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COPYRIGHT ROYALTY TRIBUNAL

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CABLE TELEVISION COPYRIGHT :  
ROYALTY DISTRIBUTION : Docket No. 80-4  
PROCEEDING - 1979 REMAND :  
----- X

Room 538  
2033 K Street, Northwest  
Washington, D. C.

Tuesday, February 21, 1984

The hearing in the above-entitled matter com-  
menced at 10:05 a.m., pursuant to notice.

BEFORE:

THOMAS C. BRENNAN Chairman  
DOUGLAS E. COULTER Commissioner  
EDDIE RAY Commissioner

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PAGE

Argument by Mr. Harrington, Devotional	5
Argument by Mr. Lane, MPAA	31
Argument by Mr. Stewart, NAB	58
Argument by Mr. Duncan, ASCAP	70
Argument by Mr. Koenigsberg, ASCAP	71
Rebuttal Argument by Mr. Stewart	81

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P R O C E E D I N G S

CHAIRMAN BRENNAN: The Tribunal is meeting this morning to hear oral arguments on two of the 1979 Cable Distribution Remand issues. We will follow the announced schedule, and start with the devotional issue.

Mr. Harrington.

MR. HARRINGTON: May it please the Tribunal, my name is Clifford Harrington, I appear before you today on behalf of the Devotional Claimants, CBN, PTL and the Old Time Gospel Hour.

I would like to reserve five minutes for reply. I would also like to point out initially that the Devotional Claimants have agreed among themselves as to a method of distributing any joint award you might make to them. Therefore, I don't believe it is necessary for you to make separate awards to individual claimants in this case, the joint award will be perfectly satisfactory to us.

The Devotional Claimants took an active part in the 1970 Cable Copyright Distribution proceedings, we took part in Phase I as part of the category, including all syndicated programs. And at the end of Phase I, you made an award of 70 percent of the entire fund to, and I quote, "Motion Picture Association of America, and other program syndicators, including claimants for syndicated religious programs and programs syndicated by commercial

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1 television stations".

2 Subsequent to Phase I we participated in Phase II,  
3 where awards were to be made to individual claimants. At  
4 the end of Phase II, however, in your final determination  
5 you made no award to any of the Devotional Claimants. We  
6 obviously felt that that was an error and took an appeal  
7 to the Court of Appeals for the District of Columbia  
8 Circuit.

9 The court's opinion is before you. Unlike the  
10 arguments of the settling parties, you cannot read that  
11 decision and simply say, go back and polish your previous  
12 decision. It is not merely a chance to put icing on the  
13 cake, the decision reflects a very fundamental concern  
14 with the treatment that you have given the Devotional  
15 Claimants.

16 This is shown by the fact that the court in the  
17 past has given this Tribunal great latitude in its treat-  
18 ment of its decisions. In fact, if you will read the  
19 section dealing with MPAA's appeal in 1979, appeal to the  
20 Court of Appeals, you will see that they did give you  
21 great latitude. I parsed the record very closely to find  
22 material that would support your decision, even though  
23 it might not be fully explained in the written determination.  
24 But that is not the case here.

25 The case here is that the court found a

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1 fundamental problem with your treatment of the Devotional  
2 Claimants. And it uses unusually stringent language in  
3 its decision, language that I have rarely seen in a Court  
4 of Appeals decision relating to an administrative agency,  
5 saying that your decision had an air of unexplained  
6 arbitrariness, that it had factual weaknesses behind its  
7 neat conclusions; that it took on the texture of quick-  
8 silver, that the application of the harm factor was made  
9 with an unexplained vengence against the Devotional  
10 Claimants.

11 Moreover, the Court reviewed the records, based  
12 on your full brief presented which gave this Tribunal the  
13 full opportunity to cite record material to support your  
14 zero award for the Devotional Claimants, yet you were  
15 unable to convince the court. In fact, the Court found  
16 substantial evidence under each of the three primary  
17 criteria in support of the Devotional Claimants.

18 The Court also found dissimilar treatment of  
19 the claimants which, in several respects, seems similarly  
20 situated to the Devotional Claimants.

21 Indeed, the Court found that the evidence, quote,  
22 "Seems similar to that published, the Tribunal appears  
23 to have elsewhere based the awards", unquote.

24 The task before you is very clear, start with a  
25 clean slate, make a fresh evaluation of the evidence, make

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1 a redetermination, don't merely go back and look for  
2 evidence, snip it here and there, to support what you al-  
3 ready have done. Don't go into this with preconceptions,  
4 make a fresh start.

5 This is not the time to merely polish you past  
6 decision, but rather to take a whole new approach to the  
7 treatment of the Devotional Claimants.

8 Both in Phase I and Phase II the Devotional  
9 Claimants presented compelling evidence under each of the  
10 five criteria which you, yourselves, had established to  
11 decide the distribution of funds out of the Cable Copyright  
12 Royalty Fund.

13 First, let's look at harm. The key element of  
14 harm that we presented was a loss of control over our  
15 intellectual property rights. The fact is that Section  
16 106 of the Copyright Act gives all copyright owners, it  
17 doesn't exclude Devotional Claimants, it gives all copy-  
18 right owners the exclusive right to control the use of  
19 their intellectual properties. And that right excludes  
20 not just the licensing, but to refraining from licensing,  
21 as the United States Supreme Court said in Fox Film versus  
22 Doyle, a copyright holder may, if he wish, refrain from  
23 licensing the public performance of his work and content  
24 himself with simply exercising the right to exclude others  
25 from using his property.

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1           Indeed, the primary power, and hence the primary  
2 value of the copyright is this right to control the use of  
3 your intellectual property. That has been taken away from  
4 us by the compulsory licensing provisions of Section 111,  
5 it is a very real harm to the Devotional Claimants.

6           We also presented specific evidence as to  
7 particularized harm, audience fragmentation which results  
8 in higher programming costs to the Devotional Claimants.  
9 The disruption of our programming schedule, and over-  
10 exposure which is perceived by viewers, which hurt our  
11 appeal to the audience. That is very important to us  
12 because we, among all of the claimants, are wholly viewer-  
13 supported. We don't have commercial sponsorship, we don't  
14 government funding, we are wholly viewer-supported. This  
15 is the true arbiter of marketplace value, viewer support,  
16 and we have it.

17           Moreover, we have shown that at least some of  
18 the claimants have been impeded in their ability to  
19 directly license the very same programs directly to the  
20 cable industry, and that is also a major harm to us.

21           The second criterion I would like to discuss  
22 is marketplace value. We have shown marketplace value  
23 through production and distribution costs in the tens of  
24 millions of dollars. We are talking about fresh, new  
25 programming, not stale, old reruns, not 1930s and '40s

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1 movies, not reruns -- not the 72nd rerun of the Desi-Lucy  
2 shows, we are talking about brand new shows, five days a  
3 week in two case, one day a week in the other.

4 We are also talking about, in terms of marketplace  
5 value, this element of direct viewer support. That is a  
6 test of marketplace value, showing that people are willing  
7 to spend money to support our programs. It is not simply  
8 through an indirect subsidy based on an extra half a cent  
9 of every tube of toothpaste, it is cash out of their pockets.

10 CHAIRMAN BRENNAN: What is your response, Mr.  
11 Harrington, to the argument advanced by the settling  
12 parties that the time of day when these programs appear,  
13 by itself, suggests limited marketplace value?

14 MR. HARRINGTON: Well, all I can say is that the  
15 material which was cited by the settling parties in their  
16 reply brief, I think is inaccurate. There is evidence,  
17 and in the testimony of Mr. Ditchfield, as to the spread,  
18 for example, of CBN's programming. And the evidence was  
19 that the preponderance ran in good time periods, it was  
20 not in the pre-seven o'clock period, which is claimed by  
21 the settling parties.

22 So, I just have to disagree with their claim as  
23 to what the evidence supports.

24 Another factor showing marketplace value is a  
25 very broad distant signal carriage, and there is a lot of

1 evidence to support that, not just ours.. MPAA itself put  
2 in evidence showing dozens and dozens and dozens -- over  
3 two or 300 stations which were carried on a distant signal  
4 basis, which carry substantial amounts of devotional  
5 programming.

6           Indeed, there is even a showing that some devot-  
7 ional stations, which were 100 percent devotional program-  
8 ming, were carried on a distant signal basis.

9           If that is the case, how can one ascribe the value  
10 of that copyright payment to anyone, other than the owners  
11 of the religious programming on those stations? It  
12 certainly wasn't for MPAA's movies which never appeared on  
13 the stations -- that the cable system carried those  
14 stations. It has strictly to do with the benefit of  
15 religious programming.

16           The implausibility of the finding that there is  
17 no marketplace value for devotional programming is under-  
18 scored by the very treatment of the satellite networks  
19 which carry predominately religious programming schedules.  
20 The CBN satellite network evidence shows was carried by  
21 cable systems having more than 10 million subscribers  
22 in 1979.

23           This represents literally thousands of cable  
24 systems. Indeed, in 1979, the CBN satellite network was  
25 number two, of all types, in cable carriage, exceeding

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1 even sports networks, such as ESPN. Moreover, the record  
2 shows that one devotional program, the 700 Club, had higher  
3 ratings than the CBS Morning News in a very important Los  
4 Angeles television market, in 1979.

5           These all are extrinsic factors which prove real  
6 marketplace value.

7           Next, we will turn to the benefit criterion. You  
8 have heard before from many parties that cable operators  
9 do not sell gross rating points, they sell subscriptions.  
10 They are interested in a narrow casting technique, where  
11 they adopt particular programming for particular types of  
12 listeners. Devotional programming is very critical to that  
13 type of an offering. Furthermore, it balances out the  
14 sex and violence carried on the movie channels which the  
15 cable systems carry. It is very important at franchising  
16 time to be able to point out the mix of programming they  
17 are carrying for all viewers, whether they want to see the  
18 Playboy channel, or whether they want to see religious  
19 programming on a distant independent station.

20           There is also extrinsic evidence on benefits. The  
21 letter from the cable operator which is cited to the Court  
22 of Appeals, and in the Court of Appeals decision. Mr.  
23 Attaway's own testimony in which he indicates specialty  
24 programming would not be carried on a distant signal  
25 basis, did it not have benefit.

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1           Furthermore, benefit can be seen from the very  
2 extent of the carriage, and I will give you two examples.  
3 One is the case of KXTX-TV and you have heard a lot about  
4 KXTX-TV. It is a CBN station, it runs 18 percent CBN  
5 programming, and over 30 percent religious programming, in  
6 general, specialty programming. It is carried extensively  
7 throughout the Southwest by common carrier -- we don't give  
8 it away, they have to pay to get it, they pay a third-party,  
9 a common carrier with a microwave service to get it.

10           Why do they pay those thousands of dollars a  
11 month, were it not a benefit?

12           The same thing can be seen in PTL station in Ohio,  
13 also, it is 100 percent religion. Why would that be carried  
14 if it had no benefit?

15           The other two secondary criterion, also have to  
16 be considered. First is quality, and we put a lot of  
17 evidence in the record about the quality of our studios,  
18 and the dozens of videotape machines, and very high  
19 technical quality. But I think the real key comes back  
20 to the fact that we offer an alternative programming to  
21 that available on the networks, on the stale, old off-  
22 network programming that MPAA and its cohorts give to the  
23 public. We are talking about brand new, fresh, everyday  
24 programming, something that is not available on any  
25 network, that appeals to a hard core viewer, much like PBS

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1 programming. And it is a quality of programming which is  
2 simply otherwise unavailable, and you should sponsor that  
3 through a substantial award.

4 Finally, we turn to time related considerations.  
5 There has been a lot of discussion about the formula of  
6 two of the claimants use.. I am not standing here before  
7 you today to tell you that that is 100 percent statistically  
8 accurate formula, nor, however, have any other formulae  
9 or methodologies given by any of the parties in this case  
10 been found to be 100 percent statistically accurate.

11 I think it is a rough guide, based on the cross-  
12 examination, perhaps a few adjustments should be made.  
13 But even the MPAA, itself, and the settling parties con-  
14 cede that over 5 percent of all time on distant signal  
15 viewing was devotional programming.

16 And, moreover, there is other evidence in the  
17 record, there were studies showing extent to which  
18 devotional programming appeared on the very most highly  
19 carried Top 25 cable carried stations, and also, under  
20 other methodologies.

21 In addition to considering these factors, I urge  
22 you to consider the Devotional Claimants on the same basis  
23 as you do all the other claimants. You have to treat us  
24 the same as you do similarly situated claimants, or your  
25 decision will again be reversed.

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1           And I point to two in particular for your con-  
2 sideration today. First, PBS, PBS is not a commercial  
3 it is viewer supported to a large extent, high quality,  
4 it offers an alternative program source to the networks.  
5 The same can be said about the Devotional Claimants.

6           Moreover, if you examine the evidentiary pre-  
7 sentation made by PBS in 1979, it is virtually the same  
8 as that made by the Devotional Claimants. You made an  
9 award to PBS, you must make an award to the Devotional  
10 Claimants.

11           If you make no award to the Devotional Claimants,  
12 then rethink what you have done to PBS, and take away  
13 the award you made to them.

14           I don't think you are going to do that.

15           COMMISSIONER COULTER: Mr. Harrington, is it your  
16 position that the Court's opinion requires us to make an  
17 award to Devotionals in this case?

18           MR. HARRINGTON: It does not say so, per se. I  
19 do think, however, that you have to consider the very  
20 relevant evidence which was not considered, or brushed  
21 aside in your 1979 decision.

22           It is my belief, when you consider those factors,  
23 you will have to make an award to the Devotional Claimants.

24           You have attempted in your 1980 decision, to  
25 draw one distinction -- and it is the only one you were

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1 able to find in 1980 between the Devotional Claimants and  
2 PBS. And that was the fact that PBS offers secular pro-  
3 gramming of some type, and the Devotional Claimants have  
4 some ministry involved in their programming.

5 Well, first, that is a distinction without a  
6 difference, but more importantly, it is an unconstitutional  
7 distinction, an improper attempt to eliminate or affect  
8 the practice of religion. It is clearly a violation of  
9 the First Amendment to the United States Constitution, it  
10 also violates free speech provisions of the United States  
11 Constitution.

12 And our concerns with this were underscored by  
13 the Court's vacation of the 1980 decision. It didn't  
14 merely remand, based on your request for remand, it said  
15 "Considering both the request for remand, and our request  
16 for summary reversal, it was vacating the decision and  
17 remanding it, too". Far harsher than that which took place  
18 in 1979.

19 I would also like to point out the NAB case.  
20 Your own conclusions in both 1979 and 1980 as to NAB said  
21 they haven't shown harm, they haven't shown benefit, they  
22 haven't shown marketplace value. The only thing they have  
23 shown is some time related value, and so we are going to  
24 make an award to them based solely on time related con-  
25 sideration.

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1           How can you deny that we have significant amounts  
2 of time, and if you are going to treat us similarly, you  
3 must make an award to us.

4           We don't ask for any special treatment, we don't  
5 ask for any handout that we don't deserve. What we ask  
6 for is fair and equal handed treatment. Our programming,  
7 our intellectual product has been misappropriated by the  
8 cable television industry, we have lost the right to  
9 control that programming. We should be compensated for  
10 it, just as are the other copyright owners who have  
11 appeared before you.

12           We ask for nothing more, we are entitled to  
13 nothing less.

14           Thank you.

15           CHAIRMAN BRENNAN: Commissioner Coulter?

16           COMMISSIONER COULTER: Mr. Harrington, concerning  
17 the issue of harm, in MPAA's initial brief, on page 17 --  
18 do you have that?

19           It, basically, acknowledges that the Court  
20 reversed us on the issue of harm to you, to your satellite  
21 transmission due to distant signal importation, but it  
22 says that you did not provide any specific showing of  
23 that harm.

24           Now, could you refresh for me, or indicate to  
25 me more specifically where you feel you have made a

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1 specific showing? And I mean that, independent of the  
2 more general and more abstract assertion that such harm  
3 may possibly exist. Could you point that out to me, please?

4 Do you understand my question?

5 MR. HARRINGTON: I understand your question  
6 perfectly.

7 The Court's decision as I read it said that a  
8 generalized harm to the satellite network is not com-  
9 pensatory -- or a more particularized harm, for example,  
10 in the case of showing lost ministry revenues would be.  
11 I can't show you in the record where we have put a dollar  
12 and cents figure on that. I can tell you that Mr.  
13 Ditchfield and others have testified that their ability  
14 to place the network has been impeded, and that inherently  
15 must have an affect on our ability to raise funds.

16 COMMISSIONER COULTER: You would acknowledge  
17 that we have difficulty in quantifying that harm?

18 MR. HARRINGTON: I do, but I don't think, by no  
19 means, is that the whole basis of our case.

20 COMMISSIONER COULTER: No, but nevetheless, it  
21 was an issue where the Court took a stand, but neverthe-  
22 less -- the quantification had not yet been provided.

23 MR. HARRINGTON: Most, if not all of the parties,  
24 had a difficult time with quantifying harm. As a matter  
25 of fact, you, yourself, have held that harm is not really

1 much help to you. And that is one of the things that  
2 concerned the Court, is that you found no harm to us, yet  
3 you made the same finding to other parties and didn't dis-  
4 qualify them on the same grounds.

5 COMMISSIONER COULTER: Well, that is why I am  
6 raising this, because it was our treatment of it, with  
7 respect to you, that was singled out and therefore, to the  
8 extent that we should consider harm as it relates to you  
9 differently than we do for other people.

10 MR. HARRINGTON: I am not asking for different  
11 treatment, I am asking for the same treatment. And I  
12 think our evidence is very similar, for example, to PBS's  
13 evidence on harm.

14 COMMISSIONER COULTER: Now, you have made what I  
15 believe is a fairly major point of the fact that in a  
16 generic sense, you feel that you are like PBS and NPR.

17 MR. HARRINGTON: I would say that, we argued it  
18 both in 1979 to the Court of Appeals, where it was  
19 accepted. We argued it in 1980, you rejected it and  
20 your rejection of it has been reversed, in my view, by  
21 the Court of Appeals.

22 COMMISSIONER COULTER: How does that similarity  
23 situate itself, given the fact that PBS and NPR signals  
24 are continuous signals, whereas your programs are indivi-  
25 dual programs, as part of other signals, in large measure?

1 MR. HARRINGTON: Well, I don't know if that is  
2 exactly true --

3 COMMISSIONER COULTER: Well, I said in large  
4 measure.

5 MR. HARRINGTON: It is specialty programming.

6 COMMISSIONER COULTER: But in large measure you  
7 would agree with that statement?

8 MR. HARRINGTON: I don't know if I would. I  
9 will take it arguendo.

10 The fact remains that the carriage of PBS stations  
11 only results in a .25 DSE rating, one-fourth of that of a  
12 commercial station. So, for every hour of PBS programming,  
13 it is only the equivalent of a copyright payment of four  
14 hours of devotional programming, the same theory, because  
15 our programming is carried at a full one point of DSE for  
16 every devotional station, or portion of an independent  
17 station that is carried.

18 So, to that extent it seems to offset it somewhat.  
19 But the fact is that the record indicates that there is  
20 very real benefit to stations with very high content of  
21 devotional programming are carried, as are PBS stations.  
22 So, I don't see that that is really a distinction.

23 COMMISSIONER COULTER: Well, the distinction  
24 nevertheless exists.

25 MR. HARRINGTON: Let's go back to KXTX, that

1 station-- it meets the definition of a specialty station,  
2 if it meets the definition it must contain both in prime  
3 time and overall, 33 and one-third percent religious pro-  
4 gramming. And it does, it meets that definition and it  
5 has been so concluded by the FCC. That station is carried  
6 by many, many television stations, by microwave, they pay  
7 hard cash dollars to carry it.

8 I just have to believe that if it had no market-  
9 place value, if it had no worth, it would not be carried.

10 COMMISSIONER COULTER: I understand that, but the  
11 point is is whether that for you constitutes an exception,  
12 whereas with PBS and NPR, they are, to my knowledge, almost  
13 universally carried as full signals.

14 MR. HARRINGTON: Would you like me to present  
15 evidence? I would be happy to get you additional material  
16 from the FCC of literally hundreds of cable systems that  
17 have asked not to carry additional PBS stations.

18 I can produce that, because that is just not the  
19 case.

20 COMMISSIONER COULTER: Well, I am not sure whether  
21 we are allowed to do that as part of this remand. But  
22 the question is, that is a distinction between you and them.

23 MR. HARRINGTON: It is a distinction, but I don't  
24 think it is a distinction of any great merit.

25 COMMISSIONER COULTER: Okay. One of your other

1 points raised is the fact that we gave something to Mutual  
2 and didn't give anything to you. Do you equate the  
3 advertising slots provided in the barter arrangements for  
4 Mutual with your fund-raising efforts?

5 MR. HARRINGTON: Well, the fund-raising efforts  
6 differ from claimant to claimant. There is evidence in  
7 this proceeding for CBN, which I am most familiar with,  
8 and it says that we don't do fund-raising in the programs  
9 for which copyright was filed. You will find that in Mr.  
10 Ditchfield's testimony. He said, "We run telethons on a  
11 semi-annual basis, we have not claimed for those".

12 Now, there is one, and perhaps two, spots which  
13 are on the 700 Club, but don't say a word about revenues  
14 during the course of a typical program.

15 COMMISSIONER COULTER: Is that transcript page  
16 7048?

17 MR. HARRINGTON: I don't know, but Mr. Ditchfield  
18 did so testify. Now, in terms of -- I guess I have lost  
19 my fact -- would you mind asking the question?

20 COMMISSIONER COULTER: The question is whether you  
21 equate the advertising slots allowed Mutual with your  
22 fund-raising efforts?

23 MR. HARRINGTON: To the extent that there are  
24 spots, or requests for fund-raising, there is some  
25 similarity. I must point out to you, this is very

1 important, Mutual of Omaha was singled out for treatment  
2 because it is bartered programming. We put in the record  
3 in 1979, a list, two-pages long, of major syndicated  
4 programming in the MPAA camp which are distributed under  
5 a barter basis, shows like Sha-Na-Na and the Lawrence Welk  
6 Program, big syndicated programs.

7 So, the same thing is true of MPAA's programs,  
8 as ours. And you didn't mark down MPAA because it was  
9 partially bartered.

10 COMMISSIONER COULTER: Are your fund-raising  
11 efforts -- and I am speaking of devotionals as a whole,  
12 not strictly of CBN with the distinctions that you have  
13 just made -- are your fund-raising efforts, or the funds  
14 you raise from your efforts, are they plowed back  
15 specifically for the programming by itself?

16 MR. HARRINGTON: I can't say that all of them are,  
17 each of the three claims you have before you here today  
18 has an institution of higher learning affiliated with it.  
19 CBN is basically -- it has no churches, it has no on-the-  
20 spot missionaries --

21 COMMISSIONER COULTER: Yes, but you are represent-  
22 ing all of the devotionals?

23 MR. HARRINGTON: And the same thing is true, to  
24 my knowledge, of PTL, as to Falwell, they do have a church,  
25 the Old Time Gospel Hour, they do have a church, but it is

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1 the only one.

2 But predominately it is used to produce the pro-  
3 gramming.

4 COMMISSIONER COULTER: But to the extent that the  
5 fund-raising that takes place, as a part of the programming  
6 that you are claiming for, to the extent that that fund-  
7 raising is used for purposes other than the programming  
8 appearing, does not that distinguish you from both these  
9 MPAA barter programs that you talked about, and from PBS  
10 and NPR?

11 MR. HARRINGTON: It doesn't distinguish us from  
12 MPAA at all, MPAA's clients are in business to make money,  
13 they make a profit. They make more money than they put  
14 out. So, I don't see how that makes a distinction at all.

15 COMMISSIONER COULTER: But are they maintaining  
16 an educational -- it is a fundamental issue.

17 MR. HARRINGTON: It is a fundamental issue behind  
18 the question, that I think you are getting to, is do we  
19 receive some benefit from carriage that overrides the harm  
20 that results.

21 COMMISSIONER COULTER: That is not my question.  
22 My question is do you not receive a benefit from carriage  
23 that is completely different from the benefit received by  
24 everybody else, that's my question?

25 MR. HARRINGTON: PBS receives funds, just as we

1 do. The fact that PBS is not very good at what it does,  
2 and doesn't raise enough funds to cover its costs, should  
3 we be blamed for that?

4 COMMISSIONER COULTER: Well, maybe it is the  
5 spiritual element that is lacking.

6 MR. HARRINGTON: I must disagree with you. The  
7 question that -- the fact which underlies your question  
8 is do we receive some benefit, in excess of harm --

9 COMMISSIONER COULTER: No, different from other  
10 people's benefit.

11 MR. HARRINGTON: Let me answer, because I think  
12 that that underscores your question, the fact is we don't.  
13 We receive some benefit, it is true, so does PBS, so does  
14 Mutual, so do the barter programmers involved, from distant  
15 signal carriage. NAB receives it, when Jay Rockefeller  
16 runs spots on Channel 5 in Washington for his gubernatorial  
17 campaign in West Virginia, tell me that that isn't a  
18 benefit to the Washington, D. C. station, because the  
19 only way that show is getting -- that spot is getting into  
20 West Virginia is on a distant signal basis?

21 So, they have made cash money on that, just as  
22 we have. And the Court noted that in its 1978 decision.

23 But, no, we think the harm on balance is greater  
24 than the benefit, it is very clear. And there are a  
25 couple of points I would like to point out to you.

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1                   COMMISSIONER COULTER: Can I come back to your  
2 last example?

3                   MR. HARRINGTON: Yes.

4                   COMMISSIONER COULTER: Are you trying to say that  
5 the benefit that that station gets is cash that is completely  
6 unrelated to the small amount of actual relevant carriage  
7 of the programming?

8                   Am I making any sense?

9                   MR. HARRINGTON: Let me put it this way, except  
10 for a few members of Congress and their staff, virtually  
11 no one within the normal viewing area of Channel 5,  
12 Washington, D. C., can vote in West Virginia. And so the  
13 fact is -- because the signal stops out there at Leesburg,  
14 so how can those spots be of any benefit to Mr. Rockefeller,  
15 if it isn't for the fact that the station is being carried  
16 on a distant signal basis into all of those hollows in  
17 West Virginia, where he is getting exposure to his voters.  
18 And that is a cash benefit from the distant signal carriage  
19 Channel 5 gets.

20                   COMMISSIONER COULTER: I don't see the --

21                   MR. HARRINGTON: I think it is a real comparison,  
22 but obviously you don't.

23                   The other two points, to finish up the answer,  
24 let's assume, Commissioner Coulter, that you wrote a book,  
25 that book, perhaps in initial sales was not very successful.

1 Some Hollywood movie producer, without ever contacting you,  
2 made a movie out of it and it became a block-buster. As  
3 a result of that book sales took off. Now, that is a  
4 benefit to you. Have you benefitted from the fact that your  
5 book was made into a movie? Yes. Have you been harmed?  
6 Yes, because you have lost to say who produces the movie,  
7 and to get your share of the revenue.

8 The Copyright Act makes very clear that harm is  
9 not normally an element for damages. If, for example, a  
10 cable operator were not to pay his licensing fees and were  
11 therefore to lose his compulsory license, there is no  
12 question whatsoever that under the Act, the Devotional  
13 Claimants would have a right to sue for infringement, if  
14 their programs were carried by that cable system, and their  
15 damages would not be based on harm, but rather would be  
16 statutorily based, because the Act presumes harm.

17 COMMISSIONER COULTER: Your example there still  
18 doesn't elucidate for me the question of whether the  
19 benefit you gain or the harm you suffer isn't of a differ-  
20 ent character than that of other claimants.

21 MR. HARRINGTON: Perhaps it is of a different  
22 character, it is a very real harm. And any harm --

23 COMMISSIONER COULTER: A difference in character  
24 is precisely --

25 MR. HARRINGTON: Let me go to a major point, we

1 are arguing about harm here, but the point is you, yourself,  
2 have said harm is of very little benefit to you in your  
3 decision.

4 Now, how can you say that as to the devotionals  
5 the harm criterion is all important, but as to everyone  
6 else, it doesn't matter? I just don't think you can make  
7 that distinction.

8 As a matter of fact, based on your treatment of  
9 NAB, if you found us wanting under each of the three pri-  
10 mary criteria, you would still have to give us an award,  
11 under secondary criteria.

12 COMMISSIONER COULTER: Okay, we will come to that,  
13 but my reading of the Court's opinion, while recognizing  
14 your point concerning harm, and the fact that we singled  
15 it out in a different way than we did with other claimants,  
16 nevertheless --

17 MR. HARRINGTON: I think the words were "you  
18 applied it with a vengeance".

19 COMMISSIONER COULTER: Well, you know, everybody  
20 is entitled to a characterization. It still left open the  
21 fact that that harm had not been very clearly specified.

22 MR. HARRINGTON: But I think it also said that  
23 it was specified, at least in similar terms to that of  
24 the other claimants. Now, maybe you are telling me that  
25 the Court didn't read your decision very well, but I

1 think it read it pretty well.

2 COMMISSIONER COULTER: I don't think we were con-  
3 fronted directly, or to my recollection, we weren't con-  
4 fronted directly with compensating other claimants for  
5 harm to general revenues from satellite transmission.

6 MR. HARRINGTON: It seems that we are going way  
7 off the track, because I am not talking about just the  
8 harm from satellite transmission, I am talking about all --

9 COMMISSIONER COULTER: Well, that is what I am  
10 talking about.

11 MR. HARRINGTON: It was not clear to me.

12 COMMISSIONER COULTER: Now ~~on~~ on the time issue,  
13 are you suggesting, say, in the absence of anything else,  
14 that we should, if nothing more, at least apply the time  
15 formula, as you understand it, that we applied to NAB,  
16 that we should apply that to you?

17 MR. HARRINGTON: I am not quite sure if I under-  
18 stand your question. You gave credit for time related  
19 considerations --

20 COMMISSIONER COULTER: Okay, but what kind of  
21 credit did we give to NAB, in your understanding?

22 MR. HARRINGTON: Rather substantial, they ended  
23 up with 5 percent of the pot.

24 COMMISSIONER COULTER: Well, what was their time?

25 MR. HARRINGTON: Around 15 percent.

1           COMMISSIONER COULTER: Should we apply the same  
2 discounting to you that we apply to them?

3           MR. HARRINGTON: No, because we have shown evidence  
4 under each of the three primary criteria, which NAB did  
5 not. If you found that we did not, then some discounting  
6 might be in order, but I don't think you could make that  
7 finding, based on the record, and of course, the decision.

8           COMMISSIONER COULTER: If you want to use just  
9 the simple numbers, which we didn't necessarily do, but  
10 just for the sake of argument, if you want to use them,  
11 we gave NAB approximately half of what their viewing  
12 figures would have given them, and the viewing figures  
13 were approximately half of what their time was.

14           So, my next question is what share are you urging  
15 us to give you?

16           MR. HARRINGTON: We have not asked for a specific  
17 share at this time, we have not agreed among ourselves  
18 what it is. It will be presented in our supplemental  
19 findings and conclusions, I can't comment on that at this  
20 time.

21           COMMISSIONER COULTER: Well, is it what you asked  
22 for in your original brief?

23           MR. HARRINGTON: I do not think it would be the  
24 same amount as in our original briefs. We said in a foot-  
25 note at the conclusion of our required brief that we

1 understand your concerns, and we are prepared to help you.  
2 And we are going to give you a very reasonable number, a  
3 number that is a hard number that you can adopt.

4 So, that is all I can say. We don't have that  
5 number firmly in mind yet, in a general range --

6 COMMISSIONER COULTER: To the extent that it is  
7 less than the figures that you urged upon us in '79, to  
8 that extent do we then discount your arguments relating  
9 to harm, marketplace and benefit?

10 MR. HARRINGTON: You have to remember that in  
11 1979 --

12 COMMISSIONER COULTER: Wait a second, why not?

13 MR. HARRINGTON: Well, that is what I am trying  
14 to explain. You have to remember in 1979, we were pre-  
15 senting our cases, separate parties, I had no knowledge  
16 of what the other parties were going to present, we each  
17 came up with our own view. We have now taken a very hard  
18 look at the Court of Appeals decision, and I think we have  
19 gained a lot of ground, and in a couple of places we have  
20 lost arguments that I thought we were going to win.

21 I still am honestly convinced that we have an  
22 absolute statutory right to compensation. And I am ready  
23 to argue that to the Supreme Court, if necessary. But  
24 we are trying to be realists. And, no, I don't think it  
25 does. I will point out to you that in Phase I of the 1979

1 proceedings Sports asked for over 30 percent and didn't get  
2 anywhere near that. MPAA asked for more than 10 points  
3 more than it got -- all the parties, just about, asked for  
4 more than they ultimately got.

5 The fact that they are now parties to an internal  
6 agreement doesn't mean that they now agree as to the  
7 wisdom of each other's cases. No, I don't think that means  
8 that at all.

9 We are taking a very realistic view at this time  
10 with the case as we find it. And if that were not the  
11 case, we would not have been asked to file supplemental  
12 findings.

13 You know, we heard that you are stuck with the  
14 findings as you have them. And you have already made find-  
15 ings in this case, you made them in your determination.  
16 We are very satisfied with those findings you have already  
17 made, but you want supplemental findings, we will submit  
18 them and we will take a very hard look at the evidence,  
19 and we are going to be very fair because it doesn't serve  
20 our interests to try to take a hard line position that we  
21 know you won't adopt. We are going to do it right.

22 COMMISSIONER COULTER: All right. I neglected to  
23 ask this before, but it concerns me because the aspects  
24 of harm that we were talking about -- a point that is  
25 very distinctly raised. To what extent is the

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1 fractionalization of your audience any difference than any-  
2 one else's?

3 MR. HARRINGTON: All are fractionalized and so  
4 to some extent that is true of everyone. And you made  
5 awards to everyone else, because you found some residual  
6 -- I presume you didn't disqualify them for no showing of  
7 harm, like you did us. You must have found some residuals,  
8 and I think that is it.

9 There is a statutory presumption of harm and it  
10 lies on these very factors that we are talking about, and  
11 I don't think it can be ignored.

12 CHAIRMAN BRENNAN: Thank you, Mr. Harrington.

13 T1/S2

14 MR. LANE: Mr. Chairman, Commissioners, my name  
15 is Dennis Lane, I am representing the position of the  
16 settling parties on the Devotional Claimants issue, the  
17 settling parties are the program suppliers, the Joint  
18 Sports Claimants, the Public Broadcasting Service, ASCAP,  
19 BMI and NPR.

20 Since I am second in the argument, I would like  
21 to start out by saying, I get the feeling that the views  
22 expressed earlier are completely opposite, so I would like  
23 to start out by completely disagreeing with Mr. Harrington.  
24 And saying that we find that the Court decision is not  
25 a rejection of the result, rather the remand is based on  
the Court's dissatisfaction that the treatment reflected

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1 recent decisionmaking on your part, and by recent decision-  
2 making the Court refers to a failure to explain adequately  
3 all of the bases for your decision, and the failure to  
4 address specific points of evidence raised.

5           Notwithstanding the Court's decision to give the  
6 non-award in the case very careful scrutiny -- and they  
7 were very particular in stating that at the beginning of  
8 their decision -- and notwithstanding the fact that the  
9 Court had a one-sided presentation by the Devotional  
10 Claimants before it, the Court did not find that any of  
11 the underlining premises of your decision were completely  
12 devoid of merit, rather the Court found that there were  
13 inadequate explanations and that some of the evidence  
14 presented by the Devotional Claimants was not addressed,  
15 either at all, or adequately addressed, in their opinion.

16           This, in our opinion, is not a showing that an  
17 award is now required to be made, but rather the remand  
18 is for the purpose of discussing this evidence, or explain-  
19 ing what the bases for your decision were, and in our  
20 opinion, coming to the same conclusion you reached  
21 originally.

22           The Court rejected, also, the contention made  
23 by Mr. Harrington that the listing of the Devotional  
24 Claimants in the summary notice of the Phase I award is  
25 under the program suppliers category and necessitated a

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1 Phase II award. The Court, on page 34 of the opinion  
2 stated specifically that that did not lock the Tribunal  
3 into making an award.

4 More important, perhaps, is the evidence presented  
5 by the Devotional Claimants in Phase I of that decision  
6 and your treatment thereof. The Devotional Claimants in  
7 their Phase I brief to you, which I have copies here --  
8 I would like to point out a few of the things that they  
9 brought up in those briefs.

10 First of all -- and I am going to use PTL for this  
11 example, although CBN states the same in its brief -- PTL  
12 is not a joint claimant, PLT stands on its own as an  
13 individual claimant, which has filed an individual claim  
14 for only that portion of the copyright royalty fees to  
15 which it is individually entitled.

16 And it went on to state -- excuse me, that was  
17 on page 15, paragraph 11 of their proposed conclusions.  
18 On page 16, paragraph 16 of the same conclusions, PTL  
19 states, "PTL is entitled to recover 8.5 percent of all  
20 compulsory fees paid by cable companies under the statutory  
21 scheme for the 1979 period".

22 CBN's brief, in Phase I, had virtually identical  
23 language on the individuality of their claim.

24 Second, I would like to point out CBN indicated  
25 specifically that its claim was based on time alone in

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1 Phase I, it states, and I am quoting from page 11, of their  
2 Phase I brief.

3 "CBN will present, if necessary in Phase II of  
4 this proceeding, its case for its claim of cable copyright  
5 royalties based on the criteria which is adopted by the  
6 Tribunal", that is the five criteria which were adopted  
7 in the 1978 proceeding, not in the 1979 proceeding.

8 And then it goes on to state, "It will set forth  
9 below, however, its claim based on a more objective measur-  
10 able standard", that more objective measurable standard  
11 which you find on page 12, in paragraph 29 is the time  
12 based formula, the same one they used in Phase II. And  
13 that resulted in a claim which CBN asked in Phase I of  
14 4.039 percent, a very precise claim, solely based on time.

15 The Phase I decision, the final determination,  
16 your opinion, indicated no reference to the Devotional  
17 Claimant's briefs, 278 footnotes discussing the parties'  
18 evidence, not one of them refers to Devotional Claimants'  
19 briefs.

20 The second page of your discussion, nowhere does  
21 it discuss the Devotional Claimants' brief. Your decision  
22 on the program -- the syndicated programs category, no-  
23 where does it discuss Devotional Claimants' contention.

24 It is apparent why there was no discussion, it  
25 was a time-based award, it did not adress -- it specifically

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1 did not address the criteria you had established. There  
2 was no reason for you to discuss it. It had no value in  
3 the result of the 70 percent that you gave the syndicated  
4 program category, and therefore, it was of no use in your  
5 decision, -- in our award.

6 The proper determination, I think, on the remand  
7 is for you to indicate clearly that the Phase I decision  
8 was based on the evidence that the program suppliers pre-  
9 sented, and not on any evidence of the Devotional Claimants.  
10 It was simply the way you had previously categorized the  
11 syndicated program category, that you followed in the  
12 summary notice -- remember, that is the only place it  
13 appears, is in the summary notice. It doesn't appear in  
14 the final determination.

15 And, therefore, you gave no award in Phase I and  
16 you were consistent, you gave no award in Phase II.

17 Now, going beyond the question of whether you are  
18 required to give an award, and whether you were consistent,  
19 the Court set out a positive standard of reasonableness  
20 for non-awards, and I am paraphrasing from page 16 of the  
21 circuit opinion.

22 The claimants retransmitted works are of such  
23 negligible marketplace value and/or of such negligible  
24 benefit to cable operators that no award is reasonable.

25 It is clear, in our view, that the record evidence

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1 shows that this standard has been satisfied, and no award  
2 is required to be given to the Devotional Claimants.

3 In this respect we think it is very important that  
4 the Tribunal look to the entire record established in this  
5 proceeding. We, as the settling parties, have tried very  
6 hard in our two briefs on the supplemental, to get back to  
7 the balance of that record, to show you in our opening  
8 brief, where we felt cross-examination in particular  
9 established that, the weakness of the Devotional Claimants'  
10 position. And in our second brief, some of the positive  
11 evidence that the MPAA has presented in Phase II and some  
12 of the other evidence in Phase I, in particular with KXTX,  
13 that also showed the weakness of the Devotional Claimants'  
14 position.

15 We think that the Court was faced with a more  
16 one-sided presentation than is appropriate from looking  
17 at the entire record, and that you must look, not only at  
18 the evidence that supports the Devotional Claimants'  
19 position, but the evidence that detracts from that position.

20 In our view, that evidence severely detracts  
21 from any Devotional claim, and therefore, warrants a  
22 conclusion that there is only negligible marketplace value  
23 and/or benefit of most of these programs.

24 Again, I would like to point out that the cases  
25 that you were presented with at the time, were very

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1 heavily weighted for CBN and PTL on a time basis. Again,  
2 we get very precise numbers, we have set them out in the  
3 opening brief. They are to the hundreds of percent point.

4 Old Time Gospel Hour's position was based upon  
5 conversation between the counsel and one of the witnesses,  
6 we attempted to cross-examine on that, and found that there  
7 was virtually nothing there to support this claimed value.

8 We believe that any analysis must begin with the  
9 fundamental distinction that the way that the Devotional  
10 Claimants get on the air is by purchasing time and that  
11 no other party is in that same position. This fundamental  
12 distinction, in our view, indicates a lack of marketplace  
13 value. And, also, it indicates and supports your finding  
14 that there is a possible negative harm that is of benefit  
15 from distant carriage.

16 Despite the claims of no contrary evidence,  
17 we think that the record did establish that -- maybe not  
18 the only way, but certainly in the vast, vast majority  
19 of cases, the only for these programs to be aired is by  
20 paying for the time to get on the stations. We have cited  
21 that evidence in our briefs, the citations are fairly  
22 complete.

23 Even though the Devotionals are willing to  
24 purchase time, they are relegated on most stations to  
25 the poorest time slots, that is before 8:00 a.m. and after

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1 11:00 p.m., on Sunday mornings. I don't think, contrary  
2 to Mr. Harrington, and maybe he can point it out to me,  
3 that the preponderance of the evidence shows that they are  
4 in the better time slots.

5 I have just looked at a few of the stations, one  
6 station that comes to mind is WOR, where the devotional  
7 program, PTL Club, is carried -- was carried in 1979 at  
8 7:30 in the morning.

9 The number of stations has been touted as a  
10 reason -- the number of instances of carriage of stations  
11 has been touted as a reason, as to why the Devotional  
12 Claimants should be given an award. But quite frankly, we  
13 find this to be totally valueless. We think that these  
14 programs are an incidental part of the programming on  
15 the station, and that the reason that the stations are  
16 carried, are reasons wholly different, separate and apart  
17 from any of the devotional programs.

18 In fact, Mr. Ditchfield, himself, testified that  
19 he knows of no cable systems that carried the stations  
20 because of the devotional programming.

21 And going back to WOR, one of the superstations,  
22 it is true, it carries PTL Club; it is true that on our  
23 exhibit on Phase II, and I forget the number, it shows  
24 that WOR is carried by 180 Form 3 cable systems.

25 What is not true is that there is any correlation

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1 between that carriage and PTL programming happening to be  
2 on WOR.

3 In fact, I think the vast majority, the overwhelm-  
4 ing weight, a substantial amount of record evidence, how-  
5 ever you want to term it, from both Phase I and Phase II  
6 indicates that the reason for WOR's carriage are a multitude  
7 of other reasons, having nothing to do with the devotional  
8 programming.

9 He also presented evidence that cable systems are  
10 also inundated with by the devotional programming of  
11 various types trying to get on the system, through access  
12 channels, through the satellite coverage, through various  
13 means. There is no indication that the cable systems are  
14 particularly interested in this programming.

15 There is some testimony in the record that the  
16 CBN carriage of its satellite network since it was avail-  
17 able for free, and there was some question about who paid  
18 for the dish, the satellite did coming down -- there is  
19 some question as to whether those were reasons for it to  
20 be carried, rather than any interest in the programming.

21 One thing that the Court was particularly concerned  
22 about was whether the decision to avoid commercial  
23 messages simply is a program format decision by the  
24 Devotional Claimants, and it basically has nothing to do  
25 with the marketplace value.

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1           First of all, I think that you have to realize  
2 that if it is a formatting decision, that this takes away  
3 the claim that these arguments are variety shows, talk shows  
4 type things, because all other variety-talk shows can take  
5 commercial messages within their format, and it places it  
6 clearly within the broad category known as devotional  
7 programming, which traditionally has very little value  
8 among television station viewers.

9           We think that the weight of the evidence here is  
10 that the practicalities of having to purchase time are  
11 more -- outweigh the formatting value of this programming,  
12 and we gave some examples. For example, the sports pro-  
13 gramming, it is quite clear that in various instances  
14 where sports interests purchase time, that is clear that  
15 others, the stations themselves would want to have this  
16 programming on, if it were not purchased at the time.

17           One point that I would like to address to  
18 Commissioner Coulter was -- he asked the question concern-  
19 ing whether there was an accounting of the funds, whether  
20 the funds went directly from the viewers and were plowed  
21 back into the programs. I think that you will find that  
22 we crossed very heavily on this point and there is no  
23 segretation of funds that come in, and says, these funds  
24 come in because programming, these funds come in because  
25 of this aspect of the ministry, these funds come in because

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1 of this aspect. It is obvious that programming is paid  
2 for out of the funds received. So, somehow it is channeled,  
3 but there is no indication that the money comes in necessar-  
4 ily because of the programming, which we think is the  
5 important point.

6 MR. RAY: Excuse me, are there any indications  
7 in the record that monies come in to PBS because of pro-  
8 gramming, no segregation?

9 MR. LANE: Well, Commissioner Ray, in our opinion,  
10 because PBS only offers programming, it doesn't have the  
11 various other aspects of the ministry which CBN pointed  
12 out, for example, I think they talked about they have  
13 telephone centers. As Mr. Harrington pointed out this  
14 morning, they have institutions of higher learning, some  
15 of them, I believe, have missionaries, I am not quite  
16 sure which ones do and don't.

17 There is an indication that some of this value --  
18 we presented some evidence in the record, I think it was  
19 Exhibit 7, 8 and 9, about the question of whether money  
20 was being sought in return for receiving a bible and  
21 certain other information, or material from the PTL Club.

22 So, we think that -- and also, Mr. Ditchfield,  
23 himself, in speaking of this question, drew an analogy  
24 to the Jerry Lewis telethon for Muscular Dystrophy and  
25 said that -- I forget exactly how he put it, but if you

1 are in accordance with the theme behind that, you will send  
2 money in to the telethon, regardless of whether you like  
3 the programming, and he said the same is true in the CBN  
4 case.

5 So I think, from our standpoint, we say PBS just  
6 has programming, when they are asking for money, they are  
7 asking because that is all they can give you is programming.  
8 The Devotional Claimants offer other things, as well, which  
9 are an important part of the ministry and many people may  
10 feel the need to contribute, or the desire to contribute  
11 to those parts of the ministry, rather than the programming.

12 CHAIRMAN BRENNAN: Four minutes, Mr. Lane.

13 MR. LANE: I would just like to talk about the  
14 harm distinction. First of all, I think the loss of con-  
15 trol over the programming is suffered by all program  
16 suppliers, copyright owners, sports interests, everybody  
17 loses control, that is what the compulsory license is  
18 about. It is not something that is somehow especially  
19 apart of the Devotional Claimants.

20 The second thing is the harm that was discussed  
21 in the Act, and which we think is important, is the  
22 diminished value of the program in the distant market.  
23 In other words, the programs can't be sold in that market  
24 because they -- or they can be sold, but sold at a lower  
25 price, or no price at all.

1           For the Devotional Claimants, there isn't that  
2 same problem because they are purchasing time and they don't  
3 have to purchase the time, and in fact, there is a savings  
4 for them. There is no loss, they are not selling anything  
5 in that distant market, so they haven't lost something.

6           Finally, we think that we have explained in great  
7 detail in our brief why the Devotionals are dissimilar from  
8 PBS and NPR, rather than go through with that, I think I  
9 will just end by noting that in our view, they are dis-  
10 similar, and that should be taken into account.

11           CHAIRMAN BRENNAN: Thank you, Mr. Lane.

12           Mr. Harrington in his remarks called our attention  
13 to the recent action of the Court of Appeals with regard  
14 to the appeal of our 1980 determination. And suggested  
15 that perhaps the Court was trying to send us a message.

16           Would you comment on that analysis?

17           MR. LANE: Well, the Court, I think, was probably  
18 trying to send you a message and save itself a lot of work.  
19 I don't read the vacation and remand quite as stringently.  
20 I read it as saying what is the sense of us going through  
21 this appeal, as you know, the briefs were eminent, every-  
22 body was filing for an extension of time, we are going to  
23 get a whole bunch of briefs in -- we are going to decide  
24 the 1980 issue, and then you come out with your decision  
25 on the '79 issue, and all of the sudden the ballgame is

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1 changed and they have got to send it back for re-briefing.

2 I see no particular solace for the Devotional  
3 Claimants in the fact that it was a vacation, as well as  
4 a remand. I am not a great appellant procedure lawyer,  
5 and I don't know the difference, but my view is they pro-  
6 bably had to vacate it to send it back to you at this time.

7 So, I view that simply as an expedient way of  
8 trying to get both cases on track and give you a chance to  
9 have both decisions come out consistently, rather than  
10 some kind of a mix up and two appellate decisions, or  
11 going up the third time on the '79 case, when we haven't  
12 finished the '80 case.

13 CHAIRMAN BRENNAN: Which leads into this excerpt  
14 from the CBN reply brief. I would like to have your comments  
15 on this, on page.

16 "The course charted by the settling parties will  
17 cast this Tribunal adrift, yet again on uncharted and  
18 dangerous seas, lead to endless litigation which will  
19 further delay final resolution of this proceeding, and  
20 doubtless result in yet another reversal and remand to  
21 provide fair and even-handed treatment to claimants to the  
22 CBN", end of quote.

23 Would you comment on that?

24 MR. LANE: Yes, I think that is a very interesting  
25 sentence. Obviously, Mr. Harrington alluded this morning

1 to their intention to take it to the Supreme Court, if  
2 necessary, and I assume that is what the endless litigation  
3 refers to here.

4 I think the important point, and obviously there  
5 is nothing we can do to stop that, we would be simply  
6 intervenors in such a case -- the important point is that  
7 first of all, we don't think this was a reversal, it was  
8 a remand, but not a reveral. So, we don't think there will  
9 be yet another reversal.

10 Second, we don't believe that you should give  
11 anything, other than fair and even-handed treatment to  
12 claimants, such as CBN, to any claimants. But we think  
13 that the weight of the record evidence, and viewing it  
14 even-handedly, on our part, shows that there is simply  
15 no marketplace value.

16 CHAIRMAN BRENNAN: Do you think Judge Mikva is  
17 encouraging us to make token payments to each claimant?

18 MR. LANE: No, I think Judge Mikva, in fact, goes  
19 out of his way to indicate quite clearly that you don't  
20 have to do that, they don't expect you to make token  
21 payments. That they have left the door open for you to  
22 give people non-awards. He has established a standard  
23 of negligible -- in other words, the standard is not  
24 simply that there is no benefit, you know, you might find  
25 some negligible benefit someplace, you might find some

1 negligible marketplace value, but that still could lead  
2 to the conclusion that no award should be given.

3           So, I would reject the notion, if I knew exactly  
4 where it was -- I remember since where he specifically  
5 said you should give no award, if you so desire.

6           CHAIRMAN BRENNAN: Thank you.

7           Commissioner Coulter.

8           COMMISSIONER COULTER: Mr. Lane, in your view, is  
9 there a different character to the Court's remand as it  
10 relates to the marketplace-benefit issue, as opposed to the  
11 harm issue?

12           What I mean by that is -- to me, in some sense  
13 it strikes me that with marketplace and benefit we are  
14 being remanded upon, I believe the term that has been used  
15 on various occasions -- we are being remanded for inart-  
16 ful expression. And with the harm issue there is more of  
17 an issue of law. Could you address that, please?

18           MR. LANE: Well, I don't see that it is an issue  
19 of law, I think that when you read -- I am looking at page  
20 30, when you read on page 30 which discussed the harm,  
21 that it is closely related to the facts of the case, and  
22 they cite various portions of the final determination  
23 indicating evidentiary positions. So, that suggests to  
24 me that it is not a matter of law, the distinction that  
25 Mr. Harrington was making this morning with loss of control,

1 as being the harm suffered by all of us, I think is true.  
2 All of us suffer the harm, that is the only reason for the  
3 compulsory license, we have lost control, we can't do  
4 anything. We have to let cable systems, as long as they  
5 pay the compulsory license fee, we have to let them take  
6 our programming.

7 The difference that I see is that if you put that  
8 harm aside, the harm that was talked about in that, that  
9 gives rise to a payment, and therefore the reason that  
10 we are entitled to an award -- and this is discussed at  
11 page 90 of the House report -- is the harm in the loss  
12 of the value to us, lower prices, or no price at all in  
13 distant markets because the same program is being imported  
14 into that market. And that harm simply isn't present in  
15 the Devotional Claimants.

16 If they are purchasing time, they are not losing  
17 the sale. The San Diego situation, I believe, brought up  
18 where they specifically decided they were not going to  
19 purchase the San Diego market, because I have the L.A.  
20 station coming in on distant signal, this indicates quite  
21 clearly that that kind of -- the harm that other copy-  
22 right owners would suffer by not being able to sell in  
23 the San Diego market, or selling at a lower price and  
24 therefore receiving less revenues is precisely the payment  
25 to which we are entitled to under the Act.

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1           COMMISSIONER COULTER: I know the general issues,  
2 what I meant more specifically was our statement and our  
3 opinion that harm suffered by satellite network is not a  
4 harm for which the Tribunal can provide compensation under  
5 Section 111, and in your brief your agreement with the  
6 Court's opinion that that isn't true, that it does fall  
7 under Section 111, but then your subsequent statement that  
8 no showing has been made -- to me, there is a different  
9 character to that judgment, than there is to the argument  
10 of inartful expression, or inadequate explanation.

11           MR. LANE: I see what you are saying, Commissioner  
12 Coulter. The question of the satellite carriage, I think  
13 the Court divided the issue into two and said, look, for  
14 satellite carriage, you are not going to get an award,  
15 forget about it; but if you can show that -- the showing --  
16 I don't know quite how to construct it -- if you can show  
17 that having the satellite carriage available would make  
18 your programming in prime time, in the prime time would  
19 lead to greater revenues, then you receive by having your  
20 programs on at different times, if you can show all of  
21 those things, you might be entitled to an award. But  
22 I would point out the Court's last sentence in the para-  
23 graph on page 32, "Although it appears to us that proving  
24 such an attenuated loss would be extremely difficult,  
25 competent evidence of such harm would not be beyond the

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1 power of the Tribunal to evaluate", suggests to me that  
2 yes, there is a theory there, and perhaps if you get all  
3 of the evidence in, and you can show something, you can  
4 do that.

5 I would just like to take it over to one thing  
6 that you discussed in regard to the program suppliers,  
7 and I don't recall if it was the '79 case, or the '80  
8 case. But we had made a showing, we felt that there was  
9 a loss of audience and the loss of audience showed harm.  
10 And you, in your decision, indicated that there had to be  
11 a benchmark and that once we established what the bench-  
12 mark was, say pre-cable audience in the local market, and  
13 we showed a drop in the audience level, that would be the  
14 "harm".

15 COMMISSIONER COULTER: Are you referring to the  
16 rate adjustment case? I don't think you are referring to  
17 a distribution case, are you?

18 MR. LANE: No, I think it was a distribution case.  
19 I am pretty sure it was NAB, who indicated that was the  
20 proper measure.

21 But I think it is the same type of analogy, they  
22 would have to show that, first of all, they could get more  
23 money in prime time, which I think would be hard for them  
24 to establish, that's my own opinion. Second, that if when  
25 they were on prime time, they did get more money, and,

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1 third, that that money was greater than the money they were  
2 getting from being on the very poor time slot. If they  
3 could show all of those things, you could take that into  
4 consideration, and that might have some effect on your  
5 decision.

6 I don't think that would require you to give an  
7 award. In fact, I think the fact that they say it is an  
8 attenuated harm, suggests to me that even if you found all  
9 of those things, it might be negligible.

10 COMMISSIONER COULTER: Thank you.

11 CHAIRMAN BRENNAN: Mr. Harrington.

12 MR. BECHTEL: Excuse me, may it please the Tribunal,  
13 Mr. Harrington in his remarks this morning raised one new  
14 item about hundreds of cable systems trying to get the FCC  
15 to keep public television off.

16 May I have 20 seconds to respond to that?

17 CHAIRMAN BRENNAN: And add an additional minute  
18 to Mr. Harrington.

19 MR. HARRINGTON: Thank you.

20 MR. BECHTEL: That is not in the record, and we  
21 try to keep track of those things. I think Mr. Harrington  
22 was exaggerating, but if there is such evidence, I am sure  
23 it will be forth coming at a future hearing.

24 However, I would call to your attention something  
25 that is in the record, and that is to say distant signals,

1 which is what we are dealing with, are carried voluntarily  
2 by cable systems and are not by any FCC requirement.

3 In the year 1979, 10 percent of the distant cable  
4 inventory of cable systems in this country was voluntarily  
5 devoted to public television signals, none was voluntarily  
6 devoted to religious.

7 CHAIRMAN BRENNAN: Mr. Harrington.

8 MR. HARRINGTON: I don't quite know where to start.  
9 When I attempted to raise an objection, I was told no fair  
10 ganging up on single counsel, but I will proceed.

11 One thing has very much troubled us, in the opening  
12 brief; or reply brief of the settling parties, we think  
13 there are a number of claims which are wholly unsupported  
14 by record evidence. And I will point one out to you, just  
15 to make an oral argument, that is the statement that CBN  
16 somehow encourages cable systems to carry its satellite  
17 network by giving away earth stations.

18 There is nothing in the record to support that  
19 whatsoever. In fact, it is absolutely false. I can make  
20 a personal statement, because I work with the satellite  
21 program very closely -- they have never given away a dish  
22 to a cable system, ever.

23 Commissioner Coulter, you wondered whether the  
24 Court of Appeals' decision reflects simply a concern about  
25 unartful expression. I don't know how to say this politely,

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1 but the Court has never reversed you todate on the grounds  
2 of unartful expression. It has expressed its real concern  
3 about some of the decisions that have been written and the  
4 way they have been written, but in each case they have  
5 upheld you.

6 Here they reversed you and I think they did it for  
7 a very good reason. As a matter of fact, I don't recall if  
8 you were present, but had you been at the oral arguments  
9 on the '79 appeal, you would have seen from Judge Wilkie's  
10 examination of the Justice Department's attorney who was  
11 appearing on your behalf, that there are some very real  
12 concerns here about the substantive treatment of the  
13 Devotional Claimants.

14 Once again, we heard from the settling parties  
15 about the so-called fundamental distinction, the very  
16 fundamental distinction that the Court found takes on the  
17 texture of quick silver and was totally unsupported in the  
18 record.

19 You know, what they have asked you to do is  
20 play the ostrich, stick your head in the sand and ignore  
21 what the Court has told you. That won't suffice, you are  
22 going to get reversed if you go up with the same old story.  
23 That is the exact reasoning that was given you -- given to  
24 the Court by the Justice Department.

25 Now, let me tell you, we have heard Mr. Lane

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1 say somehow it was a one-sided presentation to the Court  
2 about the evidence. That is not true. Read the brief that  
3 was filed on your behalf. The Justice Department went  
4 through and tried to pick snippets from the record here and  
5 there to support their claim that there was no benefit, no  
6 harm, no marketplace value. The Court rejected those.

7 We have heard from Mr. Lane that there is no  
8 evidence that the money that is given to CBN or PTL, or  
9 to Old Time is based on their programming at all, but some-  
10 how it is based because they give away bibles, or something,  
11 when we have telethons.

12 Now, come on, Mr. Lane, the fact is that we have  
13 seen PBS telethons, we know that they give away lawn  
14 furniture and umbrellas and all sorts of things to encourage  
15 people to give -- and, yes, occasionally devotional program-  
16 mers give out bibles, I guess. But that doesn't mean that  
17 people don't know what they are supporting.

18 And the fact is that millions of Americans support  
19 religious programming because of the quality of the pro-  
20 gramming. CBN does not have missionaries, contrary to  
21 what Mr. Lane says, and perhaps he can cite in the record  
22 where it says that we do, or any of the other devotional  
23 programmers do.

24 The fact is the people know us for our programming,  
25 and we are not in a separate business of running churches,

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1 we are in the business of providing programming.

2 Mr. Lane claims that the Act, the Copyright Act  
3 talks about harm. I ask Mr. Lane to show me one word in  
4 the Copyright Act in Section 111 that talks about harm, it  
5 doesn't mention it once. It doesn't mention it in 106,  
6 where it sets the compulsory -- where it sets the rights  
7 of copyright holders, it is just not there.

T2/S1

8 He also said the Court's decision in 1980 didn't  
9 mean very much, the '80 appeal. I must strongly disagree.  
10 If the Court merely wanted to remand, the way they would  
11 have done so, was to say "We have before us the Tribunal's  
12 request for remand, we hereby grant it, and remand the  
13 case, too". "We also have before us the motion for summary  
14 reversal of the Devotional Claimants, that is moot because  
15 of our remand, therefore, we are going to dismiss that  
16 motion", that didn't happen either.

17 They said "We have before us both the motion for  
18 remand and the motion for summary reversal" and they vacated  
19 and remanded -- and vacated means something, it means your  
20 decision is nil, it does not exist. The entire decision  
21 is gone, and the reason they did that was to give you the  
22 opportunity to start with a clean, fresh cloth.

23 There is one other thing, since the settling  
24 parties have not seen fit to constrain themselves to the  
25 1979 record evidence, one point I just couldn't avoid

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1 mentioning, it is in Today's Broadcasting Magazine, it  
2 says, and I quote, "Christian Broadcasting Network's January  
3 prime time syndicated information-entertainment special,  
4 "Don't Ask Me, Ask God" pulled 10.5 Nielsen rating. This  
5 translates into some 16 million viewers, says CBN spokesman,  
6 based on Nielsen's report for 1983 syndicated specials,  
7 the show would have ranked eighth among all syndicated  
8 prime time specials, the spokesman said".

9           If there is no benefit, if there is no marketplace  
10 value, if it is only being carried because we have to pay  
11 for it, where do the 16 million viewers come from?

12           Thank you.

13           CHAIRMAN BRENNAN: Thank you, Mr. Harrington.

14           COMMISSIONER COULTER: Mr. Harrington, just a  
15 point that I neglected to ask you about earlier. And this  
16 concerns my probing as to whether or not a distinction does  
17 indeed, exist between you and PBS, because of the fact that  
18 they are continuous signal and your programs generally  
19 aren't, devotional people's aren't.

20           You raised the DSE ratings, and I just wanted to  
21 make a point, we very clearly, in 1978, disassociated any  
22 relationship between the pay-in and the pay-out. It was  
23 a proposal made by MPAA at the time, and I just want you to  
24 answer my question again in recognition of the fact that --

25           MR. HARRINGTON: I am well aware of your treatment

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1 of the fee generation method. Which in my own personal  
2 view, was the biggest mistake this Tribunal has ever made,  
3 because it has been a very easy formula to handle, and we  
4 wouldn't have been sitting here today arguing about these  
5 things, and we wouldn't be spending millions of dollars in  
6 litigation, but that is water over the dam, and I recognize  
7 that.

8 The fact is, however, that PBS, as far as I am  
9 concerned -- that is not a real distinction that makes a  
10 difference, the fact that PBS is carried in the large  
11 blocks and devotional somewhat less. The fact is, most  
12 PBS stations are not on a full broadcast day.

13 COMMISSIONER COULTER: No, no, Mr. Harrington,  
14 let me interrupt you here. The point is a cable operator  
15 picks up the whole signal when he picks up PBS, and therefore,  
16 picks it distinctly for that purpose. Whereas with  
17 devotional programming, they pick up a signal, of which  
18 devotional programming is only one and a relatively small  
19 part. That is the point I am trying to make.

20 Now, will you acknowledge that distinction?

21 MR. HARRINGTON: I acknowledge what you are  
22 saying is a distinction, I am saying that distinction does  
23 not make a difference.

24 I mean, I just don't see the distinction there,  
25 to be honest with you, sir, because the fact is that we

1 have put in evidence about stations that carry nothing  
2 but religious programming and are carried on a distant  
3 signal basis. That is a 100 percent correlation, isn't  
4 it?

5 We have also talked about major stations that  
6 have substantial, 30 percent, religious programming, that  
7 is a pretty substantial correlation, too. And the claim  
8 by the settling parties, that KXTX is carried for sports  
9 is the most ridiculous thing I have ever heard. The fact  
10 is 33-1/3 percent of its prime time, year-in, year-out  
11 is religious, it is not sports. And the sports has nothing  
12 to do with its significant carriage.

13 Thank you.

14 CHAIRMAN BRENNAN: Thank you, Mr. Harrington.

15 Just to keep the record clear as to Mr. Bechtel's  
16 intervention, the Tribunal has always, in oral argument,  
17 allowed time-sharing among counsel.

18 MR. BECHTEL: I thought that would have been  
19 notified in advance, Mr. Chairman.

20 CHAIRMAN BRENNAN: The Chairman was notified and  
21 that meets the Tribunal's requirements.

22 MR. BECHTEL: If it please the Court, I was  
23 responding to something which Mr. Harrington did not put  
24 in his brief, which was outside the record, and which he  
25 raised in his oral argument this morning.

1           CHAIRMAN BRENNAN: This concludes the oral argu-  
2 ment on the devotional issue. We will take a recess.

3           (Whereupon, a short recess was taken.)

4           CHAIRMAN BRENNAN: We will turn now to the oral  
5 argument on the commercial radio media issue.

6           Mr. Stewart.

7           MR. STEWART: Good morning, my name is John Stewart,  
8 and I am here representing the National Association of  
9 Broadcasters. I would like to reserve five-minutes of my  
10 time for rebuttal.

11           The issue before us here is how to split up this  
12 award of royalty for radio carriage, and I would like to  
13 start, if I could with a point of reference, a common  
14 experience.

15           If I was to ask each of you what you watched on  
16 television yesterday, or last night, you would give me  
17 an answer something like, "Well, I watched the Superman  
18 picture", or "I watched the news when I got home" -- I  
19 don't know if the Olympics was still on last night because  
20 I was busy, but you might have told me that you were watch-  
21 ing the Olympics. You would have named the program that  
22 you watched, you wouldn't, just as Mr. Valenti testified  
23 in this '79 hearing, you wouldn't have said, "Well, I have  
24 to go home and watch WRC tonight", because you think about  
25 programs --

1           CHAIRMAN BRENNAN: I was preparing for this oral  
2 argument, Mr. Stewart, I watched the Comedy of Errors.

3           (Laughter.)

4           MR. STEWART: Let me know when you start recogniz-  
5 ing something.

6           If I were to ask you the same question about radio,  
7 what did you listen to on the radio yesterday, or last  
8 night, or the day before, you would give me a different  
9 kind of answer. You would say, "I listened to WASH, or I  
10 listened to WGMS, or WAMU", or whatever your favorite  
11 radio stations might be. There could be exceptions to  
12 that, you might say -- Chairman Brennan might well say,  
13 "Well, I listened to a particular opera over the weekend"  
14 or you might say, "I listened to the Ken Beatrice Show,  
15 the sports show that I like", or "I listened to the Paul  
16 Anthony jazz program on Saturday night on WGMS".

17           But, by and large, you would talk about your  
18 favorite radio station, you wouldn't remember specific  
19 pieces of music that you heard, by and large, and that  
20 is true for all people, that is just a common experience.

21           And this difference between the way people use  
22 television and the way people use radio is at the core of  
23 the issue that we have before us here today. What you look  
24 at and the way people use radio is that they use the blend  
25 of music and everything else that represents the station,

1 not the specific program materials, not the copyrighted  
2 individual musical selections.

3 Now, broadcasters would be the last to say that  
4 music is of no importance to them. For radio stations that  
5 run music -- there are, of course, talk, and all news  
6 format and discussion radio stations -- but to radio  
7 stations that run music, music is every important, and there  
8 is no question about that.

9 In your 1980 decision which the music claimants  
10 have urged on you, and in this proceeding, also, you said  
11 that what the broadcaster does, the formatting efforts he  
12 makes, are of no value, independent of the music.

13 Now, I read that very carefully, in a sense it is  
14 true, it is absolutely true. There is this conundrum that  
15 we discussed in our brief, there is kind of a necessary  
16 but insufficient aspect to this. On the one hand the  
17 radio station who puts all of this effort into formatting  
18 and producing its own programs, its news, everything else  
19 that goes into the station, who didn't have any music and  
20 it was a music station, would -- it is kind of hard to  
21 conceive what that would be.

22 But on the other side of the coin is the same,  
23 in reverse, a collection of music without the value that  
24 the broadcaster has in producing a radio station, also  
25 would not be worth very much. In fact, what it would be

1 would be a jukebox, or the stack of records that you have  
2 at home, next to your stereo.

3 You pick your own music and you listen to it, but  
4 you would be missing everything else that the broadcaster  
5 adds, and it is all that extra, how the broadcaster takes  
6 music and turns it into a station, that the broadcasters  
7 are claiming here.

8 Now, I think it is noteworthy that all the other  
9 claimants in this proceeding, in the 1979 -- in the course  
10 of the proceeding in 1979, urged on you that if you were  
11 going to give money for commercial radio carriage at all,  
12 you give some money to the broadcasters for their con-  
13 tribution.

14 The music claimants suggested that NAB repre-  
15 sented stations receive .5 percent of the total award  
16 representing their contribution to the value of the radio  
17 station. NPR suggested that we get 1.8 percent. Even we  
18 only claimed 1.7 percent for the broadcasters' contribution  
19 to commercial radio.

20 COMMISSIONER COULTER: But didn't music misread  
21 the Copyright Act, didn't they assume that we were required  
22 to make some award to the commercial radio?

23 MR. STEWART: I don't recall that as being the  
24 basis for their argument that NAB should receive .5.

25 COMMISSIONER COULTER: To make some award?

1           MR. STEWART: That's right. Once they got over  
2 the threshold, if they said you have to give some money for  
3 commercial radio, they could have taken the position that  
4 they have now shifted to, that broadcasters should get no  
5 part of that. But they didn't, they looked at the evidence  
6 and they said that broadcasters should get a share for what  
7 they provide of the value of a commercial radio station.

8           To be sure, they gave us a smaller percentage than  
9 we asked for ourselves, and they had some reasons for  
10 allocating that share among the different claimants, broad-  
11 casters and music licensing societies, but they did say  
12 we should get a share, and they have now shifted.

13           The position that music takes now is hard to  
14 understand, and I urge you to think about this in a way --  
15 it is difficult to think about what a radio station without  
16 formatting is. I have suggested it is like a jukebox, and  
17 it is hard to analogize that as you are driving down the  
18 street, or sitting at home, you listen to a jukebox, instead  
19 of the radio. But there is a tremendous difference between  
20 those two, in terms of the values that the listener receives  
21 and in the context of this proceeding, the value that the  
22 cable subscriber and the cable operator receives.

23           It is the difference, the added value that the  
24 broadcasters are responsible for and they are the copy-  
25 righters of, and it is that value that we are seeking

1 royalties for.

2 In your decision --

3 COMMISSIONER COULTER: Excuse me, could you say  
4 that again? I don't understand the difference.

5 MR. STEWART: Well, the collection of music, the  
6 collection of records that a broadcast station might play,  
7 in which the music claimants on the copyright is worth  
8 something, but it is not worth 100 percent of the value  
9 of a radio station. If it were -- if all that a radio  
10 station was, was a jukebox, where you selected your own  
11 music, then I would agree with you, that 100 percent of  
12 the value of that radio station goes to the music claimants,  
13 because they own the copyrights to the music.

14 The broadcasters own the copyright in the programs  
15 that they produce and in the format, the music sequencing  
16 and so on. And it is the difference between the jukebox  
17 and a radio station that represents the value that we are  
18 talking about here.

19 COMMISSIONER COULTER: Thank you.

20 MR. STEWART: If you can conceptualize it that  
21 way.

22 COMMISSIONER COULTER: Sure.

23 MR. STEWART: Now, the Court said in its decision  
24 that it doesn't make sense, it is inconsistent for you,

25 on the one hand to say NAB gets nothing because we

1 find that they have not proved that there is a value at  
2 all in commercial radio carriage by cable operators, which  
3 is all you said in that section of your decision.

4 And on the other hand, you say that you have  
5 included some award to the music claimants for their  
6 copyrighted works on commercial radio, because it didn't  
7 make sense to say it wasn't worth anything, and then to  
8 give some royalties to the music claimants.

9 Now, we are back before you and the question is  
10 -- and we apparently agree with you on this issue, we,  
11 the music claimants, there is value to commercial radio.  
12 There is support in the record for holding that there  
13 is value for commercial radio. The question is how we  
14 split it up.

15 And I would suggest to you that there is no  
16 basis in the record for saying that the broadcasters'  
17 contribution to commercial radio station carriage is worth  
18 zero. All the record evidence, in fact, supports the  
19 conclusion that it is of substantial value.

20 The music claimants in their briefs have focused  
21 on what they call contrary evidence, and what they say  
22 was a recanting by Mr. Abrams, the NAB's witness, about  
23 what was really most important. I won't go back through  
24 all of our briefs, but that really is a misleading  
25 statement.

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1           What Mr. Abrams said was not that the broadcasters'  
2 contributions were worth nothing, or even that they were  
3 less than 50 percent of the value of the radio station.  
4 He only said that the music was the most single important  
5 element. And I agree with that, and radio broadcasters  
6 agree with that, it is very important. But is certainly  
7 is not 100 percent of the value of a radio station, or  
8 why are radio stations in business?

9           Why don't we just have jukeboxes?

10           Now, the next question you have to reach is  
11 quantification, how you divide it up. And there are two  
12 parts to that, the first part is how much did you award  
13 for commercial radio, the second part is how you divide  
14 that up, whatever it is, between the broadcasters on the  
15 one hand, and the music claimants, or the music licensing  
16 societies on the other?

17           COMMISSIONER COULTER: How do we know how much  
18 we gave commercial radio?

19           MR. STEWART: I have some suggestions.

20           CHAIRMAN BRENNAN: I would be glad to hear  
21 them.

22           MR. STEWART: First of all, you could look at  
23 the proposed findings of music, and in its proposed find-  
24 ings it suggests the following numbers; 2.5 percent of the  
25 music royalties be attributable -- that it be awarded 2.5

1 percent of the royalties for its radio music; and second,  
2 that it be awarded 6.5 percent of the royalties for its  
3 television music. You just add those together, it is 9  
4 percent proposed worth. In music's mind at the time, its  
5 radio music was responsible for 2.5 out of the 9 or 28  
6 percent of its royalties.

7 That would mean that if you take that same 28  
8 percent and apply it to the 4.25 award, that music received  
9 1.25 percent of the royalties attributable to radio music.  
10 That would be based on what music itself proposed. You  
11 didn't give them 9 percent, and I don't know, but I assume  
12 that the ratio of the music claimants internal distribution  
13 is based on it proposes to the Tribunal, that is when it  
14 got its 4.25 and had to decide how much it was going to  
15 send to radio and how much it was going to send to tele-  
16 vision, it followed the same approach that it proposed to  
17 the Tribunal, as to the allocation.

18 A second way of looking at it is the approach that  
19 we took in our brief to the Court of Appeals, which was  
20 that the cost evidence on which the music claimants rely,  
21 programming cost evidence, when you fix it so that it had  
22 the appropriate denominator, because music originally  
23 proposed that you only look at some of the categories and  
24 not all of them -- when you fixed it so it took account of  
25 all of the categories, it represented 3.7 percent of all

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1 programming costs, for television programming costs.

2 If you just subtract from the 4.25 award, 3.7, you  
3 get our number of .55 percent for radio. Now, that was  
4 an attempt by us to work backwards from the evidence that  
5 we saw and the evidence that you cited in your opinion,  
6 and the 3.7 number is the one that you used.

7 Now, also as a gauge for judging the reasonable-  
8 ness of this number, you can look at NPR's award, which  
9 was .25. The evidence showed in the 1979 proceeding that  
10 there were 30 times as many distant commercial FM signals  
11 as there were distant NPR signals, three times as many.

12 Now, you took an approach, and the Court approved  
13 your approach of talking about the distinct nature of  
14 NPR programming and so on.

15 But I would suggest if you take the 1.25 number,  
16 for example, which is five times the NPR award, that it  
17 compares with record evidence that shows there were 30  
18 times as many commercial signals, and that gives you a  
19 good gauge to suggest that the 1.25 is appropriate.

20 Now, the next question, how much of that award,  
21 however much it is, goes to broadcasters?

22 The record evidence is, I think, unusual in  
23 Tribunal history in some respects -- I haven't really  
24 looked to see if there is anything at all like this, but  
25 here you have an expert witness who was able -- this issue

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1 presents one of those cases where there aren't any nice  
2 numbers for the Tribunal, because the two elements are so  
3 inter-meshed that you can't separate them out, you can't  
4 say how much listening was there to the format, versus the  
5 music, or anything like that.

6 COMMISSIONER COULTER: We can't split the differ-  
7 ence?

8 MR. STEWART: Well, you don't need to split the  
9 difference, because here you have something better than  
10 that which is Lee Abrams expert opinion, based on his  
11 years of experience and success about what relevant weights  
12 the different elements of a radio station signal were.  
13 And he went through, and they were 30 percent for the songs,  
14 20 percent for the artists, 20 percent to music sequence  
15 and 20 percent to disc jockey presentation, 5 percent to  
16 the news and other programming decisions of the station,  
17 and 5 percent to what he called image enhancers.

18 That provides a basis to allocate the commercial  
19 radio award between the broadcasters and music licensees  
20 of 30 percent of that award to the music licensing societies,  
21 because only 30 percent of the value of the station signal  
22 is attributable to the songs themselves.

23 Even taking the adjustment to exclude the artists,  
24 and there is a question about whether or not that is  
25 appropriate because the broadcaster not only decides which

1 rendition, which artists' rendition of the song is going  
2 to be more likely to fix in his station's sound, but he  
3 also uses the artist and interviews with him, and all those  
4 kinds of things. So, it is questionable on the record  
5 whether you should just take that out, but even if you  
6 were to just take that out, take out the artist, so what  
7 would be left would be only 80 percent of which 30 percent  
8 for the music, the songs themselves and the other 50 for  
9 the copyrighters contribution, and then that 5/8 ratio  
10 would be 62 percent of the commercial radio went to  
11 broadcasters, and the remainder for the music licensing  
12 societies.

13 That what those records support for, and it seems  
14 to me that is a quantification that will stand further  
15 review.

16 It is as simple as that. I have no further  
17 direct argument.

18 COMMISSIONER COULTER: What was the total value  
19 for commercial radio that you suggested?

20 MR. STEWART: Well, there were two possibilities,  
21 one was 1.25 out of the 4.25.

22 COMMISSIONER COULTER: And so you would make it  
23 approximately one-fourth of the value of the total value  
24 of the broadcasters, and one-third of the value for tele-  
25 vision broadcasters?

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1 MR. STEWART: One-third of the value for music  
2 on television programming, three-quarters of the music  
3 award would represent music on television programs and 28  
4 percent for radio. That was something that came out of the  
5 music licensing societies own proposed findings.

6 CHAIRMAN BRENNAN: Mr. Duncan?

7 MR. DUNCAN: May it please the Tribunal, my name  
8 is Charles Duncan, and with me is Joel Winnik, local counsel  
9 for BMI; also, Mr. Edward Chapin, who is counsel for BMI,  
10 and Mr. Fred Koenigberg, who represents ASCAP.

11 With the Tribunal's permission, I would like to  
12 make a brief opening statement and yield the balance of  
13 the time to Mr. Koenigsberg.

14 Mr. Stewart seemed to suggest to the Tribunal  
15 that we are here today to split the radio award in some  
16 way, and that is not the way I read the Court of Appeals'  
17 opinion. The question is whether or not the zero award to  
18 NAB is justified. And we take the position that it was  
19 fully justified.

20 The Court did not say that the Tribunal was wrong,  
21 and we do not think it was wrong in making the zero award  
22 to NAB. The Court said merely that we need a better  
23 explanation of why that was done.

24 If I may read briefly from the Court's opinion,  
25 page 45, "Although it may well be that the Tribunal can

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1 adequately explain its different treatment of music,  
2 and commercial broadcasting radio claimants. The inadequate  
3 state of its present explanation requires us to set aside  
4 the radio award to music and non-award to NAB."

5 The Court did not say that NAB should get something,  
6 it didn't even imply that. And I would suggest to you that  
7 had the Court meant to do that, it would say so.

8 The case before you this morning is not unlike the  
9 NPR remand in 1978, where the results that you originally  
10 reached can be sustained with, if I may say, appropriate  
11 decisional articulation. It seems to me that the amount of  
12 award for commercial radio was, in fact, minute, as the  
13 Chairman has pointed out, we do not know what that is.

14 Mr. Koenigsberg will argue that the overwhelming  
15 value of commercial radio is in music, and that is what  
16 justifies the award to music, and the non-award to NAB.

17 I would like to yield at this point.

18 CHAIRMAN BRENNAN: Thank you, Mr. Duncan.

19 Mr. Koenigsberg.

20 MR. KOENIGSBERG: Thank you, Mr. Chairman, good  
21 morning. Good morning, members of the Tribunal.

22 We believe that the record before you in the 1979  
23 proceeding shows that music is the key to commercial radio.  
24 No one has questioned music's right to a share, if a share  
25 is to be ordered for commercial radio. You have a great

1 deal of testimony in the record representative of the music  
2 society; Dr. Fagan who has been here many times before you  
3 on the five criteria that you have set forth to justify  
4 the claim to cable royalty.

5 And we would also suggest to you that Mr. Abrams'  
6 statements would support the conclusion that you reach,  
7 that we urge upon you, is correct.

8 Let me make just one comment about Mr. Abrams'  
9 testimony, a witness as you well know, doesn't get on the  
10 stand to advocate one party's point of view and then on  
11 cross-examination breakdown -- this happens on Perry Mason,  
12 and say, "Oh, my God, I lied, I'm sorry, the truth is  
13 such and such" -- that never happens.

14 Rather what you find are contradictions like  
15 changes of emphasis, all of which when taken together cast  
16 strong doubt upon the position that the witness has urged  
17 upon you in direct testimony, and really shows that the  
18 truth, if I may use that word, lies somewhere else.

19 And I think Mr. Lane summed that up for you this  
20 morning when he referred to the case that the devotionals  
21 put on. I think the situation is exactly the same.

22 You were correct in your conclusion, music has  
23 value, commercial broadcasters' contributions, whatever  
24 they may be, do not. And let's take a look at the record  
25 and see why that is the case.

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1           There are two aspects to their case: one, format-  
2           ting and secondly, what we call the copyrighted elements  
3           in the commercial radio broadcast. And I think the record  
4           is clear about formatting, it is just an empty shell with-  
5           out music.

6           Mr. Stewart said he didn't know what radio  
7           station format without music would be, I would say it would  
8           be nothing, nothing whatsoever.

9           And if I were to sum up what I think your findings  
10          on this fact should be, if it were well articulated, I  
11          would say it would be this, we hold that the broadcasters'  
12          format is of no significant value, independent of that  
13          attributable to music. A finding which should sound  
14          familiar to you, because that, after all, is what you  
15          found in 1980.

16          Now, the Court of Appeals -- that argument was  
17          made by your counsel to the Court of Appeals, and the Court  
18          of Appeals said that is post-hoc rationale. The Court  
19          of Appeals' problem, I think was that you didn't state  
20          that in your opinion, but rather after your opinion was  
21          written, your counsel then put that argument forth.

22          I think that rationale, in my opinion, was what  
23          you had in mind. I hope it was. We would suggest to you  
24          that that was the correct rationale to advocate.

25          Let's take a look at Mr. Abrams' statements on

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1 formatting, we are dealing here with formatting. We know  
2 that formatting is the same sort of claim as it made in  
3 television for compilation. And there I would suggest to  
4 you, again, in 1980 you recognized that fact, and that  
5 finding would equally hold true for 1979. We have citations  
6 in our briefs on that point.

7 Mr. Abrams said that music was the most important  
8 element, but he said more than that, however, you will  
9 recall that he put in an article as an exhibit. And what  
10 did he say in that article, the very first line of that  
11 article said, playing music that people want to hear has  
12 always been the idea of the radio.

13 I asked him if he agreed with that statement,  
14 he said, "I would say that is correct".

15 You have testimony from Mr. Abrams, not on our  
16 cross-examination of him, but of NPR's cross-examination  
17 when he was asked if unbroken music is appealing, and he  
18 said, "It sure is". He said, "The unbroken music --  
19 imposed the word music, that is what is being talked about  
20 -- it is appealing, is it not, to listeners?"

21 Mr. Abrams said, "Sure, especially if it was an  
22 hour of the Beatles, non-stop".

23 Interestingly, he wasn't sure if the stations  
24 owned the formats, or not -- you asked him that, Commissioner  
25 Coulter, and he didn't know the answer to that. He started

1 by saying "No, I don't think so" and then he said, "Well,  
2 I am not sure".

3 And he also said, by the way, on examination, that  
4 8 percent of the stations don't even record their broad-  
5 cast signals. So, his stations, which are presumably  
6 the really good stations, because they have his formats,  
7 and if 8 percent of them don't record their signals they  
8 can't make a claim before you, as we well know.

9 Let's talk about format duplication for a moment,  
10 there is a point that you made something of and the Court  
11 made something of. And the quotation there is Frank  
12 Mankiewicz's statement that you only have five or six  
13 formats, and they are pretty much duplicated in every  
14 market.

15 Well, I think arguing with that -- and what is  
16 the result of that statement? The result is when the  
17 cable operator would bring in the second album oriented  
18 rock station, a second station with a format of AOR, as it  
19 is called, into a market that already has an AOR format  
20 station, the logical conclusion is that the importation  
21 of the second format adds nothing by way of formatting  
22 value. But it does add something by way of value for the  
23 musical content to the cable operator, because stations  
24 don't play the same records, even stations with the same  
25 format don't play all the same records, and they don't play

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1 them at the same time, even if they do play the same  
2 selections.

3 Mr. Stewart said if you were asked what radio  
4 station you listened to last night, you might say WXYZ,  
5 but how often have you had the experience when you are  
6 listening to a station and a musical selection comes on  
7 and you don't particularly like it, what do you do? You  
8 turn to another station, probably of the same format, if  
9 that is what you are interested in, to hear music that you  
10 do like, to hear music that you do like.

11 Mr. Ferrall asked Mr. Abrams at the conclusion of  
12 his direct examination if two stations had 10,000 of the  
13 same records would they be the same, and he said, no, they  
14 play different records. That is the key, I think.

15 Now, let's turn to the copyrighted elements, the  
16 non-format elements, the other elements that the broadcast-  
17 ers own. I would suggest to you that a finding of this  
18 sort would be appropriate, we hold that to a very sub-  
19 stantial degree any value of distant commercial radio  
20 signals, as attributable to music and that the non-musical  
21 program elements of these signals is of negligible value,  
22 again, from your 1980 decision, equally applicable to the  
23 1979 record. And let's see why.

24 Let's take a look at what these elements are,  
25 traffic reports. You have record evidence, Mr. Abrams --

1 Mr. Wasluskey (phonetic) didn't think traffic was very  
2 much value to distant listeners, distant cable operators,  
3 and the logic of that is overwhelming. If you live in  
4 Oshkosh, what could it possibly concern you that there  
5 is a traffic jam in Chicago? It just makes no sense what-  
6 soever.

7 Weather reports, why does a weather report on  
8 the distant station concern you? Obviously if you are in  
9 Atlanta, the weather in Chicago means nothing to you at  
10 all. If you have an Aunt Minnie in Chicago, maybe, but  
11 even there what value is that?

12 Well, the NAB says, it is regional, regional.  
13 But the question of duplication comes right in there, why  
14 would you want a weather forecast from Chicago, when you  
15 can listen to your own radio station in Oshkosh, or wherever  
16 and know precisely what your weather is and what it is  
17 going to be.

18 Again, logic tells you that that can't be of much  
19 value.

20 Public affairs programming, as I recall in the  
21 record, there was testimony that public affairs programming  
22 is confined to the Sunday morning ghetto, by and large,  
23 and that is really of very limited value. And, again, the  
24 same arguments are being made in television, I might  
25 suggest -- what do you care about public affairs discussions

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1 of the Chicago sewer system, when you do live in Oshkosh,  
2 it doesn't mean much to you.

3 News. Is the news of value? Mr. Abrams said,  
4 when you look at the news on a station, let's take some  
5 examples -- all of the examples he gave were local news  
6 items. Chicago Rapid Transit Authority is going to increase  
7 its fares, the distant people don't particularly care  
8 about that.

9 Something else, I was reading Mr. Abrams' --  
10 re-reading Mr. Abrams' testimony last night and I noted in  
11 his direct testimony, he stressed that news is especially  
12 important, specially of value in drive time, when people  
13 commute, they like to turn their radios on in the car and  
14 get the news.

15 And unless there has been some technological  
16 breakthrough that I don't know about, I don't know how  
17 you can receive a cable re-transmission of radio in your  
18 car. You would need a long extension cord.

19 What else have we got? Disc jockey patterns.  
20 Now, testimony here I would suggest is contradictory, and  
21 it is because within Mr. Abrams' own testimony, and it  
22 is because of that contradiction that it is entitled to  
23 very little weight. On the one hand he says disc jockeys  
24 are very important to stations, and then on the other hand  
25 he cites instances where stations don't have disc jockeys,

1 and my stations all have them, because he has rock stations,  
2 but there are lots of stations that don't play rock music,  
3 that are very valuable, that are re-transmitted on a distant  
4 basis -- they don't have disc jockeys.

5 He cited cases where disc jockey intrusion into,  
6 the music flow is a negative value, you have got to avoid  
7 that, he says.

8 I would suggest to you that a finding on this  
9 point would be something like this, disc jockey time is  
10 the least attractive part of the commercial radio hour.  
11 Again, a finding that you made in 1980, equally applicable  
12 to the 1979 record.

13 Now, let's put all of this together. We start with  
14 the suggestion to you that your conclusion in 1979 was  
15 correct, as to commercial radio. Whatever value there is  
16 in it is attributable overwhelmingly to the musical con-  
17 tent.

18 And the Court, I think, refers to your fact-  
19 finding expertise, it simply says it needs a better ex-  
20 planation for that result. I think if you had given the  
21 explanation in 1979, that you gave in 1980, we wouldn't  
22 be here before you on this issue today.

23 Now, Mr. Stewart went through all sorts of higher  
24 mathematics to try and come up with some sort of  
25 quantification of the share that you attributed to

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1 commercial radio. He is correct, in one aspect we did say,  
2 in our proposed findings that we should get, I think,  
3 three-quarters and NAB get one-quarter of whatever it was  
4 you allocated, but remember, we were then suggesting to  
5 you an allocation of 3.25 percent for commercial radio.

6 I don't think we won on that one. I don't think  
7 we succeeded in convincing you that commercial radio was  
8 worth 3.25 percent, or anything remotely approximating it.

9 As much as it pains me to say it, I think that  
10 based on the 1979 record, you gave us the most minute  
11 amount in our share. And if that is correct, then the  
12 question is how thin can you slice this pie?

13 Even if the NAB is entitled to something, what it  
14 is entitled to is so small as to be unrecognizable, based  
15 on the 1979 record. And in those circumstances, as in other  
16 circumstances before you, you need not make an award to  
17 them.

18 And in answer to your question, Mr. Chairman, I  
19 don't think that Judge Mikva said you had to make a token  
20 award to anybody -- the price of a token these days in  
21 New York is 90 cents, and I don't even think you have to  
22 make that sort of award.

23 Well, if you have any questions, we would be  
24 delighted to answer them.

25 CHAIRMAN BRENNAN: Thank you, Mr. Koenigsberg.

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1 Mr. Stewart?

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2 MR. STEWART: First, with respect to what Mr.  
3 Duncan said about the Court. The Court most certainly did  
4 say that an award to NAB seemed appropriate, on page 43  
5 of its opinion it said, "The Tribunal's award to music  
6 suggests that its non-award to NAB was arbitrary", and that  
7 is exactly what we have to deal with.

8 CHAIRMAN BRENNAN: If we made no award to music,  
9 what would be the result then?

10 MR. STEWART: I think if your conclusion was as  
11 the music claimants' shifting position has now come to,  
12 that it actually got nothing for commercial radio, then  
13 you ought to say, "We hereby give nothing for commercial  
14 radio to music, and we reduce its award and distribute  
15 that pro rata to the other parties", or identify the amount  
16 that was given to the music claimants for commercial radio,  
17 and split it between us, and then those are the options  
18 that it seems to me you have before you.

19 I am concerned because I think Fred is leading  
20 you into a trap. Fred's cavalier disregard for the record  
21 here is something that is going to be a problem for you.  
22 When he says -- and let me just take some statistical  
23 examples, and we will give you these in our proposed find-  
24 ings -- he talked about empty shells. He says, for example,  
25 that the only examples that Mr. Abrams gave about news

1 were local events. That is flatly not true. In the very  
2 same couple of paragraphs where Fred and he were talking  
3 about that issue, Mr. Abrams talked about the increasing  
4 interest in news about international terrorism. He said  
5 for a rock station listener, or the station that he was  
6 talking about, it was important to have this news commentator  
7 be a "Paul Harvey-type", aggressive type. He talked in  
8 many respects -- and he mentioned another story that I  
9 don't recall off the top of my head, that was not local.

10 And when you pick out the things that Fred has  
11 picked out, traffic and weather and equate those to all of  
12 the programming that broadcasters produce, independent of  
13 their formats, then you do have a problem. But that is  
14 not what the record shows, and you can't make a conclusion  
15 based on what Fred has told you about the record.

16 Now, it is also interesting to point out that  
17 Fred proposed the award to NAB of .5, which was a one-third  
18 share of what they said commercial radio got, but without  
19 regard to formatting, because music's position at the time  
20 was that broadcasters had no copyrighting formatting --  
21 a position that is flatly wrong. It has been clarified  
22 by the Court of Appeals. So, Fred's .5 award to NAB has  
23 to be increased to represent the value of the formatting  
24 contribution, and that is something that is significant.

25 Fred says that music is the key, and I haven't

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1 argued with that. But it is very important for you not to  
2 say, well, there are two factors that contribute to the  
3 value of this, in general, two categories that effect it,  
4 music and what the broadcasters do.

5 In my view, music is more important. What does  
6 that mean? It is over 50 percent -- so I will conclude  
7 that because it is more than 50 percent in my view, that  
8 is not supported in the record -- but because it is more  
9 than 50 percent, in my view, I am going to give 100 percent  
10 to that copyright owner, and nothing to the other copy-  
11 right owner.

12 That is not the way you ought to approach this  
13 thing. You have the basis for making an allocation of  
14 the total value, and that is what you ought to do.

15 And in talking about unbroken music, here is  
16 another example of how the record has been presented to  
17 you by the music claimants, and it is the record that you  
18 are going to have to use to support your decision in this  
19 remand proceeding.

20 Fred said that Mr. Abrams had admitted something  
21 about the value of unbroken music. Let me just read to  
22 you some questions from Fred and the answers.

23 "So stations can get along without a disc jockey?"

24 "Not a rock station, generally, but some stations"

25 "Well, theoretically, a rock station could put on

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1 nothing but wall-to-wall music, and then new, and not have  
2 a disc jockey, at all?"

3 Answer: "Yes, but if there is a competitor there  
4 with a good personality, they would probably get beaten  
5 pretty badly in the race."

6 Mr. Abrams said exactly the point that we have  
7 been talking about, that what the broadcaster does, is what  
8 makes the radio station valuable to listeners. And for you  
9 to make an appropriate decision based on the record, I  
10 think you have to look at the whole record. We have pointed  
11 out some of those aspects in our reply briefs, and we will  
12 do more in the proposed findings.

13 I have no other points.

14 CHAIRMAN BRENNAN: Thank you, Mr. Stewart.

15 That concludes the oral argument. We will recess  
16 at the call of the Chair.

17 (Whereupon, the hearing was adjourned at 12:15  
18 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Cable Television Copyright Royalty  
Distribution Proceeding---1979 Remand  
Docket No. 80-4

Before: Copyright Royalty Tribunal

Date: February 21, 1984

Place: Room 538  
2033 K Street, N.W.  
Washington, D.C.

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to type-  
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*Neal R. Gross*

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