Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

ORIGINAL

In the Matter of	)	
	)	Docket No. 80-4
Distribution of	)	
Cable Royalty Fees	)	

OPPOSITION OF NATIONAL PUBLIC RADIO
TO CHRISTIAN BROADCASTING NETWORK PROPOSAL
FOR 1979 CABLE ROYALTY DISTRIBUTION PROCEDURES

National Public Radio ("NPR") opposes the suggestions of the Christian Broadcasting Network, Inc. ("CBN") that the Tribunal "consider the 1978 Notice of Final Determination as res judicata in the 1979 Proceeding" and that evidence in the 1979 proceeding be limited to that "showing changed circumstances from 1978." Such a procedure, if adopted, would be without foundation in the law and would render the entire 1979 proceeding immediately subject to reversal. As a matter of both law and policy, the CBN's suggestions should be rejected by the Tribunal.

1. In judicial proceedings, the doctrine of res judicata has no application if the subject matter of the claim is different. The requirement of strict identity of claims in the application of res judicata is explained by the Supreme Court in Commissioner v. Sunnen, 333 U.S. 591, 601-602 (1948):

> [I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable

> from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue.

Because the current proceeding before the Tribunal involves the 1979 Cable Royalty Fund, which is not the same as the 1978 Cable Royalty Fund, the 1978 determination cannot be given res judicata effect.

2. Even if the 1979 proceeding did involve identical facts, the doctrine of res judicata could not be applied to bar additional evidence because of the unique nature of the 1978 proceedings and determination. Where, as here, the prior administrative determination was based -- as it was with respect to the radio claims generally, and NPR's claim in particular -- on an alleged inadequacy of proof, that determination cannot be given res judicata effect to bar additional evidence in a later administrative proceeding. In FTC v. Raladam, 316 U.S. 149, 150-151 (1942), for example, the Supreme Court refused to bar a misleading advertising action by the Federal Trade Commission simply because a prior FTC action -- based upon the same advertising claims -- had been reversed for lack of evidence. The court held that, because the prior order was based upon "the inadequacy of the findings and proof," the prior determination was not controlling and additional evidence could be submitted to cure the evidentiary inadequacy.

3. Moreover, where, as here, the governing law is in a developmental stage, the application of res judicata is particu-

larly inappropriate. As a leading treatise on administrative law notes (2 K. Davis, Administrative Law Treatise § 18.02 (p. 566)),

> a tribunal ought not be barred from using trial-and error-methods of feeling its way into an undeveloped frontier of law and policy.

The role and responsibilities of administrative agencies like the Copyright Royalty Tribunal require that they deal with "fluid facts and shifting policies." Id. at 545. For this reason the doctrine of res judicata is not applicable to administrative proceedings in the same way as it is to judicial determinations. In Re Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) (Harlan, J.). Thus, in Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947), for example, the FCC had granted a broadcasting license and had renewed that license regularly over a period of eleven years. In the eleventh year, the FCC denied the renewal, although all the facts remained the same. On appeal, the court held that the Commission was empowered to establish a new policy or to apply a policy differently to old facts.

4. For these reasons, the type of proposal made by CBN has been rejected repeatedly in circumstances analogous to those here. In Grand View Dairy v. Jones, 157 F.2d 5 (2d Cir.), cert. denied, 329 U.S. 787 (1946), a claimant on a Producers-Settlement-Fund created by the Agricultural Marketing Agreement Act argued that because he had previously received an allowance from the agency charged with distributing the Fund, he should be granted a similar allowance in a subsequent proceeding. He

asserted that the facts concerning his eligibility had not changed and, therefore, that the prior proceeding was entitled to res judicata effect. The court rejected this claim and refused to bind the agency to its earlier determination. See also, United States v. Stone & Downer, 274 U.S. 225 (1927) (res judicata in customs controversies limited to "the identical importation").

5. If the Tribunal were to bar evidence additional to that submitted in the 1978 proceedings, it would deny NPR and the other claimants the right to present evidence with notice of the criteria announced by the Tribunal at the end of the 1978 proceedings and would freeze the administrative record as it was in the 1978 proceeding. Such a decision would be a clear denial of due process.

For the above-stated reasons, NPR opposes the request of CBN.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jamie S. Gorelick, certify that I have this 20th day of March, 1981, caused copies of the attached Opposition of National Public Radio To Christian Broadcasting Network Proposal For 1979 Cable Royalty Distribution Procedures to be served by mail, first class, postage prepaid, on the following:

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