

COPYRIGHT ROYALTY TRIBUNAL

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In the matter of: :
:
:CRT Docket No. 80-4
1979 CABLE ROYALTY DISTRIBUTION :
: Phase II
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2120 L Street, N.W.
Washington, D.C.

Tuesday, January 19, 1982

The hearing in the above-entitled matter
commenced at 10:00 a.m., pursuant to adjournment;

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

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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

CHARLES T. DUNCAN, Attorney-at-Law
Counsel for BMI

C O N T E N T S

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P R O C E E D I N G S

1
2 CHAIRMAN GARCIA: The 1979 cable distribution
3 proceeding, phase II will come to order. Is there any other
4 witness beside Mr. Chryar in the audience? If there are,
5 would they please stand so I can swear them in?

6 (No response.)

7 CHAIRMAN GARCIA: Mr. Chryar, would you please
8 stand?

9 Whereupon,

10 JOSEPH CHRYAR

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

13 CHAIRMAN GARCIA: Before we proceed with the hearing,
14 I have a two-page listing of all the claimants that are a
15 part of phase II that have not reached voluntary agreement
16 and are not necessarily represented here. I am sorry I did
17 not bring an extra copy for everybody here. We will make one
18 available to you this afternoon or tomorrow.

19 If you can identify some individuals that you have
20 reached agreement with that fell through the crack that we
21 didn't get notice of, I would appreciate it.

22 Mr. Chryar, would you proceed with your case?

23 THE WITNESS: To the Tribunal and distinguished
24 gentlemen, the claimant's purpose in this phase II proceeding
25 is to receive its share of the distribution cable compulsory

1 license fees pursuant to Title 17 U.S. Code, Section 111(D) (5)
2 (A), Section 115 (A) (2), (B) (1), (2), and Section 116(C) (4)
3 (A) (2), which states that the ownership or control of the
4 signal carriage complement of the cable system changes shall
5 be recorded in the copyright office, a notice including a
6 statement of the identity and address of the person who owns
7 or operates the secondary transmission service or has power
8 to exercise primary control over it together with the name and
9 location of the primary transmitter or primary transmitters
10 whose signals are regularly carried by the cable systems, and
11 thereafter from time to time such further information the
12 register of copyrights desire.

13 That during the month of July in each year, every
14 person claiming to be entitled to compulsory license fees for
15 secondary transmission shall file a claim and any claimants
16 may agree among themselves as to the proportionate division
17 of compulsory licensing fees among them, may lump their claims
18 together and file jointly or as a single claim or designate
19 a common agent to receive payment on their behalf.

20 That a compulsory license includes the privilege of
21 making a musical arrangement of the work to the extent
22 necessary to conform it to the style or manner of interpreta-
23 tion of the performance involved, but the arrangement shall
24 not change the basic melody or fundamental character of the
25 work and shall not be subject to protection as a derivative

1 work under the title, except with the express consent of the
2 copyright owner.

3 That any person who wishes to obtain a compulsory
4 license shall, before or within thirty days after making and
5 before distributing any phonorecords of the work, shall serve
6 notice of intention to do so on the copyright owner. If
7 the registration or other public record of the Copyright
8 Office do not identify the copyright owner and include an
9 address at which notice can be served, it shall be sufficient
10 to file the notice of intention in the Copyright Office.

11 And failure to serve or file the notice forecloses
12 the possibility of a compulsory license and, in the absence
13 of a negotiated license, renders the making of this distribu-
14 tion of phonorecords actionable as acts of infringement under
15 section 501 and fully subject to the remedies provided by
16 section 502 through 506 and 509.

17 That the royalty under a compulsory license shall
18 be payable for every phonorecord made and distributed in
19 accordance with the license.

20 That during the month of January in each year, every
21 person claiming to be entitled to compulsory license fees
22 for coin-operated performances during the preceding twelve-
23 month period shall file a claim with the Copyright Royalty
24 Tribunal, in accordance with the requirements that the
25 Tribunal shall prescribe by regulation and that each claimant

1 shall include an agreement to accept as final the determination
2 of the Copyright Royalty Tribunal.

3 That during the pendency of any proceeding under
4 Section 116, the Copyright Royalty Tribunal shall withhold
5 from distribution an amount sufficient to satisfy all claims
6 with respect to which a controversy exists, but shall have
7 discretion to proceed to distribute any amounts that are not
8 in controversy.

9 I would like to produce at this particular time the
10 contract between BMI and Soprano, which is marked Exhibit C-2,
11 second paragraph that states, publisher hereby settles, assigns
12 and transfers to BMI, its successor and assign, the following
13 rights and all works including but not limited to the work
14 itemized in schedule A and extended hereto and made a part
15 hereof; (b) the non-exclusive right -- that's what each
16 publisher grants to, that signs this particular contract,
17 that's what Soprano -- that's the right that Soprano gave to
18 BMI; under paragraph second (b), the non-exclusive right to
19 adopt, arrange, translate, change and dramatize for performing,
20 broadcasting and television purposes, including the right to
21 grant non-exclusive licenses to adeopt, arrange, translate
22 and dramatize for performance, broadcasting and television
23 purposes.

24 Also, the third paragraph (f), this particular
25 publishing contract, Soprano gave to BMI in consideration of

Accurate Reporters, Inc.

(202) 544-4404

1 this particular agreement, BMI agrees to pay publisher the
2 following: two cents per performance by commercial amplitude
3 modules U.S. broadcasting station license by BMI and each
4 original work printed in the U.S., either in customary saleable
5 form or in professional copies, provided that said printing
6 are in such quantities as make copies of said work generally
7 available to broadcasters either without charge or at a
8 customary price of such term.

9 I direct your attention to Exhibit C-3, "Moving and
10 Grooving" was cleared through BMI in 1973. The clearance
11 form index department, the number is 0089911, and it was done
12 October 26, 1973.

13 Also, I direct your attention to the copyright
14 registration which is Exhibit "D", which shows that this
15 particular work was copyrighted, registered in the Copyright
16 Office the fifth month, 26th day, 1973.

17 I direct your attention to D-2, which is a copy of
18 Black Radio Exclusive Reports, which shows the author,
19 J.D. Nicholson's work was added to KVOV Radio Station in
20 Las Vegas, Nevada.

21 Also, I would like to direct you to Exhibit E, whereby
22 Soprano, the representative of Soprano, Mr. Joseph Chryar,
23 received a letter from BMI's representative, John J. Tumble.
24 The letter states, I acknowledge receipt of your letter of
25 December 4, 1981. As you may know, BMI pays royalties on the

1 basis of performances of the musical compositions of the
2 licensees. Our records do not reflect that "Moving and
3 "Grooving" has had any logged performances since the time of
4 the clearance in 1973. In addition, Soprano Music has not had
5 any BMI earnings at least since 1974. If you believe that
6 you have a claim against BMI, please refer to Paragraph 14
7 of your affiliation agreement. As a point of information, the
8 cable royalty distribution proceedings which you referred to
9 have absolutely nothing to do with the distribution of royalty
10 publishing codes. It is alleged furthermore, the Copyright
11 Royalty Tribunal has no interest in your alleged claim against
12 BMI.

13 Under Section 801, Title 17 of the U.S. Code, (A),
14 which is the Copyright Royalty Tribunal's establishment --
15 its establishment and purpose, (A) -- no; (B) (1) states that
16 the Copyright Royalty Tribunal's establishment and purpose is
17 to make determinations concerning adjustments of reasonable
18 copyright royalty rights as provided in Section 115 and 116
19 and to make determinations as to reasonable terms and rates
20 or royalty payments as provided in Section 118. The rights
21 applicable under Section 115 and 116 shall be calculated to
22 achieve the following objectives.

23 BMI and ASCAP have stated that their 1979 broadcast
24 revenues, together, was 142.9 million, which was 97.9 percent
25 of all the music's share.

1 It is our contention, Soprano's contention that 25
2 percent should be awarded to Soprano on the premise that
3 the particular right that was given to BMI was never compen-
4 sated for.

5 MR. MIDLEN: Madam Chairman, if I might, I would
6 like to interject an objection to this testimony at this time.
7 It is my understanding Soprano did not file the requisite
8 claim in July of 1980; therefore, is entitled to nothing.

9 We have quite a few people here today. And I feel
10 that this is totally irrelevant to the Tribunal's phase II
11 determination and that all of your time is being wasted.

12 CHAIRMAN GARCIA: The Tribunal has determined that
13 Soprano is a valid claimant in this hearing. A claim was
14 filed properly.

15 MR. DUNCAN: Madam Chairman, may I ask when that
16 was done?

17 CHAIRMAN GARCIA: It is logged in as of July 1980.
18 It was 1979. It was received July 24.

19 THE WITNESS: Also, if I may proceed --

20 CHAIRMAN GARCIA: Please do.

21 THE WITNESS: I would like to play a tape of some
22 of the work that has derived from "Moving and Grooving".

23 Let me also state that in 1973, "Moving and Grooving"
24 was released as an instrumental. However, "Moving and
25 Grooving" has words; it was fully copyrighted with words and

1 music. However, we did not at this particular time release
2 it with the words. We only released it with the instrumental.
3 I have a copy here of the particular lyrics. I didn't have
4 a chance to make copies for everybody to see, but I can pass
5 this around.

6 MR. BRENNAN: Is it your view that this song was
7 performed on radio or television in 1979?

8 THE WITNESS: It was performed in '79, '80, 1981
9 and in 1974. I direct your attention to this tape. I hope
10 we can get some kind of play here. "Moving and Grooving"
11 would be the first turn that is an instrumental.

12 (Whereupon, the tape recorded is playing.)

13 THE WITNESS: I can't get no volume. Can you hear
14 it?

15 CHAIRMAN GARCIA: We can hear it. Why don't you
16 just go on?

17 THE WITNESS: The thing is that I would like for
18 them to hear some of the words and stuff.

19 MS. BURG: Are the words coming out?

20 THE WITNESS: Yes.

21 (Recorder playing.)

22 THE WITNESS: Well, the first derivative work would
23 be "Don't Stop the Music." You can pass that to your
24 associates so you can see who published the lyrics.

25 CHAIRMAN GARCIA: You are saying that is the same

1 music?

2 THE WITNESS: Same music; also, they have used the
3 words.

4 CHAIRMAN GARCIA: They are different? That is not
5 the words to "Moving and Grooving" that you showed us a few
6 moments ago, is it?

7 THE WITNESS: No. But they do use the words "Moving
8 and Grooving" in this particular song. In other words, this
9 song could not be "Don't Stop the Music," if they didn't use
10 "Moving and Grooving." That is what I'm saying.

11 In other words, it is music as well as the words.
12 Do you understand what I am saying?

13 CHAIRMAN GARCIA: Yes.

14 MS. BURG: But that is another writer and another
15 publisher.

16 THE WITNESS: Right.

17 MS. BURG: To that extent, Mr. Chryar, without
18 judging the merits of the overall case, is that properly in
19 our domain? This sounds like a contention between the writers
20 vis-a-vis the publishers. This is really not what we are
21 equipped to handle.

22 THE WITNESS: I pass this to you. I asked you to
23 look at the publisher on that.

24 MS. BURG: Bob Monico doesn't mean anything to me.

25 THE WITNESS: "Once you get started" is what I'm

1 saying. This is the particular tone derived from "Moving and
2 Grooving." Do you see who it is published by?

3 MS. BURG: American Broadcasting Music, Incorporated,
4 represented by ASCAP.

5 THE WITNESS: Yes.

6 MS. BURG: You may well have an issue with -- and
7 I can't judge that -- with Performing Rights Society. I'm
8 not sure the arena for that.

9 THE WITNESS: You know, according to Section 108,
10 the Tribunal, also Section 115, and I have just shown the
11 contract where we gave BMI, Broadcast Music, Incorporated,
12 for the right to compile, adopt and also license to the thir
13 parties. What I'm saying is that if BMI, Broadcast Music,
14 Incorporated, derived a particular work from our work, then
15 this is the right place to be because that is where it started
16 at. In other words, if we would have been payed for the first
17 derivation from our work from Broadcast Music, Incorporated,
18 then I wouldn't have no need to be here. But according to
19 Section 116, if that is not a voluntary agreement between
20 the particular performing societies or their members, then
21 it is the claimant's right to ask for their share. That is
22 why I'm here, is to ask for my share or the share, you know,
23 of this particular work that has derived from "Moving and
24 Grooving."

25 I'm sorry that the batteries are not as strong as

1 they should be, but I brought all of the particular tunes
2 here and even though a member publisher uses the work, I
3 mean once it is in the public domain, anybody can use it; but
4 it is being -- but he is being paid for all that particular
5 work. All the money is being sent to Broadcasting Music,
6 Incorporated to be given to Soprano.

7 Soprano has never received no money for this partic-
8 ular work since 1974, just like in 1974, Soprano did not
9 receive any money for this particular work, see. So this is
10 a proper place for me to be in order to ask for Soprano's
11 musical share of "Moving and Grooving."

12 MS. BURG: That was played on radio and television?

13 THE WITNESS: Radio and television. In fact, the
14 Lido club in France transmitted "Moving and Grooving." I
15 should have the --

16 MS. BURG: Let me ask you one more question, Mr.
17 Chryar. Are you similarly saying that when it was played on
18 radio and TV, it was retransmitted on cable TV?

19 THE WITNESS: It was. I can read you further.
20 Here, Associated Press, 7-29-81, the Herald Examiner. I will
21 read portions of this so we can understand what we're talking
22 about.

23 New York, American Broadcasting Company, Incorporated
24 reported yesterday its profits rose 3.4 percent in the second
25 quarter to \$5.6 million, becoming the only parent of the

1 broadcasting network to report a gain for April through the
2 June period.

3 CBS, Incorporated and RCA Corporation, the parent
4 of NBC, both earlier reported their earnings declined in the
5 second quarter and all three diversified companies--talking
6 about ABC, CBS and NBC -- reported lower earnings for the
7 first half of the year.

8 In addition to the television and radio network,
9 an individual station, ABC, also has interest in publishing
10 records and tourist attractions.

11 I'll stop there. What's I'm saying is that each one
12 of those particular works that was derived from "Moving and
13 Grooving" was on TV, also was used by all three networks,
14 broadcast networks, ABC, CBS and NBC.

15 I didn't take the liberty to bring trade papers to
16 show, where some of these particular records were on the charts;
17 but we got one right now that I'm sure some of the learned
18 colleagues here should know about. "Litch Groove" is number
19 one in the nation right now; and it is still a derivative from
20 "Moving and Grooving." I mean, you can move and you can groove,
21 but anytime you do this you are going to be moving and grooving.
22 That is the secondary meaning.

23 MR. COULTER: Can I raise an issue? You understand
24 there are two aspects, or there is a major aspect of your
25 dispute and that is with BMI.

1 THE WITNESS: That's right.

2 MR. COULTER: That is over the fact you feel they
3 have not remunerated you.

4 THE WITNESS: That's right.

5 MR. COULTER: You understand our responsibility in
6 this hearing is to distribute royalties for copyrighted
7 material that has been carried by cable TV in 1979. That is
8 all we can do here. We can't do anything else. So the issue
9 -- I think it should be clear to you, any issue you may have
10 with BMI concnering their failure to pay you for what you feel
11 is the carriage of your material is not something that we can
12 address.

13 We can only address your claim to the extent that
14 you are speaking about the carriage. They have music on
15 cable TV in 1979, and so the other issue is really not one,
16 no matter what the merits may be, is really not one that we
17 can handle, not matter what we might like to do in the matter
18 from the standpoint of equity at large.

19 I just hope that you are clear about that.

20 THE WITNESS: I am clear about that, sir. And let
21 me state that from American Society of Composers and Authors
22 and Publishers and Broadcasters of Music, they seem to feel
23 that, from a copy that I received from them, that evidently
24 they have before the Board the same as I do, they seem to
25 feel that this proceeding is also for jukebox royalty distribu-
tion.

1 COMMISSIONER COULTER: No, we did that a little
2 earlier this year.

3 THE WITNESS: Why didn't somebody notify me of that?

4 COMMISSIONER COULTER: We notified the Performing
5 Rights Societies. You would have to again have certified
6 yourself as an interested party in that proceeding.

7 THE WITNESS: I am sure we did.

8 COMMISSIONER COULTER: We announced the proceeding.

9 THE WITNESS: I am sure we did. I have a copy of
10 a letter dated December 23. You are supposed to do this in
11 January, if you want to have a valid claim for jukebox coin-
12 operated phonorecords which we did do. We never heard anything
13 about it.

14 In fact, to be very honest and frank, we didn't even
15 receive the service list, along with the regular notification.
16 In fact, we got that, I think, a week and a half after we had
17 gotten the notification that the phase II proceedings were
18 to be held.

19 I'm not saying that -- you know, there could have
20 been a lot of reasons for this not happening. What I'm saying
21 is from the outset, Soprano has been, you know, getting
22 information half-late and that is the reason why I'm here
23 representing Soprano now, to set the record straight as far
24 as cable secondary transmissions are concerned, as far as
25 broadcasting secondary transmissions are concerned, as far

1 as jukebox coin-operated is concerned. These particular
2 licenses, in other words.

3 So this is my purpose in being here. I do under-
4 stand what this proceeding is all about, but "Moving and
5 Grooving" has been used on the cable system.

6 CHAIRMAN GARCIA: Mr. Chryar, the Tribunal will
7 search its records and determine if you are a valid claimant
8 in the jukebox distribution. If you are, we will do whatever
9 is necessary to preserve your rights.

10 COMMISSIONER COULTER: Do you still view yourself
11 as a member of BMI?

12 THE WITNESS: Of course. I'm proud to be a member
13 of BMI.

14 Let me say something right now. I'm not hostile
15 nor am I disturbed. In fact, I'm very glad that Soprano Music
16 such magnitude that BMI would use and have been used.
17 I wouldn't even be here today if no one had ever used that
18 music; so I'm proud to be a member of BMI.

19 However, as a representative of Soprano, we have to,
20 you know, say something. If nothing is said, then nothing
21 will ever be known. So this is our purpose of being here in
22 these proceedings, to let somebody know that our copyright
23 is being used. We are the owners of that particular copyright,
24 and we are not being paid what we are supposed to be paid.

25 This could be because, in fact, I don't know no

1 two organizations that are as great as BMI. Like I stated
2 before -- and ASCAP. And like I stated before, I'm proud
3 to be a member and I'll continue to be a member unless they
4 decide that they 'don't want me to be a member, you know. But
5 as far as I'm concerned, I will continue to be a member; but
6 being a member and having your work used, according to the
7 contract that we are given a right to our organization, we
8 want to be paid by that organization. I mean, the whole gamit
9 should be encouraging the production of music and the arts.

10 CHAIRMAN GARCIA: Is that the end of your direct
11 testimony?

12 THE WITNESS: Yes, it is.

13 CHAIRMAN GARCIA: How much more from the tape?

14 THE WITNESS: Not very much. You can't hardly hear
15 it anyway. It is not that much, if you can hear it.

16 CHAIRMAN GARCIA: Mr. Duncan.

17 MR. DUNCAN: Madam Chairman, may I make one statement?
18 I realize I am not a witness.

19 CHAIRMAN GARCIA: Mr. Chryar, could we turn the
20 music off?

21 THE WITNESS: Yes.

22 MR. DUNCAN: I would like to represent to the
23 commission just so the record will be clear that there is no
24 connection known to me or to Mr. Chapin or Mr. Kramer between
25 the entity called American Broadcast, Incorporated and the

1 organization which I represent, Broadcast Music, Incorporated.

2 To my personal knowledge, Broadcast Music,
3 Incorporated has operated under the name since its inception,
4 BMI. I have never until I saw those papers heard of American
5 Boreadcast Music, Incorporated. Indeed, it is linked to
6 ASCAP in the pleadings and I just want to make that represen-
7 tation to the Tribunal.

8 So far as the merits of the claim is concerned, it
9 would seem to me that if anything, it is a claim against
10 BMI, of which he admitted to be an affiliate, or possibly
11 ASCAP. It is an internal matter. I submit it is not properly
12 before this Tribunal.

13 CHAIRMAN GARCIA: Any other comments?

14 (No reponse.)

15 CHAIRMAN GARCIA: Commissioners?

16 (No response.)

17 CHAIRMAN GARCIA: Mr. Chryar, thank you for being
18 with us today. We will take your case into consideration and
19 we will notify you of our decision. The decision will be
20 made prior to March 1, 1982.

21 THE WITNESS: Thank you very much.

22 Thank you, gentlemen.

23 CHAIRMAN GARCIA: We will take a short break. Before
24 we do that, I have an announcement to make. The Tribunal
25 tomorrow will meet here, but on the 7th floor, room 700.

1 The hearing tomorrow will begin at two o'clock in the after-
2 noon since we have a meeting with the president in the morning.

3 (Whereupon, a short recess was taken.)

4 CHAIRMAN GARCIA: Mr. Scheiner, do you want to go
5 on the record?

6 MR. SCHEINER: Fine.

7 CHAIRMAN GARCIA: Before you go on the record, Art,
8 I misspoke awhile ago. It is not room 700 tomorrow; it is
9 room 800.

10 MR. FERRALL: And it is two p.m., not ten p.m.

11 MR. SCHEINER: I'm sorry. What did you say?

12 CHAIRMAN GARCIA: It is right on the schedule.

13 MR. SCHEINER: Your schedule says 800.

14 CHAIRMAN GARCIA: The sheet says 700. I was
15 correcting myself.

16 The music portion category has been completed. We
17 will turn turn over to the syndication portion.

18 Mr. Scheiner, are you ready?

19 MR. SCHEINER: Yes. A couple of preliminary matters.

20 I had filed with the Tribunal and at least attempted
21 to serve on the other parties copies of various documents.

22 What I would like to do is offer them for the record at this
23 time and note the particular documents. May I do that?

24 CHAIRMAN GARCIA: Please.

25 MR. SCHEINER: First is a document entitled

1 "Program Suppliers Pre-Hearing Statement on Phase II Issues,"
2 a document consisting of ten pages and the attachments to it.

3 (MPAA Exhibit Number 1 was marked for
4 identification.)

5 MR. SCHEINER: Second, a document entitled "Summary
6 Testimony of Allen R. Cooper, Vice President of the Motion
7 Picture Association of America, Incorporated," consisting of
8 four pages and the following attachments: MPAA Phase II
9 Exhibit 1, MPAA Phase II, Exhibit 2, Schedule 2, Exhibit 2,
10 Schedule 3, Exhibit 2, Schedule 4, Schedule 5 and MPAA Exhibit
11 3 and MPAA Phase II, Exhibit 4, Schedule 1, Schedule 2 and
12 Schedule 3.

13 (MPAA Exhibit Number 2 was marked for
14 identification.)

15 MR. SCHEINER: At this time, I will furnish the
16 reporter with a copy of the documents referred to.

17 CHAIRMAN GARCIA: Thank you.

18 MR. FERRALL: On Exhibit 4 and Exhibit 2, there is
19 no document, simply entitled Exhibit 4 and Exhibit 2, is
20 that correct? There are only documents that are entitled
21 "Schedules."

22 MR. SCHEINER: No. MPAA Phase II Exhibit 4,
23 Schedule 1 is the caption --

24 MR. FERRALL: Of the first, Exhibit 4.

25 MR. SCHEINER: Yes.

1 MR. HARRINGTON: Might I ask a question? I tkae it
2 there is a Schedule 1 to Exhibit 2? Is that listed? That
3 is, Exhibit 2, Schedule 1.

4 COMMISSIONER COULTER: Yes.

5 MR. SCHEINER: Yes.

6 MR. HARRINGTON: That is offered.

7 MR. SCHEINER: Yes.

8 MR. MIDLEN: Madam Chairman.

9 CHAIRMAN GARCIA: Yes, Mr. Midlen.

10 MR. MIDLEN: I have some objections to what has
11 been offered. First of all, there is -- there was offered,
12 I gathered, into evidence "Program Suppliers Pre-Hearing State-
13 ment" -- I am sorry. There was offered into evidence -- yes,
14 the pre-hearing statement on phase II issues. That document
15 is a document in the nature of a pleading which is a matter
16 of record in this proceeding. It is not sponsored by any
17 witness.

18 It is a pleading signed by counsel in the nature
19 that all pleadings are signed by counsel. Counsel has not
20 proposed to testify as a witness and, therefore, it would
21 appear to be wholly improper to offer one of counsel's plead-
22 ings into evidence.

23 That, to me, goes beyond the bounds of anything I
24 have ever heard of in any administrative law proceeding
25 anywhere.

1 The next objection that I have is to MPAA's phase II
2 Exhibit Number 1. That is the direct order of religious
3 broadcasting, the program producers section.

4 There are only three religious claimants in this
5 proceeding, all of which are television claimants. I find
6 that this Exhibit Number 1 is irrelevant to any issue that is
7 before this Tribunal. Most of the program suppliers listed
8 here are radio suppliers. They are not appearing before
9 this Tribunal. They have no claims, other than the three:
10 CBN, PTL and Olden Times Gospel Hour.

11 All of the TV producers that are listed here have
12 no bearing on anything.

13 There seems to be a number of paid time indications
14 or notations that are circled. Whether or not religious
15 broadcasters pay to have their programs aired on TV is not
16 one of the issues in this proceeding, certainly nothing that
17 is in contest.

18 It is a well-known fact that each of the TV
19 claimants here in this proceeding does in fact purchase time
20 on TV and certainly we are not here to deny that. Why the
21 record should be cluttered with this list of program producers
22 that don't seem to have anything to do with anything, I don't
23 know.

24 On those bases, I would object to admission into
25 evidence of those two parts of Mr. Scheiner's case.

1 CHAIRMAN GARCIA: Mr. Scheiner, do you wish to be
2 heard on that objection?

3 MR. SCHEINER: No.

4 CHAIRMAN GARCIA: It is the practice of the
5 Tribunal to allow the exhibits and give them whatever weight
6 we deem appropriate and necessary at the appropriate time.
7 I will keep your objection in mind, Mr. Midlen, and if the
8 time comes we want to admit them, we will.

9 MR. HARRINGTON: Madam Chairman, may I ask one
10 question? I take it we will have not opportunity to cross-
11 examine on the pre-hearing statement since there is no witness
12 to support that.

13 MR. SCHEINER: A fair question. The pre-hearing
14 statement was offered use for the completeness of the record
15 and for a statement of counsel's view as to what is relevant
16 and material in phase II.

17 It is not offered for any evidentiary purpose.

18 MR. HARRINGTON: Thank you.

19 CHAIRMAN GARCIA: Mr. Scheiner, you may proceed.

20 Whereupon,

21 ALLEN COOPER

22 was called as a witness herein, and having been duly sworn,
23 was examined and testified as follows:

24 MR. SCHEINER: One final point. I would like to
25 explain the manner in which I intend to proceed. I will call

1 Mr. Cooper to testify initially and at this time with respect
2 to the formula employed by MPAA in the settlement agreement
3 with those claimants who have entered into the agreement or
4 who have acceded to it.

5 I propose to reserve for later testimony further
6 presentation by Mr. Cooper in the nature of rebuttal or
7 response to the testimony of the religious claimants and
8 others.

9 Is that consistent with the Tribunal's view of how
10 I may proceed?

11 MR. HARRINGTON: May I be heard?

12 CHAIRMAN GARCIA: Yes.

13 MR. HARRINGTON: As the Tribunal is well-aware,
14 CBN has filed a motion to dismiss MPAA's claimant's claims
15 on the ground that they failed to file a direct case in this
16 proceeding. One of our major thrusts of our argument was that
17 the entire direct case, so-called direct case presented by
18 MPAA was nothing but a rebuttal aimed against the three
19 religious claimants and against the few known religious entities
20 that had failed to reach settlement with MPAA.

21 Now it appears Mr. Scheiner is trying to retrieve
22 his error by putting in a direct case through this examination.
23 I would strongly object to that.

24 MR. ADAMS: I join in that objection.

25 MR. SCHEINER: May I point out, as the Tribunal is

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1 aware, yesterday we filed our response to the motion to dismiss
2 and as we have set out there, we clearly are of the view it
3 is entirely without merit.

4 The purpose in presenting Mr. Cooper to explain the
5 formula and application is to be helpful to the Tribunal for
6 an understanding of how the settlement procedures operated
7 and to furnish related evidence with respect to the manner in
8 which other parties have entered into that agreement.

9 We also think it will be helpful to you in an overall
10 evaluation of the remaining claims of those claimants who have
11 not entered into the settlement agreement.

12 MR. HARRINGTON: Might I be heard one more point?
13 If that is the case, Mr. Scheiner, then is this a concession
14 that the exhibit or the material introduced is the summary
15 testimony of Allen Cooper, which relates solely to the so-
16 called religious or devotional claimants and is in fact
17 rebuttal testimony?

18 MR. SCHEINER: It is clearly, as I said, responsive
19 to, in answer to the testimony to be adduced by the religious
20 claimants. Indeed, I should point out that we were completely
21 forthright and indeed generous.

22 We could have reserved that testimony to a later
23 date, but we did not. We volunteered it at the very outset.

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CHAIRMAN GARCIA: Thank you. Does any
Commissioner have any objection to the outline that Mr.
Scheiner has given us as far as his direct case is
concerned?

(No response.)

CHAIRMAN GARCIA: Mr. Harrington, the Tribunal
denies your motion to dismiss MPAA's case.

Mr. Scheiner, will you please proceed? He
has been sworn.

Whereupon,

ALLEN R. COOPER

was called as a witness and having been previously sworn
was examined and testified as follows.

DIRECT EXAMINATION

BY MR. SCHEINER:

Q Would you state your full name for the record,
please?

A I am Allen R. Cooper.

Q And you are employed by the Motion Picture
Association?

A Yes.

Q And you are the same Mr. Cooper who has testi-
fied on at least several occasions in this proceeding?

A I am, sir.

Q Mr. Cooper, referring to phase I of the

1 proceeding, what reliance was placed by MPAA on Nielsen 29
2 studies in the presentation of program suppliers' direct
3 case?

4 A We placed primary and for all practical purposes
5 total reliance on a special Nielsen study of cable home
6 viewing of non-network programs in distant signal house-
7 holds.

8 Q What sample was used in that study and what
9 period was covered?

10 A A sample of 49 stations, 25 independents and 24
11 network affiliates were selected by the Nielsen Company.
12 The period encompassed by the study included 15 sweep
13 weeks, four weeks each in February, May and November, 1979,
14 and three weeks in July, 1979.

15 Q On an unweighted basis, what was the total number
16 of viewing hours in cable households of retransmitted dis-
17 tant signals?

18 A Restricting the answer to non-network programs
19 only, the total as shown in Exhibit K presented in the
20 phase I was 63,255,000.

21 MR. HARRINGTON: Madam Chairman, I note that the
22 witness appears to be reading from prepared notes. I wonder
23 if I may take a look at those notes.

24 MR. SCHEINER: No, you may not.

25 MR. HARRINGTON: I think it is a standard of

1 evidence and of law that whenever a witness takes notes to
2 the stand opposing counsel has a right to review those
3 notes.

4 CHAIRMAN GARCIA: Are you reading from your
5 notes, Mr. Cooper?

6 THE WITNESS: No, I am not, Madam Chairman. I
7 am referring to them for numbers like 216 and 255,000.

8 MR. HARRINGTON: May I ask the notes be removed?

9 MR. SCHEINER: The question was put to me. I
10 rejected the request. I defer to the Tribunal.

11 MR. MIDLEN: Madam Chairman, I would direct that
12 request to you. Mr. Harrington is entirely correct that
13 anytime a witness takes any written material to the witness
14 stand for use as reference or to read from, opposing counsel
15 are entitled to see it before his examination continues.

16 CHAIRMAN GARCIA: There is a precedent in this
17 Tribunal with the mechanical royalties proceedings where
18 we allowed the witnesses to refer to notes only for
19 refreshing their memory and not reading from them and
20 if Mr. Cooper is only using those notes to refresh his
21 memory as opposed to numbers, the Tribunal will overrule
22 your objection.

23 BY MR. SCHEINER:

24 Q Mr. Cooper, of the total 613, 255,000 hours,
25 viewing hours, how many were devoted to syndicated series

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and movies?

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Q Exactly 512,272,000 or 83.519 percent of the total.

Q Mr. Cooper, when did you first advise the program suppliers, other than member companies of MPAA that MPAA was prepared to undertake voluntary settlement arrangements?

A On November 11 and 12, 1981, we wrote to all claimants that we were able to identify as program suppliers and advised them of our desire to enter into a settlement agreement with them.

Q What was that date?

A November 11 and 12.

Q That was prior to the decision of the Tribunal in phase I?

A Yes. The Tribunal's decision in phase I is dated November 30.

MR. SCHEINER: I will underscore the point, undertook this in anticipation of the Tribunal's decision?

THE WITNESS: Yes.

BY MR. SCHEINER:

Q Describe the formula, please, which you proposed to the parties at that time?

A We proposed that each claimant's tentative share of whatever was awarded through program suppliers as a

1 category would be based entirely on each claimant's share,
2 the share of 912 million plus hours, viewing hours for
3 all syndicated series and movies that have been counted
4 before and the share was determined to be precisely on the
5 basis of that claimant's viewing hours as related to the
6 512 million.

7 For example, a claimant whose aggregate hours
8 were 5,127,000, for example, would under that formula be
9 entitled to a one percent share of the amount awarded the
10 program suppliers.

11 Q That is a different formula from the one that
12 was employed in the voluntary settlement agreement for
13 the 1978 fund, was it not?

14 A Totally different, sir.

15 Q Basically, what was the formula employed for the
16 1978 fund?

17 A For 1978, again, in accordance with our phase I
18 testimony at that time, we were using -- we had used for
19 the 1978 distribution data based upon time and fee generated
20 in view of the Tribunal's decision on the 1978 proceedings,
21 that were time based fee generated formulas were rejected,
22 we turned to another alternative which we feel is infinitely
23 more reasonable and sensible for all concerned.

24 Q In addition to the rejection by the Tribunal,
25 of the fee generated standard in the 1978 decision, did you

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1 also rely on any other expressions of the Tribunal or its
2 members with respect to fee generated during the 1979
3 proceeding?

4 A Yes. The first witness of program suppliers
5 was Mr. Valenti, President of the MPAA and at that time
6 Chairman Brennan advised Mr. Valenti that the Tribunal
7 had rejected fee generated as a basis for ascertaining
8 phase I awards to program -- to any claimant group.

9 Mr. Brennan subsequently said the equivalent
10 to Mr. Wasilewski of the National Association of Broadcasters
11 when Mr. Wasilewski testified in the 1979 proceedings.

12 Q Is it correct, Mr. Cooper, in reliance on the
13 matters that you have just related, you rejected fee
14 generated as the basis for proposing a voluntary settlement
15 agreement to the parties in the 1979 proceeding?

16 A Yes, fee generated has played no part whatsoever
17 in the formula we proposed.

18 Q In proposing the settlement on the basis you
19 have testified, did you provide each claimant with a
20 computer printout?

21 A No, sir. There were two sets of claimants that
22 we were dealing with. There was one set of claimants that
23 we referred to as money claimants and the second set of
24 claimants that we referred to as zero claimants. The money
25 claimants were claimants, copyright owners, whose programs

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1 we identified as being carried by that sample of stations
2 the 49 stations during the 15 weeks, sweep weeks of 1979
3 and therefore, for whom we could identify a share to be
4 awarded to that claimant, and for such claimant those
5 money claimants, we sent them a complete computer printout
6 of the data we had collected with respect to those programs.

7 Now, turning to the zero claimants, these are
8 claimants who had to the best of our knowledge provided the
9 Tribunal with valid claims on shares of the copyright
10 pool but for whom we could identify non non-network programs
11 carried by the 49 sample stations during the 15 weeks.

12 Obviously, there was no printout that could be
13 furnished to them. Instead, for those zero claimants, we
14 sent each of them a list of the 49 stations. We sent each
15 of them the specific dates of the sweep weeks and asked them
16 to identify if they could any programs for which they could
17 present a claim that were carried by any of those stations
18 during those sweep weeks and we would try to identify them
19 and provide a rightful share, based upon that carriage.

20 COMMISSIONER BURG: If I may interrupt, Mr.
21 Cooper, I would like you to refresh my memory. In your
22 direct case, apart from the Nielsen findings and figures
23 you did have an exhibit on fee generation, and as I recall
24 at the time, of fee generated, as I recall at the time you
25

1 said that was for internal purposes only. It wasn't part
2 of your case. You rest your case with or without these
3 fee generated financing. Nevertheless, it was in there
4 and whether you used the words, internal purpose only,
5 I don't specifically recall but there was obviously a
6 reason for its inclusion.

7 Could you refresh my memory as to what it
8 was?

9 THE WITNESS: Yes, Commaissioner Burg. In the
10 phase I, we presented two exhibits that did include some
11 fee generated material.

12 On Exhibit K, which was the basic report from
13 the Nielsen Study, we reported the data for all program
14 categories on an unweighted basis, and on a fee generated
15 basis. We presented both figures at that time. If you
16 will recall as far as the program suppliers were concerned,
17 syndicated series and movies our emphasis there was which-
18 ever way you cut it with or without fee generated the share
19 of viewing hours for program suppliers was constant at 83
20 percent.

21 The second item that we used fee generated for
22 was the exhibit L which was introduced in phase I. This
23 was based on the annual programming report of the FCC. In
24 order, for that purpose, this was in effect a rephrasing
25 of an exhibit that had been presented in the 1978

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1 proceedings, with some degree of reluctance did present
2 this exhibit L for your consideration, only because in the
3 rendition of your report and verdict, if you would, on
4 the 1978 proceeding, you indicated that that exhibit, as
5 it had been presented in 1978, had some value for you,
6 and in courtesy to you, since you had indicated it had
7 some value, we presented that again in 1979. But, through-
8 out the proceeding, Commissioner, I had emphasized to the
9 maximum extent possible that we were not relying at all on
10 fee generated, that fee generated had been used in the
11 1978 proceedings as a very rough proxy for viewing and
12 that, since we had the actual viewing data, fee generated
13 was of no additional value.

14 COMMISSIONER BURG: As far as we were concerned,
15 which I understand but apart from that, you had no other
16 use for it with respect to your own problem.

17 THE WITNESS: The only use that was made in
18 1979 proceedings with respect to fee generated, that the
19 fee generated by, for the distant carriage of TV stations
20 during 1978 was used by Nielsen as the basis for selecting
21 the sample of stations that we used for the 1979 proceed-
22 ings.

23 This, again, was in lieu of their not having
24 access to viewing data, which they had originally intended
25 to use. Again, leaping forward, if I may, Commissioner

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1 Burg for the 1980 proceeding, we intended to elimi-
2 nate the why's of fee generated totally.

3 COMMISSIONER BURG: What you are saying here,
4 apart from what you have just enumerated, the reasons you
5 just enumerated you have not used that fee generated
6 portion of the 1979 phase one direct case in any other way
7 internally?

8 THE WITNESS: Yes, ma'am.

9 BY MR. SCHEINER:

10 Q Mr. Cooper, what data or information do you
11 rely upon for determining the copyright ownership of
12 individual claimants?

13 A As principal source for identifying copyright
14 ownership was a computer tape obtained from Broadcasters
15 Information Bureau, BIB is a recognized source of data
16 concerning series, specials, and movies that is used
17 throughout the industry. Each of the listings of programs
18 contain two items that were relevant to the determination
19 of copyright as we viewed it.

20 One of those items is the name of the domestic
21 syndicate or of the TV series or movie and the second
22 item is the name or identificatin of the producer of that
23 television series or movie. For the most part, we relied
24 upon the BIB data to identify copyright owners. In
25 addition to that, particularly for programs which were not

1 listed in BIB. We relied upon two other industry source
2 books. These are Syndicated Program and All Seas,
3 published by the ARBITRON and by the A. C. Nielsen
4 Company. Those do list the name of the syndicated dis-
5 tributor for each program listed in those books.

6 Q Did you ever encounter a dispute among claimants
7 with respect to the copyright ownership of various
8 programs?

9 A We encountered disputes and there were some
10 other types of things that resulted from our transmission
11 of this information to the claimant groups.

12 Q Would you give us some examples, please?

13 A Yes. One instance of a dispute relates to
14 a cartoon series called, "Popeye." BIB lists two "Popeye"
15 series in short form. They are virtually unidentifiable
16 or undifferential from TV Guide listings as to whether you
17 are dealing with a "Popeye" series that was produced
18 by King Features or a "Popeye" series that is distributed
19 by United Artists and was produced by Warner Brothers.

20 They are both cartoon series. We had trans-
21 mitted this material to printouts to both King Features
22 and to United Artists and King Features -- we had a problem.
23 We asked King Features and United Artists to advise us as
24 to which stations, which of the sample stations they had
25 licensed their "Popeye" series to for performance during 1979

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1. where only one of the two had licensed "Popeye" to the
2 stations we had no tie. We assigned credit for that
3 station's viewing to that syndicator but in some instances,
4 both United Artists and King Features' "Popeye" series
5 were licensed to the same station and in those instances,
6 we resolved the dispute on a Solomonic basis by having them
7 agree to dividing the hours that were credited for "Popeye"
8 on those common stations equally between them.

9 Another more complex thing related to a movie
10 series of "Blondie," "Blondie Film," some 20-odd movies
11 featuring "Blondie" in various roles were picked up in
12 terms of being presented, being performed by the stations
13 and carried as distant signals by those cable systems.

14 The listings in BIB indicated that the "Blondie"
15 series was syndicated by a non-claimant, by Gold Key, but
16 that the producer, according to the BIB listing was CPT
17 which is an acronym for Columbia Pictures. In accordance
18 with the procedure we outlined for all claimants credit
19 for for "Blondie" movies was given to King Features.
20 King Features the owner of "Blondie" asked where credit
21 for the "Blondie" Pictures has been given and we told them
22 what we had done. They said they were the copyright
23 owners of the "Blondie" movies and not Columbia Pictures,
24 that Columbia Pictures had produced them years and years
25 ago but that the copyright was vested in King Features.

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We checked with Columbia Pictures and Columbia Pictures agreed that this was indeed the case and credit for those movies was then given to King Features. There are other cases along the way. Even one that was more complex in volume was cartoon series called "Spiderman," which the copyright for which we now know is owned by Marvel Comics, a subsidiary of Katon Industries.

The listings in BIB for "Spiderman" indicates the series syndicated by, ARP Films, Incorporated and that the producer was an organization called, GRAY-Lowe Arts. Arts is not a claimant in this proceeding, nor is Grand Tralarns. So, we had put the "Spiderman" credit for the "Spiderman" series into the unclaimed category.

When Marvel Comics advised us of their copy-right ownership, I checked with ARP Films, and ARP Films confirmed the fact that, indeed, as far as they were concerned, they were the syndicator but that the properties belonged to Marvel Comics. Subsequently, we credited Marvel Comics with full credit for the "Spiderman" series.

Q Mr. Cooper, during what period of time were you engaged in the resolution of those differences?

A This was in the period of one month between November 15, when the last letters went out to, last initial letters went out to claimants and December 15, when we asked for agreements to be sent to us for submission to

1 the Tribunal on December 16, the date you set. 41

2 Q Going back to your basic formula, Mr. Cooper,
3 did MPAA propose the application of that formula to
4 devotional claimants?

5 A No, sir.

6 Q Why not?

7 A As I testified in phase I, I believe that
8 household viewing hours as applied to the secular copyright
9 owners of syndicated series and movies provides a reasonable
10 and positive reflection of the three criteria that the
11 CRT had enunciated as being of principal significance and
12 that is the harm to the copyright owner, benefit to the
13 cable system operator, and the marketplace value of the
14 properties concerned.

15 Also, in phase one, I indicated to you that I
16 did not think that these same criteria applied to the
17 devotional series, to the religious broadcasters for good
18 reasons. One, the viewing hours that we were reported
19 by Nielsen were not harm to the copyright owners but
20 rather was benefit to the copyright owners, the reverse of
21 what it was to the secular suppliers.

22 Secondly, with respect to marketplace value,
23 I would like to shift to that, it is an acknowledged fact
24 that the copyright owners of the religious programs pay the
25 stations to carry them, rather than receive payment of any

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1 kind from the stations for that carriage. In my view,
2 the marketplace value of anything that you have to pay
3 people to take is not zero, but it is less than zero.

4 On the other hand, the viewing that is reported by
5 the Nielsen thing does reflect some benefit to the cable
6 system operators. But, the whole weight of the equation,
7 taking the three factors into account, rules out using
8 those Nielsen data for devotional claimants to the same
9 degree as you do for secular copyright owners.

10 In addition, of course, the base that we used
11 for the allocation for the determination of initial shares
12 to secular claimants was based only on the viewing hours
13 to syndicated series and movies, exclusive of any hours
14 of viewing for devotional claimants.

15 Q Mr. Cooper, did you propose the application
16 of the formula to, SIN, Multimedia and Mutual of Omaha?

17 A Yes.

18 Q With respect to the settlement agreement, are
19 you privileged to disclose the shares of individual
20 program suppliers?

21 A No, sir. This is a firm understanding that
22 this is sensitive, confidential, competitive information.

23 (MPAA Exhibit Number 5 was marked
24 for identification.)

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2 Q Mr. Cooper, I hand you what I have marked as
3 MPAA Exhibit Number 5, which bears the caption, "Claimants
4 Represented by MPAA."

5 Is this a complete and accurate list of member
6 companies of MPAA and nonmember companies who have entered
7 into the voluntary settlement agreement?

8 A Yes, sir.

9 Q Can you tell me what the average share of each
10 claimant is?

11 A The average share, meaning, arithmetical
12 share would be between 1.5 and 2 percent for each of the
13 parties who entered into voluntary agreement.

14 Q The parties that entered into the agreement
15 account for 98 and a half percent of the total number of
16 viewing hours that we are counting for syndicated series
17 and movies. There are some 49 claimants, money claimants,
18 if you would, for whom we found programs of theirs among
19 the syndicated series and moveis transmitted by sample
20 stations during the sweep weeks and so we are then dealing
21 with an average of near two percent on a mathematical basis.

22 However, the range is very substantial. It
23 goes from a fraction of almost 1,000 of 1 percent for one
24 claimant to a substantially higher figure, near 10 percent
25 or over for a few other claimants.

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COMMISSIONER COULTER: Can I ask a question at this point?

MR. SCHEINER: Yes.

COMMISSIONER COULTER: Mr. Cooper, the 98 percent represented by the viewing that you came up with and represented -- the 98 percent presented by the viewing or shown in the viewing being those of the parties you represented, did those parties come to this agreement before your study or afterwards?

THE WITNESS: The study was all prepared in connection with phase one of those proceedings, and we did not approach those people with the formula or their allocated shares until November.

COMMISSIONER COULTER: Thank you.

BY MR. SCHEINER:

Q You made reference, I believe, to 49 parties?

A Yes.

Q The list before you in Exhibit 5 has some, as I counted it out, 50 parties.

A Yes.

Q What was the reference to 49 parties?

A The difference relates to claimants who have signed agreements with us, but for whom no share of the program suppliers award was indicated. I would prefer not to go to specific which ones they are but included in the

1 in the list are a number of zero claimants who have signed
2 agreements with us.

3 Q Just to make this clear, a number of claimants
4 who on the application of the formula were entitled to
5 zero share, nevertheless, entered into agreements to
6 that effect?

7 A Yes.

8 MR. MIDLEN: Into agreements that they were
9 entitled to nothing?

10 MR. SCHEINER: Yes.

11 COMMISSIONER COULTER: Did they know they
12 were going to get a zero share before they entered into
13 the agreement?

14 THE WITNESS: The letters that went to them
15 and copies were sent to the Tribunal. Commissioner Coulter
16 indicated in the so-called zero letters tht there was no
17 award to be made for them on the basis of the data that
18 we had, but that if they could submit information that
19 would allow us to give them a share of the award on exactly
20 the same basis as the awards went to all other program
21 supplier claimants we would do so.

22 MR. FERRALL: Copies of letters were sent to
23 the Tribunal?

24 CHAIRMAN GARCIA: Yes.

25 MR. FERRALL: Were they also served on parties?

1 CHAIRMAN GARCIA: This was in direct response
2 to Commissioner Garcia's letter to all the parties. We
3 give you a list and so I am sure it wasn't. It was just
4 made available to the Tribunal.

5 MR. MIDLEN: Might I ask these letters be
6 made available to the rest of the parties?

7 CHAIRMAN GARCIA: Do you have any objection
8 to that, Mr. Scheiner?

9 MR. SCHEINER: No.

10 CHAIRMAN GARCIA: They are part of the record
11 anyway because we do have a copy.

12 MR. SCHEINER: I would suggest that since
13 they are part of the record, if any party is interested
14 in viewing them, they can be viewed at the Tribunal. I
15 simply don't want to undertake the burden of duplicating
16 and serving. They are available. Anybody who is
17 interested may take advantage of that availability.

18 CHAIRMAN GARCIA: Mr. Midlen, does that
19 satisfy your curiosity?

20 MR. MIDLEN: No, Madam Chairman.

21 CHAIRMAN GARCIA: Withdraw that. I will send
22 him a copy. Can we go on?

23 COMMISSIONER COULTER: The question I wanted
24 to ask, the zero shares, seven people got zero and
25 everybody else got something?

1 THE WITNESS: I think that number is probably 17
2 correct. When we speak about zero shares, again, I would
3 like, if you would indulge me, to indicate the procedures
4 that we used and why some zero shares would sign with us.

5 For example, Anthony Productions came in as
6 a claimant in this proceeding. Anthony Productions is an
7 organization that produces or owns the "Merv Griffin Show."
8 The "Merv Griffin Show" is syndicated by a claimant in this
9 proceeding to whom the share of our award was tentatively
10 assigned.

11 We advised Anthony Productions that we had made
12 this assignment to the specified syndicator and Anthony
13 Productions was satisfied that the arrangement that they had
14 with the syndicator would provide them with the compensation
15 they wanted.

16 Another zero claimant in this proceeding, a very
17 major producer, is Jack Barrie in the Barrie and Enright
18 Productions who are listed as claimants in your proceeding.
19 Their programs are syndicated by an organization called
20 King World.

21 We advised Barrie and Enright when we sent them
22 the zero letter in response to questions they raised that
23 credit for their productions was given to King World. Barrie
24 and Enright has subsequently entered into agreement filed
25 with us between themselves and King World that directs us to

1 make any payments due for Barrie and Enright properties
2 that were syndicated by King World directly to Barrie
3 and Enright. Hence, Barrie and Enright even though Barrie
4 and Enright is a zero claimant signed the agreement form
5 with us. We have an arrangement with them.

6 COMMISSIONER COULTER: In the examples you
7 mentioned -- excuse me, Mr. Scheiner. In the examples you
8 mentioned, you have got, those are people that you can
9 presume have some side arrangement with the people they are
10 dealing with and so it is possible that although you gave,
11 you assigned one party the share, the other party may have
12 gotten part of it.

13 Are there any of your zero claimants where such
14 arrangement was not the case, where you presume that they
15 got, whatever the arrangements were, they got zero, they
16 were entitled to zero?

17 THE WITNESS: Yes. I don't want to specify names.

18 MR. SCHEINER: No names, please.

19 THE WITNESS: There is another claimant whose
20 claim involved a single feature film and that claim we did
21 not come across that single feature film as being performed
22 by any of the sample stations during the week and so advised
23 them but they, nonetheless, signed a claim, signed an agree-
24 ment form with us. It is possible and we have not closed the
25 books on this, that this party will still come forward with

1 with some indication that that film was indeed shown during,
2 or by them and some of the stations during the sample weeks.
3 In which case, we will confirm it. We will give him whatever
4 share of the pool is ascribable to him.

5 COMMISSIONER COULTER: Is it fair to say the bulk
6 of your zero claimants would fit into the category you
7 described earlier?

8 THE WITNESS: No, the bulk in number fall into
9 the second category, people for whom we have no basis and
10 virtually no prospect for awarding them anything. I think
11 what you have to also consider, Commissioner, is that we are
12 performing a service for all program suppliers that are
13 identifiable.

14 For example, we are alerting them to the time
15 when they should file and how they should file. I think that
16 is possibly in desire to maintain this communication with us
17 for future years that they have entered into those agreements
18 with us.

19 COMMISSIONER COULTER: Thank you.

20 BY MR. SCHEINER:

21 Q Mr. Cooper, based upon the application of the
22 formula that you described, is it correct that 98.5 percent
23 of the funds also indicated to program suppliers would be
24 distributed among the parties listed on MPAA Exhibit 5?

25 A Yes, sir.

1 Q And would the application of the formula result
2 in an allocation of a balance to Multimedia, Mutual of
3 Omaha and SIN?

4 A Yes, sir.

5 Q What portion would be allocated to the devotional
6 claimants?

7 A None.

8 Q for the reasons you have previously stated?

9 A Yes.

10 MR. SCHEINER: I have no further question on
11 direct.

12 CHAIRMAN GARCIA: Commissioner Brennan?

13 COMMISSIONER BRENNAN: No questions.

14 CHAIRMAN GARCIA: Commissioner Coulter?

15 COMMISSIONER COULTER: A couple.

16 Just to clarify, the reason you shifted from
17 your internal distribution, the internal distribution formula
18 you had last year, the internal distribution system you
19 had this year was entirely to keep the consistency with the
20 evidence you are presenting to us and you organized according
21 to what you perceived we wanted as a result of the criteria
22 we enumerated last year, is that correct?

23 THE WITNESS: That is and also the fact, sir, we
24 totally agreed to concur with your description and virtual
25 rejection of time based fee generated formulas. We were glad

1 to have a statute that made much more sense, logic, reason⁵¹
2 and equity.

3 COMMISSIONER COULTER: Again, not getting into
4 the specific details, but did you have any greater difficulty
5 in getting people to agree this year than you had last year?

6 THE WITNESS: I would say we had much less
7 difficulty this year. We had far -- there were far more
8 claimants in the program supply category this year than
9 last year and we were able to reach agreements with all of
10 them without exception, absolutely and positively on the
11 basis of a formula.

12 COMMISSIONER COULTER: This is also, presumably,
13 because it was done differently, their shares in the context
14 of what you were dividing up could have been -- less,
15 once that would be affected would be those who would get
16 less, presumably, proportionality than they would have last
17 year and they knew this last year?

18 THE WITNESS: Yes. There will be substantial
19 difference between time based fee generated allocation and
20 allocation based upon viewing hours.

21 COMMISSIONER COULTER: So, somebody, assuming the
22 syndicator's share is 100 percent, somebody could have gotten
23 less percentage that is here this year than he got last year.
24 I assume there were people in that category.

25 THE WITNESS: I assume that, yes, indeed.

1 COMMISSIONER COULTER: Did they object?

2 THE WITNESS: It would be only objections that
3 I can report to you that relate to the three secular claimants
4 who are represented in this proceeding, namely, Multimedia,
5 Mutual of Omaha and SIN, Spanish International Network.

6 COMMISSIONER COULTER: But there were other
7 claimants who agreed that got less proportionately this year
8 than they got last year.

9 THE WITNESS: Indeed, sir.

10 COMMISSIONER COULTER: Obviously to be attributed
11 anything in your formula, the person has to show up in your
12 survey?

13 THE WITNESS: Yes.

14 COMMISSIONER COULTER: That survey, since it
15 only covers 49 stations, there is a possibility for somebody
16 to have been carried somewhere else that won't appear in
17 your survey, is that correct?

18 THE WITNESS: That certainly is true, sir.

19 COMMISSIONER COULTER: Does your formula have
20 any provision to provide for those people?

21 THE WITNESS: No, sir. It does not.

22 COMMISSIONER COULTER: Okay.

23 CHAIRMAN GARCIA: Mr. Cooper, earlier today a
24 list was submitted to the record a handful of claimants that
25 are apart of phase II but that have not reached voluntary

1 agreement. It appears there may be several syndicators
2 on that list. What recommendations would you give to the
3 Tribunal in handling those particular syndicators so that
4 all equality can be administered?

5 THE WITNESS: I think it is a legal question.
6 The reality to the fact whether or not they filed a notice
7 to appear in phase II.

8 CHAIRMAN GARCIA: Excuse me. Before you go on,
9 they are valid claimants in this proceeding?

10 THE WITNESS: I think --

11 MR. SCHEINER: Would you restate that question
12 for me, please?

13 CHAIRMAN GARCIA: Well, the question is, Mr.
14 Cooper, is if some of the claimants that have not reached a
15 voluntary agreement with MPAA, what recommendation would
16 you make to the Tribunal in disposing of those claimants?

17 MR. SCHEINER: It is not clear to me. Are we
18 now talking about valid syndicators, syndicators who have
19 filed valid claims but who have not filed an intention to
20 appear in this proceeding?

21 CHAIRMAN GARCIA: Yes.

22 MR. SCHEINER: May I see the list?

23 CHAIRMAN GARCIA: Mr. Reporter, the Tribunal gave
24 you a list at the beginning of the record.

25 (Off the record.)

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1 CHAIRMAN GARCIA: If you would look at that, Mr.
2 Cooper. Copy of this list will be available to you after
3 lunch.

4 MR. SCHEINER: I think Mr. Cooper is correct. I
5 think --

6 CHAIRMAN GARCIA: Mr. Cooper, what I will do,
7 is we will recess now, give you an opportunity to look at
8 that over the lunch and then you may answer my question at
9 that time.

10 MR. SCHEINER: I really think it is a legal
11 question.

12 THE WITNESS: I do, too.

13 CHAIRMAN GARCIA: Let the record show that the
14 Commissioner has a pending question that will be disposed
15 of after the lunch.

16 We will recess until Two o'clock.

17 MR. FERRALL: Could you bring some more copies
18 of that?

19 CHAIRMAN GARCIA: Yes. They will be available
20 here at the lower level after lunch. If you want, before
21 that you may come to our office and obtain a copy. We will
22 reconvene at Two o'clock at the lower level.

23 (Whereupon, a lunch recess was taken at
24 12 o'clock p.m.)

25

1 CHAIRMAN GARCIA: Do you have an answer to my legal
2 question?

3 MR. SCHEINER: Yes.

4 CHAIRMAN GARCIA: Mr. Scheiner, before you do
5 that, we have been asked to encourage you to use the pay
6 phone on the first level. It is on the first floor, located
7 if you walk through the door, to your right if you face L
8 Street. In other words, they don't want you using their
9 phone facilities. Go ahead.

10 MR. SCHEINER: Madam Chairman, in answer to your
11 question, we checked back in our office and determined
12 that the list that you furnished to us this morning is
13 essentially the same list furnished by you in your letter
14 dated October 7.

15 CHAIRMAN GARCIA: That is correct.

16 MR. SCHEINER: And I would, if you like, to
17 furnish copies of that letter, our response to that letter.
18 It is a response by Mr. Attaway. I think for the record
19 purpose, I will identify this as MPAA Exhibit 6 and the
20 position accepted in that letter remains our position and
21 constitutes our answer to the pending question.

22 (MPAA Exhibit Number 6 was marked for
23 identification.)

24 MR. SCHEINER: The bottom line is that none of
25 the so-called claimants listed are entitled to shares in

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1 the fund.

2 CHAIRMAN GARCIA: Mr. Scheiner, is it your
3 understanding that the additional names that this list
4 contains that are not in this letter --

5 MR. SCHEINER: We have not had an opportunity to
6 check that. Rather than take the time on the record, if
7 I may, I would like to compare the two lists and advise
8 you further in our next session as to whether there are
9 any changes in result by reason of the division in the
10 two lists. May I do that?

11 CHAIRMAN GARCIA: Please do. What we are trying
12 to ascertain here, is to make sure everyone on this list,
13 each claimant has had an opportunity to look at it, is
14 satisfied it is not part of their claim, if they have been
15 notified to notify the Tribunal if any contact has been
16 made with them.

17 MR. SCHEINER: I will supplement the Attaway
18 letter that I identified as Exhibit 6 with a further
19 analysis based on the new list that you have furnished to
20 us.

21 CHAIRMAN GARCIA: Thank you. I would also say
22 that also applies to the rest of the claimants here. If you
23 see someone on this list that is part of your umbrella
24 group that you have not identified, please let us know.
25 This is an attempt to notify the claimants for the 1979 claim.

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COMMISSIONER COULTER: Could I ask Mr. Cooper one last question, please?

Following up my questioning, you mentioned if one of the claimants that now is a zero claimant with you comes up and shows that they actually can point to a showing, that you would do something about that.

THE WITNESS: Yes.

COMMISSIONER COULTER: You indicated to me anybody who has programming appearing on stations other than the 49 stations and who is programming, therefore, won't appear in your survey. You don't have any provision to take care of those people currently?

How do you plan to take care of those zero claimants who might find subsequently they have some programming they could identify?

THE WITNESS: Commissioner, it would have been my impression that any zero claimant, a person for whom we advised we had no share for and had different view or different information, for example, that they had programs in other stations that represented a basis for a claim, should have been asked for a showing with you in the filing on December 16. That was the opportunity they had in that connection.

COMMISSIONER COULTER: Therefore, for you the issue in that respect is closed?

1 THE WITNESS: Yes.

2 CHAIRMAN GARCIA: Is there any cross, Mr. Ferrall?

3 CROSS-EXAMINATION

4 BY MR. FERRALL:

5 Q Allen, just a few questions. You said this morning
6 that in determining copyright ownership you basically looked
7 to two things: Who the syndicator was and who the producer
8 was?

9 A Yes.

10 Q Could you explain what you meant by that, how
11 exactly did you determine who the copyright owner was?

12 A I determined, Mr. Ferrall, who the syndicator
13 was, or to the best of our ability who the syndicator was
14 and who the producer was. There is a basic underlying
15 assumption that the syndicator is an appropriate claimant
16 and an appropriate representative of the copyright owner
17 if the syndicator is not the copyright owner per se.

18 If the syndicator is not a claimant, we look to
19 the producer. If the producer is a claimant we made the
20 assumption again that the producer was the copyright owner
21 and advised the producer that credit for that program was
22 being given to him.

23 Q Just to be sure we are clear, if you found the
24 name of syndicator you assumed that he held the copyright?
25

1 A That he had rights to receive the share of
2 royalties for that program, yes.

3 Q Might those rights be something other than being
4 the copyright holder?

5 A It is my understanding, Mr. Ferrall, that with
6 respect to contracts between syndicators and producers that
7 revenues received by syndicators by sale or indirectly
8 through royalties are shared with the producer in accordance
9 with contractual terms, and that revenue from the roylaty
10 Tribunal would be treated by the syndicator as, just as
11 revenue from the sales of programs of the stations.

12 Q You really didn't try to divide whether each
13 syndicator was the copyright holder or not?

14 A We did not, sir.

15 Q You found the syndicator's name for a program.
16 Why then would you look also to the producers?

17 A If syndicator was a claimant, then we did not
18 look to the producer. If the syndicator was not a claimant,
19 we looked at the producer's listings to determine if the
20 producer was the claimant. If the producer was the claimant,
21 then the share of the award would be granted to the
22 producer.

23 Q In the case of producers, did you make any effort
24 to determine whether they were copyright holders?

25 A Other than the listings in BIB and the other

1 source books, I have referred to, the answer is no.

2 Q Do BIB and the other source books you referred to
3 identify copyright holders?

4 A They identify syndicators and producers.

5 Q Do they identify copyright holders?

6 A In some rare instances, they indicate in addition
7 to producers and syndicator, they may indicate a reference
8 to rights owned by.

9 Q Are those copyrights?

10 A I don't know, sir.

11 Q But there is no other reference to rights than
12 the one you have just described?

13 A To the best of my knowledge, Mr. Ferrall, that is
14 correct.

15 Q The three basic works that you relied on you
16 described are BIB and two, is Nielsen, and ARBITRON?

17 A Two syndicated program and All Seas, yes.

18 Q Could you briefly describe for us which programs
19 or what kind of programs are included in those listings?

20 A In which?

21 Q Both of them.

22 A The BIB Source Book essentially lists all
23 syndicated series that are available for syndication in the
24 U. S. and also in the export market and likewise they list
25 some 20-odd thousand movie titles that are available in the

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1 syndicated syndication, either domestic or in the export
2 market.

3 The two syndicated program and All Seas lists all
4 syndicated series that were carried by five or more commer-
5 cial stations during the period covered by the reports. In
6 general, the period covered by the report are the sweep
7 weeks of the rating service.

8 Q Mr. Cooper, if I made a program and wanted to be
9 listed in BIB, how would I get my program listed?

10 A I think you would advise BIB and BIB would list
11 your program.

12 Q Would I pay a fee?

13 A To the best of my knowledge, you would not.

14 Q If I didn't let them know then I won't be listed?

15 A That is not so. They will search out other sources
16 that list programs, advise others, press releases, et
17 cetera. They keep, to the best of my knowledge, very good
18 track of all programs that are available in syndication.

19 Q I would like to ask you a few questions about this
20 formula of yours.

21 You testified this morning that in 1978, in
22 allocating MPAA's share of the royalties or the royalties
23 allocated --

24 A To program suppliers.

25 Q -- program suppliers you use a formula based on

1 fees generated, is that correct?

2 A The time and the fees generated, combination of
3 the two.

4 Q You went on and noted fees generated, it was made
5 clear to you by the Tribunal that fees generated was not an
6 acceptable basis to this Tribunal. So, in 1979 you used
7 a formula based on viewing hours, is that correct?

8 A That is essentially correct, Mr. Ferrall.

9 Q Is the fact that the Tribunal has rejected the
10 fees generated approach any relevance to your 1978 formula?
11 Let me ask that question a different way.

12 When you found that the Tribunal was not having
13 fees generated, did you go back and redo your 1978
14 distribution?

15 A No, sir.

16 Q Why not?

17 A With respect to the data that we had available to
18 us, it seems to be the most objective equitable way to do
19 it.

20 Q Based on the independent decision of MPAA?

21 A It was our decision and the extent to which the
22 claimants accepted that judgment indicated their agreement
23 too, indicated that their way was the appropriate way to
24 distribute 1978 funds.

25 Q You and the people you work with agreed?

1 A All of the claimants with whom we were dealing.

2 Q Now you have a formula that is based entirely
3 on viewership, viewing hours, is that correct?

4 A Household, yes, household viewing hours.

5 Q As shown in the Nielsen Study. I would like to
6 ask you a few questions about that. Before I get to
7 that, you don't know yet do you, Mr. Cooper, whether the
8 Tribunal in its final decision is going to ratify a pure
9 household viewing hours approach to allocation because
10 you haven't seen their decision, is that true?

11 A That is true.

12 Q I wonder if you could just refresh my recollection.
13 In the Nielsen Study, what was the percentage of the house-
14 hold viewing hours shown for sports programming?

15 A Do you want the precise figure?

16 Q Roughly.

17 A Around eight percent.

18 Q Was there any percentage viewing figure shown
19 for public television in that study?

20 A No. The sample of stations Nielsen used was
21 essentially the 25 independent stations and the 25 affili-
22 ated network stations.

23 Q The Tribunal has awarded to sports programming
24 a percentage which was roughly double their viewership,
25 is not that correct as shown by your Nielsen Study?

1 A They have awarded a substantially higher figure.

2 Q They have made an award to PBS on the basis of
3 something that can't possibly be your Nielsen Study because
4 your Nielsen Study didn't deal with PVA?

5 A That is correct.

6 Q If you were to reason, you and I, that when the
7 Tribunal said in their initial order that no single formula
8 or calculation was adequate to make the calculation, they,
9 in fact, meant that as evidenced by the actions they took?

10 A I am certain they meant to or they wouldn't have
11 said it.

12 Q We can reasonably infer, I suppose, that when they
13 put out their final decision, it will not be a decision
14 based solely on household viewing hours?

15 A It certainly was not. If it were based solely
16 on household viewing hours then presumably, the award to
17 program suppliers would have been higher than the once
18 announced.

19 Q So, we can reasonably assert certain, then, you
20 and I, Mr. Cooper, that when we have the final decision of
21 the Tribunal, we will find that the basis of their decision
22 is different from the basis of the allocation you are making
23 just as we did in 1979. Would you agree with that?

24 A I don't disagree, Mr. Ferrall.

25 Q Do you plan if that happens to go back and redo

1 your formula for 1979 that you have worked on?

2 A No, but I would very seriously take the Tribunal's
3 decision and the reasons for it in mind in planning the case
4 we would present in 1980.

5 Q Yes, but I would like to focus on this formula you
6 are using for this allocation. That is set. You are not
7 going to change that no matter what the Tribunal does, is
8 that what you are telling us, Mr. Cooper?

9 A I believe that the basis that we are using was
10 judged to be fair and equitable by claimants who are justified
11 to receive the preponderance of the money that is available
12 for distribution.

13 Q What you are saying is that the claimants repre-
14 sented by MPAA agreed to your formula. Is that a fair
15 summary?

16 A That certainly is true.

17 Q Did other program syndicator claimants agree to
18 your formula, like SIN or the religious people and the NAB?
19 Obviously not?

20 A SIN had agreed to begin with, then, withdrew their
21 agreement. Multimedia and Mutual of Omaha rejected our
22 formula from the outset.

23 Q Let me ask you this, Mr. Cooper. Suppose you
24 decided at MPAA that the way to allocate this money was
25 something entirely different from the case you put on,

1 something that you judge to be fair and you called up the
2 claimants you represented and they agreed with you, that
3 that was fair. For example, let us suppose that you would
4 agree among yourselves that everybody should get at least
5 something, a little something or you had some other rules
6 that you applied in addition to this strict mathematical
7 application of the Nielsen Study. Would you see anything
8 wrong with that?

9 A I think that if the claimants that we represent
10 were to agree on a different allocation formula we would
11 have accepted it.

12 Q So, really, in your judgment that is a private
13 matter between MPAA and the claimants they represent, how
14 you divide up that money?

15 A I believe that is in accordance with the statute.

16 Q Then, I am a little puzzled by the significance
17 of your formula for this proceeding, Mr. Cooper, because
18 I agree with you, with no disrespect intended to the
19 Tribunal. I think that is up to you and your claimants to
20 work out. But, the issue here, is it not, is what portion
21 of the 70 percent is MPAA's to distribute out to the
22 claimants and what portion is not not that the phase II
23 issue in a nutshell?

24 A No, sir.

25 Q Please correct me.

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1 A No. As I understand the phase II issue, at
2 least as far as my appearance here is concerned, relates to
3 the allocation of the share of the total pie granted the
4 program suppliers and the phase II questions that I think
5 are appropriate with respect to my testimony relates to
6 the allocations due to people who are program suppliers,
7 either as defined by us or as defined by the Tribunal.

8 Q Let me see if I can get at this another way.

9 Suppose, just hypothetically, Mr. Cooper, that
10 this Tribunal were to decide that 10 percent of the 70
11 percent should be divided among claimants not represented
12 by MPAA. Assume that with me, hypothetically.

13 A I shall.

14 Q You testified this morning that you and your intra-
15 mural collegiality have already managed to allocate
16 98.5 percent of the 70 percent. What would you do if the
17 Tribunal were to decide that 10 percent of that was not
18 yours to allocate?

19 A In every statement that we have ever made to
20 the claimants we represent, we have indicated to them that
21 the share figures that we have referenced to them are tenta-
22 tive and subject to change.

23 Q What do you mean by tentative?

24 A They are tentative, again, depending upon the
25 actions of the Tribunal, such as the one that you had just

1 hypothetically presented.

2 Q Then why in your judgment, Mr. Cooper, is your
3 formula by which you testified relevant in this phase II
4 proceeding? Why not it just an intramural agreement
5 between you and your client claimants?

6 A If I understand your question, Mr. Ferrall, I am
7 saying that that is all that it is, that it is an agreement
8 among valid legal claimants for a share of the program
9 supply and I think it is totally the responsibility of the
10 individual claimants who were appropriate in the program
11 supply group to agree among themselves substantially how
12 to divide the money awarded to program suppliers.

13 Q You mentioned in talking about the 98.5 percent
14 that you had agreements. In addition to that, you mentioned
15 Multimedia, Mutual of Omaha and SIN. Did I draw the
16 correct inference that on your way of looking at this, that
17 the remaining one and a half percent in your scheme of things
18 was to go to them?

19 A No, sir.

20 Q Where did the remaining one and a half percent
21 go?

22 A What I had indicated is that the aggregate shares
23 based upon our formula for those three claimants aggregated
24 less than 1.5 percent.

25 Q Let me see if I can get at this the other way.

1 You have already got agreement based on your formula from
2 98.5 percent of the total by your formula?

3 A That is correct.

4 Q Who has the remaining, by your formula, one and
5 a half percent?

6 A This is primarily, and principally, the three
7 phase II claimants who have indicated to the Tribunal that
8 they contest the amount of the award that we propose for
9 them.

10 Q Is there anything in this for NAB represented
11 claimants?

12 A I don't know who the NAB have represented claimants
13 of program suppliers are.

14 Q Let us assume, hypothetically for the purpose of
15 my question that they are U. S. commercial television
16 stations. On that assumption, is there anything in your
17 model --

18 MR. SCHEINER: I object to the question. There
19 is no basis for such an assumption. We have one claim only
20 and that is by CBS owned and operated stations, and Mr.
21 Cooper can testify to his allocation of a valid number for
22 all of those claims. There is no warrant for any other
23 assumption with respect to NAB applicants.

24 CHAIRMAN GARCIA: Overruled.

25 THE WITNESS: I don't know what the question I

1 am supposed to be answering.

2 BY MR. FERRALL:

3 Q Is there anything in your model for NAB represented
4 claimants?

5 A If the Tribunal accepts claims against program
6 suppliers from NAB represented claimants, then, we would
7 reallocate the total to include those claimants.

8 Q Under your model as it now stands, Mr. Cooper,
9 what percentage would you allocate to that group?

10 A Depends upon whatever showing they make after
11 valid claim based upon our viewing hours.

12 Q Have you made such an allocation? It must be
13 in the 1.5 percent?

14 A Yes. We have, as Mr. Scheiner indicated, the
15 filing made by the NAB contains a list of the programs
16 distributed among CBS Television Network-owned stations.
17 We examined that list carefully to determine whether any
18 of those programs were carried by any of the sample
19 stations during the 15 sweep weeks and we did find one such
20 program. That program has a title, "Yipes, don't be Afraid,"
21 and it was carried only by station, among the sample
22 stations, by station KNXT, in Los Angeles and I think that
23 we have determined that on the basis of the formula that
24 we have already described, that an amount of credit could
25 be awarded to CBS if they were considered to be a valid

1 claimant against the program supplier's share of the
2 phase I award on the basis of that program.

3 Q I am not going to interrupt you but just let me
4 say right now I am not asking about CBS. Let me try
5 again. I am not going to stop on this question until I get
6 an answer.

7 You have agreement for 98.5 percent of all of the
8 program hours, household hours in the Nielsen Study,
9 is that correct?

10 A We have an agreement that would distribute the
11 identifiable claimed household hours, the identifiable hours
12 among identified claimants to the extent of 98.5 percent
13 of the pool.

14 Q That is 98.5 percent of the total syndicated
15 household hours have been accounted for, is that correct?

16 A It does not include the hours of some programs
17 for which we could not identify, either by title or the
18 syndicator claimant only.

19 Q If I can get you to answer my first question
20 before I go to the next. You have accounted for and
21 made agreements with syndicators who represent 98.5 percent
22 of 512 plus million household hours of programming, is
23 that correct?

24 A That is not correct.

25 Q Could you correct me on it?

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1 A There are two errors in your statement. Number 1
 2 the agreements are not only with syndicators but they are
 3 with syndicators and producers. Secondly, the distribution
 4 relates to, as I will restate, again identifiable programs
 5 for whom the title of the program is known and for whom
 6 the syndicator and/or producer can identified from available
 7 data.

8 Of all programs of all the hours for which such
 9 identification is possible, 98.5 percent has been allocated
 10 among the claimants we represent.

11 Q I am just going to keep on this. I really think
 12 it is important. I want to get it straight. I am going
 13 to start at the beginning.

14 Allen, there is 512, roughly, million hours of
 15 programming that is the basis, the denominator in your
 16 formula, is that correct?

17 A That is correct.

18 Q You testified this morning that if someone had
 19 5,120,000 hours of programming or hours of whatever these
 20 are, they would get one percent?

21 A That is correct.

22 Q And on that approach, you have accounted for
 23 in agreements that you have reached, voluntary agreements,
 24 98.5 percent of the 512 million group household hours?
 25 Is that correct?

1 A That is correct.

2 Q Now what is the remaining one and a half percent?

3 A The remaining one and a half percent includes the
4 hours related to three claimants in the identified claimant,
5 program supply claimants who did not accept our agreement
6 and these programs which we were unable to identify and
7 relate to a specific syndicator and/or producer.

8 Q Could you tell us what those programs are that you
9 have not been able to identify?

10 A Significant portion of them relates to, not in
11 terms of hours but just in terms of numbers, relate to
12 movies, which were shown particularly in the late night
13 period. The Nielsen data did not identify movies, if you
14 will recall. They could only identify series. We had
15 to rely upon TV Guide listings for the movie titles.

16 Another proof of group of programs that classified
17 that way relate principally to syndicated cartoon programs
18 which are shown on some stations as under umbrella titles
19 that do not identify, do not allow us to identify the
20 syndicator or producer.

21 They could be titles such as Cartoon, or some
22 other title, Cartoon Playhouse. Clearly, these are programs
23 that consist of cartoons but we cannot determine from the
24 data available to us who the syndicators or who the pro-
25 ducers are of the cartoons that comprise those programs.

1 That is by far the main part of the 1.5 that is unaccounted
2 for.

3 Q Is there anything else?

4 A There is an amount of programs for whom we
5 do have identified syndicators, producers but neither the
6 syndicator nor the producer is a claimant in this proceeding.

7 Q Are any of them broadcast station licensees?

8 A I believe there are possibly three titles that
9 may be attributable to a broadcast station licensee. They
10 are inconsequential in terms of viewing hours.

11 Q Could you tell us what they are?

12 A I don't know if the listings are correct, but if
13 memory serves, there is a program called, "Consultation,"
14 which may be a program produce by BBI, Boston Broadcasters,
15 Incorporated.

16 Our data indicate that that program was carried
17 by WBIT, the Hartford station owned by, BYACOM, it is in
18 our sample, and the distant viewing of "Consultation" via
19 WTIP was zero.

20 There is another program that BIB lists with
21 some station association called, "Polka Varieties," that
22 appears in the listing, again, of minimal consequence.
23 There is also a program that I believe an agricultural
24 subject, that is attributable to WGN Continental. I believe
25 it is called, "Agriculture, USA." It appears at something

1 like Six A.M. on some stations. It has virtually no viewers.
2 Martin Agronsky and Things --

3 Q There is a listing for, it is called Martin
4 "Agronsky and Friends."

5 COMMISSIONER BURG: Agronsky and Company.

6 THE WITNESS: It is called, "Agronsky and Company.
7 We did pick up "Agronsky and Company." The BIB data suggests
8 that there is no station associated with it. The BIB
9 listing indicates that it is a Post-Newsweek syndication
10 and /or production, and I do not see a station associated
11 with that syndicate.

12 Q Have you entered into a voluntary agreement with
13 Post-Newsweek?

14 A No, to the best of my knowledge, Post-Newsweek
15 per se is not a claimant in this proceeding.

16 Q What do you mean per se?

17 A I do not encounter in the list of claimants
18 supplied or maintained by the Copyright Tribunal a listing
19 of Post-Newsweek as a program supply claimant.

20 Q What about for WGN, the agriculture show you
21 mentioned, do you find a claim for them?

22 A The question I am raising is not that it is
23 WGN, but the list of associate, I believe it is with the
24 Show, "Agriculture, USA," is WGN Continental, which is not
25 necessarily the same as station WGN.

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1 Q Suppose I told you, Mr. Cooper, that I knew, and
2 to an absolute certainty, that "Agronsky and Company"
3 was made on Channel 9 WTOP, Washington, D.C. and that they
4 were a claimant? Would that have any effect on your
5 judgment?

6 A If they were a claimant as a program supplier
7 syndicator, yes, it would have an effect on my judgment.

8 Q What do you mean as a program supplier syndicator?

9 A The claims that are filed with the Tribunal in
10 accordance with the law do not specifically ask for -- I
11 think this something that may be corrected at sometime in
12 the future -- the basis on which a claim is filed. There
13 is a claim filed with a station operator or syndicator or
14 producer and for what type of material. I am not aware
15 of a claim filed by Post-Newsweek or by WTOP --

16 Q What is, what it was at the time?

17 A -- for the Martin Agronsky program as program
18 supplier.

19 Q You mean you are not aware that they filed a
20 claim that specifically listed Martin Agronsky, "Martin
21 Agronsky and Company" as their ground?

22 A It is my belief, Mr. Ferrall, and it is not
23 one that I can support with factual data, is tht I will
24 assume that WTOP did file a claim and I will also further
25 assume that WTOP claim, to the best of my ability to read it,

1 was for a share of the royalties that will be awarded to the
2 broadcasters.

3 Q How would you know from looking at a claim which
4 part of the pot, the '79 royalty pot the claimant was
5 interested in receiving an award?

6 A Generally, syndicated claims will report that
7 they are syndicators and that the kind of programs which
8 they are selling, licensing for stations and that they are
9 indeed in the syndication business.

10 Q If a syndicator failed to report that in his
11 claim, would you have disallowed him in the apportionment
12 of your formula?

13 A I would not have because it would be clear to
14 me that a syndicator claim was not a station operator
15 who was filing as a syndicator or program supplier for a
16 share of our award rather than as a station operator, for
17 example.

18 Q You have been very forthcoming on this, Mr.
19 Cooper. I know you are not a liar. I don't want to
20 press you into a legal question but is it your understand-
21 ing of the law that the claimant is required to declare
22 as a part of their claim where they want their money to
23 come from, which part of the pot they want their money to
24 come from?

25 MR. SCHEINER: Madam Chairman, reluctantly, I must

1 interpose an objection, despite Mr. Ferrall's disavowals.
2 He clearly is calling for a legal conclusion. I think that
3 is inappropriate.

4 CHAIRMAN GARCIA: Sustained.

5 BY MR. FERRALL:

6 Q Let me ask you a slightly different question, Mr.
7 Cooper. In making the determination as to whether a claimant
8 was entitled to the privileges of, that MPAA afforded,
9 notification last November and this sort of thing, did you
10 take into account your own judgment as to whether that claim-
11 ant as a broadcast licensee or as a syndicator?

12 A IN conjunction with Mr. Attaway and the letter
13 that Mr. Scheiner has offered in evidence today, we did
14 review the claims that were filed with the CRT and did make
15 such judgments.

16 Q So, you would not have sent your letter, for
17 example, to Post-Newsweek?

18 A We did not send a letter to Post-Newsweek.

19 Q I would like to ask you a couple of questions
20 about the Nielsen Study as it applies to this purpose,
21 picking up on a couple of question that Commissioner
22 Coulter asked. The Nielsen Study was 49 stations, is that
23 correct?

24 A That is right.

25 Q And there were about how many stations carried

1 carried as distant signals in 1979, 535 sticks in my mind,
2 is that about right?

3 A I wouldn't quarrel with that. That would include
4 educational, and Canadian stations?

5 Q I didn't intend to include that.

6 A I think the number is too high.

7 Q What do you believe the number is?

8 A I believe the number would be closer to 400.

9 Q And the Nielsen Study covered 15 weeks out of
10 the '79 weeks?

11 A Out of 52 weeks.

12 Q Out of 52 weeks?

13 A That is correct.

14 Q That is about 35 percent of the year.

15 A Yes.

16 Q So, you have roughly 10 percent of the stations
17 and roughly 35 percent of the hours, is that correct?

18 A That is approximately correct.

19 Q Now, I have one other recollection that I had
20 about the Nielsen Study and that was that a decision was made
21 for group owners to include only one station from a group,
22 is that correct?

23 A Only one station in either the independent category
24 or the network category, but it is possible and it is a fact
25 that a group owner has an independent and a network station

1 on the sample.

2 Q Do you know how many groups had more than one
3 station represented in the Nielsen Study?

4 A As far as I know there was only one.

5 Q Metromedia?

6 A That is correct.

7 _ Now, suppose I was a syndicator and I had a show
8 I wanted to sell. We agree based on our just having
9 banged around this industry for a long time together, Mr.
10 Cooper, that probably one of my very first objectives as a
11 syndicator would be to sell my show to groups?

12 A Yes.

13 Q And probably the group I would like to sell the
14 most for openers would be the three network "O and O"
15 groups or that would be high on my list, to say the least.
16 Would you agree with that?

17 A I thoroughly would not disagree.

18 Q Is that the same as agreeing?

19 A It is essentially the same. It would depend upon
20 the property I have. For example, a network O and O
21 could probably use a half hour and not an hour or an hour
22 and a half program in syndication. So if I had a half hour
23 program, my first target would be a network. If I had
24 an hour, hour and a half, my first target would be an
25 independent group outlet.

1 Q Let us hypothesize a world in which there are
 2 seven large group owners each with seven stations, just
 3 for purpose of illustration, and let's assume that I managed
 4 to sell my show to all of them, to 49 stations.

5 Now, let us further assume that one of those
 6 groups is not Metromedia, just to keep the mathematics
 7 straight. That means even though I had sold to 49 group
 8 owned stations, the best I could hope to do in the Nielsen
 9 Study is to have my show on seven stations. is that correct?

10 MR. SCHEINER: Madam Chairman, this line of
 11 examination is so wide of the mark. What we are leading up
 12 to is, God help us, an attempt to retry the questions that
 13 were endlessly litigated in phase I, the adequacy of the
 14 sample, the objectivity, and on and on, and I think it is
 15 grossly inappropriate.

16 MR. MIDLEN: Madam Chairman --

17 MR. SCHEINER: I haven't finished.

18 MR. MIDLEN: I thought you had.

19 MR. SCHEINER: You are wrong again. I think it
 20 is grossly inappropriate to pursue it.

21 MR. MIDLEN: There was vigorous objection to
 22 getting into the Nielsen Study to begin with on the basis
 23 it was not part of this witness's direct that has been
 24 exchanged and nonetheless, Mr. Scheiner was permitted to do
 25 so. It was he and the MPAA that opened up the entire area

1 of the Nielsen Study. I think the pending question that
2 Mr. Ferrall has just asked is an excellent one, and very
3 much related to the one I will undoubtedly ask on behalf
4 of the full time gospel hour.

5 CHAIRMAN GARCIA: Mr. Ferrall.

6 MR. FERRALL: Thank you, MAdam ChAirman.

7 The Tribunal may take some comfort in knowing
8 that where I am headed has nothing to do with what Mr.
9 Scheiner speculated. I want to probe briefly with the
10 witness on the adequacy of this study for the purpose of
11 making allocations. I have no challenge as to the
12 accuracy at all.

13 CHAIRMAN GARCIA: The objection is overruled.

14 BY MR. FERRALL:

15 Q Let us go back. I don't want to burden the
16 reporter with trying to unearth all of this, Allen. On my
17 hypothetical, if I sold the seven groups or seven stations my
18 expectation is that in your study of 49 stations, I would
19 be there, at most with seven stations representing my
20 program, is that correct?

21 A No.

22 Q Why not?

23 A Because you are making an assumption that if I
24 sell to one group I can't sell to another group and that is
25 erroneous. If I were a syndicator, I would not restrict

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1 my sales to only the seven stations that are owned by one
2 group of stations. I would restrict it to, and I would
3 restrict it by license, to one station in a market, but
4 I could have, even under your hypothetical, sold it to 49
5 stations, to every station in your hypothetical group. If
6 you just limit yourself --

7 Q I am just doing this for illustration.

8 A I understand, you are trying --

9 Q You are trying to help me. I appreciate that.

10 Assume with me for a moment that I sold my program to seven
11 groups, seven only, 49 stations. That was my sale. That
12 is it. That is all I did. Then I would only be represented
13 in your Nielsen Study on seven stations, is that correct?

14 A No. It is not correct. You would be represented
15 on 49 stations.

16 Q How could that be if you only took one station in
17 the study from each group?

18 A Excuse me. You are absolutely right. I stand
19 corrected. You are right. I would only be on seven.

20 Q If in addition, if instead of those facts, I
21 had sold my program to 49 stations, that were not in the
22 Nielsen Survey, I would not be in the Nielsen Survey at
23 all, is that correct?

24 A That is correct.

25 Q And I would get a zero allocation on the listing

1 application of your formula?

2 A That is correct.

3 Q Now, if I had sold my program to all 49 stations
4 in the Nielsen Study, and my program ran during 37 hours of
5 the year -- 37 weeks of the year, not surveyed by Nielsen
6 I would be zero, wouldn't I?

7 A In your hypothetical, the answer is yes.

8 Q Was any effort made to take those kinds of factors
9 into account in applying the formula which you used,
10 Mr. Cooper?

11 A The hypothetical illustration that you use is so
12 far from reality that there wasn't a factor to be taken
13 into account. Most of the hours that we are dealing with
14 are syndicated series which are on generally throughout the
15 year, 52 weeks. And, with respect to movies, movies are
16 generally sold in substantial groups and it is not unreason-
17 able for any movie syndicator, any supplier of movies to
18 expect that a sample of his movies that would also appear
19 during the sample weeks.

20 Q I didn't mean to attack the reasonableness of what
21 you did. I just want to get it clear what you did. Let me
22 ask it this way. Did you have a formula mechanically
23 without variance to whether or not a program appeared on
24 the 49 stations as selected in the Nielsen Survey during
25 the 15 weeks covered by that survey?

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1 A The answer to that, Mr. Ferrall, is yes. We have
2 abstemiously avoided making any exemptions to any claim-
3 ant for the account who were on those stations during those
4 weeks.

5 Q If I made a block-buster special, the "Bruce Springstein
6 Special," promoted on the cover of Time Magazine, that
7 had an audience of 40 million people and it didn't run
8 during those 15 weeks, I would get zero compensation under
9 your formula?

10 A You would. If you had produced a "Bruce
11 Springstein Special" of such powerful potential, I can
12 assure you it would have been carried during the sweep
13 week, not during the nonsweep week.

14 Q That is very heartening. Didn't the Nielsen Study
15 reveal its identification for movies?

16 A It did not. I don't know they had no title
17 data for movies.

18 Q How did you know how to make the allocation to
19 movie title?

20 MR. SCHEINER: This was the subject of endless
21 testimony in phase I. I am not concerned with the answer
22 but I am concerned with a dreadful waste of time.

23 CHAIRMAN GARCIA: Mr. Ferrall.

24 MR. FERRALL: I would like to know how he allocated
25 the money in phase II to movie producers if the

1 Nielsen Study does not show who the movie producer was. 86

2 CHAIRMAN GARCIA: Mr. Ferrall, I could be mistaken.
3 I think he has addressed that question when he stated they
4 looked at TV Guide and ascertained the title from that.

5 BY MR. FERRALL:

6 Q Is that how you did it?

7 A Exactly. Commissioner Garcia is correct.

8 Q I want to ask you just one last question, Allen.
9 Maybe you have already answered it.

10 Your model that you used, your formula as you
11 call it, gives no account to the relative value or utility
12 of programming to cable operators, benefit to cable operators,
13 is that correct?

14 A That is not at all correct.

15 Q Why is not it?

16 A Because the benefit to cable operators is related
17 directly to viewing. It is a fact which I testified to at
18 length and which incidentally was just confirmed by some
19 material in the current issues of Kagan Advertising Report.

20 If I may refer to it, this is referenced in the
21 current issue that deals with the subject of research by
22 cable systems and makes reference to the fact that cable
23 systems are going to engage in far more research among
24 their subscribers in the future than they have in the past
25 and among items quoted that they are going to look for in

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1 the search was a reference of a Harris Kagan, which is one
2 of the large multiple system operators and Burt Harris
3 is quoted to have said that, Channels, and I am quoting,
4 from the Paul Kagan TV program issue of January 12, 1982,
5 he said, "Channels that are found to have low viewership
6 will be switched out for others with greater subscriber
7 interest, even if the per subscriber costs is higher,
8 according to Harris."

9 I think the aspect of viewership as indicated
10 by this quotation from Mr. Harris is clearly the benefit
11 to cable system operators that you are referring to. I think
12 that is why I do not agree with your statement.

13 Q Let me ask you another question. In your formula,
14 does your formula necessarily assume that insofar as benefit
15 to cable operators is concerned, the sole measure of that
16 benefit is viewership?

17 A My formula assumes tht the viewership figures
18 reflect the benefit to cable systems and they also reflect
19 what the cable system operator would have had to pay to
20 be able to carry that program who did not have a compulsory
21 license.

22 Q Let me see if I can shortcut this with a simple
23 hypothesis. A world cable system, Mr. Cooper, where 10,000
24 people, subscribers watch "Little Rascals" and 1,000 watch
25 baseball games on a distant signal basis. Would you concede

1 the possibility that the baseball game might be of greater
2 value to the cable operator than "Little Rascals?"

3 A Are you referring to a possibility? I would
4 concede that it is a possibility.

5 Q Would your formula reflect that possibility?

6 A No. My formula and your hypothetical would --

7 Q Would assume "Little Rascals" --

8 A was 10 times more valuable to the cable operators
9 than baseball.

10 CHAIRMAN GARICA: Commissioner Coulter.

11 COMMISSIONER COULTER: Mr. Cooper, is it possible
12 that stations that are syndicating their production would
13 be represented by a different syndicator?

14 THE WITNESS: Oh, yes. That is very often the
15 case. For example, again, I will give you one major case.
16 It happens to be a nonclaimant, Lexington Broadcasting
17 Service, which has been distributing a program, I believe
18 it is called, "Health Field. And I think initially it was
19 produced at the facility, at least of NBC owned stations,
20 and the syndicator there is Lexington Broadcasting Service.

21 COMMISSIONER COULTER: Thank you.

22 CHAIRMAN GARCIA: We will take a short recess.

23 (Whereupon, a short recess was taken at

24 3 o'clock p.m.)
25

1 CHAIRMAN GARCIA: Mr. Wood?

2 MR. WOOD: Thank you.

3 I suppose I should first introduce myself.

4 I am quite obviously not one of the regulars down here.

5 I am here to represent Mutual of Omaha in their claim for
6 the Copyright Royalty Tribunal distribution in Phase II.

7 We would like to have the record reflect that we do
8 appreciate the efforts of the MPAA in trying to work out
9 a formula to program syndicators like Mutual of Omaha.

10 But, unfortunately, when the figures came to us, we felt
11 that for reasons we will explain, that we just simply
12 could not believe that the Nielsen data upon which the
13 MPAA was relying was given Mutual of Omaha a fair share.

14 BY MR. WOOD:

15 Q If I understand you correctly, Mr. Cooper,
16 you applied the same formula to all claimants to which
17 you offered a share from the allocated funds.

18 A Precisely the same formula, Mr. Wood.

19 Q Did the syndicators of the Lawrence Welk
20 Show sign on with you for distribution from your fund?

21 A They did not. They are non-claimants.

22 Q Did the syndicators of HeeHaw sign on with
23 you?

24 A Yes, Young Street, they are associated with
25 us.

1 Q We would appreciate being told the amount of
2 money that HeeHaw was allocated under your formula. I
3 understand historically before the Tribunal that information
4 has not been disclosed. We would make application to the
5 Tribunal it is essential for Mutual of Omaha to know
6 particularly relative to HeeHaw what kind of distribution
7 they were given. HeeHaw, as we will show is one of the
8 top three syndicated shows in '79, as was Mutual of Omaha's
9 Wild Kingdom. It is difficult, if not impossible, for
10 us to tell whether Mutual of Omaha has been equitably
11 treated with other shows such as Hee Haw.

12 MR. SCHEINER: The request is denied. The
13 request insofar as it is addressed to me for disclosure
14 of the amount is denied, subject to any ruling of the
15 Tribunal. I would simply remind that we are absolutely
16 precluded by binding contractual agreement not to make a
17 disclosure of the amount sought.

18 CHAIRMAN GARCIA: Mr. Wood, was your request
19 to Mr. Scheiner?

20 MR. WOOD: No, I'll address the question to
21 the witness and allow Mr. Scheiner to object to it.

22 BY MR. WOOD:

23 Q How much money was allocated in your formula
24 to the producers or copyright claimants of Hee Haw?

25 MR. SCHEINER: I object to the question.

1 CHAIRMAN GARCIA: Mr. Wood, we will sustain
2 that objection. Earlier Mr. Scheiner indicated that those
3 agreements are confidential and this Tribunal has upheld
4 such contractual agreements within the parties once they
5 have voluntary agreement. They do not have to disclose
6 thos figures to the Tribunal.

7 BY MR. WOOD:

8 Q Did the syndicators of Carol Burnett and
9 Friends sign on with MPAA for distribution?

10 A Yes. They are listed in the exhibit that
11 was distributed this morning.

12 Q Do you know how many stations on which
13 Carol Burnett and Friends is syndicated?

14 A Do I know how many?

15 Q Yes.

16 A I can give you the information as of 1979
17 from both Nielsen and ARBITRON.

18 Q I'm speaking only in 1979.

19 A If you wish, I can refer to source data and
20 give you that answer.

21 Q Please.

22 Let me ask you this then. Was it fewer
23 than 218 stations?

24 A Certainly.

25 Q Was it significantly fewer than 219 stations

1 to the best of your recollection?

2 A I would believe that it would be between 150
3 and 200 stations.

4 Q You were kind enough at lunch to give me
5 a copy of the list of stations in the Nielsen sample.

6 MR. WOOD: I would like to mark that for
7 identification as Mutual of Omaha's Exhibit 1 for the
8 moment.

9 (Mutual of Omaha's Exhibit No. 1 was marked
10 for identification.)

11 MR. SCHEINER: Before you distribute that,
12 may I have a copy? Mr. Cooper points out to me that this
13 was furnished to counsel at his request for a list of
14 stations, but unfortunately the copy that we have, that we
15 gave to him did contain some additional information
16 Mr. Cooper advises me is not appropriate to be divulged.
17 So, I would like, counsel, to withdraw this and you can
18 furnish a clean list, but not with the notations that are
19 on it.

20 MR. WOOD: Fine.

21 MR. SCHEINER: Was that your point, Allen?

22 THE WITNESS: Yes, please.

23 MR. WOOD: Let me give the witness at least
24 refer to what he gave me so that he can answer the questions
25 I might have. I will also file a clean list.

1 I would also mark as Exhibit 2 Mutual of
2 Omaha's Exhibit 2 a photocopy of the computer list that
3 was provided to Mutual of Omaha by the MPAA when they offered
4 the distribution list, Mutual of Omaha.

5 (Mutual of Omaha's Exhibit No. 2 was marked
6 for identification.)

7 BY MR. WOOD:

8 Q Referring to the computer print-out that
9 you provided to us, let me understand exactly that this
10 computer print-out is saying. Taking the top stations,
11 KCRA out of Sacramento, and working the way across, would
12 you explain to me starting at the column W, QHRS, on top,
13 exactly what this is telling me relative to Mutual of
14 Omaha's Wild Kingdom?

15 A Yes, the print-out indicates that KCRA
16 carried Wild Kingdom for a total of 30 hours during the week
17 or one half of hour per week.

18 The number, percent of total hours related
19 to an overall, again, a number that was adduced in Exhibit
20 K in Phase I, showing the total number of quarter hours of
21 syndicated series and movie programs. The base number of
22 those percentages of quarter hours was 195,668.

23 The next listing is the number of household
24 viewing hours in tenths. What I mean is that a zero should
25 be added to that number to come out to the exact number of

1 viewing hours per the Nielsen study.

2 In Sacramento, Wild Kingdom was viewed to
3 the extent of 69,220 hours as a distant signal retransmit-
4 ted from KCRA.

5 The .014 in the percent of total household
6 hours refers back to the figure mentioned earlier this
7 morning of the total number of household hours of syndicated
8 series of movies of 512,272,000.

9 The last column, dollars of 13.5 million,
10 represents an effort at allowing the claimants to have some
11 idea prior to the CRT's award of the value of the 69,220
12 hours on Sacramento. In this case, it would be \$1,823.78
13 and 15 and a half million is available to be distributed
14 among program suppliers.

15 Q When you totalled up the final figure in
16 the right-hand column for 13 out of 49 stations out of your
17 sample, you arrived at that figure that appears in the
18 lower right-hand corner of \$14,326.48; is that right?

19 A That's correct.

20 Q Did the syndicators of HeeHaw get more than
21 that?

22 MR. SCHEINER: I object.

23 CHAIRMAN GARCIA: Would you rephrase your
24 question?

25 BY MR. WOOD:

1 Q How does that--

2 MR. WOOD: There is going to be no way I
3 can phrase this question without having the objection posed.
4 The point we are trying to make here is that under the two
5 examples, the two shows I have mentioned, HeeHaw which is
6 syndicated approximately to the same extent Mutual of
7 Omaha has been, and the Carol Burnett and Friends which
8 has been syndicated substantially less, if we were given
9 the figures to make some comparison to see whether or not
10 the extent of syndication of the show was reflected in those
11 figures then we would be able to make a better evaluation
12 of the propriety of the figures. Knowing that I will not
13 get those numbers voluntarily, let me ask a more general
14 question to the witness.

15 BY MR. WOOD:

16 Q To what extent does your formula
17 reflect a highly syndicated show and does it recognize in
18 any way the higher viewership of a highly syndicated show
19 than it would a lesser syndicated show?

20 MR. SCHEINER: What is a highly syndicated
21 show?

22 MR. WOOD: I will rephrase it.

23 BY MR. WOOD:

24 Q Let's assume hypothetically that Mutual of
25 Omaha has Wild Kingdom in '78 was syndicated to 215 stations

1 and that the Carol Burnett and Friends was syndicated to 75
2 stations. Does your formula reflect the difference in that
3 degree of syndication?

4 A When you speak about syndication, Mr. Wood,
5 what you are talking about is absolutely tip of the iceberg.
6 That is the number of stations that may carry a program.

7 For example, in the example, you cite
8 Carol Burnet and Wild Kingdom. Carol Burnett is most
9 often shown on a script basis in prime time, but the
10 stations that have licenses as carriage. Wild Kingdom
11 is carried in marginal time period and often on a preemptable
12 basis. The difference between the frequency of the showing,
13 the popularity of the program in terms of its audience
14 ratings, the number of times it is shown in the course of a
15 week are all major items which are far more important than,
16 and significant in terms of criteria that are judged valuable
17 by anyone including the CRT than merely the number of
18 stations that carry the program.

19 Q If I understand you correctly, you are saying
20 that because the example of Carol Burnett was a script
21 series and aired on a more frequent basis than Mutual of
22 Omaha during your sweep period that you would naturally
23 have a higher viewership in terms of hours and they would get
24 programs a higher allocation?

25 A It would not only be a script series, but

1 it would also be carried in a time period that is more
2 likely to attract a larger audience.

3 Q This computer print-out that you provided
4 to us, that reflects, if I understand it, the calendar
5 year 1979.

6 A The data are for the 15 sweep weeks that were
7 referred to earlier, Mr. Wood.

8 Q I understand, all during the calendar year '79.

9 A They were also during the calendar year
10 1979, yes.

11 Q Is it not true a lot of syndication contracts
12 are from September to September in a given year?

13 A I'm not aware of that.

14 Q Let us assume hypothetically.

15 A I don't believe that is a true statement,
16 Mr. Wood.

17 Q Let us assume hypothetically. Let me
18 finish the question. Let's assume hypothetically Wild
19 Kingdom is syndicated on a September to September basis to
20 stations to which it is syndicated. Does your formula
21 take into account any kinds of shifts from a station that
22 may be in your sample in a given market to another station
23 in the same market because there may be a shift mid-season,
24 mid-calendar year under your hypothetical?

25 A Yes. The sample consists of several instances

1 multiple stations in the same market and if the programs
2 were shifted from one station in Baltimore to another station
3 in Baltimore, I think there were three, at least three
4 in Baltimore, stations and the sample was, likewise, the
5 Los Angeles, likewise, Sacramento, other markets like
6 that, it would have reflected that.

7 MR. WOOD: Let me have marked for identifi-
8 cation two more exhibits, three and four, which are
9 Wild Kingdom clearance reports of stations to which
10 this program was syndicated in 1979.

11 (Mutual of Omaha's Exhibit Nos. 3 and 4 were
12 marked for identification.)

13 MR. WOOD: They are a little confusing. On
14 the top, you will note one is 78-79, one is 79-80. That
15 is again because Mutual of Omaha contracts are from
16 September to September. In order to have it syndicated
17 for 78-79, it is necessary to have two lists.

18 BY MR. WOOD:

19 Q If you would refer on the computer print-
20 out that you provided to us to the 12th station, which I
21 believe is WTRV in West Virginia--

22 A Yes.

23 Q --if I understand your formula, Mutual of
24 Omaha's Wild King was allocated \$185.61 for the carriage
25 of Wild Kingdom on WTRV during the calendar year '79.

1 A That is correct. It was allocated, really
2 sir, that point, whatever value would ultimately come from
3 54,000 rather from 7,040 hours.

4 Q I understand. Let me understand this. It
5 aired how many hours, according to this formula on WTRV
6 in Wheeling, West Virginia?

7 A The formula has nothing to do with it. The
8 Nielsen report that Wild King was carried during five sweep
9 weeks to the extent of 15 quarter hours.

10 Q Or seven and a half hours for all intents
11 and purposes.

12 A 15 quarter hours is three and a quarter
13 hours -- three and three-quarter hours.

14 Q Three and three-quarter hours. I don't want
15 you to take -- you can take the time to look through
16 Exhibit 3 and 4 and you will find that Wild Kingdom never
17 aired on WTRV in Wheeling, West Virginia in '78. Why
18 would Nielsen data indicate that it did?

19 MR. SCHEINER: Madam Chairman, I have a
20 basic objection to this line of examination. I raise
21 the objection in the interest of time. Also, because I
22 think the line of examination is quite inappropriate. First,
23 the question raised by counsel are clearly beyond the scope
24 of direct examination of Mr. Cooper. For that reason,
25 would be impermissible. Second, I would point out that

1 what counsel is attempting to do is not cross examine,
2 but rather to put in its direct case with a view towards
3 establishing on whatever criteria he proposes to argue
4 the value, or the appropriate merit or worth of Wild Kingdom.

5 I would have no objection to that, but
6 please recognize that is part of his direct case and what we
7 are doing now is confusing the record terribly by putting
8 questions to Mr. Cooper that are well beyond anything
9 that he has testified to, and, in counsel's attempt to
10 establish his own direct case. Save this, put it on
11 through your own witness, rather than attempting to
12 quarrel with Mr. Cooper on this score.

13 MR. WOOD: On both points, the first point,
14 the first point, I do not believe I'm outside the scope of
15 direct examination here. The issue of the propriety of
16 the formula proposed by MPAA relative to allocation of the
17 actual monies is what is at issue here. Mutual of Omaha
18 has on the record objected to the amount of money that is
19 allocated pursuant to that formula from the MPAA. This
20 witness is as appropriate a witness as there is to explain
21 some discrepancies in the computer print-out that we
22 received and information our client has as to how that
23 particular program was syndicated.

24 I have not sought to admit any of the
25 documents I presented into evidence. On each occasion, I

1 only marked them for identification for purposes of ~~cross~~
2 examination of this witness. These documents will indeed
3 be presented in the direct case on Friday. At this point,
4 in order to properly examine Mr. Cooper and to address the
5 issues that this computer print-out represents to
6 Mutual of Omaha, it is necessary these documents be
7 referred to and the question is going in that direction.

8 MR. SCHEINER: Two points in reply. The
9 settlement agreement is a voluntary agreement. All
10 claimants may accept it or reject it. If they accept it,
11 fine, if they reject it, they are then put to proof as to
12 the value of their respective programs.

13 Second, to interrogate Mr. Cooper on the
14 basis of exhibits marked for identification, where no one
15 has come into testify to their accuracy, no one has
16 sponsored those exhibits, these exhibits may be absolutely
17 accurate in every detail or they may be completely inaccur-
18 rate. I think it inappropriate and wasteful to examine
19 Mr. Cooper on such material and particularly when we are
20 advised that indeed they will be part of Mutual's direct
21 case.

22 CHAIRMAN GARCIA: I think Mr. Wood, do you
23 have many questions along this line?

24 MR. WOOD: No. In fact, that is the only
25 question I have.

1 CHAIRMAN GARCIA: In that case, I will
2 overrule and I will note the objection, Mr. Scheiner.

3 BY MR. WOOD:

4 Q The question, Mr. Cooper, is essentially
5 why, if Mutual of Omaha's information indicates it was
6 never aired on WTRV from Wheeling, West Virginia, the Nielsen
7 data wouldn't indicate that it was aired 15 and a quarter
8 hours.

9 A I would speculate, Mr. Wood, that your data
10 are incorrect.

11 Q You testified earlier than, and it was
12 lengthy testimony. I'm not quite sure if I do understand
13 what the final resolution was, but I believe that you
14 are saying, correct me if I'm wrong, that the three
15 claimants that are represented here, SIN, Multimedia,
16 Mutual of Omaha are somehow entitled, if anything, to
17 approximately 1.5 percent of the remaining allocation that the
18 Copyright Royalty Tribunal has allocated to the syndicators,
19 program originators.

20 A I'm saying you are now participating. I
21 think it is up to you to make your case to the Tribunal.

22 Q You have agreements. I don't mean to keep
23 pressing this point that was pressed earlier, but I have
24 agreements with 98.5 percent of the claimants that are
25 properly, have properly made claims for that money; is that

1 correct?

2 A I think that statement is correct.

3 Q Mutual of Omaha's Wild Kingdom under the
4 formula you propose, if I understand it correctly, would
5 receive of that, according to your formula, 55 claimants?

6 MR. SCHEINER: The numbers are on the
7 exhibits.

8 BY MR. WOOD:

9 Q 55 claimants have agreed?

10 Assuming Mutual of Omaha's Wild Kingdom
11 were the 56th claimant, we would fit under your formula
12 one percent of the monies that are available and SIN and
13 Multimedia then would share, if I understand it correctly
14 then, in 1.49 percent, 1.4 percent, excuse me, 1.4
15 percent of the remaining; is that correct?

16 A Essentially correct.

17 Q Assume hypothetically for a moment that
18 Wild Kingdom is one of the top three syndicated series in
19 1979. I notice you have a problem with syndicates series.

20 A No, my problem, sir, is with the t-o-p.

21 Q Let us assume simply the number of
22 stations which air a given program, not the amount of
23 viewing hours it has, but the number of stations that air
24 a given program that Mutual of Omaha is in the top three
25 and that it covers, according to Nielsen data, as much as

1 92 percent of U.S. households.

2 When they would a show, one of the 56 claim-
3 ants, receive less than one-tenth of a percent under your
4 formula?

5 CHAIRMAN GARCIA: May I ask a clarifying
6 question of counsel please? When you say it covers 90
7 some percent of U.S. households, does that mean it
8 delivers 95 percent of those households?

9 MR. WOOD: On a delivered basis -- not
10 on a delivered basis, excuse me.

11 CHAIRMAN GARCIA: So, the household is picking
12 up that program at some point, but you are not saying the
13 households are watching that program.

14 MR. WOOD: I am not saying that necessarily.

15 CHAIRMAN GARCIA: Thank you.
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1 THE WITNESS: The answer, Mr. Wood, is that
2 the viewing level of the Wild Kingdom Program as a
3 distant signal in cable household is low and one of the
4 very reasons that it is so low is the reason that you have
5 already stated, and that is that Mutual of Omaha's line
6 up is a very extensive one and the larger the number of
7 stations that broadcast a program throughout the U.S., the
8 less incentive there is for a cable household to reach out for
9 that program as a distant signal.

10 We are dealing here with the distribution of
11 cable copyright for the carriage and viewing, for the
12 carriage of programs as distant signals and the viewing
13 that the program gets in markets where it is broadcast
14 locally, when it is viewed on a local station is not
15 compensable from this copyright royalty pool. So, the
16 larger the number of stations is that you present to us, the
17 less likely it is that that program will be viewed on distant
18 basis.

19 BY MR. WOOD:

20 Q So, if I understand that point correctly, under
21 your formula, the more highly syndicated a show, like,
22 hypothetically, Wild Kingdom at 200 some odd stations,
23 because of the wide distribution in local markets, I'm not
24 trying to make your case, but I want to understand your
25 point, that because of that and the local carriage that you

1 would have in all those given markets, you discount any
2 distant signal carriage in those markets completely?

3 A We don't discount them. There is not a
4 complete discounting at all. There is accounting of it by
5 the Nielsen Company to the extent, on those stations during
6 those weeks, of 544,000 hours of viewing. That is not
7 an insubstantial amount. So, to say we are discounting it
8 completely, Mr. Wood, would be a terrible overstatement.

9 Q But are you not discounting many -- let me retrack
10 that. Let me get back to the point and explain this to me.
11 If you have a highly syndicated program in your opinion, is
12 it not correct under this distribution formula that you
13 would have that there comes a time when a show becomes so
14 highly syndicated in terms of number of stations -- putting
15 viewing hours -- in terms of number of stations that it
16 begins to substantially fall off on your formula so that
17 it is not allocated distant signal carriage to an extent
18 that a show that might be syndicated to fewer stations in
19 Mutual of Omaha has Wild Kingdom?

20 A We are not allocating viewing hours.
21 Viewing hours are those reported to us by Nielsen based
22 upon an examination of a number in excess of 100,000
23 diaries in cable households. The viewing levels that are
24 attributed to it here are the viewing levels for that program
25 as a distant signal in cable households.

1 One of the evidences, the strong evidence ~~107~~
2 the fact that Wild Kingdom is syndicated by a very large
3 number of stations is the fact that it appears in the
4 Nielsen print-out as being carried by this number of
5 stations out of the 49 station sample.

6 This is a large number of stations out of 49;
7 so, we are not arguing at all the question as to whether
8 ot nor many stations broadcast Wild Kingdom. But, the
9 fact that so many do broadcast it is what vitiates against
10 its being viewed as a distant signal in cable households.

11 Q You were testifying earlier as to the number
12 of commercial stations that might carry a syndicated program
13 and the number suggested to you was 535. You seemed more
14 comfortable with 400.

15 A That is not so, please. The question was how
16 many U.S. commercial stations were retransmitted as distant
17 signals by cable households. That is when that number was
18 reduced.

19 Q Let's change the number. How many commercial
20 stations are there?

21 The absolute number of commercial stations,
22 total number of commercial stations?

23 A Of U.S. licensed commercial stations approxi-
24 mately 750.

25 Q If Mutual of Omaha's Wild Kingdom is syndicated

1 hypothetically to 220 of those 750 stations in the
2 marketplace, it would be roughly 31 or 32 percent, I guess,
3 of the total number of stations, would it not, around there?

4 A Approximately so.

5 Q Your formula has 49 stations total on which
6 according to the allocation you provided to us there were 13
7 stations on which it was broadcast, according to our information
8 12. Taking the 13, I believe that works out to approximately
9 25 to 26 percent of the total, 13 to 49. So, there is
10 a difference there of six to seven percent in terms of the
11 number of stations that might in that sample basis be
12 indicated as having run Mutual of Omaha's Wild Kingdom.

13 A Is there a run for that higher percentage
14 discrepancy?

15 Q Yes. Our sample was never represented as
16 being a random sample of all U.S. TV stations.

17 Q But, is it not true that the sample in terms of
18 the program like Wild Kingdom discounts the fact that it
19 has got such a wide distribution to stations that it would
20 have the formula been on a more random basis rather
21 than the basis you had indicated considerably more viewership
22 in terms of your hours that you have indicated?

23 A No, sir, I doubt that.

24 MR. WOOD: Nothing else.

25 CHAIRMAN GARCIA: Thank you.

1 MR. MIDLEN: Do you want to keep the dissident
2 claimants together versus the religious claimants?

3 CHAIRMAN GARCIA: You are not ready to go?

4 MR. MIDLEN: I am ready.

5 MR. LUTZKER: For the record, my name is
6 Arnold Lutzker with the law firm of Dow, Lohnes and
7 Albertson. We are representing Multimedia Program Productions,
8 Inc., one of the claimants in this proceeding.

9 CROSS EXAMINATION

10 BY MR. LUTZKER:

11 Q Mr. Cooper, the figure of 98.5 percent is one that
12 sticks out in my mind when I look at you. I know we have
13 gone over this point a number of times. I do feel compelled
14 to just try to pin down a couple of questions about it.

15 There has been mention in this proceeding, a
16 reference to an unclaimed pool. With respect to the 1978
17 distribution proceeding what percentage of program
18 syndicators which were represented by the MPAA formula
19 represented the -- in the '78 proceeding there was a 75
20 percent allocation. What percentage of those, of the
21 program syndicated which were represented by MPAA has
22 programs which were covered during that '78 proceeding?

23 A I don't understand that question.

24 Q I will withdraw the question. I will try to
25 make it more specific.

1 You have stated your umbrella group represents
2 or covers 98.5 percent of the hours in the survey that
3 refers to syndicated programming, programs.

4 A I think, Mr. Lutzker, we have gone through this
5 as we have gone through this proceeding that we
6 have clarified 98.5. It refers to the claim, to the
7 identified programs of claimants.

8 Q What percentage of the six million some odd
9 syndicated program hours are unclaimed?

10 MR. SCHEINER: I object. I don't know that that
11 question is before us in Phase II of this proceeding.

12 MR. LUTZKER: You recall the conversation held
13 at the prehearing conference. The issue of the unclaimed
14 pool within the program syndicators share was recognized
15 to be a matter that was brought up at that time. I had
16 understood the remarks that I made at that point and the
17 remarks that you had agreed to as constituting a recognition
18 that, to the extent there is an unclaimed pool, that is,
19 let us take the programming, Show Biz, which you objected
20 to Multimedia's ownership claim. I am aware that MPAA does
21 not represent Show Biz. Your position is that it was not
22 a valid claimant. The Tribunal has ruled on that motion.
23 As far as I understand it, there is now no one that can claim
24 the Show Biz program.

25 MR. SCHEINER: Exactly right.

1 MR. LUTZKER: My question directed to
2 Mr. Cooper, who else is in this category. I want to
3 identify for the purposes of the record who is it that is
4 and what percentage of the MPAA share as you have articulated
5 out of a hundred percent, to the extent the 70 percent
6 allocated to the program sector is now 100 percent. How
7 much of that 100 percent is not represented by MPAA,
8 according to your formula.

9 MR. SCHEINER: My objection at the prehearing
10 conference was made in light of my understanding that one
11 or more of the devotional claimaints have raised the question
12 of unclaimed funds. I took the position that it was
13 inappropriate that the unclaimed funds were properly allocated
14 to the claimaints before you within each separate category.
15 But, that in any event, the question was not raised timely
16 with you. Indeed, the devotional claimaints have argued
17 that your '78 proceeding was res judicata itself. In
18 response to that argument I was advised that I had misread
19 the devotional pleading, that they had not intended to
20 raise the question of unclaimed funds.

21 Second, Mr. Lutzker and I agreed that whatever
22 percentage was allocated by the Tribunal would apply and
23 include the unclaimed funds. And, in light of that, I
24 submit to you that an exploration of the amount of the
25 unclaimed fund is inappropriate at this time. If you want

1 to get into it, you've got to open up that question as it
2 relates to every other group claimant and every other award
3 that you have made to such other groups.

4 MR. LUTZKER: I would disagree on two points.
5 I don't see that the position on the unclaimed pool within
6 each program category is necessarily dispositive of how you
7 handle the program syndicator. As I understand the procedure
8 of the Tribunal, you will make an allocation within the
9 Tribunal distribution claim and to the extent there is
10 an unclaimed pool, that pool will be divided in an equal
11 proportion to that amount which has been distributed to the
12 valid claimants.

13 Now, for the MPAA to claim 98.5 percent of
14 the 100 percent program syndicator's share to me means that
15 there is an unclaimed pool which, along with Multimedia,
16 SIN and Mutual, resides in 1.5 percent. I just want to
17 determine for the record if that assumption is correct.
18 If it is not correct, I would like to know for the record
19 what is that percentage that constitutes an unclaimed
20 amount.

21 Secondly, I would add that in Multimedia's
22 pleading which was timely filed, we did make reference to
23 an unclaimed pool in our conclusions with respect to the
24 share that we felt is appropriate for distribution in this
25 proceeding, and I am not prepared to speak for other parties

1 in this proceeding, but I think as far as Multimedia is
2 concerned we have made a valid--we have raised the issue
3 as a Phase II issue in a valid way. And, I think it is
4 necessary in order to probe what is MPAA's adequate share
5 of the 100 percent now under consideration. If we determine
6 that amount, and I think Mr. Cooper is the only one who can
7 address the issue.

8 CHAIRMAN GARCIA: The objection is overruled.

9 THE WITNESS: Would you restate the question
10 please, Mr. Lutzker?

11 BY MR. LUTZKER:

12 Q Let me create the universe again. As far as
13 the program syndicators share is concerned, we are now
14 dealing with 100 percent. You have stated that MPAA's
15 umbrella constitutes 98.5 percent. Is that 98.5 percent of
16 the 100 allocated to the program syndicators?

17 A That's correct, 98.5 percent of the 70 percent.

18 Q You have also indicated that in November,
19 approximately, you distributed to program syndicators,
20 including Multimedia a letter indicating what its apportioned
21 share of the syndicators allotment would be. And, do you
22 recall that we had had several phone conversations respecting
23 my evaluation of Multimedia's share? Do you recall that?

24 A The thing I remember most about our conversation,
25 Mr. Lutzker is your emphasis on "quality" as being the

1 differentiation that we were not taking full account of.

2 Q I appreciate that. I will pose for the record
3 those remarks later. But, you do--

4 COMMISSIONER BRENNAN: Glad to get some
5 support within the program syndicator category for those.

6 BY MR. LUTZKER:

7 Q You recollect our telephone conversation?

8 A Obviously.

9 Q Do you recall at any time my asking you a
10 question directly related to the question of the unclaimed
11 pool?

12 A I do not, sir.

13 Q Let me refresh your recollection, if I can,
14 based upon the conversation. If you can't recall it, you
15 can't recall it.

16 You indicated in the telephone conversation
17 that in response to my question as to what amount the MPAA
18 allocation had based upon the accumulation of all the
19 percentage shares of which Multimedia was one small amount,
20 you indicated a filing figure roughly between 90 and 92
21 percent. Do you have any recollection of that figure?

22 A It may have been a figure that we were
23 talking about in November, yes. Since that time, as I
24 have already testified, we have made taken programs out of
25 the unclaimed category and awarded them and awarded them

1 and assigned them to claimants, following the correspon-
2 dence that we had with them. I have referred in the testimony
3 to, for example, to the substantial number of program
4 hours related to the program cartoon series "Spiderman",
5 which initially had been in the unclaimed category because
6 neither the syndicator nor the producer is referenced in
7 BIB as referenced in BIB as claimants. On the basis
8 of identification, discussions we had with Marvin
9 Collins, the subsidiary of Kagens Industry, then Spiderman
10 was put into the claim category and out of the unclaimed
11 category. That was a substantial number of hours right
12 there.

13 Q You are saying at some time in November of
14 1981, you had -- it is certainly conceivable that about 90
15 to 92 percent of the programming was allocated to identified
16 claimants, about eight percent to ten percent was not.
17 But, during the period of November to December, this
18 additional 15 percent was resolved.

19 A What we may have talked about in November,
20 and again, I do not recall the specifics of it, related to
21 the number of claimants with whom, who had submitted
22 signing agreements to us.

23 I may at one time have talked to you that we
24 had signed an agreement from claimants representing 90
25 percent of the pool. As the month wore out, it became

lw-12

1 closer to the date we had to file with the Tribunal the
2 number of claimants who joined who agreed to MPAA
3 representation increased daily.

4 Q Well, there may be a question of recollection
5 and I understand that. Let me ask you this. Between
6 November and December, 10 percent of the hours covered
7 by the MPAA formula constitutes approximately how many
8 hours?

9 A As I have testified--

10 Q About 10 million?

11 A Pardon me.

12 Q Six million?

13 A No, it is larger. It would have constituted
14 51 million.

15 Q So in the month of November to December,
16 you resolved approximately 51 million; so it would have
17 been approximately 45 to 49 million of those hours that
18 were under an uncertain allocation, and they had been
19 resolved during that period. Is that what you are saying?

20 A That is not what I am saying. No, I think we
21 have gone over this ground. The 98.5 figure I used earlier
22 today and I have used many times, and it will become part
23 of the history of this proceeding, relates to the percentage
24 of identified claims, of identifiable hours of claimants
25 represented by the MPAA. In other words, I am not

1 including in that two categories, unidentifiable programs
2 and programs that are in what we would consider to be
3 an unclaimed category.

4 Q What is your approximate estimate of
5 unclaimed category of the 100 percent?

6 A Of the 100 percent, the 715 million hours, it
7 would be my feeling that no more than five percent was
8 still in an unclaimed category.

9 Q And what percentage would be unidentifiable,
10 movies or others, the ownership of which can't be
11 determined?

12 A Of the five percent, one percentage point
13 of the five percent -- one percentage point of the five
14 percent. Those are very rough numbers, Mr. Lutsker.

15 Q I appreciate that. I just want to see if
16 I understand again in terms of this; so what you are saying
17 is that of the--taking the Nielsen study of these
18 multimillion hours, five percent of those hours are
19 unaccounted for within your umbrella group?

20 A No, somewhat more than that, about six
21 and a half percent is unaccounted for.

22 Q So, in other words, I don't want to put
23 words in your mouth, but as I understand what you are
24 saying, 93.5 percent of the hours claimed are represented
25 by companies that have signed the agreement?

1 A No, sir. I would what, what I'm saying to
2 the best of my ability to provide that estimate is that
3 93.5 percent of the 712 million hours were hours that
4 were generated by programs that belonged to our "umbrella
5 claimant".

6 Q And, in terms of the entities that are not
7 part of the umbrella group, do they fit in the balance
8 of that and a half percent or are they -- are they
9 additional to the six and a half percent?

10 A They are included in that.

11 Q I'm sorry for that tortured route, but that
12 helps clarify it for me.

13 Since the question of quality was broached
14 in our conversation, let me just get to the point with a
15 question. Is it true that the MPAA formula does not
16 take the Tribunal's criteria of quality into account?

17 A It does not separately define or provide
18 an objective measure of quality.

19 Q So, you are saying it does not, the formula,
20 MPAA formula does not take the Tribunal's definition of
21 quality into account?

22 A We have made the assumption in previous
23 discussions that whatever quality is, it should be reflected
24 in, somehow, in viewing, which is one way of looking at it.
25 I don't know how to define "quality". I don't know how to

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mention it.

If you don't know how to define it or
measure it, am I correct in assuming you didn't define it
and didn't measure it?

A We did not define it; we did not measure it.

MR. LUTZKER: Thank you.

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KEJ-1

1 COMMISSIONER GARCIA: Shall we proceed?

2 BY MR. LUTZKER:

3 Q. Let me ask you a couple of questions about your
4 determination of the copyright ownership and also as this
5 relates to the agreement that you have with the program
6 syndicators.

7 First, you testified earlier that you made the
8 initial determination; in making the initial determination of
9 copyright ownership, you made an assumption that either the
10 program syndicator or the program producer was the copyright
11 owner, is that correct?

12 A. That's correct.

13 Q. Is it possible, however, that neither could be the
14 copyright owner?

15 A. Anything is possible.

16 Q. Anything is possible. Does MPAA have any procedure
17 for determining within its umbrella group whether or not the
18 owners, the, quote, "owners," under the assumption are in fact
19 the owners?

20 A. Mr. Lutzker, I believe in the letter that you got
21 when we sent you a printout, we asked you to review the list
22 and determine if you were the owner of those programs and
23 if not to advise us that you were not the owner of them, and
24 to advise us also as to whether or not you had other programs
25 that you thought we should look for in terms of crediting to

1 you.

2 Q I am just referring to the letter just to refresh my-
3 self on this; I may be reading this incorrectly, but I don't
4 see the exact representation.

5 A There should be one. I know that with respect to,
6 for example, the distribution of material to our member companies
7 that we received or were advised by several of them that
8 titles that were ascribed to them in the printout were not
9 theirs, that they were the copyright owners and we deleted
10 the programs from the credit. So I am assuming that the
11 parties receiving the printout were being honorable in advising
12 us with respect to programs, that they were not entitled to
13 be viewed as the copyright owner.

14 Q You are saying you assume they are honorable. I
15 don't want to question the integrity of other parties, but in
16 terms of your procedures you don't have any definitive proce-
17 dures to the extent of an affidavit or statement on their
18 part.

19 A Only in those rare issues where there could have
20 been question in respect to ownership and in those instances we
21 considered for affirmative information.

22 Q When you say there could have been a dispute, you
23 are referring to two companies claiming the same program or
24 a program syndicator and a program producer claiming the same
25 program on a disputed basis?

KEJ-3

1 A. No. I was referring more to a claim for program
2 ownership that was contrary, totally the listing of both
3 syndicator and producer and BIB.

4 Q. I don't know if I understand.

5 A. I had mentioned earlier, again, the Spiderman's
6 diagram to be one of our favorites now, where the problem there
7 related to the fact that neither the syndicator which was our
8 ARP films, nor the producer syndicator, and that Frantray
9 Lawrence, I think, turned out to be the appropriate copyright
10 owner and that copyright owner was Cadence, Inc., and its
11 subsidiary, Marvel Company, Inc. In that instance we received
12 a statement in writing from Marvel Company, Inc., in writing,
13 asserting the ownership of Spiderman.

14 Q. Let me use the Sho Biz example for purposes of
15 illustration. Multimedia presently is the owner of the Sho Biz
16 program, but was not the owner in 1979.

17 A. Anyway,, that MPAA's formula procedure would have
18 brought out the ownership issue if Multimedia was part of the
19 umbrella group.

20 Q. You are stating that Multimedia was not listed at all
21 in BIB in association with the Sho Biz program?

22 A. That's correct.

23 Q. Then we would not have attributed Multimedia to those
24 programs at all, except they would have expected Multimedia to
25 advise us in connection with the letters that we sent that all

KEJ-4

1 programs that they were the parent of Sho Biz and that they
2 were entitled to receive the royalties for it.

3 Q Again, this is something you suspect of the members
4 of your umbrella group, but you have no implementing producers?

5 A That's correct, sir.

6 Q Have you provided the Tribunal at any time in phase
7 I a list of the programs contained in the Nielsen Survey?

8 A We did not.

9 Q Are you prepared to do it with reference to phase II?

10 A We are not.

11 Q If I ask you to provide that, will you provide that?

12 MR. SCHEINER: You can ask counsel, and counsel will
13 deny it.

14 BY MR. LUTZKER:

15 Q I am asking the witness if he will provide the
16 Tribunal with a list of the programs?

17 A On advise of counsel, if his views concur with my
18 own, I will not.

19 Q Is the basis for your refusal to provide the program-
20 ming covered by the umbrella group related to confidentiality
21 of the list?

22 A It is essentially related to the costliness of the
23 data we have obtained through the Nielsen Company, and which
24 is of a proprietary nature.

25 Q Let me turn to the Nielsen Study for a minute.

KEJ-5

1 Is it true that 1979 was the first year that Neilsen began to
2 measure cable homes?

3 A. No, sir.

4 MR. SCHEINER: I object. I do object to going back
5 to the phase I part of this hearing.

6 CHAIRMAN GARCIA: The question has been answered,
7 hasn't it?

8 THE WITNESS: It has been asked and answered.

9 MR. LUTZKER: I have got a few questions regarding
10 the Nielsen Study and I feel they are relevant to the phase II
11 proceeding based upon the assertions of MPAA at this time and
12 I do want to proceed with them.

13 CHAIRMAN GARCIA: The objection is overruled.

14 BY MR. LUTZKER:

15 Q. To your knowledge, when was the first year Nielsen
16 began to measure cable homes?

17 A. As soon as there were any cable homes, which would
18 probably go back to the 1950's.

19 Q. Is it true that study relied upon by MPAA was based
20 upon diary keeping?

21 A. It was based upon diaries.

22 Q. To your knowledge -- strike that.

23 Do you know how many diary keepers were in the sample
24 or samples for the 1979 survey?

25 A. It was testified to in detail in phase I, Mr. Lutzker.

KEJ-6

1 It is part of the record. As I indicated formerly the number
2 was in excess of 100,000.

3 Q. Do you know what the rate of return of the diaries
4 was?

5 MR. SCHEINER: I must renew my objection.

6 MR. LUTZKER: This is my last question.

7 MR. SCHEINER: I still renew the objection.

8 CHAIRMAN GARCIA: Do you have that information?

9 THE WITNESS: It was part of the phase I record.
10 Can I answer the question?

11 CHAIRMAN GARCIA: Please answer the question.

12 THE WITNESS: It is my understanding the rate of
13 return on the diaries was in excess of 50 percent, probably
14 close to 60 percent.

15 BY MR. LUTZKER:

16 Q. Regarding the MPAA formula, is it true that the
17 formula does not allow -- and this, I think, is growing from
18 your earlier testimony -- a showing of particularized harm to
19 program suppliers?

20 A. In our view, Mr. Lutzker, the viewing of syndicated
21 programs as distant signals is harm to program suppliers.

22 Q. So distant viewing is the signal definition of harm
23 to program suppliers?

24 A. It is a measure of harm to program suppliers.

25 Q. Is it the only measure that is measured by the MPAA

MPAA-7

1 formula?

2 A. I think that is all that household viewing hours
3 show.

4 Q. I have just one last question that relates to the
5 position of MPAA with respect to the three secular claimants.
6 Returning to your percentage figures, assuming that MPAA's case
7 is made for X percent of this 100 percent pie, do you have
8 any position with respect to the division of the balance of
9 the pie among the group of SIN, Mutual and Multimedia?

10 A. Yes. My concern relates to the fact that whenever
11 the aware is made, it should be reduced by the Tribunal to
12 reflect the additional costs that we are bearing in terms of
13 this procedure that will be shared among all of the other phase
14 II claimants and they have acceded agreements with us. To do
15 otherwise would be to discourage voluntary agreements in the
16 future.

17 Q. So in other words, your position is that claimants
18 that seek to enforce their rights before this Tribunal in
19 accordance with the statutory and regulatory procedures should
20 be penalized.

21 A. I'm just saying they don't think that other claimants,
22 valid claimants should be required to bear the expense of this
23 proceeding.

24 Q. In other words, not only is it your cost; but also
25 the cost that would be born by people who do not dispute the

KEJ-8

1 agreement at all and that doesn't seem to be equitable.

2 But, in other words, it is your position that those
3 that are here enforcing their rights before the Tribunal
4 should receive less compensation than might otherwise be the
5 case had they not made this presentation.

6 MR. SCHEINER: I object. That question has been
7 asked and answered.

8 CHAIRMAN GARCIA: The question has been answered.

9 MR. LUTZKER: That is all.

10 COMMISSIONER COULTER: My questions are related to
11 the previous question.

12 Mr. Cooper, Mr. Scheiner, during the pre-hearing
13 conference, made a clarification to me. I just want to make
14 sure in my own mind. When a station's programming is presented
15 by the station and then subsequently syndicated, both the
16 local station programming and the subsequent syndication are
17 lumped together in terms of your settlement among your parties;
18 is that correct?

19 THE WITNESS: Yes. To the extent that a program is
20 identified as a syndicated program, we counted all the viewing
21 to that program, including the viewing on, of the originating
22 producing station.

23 COMMISSIONER COULTER: That is carried on cable?

24 THE WITNESS: Yes.

25 COMMISSIONER COULTER: Okay. To the extent it is

lw-a₉

1 identified to extent that specific program has been
2 identified, and extracted from, say, the nomenclature
3 as station programming?

4 THE WITNESS: We are assuming the local
5 station broadcast has the same name as the syndicated
6 program.

7 CHAIRMAN GARCIA: Ms. Dowell?

8 CROSS EXAMINATION

9 BY MS. DOWELL:

10 Q I understand MPAA has endeavored to facilitate
11 a mutual agreement with all the program syndicators and
12 suppliers in order to distribute 100 percent of the amount
13 allocated to that category. When presented--

14 A Yes.

15 Q When presented to the syndicators and
16 suppliers, understand from previous questions from Multimedia
17 that he has an objection, were there other objections that
18 you were aware of to that particular formula? You gave
19 notice November 11th and November 12th I believe you testified
20 to people you had identified as appropriately fitting into
21 that category. What objections were raised and what was
22 the nature of those objections to the formula?

23 A I think, Ma'am, that for producers and syndicators,
24 programs are like children. I mean, mine are better than
25 everybody elses and that there is no single fair objective

lw10

1 standard that would judge that, that would treat -- that
2 really gives the same consideration to my magnificent
3 programs versus the other programs that everyone else has
4 produced.

5 Q Were there any specific objections raised to the
6 methodology or were all the complaints that you just didn't
7 give fair consideration to my product?

8 A There was at least one other question related
9 to methodology. A syndicator who is also a program owner
10 felt the restriction that we had made on limiting the
11 number of group owned stations resulted in an injustice
12 to that syndicator.

13 Q You said one other. Was that the first complaint
14 about methodology?

15 A Excuse me. You said there was one other
16 specific complaint about methodology, one other specific
17 complaint in addition to--

18 A The issue with SIN, and I recognize that you
19 represent the Spanish International Network, was raised
20 earlier in conversations with Ms. Siegel of SIN. At that
21 time, she did say that SIN had been engaged off air
22 period of time in controversy which the rating systems
23 offer the equity, over the validity of the measurements of
24 SIN television broadcast programs.

25 The reference particularly that Ms. Siegel

1 referred to related as I recall--

2 Q May I stop you a moment please? Were those
3 concerns communicated to you only in conversations or
4 were they also presented to you in the form of--

5 A They were presented in the form of writing,
6 which is part of the record. I think you have introduced
7 those. Essentially, the accounting in the record is
8 accurate.

9 Q What, if anything, did the MPAA do to address
10 the concerns raised, in what manner were they addressed?

11 A We advised Ms. Siegel in as much detail as
12 we could on the precise procedures that we had used in
13 terms of developing the data, the Nielsen data and we
14 also indicated, however, that we would not make any
15 exceptions for any claimant in terms of the application
16 of the formula to determine the shares of whatever amount
17 was awarded to program suppliers.

18 Q Was it put to you that exceptions should be
19 made or were their suggestions as to additional information--

20 MR. SCHEINER: Madam Chairman--I'm sorry. Did
21 you finish the question?

22 MS. DOWELL: No -- should be set up.

23 MR. SCHEINER: I think this line of examination
24 is wholly irrelevant to SIN's entitlement -- conversations
25 with respect to the applicability, inapplicability of the

lw-12

1 MPAA formula are irrelevant. SIN doesn't like it. SIN
2 is here to put on its case, to establish the value of its
3 case. Let's get on with that.

4 CHAIRMAN GARCIA: Are you finished with this
5 line of questions?

6 MS. DOWELL: I have one additional question
7 that goes specifically to the objections made by
8 Mr. Scheiner.

9 CHAIRMAN GARCIA: Please proceed.

10 BY MS. DOWELL:

11 Q Do you recall Mr. Cooper, how much SIN did
12 receive in the 1978 distribution of those two syndicated
13 categories?

14 A You volunteered that figure in your pretrial
15 statement.

16 Q Do you recall?

17 A I applied -- the number that sticks in my head
18 I may be totally wrong, is 1.7, 1.2--.

19 Q How about 1.2.

20 A I will accept 1.2 if you accept 1.2.

21 Q Do you recall given the percentage that MPAA
22 proposes to give SIN under, or did propose to give SIN
23 under the formula for the 1979 distribution what the
24 relative percentage was?

25 A You have the numbers. I believe that the number

lw-13

1 for SIN is about two-tenths of one percent.

2 MS. DOWELL: I have no further questions.

3 CHAIRMAN GARCIA: We will adjourn until
4 tomorrow at 1:00 in this same room.

5 (Whereupon, the hearing was adjourned at
6 4:35 p.m., to reconvene at 1:00 p.m. the following day.)

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