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Thursday, December 6, 1979

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2000 L Street, N.W.  
Suite 500  
Washington, D.C.

Whereupon, the Tribunal convened at 10:00 a.m.,  
pursuant to notice.

PRESENT:

MARY LOU BURG, Chairwoman

DOUGLAS E. COULTER, Commissioner

THOMAS C. BRENNAN, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

ORIGINAL

P A R T I C I P A N T S

1

2 GORDON T. KING  
Coudert Brothers, representing NAB

3

4 ERNEST SANCHEZ  
General Counsel,  
National Public Radio

5

6 JAMES F. FITZPATRICK  
Arnold & Porter,  
representing sports interests

7

8 PHILIP HOCHBERG  
National Basketball Association  
National Hockey League  
9 North American Soccer League

10 RICHARD THOMAS,  
NCAA

11

12 CHARLES T. DUNCAN  
Local Counsel, BMI

13 EDWARD CHAPIN  
Counsel, BMI

14

15 RICHARD DANNAY  
Schwab, Goldberg, Price & Dannay  
representing graphic, pictorial and  
16 sculptural claimants.

17 ARTHUR SCHEINER  
Wilner & Scheiner  
18 MPAA

19 I. FRED KOENIGBERG  
Counsel, ASCAP

20

21 ALBERT F. CIANCIMINO  
Vice President, Counsel  
SESAC, Inc.

22

23

24

25

P R O C E E D I N G S

1  
2 CHAIRWOMAN BURG: Good morning, we will start  
3 the second day of these proceedings on the issue of the  
4 standing of sports claimants. You know, the time allocation  
5 schedule will be not unlike yesterday's, although I see that  
6 some of the representatives have claimed somewhat shorter  
7 time periods.

8 We will begin again with the broadcasters,  
9 Mr. King, representing NAB. He will have 20 minutes; he  
10 will be followed by Ernest Sanchez with five minutes. Any  
11 questions from the commissioners will not be charged to  
12 your time.

13 Mr. King?

14 MR. KING: Thank you and good morning. As a  
15 preliminary matter, I would, out of the 20 minutes that I'm  
16 allocated, like to present Mr. Jim Popham who is known to  
17 you. He's assistant general counsel at the NAB. And we  
18 feel that there may have been an impression created in the  
19 proceedings yesterday as to the amount of royalties  
20 claimed by the NAB, if they were successful on all points.

21 Mr. Popham has been through the negotiating  
22 process and we feel that it would be appropriate, with the  
23 permission of the Tribunal, to have Mr. Popham address you  
24 on that point, with the clear understanding that it's being  
25 charged to the time that I have on this issue.

1                   COMMISSIONER BRENNAN: I would like to reserve an  
2 objection to that, unless it would perhaps modify to allow  
3 other parties of interest a chance to respond to whatever  
4 Mr. Popham might say.

5                   MR. KING: That's clear; that's fine. But I  
6 think it's so elemental that I don't think it will be  
7 necessary, but that's fine with us.

8                   CHAIRWOMAN BURG: Unless, Commissioner Brennan,  
9 there is any other objection, the Chair will allow it.

10                  COMMISSIONER COULTER: I'd like to hear it.

11                  CHAIRWOMAN BURG: Mr. James?

12                  COMMISSIONER JAMES: No, go right ahead.

13                  CHAIRWOMAN BURG: All right, fine.

14                  MR. POPHAM: Thank you very much. During the  
15 course of these hearings, I think there has been an attempt  
16 to create an impression that broadcasters have tried to  
17 launch themselves into the role as the major party in  
18 interest, grabbing at, perhaps, all of the great part of the  
19 royalties. I think that's an impression which is false  
20 and erroneous, and one which should be corrected.

21                  During the course of the negotiating process,  
22 the broadcast position is that the final negotiations was a  
23 figure of 25 percent of the royalties. This 25 percent  
24 figure included the royalties attributable to broadcasters'  
25 local programming, to the value of the compilation, to the

1 syndicated programming which broadcasters could claim  
2 pursuant to their exclusive rights and the claim for the  
3 radio broadcast stations.

4 It was a percentage figure which frankly  
5 represented a compromise of our position. Ultimately, we  
6 feel, we might perhaps range into the 25 to 35 percent range,  
7 if we were to prevail on all three issues.

8 Thank you, that's all I have to say.

9 COMMISSIONER COULTER: I have a question. If,  
10 as I think it's clear from some of the questions I asked  
11 yesterday, is the concept of the broadcast day as a work  
12 gives me trouble. If you receive any money for compilation,  
13 would that be interpreted as recognizing a broadcast day a  
14 a work? Would that automatically certify that the broadcast  
15 day is a work, if you receive even a penny for compilation.

16 MR. POPHAM: We are certainly arguing that the  
17 broadcast day is a compilation. And I think that it's the  
18 equivalent of a working copyright terms and, yes, I think  
19 that would be the case.

20 COMMISSIONER COULTER: One more question. And  
21 this, I think, comes to the heart of the matter on the issue  
22 of compilation. If you can't sell the broadcast day, which  
23 was recognized by Mr. King yesterday, due to the contracts  
24 of the work in that compilation, then you have not received  
25 the right to compile those works. And therefore, it isn't a

1 work. I think it's unavoidable.

2 MR. POPHAM: Well, I think, first of all,  
3 these are matters which Mr. King addressed yesterday. He  
4 may wish to respond more to your question. But we have  
5 certainly spoken already, I think, to the fact that when  
6 a syndicator sells a program to a broadcast station, that  
7 syndicator knows exactly what use will be made of that  
8 program. It will be used as part of the broadcasters'  
9 broadcast day.

10 Now, in terms of additional rights, there is  
11 no doubt that the broadcaster has the right to use that  
12 program in his broadcast day, he may not be able to sell it  
13 beyond the resale that occurs pursuant to the compulsory  
14 license to the cable system. But this is no different than  
15 any other situation where someone has a right to use a  
16 particular copyrighted work, but only in certain circumstances.

17 In other words, any time you have a copyrighted  
18 work which includes other copyrighted works, there may be  
19 limitations on the underlying works which effect the right  
20 of the copyright owner of that work to use it in one way or  
21 another.

22 But, again, the syndicators are well aware that  
23 the broadcast programming that they provide stations is  
24 very definitely used as part of the broadcast day and not  
25 an isolation from other programs.

1 MR. SCHEINER: May I be heard briefly?

2 CHAIRWOMAN BURG: Mr. Scheiner, they have an  
3 hour's time really.

4 MR. SCHEINER: All right.

5 COMMISSIONER BRENNAN: Madam Chair, I believe  
6 the understanding was that there was to be an opportunity--

7 CHAIRWOMAN BURG: All right.

8 MR. SCHEINER: I'd really like to note an  
9 objection to the procedure and to reserve any comments with  
10 respect to the matters volunteered by Mr. Popham at this  
11 time. I would like to note that the negotiations between  
12 the parties was never referred to throughout the extended  
13 discussion yesterday. And, any comments, statements concern-  
14 ing the position of the broadcasters in those negotiations,  
15 I think is quite improper.

16 We did not advert to it yesterday, and I  
17 don't think that properly raised before you at this time.

18 MR. FITZPATRICK: Might I echo what Arthur  
19 has said. The negotiations aren't part of this discussion.  
20 Was is part of this discussion is what's on the record,  
21 that 40 percent of the broadcasters applying the theories  
22 that we heard yesterday, apparently we heard today, that  
23 claimed over 100 percent of the pot. That has been the  
24 claim; that has been the concern.

25 What might be some claim or some feeling in

1 some other forum in a negotiation is irrelevant here. The  
2 facts are that a handful of the broadcasters have claimed  
3 all the money. And you might be well aware of our concern  
4 with that fact.

5 CHAIRWOMAN BURG: Thank you. Would you identify  
6 yourself for the record?

7 MR. FITZPATRICK: Yes. My name is James  
8 Fitzpatrick, representing the joint sports interests.

9 CHAIRWOMAN BURG: Mr. King, you still have the  
10 better part of an hour if you wish to use it.

11 MR. KING: Thank you, I don't think I'll use  
12 it. But, frankly, I had thought that the spirit of  
13 negotiation, that the negotiating process was always before  
14 the Tribunal. I thought it was one of the main factors  
15 that would influence the course of action by the Tribunal.  
16 I think it's always before the Tribunal.

17 Secondly, I do want to respond to one matter  
18 raised by Mr. Coulter, and that is the broadcast day. It  
19 may well be, as you're saying, Mr. Coulter, that broadcast  
20 day, because of contractual restrictions on the syndicated  
21 programming cannot be sold. But a copyright in that  
22 compilation has other aspects to it. It has affirmative  
23 aspects or defensive aspects.

24 We could, for example, sue if the broadcast  
25 day was pirated by another person. We have a compilation.



1 And if that compilation is pirated, however remote that  
2 possibility seems, by another station, we would be in a  
3 position to sue for the infringement of that compilation.

4 Also, the compilation is a work under the  
5 Copyright Law, whatever value you may choose to attach to  
6 it, whatever you think it's worth, it is a work under the  
7 Copyright Law. And we are entitled to fix and preserve  
8 our rights. And so it has that aspect to it as well.

9 It's quite true that we cannot sell it as  
10 one would sell a novel, or as a syndicator would sell one  
11 of its programs. But the copyright in that compilation has  
12 values quite apart from that. I just want to raise that.

13 MR. BAUMGARTEN: Madam Chair, may I be  
14 heard for a few minutes?

15 CHAIRWOMAN BURG: (Nodding affirmatively.)

16 MR. BAUMGARTEN: We are reopening a whole  
17 issue that was discussed yesterday; we're entitled to a  
18 rebuttal.

19 CHAIRWOMAN BURG: Yes, I'm afraid my colleague  
20 reopened it. So, I'll have to give you the time.

21 MR. BAUMGARTEN: I do apologize for taking  
22 the Tribunal's time on this. We are now told that the  
23 broadcasters could sue for piracy of a broadcast day.

24 If you will look at their briefs, they said  
25 that they could not sue for piracy of the broadcast day,

1 unless the Tribunal authorizes them to fix the work, a  
2 right which they do not have by contract. If someone were  
3 to pirate the broadcast day, I could see they could sue.  
4 They can sue for copyright infringements of their local  
5 programs, especially the copyright owners of--and they  
6 indeed could sue for copyright infringement of syndicated  
7 programs of which there were exclusive licenses if (a) the  
8 piracy was by broadcasters on the cable systems and the  
9 suit were brought under 501(b).

10 If the "piracy" were by a cable system, that  
11 would have to go under 501(c). But this is not an infringe-  
12 ment of the broadcast day; it's a super infringement of  
13 the constituent elements.

14 As Mr. Coulter has suggested, and as we responded  
15 yesterday, we agree with Mr. Coulter's suggestion, that the  
16 broadcast day as a living thing, as a work, is totally  
17 artificial. It does not exist elsewhere in the arguments  
18 in this room. It cannot be sold in the distant market. And  
19 we're only talking about transmissions into a distant  
20 market.

21 As Mr. Korman pointed out yesterday, and as  
22 the NCAA has pointed out, the whole concept is artificial.  
23 Why not a broadcast hour or a broadcast hour or a broadcast  
24 year. The broadcast day does not exist, in Mr. Coulter's  
25 words, in any real sense as a word.

1 I thank you for your patience, and I hope we  
2 can put an end to the issue.

3 COMMISSIONER JAMES: I have a question for  
4 Mr. Baumgarten. Mr. Baumgarten, you're not saying that  
5 nothing is copyrightable unless it's sellable; are you?

6 MR. BAUMGARTEN: No, I'm not. There are a  
7 lot of works created by volunteer organizations that  
8 distribute it free. But remember, what the broadcasters  
9 are trying to do here, is sell the broadcast day. They're  
10 trying to sell it through the intermediary of the Copyright  
11 Royalty Tribunal. And that sale could not be made in any  
12 real sense in the real world.

13 In the distant market, they could not sell the  
14 broadcast day because their rights in the constituent  
15 programs are limited. Mr. Popham says that's true of any  
16 derivative work. Nonsense. If I get the right to translation  
17 your novel into a different language, I can sell my transla-  
18 tion or give it away or do whatever I would with it.

19 When the motion picture companies get motion  
20 picture rights of a novel, they can exhibit the motion  
21 picture for free, they can exhibit it for charge, they can  
22 sell dramatization rights in the motion picture. It exists;  
23 it's a living thing. The broadcast day is not the same  
24 category. But I'm not saying that the work is not copyright-  
25 able unless it's sold; no, sir. Thank you.

1 CHAIRWOMAN BURG: Mr. King?

2 MR. KING: I think -- maybe we shouldn't  
3 start on this--

4 CHAIRWOMAN BURG: I think, Mr. King, the  
5 issue before us this morning is the standing of the sports  
6 claimant. If you would be so kind, I'd appreciate it.

7 MR. KING: There is, in the reply brief of  
8 the sports interests, a statement which I think is really  
9 dispositive of the entire issue. And that statement  
10 appears on page 10, and the bottom of that paragraph, the  
11 first full paragraph, which states that the broadcaster's  
12 authorship function is undertaken in a work-for-hire  
13 situation, where all copyright ownership rights are transferred,  
14 invested in the club.

15 Now, there are two aspects to that. Firstly,  
16 it makes it abundantly clear that the sports interests are  
17 relying upon contracts. If you will recall, from our  
18 initial brief, we had taken the position that their basis  
19 for claims to copyrights could be either as producers or  
20 pursuant to contracts.

21 I think it's very clear from reading all of  
22 the briefs submitted by these sports interests, that they  
23 are, in fact, relying upon contracts. If there is a  
24 contract between a given station and a ball club, that  
25 contract will control. And that is the position the sports

1 people are taking. And quite frankly, that is the  
2 position that the broadcasters are taking.

3 The broadcasters do not agree that the  
4 station's authorship function is made pursuant to a work-for-  
5 hire situation. We are not employees, and the work is not  
6 a commissioned work within the meaning of the Copyright  
7 Law.

8 We disagree entirely as to the legal import  
9 of the contracts. But, we recognize that the contracts  
10 are dispositive. We think, therefore, that each contract  
11 between each of the ball clubs and each of the stations  
12 will have to be analyzed. I don't think there's any way  
13 around it.

14 It is the position that we have taken; and it  
15 is the position that the sports interests are taking. It  
16 is clear that if, in fact, there is a contract between a  
17 station and a given ball club, that contract is going to  
18 control the rights. And I don't see any way around it.  
19 And I don't see any way around having the Tribunal examine  
20 each contract. And we would be frank to admit that where  
21 those contracts that's copyright in the ball clubs, we'll  
22 recognize it and it will no longer be an issue.

23 But, what I'm saying is that, although there  
24 are a number of claims made, reasons why the sports  
25 interests and perhaps the broadcasts are entitled to

1 copyrights. Those arguments are backed by the fact that  
2 contracts exist between the clubs and the broadcasters,  
3 and those contracts are going to control.

4 I don't know what Mr. Fitzpatrick is going to  
5 say to that, but that is the position that I am taking  
6 now. And I should like to reserve any other time to  
7 counter what he has to say. If there are any questions  
8 now by the commissioners, certainly I would be glad to  
9 answer them.

10 CHAIRWOMAN BURG: I have some questions, and  
11 I guess this is as good a time as any. Mr. King, who  
12 determines the number of games to be televised or broadcasted?  
13 In terms of radio, generally all the games are picked up  
14 and broadcasted. But in television there is usually a  
15 specific number. Who makes that determination?

16 MR. KING: The parties make that determination.

17 CHAIRWOMAN BURG: "Parties" being?

18 MR. KING: The station and the ball club.

19 CHAIRWOMAN BURG: Who determines and approves  
20 the network of stations, if it's a regional network that's  
21 set up or state wide network. I'm not talking about a  
22 national net work.

23 MR. KING: Because it's a matter of contract,  
24 because the entire relationship is contract the  
25 parties will agree upon.

1 CHAIRWOMAN BURG: Which rights of approval,  
2 if any, does the sports club exercise with respect to play-  
3 by-play announcer--

4 MR. KING: In most cases, the announcers are  
5 supplied by the station; and perhaps, in some cases, in  
6 consultation with the ball clubs.

7 CHAIRWOMAN BURG: Are you saying that the  
8 station employees and AIRGO(phonetic) pays the play-by-play  
9 announcer?

10 MR. KING: In most cases.

11 CHAIRWOMAN BURG: And that the clubs have no  
12 right of approval over that play-by-play announcer or  
13 color announcer?

14 MR. KING: I think that is a matter between a  
15 given club and a given station. In a particular contract  
16 there may be a provision over right of approval as to who  
17 the announcers will be. I suppose it's even conceivable  
18 in any given case, a ball club could pay announcer, and that  
19 announcer would be an employee of the club. I think that's  
20 exceptionally rare.

21 But, I do think there are certain cases where  
22 the announcers go out with the approval of the ball club.

23 CHAIRWOMAN BURG: There was an interesting  
24 piece in my hometown paper concerning the voice of the  
25 Brewers just a few days ago, was apparently leaving Milwaukee

1 Brewers' baseball games on radio and television, a  
2 position he's held since 1970 because of some conflict with  
3 NBC television coverage of the olympics in Moscow, which is  
4 is going to cover. He will miss something like 172 games.  
5 And the man said that he had been asked by the Brewers and  
6 WTMJ, Inc., which originates radio and television broadcasts  
7 of Brewers' games, to choose between baseball and the  
8 olympics.

9 It's interesting that in both cases, both  
10 parties are involved in that decision, that he was asked  
11 to buy the ball club and the station.

12 MR. KING: I think that in any contract,  
13 you're going to have rights and liabilities of each party  
14 to the contract. And, it may be that in certain cases,  
15 the rights of the broadcasts will be provided. But, in  
16 view of the statement made by the sports interests that  
17 it has undertaken pursuant to a work-for-hire relationship,  
18 then one would expect to find either of two things: (1) that,  
19 under an examination of the relationship between the  
20 ball club and the station, this station is, in fact, an  
21 employee of the club. And I just don't think that's the  
22 case.

23 The other would be that it's a work by  
24 commission. And in that case, he may expect to find in the  
25 contract, a statement by the parties that they agree that the



1 work is being -- is one of hire. And I don't think you're  
2 going to find that. So, I'm saying that you are going to  
3 have to examine each contract to determine whether there is  
4 a work-for-hire.

5 And, in each contract, there are going to be  
6 rights and liabilities. The ball clubs are going to have  
7 certain rights, and the stations have certain rights. But  
8 the crucial question is ownership of copyright.

9 CHAIRWOMAN BURG: Generally, Mr. King, would  
10 you say that a sports club would have approval over or rights  
11 of refusal for the sponsor, the commercial sponsorship  
12 lined up for those telecasts in this instance?

13 MR. KING: I don't know if there is any  
14 general rule. It would not surprise me. I hear people in  
15 the background making remarks. But, I mean, I don't know  
16 that there's any general rule; it would not surprise me.  
17 And, I don't think it would have anything to do with  
18 copyright ownership.

19 I would think that any team or any product is  
20 going to be very careful about who it's associated with.  
21 And it wouldn't surprise me.

22 CHAIRWOMAN BURG: I thank you. I have problems  
23 in this regard because I, at one time, worked for a radio  
24 station that was the originator of games for pro football  
25 games for the University of Wisconsin and Milwaukee baseball

1 franchise.

2 And, as I recall, virtually all of the  
3 questions I asked, the station itself was under rather  
4 substantial restraints in terms of what it could do. That's  
5 fine. I thank you for answering those questions.

6 COMMISSIONER BRENNAN: Mr. King, could you  
7 comment for a bit on the announcements made at the end of  
8 these telecasts, as to the reservation of reproduction  
9 rights?

10 MR. KING: Is there any particular language?

11 COMMISSIONER BRENNAN: Living in New Jersey,  
12 and watching perhaps more of the telecasts of the New York  
13 teams, at the end of the telecast, you would usually find  
14 an announcement to the effect that all rights -- this  
15 telecast is authorized under television rights granted by  
16 the New York Yankees.

17 MR. KING: Is there language that follows?

18 COMMISSIONER BRENNAN: "Solely for the enter-  
19 tainment of our audience; and any publication, reproduction  
20 or other use of pictures, descriptions or accounts of this  
21 game, without the expressed consent of the club, is  
22 prohibited."

23 MR. KING: Yes. I think that that language  
24 is intended to protect, I suppose, a number of interests  
25 that the ball club has. I remember living in New Jersey back

1 when the New York football Giants were so very popular and  
2 so very successful, that any number of establishments,  
3 bars, hotels, what have you, would charge special fees to  
4 have people come in and watch telecasts of the games. And  
5 I think perhaps it was geared to prevent that, perhaps to  
6 prevent an erosion of the amounts of money the teams can  
7 charge for television rights.

8 COMMISSIONER BRENNAN: According to your  
9 previous statements, the individuals making these announce-  
10 ments are employees of the broadcaster; is that correct?

11 MR. KING: Yes.

12 COMMISSIONER BRENNAN: Is it your position that  
13 an announcement of the type I read would only be authorized  
14 by the broadcaster if the broadcaster had acquired from the  
15 club copyright ownership?

16 MR. KING: No.

17 COMMISSIONER BRENNAN: Why not?

18 MR. KING: Because it could be to prevent an  
19 erosion of the ball club's gate receipts. I think that was  
20 their concern about cable. That, if establishments can  
21 cause fees, fees in excess of what they would normally  
22 charge simply to become movie theatres where baseball  
23 games are being broadcast, that would be an erosion of your  
24 television rights, an erosion of your gate receipts, neither  
25 of which would have anything to do with copyright.

1 I was handed another form of this announcement  
2 which can, I suppose, show you the extent to which they can  
3 bear it. "This copyrighted telecast is presented by the  
4 Houston Astros and Metromedia, Inc., and is intended solely  
5 for the private, non-commercial use of our audience." Then  
6 it goes on with language similar to that which is quoted.

7 I would think that in any case, the form of  
8 the announcement would not supercede the contract between  
9 the parties. That will speak for itself. And that will  
10 determine copyright ownership. This will not. This will  
11 not control.

12 COMMISSIONER COULTER: In looking at the  
13 briefs of both sides on the sports issue, it occurred to  
14 me that perhaps there is no disagreement between you. You're  
15 both saying that you want to base everything on the contracts.  
16 Therefore, aside from your objection to the language  
17 "authorship for hire", what is the area of dispute then, if  
18 both you and the sports interests agree that the contractual  
19 language should prevail?

20 MR. KING: The statement that the contractual  
21 language would prevail is generally true. More specifically  
22 is the narrow focus of the sports interests as reflected  
23 by this reply brief. The broadcaster's authorship is  
24 undertaken in a work-for-hire situation. So, that narrows  
25 the contractual focus considerably. And we're now looking

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1 broadcaster has the copyright.

2 MR. KING: Right.

3 COMMISSIONER COULTER: There are those  
4 categories of the contract; is that correct?

5 MR. KING: Yes.

6 COMMISSIONER COULTER: Then there is another  
7 category where the contract states specifically that the  
8 club has the right. Is that right?

9 MR. KING: There may be, I don't know. I don't  
10 know. Mr. Fitzpatrick might.

11 COMMISSIONER COULTER: I'll ask him later.  
12 Those two areas of contract then, therefore, remain  
13 undisputed by both sides?

14 MR. KING: Correct.

15 COMMISSIONER COULTER: Then there's a third  
16 area where presumably that the word "copyright" doesn't  
17 appear in the contract. And that is the area of dispute;  
18 is that correct?

19 MR. KING: Yes.

20 COMMISSIONER COULTER: What portion of  
21 the contract does that concern of the total, approximate  
22 figure?

23 MR. KING: I think perhaps most of it. And in  
24 that category, we would be examining the contracts to see  
25 if we have a work-for-hire situation, where the copyright

1 was transferred within a work-for-situation.

2 COMMISSIONER COULTER: Thank you.

3 CHAIRWOMAN BURG: Now, Mr. King, you're  
4 going to reserve your additional time?

5 MR. KING: Yes.

6 CHAIRWOMAN BURG: Mr. Sanchez from NPR is  
7 next.

8 MR. SANCHEZ: Ms. Burg, members of the Tribunal,  
9 good morning. I found myself agreeing very strongly with  
10 Mr. King's remarks this morning. And looking at the  
11 briefs that have been submitted, I think the issues have  
12 been very thoroughly aired. In this circumstance, rather  
13 than rehashing arguments that you already have before you,  
14 I think maybe we could best assist the Tribunal on this  
15 issue by relinquishing our time.

16 CHAIRWOMAN BURG: Thank you, Mr. Sanchez.

17 Now, Mr. Fitzpatrick?

18 MR. FITZPATRICK: Members of the Tribunal,  
19 my name is James Fitzpatrick from Arnold & Porter, and  
20 we represent the Commissioner of Baseball. With me here  
21 today are my colleagues, David Lloyd and Bob Garrett. Also  
22 here is Bill Hochberg, who is representing the NBA, the  
23 National Hockey League and Soccer; and Richie Thomas, who  
24 is representing the NCAA.

25 I'm going to make an initial presentation. And

1 the other gentlemen are here to answer specific questions,  
2 if they get into detail, in terms of their own practices  
3 that I wouldn't feel comfortable in answering.

4 I must say that there's nothing -- there's a  
5 never-ending series of surprises in the broadcasters'  
6 position here. We thought we had a major issue. The broad-  
7 casters questioned whether music should be here at all.  
8 That was a "now you see it; now you don't" proposition;  
9 that's gone now -- withdrawn.

10 The broadcasters have stated in their pleadings,  
11 in their opening brief, it says that they are the owners of  
12 the sports copyright and should be entitled to compensation.  
13 Here today, after all of the briefing, we find that the  
14 issue is supposedly revolving back to the question of  
15 contract.

16 I am somewhat sorrowful that Mr. King apparently  
17 didn't read our briefs, because our briefs, I thought, set  
18 forth, in some great detail, our view that the legislative  
19 intention of the Congress was to respond to our pleas, our  
20 concerns for the protection of our property rights. And I  
21 will refer in a few minutes to that legislative history.

22 Furthermore, we discussed in some detail the  
23 fact that the federal recognition of our copyright was a  
24 continuation of a decade long judicial recognition, that we  
25 had common law property rights in the play-by-play accounts



1 of our game, property rights which, in the common law,  
2 might have been cut off by the passage of the federal  
3 legislation, a right that had been recognized repeatedly.

4           Furthermore, in our papers, we pointed to  
5 the horse of commercial dealing between the broadcasters  
6 and us, which, in every instance, we believe, reflected  
7 the fact that we were the owners initially of the property  
8 rights in our games. And that, the broadcasters came into  
9 our stadia to televise our game in a limited area and with  
10 a very, very limited grant of rights.

11           I'd like, at the outset, to talk about -- speak  
12 to some of the questions that had arisen in connection  
13 with Mr. King's short appearance. First, in terms of  
14 Mr. Coulter's discussion about the category of contracts,  
15 he first said: are there instances where the broadcasters  
16 were given the copyright. Yes, indeed. Our brief very  
17 clearly spelled that out.

18           Ted Turner's Atlanta Hawk -- this is the only  
19 instance we have found -- Ted Turner's Atlanta Hawks gave  
20 to Ted Turner's superstation the expressed copyrights by  
21 contract. It's the only instance that we have ever seen  
22 where there is an expressed grant of right. The claim  
23 number 207 before this Tribunal filed by Ted Turner's  
24 superstation says that Ted Turner's team is the appropriate  
25 claimant in these proceedings. So, that's the only instance

1 of where there was expressed grant of copyright to the  
2 client.

3 In terms of the second category, our briefs  
4 have set forth in some great detail the instances where  
5 clubs have, for the rights, the traditional rights of  
6 clubs over their property has been explicitly confirmed.  
7 And I will speak to some of those instances in a few minutes.

8 In all the remaining contracts which, again,  
9 we detailed in our brief, the arrangement of the rights  
10 makes it absolutely clear, clear beyond any doubts, as we  
11 see it, that you're starting with the proposition of the  
12 sports club granting very, very limited rights, opportunities  
13 and obligations for a broadcaster to create a game and  
14 televise it in a given market, with a reservation of all  
15 additional rights to the club, the rights that would be  
16 created, the rights that would be attributed to the copy-  
17 right owner, had the broadcaster been the copyright owner,  
18 are directly inconsistent with the terms of the contract.

19 If the broadcaster were the copyright owner,  
20 he would have the right to make copies and sell copies  
21 or sell the game in other markets, he clearly doesn't have  
22 that right. He would have the right to sell it in other  
23 media. He clearly doesn't have that right. He would have  
24 the right to reproduce it under Section 106.

25 The clubs grant the right to a broadcaster to

1 reproduce for news clips for the highlights show. But  
2 the broadcaster does not have the right to take our game,  
3 our property and go out and hock it.

4 Now, you start then, with these three  
5 categories, where in every instance, in our view, the  
6 contractual dealing is completely consistent with a decade-  
7 long attempt on the part of sports to get protection for their  
8 live programming, and a decade-long acknowledgement by the  
9 broadcasters in those hearings that sports was the copyright  
10 owner of sports programming.

11 In terms of Ms. Burg's question, her four points,  
12 the number of games, that is initially a matter for the  
13 club to determine. Generally, we know that most of our  
14 television patterns involve televising away games rather  
15 than home games.

16 There are some stations, such as Mr. Polinger's  
17 Picks (ph) has a different pattern, where the club and  
18 the broadcaster have arranged that many home games as  
19 away games will be televised. But, there should be no  
20 doubt that the club could be forced to televise games  
21 against its consent, because it basically has a right to  
22 those games, and the property right in terms of determining  
23 who will have the opportunity to telecast, or in any other  
24 way, to cable cast those games.

25 Second, in terms of the team network, as we'll

1 develop in a few minutes, that ultimately is a question  
2 for clubs to decide, because team networks have historically  
3 been put together in a way that maximize, in a geographic  
4 area, the attractiveness of a particular club in a particular  
5 region.

6 In Minnesota, the Minnesota Twins will have a  
7 team network that will be in Minnesota, go down in Nebraska--  
8 in that geographic area. The Cleveland Indians will have  
9 a team network that will go down into Ohio and maybe over  
10 into my home in northeastern Indiana, or maybe cut into  
11 some parts of Pennsylvania.

12 But, the arrangement of the team network is  
13 an essential part of baseball's history in terms of  
14 marketing its product. And it has been developed in a way  
15 to attempt to reinforce whole fan loyalty. And indeed, it  
16 was the very emergence of cable as, again, we will develop  
17 in a few minutes, that knocked that traditional pattern of  
18 telecasting our games, and that's why we spent a decade  
19 attempting to get copyright protection for our live  
20 sports programming.

21 In terms of play-by-play, I know of no instance  
22 where the club doesn't have the right to approve the  
23 announcer. And in those instances where the club doesn't  
24 employ the announcer himself -- in the FCC, there's a  
25 regulation that says if the club employs the announcer, there

1 has to be a disclaimer, apparently is a truth in sports  
2 casting provisions.

3           Finally, in terms of sponsors, there clearly  
4 is a right to veto particular sponsors. There are  
5 manufacturers who might be engaged in gambling or some other--  
6 the sale of hard liquor, not to say that ball players are  
7 not known to nip, but nevertheless, in terms of the public  
8 presentation of their program, they might not want the  
9 sponsors--certain kinds of sponsors to connect it financially  
10 with the game.

11           As far as the disclaimer that Mr. Brennan  
12 raised, I think that that disclaimer, again, has a history  
13 which was initially--which goes back many, many years,  
14 and indeed goes back before the emergence of cable, which  
15 was a public announcement to confirm and reinforce these  
16 common law property rights that have existed in the sports  
17 club and in their broadcasts for many, many years.

18           So, with those preliminaries, let me turn to  
19 what we see are the issues here. And I must say, we do not  
20 feel, that after all this storm and lightning, and the  
21 broadcasters raising this issue, claiming, as they have,  
22 that they are the copyright owners. That, this is something  
23 that we start all over again.

24           We think that the record is clear. We think  
25 that they have brought this issue up, with the claim that

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1 they are the owner and that they get our money. And we  
2 think there is a set of judgements, decisions that are  
3 quite appropriate for the Tribunal to make in response.

4 Now, first, there has been no doubt at any  
5 time in these proceedings, prior to the negotiations or  
6 in these proceedings that broadcaster have a right to  
7 claim for their local news and public affairs program, there  
8 is absolutely no doubt about that.

9 They don't get very much out of the pool  
10 because there ain't much of it. And what's there isn't  
11 particularly popular in the distant cable markets where  
12 it's being heard.

13 Chicago local news that might be carried  
14 in Albuquerque is not a gripper, that is not the kind of  
15 programming that cable systems and cable subscribers are  
16 anxious to hear. And we will have proof on that once we  
17 get to the evidentiary stage.

18 But, there's no doubt that the broadcasters  
19 have certain limited rights in terms of programming that  
20 they have created, a new shell--when they bring Martin  
21 Agronsky into the studio and collect some newscasters,  
22 commentators, they clearly have created that show.

23 But that has not been enough for the broad-  
24 casters. They had a four-prong effort to try to claim  
25 significantly exaggerated amounts from the Tribunal. First

1 as I pointed out, music has no place here. Well, let's  
2 go on now. Second, yesterday, we had two theories advanced,  
3 one that a broadcast day was a compilation; and the second,  
4 that there is a right under syndicated exclusivity, they  
5 have a right to get paid because they don't exercise the  
6 right that they have under the FCC rules.

7 Now, those, by our lights, were essentially  
8 intended to create something out of nothing. And they  
9 are before the Tribunal. And we are supporting the compi-  
10 lation claim.

11 But the sports issue is quite different  
12 indeed, because no one doubts that what we're talking about  
13 in terms of our programming is programming that is  
14 rightly entitled to compensation. There can't be any doubt  
15 that the sports programming is entitled to a share, and we  
16 will do our best to demonstrate to the Tribunal, the value  
17 of the sports programming, in terms of its audience and  
18 its promotional value. And that, though, is for another day.

19 But, this issue is one in which the question  
20 is whether or not we, our colleagues and our clubs, have  
21 standing to make the claim on behalf of this sports  
22 programming. Now, we think that there are four elements  
23 here that quite clearly confirm that right. And they are  
24 spelled out in our brief. And I'm only going to summarize  
25 them today.

1 First, it's quite clear by our lights, that  
2 Congress created a copyright and live sports programming  
3 in response to the extended pleas on behalf of sports that  
4 cable was disrupting the traditional patterns of broadcasting,  
5 and that they had lost control over that programming, and  
6 it was harming sports. And that, we needed copyright  
7 protection.

8 Second, that federal copyright protection  
9 was the continuation of a well-recognized common law  
10 doctrine that confirmed our rights in our rights in our  
11 programming.

12 Third, that not only over the course of a  
13 decade did we affirmatively make our case for protection,  
14 but that the broadcasters, men of insight and great  
15 responsibility in terms of representing their industry,  
16 on the record, acknowledge that the sports interests were  
17 the proprietors, the entrepreneurs and the owners. As  
18 John Sommers, a man of great probity said to Chairman  
19 Castenmeyer (ph), in response to who owns the copyright,  
20 he thought the club or the league is the copyright owner.

21 Now, the final element is that the entire  
22 course of commercial dealing between us and broadcasters  
23 confirms what the Congress intended and what the common law  
24 had recognized, that there are extraordinarily tight limita-  
25 tions on the broadcasters in terms of what they can do as



1 part of televising the creation, involvement of broadcasting  
2 one of our games, and that those limitations are on their  
3 face directly contrary to any assertion that the broadcasters  
4 are the proper claimants here.

5           They are licensed to televise a game in a  
6 limited geographic area. There are no rights to sell  
7 products to other people; there are no rights to reproduce.  
8 There are no rights to create derivative work. Indeed,  
9 as Mr. Brennan pointed out, we think that the entire  
10 relationship is exemplified in the announcements that have  
11 recognized our rights.

12           Before turning to the details of these arguments,  
13 it seems to me, worthwhile to sketch in very, very preliminary  
14 and brief fashion, the setting for this entire confrontation.  
15 For decades, baseball and all the other sports have  
16 developed regional television and radio networks for  
17 carriage of their game. And they have dealt with flagship  
18 stations which create those games.

19           And, as we said earlier, the placement, the  
20 carriage of those games have been a part of our attempt,  
21 sports' attempt to create in a region, an enthusiastic  
22 following for that particular club. And we have consciously  
23 thought that that was a good policy on behalf of the develop-  
24 ment of baseball.

25           You would have, for example, in the southeast,

1 the Atlanta team has in the past had a regional television  
2 network of 30 stations all through the south. The  
3 Red Sox has a similar arrangement in the northeast--an  
4 attempt by each club to create a broadcast pattern that  
5 reinforces the interest in the area for their clubs.

6 Now, cable came along and knocked that  
7 effort in total into a contact, because cable had the  
8 technological ability to take those--pick up that signal  
9 from Plymouth, New Hampshire and take it to Cleveland or  
10 take it to Pittsburgh, or take it to some other area where  
11 we had, in the first instance, decided that we would  
12 prefer that the Pirates were going to be featured. Cable  
13 had that right. And the emergence of cable on us created  
14 very, very serious economic ramifications.

15 We joined in that concern with the movie  
16 and syndicated people, because their cables had also  
17 created significant problems for them in terms of their  
18 marketing strategy.

19 Finally, cable created a very serious problem  
20 for the broadcasters. All at once you had the creation of  
21 a new communications media, a competing communications  
22 medium that could get its programming on the cheap for  
23 free. They did that.

24 The broadcasters paid very significant amounts  
25 of money to us and to the movie people for the rights to

1 our programming; cable got it for free. And that unfair  
2 competition is a problem for the broadcasters. If the  
3 competitors were getting money for free, was much more  
4 greatly exaggerated, emphasized when the two copyright cases  
5 came down for the (unintelligible) Teleprompter that  
6 confirmed under the 99 Law that there was no obligation for  
7 cable to pay.

8 So, both program suppliers, movies and we  
9 worried about what had happened to our marketing practices,  
10 and the broadcasters basically worry about the emergence  
11 of a competitor that had no costs, turned to the regulatory  
12 agencies and to the court, and to the Congress for relief.

13 The broadcasters, over the course of many,  
14 many years have preceded at the FCC in an attempted to  
15 control the expansion of cable, and to hem it in, in terms  
16 of the programming that it can carry. And in many instances,  
17 sports and others have been there with them, concerned with  
18 a profligate policy at the FCC that would permit cable  
19 to pick up the same programming, and essentially, it will.

20 And there had been certain standards emerged,  
21 communication standards as to what cable systems can carry.  
22 Concurrently, we also went to the Hill. And there, the  
23 vehicle had to be the Copyright Revision Bill which was  
24 first considered formally in 1965. And we went there. The  
25 program suppliers asking for further protection; the

1 broadcasters concerned about the obligation that cable  
2 had to pay money for its programming.

3           Now, with that background, turning to the  
4 first of the four elements that I think is quite significant  
5 in the consideration of the legal issue here today. That  
6 is, Congress' recognition of the statutory copyright in  
7 live sports programming. We, at the very first set of  
8 hearings in the House in 1965--and these references are in  
9 our pleadings--came to the Congress and said that cable  
10 was reeking significant damage to our traditional pattern  
11 of broadcasting, and that it was our programming, and there  
12 should be some kind of protection for us against cable's  
13 use of our programming.

14           Indeed, as we pointed out on page 10 of our  
15 brief, one of the earlier statements before the commissioner  
16 was, we produce these programs at great expense to ourselves,  
17 and total strangers to our league and to its interests do  
18 with them as they will. We must have copyright protection  
19 if we are to reestablish our rights to sell, to broadcast  
20 our programs in accordance with our proper ownership rights.

21           We, as major producers of sports programs,  
22 need and want the same protection against unlicensed use of  
23 programs as do the producers of any other type of television  
24 entertainment.

25           At the very outset, we were there in the Congress,

1 saying there had to be copyright protection for live sports  
2 programming. Now, that created, theologically, a problem  
3 in terms of the Copyright Law, because historically copyright--  
4 historically, when one looked at a work, you had something,  
5 a movie that was in the can, that was fixed; and one could  
6 determine its fixness before it was about to be used.

7 With sports programming, you had a quite  
8 different situation, because it was created and simulta-  
9 neously broadcast and in the nature of a sports program;  
10 though it is extraordinarily valuable the first time around,  
11 it loses its value very, very significantly thereafter,  
12 though some sports programs are attractive the next day  
13 and the following day, and a World Series film might be  
14 attractive in the next year, your run-of-the-mill game,  
15 your run-of-the-mill hockey game this week does not have a  
16 significant commercial attraction two weeks hence. But, it  
17 certainly does when it is broadcast, at the time it is  
18 telecast.

19 So, the Congress had to adjust the concept  
20 of fixation which is a constitutional concept, and for the  
21 first time in the law, while the bill was before the House,  
22 they altered the bill, and the copyright papers indicate  
23 that the suggestion on this amendment to fixation was at  
24 the sponsorship of the sports interests, as we pointed out  
25 in our brief, and it altered the definition of fixation.

1 So, a work could be fixed if the recordation vote is  
2 being made simultaneously with its transmission. So, one  
3 had the situation where our fixation for our lives sports  
4 programming was simultaneous with the telecast.

5 And that was in the Congress' view, and I  
6 think in the views stated broadly, meets the constitutional  
7 requirement for fixation. It happens that on the part of  
8 this change would also benefit the Walter Cronkite Show or  
9 the Jim Vance Show, which would also gain its copyright  
10 protection because it was fixed concurrently with the  
11 recordation.

12 So, from the very outset, set one, at the  
13 very outset, the copyright in sports programming  
14 was the product of our urging on the basis of our claims of  
15 harm, what cable had done to our patterns of broadcasting.  
16 This is spelled out in more detail in our brief.

17 The second stage of the congressional recogni-  
18 tion of sports and our interests in our programming came in  
19 the Senate in a period from 1969 to 1974. As the bill  
20 emerged, matured in the middle 1960's, for the first time,  
21 as I recall, it was at that point that compulsory license  
22 was added to the bill.

23 At the very outset, there was an exquisitely  
24 complicated system of black and gray and white regions for  
25 cable carriage. That was changed to a compulsory licensing

1 system. And as it was pointed out yesterday by Arthur  
2 and John, the compulsory license system basically says the  
3 user has a right to get the owners property.

4                   Compulsory license was composed in the bill.  
5 The sports interests came to the Senate Subcommittee with  
6 plea that the sports entrepreneur said that our programming,  
7 because of the special problems we had, should be  
8 excluded from the compulsory license system. And, for  
9 a number of years, while the bill was before the Senate  
10 Subcommittee, that was the judgement of the subcommittee.  
11 And the subcommittee had reflected a view that unrestricted  
12 secondary transmission by CATV of professional sporting  
13 events could seriously injure the property rights of  
14 professional sporting leads in televising their live sports  
15 broadcast.

16                   Now, ultimately, we lost that battle. And  
17 there are many here who remember that occasion, because the  
18 Congress, the Senate rejected our plea that we be excluded  
19 from the compulsory license system. And the import of that  
20 would have been that cable systems would have had to deal  
21 directly with us and not get programming through compulsory  
22 license.

23                   We lost that fight and we were returned to the  
24 compulsory license system. But it's quite clear, that as  
25 that debate went forward on the floor, and as it reflected

1 when the bill went to the Commerce Committee--and the  
2 citations are set forth in our brief--that the Congress was  
3 well aware that the interests at issue were sports and CATV.

4 And we quoted in our briefs Senator Scott who  
5 was the supporter of the sports program in excluding them  
6 from the compulsory license; and the statement of  
7 Senator Hruska who is the major opponent, most squarely  
8 recognizing that the sports interests were what was at  
9 issue in their programming.

10 Now, the ultimate disposition was to leave  
11 this -- to put us back under the compulsory license and  
12 leave special protection for us at the FCC as a matter of  
13 communication policy. But not something we wanted; but  
14 something we had to accept.

15 It is not irrelevant to note that when the  
16 issue went to the FCC and very limited protection was given  
17 to sports, the formulation at the FCC in terms of blacking  
18 out cable games that came in and upset our home game was  
19 stated in these terms: deletion of sports programming by  
20 effected cable systems will be contingent upon notice  
21 being given by the holder of the broadcast rights, that is  
22 the team, promoter, league or other agent.

23 So, it's quite clear that, once again,  
24 the FCC is following the same pattern that when we had a  
25 concern, we advanced it in opposition to the rights of



1 cable.

2 Now, this affirmative showing--and I will not  
3 detail it in full--this affirmative showing of our claim  
4 of rights and the colloquy, in terms of the recognition of  
5 our rights and decisions of the Congress in terms of our  
6 rights, we think is quite dispositive. And we think that  
7 the broadcasters throughout this entire period recognized  
8 that quite clearly.

9 And, again in our brief, we pointed to four  
10 instances--in the briefs, we pointed out there are four  
11 instances where that was quite clear. At one point,  
12 Mr. Castenmeyer, as I noted earlier, asked John Sommers,  
13 one of my questions is who in fact is the copyright holder,  
14 who is the creator, author of this work. In the case for  
15 professional baseball games, transmitted over, let's say,  
16 a network instantaneously, Mr. Sommer says, "Well, I guess  
17 the club or the league is the copyright holder, but the  
18 station has purchased the right to broadcast that game,  
19 usually at a very large sum of money."

20 Now, that response reflects the two interests  
21 at issue; indeed, we are the copyright owner and have the  
22 copyright claim. The broadcaster has paid a bundle of  
23 money for our programming and didn't want cable to get off  
24 scot free, in terms of not having to pay for its programming.

25 Second, Mr. Wasilewski wrote to Pete Rodino,

1 and this is reflected in the NAB Reply Brief, in which he  
2 talked about the fact that there would be a compulsory  
3 license, in return cable systems will pay token fees, which  
4 will be paid to the Register of Copyright for ultimate  
5 distribution to copyright owners.

6 The fees, for the most part, will not be  
7 paid to broadcasters, but principally to the big Hollywood  
8 studios and to sports clubs. It's quite clear that he  
9 knew who the appropriate claimants are.

10 At another point, Mr. Wasilewski, in 1975 said:

11 The broadcasters are not per se in that proposed  
12 legislation asking for payments to them for the use of  
13 their signals per se; they are asking for payment to the  
14 copyright proprietor for the use of that programming  
15 material by the CATV, to the copyright proprietor, a  
16 motion picture producer or special sports interest or what  
17 have you.

18 And finally, Bernie Gènesse (ph), an experienced  
19 and respected lawyer for the major television interests  
20 said at the very outset of the hearing, described at the  
21 very outset of these hearings in 1965 what it was that the  
22 broadcasters were concerned with. And he described the  
23 television stations program in a number of categories.  
24 And the first two are critical.

25 First, locally created programs owned by the

1 stations, for example, local documentaries; and second,  
2 locally created programs owned by others and produced by  
3 the station on television under exclusive territorial  
4 license, for example, sports telecasts, programs owned by  
5 others, produced by the television station.

6 This entire record, we think, is complete  
7 and comprehensive and unambiguous. And it is attempted  
8 to be put off by what is, in fact, an astonishing theory  
9 of statutory construction. That, the only thing that one  
10 can look at are statements by subcommittee members in  
11 floor debate and committee reports.

12 Now, I must confess that if one of my law  
13 students in a legislation course at Georgetown Law School  
14 answered a question that asked him, at the conclusion of  
15 the course, what materials the federal courts look to in  
16 terms of leaning congressional intent, and he answered  
17 that, he'd take the course again, because he wasn't listening  
18 or he wasn't reading.

19 That is so far afield from the accepted  
20 norm of statutory interpretation, as Mr. Scheiner pointed  
21 out in spades yesterday, that it is simply staggering.  
22 Indeed, it's worth looking at the Betamax Case that  
23 Commissioner Brennan referred to yesterday, as one tiny  
24 example where Judge Ferguson said: Home use recordings from  
25 radio and television broadcasts was discussed in committee

1 hearings, floor debate and reports from the Office of  
2 Copyrights. Statements from all three sources are  
3 relevant to a determination of legislative intent.

4           The proper rule clearly is that the court is  
5 free, or the Tribunal is free to look to various reflections  
6 of congressional purpose. And there are, of course,  
7 reflections that are given varying weight. But, the issue  
8 is the question of whether a report is more definitive  
9 than a colloquy or where a colloquy is more definitive  
10 than testimony.

11           But, it is simply an archaic and obsolete  
12 rule to think that one cannot look to relevant legislative  
13 materials. And there's not a person in this room that  
14 does not know the legislative process and the fact that  
15 positions emerge in colloquy, emerge in statements of  
16 official government agencies, as well as in committee  
17 reports.

18           Now, to suggest that we must discount  
19 Mr. Wasilewski's admissions in this part, because he is  
20 a paid lobbyist, I think, is quite surprising. The  
21 people who made the statements, that conceded that we are  
22 the owners of the sports copyright are some of the most  
23 competent, experienced Washington hands around. They are  
24 people who are skilled at representing their industries,  
25 they are people who are experienced, and they are people

1 all deeply immersed in this copyright--in the development  
2 of the Copyright Law. One simply can't brush it off that  
3 easily.

4 So, it's quite clear, we believe, that going  
5 no further, that the legislative intent, that the legislative  
6 purpose was to have us sitting at this table, asserting the  
7 value of sports programming.

8 Madam Chairman, could I get a time check?

9 MS. CARLISLE: Well, your hour is up at 11:30.  
10 So, you have about 15 more minutes.

11 MR. FITZPATRICK: Thank you very much.

12 CHAIRWOMAN BURG: Mr. Fitzpatrick, while  
13 you're drinking your water, let me--. In your brief at  
14 some point, you said that broadcasters licensed to present  
15 sports telecast were contractually forbidden from recording  
16 those games or those sports broadcasts. Well, I'm  
17 confused, because obviously, it has been stated that those  
18 recordings are done; secondly, it seems to me, that at  
19 some point, I have seen delayed broadcasts of games. I'm  
20 not sure now--

21 MR. FITZPATRICK: You're certainly getting  
22 delayed broadcasts of games. The Notre Dame games, for  
23 example, are played here on Sundays. And there is an  
24 audience for that. Obviously, the contractual arrangement  
25 between Notre Dame, when they sold the rights to their game,

1 they authorized the broadcasters, authorized someone  
2 to rebroadcast the market at a subsequent time.

3 CHAIRWOMAN BURG: Well then, what, indeed, is  
4 contractually forbidden?

5 MR. FITZPATRICK: Well, a typical provision  
6 is pointed out in our brief on page 30, that the Tiger  
7 Baseball Club says that WWJ shall not rebroadcast, reenact,  
8 dramatize or use any copy in any manner, the broadcast  
9 made pursuant to the rights granted to adhere under without  
10 the consent of the baseball club. The Cubs, in a contract  
11 with WGN says that they can--WGN can record "--selected  
12 portions of the club's telecast. These recordings can  
13 only be used for the limited purpose of broadcasting over  
14 WGN news highlights."

15 There is no--we know of no pattern or  
16 expectation that the broadcasters are going to record for any  
17 future use, except if they are requested to do so by the  
18 club. Now, we earlier filed with this Tribunal a detailed  
19 description of how we fix our--how we have undertaken the  
20 responsibility of fixing each of these telecasts. And we  
21 have an elaborate system of making sure that every fee that  
22 goes to the play-by-play announcers is recorded and is sent  
23 into the baseball central office and examined for purpose  
24 of highlights, that entire process is recorded and logged.

25 Now, it is conceivable that pursuant to that

1 process in which we have undertaken our responsibilities  
2 to ensure the fixation of our work that the broadcasters  
3 have performed some physical task in connection with that  
4 recordation.

5 CHARWOMAN BURG: Excuse me. Fixation is a  
6 part of my question. But it's on the other side. If the  
7 broadcasters are contractually forbidden, then, you know--.  
8 It seems to me I asked Mr. Feinberg yesterday, or perhaps  
9 Mr. King, if they, indeed, recorded games. And as I  
10 recall, the answer was in the affirmative.

11 MR. FITZPATRICK: It's conceivable that they  
12 are recording in the sense that that audio-visual logger  
13 goes off every couple minutes and takes a shot. I don't  
14 know, or maybe they're recording their entire contest. I  
15 know of no practice where there is a conscious willingness,  
16 encouragement to broadcasters to tape or record, to  
17 exercise rights under the Copyright Law to resell.

18 Now, it is conceivable that the broadcasters  
19 can come forward with a contract that would demonstrate  
20 that. That is quite alien to my understanding of the  
21 rights, though it is--though, I must say, our view of the  
22 limited rights given, and the fact that we are not giving  
23 to them a right to claim here, does not turn on that question  
24 of whether, for one reason or another, we might have  
25 authorized them to reproduce.

1 CHAIRWOMAN BURG: But, they state that  
2 in terms of compilation, a necessary requirement for  
3 compilation is fixation.

4 MR. FITZPATRICK: That's right. I think that  
5 there is something of a dilemma. They've got to say that  
6 they're recording our programs. And I don't know how they're  
7 doing it. When the question was asked of Mr. King yesterday,  
8 there was such a (unintelligible) from the audience to  
9 that question. And I am in the dark as to what that  
10 practice involves.

11 I must say that recordation which has as its  
12 purpose an attempt to exercise a copyright, the right to  
13 resell that tape or to market it to a competing club,  
14 station, or to do something else with it would be directly  
15 contrary to the entire course of contractual relationship.

16 CHAIRWOMAN BURG: Okay, thank you. Now,  
17 resume with your time.

18 MR. FITZPATRICK: Well, let me say, I've  
19 spoken briefly about the legislative history, which we  
20 feel is, itself, dispositive of the issue of our standing.  
21 And we have suggested in the relief section of our brief,  
22 that the appropriate resolution of this matter is for the  
23 Tribunal to declare what we think this entire course of  
24 history in our brief unequivocally demonstrates that Congress  
25 intended that we are the appropriate claimant here.



1           If, however, at the hearing, the broadcasters  
2 could come forward with a contract that says that they  
3 have the copyright, that we have given to them some of our  
4 property rights to come here, then I think one has to have  
5 that form available to you.

6           But, we are not saying that everything is up  
7 for grabs. What we are saying is that this consistent  
8 course of dealing between them and us and the congressional  
9 recognition of it and the congressional concern for our  
10 problems with cable, presumptively establishes our rights  
11 to be here.

12           We know of only one contract, which is the  
13 Ted Turner Aberration, in which there is the grant of a  
14 right to the broadcasters. And that station told this  
15 Tribunal that we're the right claimants.

16           Now, I must say, that there are in some instances,  
17 as a matter of contract, given all of this protection and  
18 the limited right that some of the money that comes to us  
19 might be shared with the broadcasters. That is not a  
20 question of who is the claimant here. That is a question  
21 of contract; that is a question that I presume will be  
22 fully accommodated in the courts, if anybody welshes on that.  
23 But, that is clearly an arrangement that does not control  
24 who is the copyright owner. The monies come to us. And in  
25 some instances, there have been bargains with broadcasters

1 that they get a share of that money. But that does not  
2 interfere with the basic proposition, that in the first  
3 instance, as a matter of Copyright Law, we are the  
4 copyright owners.

5 COMMISSIONER JAMES: Excuse me. Are you  
6 saying that absence of any provision in the contract that  
7 the sports interests is inherently the copyright owner?

8 MR. FITZPATRICK: Am I saying, without the  
9 expressed recognition, yes--yes, I am. Let me explain  
10 to you, if I could, why. This problem, as I must say,  
11 never existed until the very recent past. It was absolutely  
12 clear historically, that the broadcaster--that we were  
13 getting limited rights to the broadcaster.

14 The contracts are in some instances, now in  
15 the process of negotiation. And, with the exception of  
16 the Turner Matter, there is, in every instance, a  
17 recognition of property rights are in the club. Now, we are  
18 in a dynamic situation in which the contracts are now being  
19 redrafted. Well, they simply expire, they simply expire.

20 COMMISSIONER JAMES: Well, now, if you've  
21 always had an inherent right in the absence of any contract,  
22 and your contracts over the years, as you have announced  
23 in your brief, very vague, very ambiguous about what the  
24 rights of the--were being reserved. And now, on all your  
25 new contracts, you're specifically, according to your brief

1 at 34, you're saying things about Federal Copyright Law,  
2 and there's even one contract that I think you even quote  
3 the revision of the Act of (unintelligible) by '76, tell  
4 where it's published, and say that you're entitled to the  
5 royalty distribution pursuant to Section 111.

6 MR. FITZPATRICK: Right.

7 COMMISSIONER JAMES: Well, if you had this  
8 inherent right, why are now your contracts taking on a little  
9 different tone?

10 MR. FITZPATRICK: Our contracts are taking on  
11 a different tone because we are faced with the claim of the  
12 broadcasters that they get the money. And that we didn't--

13 COMMISSIONER JAMES: --the copyright owner,  
14 what difference does it make, if you are the inherent  
15 copyright owner?

16 MR. FITZPATRICK: It makes the difference  
17 that my clients don't have to spend the time writing a  
18 brief, and you don't have to spend the time listening to a  
19 non-issue. When we talk about--

20 COMMISSIONER JAMES: The contracts do play a  
21 very important part.

22 MR. FITZPATRICK: The contracts could play  
23 an important part in terms of affirmatively reflecting  
24 their ownership. That is our view. If one looks at the  
25 contracts and one sees the extraordinarily limited grant of

1 rights, which is totally inconsistent with the rights  
2 contemplated under Section 106. If you want to call it  
3 inherent, we would call it quite explicit, that there was  
4 a recognition that we are the owner of the right.

5 One also should remember that the Copyright  
6 Law assumes that when a work is commissioned, the person  
7 who is doing the commission is the owner. And it is clear,  
8 we believe, without any question, that we are the ones who  
9 are commissioning this work.

10 The broadcasters have no right to come into our  
11 stadium and televise our game without our asking them to.  
12 So, they can't be any doubt in my mind that the creation  
13 of this work is one that we had commissioned. And as such,  
14 under the law, we are the owners of that right.

15 I must say that we are in something of the  
16 same situation where we are trying to adjust an established  
17 pattern of dealing to a new statutory arrangement, where  
18 rights will be much more explicitly spelled out in years to  
19 come, simply because you have the Copyright Royalty  
20 Tribunal, and we will all attempt to make these proceedings  
21 much more simple in years to come. But that does not, in  
22 our view, undercut the basic proposition that Congress was  
23 intending, that we be the property owner and that we be the  
24 appropriate claimant.

25 COMMISSIONER COULTER: You said the broadcast

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1 COMMISSIONER JAMES: Are there any instances  
2 where a sports team would do the whole shabang?

3 MR. FITZPATRICK: Oh, yes.

4 COMMISSIONER JAMES: And then they just buy  
5 time from the station, and the whole production is theirs.

6 MR. FITZPATRICK: Yes, yes.

7 COMMISSIONER JAMES: They appoint the camera  
8 man, the announcer, et cetera?

9 MR. FITZPATRICK: Yes, there are instances  
10 where we have the responsibility for the entire production,  
11 whether it's contracted out. In some instances, the broad-  
12 caster has that responsibility of any those--

13 COMMISSIONER JAMES: Excuse me. You say where  
14 the broadcaster has responsibility. I'm not--

15 MR. FITZPATRICK: Where it's the broadcaster's  
16 cameraman--

17 COMMISSIONER JAMES: He's got a contract with  
18 you.

19 MR. FITZPATRICK: Goes clearly under contract  
20 with us; yes, indeed.

21 COMMISSIONER JAMES: So that you have the  
22 total responsibility for producing that sports show.

23 MR. FITZPATRICK: Right. The Knicks and the  
24 Rangers are examples where they buy time and handle the  
25 entire production.

1 COMMISSIONER JAMES: They buy time from the--

2 MR. FITZPATRICK: They buy time from the  
3 station and handle the entire production. But every one of  
4 these instances--

5 COMMISSIONER JAMES: Excuse me. You're  
6 jumping too far ahead of where I want to take you. There is  
7 no dispute about that type of production; is there?

8 MR. FITZPATRICK: I don't think so. I think  
9 that--

10 COMMISSIONER JAMES: That's one category we  
11 don't really have to be concerned with, is where a sports  
12 entity has produced and literally bought time from the  
13 station. Does the station do it or you do it, does the  
14 entity do it?

15 MR. FITZPATRICK: I don't know the answer  
16 to that. I would presume that since the team has the  
17 total responsibility for the production, and indeed, the  
18 team would be making the copyright claim, that it would be  
19 their ultimate responsibility to ensure that there was  
20 fixation. What I don't know is whether, in fact, as part  
21 of the production process, it is a team employed camera man  
22 to make sure that the recordation is made, or whether at  
23 some other point in the process, the team ensures that the  
24 record is made of the game and fixed; and therefore, creating  
25 the copyright.

1 But, the practical aspects of that, I know  
2 that there is the fixation under the -- which is the  
3 responsibility of the teams of they are creating the program.  
4 There would have to be a demonstration of fixation, ulti-  
5 mately, we will all be coming before you in terms of  
6 fixation and proof of fixation.

7 COMMISSIONER JAMES: Hopefully not.

8 CHAIRWOMAN BURG: How much more time does  
9 Mr. Fitzpatrick have?

10 MS. CARLISLE: About 10 minutes.

11 MR. FITZPATRICK: Ten minutes doesn't seem to  
12 be going away.

13 MR. FITZPATRICK: Okay, let me wind up.

14 CHAIRWOMAN BURG: You can just stop where you  
15 want.

16 MR. FITZPATRICK: If I knew I was ahead, I'd  
17 stop.

18 (General laughter.)

19 CHAIRWOMAN BURG: At any rate, let's have a  
20 five-minute recess--not six, five.

21 (A short recess was taken.)

22 CHAIRWOMAN BURG: Mr. Fitzpatrick, you may  
23 continue with your interminable 10 minutes.

24 MR. FITZPATRICK: All right. I'll be quite  
25 brief and terminate the interminable--. I think, in summary



1 we think that the legislative history, the established  
2 commercial relations clearly demonstrate that the common law  
3 principles, that we possess the rights and we've given  
4 away only quite limited rights is something that should be  
5 recognized here.

6 And that, a strong affirmative burden should  
7 be put on the broadcasters to demonstrate that they have  
8 received in this grant of rights from us to them to tele-  
9 cast our game; that, they have received a copyright. As I  
10 say, we know of one instance that has been disclaimed.

11 It might be that they could come up with  
12 something else. But we think that the case has been proved  
13 that we were intended to be the owner. The burden now shifts  
14 to them. We think that that pattern is clear. We know we  
15 have fixed our works and we have talked to this Tribunal  
16 about it.

17 We further know that we have filed our claim.  
18 We're the one group here, in terms of our programming, that  
19 has filed claims for all of its programming. In contrast,  
20 the broadcasters have been quite casual in terms of  
21 claiming for, in fact, for sports programming.

22 Almost 30 percent of the flagship stations,  
23 among baseball, basketball, hockey and soccer, did not even  
24 file in this proceeding. Our count is three of baseball's  
25 24 flagships, six of NBA's 23 flagships, seven of NHL's 16

1 flagships and eight of soccer's 24 flagships didn't even  
2 file.

3 Now, that, obviously, is not dispositive of  
4 this matter. But it certainly is a reflection in terms of  
5 who feels that there is a copyright state here and who is  
6 the appropriate claimant. Without--as we talked about  
7 yesterday, there has to be a specific claim for specific  
8 programming.

9 One doesn't claim categories; one doesn't  
10 claim broad concepts. One claims for programming. We are  
11 here before you, having fulfilled all the requirements.  
12 Under the Copyright Law, we are the copyright owner, and we  
13 are here claiming for our works.

14 The broadcasters are not in that position.  
15 We believe you should rule that the showing that we have  
16 made indicates that the sports club are the appropriate  
17 claimants, have standing, and that the role of the broad-  
18 casters is to bring forward any contractual language that  
19 would indicate that we had given away our rights to be here.

20 I'll reserve the balance of that 10 minutes.

21 CHAIRWOMAN BURG: Thank you.

22 MR. HOCHBERG: Chairman Burg, my name is  
23 Philip Hochberg. And I would like to take 90 seconds of  
24 Mr. Fitzpatrick's balance to state the comments, if you will  
25 of the National Basketball Association, the National Hockey

1 League and the North American Soccer League.

2 I would concur in everything that my Brother  
3 Fitzpatrick has said. I would merely try to reemphasize  
4 to the Tribunal that the legislative history is absolutely,  
5 without equivocation, clear that the sports interests  
6 sought and obtained the right to copyright their programs.

7 I would further urge upon you the thought that  
8 no broadcasting station could come into any of our arenas,  
9 any of our ballparks, televise any part of that game without  
10 the expressed permission of the team. There is an  
11 underlying property right which must be recognized that  
12 exists in the various sports franchise.

13 That, the burden, I would suggest to you, is  
14 on the broadcaster to prove that he has some right, some  
15 claim to any part of those compulsory license fees.

16 Thank you.

17 CHAIRWOMAN BURG: Thank you. It strikes me,  
18 Mr. King, that you would want to take more of your  
19 originally allocated time.

20 MR. KING: I'm not sure.

21 CHAIRWOMAN BURG: Please do so if you wish.

22 MR. KING: We might all agree that a television  
23 crew could not suddenly walk in here and start recording  
24 the proceedings, absent some type of permission. That is  
25 not dispositive of the ownership of copyright. I'm saying

1 this purely in response to the remarks just made by  
2 Mr. Hochberg.

3           It's absolutely correct, that at common law,  
4 certain sports events, there was a common law right in  
5 them, there was a recognition of the right of the people  
6 that own the team and own the arena. And they can control  
7 who came in to photograph and to record the baseball  
8 games, football games, hockey games, what have you.

9           That has absolutely nothing to do with the  
10 ownership of copyright. The ownership of copyright--and this  
11 is a question in response to a question by Commissioner James:  
12 absent a contract, who owns the copyright.

13           And Mr. Fitzpatrick claimed that he did. But,  
14 he does, it is crystal clear from his papers, on the basis  
15 of employee-for-hire. There is no other basis for it.  
16 If you have a contract, ownership of copyright is going to  
17 be regulated by that contract.

18           So, what he's talking about in a situation  
19 where there is no contract, that the broadcast station is  
20 an employee for hire. Now, I don't have absolute knowledge  
21 of all of the contracts that are entered between broadcasting  
22 stations and ball clubs.

23           It has been represented to me that the provision  
24 which I am about to read is standard. I accept it to be  
25 standard, but I do not know it to be the case of my own

1 knowledge.

2 It is understood that this is an agreement  
3 between independent contractors. And that, neither party  
4 is in any way an agent, employee or representative of the  
5 other party.

6 Now, that clearly dispels any notion of  
7 employment relationship. Now, how about the Commission's  
8 work, which is the other route that Mr. Fitzpatrick takes.  
9 Under the new act, if it's a commissioned work, and if  
10 the so-called commissioning party is to claim a copyright,  
11 there must be a written acknowledgement by the party that the  
12 work is to be treated as one for hire. It is not claimed  
13 by Mr. Fitzpatrick, and I do not suspect it will be claimed,  
14 that in any agreement covering broadcast during the relevant  
15 period, there was any such provision in any contract  
16 between a ball club and a broadcasting station.

17 The point of it is, and it goes back to a  
18 statement I had made when I stood up to speak this morning,  
19 that in most cases, the resolution of the problem before  
20 us is going to be according to the specific contracts.

21 There was another statement made by  
22 Mr. Fitzpatrick--again, we're getting into the details  
23 of contract--that, it is, if not uniform, certainly generally  
24 the rule that the ball club controls the schedule in which  
25 games would be telecast. I think, if my recollection is

1 correct, he said that is uniform, without exception.

2                   That is not the case. We have contracts here  
3 today,, at least one in which the broadcast station has the  
4 right to determine what games will be broadcast, will be  
5 telecast.

6                   I'm simply saying that it is pointless to  
7 speak about contracts abstractly; where rights are to be  
8 determined by contracts, I think the specific contracts  
9 have to be examined, have to be analyzed.

10                   But, the point is that, absent a contract--and  
11 that was the question raised by Commissioner James: how does  
12 the ball club, how do the sport interests claim copyright.  
13 And it's right in their brief. They claim copyright by  
14 employee for hire.

15                   Now, I have read you a provision which has  
16 represented to be to be representative, and there is no  
17 employee relationship. There is no commissioned work  
18 under the new act. And I suggest that if these rights were  
19 to be determined under the old act, there would be no  
20 commissioned work either. There would be no commissioned  
21 work because the commissioning party is not paying. That is  
22 a major consideration.

23                   It is the so-called commissioned party that  
24 is paying in this case; the broadcast station pays. The so-  
25 called commissioning party exercises very little supervision

1 over how the work is produced. All of that is done by  
2 the broadcasters. So, I don't see how, under any circum-  
3 stances, the ball club can represent itself to be the  
4 owner of these copyrights, absent contractual provision  
5 precisely conveying those rights.

6 The burden is not ours. If there's a burden,  
7 it's joint in the interest of getting this thing going.  
8 But, clearly in those cases where there is no contract,  
9 the burden is going to be on the ball club to justify the  
10 Employee for Hire Doctrine. And we don't think they can do  
11 it.

12 During the recess, and this has to do with  
13 expressed claims to copyright ownership, it was represented  
14 to me that the CBC does claim copyright in their programs.  
15 They have it right up front on the telecast, on the  
16 monitor. So, there would be an example where the broad-  
17 cast station clearly claims its copyright right on the  
18 monitor.

19 Now, there are a couple of things that  
20 Mr. Fitzpatrick said that were also interesting. One, in  
21 connection with certain hockey telecast, the telecast  
22 has no value once the event is over. And yet, copyright  
23 is claimed in the event. It sort of touches upon something  
24 we were talking about yesterday--the value of a work. It's  
25 valuable, as Mr. Fitzpatrick said, only as of the time it's

1 being broadcast. We have the same argument on compilation.

2 The other thing, on page nine of their reply  
3 brief, Mr. Fitzpatrick states it is their position that  
4 under 11(d)4 of the Copyright Act, the Tribunal is  
5 authorized to distribute CAT royalties only to copyright  
6 owners. We agree entirely. And this sort of gets back to  
7 something we were talking about yesterday.

8 Now, Mr. Fitzpatrick has spent a fair amount  
9 of time on legislative history. And our views on that  
10 subject were expressed yesterday and will not be here  
11 repeated. We disagree entirely with his analysis of what  
12 relevant considerations are.

13 The basis for that was our presentation  
14 yesterday and in our briefs.

15 COMMISSIONER COULTER: May I just interrupt  
16 you on that issue?

17 MR. KING: Yes.

18 COMMISSIONER COULTER: When Mr. Wasilewski  
19 or Mr. Sommers, or whatever it is, spoke, he knew he was  
20 speaking on the record; is that correct? He would have  
21 known he was speaking for the record.

22 MR. KING: On the record?

23 COMMISSIONER COULTER: Yes.

24 MR. KING: Sure.

25 COMMISSIONER COULTER: I mean, he did. And



1 presumably, his conversation was made in that reference.  
2 And it becomes part of a public record. I would ask you,  
3 would you promise to never to refer to the record here  
4 again?

5 MR. KING: No. But that's not the point.

6 COMMISSIONER COULTER: But the point is, it  
7 was a public statement made for a record someplace. And  
8 the question is whether it's totally inappropriate to even  
9 pay any attention to that at all.

10 MR. KING: I think statements of that type,  
11 as we said yesterday, are recorded no weight in  
12 determining legislative intention. And you simply cannot  
13 say that that statement played a role or what role in the  
14 legislative process. So, what you look at is the act itself.  
15 And then you get into the interpretation, as expressed in  
16 the committee reports and in the presentation of the bill  
17 on the floor. And you look at that to determine what the  
18 Legislature intended by certain provisions.

19 And I think that the fallacy of relying upon  
20 statements such as are suggested by the NPAA and the sports  
21 interests is the casual nature in which they can be uttered.  
22 Mr. Wasilewski, for example, on this quote was being asked  
23 questions about the record industry, the complexities of  
24 it, the intricacies of it. To illustrate a point, he  
25 refers to sports or program syndicators, without even thinking,

1 obviously.

2           And, even if one looks at the statement itself,  
3 that the plain language of the statement is not inconsistent  
4 with the position we're taking here. And represented by  
5 Mr. Popham, that we are not the major claimant, 25 percent,  
6 if everything we're saying is true.

7           The other thing, the NAB cannot speak for all  
8 stations. There are a number of broadcasting stations  
9 that were not represented by the NAB. That would be  
10 another reason for tending to discount Wasilewski's state-  
11 ment.

12           But, the statement made by Mr. Sommers, "I  
13 guess", how much credibility can you attach to that? "I  
14 guess they own it." Is that an acknowledgement that we have  
15 no interest in it? Absolutely not. And yet, it's being  
16 urged. And it was urged yesterday.

17           There is no acknowledgement that is inconsistent  
18 with the position we've been taking throughout these  
19 proceedings. If you want to look at the language itself,  
20 and not accept the opposing claimants' characterizations of  
21 it. Thank you.

22           COMMISSIONER COULTER: I have another question.  
23 In my first questions to you, I tried to get a handle on  
24 just what the nature of the problem was between contracts,  
25 gave specified copyright with the broadcaster, those

1 presumably specifying it with the team, then this large  
2 contested role in between.

3 Your assertion is that it belongs to you  
4 first; and the teams' assertion is the contrary. So, it  
5 appears to me, at least, that there needs to be some way of  
6 determining sort of the flow of authority there. Would you  
7 agree?

8 MR. KING: I'm sorry.

9 COMMISSIONER COULTER: A flow of authority.  
10 There has to be some way to identify in which direction  
11 authority is transmitted. If we have this contested  
12 middle world, where --

13 MR. KING: I think that that would be a  
14 consideration in interpreting the contract.

15 COMMISSIONER COULTER: Yes. And my next  
16 question is would the most tangible way to try to determine  
17 that be the payment, you know, who pays whom?

18 MR. KING: We pay them.

19 COMMISSIONER COULTER: I'm just--

20 MR. KING: If that would follow, then the  
21 burden would be theirs. I think it's theirs on the basis  
22 of their papers. They are, again, relying, to start with,  
23 on the Work for Hire Doctrine. And I think they should  
24 prove it, if that's the basis.

25 I think another way of doing it, frankly, the

1 easiest way, is just that the parties can agree on what  
2 the contracts are, and just proceed on that basis. As long  
3 as we can stipulate as to what the contracts are, so that  
4 there is no dispute about that, the authenticity of the  
5 agreement in each case.

6 I think it may be a large number of cases  
7 where there will be no dispute. I don't know. We'd have  
8 to look at each contract. But I think that that would be the  
9 way of proceeding, frankly, without worrying about how  
10 authority flows.

11 I mean, if there is a dispute, it's necessary  
12 to interpret it, and that becomes a relevant factor, then  
13 we can get into it.

14 CHAIRWOMAN BURG: All right.

15 MR. FEINBERG: Excuse me, Madam Chairman. I  
16 ask Mr. King if I could just have a minute. I'd just like  
17 to respond to something that Mr. Fitzpatrick said this  
18 morning. He has invoked the name of Ted Turner several  
19 times and called the contract of the Hawks an aberration.  
20 And I think I would like to clarify his remarks in the  
21 respect that WTBS, in submitting its filing this past July,  
22 indicated that the leagues would be filing for the royalties  
23 for the sports casts.

24 This, in no way, is meant to suggest that the  
25 leagues had any legal rights one way or the other. As

1 Mr. Fitzpatrick correctly pointed out, the particular  
2 contract between WTBS and the Hawks grants the rights in the  
3 telecasts to WTBS. Now through a private arrangement between  
4 Super Station, Inc. and the leagues, WTBS has relinquished  
5 its claim to royalties of the Hawks games for the 1978  
6 season. And I think that's even stated in the brief of  
7 the leagues.

8           So, I just thought I'd like to say that that  
9 should play no part in your consideration of any of these  
10 issues, the fact that WTBS has relinquished its right to  
11 claim royalties for the past year.

12           COMMISSIONER JAMES: One further point, they  
13 relinquished it by contract; didn't they?

14           MR. FEINBERG: No, they did not relinquish it  
15 by contract. The present contract between the Hawks and  
16 WTBS, grants WTBS the rights to the royalties. The contrast  
17 is that the contract grants them the rights to the copyright;  
18 and hence, the royalties.

19           Now, in this particular case, WTBS is owned  
20 by Super Station, Inc., and Super Station, Inc., is owned  
21 by Ted Turner. And Ted Turner also owns the Hawks. Through  
22 an informal arrangement, WTBS has agreed to seed the rights  
23 of the royalties for the 1978 accounting period to the teams.  
24 And the teams have correctly represented they are claiming  
25 rights to these royalties.

1                   That is a private agreement between the club  
2 and the station.

3                   COMMISSIONER JAMES: I'm saying that they  
4 relinquish it by this private arrangement through a  
5 contract; wasn't it?

6                   MR. FEINBERG: No, there's no contract; it  
7 was verbally agreed upon. There's an arrangement, an  
8 informal arrangement. There's no contract, no.

9                   COMMISSIONER JAMES: An informal arrangement?

10                   MR. FEINBERG: An informal, verbal arrangement.  
11 There is no contract. And we have not contested the  
12 league's right to claim the royalties for the Hawks'  
13 contests for 1978. That would have no bearing on any  
14 decision of this Tribunal or any future distribution  
15 proceedings.

16                   And by that, I would mean to say, that WTBS  
17 would not continue this arrangement. That's not a question  
18 here. But I just wanted to clarify the record, and that  
19 was all.

20                   CHAIRWOMAN BURG: All right. We will now go  
21 into rebuttal time.

22                   MR. FITZPATRICK: There are three brief points.  
23 First, the record should be absolutely clear that our  
24 statement was that Mr. Turner's contract was an aberration;  
25 not Mr. Turner was an aberration.

1 We are still not certain as to where, in fact, there is  
2 a controversy in terms of particular program claims. They  
3 said: we have claimed, in terms of all sports programming,  
4 30 percent of the flagship stations, haven't filed claims  
5 at all, but that made up quite nicely, thank you, by the  
6 40 percent of the broadcasters that did file that asked for  
7 more than 100 percent of the pot.

8 We think that the record is clear, that the  
9 burden is on the broadcasters at this point in the evidentiary  
10 hearing to come forward with a demonstration that in our  
11 grant of our property rights, we have acknowledged that they  
12 are the appropriate claimants here. In the absence of  
13 that, Members of the Tribunal, we feel that the sports  
14 interests are the appropriate claimants, and they have the  
15 standing here to assert the best claim that we can for the  
16 largest part of the pot, that might be properly attributable  
17 to our sports programming.

18 I will conclude unless there are any further  
19 questions.

20 (No verbal response.)

21 MR. FITZPATRICK: Thank you so much.

22 CHAIRWOMAN BURG: Mr. King?

23 MR. KING: Just a few last couple of things, if  
24 I may. I certainly never said or indicated during my last  
25 remarks that the NAB was not authorized to appear here for

1 the claimant stations. That certainly was not the import  
2 of what I said. And I just wanted to clarify that.

3 Secondly, Mr. Fitzpatrick continues to make  
4 reference to common law rights. We are now talking about  
5 copyright, ownership of copyright. We're not talking about  
6 common law rights. Common law preempted to the extent that  
7 it's inconsistent with copyright.

8 That's all; thank you very much.

9 CHAIRWOMAN BURG: All right. This will conclude  
10 this portion of these proceedings.

11 The Tribunal will meet again this afternoon  
12 at 1:30 to hear the graphic, pictorial and sculpture argu-  
13 ments.

14 (Whereupon, a luncheon recess was taken.)

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1 (General laughter.)

2 MR. FITZPATRICK: I think he's an enterprising  
3 sports and communications entrepreneur. It was an  
4 aberration in the sense that that was the only contract  
5 that we know of where this flow of authority has resulted  
6 in expressed recognition that the team, that the broadcaster  
7 has the rights to claim here.

8 In terms of the flow of authority, I think  
9 that the common law, the legislative history and the reality  
10 that it is our property rights, that we are in a limited  
11 fashion permitting the broadcasters to exercise, defines  
12 that flow of authority and establishes the burden of  
13 going forward in the evidentiary hearing.

14 We believe that what we have demonstrated  
15 imposes that burden, and we think we will be fully prepared  
16 to respond to any claims that the broadcasters might have  
17 that indicate that in our limited grant of rights to them,  
18 to telecast our games, we've granted to them the authority,  
19 we contemplated granting to them the authority under  
20 Section 106 of the Act.

21 Finally, I was interested to hear that the  
22 NAB is not here representing all the broadcasters. We're  
23 still not certain which of the broadcasters they are. We  
24 are not certain which of our flagship stations are the  
25 stations, on our team network are being represented by them.

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COPYRIGHT ROYALTY TRIBUNAL

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Thursday, December 6, 1979

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2000 L Street, N.W.  
Suite 500  
Washington, D.C.

Whereupon, the Tribunal reconvened at 1:30 p.m.,  
following the morning session.

PRESENT:

MARY LOU BURG, Chairwoman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

**ORIGINAL**

AFTERNOON SESSION

1  
2 MR. SCHEINER: Madam Chairman, may I raise  
3 a preliminary matter?

4 CHAIRWOMAN BURG: Yes, sir.

5 MR. SCHEINER: This morning, when Mr. Popham  
6 was granted leave to address the Tribunal, I noted an  
7 objection and also requested an opportunity to reserve some  
8 time to address any such comments as he might make.

9 I would like to take some very few minutes, three  
10 to four at the most.

11 CHAIRWOMAN BURG: You were on the record in  
12 making that request. Please go ahead.

13 MR. SCHEINER: The reason for my request was  
14 that Mr. Popham had come up with a number, a number of some  
15 25 percent, which purportedly represents the claims, not  
16 clear, either NAB and/or broadcasters.

17 I think it appropriate to make several  
18 comments with respect to the statements he made. First,  
19 very briefly, I repeat our basic position which we've main-  
20 tained since the inception of these proceedings.

21 Broadcast stations are entitled to share in  
22 cable royalties. And their entitlement is to their local  
23 programs, which are predominantly news and public affairs  
24 programs.

25 In the course of a day and a half of argument,

1 I also note that NAB has rather backed away from the  
2 position which it took in its briefs. First, as previously  
3 noted, they backed away from their position on music.

4 Second, this morning, they backed away on  
5 any legal argument that it advanced with respect to its  
6 copyright in sports interests, but rather predicated its  
7 argument entirely on some contractual claims.

8 Third, yesterday, we heard some numbers,  
9 different numbers. You will recall that yesterday, in  
10 response to questions from the Tribunal, you were--

11 COMMISSIONER JAMES: Madam Chairman--excuse me  
12 just a minute. Can we have a recess?

13 CHAIRWOMAN BURG: Does it apply to what's going  
14 on now?

15 COMMISSIONER JAMES: Yes.

16 CHAIRWOMAN BURG: Excuse us for a few moments  
17 please, Mr. Scheiner.

18 (A short recess was taken.)

19 CHAIRWOMAN BURG: Mr. Scheiner, my council  
20 informs me that summation is not in order now. But you are  
21 entirely free to respond to Mr. Popham's remarks of this  
22 morning.

23 MR. SCHEINER: Very well.

24 The number given to you this morning was 25  
25 percent. The number given to you yesterday was 10 percent.

1 The number yesterday was a number addressed to compilation  
2 and exclusivity. The number today is 25 percent, as I  
3 understand it, it's compilation, exclusivity in sports.

4 The fact of the matter is that this claim is  
5 contrary to the claims of the persons whom they purport to  
6 represent, where 40 percent of the potential claimants  
7 are claiming over 100 percent of the pot.

8 And, I submit to you, that this is an abandon-  
9 ment of the positions taken by the claimants who may  
10 purport to represent; and I submit to you that this kind of  
11 negotiating before the Tribunal is tantamount to an abuse  
12 of your process. Thank you.

13 CHAIRWOMAN BURG: Thank you.

14 With regard to the issue of pictorial, graphic  
15 and sculptural claimants, Mr. Richard Dannay will speak on  
16 behalf of the claimant. Mr. Dannay, it has been our  
17 procedure here to grant each side one hour to present your  
18 arguments, which you may take all of or any portion thereof.

19 The other side will then have its hour. And  
20 then we'll come back for 10 minutes of rebuttal for each  
21 side.

22 MR. DANNAY: Thank you very, good afternoon.  
23 My name is Richard Dannay from Schwab, Goldberg, Price and  
24 Dannay of New York City. With me is Harriet Yaski (ph), from  
25 Hensen (ph) Associates, Muppets, Inc., the claimants. And

1 we do represent the so-called character claimants, that  
2 is the owners of copyrights in certain pictorial, graphic  
3 and sculptural works which consist of very celebrated,  
4 well-known visual characters such as the Muppet Show  
5 characters, the Sesame Street characters and a variety of  
6 other very well known characters, Superman, Batman and so  
7 forth, as indicated in our brief.

8 I'd like to just begin by not repeating what  
9 we do have in the brief, but just stating in very general  
10 terms what our basic position is. And then, turn to the  
11 objections that were raised to that position in the opposing  
12 briefs.

13 Essentially, and very simply, our position is  
14 that we, the character claimants, have met and satisfied  
15 all of the criteria of the statutory provision in Section 111  
16 of the Act.

17 We are copyright owners, we are copyright  
18 owners of works, as that term is used in that section, and  
19 the works have been included, as that word is used, in the  
20 qualifying secondary transmissions which give rise to the  
21 cable royalty payment.

22 And because we have satisfied each of the  
23 statutory criteria, it follows that the character claimants  
24 are entitled we believe, as a matter of law, in our further  
25 discussion to an appropriate share of the royalty fund that's

1 created under Section 111.

2 And, we submit that there really is no  
3 discretion once we have met the statutory criteria for  
4 denial of any payment to the character claimants. The only  
5 question that remains, once it's determined that they are  
6 copyright owners, works included in the relevant secondary  
7 transmissions, the only question is how much they're  
8 entitled to, not really whether they're entitled to it.

9 Now, as I understand the arguments that have  
10 been raised in opposition to this position, for example,  
11 those raised by MPAA and ASCAP, both of whom oppose the  
12 claims, they boil down, as we see it, essentially to two  
13 objections.

14 One objection could be called, under the  
15 appropriate label, the Program Objection; and the other  
16 one could be called the Licensing Objection. I'd like to  
17 deal with those in that order.

18 The program objection, according to the  
19 opponents of our position, they say that Section 111(d)4  
20 applies only to works which are programs, and only to  
21 copyright owners who are program copyright owners, owners  
22 of the programs themselves.

23 More specifically, if one looks at the reply  
24 brief of MPAA, particularly page 24, they say that Section 111  
25 is intended solely--and I quote: "--solely to provide

1 royalties to the creators and distributors of programs--"  
2 which they underline and emphasize. "--solely to provide  
3 royalties to the creators and distributors of programs  
4 and to no other entity."

5           And then, they go on to say that this provision  
6 cannot apply to owners of characters which may appear as  
7 part of those programs. So, that only copyright owners of  
8 programs, they say, come within the class of copyright  
9 owners that would be entitled to receive cable royalties  
10 under Section 111.

11           Another way of putting it, another way I  
12 think they do put it is to say that the only programs  
13 that qualify as works under Section 111, only programs  
14 qualify as works under Section 111. And because the  
15 characters, not being programs, the characters cannot  
16 qualify as works under that section.

17           Very briefly, before I comment on what I have  
18 called the Program Objection, let me just mention what the  
19 Licensing Objection is. Essentially they say that the  
20 character claimants have licensed away to the program  
21 producer, television program producers, the right to use the  
22 characters in the programs.

23           Now, it is our position that neither of those  
24 objections has any merit at all; neither of those objections  
25 can serve to defeat the claims of the character claimants.



1           Let me start with the program objection, as  
2 I called it. I think, very simply, when one looks at the  
3 face of the statute, that this objection is precluded by  
4 the very plain meaning of the section, to be expressed in  
5 unambiguous language that appears in Section 111(d)4.

6           Under that section, the right to receive  
7 cable royalties is not limited in any way to owners of  
8 "programs" or to works which are "programs". Quite to the  
9 contrary, Section 111 says that payment is to be made  
10 to--and I again quote: "--any such owner--", of course,  
11 that means copyright owner. "--any such owner whose work  
12 was concluded in a secondary transmission made by a cable  
13 system of a non-network television program." And then it  
14 goes on to clarify what those signals would consist of.

15           In other words, payment under this provision  
16 is to be made to the copyright owners of works which are  
17 included in programs. It doesn't say, as I think MPAA  
18 and perhaps others would seem to be arguing, that payment  
19 is to be made to copyright owners of programs, as distinguished  
20 from works, which have been included in secondary transmissions.

21           I think this is very important, because I  
22 think the language is so clear and so precise, that it leaves  
23 no room for any reasonable debate. That, Congress intended  
24 that this kind of narrow interpretation of this provision  
25 which MPAA is arguing for, namely limiting the provision to

1 programs only and to program copyright owners only, it would  
2 have been simple to say so. But, quite to the contrary,  
3 Congress did not. It chose its words carefully. It used  
4 all of the words that are at issue here: copyright owner,  
5 works, program and so forth. But they've put them in a  
6 certain sequence, a certain position and with a certain  
7 meaning that really is inescapable.

8           And to reach the result that's advocated by  
9 MPAA and others, you have to alter those words. You have  
10 to substitute new words and change the sequence in order to,  
11 as we maintain, distort the meaning to make it limited,  
12 very narrowly to a closed club of program owners.

13           In fact, in one sense, I think I agree with  
14 MPAA in a comment which they made on page 17 of their main  
15 brief, in connection with an issue, I should point out, on  
16 which we express no opinion. But I do infer to the basic  
17 approach which they advocate, namely that you have to look  
18 to the plain meaning of the statute. And where the meaning  
19 is plain, we don't have to go back into legislative history.

20           Let me just read from that briefly. MPAA says,  
21 and I quote: "Program syndicators submit that the Tribunal  
22 need not go beyond the language of section 111 (d) 4(a) to  
23 dispose of any NAB's claim to royalties--" et cetera.

24           The plain meaning of the section precludes such  
25 royalties. The statute, itself, leaves no ambiguity; and

1 therefore, nothing to construe. The Tribunal, no less  
2 than the courts, must assume that the legislative purpose  
3 is expressed by the ordinary meaning of the words used in  
4 the statute. Well, I couldn't agree more.

5 And I think that when one reads the section  
6 and makes the appropriate distinction between works, on the  
7 one hand, and programs which include those works, you can  
8 see that there is validity to the claim of the character  
9 claimants, and that MPAA's position is very narrowly  
10 restricted and would seek to foreclose copyright owners  
11 of works and keep the club of people who are allegedly  
12 entitled to the cable royalties, very narrow, very small.

13 COMMISSIONER BRENNAN: Mr. Dannay, during the  
14 long tenancy of the Copyright Bill before the Congress,  
15 did the claimant that you represent submit any recommendations  
16 to the Congress as to the cable fee schedule?

17 MR. DANNAY: To my knowledge, they did not  
18 participate directly in those proceedings. However--

19 COMMISSIONER BRENNAN: If they contemplated  
20 receiving cable royalties, isn't it rather unusual they  
21 had no interest in the amount of the royalties established  
22 by the Congress?

23 MR. DANNAY: I would say that they had no  
24 interest in the subject matter. I would say that not being  
25

1 one of quite practical about it, not being one of the  
2 major claimants, and certainly on the face of the claims  
3 that is still so. They did not, certainly didn't carry  
4 the laboring, nor did they participate as heavily as one  
5 might expect.

6 But, I think the crucial thing is not whether  
7 the character claimants sought to bring themselves actively  
8 within the legislative process at that time. I think it's  
9 important what the statute says and does the statute  
10 confer a benefit. I know of no principle of law or other-  
11 wise that says that the statute clearly confers a benefit  
12 on the class of claimants that they are precluded from  
13 participating in the benefits so provided simply because  
14 they were not actively involved in the legislative process.  
15 And I think that's exactly what happened here.

16 I don't think that the legislative history is  
17 helpful particularly one way or the other in the sense that  
18 it doesn't grapple, doesn't deal explicitly with the very  
19 issue that is being presented. But of significance is the  
20 fact that it does not preclude the claim being asserted here.  
21 I think that is the critical point.

22 There is nothing in the legislative history  
23 that I'm aware of that has been called to my attention that  
24 would preclude it. And it seems to me that the plain meaning  
25 of the statute which I've just indicated encompasses the

1 kind of claim, the character claimants are making that  
2 removes all objection.

3 In fact, if you'd take the MPAA claim and  
4 bring it to its logical conclusion, you can see that it  
5 cannot be a sound objection on their part, because if the  
6 program objection, as I call it, nor to put a concise  
7 label on it, if that were upheld, I think the logical and  
8 the unavoidable conclusion would be that no payment, no pay-  
9 ment at all could be made to the performing rights societies.

10 Now, why do I say that? I think if you  
11 consider the music analogy, which was raised very briefly  
12 in the memorandum that we submitted, you can see that the  
13 performing rights societies, who I think are pretty generally  
14 conceded to be entitled to some payment under the provision,  
15 they own rights in music, or the music copyright owners  
16 who they represent own rights in music.

17 That music is not a program. That music, just  
18 as in the case of the characters, is merely an element  
19 that is included in programs. But it does not, in and of  
20 itself, constitute a program.

21 And so, if you were to take this position,  
22 the Tribunal were to take the position that only programs  
23 or copyright owners of programs were entitled to payments  
24 under Section 111, it would seem to me to lead inevitably  
25 to the result that the performing rights societies would

1 barred on that ground alone from participating.

2           They answer that a little bit, or attempt to,  
3 in their brief, by turning to the licensing objection,  
4 which I'm going to get to very shortly. But, I submit to  
5 you, that the licensing objection has nothing to do  
6 with the question, whether the copyright of music is an  
7 element of a program, included in a program or a program,  
8 in and of itself.

9           And if, as a threshold matter, in order to  
10 qualify as a work, you would have to have a program, then I  
11 think the performing rights societies would lose. I'm not  
12 advocating that, quite obviously. I think that would be an  
13 absurd conclusion that one would have to reach in order to  
14 defeat the character claimants--that we're making here today.

15           And I think that because of the similarity  
16 of the position on this point, I cannot see any reason in  
17 fairness where under the statute, or any other reason, why  
18 the character claimants should receive any different  
19 treatment or be put into any different position than the  
20 performing rights societies.

21           I want to go now to the question of the  
22 licensing objection, as I termed it. I think that once  
23 rebuttal of the program objection has been made, it inevitably  
24 leads to a dismissal of any consideration of the so-called  
25 licensing objection as well. And for this reason--in our

1 view, and our basic position is that the contracts or licenses  
2 which have been referred to in some of the objecting  
3 parties' briefs, those licenses had no bearing at all on  
4 the question of the standing of the character claimants  
5 under section 111 to receive royalties, no matter what the  
6 contract said.

7           And, I should add, as an aside, recognizing  
8 that I'm saying that the contracts have no relevance on  
9 this issue, I do want to add that they are not uniformed  
10 contracts. I'm not personally familiar with them. But I  
11 know that they are not uniformed contracts. They don't all  
12 say the same thing. They present a variety of situations.  
13 They've been characterized, I'm afraid, in the opposing  
14 briefs as if there is one standard form.

15           But, no matter what the contracts say, the  
16 character claimants remain the copyright owners, as that  
17 word is used in section 111. They remain copyright owners  
18 of their own works, namely the characters.

19           There may be, of course, several copyrights  
20 in the program, in the program material.

21           COMMISSIONER JAMES: Are you saying that it  
22 cannot be--that that right cannot be transferred by a  
23 contract?

24           MR. DANNAY: What I am saying is that the--

25           COMMISSIONER JAMES: Whether it has or has not,

1 you're not saying that it cannot be transferred to a  
2 program producer by contract; are you?

3 MR. DANNAY: What I am saying is that the  
4 contracts, no matter how interpreted, unless each and every  
5 copyright interest of all kind were renounced or abandoned  
6 by the character owners and no one makes that claim, and of  
7 course, that's not true.

8 COMMISSIONER JAMES: No, I'm just--. Let me  
9 put it in my positive form. Can the ownership of a  
10 copyright be transferred by contract?

11 MR. DANNAY: Incidents of ownership can be.  
12 But what I'm saying is the status of the copyright claimants  
13 as copyright owners is in no way lost or diminished by  
14 anything that the contract could possibly say. And for that  
15 reason, as I will elaborate on in a moment, I don't think  
16 it's even necessary to get into the question, neither  
17 necessary nor appropriate to get into the question of what  
18 the contract says.

19 And I would suggest that in addition to the  
20 fact that it is immaterial what the contract says, the  
21 burden of going over hundreds and hundreds of contracts of  
22 different kinds, I don't think that was contemplated in  
23 this kind of a proceeding.

24 But, be that as it may, the important point I  
25 want to stress is that the character claimants remain as



1 copyright owners of their works. We don't take the  
2 position that the program producers are not copyright owners,  
3 perhaps, of their programs as a program.

4 But, again, I want to focus back on what the  
5 statute said. The statute directs that payments be made  
6 to copyright owners of works included in programs. It does  
7 not say copyright payments should be made to copyright  
8 owners of programs. And for that reason, and for the  
9 additional reason that the character claimants remain  
10 copyright owners of their works, which have been included  
11 in these programs.

12 The character claimants meet the test of  
13 being copyright owners, in the sense that that term is  
14 used under section 111. And I don't think anything that  
15 could appear in the license agreements would in any way  
16 diminish or eliminate this status as copyright owners, having  
17 sufficient interest in their works, their characters, as  
18 they may be included in programs.

19 Now, there is another way to approach this,  
20 a very practical way, in addition to concentrating on the  
21 specific language of the statute. Suppose, hypothetically,  
22 that a cable system transmitted a television program, the  
23 Muppet Show, for example. Let's assume, further, that the  
24 cable system was not exempt from copyright infringement  
25 liability, and for one reason for another, or for various

1 reasons, perhaps a failure to report or whatever, they had  
2 lost the benefit of the compulsory license, so that they could  
3 not take advantage of its benefits. There would be no  
4 question that that secondary transmission, made by a  
5 cable system under those circumstances, would be actionable  
6 as an infringement under Chapter Five of the Copyright Law,  
7 Section 501, et cetera.

8           Indeed, Section 111, in several places says  
9 just exactly that. Now, what is the significance of that?  
10 If, in fact, the character claimants would have standing to  
11 sue the cable system which had lost, it was unable to take  
12 advantage of the compulsory license benefit to insulate  
13 itself from an infringement suit, then, indeed, it would  
14 be anomalous, I suggest, to exclude character claimants  
15 from standing on this Section 111 of the Act, to receive  
16 cable royalties which are, in reality, nothing more than  
17 the equivalent of damages that would otherwise be paid for  
18 an infringement, as a compulsory license fee.

19           So, since the character claimants could sue  
20 a cable system that could not avail itself of a compulsory  
21 license, I cannot see how, under the statute, as it's  
22 written or under any common sense fairness that the charac-  
23 ter claimants should have any lesser copyright interests  
24 for purposes of receiving payments under 111 for those  
25 very cable royalties which are nothing more than the

1 substitutive for what would otherwise be damages, in an  
2 infringement suit.

3           Therefore, I say again, with that reasoning  
4 in mind, I think it is quite clear that the licensing  
5 provisions are not relevant. And I repeat, in response to  
6 your earlier question, I don't think anyone has suggested  
7 that the character owners had forfeited or abandoned or  
8 conveyed each and every conceivable copyright interest, such  
9 that there is nothing left to their original status as a  
10 copyright owner.

11           In short, we believe the licensing arrangements  
12 have absolutely no relevance. I should say really, in  
13 passing, an additional point which I think is worth is  
14 considering, that the display right under Section 106,  
15 Subdivision Five, which, of course, is the right that applies  
16 to pictorial, graphic and sculptural works, which these  
17 characters are, this right was newly created under the  
18 1976 Copyright Act, which, of course, went into effect  
19 January 1, 1978.

20           After the licenses raised by the objecting  
21 parties, we negotiated and signed. In other words, this  
22 right didn't even exist at the time. I don't see how the  
23 character owners could be deemed to have granted a way or  
24 right that was never in existence at the time that the  
25 licenses were signed and went into effect. So, for this

1 reason, in addition to the reasons I've mentioned before,  
2 I don't think that the Tribunal need place itself in the  
3 burden of the position of having to sit through weighing,  
4 review and analyze hundreds and hundreds of agreements with  
5 different nuances in different industry practices in order  
6 to decide this issue, because I think the issue is really  
7 a smoke screen, trying to keep, again, the club of payees  
8 under the provision very small.

9           The program producers, obviously, do not own  
10 any rights in the copyrighted characters as such. Whatever  
11 rights they have are in their programs; payment under 111  
12 does not relate to ownership of the program, as distinguished  
13 from ownership of rights in the works, which are included  
14 in those programs.

15           There is another important factor here, too,  
16 and this has been raised somewhat in the briefs. Where a  
17 work has become so emerged or so blended with other  
18 program so that it is indistinguishable from the program  
19 material, as might I suppose be the case in instances of  
20 certain copyrighted themes or logs, yes, under those  
21 circumstances it might be difficulty in segregating the  
22 program from the program material it included.

23           But, we don't reach that question, because,  
24 as I mentioned before, the character, just like the copyrighted  
25 music, stand in a very different footage. They never lose

1 their identity. The characters, like the music, are always  
2 recognizable in just the same form that it existed before  
3 it was ever included in the program. Nobody has any  
4 problem recognizing it.

5           COMMISSIONER BRENNAN: In your brief, you  
6 distinguish the characters from plays. If we had an author  
7 of a play which secures copyright, retains copyright  
8 ownership, permits a broadcaster to perform the play,  
9 the play is performed exactly as written, complete text,  
10 and then, this transmission is picked up by a cable operator  
11 and imported as a distant signal. If we were to accept  
12 your argument, would the playwright be entitled to file a  
13 claim before this body?

14           MR. DANNAY: Fortunately, I'm not in a position  
15 where I would have to decide that. But I think that, yes,  
16 if they can be analogized to the position of the character  
17 claimants in the nature of their work and the ownership  
18 issues and they can be analogized appropriately to the  
19 music position, I can see an argument being made.

20           Actually, in the real world, however, I think  
21 that most other elements that I can think of, other than,  
22 as a practical matter, characters in music, we made some  
23 small other exceptions, which would be only incidental part  
24 of any program. I don't think that's really what happens.  
25 I think where we know that, as a practical matter, most

1 themes, block themes, story lines tend to be changed  
2 so drastically, then maybe they are no longer recognizable  
3 as they appear in the program. And in that sense, I  
4 suppose the concept of what is included in a television  
5 program, for purposes of determining one of the criteria  
6 triggering entitlement to royalty payments. In that sense,  
7 I suppose, the character claimants, like music, copyrighted  
8 music, really, as a practical matter, in most situations,  
9 at least on those facts, will be different than on the  
10 program material.

11                   COMMISSIONER BRENNAN: Some years ago, the  
12 copyright owners in the film, "Gone With the Wind" authorized  
13 the first television performance of that film. And this,  
14 of course, was a major event in television. Could possibly,  
15 if we were in existence at that time, the estate of  
16 Margaret Mitchell come before us and file a claim because  
17 of the distinct contribution and nature of that underlying  
18 work?

19                   MR. DANNAY: Of course, one of the problems  
20 when one talks about a printed work, which is adapted  
21 really into a derivative work, there is a transformation.  
22 There's a transformation in the very definition of a  
23 derivative work.

24                   But, I don't think that anything that occurs  
25 to the characters, as they are drawn into and included in

1 programs makes them a derivative work. Those characters  
2 retain the same visual identity, and they retain, indeed,  
3 the same personality identity, if you will, that they had  
4 before they ever were drawn into and included in the  
5 program.

6 So, there really is a difference in the  
7 nature of that kind of work.

8 COMMISSIONER BRENNAN: The characters in  
9 "Gone with the Wind" were transferred by Clark Gable and  
10 others, and so therefore--

11 MR. DANNAY: The actors add a dimension,  
12 certainly. I think that has always been the case. In the  
13 case of the Muppets for example, or the other characters  
14 that I mentioned before, they appear precisely in the form  
15 that they were originated and created by the character  
16 claimants themselves, without any change whatsoever. They  
17 are immediately recognizable.

18 And, indeed, before that, in terms of equity,  
19 those characters, and the characters alone, in almost all  
20 circumstances, are really the dominant drawing power, the  
21 dominant element of the programs in which they appear--often  
22 very much different, therefore, from other elements, other  
23 copyrightable elements which may appear in other kinds of  
24 programs where the actors who play the parts created by  
25 the literary characters add a dimension which may very well

1 change them from the one they read in the book.

2 COMMISSIONER COULTER: Mr. Dannay, what  
3 you're saying, then is not -- the crucial element is not  
4 the copyright which the playwright would obtain just as,  
5 presumably, the author of his characters were, but the  
6 nature of the copyright of the material, that's the basis  
7 of your claim?

8 MR. DANNAY: Well, I think the basis of the  
9 claim are the three elements of the statute. And I think  
10 each has to be satisfied. Perhaps I misunderstood the  
11 question.

12 COMMISSIONER COULTER: The question was is a  
13 playwright retaining, obviously, his copyright in a play,  
14 if that play is -- after he has obviously contracted it  
15 with a television company to produce, that play is carried  
16 on a secondary transmission, because that playwright  
17 obviously still possesses the copyright in one sense, would  
18 be analogous to your circumstance, except the nature of  
19 the copyrighted material. That's the only distinction  
20 you're making.

21 MR. DANNAY: In the situation you've described,  
22 assuming that there is copyright ownership, and with  
23 knowledge that they are works rather than programs, which  
24 is the test, the question would then be whether they are  
25 the kind of work that is included in the program that is



1 being secondarily transmitted. And, there are differences  
2 between characters, on the one hand that's vindicated and  
3 the kinds of elements which have been described in the  
4 very sense they mentioned. The characters undergo no  
5 change.

6 COMMISSIONER COULTER: But, what you're  
7 asking us to do, though, is make a distinction between the  
8 nature of the copyrighted material.

9 MR. DANNAY: Well, frankly, I'm not asking you  
10 to make that distinction. We are merely saying that what-  
11 ever the entitlement or lack of entitlement of other  
12 elements who may or may not have filed claims, it is clear  
13 that the character claimants satisfy each of the criteria  
14 set forth in the statute.

15 What the implications of that will be for other  
16 copyrightable elements, I simply don't have enough informa-  
17 tion to trace it out to its logical conclusion. But what is  
18 important is that a benefit was conferred on claimants  
19 in the position of the character owners. They meet all the  
20 tests. I don't see how in fairness or under the statute  
21 they can be excluded from the benefits conferred by this  
22 statute, simply because it may, in the process, raise some  
23 additional difficult questions with regard to other  
24 material that may also be included in the programs.

25 But, I'm suggesting to you that there is a

1 basis for a distinction, yes, between characters, on the  
2 one hand--characters in music, say, on the one hand, to  
3 claims that are presented here, and the other kinds of  
4 copyrighted material which could be included in the program,  
5 in that the other material almost invariably undergoes a  
6 very serious transformation, causing its identity, in a  
7 sense, perhaps to be lost, or to at least be blended with  
8 or merged with so much additional material of value and  
9 importance, that one could say that the characteristics  
10 of the original work had somehow been lost. That is not  
11 the case with the characters.

12 COMMISSIONER COULTER: But you've dismissed  
13 what seems to be a fairly substantial aspect. In other  
14 words, the relationship between these characters and the  
15 people responsible for programming them. In other words,  
16 the licensing argument, that contractual relationship  
17 strikes me as fairly crucial.

18 MR. DANNAY: Well, with all due respect, as  
19 I indicated before, I don't think it's crucial within the  
20 context of determining entitlement to the cable royalty  
21 payments under Section 111.

22 COMMISSIONER COULTER: You implied, however,  
23 though, that it was possibly crucial in the case of a  
24 playwright.

25 MR. DANNAY: No, I thought we were focusing

1 there on the nature of the work, which was being either  
2 enacted in one case or simply included in another case  
3 in the ultimate program.

4 And, as I said at the outset of my remarks  
5 in connection with the objections that were raised. We're  
6 not taking the position that the program producers don't  
7 have the copyright in their program as a program. We  
8 assume that they have filed in asserting arguments on  
9 behalf of those claims.

10 But, that doesn't preclude the additional  
11 claim on behalf of character claimants who, because of the  
12 way the statute is clearly and plainly worded, are  
13 copyright owners of works which have been included in  
14 secondary transmission for those programs.

15 We are not trying to argue, quite frankly,  
16 that any other party is or is not entitled to receive  
17 payment. We're merely making the argument that the character  
18 claimants, because they meet each of the criteria in the  
19 statute, are, in fact, entitled to payment. And while it  
20 may perhaps come as a surprise to certain parties, because  
21 of the lack of participation by the character claimants  
22 in the legislative process that led to the development of  
23 the act, because this benefit is clearly conferred, I don't  
24 see how it can be precluded in the case of the character  
25 claimant.

1           In addition, too, there has been sort of a  
2 suggestion, I think, in some of the briefs, one has to  
3 read a little bit between the lines I suppose, that somehow  
4 characters really aren't works after all under the meaning  
5 of the Copyright Law.

6           Of course, that's clearly not true. Characters  
7 such as those owned by the character claimants are clearly  
8 pictorial, graphic and sculptural works under Section 102.  
9 There is no question about that. And one can only consider  
10 very briefly the long history of consistent recognition by  
11 courts to the copyright status of characters and the  
12 protection of characters, particularly those characters  
13 in the visual form, exemplified by the characters which  
14 are owned by the claimants here.

15           We've cited several cases in our brief.  
16 I'm sure that you are familiar with them, characters such  
17 as Superman, Batman, Robin and so forth have all been  
18 protected. And even in a case that was not cited in our  
19 brief, the Walt Disney characters in the Disney versus  
20 Air Pirates (ph) Case, Mickey Mouse, his brethren were  
21 protected against infringement.

22           So, there is, in fact, a long and consistent  
23 recognition of the rights of characters under the Copyright  
24 Law, as detectable works, the rights which can be enforced  
25 against others. And therefore, I don't think that on that

1 ground alone there can be any denial of the claim.

2 I think I've touched enough upon the question,  
3 the remaining criteria. I've talked about the meeting the  
4 test of being a copyright owner. I've talked about the  
5 test of meeting the definition of works, as that term is  
6 used in Section 111. And I have dwelled on the included  
7 tests sufficiently to see and to summarize that, indeed,  
8 the character claimants had met each of the tests set  
9 forth in the act.

10 And, I think once that is established, then  
11 the burden lies very heavily on the other parties to show  
12 why any payment should be denied to the character claimants.

13 Thank you. I'd like to reserve any additional  
14 time I may have for rebuttal comments.

15 CHAIRWOMAN BURG: Thank you, Mr. Dannay.

16 The opposing side will begin. And I might  
17 add that the schedule, the order of appearance was designated  
18 to us, we did not assign it. Mr. Scheiner will begin with  
19 15 minutes, followed by Mr. Koenigsberg with 15 minutes,  
20 either Mr. Chapin or Mr. Duncan with 15 minutes,  
21 Mr. Ciancimino with five minutes and Gordon King, five  
22 minutes.

23 MR. KOENIGSBERG: Madam Chairman, with your  
24 permission, Mr. Scheiner and I would like to switch places.  
25 And, if it's alright with the Tribunal, I'll lead off and

1 Mr. Scheiner could follow.

2 My name is Fred Koenigsberg, I'm counsel to  
3 ASCAP. ASCAP's General Counsel, Bernard Korman, was here  
4 yesterday. He expresses his regrets of not being able to  
5 be here today. We talked about sports this morning; I  
6 guess you can think of me as a designated hitter.

7 I might initially say that I'm kind of sorry  
8 that broadcasters withdrew their claim that the performing  
9 rights societies couldn't be here at all, because I love,  
10 as designated hitter, to get those nice, fat pitches that  
11 I know I can hit out of the ballpark. Since they did  
12 withdraw it, we won that game by forfeit, I guess. I suppose  
13 we have to deal with the curve balls like the cartoon  
14 characters have now thrown at us.

15 All the theory that has been expressed on  
16 this cartoon character point, interesting, fascinating.  
17 But it is presented to you, I submit, in a vacuum. And  
18 you can't discuss the Copyright Law, you can't discuss the  
19 cable compulsory license, you can't discuss what the  
20 Tribunal is supposed to do in these proceedings in a vacuum.

21 You've got to look at the way the real world  
22 works, the way the world works as Congress understood it.  
23 You've got to look at what Congress intended in the law.  
24 And, I think when you look at the Copyright Law in that  
25 context, the claims of the cartoon characters really fall by

1 wayside.

2 I would suggest to you, with all respect,  
3 that the question which the Tribunal should always consider  
4 in determining, not only this question, but all the  
5 issues that have been put before you in the past day and  
6 a half, is that what would happen in a world where no  
7 compulsory license existed. What would the licensing  
8 arrangements be? Who would license whom? How would the  
9 world work? Because, as has been mentioned to you before,  
10 what the compulsory license does is replace a voluntary  
11 licensing arrangement in a world where cable systems had  
12 liability for performances, had to pay copyright owners  
13 for performances.

14 And when you look at what happens in the  
15 real world, I think you come to some conclusions that are  
16 just directly opposite to what my good friend, Richard  
17 Dannay has suggested.

18 Mr. Dannay suggests that you should not, in  
19 any way, examine the licensing arrangements that have  
20 occurred, that are stated in the cartoon characters' brief.  
21 Well, that's kind of an Alice in Wonderland approach. We  
22 can refer to some other cartoon.

23 How can you ignore the conveyance of rights?  
24 How can you ignore the way the world works, as Commissioner  
25 James pointed out. Of course, copyrights can be transferred.

1 Of course, rights and copyrights can be transferred. And  
2 they always are. And that, I think, is a question that  
3 you have to look at when you examine this claim.

4 The result, if you buy the argument that you  
5 don't look at the licensing arrangements, if you buy the  
6 argument that as "any copyright owner is entitled to claim",  
7 becomes ludicrous, because that result would, as the  
8 questioning, I think, indicated, would get you to the  
9 strange, wonderous world where people who wrote screen plays  
10 would be able to come in and make a claim before the  
11 Tribunal, people who wrote novels which were adapted into  
12 programs would be able to come and make a claim before  
13 the Tribunal. I suppose somebody who wrote a treatment of an  
14 idea would be able to come in and make a claim. And that  
15 is not at all what Congress intended.

16 Congress knew very well, I think, what the  
17 licensing arrangements in the real world were. And they  
18 knew that, for the most part, program producers got the  
19 rights that they needed to make a program, put it on  
20 broadcasting stations, have it retransmitted by cable systems.

21 Now, there has also been much talk about  
22 analogies to music and to the claims of the performing  
23 rights societies. And I would suggest to you that those  
24 analogies that have been suggested must fall by the wayside  
25 precisely because of the way the real world works, precisely



1 because of the way the licensing arrangements in the real  
2 world are structured.

3 Music is, as the Supreme Court and other  
4 courts mentioned in the recent CBS Case that involved ASCAP  
5 and BMI, music is unique. It operates under its own  
6 terms.

7 The licensing arrangements in the world of  
8 music are very different from any other licensing arrangements  
9 that are made. And they are different because the copyright  
10 owners of the musical compositions are not asked by the  
11 program producers for the performing rights in their  
12 musical compositions.

13 The performing rights are, therefore, expressly  
14 withheld by every contract that the copyright owner of the  
15 musical composition has with the program producer. And  
16 those are performing rights for every possible means of  
17 performance to which the programs can be put: broadcast  
18 performances, cable television performances and anything  
19 else, I suppose.

20 That is a long standing fact of life. It is  
21 a long standing history of the way licensing occurs in the  
22 world. And that, I would submit to you, is the real  
23 difference here, and one that cannot be overlooked. And  
24 that difference is recognized, I think, by Congress. It  
25 has been mentioned no where throughout the long history of

1 revision, was Congress approached by cartoon character  
2 claimants or really anybody else like screen writers or  
3 novelists or anybody of that sort, with the claim that:  
4 we will be entitled to royalties if you pass this law.

5 That, of course, is not the case as far as  
6 music is concerned because the performing rights organizations  
7 were always before Congress, making their positions known,  
8 and Congress knew full well about how performing rights  
9 in music were licensed in the world.

10 The fact that they didn't appear, I think, is  
11 very significant. We're not talking about a situation  
12 where we're hundreds of years in the future. We're talking  
13 about legislative history that occurred virtually yesterday,  
14 1976 and 1975 and 1973.

15 All the people who participated in that  
16 legislative history are here now. Having gone away, it's  
17 not a question of--gee, well Congress didn't know about it,  
18 Congress didn't intend it. Congress knew full well what it  
19 was doing. The draftsman of the bill knew full well.

20 And, the recognition of the difference of  
21 music compared to cartoon characters, I think, I think  
22 runs throughout the history of this bill. Indeed, if you  
23 look at the discussion of performing rights in the Senate  
24 and the House reports, you find that it is music that is  
25 taken to be the paradigm of the separate licensing of

1 performing rights. Language of the reports say: the  
2 singers performing, whenever he or she performs a song and  
3 the broadcasting network is performing, when it carries  
4 that performance of the song in a local station and in  
5 the cable system. But, that's not the case with cartoon  
6 characters, because the rights are conveyed.

7 I think I've taken enough of the Tribunal's  
8 time on this point. I don't want to beat it into the ground.  
9 The details of the arrangements certainly are known to the  
10 program producers. I imagine I'll get comment on it.

11 Unless the Tribunal has any questions to  
12 ask, I would reserve the remainder of my time.

13 CHAIRWOMAN BURG: Thank you. Who will  
14 speak next. Mr. Duncan?

15 MR. DUNCAN: Yes.

16 CHAIRWOMAN BURG: Would you identify yourself?

17 MR. DUNCAN: Yes, my name is Charles T. Duncan.

18 I am local counsel for Broadcast Music, Inc. Chairman Burg  
19 and Members of the Commission, I will try not to duplicate  
20 what Mr. Koenigsberg has said. I will indicate that we think  
21 that the licensing arrangements between the cartoon  
22 character creators, on the one hand, and the program  
23 suppliers on the other, are, in fact, decisive.

24 And, for purposes of the formula that  
25 Mr. Dannay has worked out, to the extent of the performance

1 rights on television for cable distribution purposes,  
2 the cartoon character creator ceased to be the copyright  
3 owners for the simple reason that they have, by contract,  
4 given that right to the program suppliers.

5           So, that the first of his four steps falls  
6 there. I also adopt what Mr. Koenigsberg said with  
7 respect to the distinction between the cartoon characters  
8 and their licensing arrangements, on the one hand, and the  
9 music interests, on the other.

10           BMI, like ASCAP, directly gives performing  
11 rights to the television station, not to the programmer.  
12 So that music is very, very different from the arrangements  
13 entered into by the cartoon characters.

14           There are two other points that I would want  
15 to make that I think indicate the speciousness of the argument  
16 which has been propounded to you. In order to prevail,  
17 the cartoon character proponents have to show that they are  
18 the owners of works included in certain transmissions.

19           We've already commented on the question of  
20 ownership. They're not owners, because for this purpose  
21 they, by contract, transferred that right away. Mr. Dannay  
22 suggests that there is no question but that the cartoon  
23 characters are works.

24           And, I submit to the Tribunal that there is a  
25 question as to that proposition, at least as to some of the

1 cartoon characters. And this is an issue which I think  
2 the Tribunal will have to decide. I would like to quote  
3 from the Law of Copyright, Section 2.12.

4           With a preamble, he says that "It is appropriate  
5 to consider the copyright ability of the character apart  
6 from the original work in which the character appeared.  
7 Although the courts are in conflict on this issue, the  
8 cases which accord copyright protection to characters, per  
9 se--", and he cites a number of cases which accord protection.  
10 And those which deny such protection--he cites more cases  
11 which deny protection -- are generally more reconcilable  
12 than the language in some of the opinions would seem to  
13 indicate.

14           It's interesting in support of that point,  
15 that the proponent only cited three circuit cases, the  
16 most recent of which is 1940, and three district court  
17 cases. But, a question does exist, as the quotation from  
18 Nimmer and the cases there cited will suggest as to whether  
19 or not the cartoon characters, or all of them are works  
20 within the meaning of the Copyright Law.

21           There is still a third fallacy to the argument  
22 which has been laid. In the brief, in the first brief  
23 which was presented, much was made of the fact that the  
24 cartoon characters have an independent personality, that  
25 they are so unique and distinct, they have a persona. And,

1 because of this persona, they do not merge into the  
2 underlying program.

3 I thought a good deal about the effect of  
4 the merger argument, and I cannot see from an analytical  
5 point of view, where it advances their cause at all. And I  
6 suspect that they make the merger argument simply to either  
7 preserve their argument that they are within the word  
8 "included" as used in Section 111; or, to forestall the  
9 otherwise obvious, absurd result which would follow from  
10 that argument, namely that they have to argue that they  
11 are not merged in order to avoid having all of the other  
12 persons who contribute to a television program, being able  
13 to claim exactly as they do.

14 But, the merger argument, in and of itself,  
15 does not transform them into proper claimants before this  
16 Tribunal. So, for the reasons advanced by Mr. Koenigsberg,  
17 as well as the additional ones which I have suggested,  
18 we urge that the cartoon characters are not proper claimants  
19 for cable royalty distribution.

20 I would like to reserve two minutes of my  
21 rebuttal time to Mr. Chapin, who would like to make a  
22 statement which I think is relevant to the issue here.

23 CHAIRWOMAN BURG: Thank you, Mr. Duncan.

24 Mr. Scheiner?

25 MR. SCHEINER: My name is Arthur Scheiner, and

1 I appear on behalf of the Motion Picture Association of  
2 America, it's member companies in other programs, producers  
3 and syndicators.

4 I trust the Tribunal will be relieved to hear  
5 that I have generally very little to say. I would like  
6 merely to underscore, possibly italicize a couple of the  
7 comments that were made by the gentleman who preceded me.

8 I think Mr. Dannay has properly stated the  
9 issues that are before you with respect to the claims of  
10 the cartoon characters, namely, as he put it, the work  
11 question and secondly, the license question.

12 I think with respect to the work, I note that  
13 Mr. Dannay, of necessity, had to speak in terms of the  
14 elements of the work, because, obviously, a cartoon character  
15 is one of the elements of a work. And, as other counsel  
16 have indicated, the question is whether these various  
17 elements were comprehended within the intent of the Congress.

18 And once again, I respectfully invite your  
19 attention to the extensive legislative history over the  
20 course of more than a decade, where no such claim on behalf  
21 of such an element was argued to be comprehended within the  
22 work.

23 Second, on the license argument, please the  
24 recognize the nature of the argument that is being advanced  
25 to you. Mr. Dannay and the cartoon characters say, that, as

1 a matter of law, and without regard to any of the provisions  
2 of the contract, pursuant to which they have licensed the  
3 use of their cartoon character, you are required to hold  
4 that they retain the royalty rights.

5 Now, I would remind you that yesterday, in a  
6 very different context, in response to Commissioner James,  
7 I volunteered that a copyright owner, of course, owns  
8 everything within the copyright; he can transfer any part of  
9 it and all of it.

10 And, I submit to you, that to argue that on  
11 that assumption which you're required to make, because the  
12 point is made, without regard to the contract, on that  
13 assumption that the copyright owner of the cartoon character  
14 has assigned everything to his licensee, he, nevertheless,  
15 has retained some right, I submit to you, is, on its face,  
16 an invalid argument, one which cannot be sustained as a  
17 matter of law.

18 That concludes my remarks.

19 CHAIRWOMAN BURG: Thank you, Mr. Scheiner.

20 Mr. Ciancimino?

21 MR. CIANCIMINO: Madam Chairman, Members of  
22 the Tribunal, my name is Albert F. Ciancimino. I am Vice  
23 President and Counsel of SESAC, Inc. in New York. And I  
24 will not repeat the comments made by the previous three  
25 speakers.



1 SESAC adopts those comments. I will, however,  
2 just make one or two comments. Number one, I disagree  
3 with Mr. Dannay in his interpretation of the Copyright  
4 Statute, by saying that his clients would have standing  
5 to sue in the event that cable did pick up programs that  
6 contained his cartoon characters.

7 I don't believe that under the current  
8 Copyright Law that that would be so. I believe the proper  
9 plaintiff in that situation would be the owner of the  
10 program that was being infringed, and not the owner of the  
11 cartoon character, which may be one component in that  
12 particular program.

13 Secondly, although it's not dispositive on  
14 any of the issues before this Tribunal, it's interesting  
15 to me, and may be of interest to the Tribunal, to consider  
16 an argument made by Mr. Dannay where he attempts to  
17 distinguish the characters in a novel such as "Gone With  
18 the Wind", in reply to a question raised by Commissioner  
19 Brennan, with the cartoon characters, saying that with a  
20 character in a novel, when it's conveyed, when it's  
21 transferred or when it's adopted into a television script  
22 or a movie or television, that that particular character  
23 loses--I think, to quote him "loses identity" or loses  
24 personality; whereas, his clients' characters do not.

25 Well, it's interesting again, and I don't know

1 whether it was dispositive on the issue, but I think  
2 several weeks ago, when I happened to be watching my cable  
3 television channel,, and there was a picture on it called  
4 "Love at First Bite", where George Hamilton portrayed  
5 Dracula.

6 I have never seen Belleluginosi (ph) perform  
7 at any disco before. But, there was George Hamilton as  
8 Dracula doing a wicked disco in a club and portraying a  
9 rather humorous interpretation of the Dracula that we all  
10 once knew and loved.

11 (General laughter.)

12 CHAIRWOMAN BURG: Speak for yourself.

13 (General laughter.)

14 MR. CIANCIMINO: I would submit to this  
15 Tribunal that if this wasn't a case of a lost identity, I  
16 don't know what is. And based on that issue, I would like  
17 to conclude my remarks; and, again, simply reiterate SESAC's  
18 support of the comments of the prior three speakers.

19 Thank you.

20 CHAIRWOMAN BURG: Thank you.

21 Mr. King?

22 MR. KING: We are taking no position on this  
23 issue.

24 CHAIRWOMAN BURG: Fine. Thank you.

25 Mr. Dannay please?

1 MR. DANNAY: We have a few comments that we  
2 would like to add. I'm intrigued with the Dracula Citation,  
3 while the character is ancient, and our literary history,  
4 one must recall that it's a literary character in its  
5 original form. And I think it proves the point that we're  
6 talking about. The originator of the character would be  
7 quite shocked to learn that it was a visual character in  
8 its original embodiment, which, of course, it was not.

9 It's a literary characters and the difficulties  
10 that were cited in retaining its identity, when a  
11 literary character is transformed into some visual form,  
12 whether in terms of a human actor or some other form, are  
13 notably in support of the comments I think I had answered  
14 earlier.

15 I would like to comment briefly, too, on the  
16 citation from Nimmer. It would have been helpful, I think,  
17 to read some of the balance of what Professor Nimmer said.  
18 And I'll just read one short statement. Professor Nimmer  
19 says and I quote--this is Section 2.12.

20 "A character is most readily protectable  
21 where both the original work and the copied work consist of  
22 cartoons or other graphic representations rather than word  
23 portraits."

24 And Professor Latman would add to that, the  
25 Copyright Law, how is the Copyright Law revised in the 1976

1 Act as published in 1979. For the record, that would  
2 be at pages 39 to 41. And I quote as to pictorial  
3 characters, notably "those in cartoon form, there is no  
4 question as to their potential copyright ability."

5 I don't want to burden your record. But I  
6 would like to just say in addition from the Walt Disney  
7 Production versus Air Pirates Case, which was decided  
8 recently--the citation is 581, F-751, Ninth Circuit  
9 Decision.

10 And there, and I quote again, the Appellate  
11 Court, "In upholding a copyright violation of Mickey Mouse  
12 and other Disney characters--", made the point in meeting  
13 a claim that such characters are not copyrightable, which  
14 it rejected and said--and I quote--"Flys in the face of a  
15 series of cases dating back to 1914, held comic strip  
16 characters protectable under the old Copyright Act."

17 I don't think anymore really needs to be  
18 said on that point, the notion that characters, in visual  
19 form, which are the only kinds of characters subject  
20 to the character claimants' claims here, are certainly  
21 copyrightable. And they have a long, a consistent  
22 history of recognition under Copyright Law in the old act.  
23 And I am sure that will continue under the new law.

24 And I would like to believe, I hope, that we  
25 will continue with respect to the clear analogy to be drawn

1 in interpreting Section 111.

2 COMMISSIONER JAMES: Excuse me for interrupting.  
3 Unless I missed something here all day in all the briefs,  
4 no one has ever said that the characters were not copyright-  
5 able; have they?

6 MR. DANNAY: I thought that one of the comments--  
7 at the moment, I forget which of the persons who stood  
8 up mentioned it, in opposition to our claim, that there was  
9 a question whether characters of this sort that we are  
10 representing are copyrightable.

11 I did not understand the comment to say, flat  
12 out, that those characters were not copyrightable. But there  
13 was kind of a suggestion that maybe the issue wasn't so  
14 clear cut. And I was responding to that, and suggesting,  
15 based on quotes that I just read, although there are many  
16 more that could be partial, if the question really were  
17 raised that, no doubt about it, that visual characters  
18 have always been copyrightable.

19 I'd like to just respond briefly to  
20 Mr. Koenigsberg's comments. I would agree that Fred  
21 Koenigsberg is a designated hitter. But, in view of the  
22 failure on his part to rebut the clear analogy that we cited,  
23 I would suggest that maybe he's a switch-hitter after all.

24 Mr. Koenigsberg addressed himself, not to the  
25 analogy that we cited, which was on the program objection

1 point, namely that music, like characters, are parts of  
2 programs, are included in programs. And so that, leaving  
3 aside licensing for the moment, that objection, that merely  
4 because the characters are not in programs, merely because  
5 the character claimants are not program owners, the claim  
6 of the character owners must fail, that has to fail, unless  
7 this Tribunal is prepared, for the same reason, to dismiss  
8 the claims of the performing rights societies, which we are  
9 not urging by any means.

10 But, clearly, users, in and of itself, is not  
11 a program. It's included in a program, albeit, it isn't  
12 completely recognizable for what it is once included in that  
13 program. I suggest to you that the Muppets, Superman and  
14 Batman, et cetera, have the same attributes and characteris-  
15 tics, as they are included in programs. They are included  
16 as copyrighted works, just as music is. And because of that,  
17 there is no reason why payment should be denied to the  
18 character owners, simply because it is not a program.

19 Most importantly, without going over that  
20 ground again, the statute doesn't require, and indeed, the  
21 statute mandates that payment be made to copyright owners of  
22 works, not copyright owners of programs. And, indeed, all  
23 the persons in this room and others who were so active  
24 through these many years in the legislative process, and who  
25 I would suggest, submitted tons and tons of papers before

1 Congress, in helping to work out the precise terms of  
2 Section 111, as it now appears. If they had any doubt as  
3 to the wording of that statute, I'm sure they would have  
4 been heard, and would have changed that wording, or helped  
5 to assist Congress in changing that wording, if our claims  
6 were, indeed, not valid.

7 I would like to say, too, that the argument that  
8 was advanced, that all the rights of the character claimants  
9 have been transferred to the program producers has no  
10 evidence whatsoever in support of it. Number one, clearly  
11 that can't be true if one looks out into the real world;  
12 number two, it's irrelevant. It's irrelevant for the  
13 reasons I mentioned, in saying that the licensing objection  
14 simply was not material to the question, because the  
15 issue on the 111 is not whether the character owners or any  
16 claimants had entered into some agreements. Obviously,  
17 they have.

18 The issue is whether those character claimants  
19 are copyright owners. That's all the statute says. Are  
20 they copyright owners--not necessarily whether they had  
21 entered into agreement and perhaps transferred certain  
22 incidents of their copyrights for certain purposes under  
23 certain conditions.

24 The statute says if you're a copyright owner,  
25 you're entitled to be paid. And so, it's kind of a smoke

1 screen, it's kind of a red herring to say that simply  
2 because contracts are in existence, you lose your status  
3 as a copyright owner. That is just plain wrong.

4 One only has to look to the expressed terms,  
5 and indeed, the legislative history behind Section 501, to  
6 know that it is absolutely clear that the character claimants,  
7 as owners of copyrights in their characters could obviously  
8 sue cable systems, which had lost the benefit of Section 111,  
9 and were unable to take advantage of the compulsory license.  
10 Maybe program producers could too; I'm not suggesting that  
11 they couldn't.

12 But, the owners of the copyrights and the  
13 characters could clearly sue a cable system as a copyright  
14 owner under Section 501, and had the benefit of the remedies  
15 under the remaining provisions of Chapter Five. And my  
16 authority for that is the explicit language that appears in  
17 Section 111, which is the subject of our concern.

18 And, it seems to me, quite obvious, that if the  
19 character claimants are copyright owners under Chapter Five,  
20 have sufficient copyright interests to assert an infringe-  
21 ment claim under the new Copyright Law, indeed, they must  
22 have the attributes of copyright ownership for purposes  
23 of Section 111. It would make no sense to permit them to  
24 sue a cable system for infringement and deny them the right  
25 to participate in the royalty fees under 111, which are



1 nothing more than the analogue, a substitute, equivolent  
2 of damages that would be awarded under the infringement  
3 suit.

4 I do want to touch, too, upon the kind of  
5 tactic that, if you recognize what we argue are the valid  
6 claims of the character claimants, you will somehow be  
7 opening the doors to all kinds of planes which are just  
8 merely suggested to you as being ones not worth of your  
9 consideration.

10 Two points on that, I touched briefly on them  
11 earlier, but I'd like to just reiterate them as part of  
12 the rebuttal. Number one, those claims are not before you.  
13 And I don't think that a claim such as the character claimants  
14 claims can be denied because of some hypothetical situation  
15 which should have been confronted with, not when the  
16 character claimants had, indeed, satisfied each of the  
17 criteria under the act.

18 And secondly, did suggest to you that there was  
19 a basis, not necessarily urging its acceptance, but there  
20 was clearly an important distinction between characters  
21 of music on the one hand, and certain other copyrightable  
22 elements, on another. It's gone into extensively in our  
23 brief. The essence of it being that the other elements,  
24 by and large, are adapted--when they're adapted, are trans-  
25 formed so significantly, that their identity, or at least

1 part of their identify, if not lost it, perhaps submerged  
2 with other important elements that are blended in with it  
3 to create something different. Maybe those are no longer  
4 works, in the sense that Section 111 is referring to it. I  
5 don't know.

6 But, clearly, the characters undergo no  
7 such transformation; and therefore, are clearly the very  
8 same works which were originated by character owners.

9 I believe that takes care of my comments. Thank  
10 you very much.

11 COMMISSIONER COULTER: I'd like you to answer,  
12 if you would, Mr. Koenigsberg's elaboration, that fundamental  
13 difference between the work you're representing and music  
14 is that music performing rights are never transferred.  
15 Whereas, in the case of cartoon characters, I assume, for  
16 a program performance rights are transferred.

17 MR. DANNAY: Yes, if I understand the point  
18 that Mr. Koenigsberg was mentioning again, I want to make  
19 a clear distinction between the two objections. The  
20 program objection--

21 COMMISSIONER COULTER: No, I'm not talking  
22 about that.

23 MR. DANNAY: Leaving that aside, just the  
24 licensing objection?

25 COMMISSIONER COULTER: No, you were saying that

1 music should be treated--that cartoon characters are  
2 analogists to music, but he raised the fundamental difference  
3 that with music performing rights are not transferred;  
4 whereas, with cartoon characters for a given performance,  
5 they are.

6 MR. DANNAY: Yes, but I just want to make  
7 clear for the record that my analogy between music, on the  
8 one hand, and the characters, on the other, related to the  
9 program objection. And I did not understand Mr. Koenigsberg  
10 to deny that in any way.

11 COMMISSIONER COULTER: No, I'm not addressing  
12 that.

13 MR. DANNAY: He answered that by giving an  
14 answer that didn't respond to it, and said on the licensing  
15 objection, we licensed all our rights, which is not true.  
16 I don't see any evidence--

17 COMMISSIONER COULTER: That's not an answer  
18 to my question.

19 MR. DANNAY: Oh, I'm sorry.

20 COMMISSIONER COULTER: I would like you to  
21 respond to the fact that he said there is a fundamental  
22 difference between the use of your characters and the use  
23 of music. And that with music, performing rights are not  
24 transferred. Whereas, with cartoon characters, they are.

25 MR. DANNAY: Well, my answer is two-fold.

1 Number one, they're not.

2 COMMISSIONER COULTER: They're not?

3 MR. DANNAY: As I indicated before by example  
4 of the display right, a display right which came into  
5 existence in 1978 when the Copyright Law went into effect,  
6 I don't see how such a right, which is the right that  
7 relates to pictorial, graphic and sculptural works, I don't  
8 see how such a right could have been conveyed before it  
9 was ever--

10 COMMISSIONER COULTER: No, I understand that.

11 MR. DANNAY: Okay. So, I would think that  
12 the character owners, if it was going to go that route,  
13 would have retained that right. But more importantly, our  
14 point, the point on behalf of the character claimants is  
15 that the licenses are irrelevant, because the statute,  
16 Section 111 doesn't talk about license. This doesn't say  
17 that a claimant is barred from receiving royalties because  
18 it has entered into licensing agreements.

19 What it says is "are you a copyright owner",  
20 and if you're a copyright owner, and if you're a copyright  
21 owner of a work that has been included in secondary transmis-  
22 sions of programs, you're entitled to receive payment. That's  
23 all the statute says.

24 COMMISSIONER COULTER: Basically what you're  
25 saying is that the distinction that Mr. Koenigsberg raised

1 doesn't make any difference?

2 MR. DANNAY: It makes no difference; I don't  
3 have to meet it head-on, which would require backing up  
4 into this room, truck loads of contracts, I suppose, from  
5 all sides, I don't think in view of the cartons I've  
6 seen that anyone would entertain that.

7 But, the point is, it's a smoke screen. It's  
8 an attempt to keep closed the number of claimants who are  
9 seeking royalties under 111. The contracts are irrelevant  
10 because they do not, in any way, diminish the status of  
11 the character claimants as copyright owners. They will  
12 remain copyright owners, notwithstanding any licensing  
13 arrangements they may have made with program producers or  
14 others.

15 And because they are copyright owners, and  
16 because they are copyright owners incidentally, as I've  
17 mentioned before, who can sue in a court to vindicate their  
18 copyright interests, they must be copyright owners for  
19 purposes of Section 111, unless we're going to make a  
20 distinction that is absolutely arbitrary and find no  
21 basis in the statute, in the language of the statute, the  
22 provision in Section 111.

23 So, our position is that the contracts are  
24 irrelevant, this Tribunal doesn't have to call for them,  
25 doesn't need to review and analyze all of the contracts. It

1 only has to answer the legal question: whether or not  
2 the character claimants are copyright owners.

3           And, if I understood the comments of the  
4 persons who made the objections, I don't think that they  
5 were really challenging the fact that the character claimants  
6 are copyright owners. They were pointing to the license  
7 agreements that really didn't bear on the issue.

8           COMMISSIONER COULTER: One other issue we sort  
9 of went around about it before, is it your--your basic  
10 claim is that the creators of the cartoon characters are  
11 copyright owners period, and that de facto establishes  
12 the claim, that's your--

13           MR. DANNAY: Let me just elaborate every  
14 briefly. It is that the character claimants are copyright  
15 owners of "works", included in secondary transmissions of  
16 the programs, yes.

17           COMMISSIONER COULTER: It's based upon their  
18 being the copyright owners. Without dealing with the issue  
19 that there is no reason that your argument should be  
20 excluded simply because other possible claimants haven't  
21 filed, without considering that aspect at all, nevertheless,  
22 you seem to, when we bring up the subject of the potential  
23 playwright and novelists, you seem to back away from the  
24 fact that that person is, de facto, the copyright owner,  
25 and then enter into the degree of the formation of the work,

1 which becomes a pretty subjective area. And then--and I  
2 return, which gets around to the nature of the work  
3 copyrighted, being perhaps the element here, rather than  
4 simple copyright ownership.

5 And, you're asking us to, I feel, to enter  
6 into that domain.

7 MR. DANNAY: Let me clarify what I was trying  
8 to suggest in terms of distinguishing characters of music  
9 on the one hand, and playwrights being the story lines and  
10 so forth, on the other hand.

11 I wasn't suggesting that the playwright or  
12 the novelist was not a copyright owner. What I was  
13 suggesting--not urging, I was simply putting the discussion  
14 on the table, if you will, that in connection with  
15 interpreting the word "works" or the word "included", but  
16 not copyright owner, that the nature of the characters and  
17 the music, on the one hand, was very different in its presen-  
18 tation in the program, from the works of novelists.

19 I wasn't relating that argument at all to the  
20 copyright owner aspect, but to the other, what is a work  
21 and is it included. And I was suggesting that it could  
22 be argued, I'm not taking a position on it, it could be  
23 argued, I suppose, that the novelists' themes and the  
24 playwrights' themes become so transformed, as to be virtually  
25 unrecognizable, or if not that, at least blended with so much

1 other material, that one could take the position that for  
2 those kinds of works, they can't be considered included  
3 in the programs, so they can't be considered works.

4 But, that argument clearly does not apply to  
5 characters in music, which undergo really no change whatso-  
6 ever. Thank you.

7 CHAIRWOMAN BURG: Thank you.

8 Mr. Koenigsberg?

9 MR. KOENIGSBERG: Thank you, Madam Chairman.  
10 Just a couple of brief points so as not to belabor this to  
11 death. Mr. Dannay says that, in talking about the  
12 distinction between music and cartoon characters, we talk  
13 about it in the licensing argument and not in the program  
14 argument. But he makes it for the program argument, not  
15 the licensing argument.

16 If you would read ASCAP's brief, you won't  
17 find a program argument, be it a "licensing argument" either,  
18 because, to our thinking, that distinction is artificial.  
19 The question is would the cartoon characters license  
20 cable systems in a world where no compulsory license exists.

21 And the answer to that question is no. And the  
22 reason why the answer to that question is no is because  
23 the rights have been transferred to the program producer.  
24 If Mr. Dannay's argument is correct and notwithstanding  
25 the transfer of the rights, the "copyright owner" still has



1 the right to make a claim, then the copyright owner,  
2 cartoon character owner, if he is a copyright owner, could  
3 theoretically also make the claim against the broadcasters  
4 who are transmitting those very programs right now.

5 But, they don't do so, because they have  
6 conveyed the performing rights or the display rights, if  
7 you will, of the cartoon characters to the program producers.  
8 Now, what Mr. Dannay is saying, in essence, is that,  
9 disprove my negative. He says: show me that we're not  
10 entitled to claims.

11 I would submit to you that the proper question  
12 to him is: show me that you are entitled to claims. And I  
13 don't think that showing has been made.

14 And, to take this one step further, he cites  
15 all sorts of things, including, that he says: we would  
16 have standing to sue if our works were used in an unauthorized  
17 way; and therefore, that gives us a right to make a  
18 claim for cable royalties.

19 Well, that means no such thing. Copyright,  
20 as we all know, is a bundle of severable rights, the right  
21 to sue for copyright infringement is a right that can be  
22 separated out, just as any other right could be separated  
23 out.

24 If I own a copyright, I could give to any  
25 member of this Tribunal, the right to sue and collect.

1 damages for infringements of that copyright, if you were  
2 willing to pay an amount of money for it. And that wouldn't  
3 give you the right to make a claim to cable royalties if  
4 my work were shown on a cable system.

5 All it would do is give you the right to sue.  
6 It's a separate and distinct item. And the fact that you  
7 may or may not have standing to sue, doesn't pertain to  
8 your right to make a claim before this Tribunal for  
9 cable royalties, because the question once again, and for  
10 the last time, that you have to answer is would you have  
11 a right to make a claim for cable royalties when no  
12 compulsory license exists. And the answer to that question  
13 for cartoon characters is no, because the rights have been  
14 conveyed. It's that simple.

15 Thank you.

16 CHAIRWOMAN BURG: Mr. Chapin?

17 MR. CHAPIN: I had thought that I would want  
18 to rebut, but I don't think that that's going to be  
19 necessary because of what all the persons who have argued  
20 against the cartoon characters have said.

21 If you would permit me, though, I would like  
22 to make one general comment, it would be less than a minute,  
23 just generally about these proceedings. I think that after  
24 the so-called threshold issues have been decided, I hope  
25 that--I think the relevant positions of the major parties

1 are going to be clarified to a great extent, and I would  
2 hope that nothing you would say in your written decision  
3 would preclude or discourage the parties from continuing  
4 their quest for a voluntary agreement, because I think once  
5 the issues are decided, we can come to an agreement quite  
6 quickly.

7 Thank you.

8 CHAIRWOMAN BURG: Mr. Chapin, let me quickly  
9 reassure you on that point, that we will not preclude it in  
10 any way.

11 MR. CHAPIN: Thank you.

12 CHAIRWOMAN BURG: Did you have time left,  
13 Mr. Ciancimino?

14 MR. CIANCIMINO: I'd like to take about five  
15 minutes.

16 CHAIRWOMAN BURG: Okay.

17 MR. CIANCIMINO: I just want to make one  
18 comment, that I think--

19 CHAIRWOMAN BURG: This is rebuttal now?

20 MR. CIANCIMINO: We're in rebuttal. What I  
21 simply want to do is place what Fred Koenigsberg has stated  
22 in the affirmative in order to put it in its proper  
23 perspective.

24 Can anyone seriously question the fact that a  
25 program producer, absent compulsory licensing, has the right

1 to license cable to perform a program which includes  
2 multiple parts, one of those parts being a character, a  
3 cartoon character.

4 I don't think anyone can seriously doubt that  
5 proposition. And the only one I think that can doubt it is  
6 the one who makes the argument that somehow, the rights in  
7 a cartoon character stand over on the side and independent  
8 of anything that might be done by the grantee, by the  
9 original grantee of those rights.

10 Could the owner of Batman, Robin, Dracula,  
11 who was an original literary work, who I submit has also  
12 become cartoon character, can the owner of these works  
13 serious bring an action to preclude the cable operator from  
14 performing a program, when that cable operator has been  
15 licensed by the program producer. I don't think there is  
16 any question that that particular situation would result  
17 in a holding or a decision that the cable operator has  
18 received the right to perform that program in its entirety,  
19 inclusive of all of the parts.

20 That's all I want to say.

21 CHAIRWOMAN BURG: Mr. Dannay, not being a  
22 lawyer, I don't know where these things start and stop.

23 MR. DANNAY: I didn't know how many preceded  
24 a rebuttal I was going to request to make briefly--

25 CHAIRWOMAN BURG: I think I'll have to deny

1 that request, Mr. Dannay. I'm sorry. I'm afraid it  
2 would go on beyond that point. And everyone else now has  
3 addressed themselves to the issue. Then we will adjourn  
4 these meetings.

5 We will respond with a decision as soon as  
6 we review the transcript and study it. And we will notify  
7 you accordingly. Thank you very much.

8 (Whereupon, the hearing was concluded at  
9 3:05 p.m.)

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