimedia is
9 making a claim for all the programming that it now owns.
10 As an aside, I don't know to what extent, this is just a
11 thought that struck me as Mr. Scheiner was making his
12 presentation, Show Biz was the distributor, as I said, of
13 a number of country music programs, as well as a program
14 entitled "Tony Brown's Journal". Tony Brown, as it turns
15 out, later I discovered a few days ago, had filed a separate
16 claim with Copyright Royalty Tribunal claiming ownership
17 of his program. I don't have a copy of the contract between
18 Show Biz and Tony Brown, and that is something I'm endeavoring
19 to obtain now.

20 To the extent that Tony Brown's program was
21 one of the seven or eight that Show Biz distributed during the
22 calendar year 1978, I think a legitimate question can be
23 raised to the extent that the Tribunal would be prepared
24 to disqualify the balance of the Show Biz programming, whether
25 the Tony Brown claim thereby qualifies Show Biz as a valid

1 claimant to the extent that Multimedia is now in a position
2 of asserting those rights.

3 I think that on balance, just to summarize,
4 the alternative is to strike this claim and put the value
5 awarded for those programs in an unclaimed pool, presumably
6 for further redistribution between other program syndicators
7 on some unidentified formula basis. I don't think that
8 serves the purpose of the Act. I think where a valid clai-
9 mant has made an assertion in the proceeding, is now
10 prepared to set forth its case with respect to all the
11 programming it owns it should be entitled to do so
12 whether the program was acquired prior to, during the year
13 of the claim in question or after, as long as it is a
14 valid claimant.

15 COMMISSIONER COULTER: I have a question.

16 CHAIRMAN GARCIA: Commissioner Coulter?

17 COMMISSIONER COULTER: When the Donohue Show
18 is syndicated, it is obviously not broadcast at the same
19 time it is being broadcast, after being broadcast by WGN,
20 is that correct?

21 MR. LUTZKER: The syndicating for Donohue is
22 little complex. If you want me to go into that, I can.
23 It changed as of January of this year, but the program is
24 a live program broadcast in Chicago. A tape is made,
25 which is then sent to Cincinnati for duplication and

1 distribution on a syndicated basis.

2 COMMISSIONER COULTER: On the syndication, it is
3 obviously rebroadcast at some other time, not simultaneously
4 of the initial broadcast.

5 MR. LUTZKER: That's right.

6 COMMISSIONER COULTER: WGN, the cable retrans-
7 mission of the Donohue Show transmitted by WGN, then
8 would be picked up in the MPAA survey as local station
9 broadcasting; wouldn't it?

10 MR. LUTZKER: In the MPAA? I don't understand
11 the MPAA survey; so, I can't really speak to that.

12 COMMISSIONER COULTER: They take today, say
13 a television today--

14 MR. LUTZKER: Donohue is listed as a local
15 program by GNA.

16 COMMISSIONER COULTER: I should perhaps
17 address the question to Mr. Scheiner.

18 The Donohue Show -- do you understand my
19 question?

20 MR. SCHEINER: I understand what you are saying.
21 Forgive me for a moment. It is my understanding that
22 when Donohue is broadcast by WGN, it is logged by WGN
23 as a local program. Nevertheless, when Donohue is picked
24 up, is syndicated and picked up and retransmitted elsewhere
25 we include WGN for credit as a syndicated program for

1 Phil Donohue.

2 COMMISSIONER COULTER: That segment that you
3 credit as a syndicated program would be paid out of normal
4 distribution?

5 MR. SCHEINER: Yes.

6 COMMISSIONER COULTER: The other portion
7 broadcast by WGN would, therefore, be part of NAB's
8 share?

9 MR. SCHEINER: No.

10 MR. LUTZKER: No.

11 MR. SCHEINER: We conceivably could have
12 taken that position, but we did not. We have agreed, as
13 Cooper has testified, that when a local program is
14 picked up and syndicated for the purpose of syndication
15 shares, we will recognize that local broadcast as a
16 syndicated program.

17 COMMISSIONER COULTER: It is both shares?

18 MR. SCHEINER: Yes.

19 MR. LUTZKER: I think you would have to
20 distinguish definition under the FCC logging rules of a
21 local program versus who is the copyright owner for
22 syndication purposes.

23 COMMISSIONER COULTER: In your formula you
24 have a way to actually put in that programming?

25 MR. SCHEINER: Yes.

1 COMMISSIONER COULTER: How come you are not
2 being repaid out of their formula?

3 MR. LUTZKER: As has been previously
4 discussed, the procedure for MPAA is to advise non-member
5 groups or non-member claimants what their allocated share
6 is. It is not a negotiated arm's length transaction.
7 This is your share, according to our formula. You like
8 it, sign the agreement. You don't like it, don't sign
9 the agreement. I think based upon the experience of
10 Multimedia with respect to the syndication of Donohue,
11 the cable carriers, the implication is that that has -- the
12 formula grossly understates what the fair share is as a
13 major syndicated program.

14 COMMISSIONER COULTER: Their formula covers
15 all syndicators.

16 MR. HARRINGTON: Could I get on the record?
17 There is a point that hasn't been cleared. Your formula
18 at least as I understand it, has never included CBS,
19 Old Time Gospel Hour, PTL. Certainly we were never advised
20 of a formula or told we could participate in any formula
21 today; is that correct? I would like to get that point
22 clear.

23 MR. SCHEINER: The answer is yes and no.
24 Our formula does include the devotional claimants. As
25 to whether you are advised of what our formula does for you,

1 I don't know. 44

2 Do you, Fritz? I am under the impression that
3 we did.

4 MR. ATTAWAY: I think not. I think it was
5 made clear long before that our formula was unacceptable
6 to the devotional groups. I don't even think we sent you
7 a letter inviting you.

8 MR. HARRINGTON: You certainly did not
9 invite us to join you.

10 MS. FORD: We never received it. We don't
11 know what the formula is.

12 MR. SCHEINER: So, we clear up this point--
13 I think the pleadings made it abundantly clear that from
14 our point of view there is basic difference between the
15 devotional claimants and the secular claimants which we
16 think are terribly significant. I think you can appreciate
17 that as well. Can we get back to this?

18 COMMISSIONER COULTER: I would like to come
19 back to this other issue, if I may.

20 You are not making any claim though that the
21 Nielsen survey, for instance, discriminates against you,
22 as opposed to any other syndicated programming; it wouldn't
23 represent you the same way it would represent all other
24 syndication?

25 MR. LUTZKER: I have no doubt whatever formula

1 devised by MPAA has applied consistently to all parties.
2 I think there are questions. We filed a copy of a
3 press release by NCTA, Cable Television Advertising
4 Bureau questioning the Nielsen diary surveys. I think
5 that a reasonable person could say, as SIN might
6 say in their case, as others might say, that it and all
7 all SIN's diary keeping raises question.

8 And, as I understand the Tribunal proceeding
9 if the parties can't agree, you present your own case.

10 MR. SCHEINER: We don't quarrel with that at
11 all. The only point, if I may, that I was addressing
12 was the claim to Show Biz programs. Multimedia in our
13 view has absolute right to pursue any type of theory of
14 distribution that it cares to, and the Tribunal will
15 determine which is the proper one. No quarrel on that score.
16 The only difference between us at the moment is whether
17 they can claim for 1979 the programs owned by Show Biz,
18 which Multimedia didn't acquire until 1981. That is the
19 only point of difference between us at this juncture.

20 COMMISSIONER COULTER: I understand. I guess
21 I was getting into the substance of the dispute.

22 CHAIRMAN GARCIA: Any other comments?

23 (No response.)

24 CHAIRMAN GARCIA: Mr. Scheiner?

25 MR. SCHEINER: The last one on this section,

1 Madam Chairman, Mutual of Omaha. I took the precaution
2 of calling their counsel this morning. He asked me to
3 advise that in the event that you were to make any
4 disposition of any arguments that I advanced, would he
5 have an opportunity to make a presentation, and that is
6 a reasonable request in view of the fact he was proceeding
7 with the understanding Mutual wouldn't be raised this
8 afternoon at all.

9 I appreciate how he got to that. My point
10 on that is very brief. Your order provides that parties
11 file, exchange, serve on other parties and in the event
12 they wish to pursue a claim and Mutual has not done so,
13 end of argument, okay?

14 In the event that you rule against me, I
15 have a contingent claim. I should put on the record that
16 the Chairman was kind enough to furnish me, at my request,
17 with a print-out furnished to the Tribunal only. We
18 have examined that print-out. I have had our experts
19 look at it, and they just plain don't understand it at
20 all.

21 MR. MIDLEN: What is it a print-out of?

22 CHAIRMAN GARCIA: From BIO Associates.

23 MR. SCHEINER: Having told you that I can't
24 tell you anything more because my experts don't understand
25 it, if you rule against me, if you permit Mutual of Omaha

1 to go forward despite the fact it hasn't exchanged with
2 parties, I would request that before they be permitted to
3 go forward, they furnish to the Tribunal and all other
4 parties a detailed, careful, intelligible explanation of
5 what that print-out is.

6 I have nothing further on Mutual.

7 CHAIRMAN GARCIA: Will you also be putting that
8 request in writing?

9 MR. SCHEINER: Sure.

10 MR. HARRINGTON: Before we proceed with the
11 next section of your presentation, I have a matter I
12 would like to bring up, Madam Chairman, because we had
13 hoped to file Wednesday, due to the weather we were
14 unfortunately unable to do so. But, we would like to
15 file a motion to dismiss MPAA case for failure to file
16 a proper case. I won't argue it at all. If Mr. Scheiner
17 would like to argue it at a later date after reviewing
18 our files, he may do so.

19 MR. SCHEINER: I may waive argument.

20 MR. HARRINGTON: One other point, since your
21 contingent argument in a couple of cases where you had
22 a problem with exhibits, failure to exchange. There is
23 a reference in your direct, so called direct case, to
24 a videotape which you plan to present. We were not
25 provided with a copy of that videotape and we will certainly

1 object to its introduction because it was not exchanged
2 with the other parties. I'm just putting you on notice.

3 MR. SCHEINER: My response is that in the
4 course of phase I, a number of parties did make showings
5 and in no instance were they served or exchanged with other
6 parties.

7 MR. MIDLEN: I beg to differ.

8 MR. SCHEINER: You will get a chance if
9 you gather I'm wrong on that, I retrack. I now recall
10 seeing a little black book in the exchange. I would
11 point out that in the exchange, in the current exchange
12 by PTL, it has advised us all that it proposes to have
13 another videotape showing in the hearing room.

14 I do have two copies of the tape, two or three.
15 I will deposit one with the Tribunal. I would have done
16 it within the last day or two, but circumstances in town
17 being what they were, you can appreciate we didn't.

18 I would be prepared to make it available to
19 you as well.

20 I would trust that -- I don't care to see the
21 PTL tape in advance. I will waive that.

22 (A short recess was taken.)

23 MR. SCHEINER: If I may, in a brief off the
24 record discussion, Mr. Midlen advised that he was author-
25 ized by Mr. Adams to speak for him with respect to any

1 questions concerning issues to be raised, any discussion
2 on issues in this prehearing conference; is that correct?

3 MR. MIDLEN: I guess, although, I mean, he
4 didn't actually use those words. I think what Chairman
5 Garcia said, he felt that he would rely on what transpires
6 here, based on what I said.

7 MR. SCHEINER: Okay.

8 MR. MIDLEN: I don't feel that I am actually
9 speaking, per se, for John Little.

10 COMMISSIONER BRENNAN: Mr. Adams has waived
11 his opportunity to be here.

12 MR. SCHEINER: I will accept that.

13 CHAIRMAN GARCIA: Mr. Midlen is the conduit;
14 is that a fair statement?

15 MR. MIDLEN: Yes.

16 MR. SCHEINER: With respect to the issues
17 specified by the parties, one or more of the devotional
18 claimants, particularly Mr. Adams, has posed what I
19 regarded to be as in effect three issues. One was the
20 relative harm allegedly suffered by devotional claimants
21 and the harm suffered by other program suppliers. I think
22 that is an appropriate issue and I think we will join
23 on that.

24 Two other issues were raised. First, the
25 issue of so-called unclaimed funds. I have treated this

1 issue rather extensively in our pleadings and wish to make
2 the following point very briefly.

3 At, prior to the commencement of the 1979
4 distribution proceeding, the Tribunal asked all interested
5 parties to come forward with a statement of their views
6 of such legal jurisdictional procedural and other questions
7 as they felt were appropriate to be raised.

8 Nobody raised the question of unclaimed funds.
9 On the contrary, one of the devotional claimants, CBA,
10 urged on the Tribunal that the CRT's 1978 decision as
11 res adjudicata, as having determined all substantive legal
12 matters then before it and in particular, showing that the
13 determination in the 1978 decision be controlling.

14 In Phase I of the proceeding, no showing of any
15 kind was made with respect to unclaimed funds.

16 COMMISSIONER BRENNAN: Are you saying last year
17 this was a Phase II issue?

18 MR. SCHEINER: You most certainly said that. I
19 would point out to you, Chairman Brennan -- I am sorry,
20 Commissioner Brennan--

21 CHAIRMAN GARCIA: That is okay.

22 COMMISSIONER BRENNAN: You may be right.

23 MR. SCHEINER: We are talking about the 1978
24 chairman. I am sorry, Chairman Burg.

25 COMMISSIONER BURG: Why don't you call us by our

1 first names. You'll have no problem.

2 MR. SCHEINER: We have no concern with the facts
3 and the resulting shares that would flow from a considera-
4 tion of the issue of unclaimed funds because it is the
5 fact that we do represent extraordinarily high percentage
6 of all possible claimants. There is a practical question
7 you must address. If you apply a question of unclaimed
8 funds, you must apply it to all parties.

9 For example, I'm confident that an application
10 of the percentage tentatively allocated to the program
11 suppliers when applied to the unclaimed funds -- music,
12 sports, NAB and Gene Bechtel tells me PBS as well, we will
13 do better than we would have by confining that percentage
14 to the share allocated to the program suppliers, but as a
15 realistic and proper manner, you cannot deal with
16 unclaimed funds with respect to one claimant, and try
17 it in a vacuum, so to speak.

18 COMMISSIONER BRENNAN: Have we barred any other
19 claimants from raising the issue in proceeding?

20 MR. SCHEINER: There has been no bar. There
21 has been no consideration given to it whatsoever. You
22 barred it in that respect. You asked all parties to
23 submit documentary evidence.

24 COMMISSIONER BRENNAN: On the date of the submis-
25 sion.

1 MR. SCHEINER: You did not. It is the fact,
2 a very important fact, that the submissions by the devotion-
3 al claimants make absolutely no showing whatsoever with
4 respect to unclaimed funds.

5 That failure, if you will, alone is despositive
6 of the pertinence of an unclaimed fund issue at this stage
7 and at this time.

8 The second issue, really, the third issue raised
9 by the devotional claimants goes to the question of a
10 60 minute hour. At best, as I understand it, it appears
11 to be their position that only they own the entire hour
12 because they own the commercials as well.

13 Parenthetically, I have a serious question as to
14 whether their claimed 60 minutes does not constitute a
15 commercial, but on the merits, as indicated, set out in
16 our pleadings, the devotional claimants regarded this
17 question of a 60 minute hour as properly a Phase I issue.
18 And Mr. Cooper, in particular was examined, cross-examined
19 by at least two of the counsel for devotional claimants.

20 As a consequence, I would submit that, to the
21 extent that the question is worth considering at all, it
22 was considered in Phase I, and was entertained by the
23 Tribunal in the determination of tentative allocations to
24 each of the claimants. You can't get two bites at the same
25 apple, not properly anyway. It is either Phase I or Phase II.

1 If it is anything it was considered in phase I, may not
2 be considered again in phase II.

3 COMMISSIONER BRENNAN: Relevant in both phases?

4 MR. SCHEINER: I wouldn't think so. Having
5 examined the respective shares of the group on the application
6 of whatever numbers were involved there, I don't see how
7 you can -- if you at all are disposed to consider the --
8 how you could double dip for this purpose.

9 Finally, like unclaimed funds, if you were in any
10 event disposed to consider the issue urged by the devotional
11 claimants, obviously you would have to do it for all
12 parties. You couldn't do it for one party, two parties,
13 to the exclusion of others.

14 That concludes my statement, except for briefly,
15 in summary, I would therefore urge that you rule that
16 the questions of unclaimed funds and what I term the 60
17 minute hour be, not be entertained as issues in the Phase
18 II proceeding.

19 CHAIRMAN GARCIA: Commissioner Coulter?

20 COMMISSIONER COULTER: Can you refresh my
21 memory, Mr. Scheiner? When you were in part of your
22 main presentation, when you were determining the percentage
23 of local programming on network affiliates, you subtracted
24 for commercials, as I recall, in part of your calculation
25 there.

1 In your survey, when you include both for your
2 programming and devotional programming, a complete survey
3 you were treating everything as a whole hour; is that correct?

4 MR. SCHEINER: Yes.

5 COMMISSIONER COULTER: You were including
6 commercials in there.

7 MR. SCHEINER: Yes.

8 COMMISSIONER COULTER: On the question of the --

9 MR. MIDLEN: We didn't really put in an
10 issue as to unclaimed funds. The issues that are--

11 CHAIRMAN GARCIA: Just a moment.

12 COMMISSIONER COULTER: Please go on.

13 MR. MIDLEN: There is one issue, who gets what
14 and then summed are four sub-issues. The first one
15 Mr. Scheiner has concurred in, the second, to what
16 extent does MPAA represent copyright owners, represent
17 those who may have been included in MPAA's claim, second,
18 to what extent has MPAA included within its case the
19 claim for copyright materials in the claim and what the
20 effect, if any, such claim should have on the share of the
21 award.

22 Somehow, he translates, Mr. Scheiner translates
23 that into an unclaimed fund issue. Basically, what we
24 are saying is MPAA should prove the case as to what it owns
25 and it should only get compensated for what it owns.

1 MR. HARRINGTON: Might I speak for a second?

2 CHAIRMAN GARCIA: Yes, Mr. Harrington.

3 MR. HARRINGTON: First, I would like to make
4 clear, if Mr. Scheiner has read our statement of what
5 issue we believe is presented in Phase II, certainly not
6 stated in the document that he had filed earlier with the
7 Tribunal, we see one issue here. That is, how should the
8 funds which have been allocated to the program syndicators,
9 to all program syndicators as a group be allocated among
10 individual program syndicators who have filed a valid
11 claim. That is the simple issue. Within that issue there
12 are a lot of sub-issues -- harm, benefit, all the issues,
13 sub-issues which have been enumerated by the Tribunal.

14 We are not agreeing with Mr. Scheiner at all that
15 the key issue here is harm or lack of harm. That is only
16 one of a number of issues. It wasn't even the primary
17 issue enumerated by the Tribunal. There were three: harm,
18 benefit, marketplace value. I want to make that clear.
19 we have presented in our direct case evidence as to each
20 of the three primary issues and also as to secondary
21 issues of quality and time related considerations.

22 Furthermore, Mr. Scheiner has said, CBN argued
23 much earlier this year that the Tribunal should stick to
24 what it did last year. It is true, we did do that. I must
25 point out, however, the Tribunal did not accept our

1 recommendation. It did not use the 1978 distribution as a
2 benchmark, which is exactly what we requested. And, only
3 slight changes be made after a showing of relative changes
4 for 1978. That was totally rejected by the Tribunal. I
5 don't see how it can now be binding on the Tribunal.

6 Finally, I think it is important to point out as
7 to unclaimed funds, it is inherent a decision be made as
8 to unclaimed funds in this portion of the proceeding. There
9 is no way a decision can be made as to what to give to
10 Multimedia, what to give to the program suppliers
11 Mr. Scheiner says he represents, what to give to CBN or
12 anyone else unless we know what portion of the fund
13 hasn't been claimed, because if you take Mr. Scheiner's
14 approach, he says make CBN prove the case, make Old Time
15 Gospel prove its case, Multimedia prove its case, we will
16 take everything else. That isn't right. Everyone has
17 a burden in this case, to prove their claim. That is the
18 basis of the motion we are filing today.

19 I think it is, therefore, very clear that each
20 of the sub-factors is involved in this case and it is
21 inherent that unclaimed funds will be an issue in this
22 proceeding.

23 MR. LUTZKER: I would add as well in the
24 request we made for the percentage share based upon our
25 showing, we recognize too that there is a pool of funds which

1 relates to programming which is not claimed. Mr. Scheiner
2 had made a presentation which I disagree with, with
3 respect to programming about Show Biz, but if he prevails
4 in that decision, then theoretically an allocation
5 entitled to Show Biz has not been claimed. To the extent
6 that a showing is not made with respect to a fraction of
7 the material under consideration for the '78 fees, it seems
8 to me that the way the material should be distributed
9 is on a pro rata basis in accordance with the allocation
10 made at the end of Phase II.

11 I would think it is incumbent upon each party
12 as just stated to make presentation on what their
13 entitlement is with respect to the shares and where there
14 is a balance, that that balance be distributed in the same
15 proportion as actual percentages derived.

16 CHAIRMAN GARCIA: Mr. Coulter, did you have an
17 additional question?

18 COMMISSIONER COULTER: I have a couple.

19 Is there religious programming that is not
20 embodied, not shown?

21 MR. HARRINGTON: There is a huge amount,
22 Mr. Coulter.

23 COMMISSIONER COULTER: So, presumably in the
24 MPAA survey, a lot of devotional programming that
25 would turn up in that survey is not programming you are

1 representing?

2 MR. MIDLEN: We have no idea.

3 COMMISSIONER COULTER: Presumably, some programming
4 is not programming you are representing.

5 MR. HARRINGTON: That is correct, nor is
6 Mr. Scheiner representing.

7 COMMISSIONER COULTER: No, but--

8 MR. MIDLEN: Religious claimants are not claiming
9 X number of religious points on behalf of all religious
10 broadcasters. We are claiming for our own copyright
11 only.

12 COMMISSIONER COULTER: You would acknowledge
13 within the category of devotional programming, there is
14 also a portion that could be asserted as being in a claim?

15 MR. HARRINGTON: Certainly, absolutely. We do not
16 dispute that. Where decision is made to give that --
17 and all other unclaimed programming on a prorata basis
18 among all syndicators or to give that portion to the
19 religious, so-called devotional syndicators, a description
20 which I object to because CBN also produces non-religious
21 programming. I want to make that clear. But, then give
22 Mr. Scheiner, assuming his case goes forward and
23 Multimedia, let them distribute among themselves, the
24 non-devotional, I don't know how that is going to come out.
25 I think that is a decision which has to be reached in this

1 proceeding. Otherwise, we are back to giving Mr. Scheiner
2 credit for all the religious programming which is not
3 claimed.

4 COMMISSIONER COULTER: That wouldn't necessarily
5 follow.

6 MR. HARRINGTON: If a prorated distribution is
7 not made it would. What happens to the money? Does it
8 go back to general funds?

9 COMMISSIONER COULTER: You might benefit to the
10 unclaimed fund to the extent you are claiming he would be.

11 MR. HARRINGTON: Last year CBN reached settlement
12 with Mr. Scheiner that included all parties to the fund
13 receive funds within the unprogrammed category.

14 MR. SCHEINER: You are correct. I hope I can
15 shortcut this, hopefully save a little time. Mr. Lutzker
16 stated my position. I am generally in concurrence ,
17 that you come up with your percentage allocations to the
18 respective claimants and you determine their respective
19 entitlement. That is applied to the fund that you
20 ultimately decide should go to the program syndicators,
21 and in that fashion you prorated, distribute such
22 unclaimed funds as there are within that category.

23 I have no difficulty with that.

24 COMMISSIONER COULTER: Is that what you were
25 saying?

1 MR. LUTZKER: Yes.

2 COMMISSIONER COULTER: You are saying the
3 unclaimed fund is a wash issue?

4 MR. LUTZKER: No. I'm saying it is not
5 necessary in Phase II to make a determination with respect
6 to the entire unclaimed funds of the sports industry,
7 broadcast, program industry, segregate that aside. Handle
8 it on a reallocation basis. The program syndicators,
9 according to the December One order are entitled to 70
10 percent of the pool. Within that 70 percent, the pool
11 now equals 100 percent of which there may be only 80
12 percent claimants. Or, in other words, 80 percent of that
13 programming is claimed. There is a 15 percent residue.
14 That residue gets divided in the like manner.

15 MR. HARRINGTON: I object to that. I don't know
16 how we can make decisions on that unless Mr. Scheiner
17 identifies the program he represents and shows us how
18 many hours they represent on TV basis. There is nothing
19 in the record on that. How can we make a prorated
20 distribution without evidence because he hasn't filed that
21 material in his direct case.

22 COMMISSIONER COULTER: We have the same thing in
23 unclaimed devotional programming?

24 MR. HARRINGTON: I think we can start off, find
25 out what we claimed, what Mr. Scheiner has claimed, what

1 Multimedia has claimed, determined that. Then, we can 61
2 determine what hasn't been claimed. Without Mr. Scheiner
3 showing what he hasn't claimed, I don't know how we can
4 make any decision in this phase.

5 CHAIRMAN GARCIA: Any other comments?

6 (No response.)

7 CHAIRMAN GARCIA: Before each one of you leave,
8 I have a list -- Mr. Scheiner.

9 MR. SCHEINER: I do have a couple of additional
10 issues.

11 CHAIRMAN GARCIA: Okay.

12 MR. SCHEINER: This goes to fees generated.

13 I adverted to it earlier. SIN and Mutual of Omaha
14 rely exclusively on fee generated, and I simply alert the
15 Tribunal to that fact and pose whether in the light of
16 such determinations as you have made, whether the pursuit
17 of any showing, based entirely on fee generated, has any
18 probative value. I note that. I would like to go on to
19 my next point.

20 COMMISSIONER COULTER: May I add a point
21 to that?

22 CHAIRMAN GARCIA: Yes, please.

23 COMMISSIONER COULTER: That is my interpretation
24 to that notice indicates there is no one formula applicable
25 for the entire pool. I don't believe the notice indicates

1 there is never an instance where a formula can be
2 applicable, and it may be an interpretation of that
3 notice is needed. I don't interpret it the same way as
4 you do.

5 MR. SCHEINER: My next point, again, forgive me
6 but it relates to SIN, I cannot tell from the
7 evidentiary submissions by SIN whether those
8 programs barring the title movies, with no other descrip-
9 tion, title or designation, are programs which SIN
10 owns, and with respect to those programs, I will ask
11 the Tribunal to require proof of copyright.

12 MS. DOWELL: We intend to.

13 MR. SCHEINER: That completes my presentation.

14 CHAIRMAN GARCIA: Two things. I have a list
15 of the order of presentation and also the locations.
16 Before you leave, I will give you a copy of that. Also,
17 a request made if there would be time for replies to
18 some of Mr. Scheiner's motions. Replies will have
19 to be in by 10:00 on Monday since the hearings start on
20 Tuesday.

21 I will poll the Commissioners. We will get
22 back to you with our decision on the various issues
23 that have been raised here.

24 MR. MIDLEN: Madam Chairman, I have got a couple
25 of matters that I would like to discuss. In Phase I, the

1 Old Time Gospel Hour put in its direct case without
2 having a live witness here. I would like to do that in
3 Phase II, if that is acceptable.

4 MR. SCHEINER: It most technically is not
5 acceptable to me if the question was put to me.

6 MR. MIDLEN: I was putting it out on the
7 table for comment.

8 With respect to the various exhibits, and these
9 are Old Time Gospel Hour exhibits, I am talking about,
10 there are various things such as magazine articles that
11 are included. How would you propose that that sort of
12 thing be acceptable as evidence, since the Tribunal
13 does not have subpoena power?

14 In other words, I can't produce the author of
15 a Newsweek article that was written a year ago.

16 COMMISSIONER COULTER: I didn't know there
17 were authors.

18 MR. MIDLEN: I also have part of a study
19 done by an insurance company, and I am not proposing to
20 fly somebody in from Chicago, I think, where ever, to get
21 on the stand and testify, yes, I was responsible for
22 this survey. We just can't. That is not practical.

23 MR. HARRINGTON: I was going to point out I
24 think Mr. Scheiner has a number of magazine articles in
25 his submission, we have a couple of magazine articles in

1 ours. I don't propose to bring in someone from the
2 particular publications to support it unless Mr. Scheiner
3 tells me now that he is going to object on that basis.

4 MR. SCHEINER: Of course not.

5 CHAIRMAN GARCIA: In answer to your question,
6 in the past we have allowed the document to come in as
7 exhibits and the Commissioners have given them whatever
8 weight they felt necessary.

9 MR. MIDLEN: That answers my question.

10 MS. DOWELL: You raised the issue of copyright
11 for the movies. The schedules attached to the direct
12 case were attached to give the Tribunal and the other
13 parties an idea of what programming SIN presented and the
14 basis of its copyright. I want to get this clear before
15 I leave.

16 Are you asking that SIN provide you with
17 evidence of copyright for each movie or are you asking
18 that SIN identify the movies in that particular program
19 schedule or all the movies run that year that were
20 rebroadcast? What precisely was the nature of
21 your request?

22 MR. SCHEINER: I am sure we can work it out.

23 MS. DOWELL: I would like to. It has been
24 impossible in the past. I don't know why.

25 MR. SCHEINER: I look at a title,, it says

1 "cinema". If I don't know what it is, if you can satisfy
2 me on that score, I will stipulate to it. Maybe we don't
3 have to go through an evidentiary showing for that purpose.
4 At the moment, I don't know what it requires for you to
5 establish that the programs that in fact that you are relying
6 on you do own. Do you know that to be sure?

7 MS. DOWELL: Do I know--

8 MR. SCHEINER: That you own the programs you
9 have relied on.

10 MS. DOWELL: I know the bulk of our programming
11 comes from maybe three distinct sources and that there are
12 general contracts assigning to SIN the copyrights of the U.S.
13 for all those.

14 MR. ATTAWAY: Absolutely, yes. If I may, I
15 think we have all very, very wisely avoided getting into
16 disputes which would require a standard of proof of copyright
17 like the actual copyright notice from the copyright office
18 which would be terribly burdensome on everybody involved.

19 MR. SCHEINER: That was not part of my request.

20 MR. ATTAWAY: I think Mr. Scheiner was talking
21 about some reasonable indication of whether you came then
22 as a copyright.

23 MR. SCHEINER: Exactly.

24 CHAIRMAN GARCIA: Mr. Scheiner--

25 MR. SCHEINER: One last point. Mechanical

1 procedural point raised with counsel before we started.
2 Is the PTL that is making a showing, a videotape showing?

3 MR. MIDLEN: Yes.

4 MR. SCHEINER: They will have the equipment
5 here. We could drag in our own equipment, but it strikes
6 me that running a million wires--

7 COMMISSIONER BRENNAN: Excuse me. You are
8 paying for this. This is coming out of the royalty fund.

9 (A discussion was held off the record.)

10 CHAIRMAN GARCIA: On the record. For those of
11 you who participated in Phase I, when we had the very
12 elaborate numbering system, for Phase II in your exhibits,
13 if you could just put your call letters and exhibit one,
14 two, three, four, forget about the double alphabet.

15 The meeting is adjourned.

16 (The meeting adjourned at 4:00 p.m.)

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