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COPYRIGHT ROYALTY TRIBUNAL

Thursday, October 11, 1979

1111 20th Street, N.W.
Seventh Floor Conference Room
Washington, D.C.

Whereupon, the Tribunal convened at 10:15 a.m.,
pursuant to notice.

PRESENT:

DOUGLAS E. COULTER, Chairman

THOMAS C. BRENNAN, Commissioner

MARY LOU BURG, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

ORIGINAL

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GORDON T. KING
Coudert Brothers, representing NAB

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Arnold & Porter

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P R O C E E D I N G S

1
2 CHAIRMAN COULTER: On the record. I think it
3 would be a good idea if we discouraged smoking in this
4 room.

5 COMMISSIONER GARCIA: Thank you, Mr. Chairman.

6 CHAIRMAN COULTER: As we indicated in our
7 notice announcing the declaration of controversy, appeared
8 in the Federal Register of September 12th, we indicated we
9 would have a conference today to discuss the general
10 procedures and structures of the distribution proceeding.
11 And that's what this conference will be about.

12 I think we'd like to give as many people as
13 possible an opportunity to voice their views and we've
14 received your comments. And we've all studied them. Before
15 we start the general discussion, are there any commissioners
16 who would like to speak.

17 (No verbal response.)

18 CHAIRMAN COULTER: I think just to start off
19 someplace, would the broadcasters like to speak first?
20 Also, could you please identify yourself for the record when
21 you start to talk.

22 MR. KING: My name is Gordon T. King. I'm with
23 the Firm of Coudert Brothers. That's C O U D E R T
24 Brothers, 200 Park Avenue; New York City, New York. And
25 I'm here on behalf of the NAB.

1 Now, one principal point I'd just like to make,
2 and that's concerns the briefing schedule. As we see it,
3 there are basically two classes of (inaudible)--the NAB
4 on one side, and then the other three claimants in the
5 principal class would be sports interests, the NPAA and
6 the music interests.

7 And, in the order of an efficient proceeding,
8 we would suggest that in the first interest, the ownership
9 interests be first established. By that, I mean this--insofar
10 as the NPAA is concerned, the NAB claims exclusivity. And
11 I think the Commission is familiar with what we mean by
12 that. That is disputed by the NPAA.

13 That goes directly to the ownership interests
14 of the NAB interests and NPAA interests. We think that in
15 the first order of business, that ownership interests should
16 be briefed by both sides. We suggested 45 days, with each
17 side having an opportunity to submit answering papers 15
18 days later.

19 We would adopt the same approach as respects to
20 sports interests. As respects to sports interests, we
21 claim they do not own the copyright; they claim that they do.
22 Again, ownership is directly an interest, directly an issue.
23 We would adopt the same procedure, that each side files an
24 opening brief, with reply briefs to follow.

25 As respects to the music interests, we would adopt

1 the same approach. So that, we would have within 60 days,
2 the matter fully briefed and ready for oral argument.
3 Now, at the same time, we would suggest that each side, each
4 of these interests likewise brief the issue of royalty
5 pay-out. The positions taken are markedly different.

6 The sports interests claim that a lot of
7 subjects and factors should be taken into consideration. And
8 that's a claim that the NAB disputes. I think the methodo-
9 logy of approaching this should be resolved before we go
10 on to the next stage of proceeding.

11 I think it's essential that as we enter the hear-
12 ing stage, each party be fully aware of what is expected of
13 it, in terms of proof, witnesses, whatever. And unless this
14 issue of royalty payments and method of evaluation is to
15 be decided now, I think we're going to have a chaotic
16 situation.

17 In essence, therefore, we're suggesting four
18 sets of papers: three sets dealing with ownership interests,
19 another set dealing with evaluation.

20 CHAIRMAN COULTER: This will be simultaneously?

21 MR. KING: Simultaneously all briefs would
22 then be filed by everybody within 60 days. And we would be
23 ready for oral argument if, in the opinion of the Tribunal,
24 it's necessary. Once that's complete, we can then move
25 on to the next stage of the proceedings, which I anticipate

1 would be the hearing stage.

2 I think that that's an efficient way of
3 proceeding. The results will eliminate issues that,
4 in the opinion of the Tribunal, are not necessary to the
5 resolution of the enter matter. And I think that, depending
6 upon the rulings made by the Tribunal, it may well result
7 in an atmosphere conducive to further negotiations. But,
8 unless this is done, as I see it, in the fashion that I've
9 outlined, we'll just have a chaotic situation.

10 We've raised certain preliminary matters on
11 timeliness and justification. Timeliness issues have been
12 addressed at length by other people. And as far as justi-
13 fication is concerned, I think that we will be seeking to
14 develop in the course of the procedures that I've outlined.

15 CHAIRMAN COULTER: All right.

16 Mr. Fitzpatrick?

17 MR. FITZPATRICK: I'm Jim Fitzpatrick, Arnold &
18 Porter. Also here is my partner Dick Ewing from Arnold &
19 Porter. (inaudible) are here as well.

20 Let me say that from our point of view, there
21 is a clear consensus that the preliminary decision on this
22 issue, I think all parties agree on the question of
23 compilation and syndicated exclusivity. There should be
24 preliminary hearing resolutions. I think all the parties'
25 papers reflect the fact that the decision there might be

1 a nudge ahead in terms of questions of resolving the
2 matter through negotiations for results, I think all of us
3 would like to reach--none of us have been able to date.

4 Those two issues, syndicated exclusivity
5 and compilation rates, at least by our light, a question of
6 whether there's a cognizable claim that attaches to that
7 particular kind of program. I think that we our doubts that
8 that is an identifiable claim, basis for a claim. And we'll
9 be wanting to participate in the briefing of those issues.

10 In contrast, I think the question of sports
11 ownership can be best resolved in the course of the full
12 proceeding. There is no doubt here that sports programming
13 will be compensated in one fashion or another. It's a
14 question essentially, by our view, as to who is initially,
15 under the Copyright Law, is the appropriate claimant in
16 the first instance. And then, in the second instance, there
17 will be a set of contracts that relate to the relationship
18 between individual clubs and individual broadcast stations.

19 We don't see this as a question that's as
20 sharply delineated as an issue of law and a question of
21 whether there is a basis for a cognizable claim, as one
22 sees in compilation, in syndicated exclusivity. I think
23 that that issue is an issue that involves, to a much greater
24 degree than the other issues, questions of fact. And we
25 would contemplate in the discussion of that issue--we would

1 prefer in the presentation of that issue, to have it
2 presented, reflecting the interests of the sports parties,
3 the Commissioners, discussions of participation of sports
4 over the course of more than a decade, attempting to get
5 recognition of their programming, their sports programming
6 under Copyright Law. And, we see this as a factual matter
7 that would involve both testimony -- much more consideration
8 of the contract it involves.

9 We would, therefore, prefer and urge the
10 Commission that they would set down these two issues which
11 we do believe are novel and reaching the syndicated exclu-
12 sivity and the compilation for early resolution.

13 On the question of resolution of criteria,
14 this issue has a long history. You will recall that there
15 were 10 latter stages of the provision process, to attempt
16 to have criteria written in the law, and substandards. And
17 some of the parties here were in great opposition to that
18 approach.

19 It turned out that Congress made a judgement
20 that they were not going to establish any criteria, and
21 they directed the Tribunal to consider all relevant factors.
22 I would strongly urge the Tribunal, that we not attempt to
23 establish criteria in the abstract. I think it's going to
24 be incredibly difficult for one to make a thoughtful judge-
25 ment as to what are the guiding criteria on the basis of

1 briefs.

2 I think that that is going to have to emerge.
3 I think that Congress has asked you to consider all the
4 evidence that is relevant and make your judgements. And I
5 think the criteria are going to emerge with your considera-
6 tion of the matter.

7 I fully appreciate that that adds significant
8 burden to you, and it adds significant burdens to us as
9 counsel, because this is not a situation where one might
10 have in an ICC Proceeding or a rate-making proceeding. It's
11 either from case law or from the statute, a very specific
12 set of criteria that we can all work with.

13 Congress made a conscious decision to refrain
14 from establishing criteria. And there will be clearly
15 differences in terms of what the parties are going to say
16 to you, as to the relevant criteria. We are going to
17 suggest, as we noted in our paper, that the Tribunal is
18 acting as a surrogate for the marketplace. Congress has
19 set up a system whereby users get our product through the
20 paying of a fee set in the statute. There's none of the
21 haggling in the marketplace.

22 And we will say to the Tribunal, that they
23 will have to try to place themselves in the situation of
24 the marketplace, how one would have reacted from the point
25 of view of the buyer and the seller. Others will have

1 more formalistic suggestions to make to the Tribunal.

2 My strongest urging is that the only way that
3 you can make a sensible determination as to the guiding
4 criteria is to hear us out on the the merits of our case. I
5 think each of us have the added burden of having to be
6 prepared to put in our own case. We know enough now about
7 what our colleagues case--the dimensions of the case are
8 going to be. We have all suggested some pre-trial proce-
9 dure that will permit us to be alert to our opponents.

10 I think at this point, it would be most unwise
11 to embark on some abstract attempt to define criteria.
12 We've had this issue before the Tribunal before, very
13 early in this proceeding. There were suggestions that
14 one establish criteria before the proceeding. And that sug-
15 gession was not adopted. I think it's most unwise here
16 on what we hope is the eve of this procedure, to try to
17 establish a set of guiding criteria until you've heard us
18 out on the case.

19 That's all I have at the outset. I want to
20 talk at some point later about the criteria--or the proce-
21 dures once one gets pass these preliminary issues.

22 CHAIRMAN COULTER: Thank you.

23 COMMISSIONER JAMES: Mr. Fitzpatrick, in your
24 opinion, what are the current threshold issues that have
25 to be resolved at this particular point?

1 MR. FITZPATRICK: One, I think the first

2 question is: is there such a thing as compilation that

3 is a cognizable claim; was that in Congress' mind when it

4 established 111, or was it going to give compensation for

5 programs, each of us here, the broadcasters and the local

6 programming, sports, the movies on their syndicated shows,

7 the music on their music. Each of us have made a claim on

8 the basis of programming. The question is can you put it

9 altogether. Did Congress contemplate that the broadcasters

10 were going to get a share by packaging that altogether and

11 get a chunk of the money on the basis of compilation.

12 We think that is the threshold, significant,

13 legal issue. Second, the issue of syndicated exclusivity,

14 is that, as a matter of law, a cognizable basis to make a

15 claim here, is the fact that the broadcasters fail to

16 exercise rights that are available to them under contract and

17 under regulatory rules, a basis for them to get to move up

18 to the thrust here and say we get more. We think that is

19 a discreet, legal issue.

20 We think that the question of describing the

21 claim, each party here, each group of parties specify the

22 programming which forms the basis of this claim is not

23 necessarily a threshold issue to be resolved. But it is

24 a threshold piece of evidence that needs to go in. And

25 there are disagreements among us on that point.

rec'd 1/4/28

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October 19, 1979

WILLIAM C. KELLY (1918-1970)

* NOT MEMBER OF D.C. BAR

LOCAL COUNSEL**
F. JAVIER FABREGAT*

The Honorable Douglas Coulter
Chairman
Copyright Royalty Tribunal
1111 20th Street, N. W., Room 450
Washington, D. C.

Re: Correction of Record

Dear Chairman Coulter:

On October 11, 1979, during the proceeding before the Copyright Royalty Tribunal, counsel for the National Association of Broadcasters made a statement that very few sports teams have contracts relating to the telecasting of games. See Transcript at 49.

While the Joint Sports Claimants assume that counsel merely misspoke, the Claimants are concerned that such a statement could prejudice legal arguments relating to the rightful claim to a share of the compulsory license pool.

For the record, counsel for the Joint Sports Claimants are not aware of a single circumstance in which telecasts were carried without a contractual relationship existing.

Should you have any questions, please communicate directly with the undersigned.

Sincerely,


Philip R. Hochberg

PRH/ch

1 The issue, as I tried to point out, the issue
2 of sports ownership, who gets the money for sports program-
3 ming, I don't consider as necessarily a threshold, legal
4 issue. The sports programming is going to be paid to
5 someone.

6 The other two issues are novel and on top of
7 everyone else's claim. So, I would see those two issues
8 that I've described, in Arthur's paper as well--

9 COMMISSIONER JAMES: You do not consider
10 ownership a threshold issue?

11 MR. FITZPATRICK: I don't consider ownership
12 in the sense that-- Well, ownership in this sense that
13 you have to resolve this as a preliminary matter, you're
14 clearly going to have to resolve that ultimately. But, I
15 would see the question of ownership as one that is going
16 to--whether Congress intended to get the money or the
17 broadcasters get the money for sports programming should
18 be developed in the course of the testimony.

19 We urge that if you want to resolve the
20 ownership issue between us and the broadcasters, that that
21 be set down as a separate evidentiary matter. We don't see
22 that handled as essentially a cross motion for summary
23 judgement, which I do think the others should be.

24 CHAIRMAN COULTER: Jim, you have to keep it
25 brief.

1 MR. FITZPATRICK: Okay, I'm sorry.

2 CHAIRMAN COULTER: Does that basically answer
3 your question?

4 COMMISSIONER JAMES: (Nodding affirmatively.)

5 MR. SHINER: Mr. Chairman, my name is Arthur
6 Shiner. I appear on behalf of Motion Picture Association
7 of America, companies of producers and syndicators. I
8 am joined by Fritz Attaway, Vice President and Co-Counsel
9 on behalf of these companies.

10 First, a very preliminary observation, and
11 then let me respond to what has been raised by other
12 counsel. I think our overriding objective must be to
13 proceed with the greatest expedition and the great efficiency
14 in these issues that are before you, so that we have a
15 chance of concluding this matter within the 12-month period--
16 now, 11 months.

17 I also think we should gear the proceedings,
18 looking towards eliminating certain issues as can be
19 eliminated and resolved at the outset, so that we may
20 proceed to negotiate a settlement.

21 With that little bit of background, I think
22 that there are basically two areas that we should address
23 this morning. The first is those matters that can be
24 considered on the basis of briefing and argument and early
25 decision by the Tribunal; and second, those matters that

1 must go to evidentiary hearing.

2 If I may, what I would like to do is confine
3 my remarks at the outset to the first set of issues and
4 reserve comment on the briefing schedule for later discussion.
5 On the first set of issues, there is agreement among all
6 parties who have filed the questions of compilation and
7 exclusivity should be addressed as a threshold matter, and
8 the subject of briefing, argument and hopefully very
9 expedited decision by the Tribunal.

10 There is a third question with respect to
11 sports. And here, I gather, there is a difference between
12 the two contending parties. And that should be resolved
13 by the Tribunal. But in any event, the two questions and is-
14 sues between the broadcaster and the producer, compilation
15 and exclusivity, there is no disagreement.

16 We recognize that this is an issue that can
17 be briefed and argued before you. I wish to disagree with
18 Mr. King when he characterizes the question presented as
19 the ownership as it relates to these two issues. There is
20 no question concerning the copyright ownership of motion
21 pictures, series and syndicated material.

22 I think it is readily conceded that the
23 producers and syndicators own the copyright. What is at
24 issue is a claim by NAB that copyright ownership aside,
25 the broadcasters have some right which is, in some fashion,

1 translatable into a claim on the copyright fund. But,
2 let us be clear that there is no genuine question concerning
3 ownership, i.e. ownership of the copyright.

4 I make a point of this, not to argue the
5 merits of the case, but to address the related question: how
6 does the Tribunal schedule the briefing on these two
7 points. And I would submit two points to you on this. It
8 is the broadcasters who have come forward with an asserted
9 claim. And as the proponents of that claim, I would urge
10 you on that, that they have the burden of going forward.
11 They are the petitioners, asserting a novel position. And it
12 is one they should advance to you and one that we should be
13 given an opportunity to respond to.

14 Second, I would submit to you, in light of the
15 fierce time constraints that the Tribunal is under, that
16 this be done on a most expedited basis. The novel claim
17 of the broadcasters has been the subject of discussions,
18 debates, controversy between the parties for some six
19 months now.

20 I would urge that you give us a very tight
21 schedule. I would urge that you require the proponents of
22 this novel claim to come forward with a brief, not later
23 than October 26th, as we have proposed in our petition,
24 stating that we, in turn, the producers, be given a very
25 narrow time frame in which to respond, November 5; and that,

1 it then be dished up to you for decision. If you deem
2 argument appropriate, it will be argued, hopefully, very
3 soon after November 5. If you do not consider argument
4 necessary, it's up to you for decision. But I submit, as
5 I stated at the outset, we must go forward with the greatest
6 expedition in order that we meet the statutory mandate of
7 the decision in the remaining period of time, namely 11
8 months.

9 That concludes my remarks on the first point, and
10 then leave the legal issues which are now before you available
11 for briefing. I would like to reserve comments on the
12 second area for decision, namely the trial schedule.

13 CHAIRMAN COULTER: Any questions?

14 (No verbal response.)

15 I think we need somebody from music--

16 MR. KOENIGSBERG: Mr. Chairman, my name is
17 Fred Koenigsberg. I wish it were spelled as easily as
18 Mr. King's name. I'm representing the American Society of
19 Composers, Authors and Publishers, ASCAP, with the Washington
20 Counsel, Mr. Zelenko.

21 I really only have a very few words to add. I
22 agree with virtually all of what Mr. Shiner said. I think
23 he has made his points very well. I was not here for the
24 last hearing because of Hurricane David, but I read the
25 transcript with much interest. And I got a very strong

1 sense from that transcript that the members of the
2 Tribunal wanted to do as much as they could to encourage the
3 voluntary agreement among the parties.

4 I know that all the parties would also like
5 to reach a voluntary agreement if it were possible. There
6 are some impediments to that sort of agreement for the
7 moment. So, the question, it seems to me, is what
8 structure can we put on these proceedings that will do the
9 most to encourage voluntary negotiations and a voluntary
10 agreement at the earliest possible time.

11 And, it seems to me, the structure that motion
12 picture interests have outlined, the structure that we
13 outlined in our submission to you, the structure that sports
14 interests outlined, and even to a degree, the structure of
15 the broadcasters outline will do the most to encourage that
16 sort of agreement.

17 Specifically, first, an examination what has
18 been referred to as the purely legal issues, the syndicated
19 exclusivity claim and the compilation claim--those are the
20 issues that have been, it seems to me, the major impediment
21 to a voluntary agreement in our discussions over the last
22 six months. And if those issues can be resolved by the
23 Tribunal, then I think the parties can go back to the
24 bargaining table and, I would hope, be able to reach an
25 agreement. There is no certainty of that, Lord knows. And

1 it may be there are other issues that are involved as well,
2 factual issues involving things that perhaps Mr. King has
3 sketched out that may have to be further resolved by the
4 Tribunal. But, it seems to me, this is a first step that
5 will encourage a voluntary agreement.

6 And, it also seems to me, that if the Tribunal
7 can take this step and, thereby, ending the proceeding as
8 quickly as possible, without having the parties incur a
9 great deal of time and expense, certainly without having
10 the Tribunal incur a good deal of time and effort in some-
11 thing that it may not have to exert itself on. And with
12 the many other things that it's going to be considering
13 over the next year, the Lord knows, that would be the best
14 for all the parties concerned.

15 MR. CHAPIN: Mr. Chairman, I'm Edward Chapin,
16 Broadcast Music, BMI. With me is Charles Duncan, our
17 Washington Counsel. And I just have a couple of very few
18 remarks. I agree with everyone that we should have an
19 expedited proceeding. I would even go further though and
20 say that, not only at the beginning stages when we're
21 discussing the legal issues, the proceedings be limited to
22 briefs, if possible. I think even in the evidentiary
23 hearing stage, a lot can be done by briefs to cut down
24 the necessity for a long proceeding with oral testimony.

25 So, with that one refinement, I would urge that

1 we go forward expeditiously.

2 CHAIRMAN COULTER: Thank you.

3 MR. CIANCIMINO: My name is Albert Ciancimino.
4 I am Vice President and Counsel of SESAC, Inc. in New York
5 City. And SESAC has joined with ASCAP in the comments
6 that have been submitted to the Tribunal. And therefore,
7 we simply wish to go on record as favoring the resolution
8 of the two initial issues of compilation and exclusivity,
9 in that hope that it will lead to a voluntary settlement among
10 the parties.

11 CHAIRMAN COULTER: Thank you.

12 Are there others?

13 MR. SANCHEZ: I'm Ernie Sanchez, National
14 Public Radio in Washington. While we share the desire of
15 the others for both flexible and prompt disposition of the
16 issues that have already been set out before the Tribunal,
17 we are concerned that the issues raised by the NPAA and the
18 sports interests, while quite important, are not the only
19 issues which should be before the Tribunal.

20 We believe that the Tribunal's obligation is,
21 not only to set the appropriate distribution of royalties
22 for audio visual works, but also for the use of audio works
23 by cable systems. As representative of the largest single
24 group of serious producers and broadcasters of original
25 public affairs progrms, of serious documentaries, of

1 original dramas and of children's programming, we feel
2 that radio interests are obviously not as large as others
3 that are before the Tribunal. But, nevertheless, they are
4 not insignificant ones.

5 We offer the hope that the Tribunal will not
6 permit itself to be swamped in the questions surrounding
7 audio visual works to the exclusion of those that are of
8 particular importance to audio works. Thank you.

9 CHAIRMAN COULTER: Are there any others who would
10 like to speak on this issue now?

11 (No verbal comment.)

12 CHAIRMAN COULTER: If not, I have a question
13 for Mr. King. Your second issue of royalty pay-out, my
14 understanding, as set by you and Mr. Fitzpatrick, that is
15 the same thing as criteria. Am I correct on that?

16 MR. KING: Yes.

17 CHAIRMAN COULTER: Given the fact that you
18 mentioned some larger legal issues initially before mention-
19 ing that, do you feel that the larger issues are more
20 important initially than the more detailed examination?

21 MR. KING: No, I don't. I think that the
22 standards that we implore raise serious questions of law
23 which I think should be resolved before the court. I think
24 that the issue of whether the Tribunal is to be a surrogate
25 of the marketplace raises a serious question of law, certainly

1 is a more serious question, I think, than whether the
2 broadcast stations have a copyright and compilation. Each
3 is a question of law.

4 And I think that each should be resolved at
5 the earliest opportunity. So, I don't think one is more
6 important than the other. I think that if, as a matter of
7 law, the Tribunal is to take the position that it is a
8 surrogate of the marketplace, then we should know before we
9 all start preparing briefs on that issue.

10 I'm interested in saving time. And I think
11 that that should be known right up front before we go any
12 further. So, I don't attach any less significance to it.
13 It falls into a different category, but it's of equal
14 importance.

15 COMMISSIONER BURG: I have a question for
16 Mr. Shiner and Mr. King. When you both wanted a tight,
17 narrow focused schedule and you wanted us to move expedi-
18 tiously, what do you contemplate or what do you designate
19 as "tight"?

20 MR. KING: Can I be heard on that? I'd like
21 to address that. It was said that the issue of syndicated
22 exclusivity presents a novel issue and not really one of
23 ownership. That's simply not true. There's nothing novel
24 about it. To the extent that broadcast stations have
25 exclusivity, it has ownership to the extent that--

1 COMMISSIONER BURG: That's not my question.

2 MR. KING: No. The question is the time
3 schedule. We suggested 45 days to brief. I think there are
4 a lot of matters that have to be briefed. If the opinion
5 of the Tribunal is that certain of these matters are not
6 to be briefed, then that would cut it down accordingly.

7 But, I would adhere to the position I took
8 at the outset. I think there is an awful lot of briefing
9 that should be done. And, I think that we can move
10 expeditiously if we spend the time on that now, resolve
11 those issues which will, I think, substantially eliminate
12 a waste of time at a later stage of the proceeding.

13 COMMISSIONER BURG: Thank you.

14 MR. SHINER: I have proposed the submission of a
15 brief by NAB by October 26th, and a reply brief by the
16 producers on November 5.

17 COMMISSIONER BURG: Mr. Fitzpatrick, do you
18 have any--?

19 MR. FITZPATRICK: We would support Mr. Shiner's
20 suggestion for the first stage.

21 MR. KING: Mr. Chairman, can I raise just a few
22 more questions? I would like to address the issue of
23 syndicated exclusivity and then the ownership by the
24 sports interests. The exclusivity is not a novel argument;
25 it goes directly to ownership. We are owners; the broadcast

1 stations are owners to the extent of exclusivity, notwith-
2 standing the copyright interests of producers.

3 So, I think that we do have here a real issue
4 of ownership. And the burden is on them as it is on us.
5 The question is who owns it. And they've got to establish
6 ownership as we have to establish ownership. And I think
7 that if that question is resolved, it will materially
8 effect the situation for settlement.

9 MR. SHINER: May I have a brief respond to
10 that point, so we can get it behind finally.

11 MR. KING: Well, I was going to address another
12 issue.

13 CHAIRMAN COULTER: Well, let's answer this.

14 MR. SHINER: Very simply, that no one quarrels
15 or disagrees with the producers, syndicators ownership of
16 copyright. I'm sure that NAB would stipulate that copy-
17 right of its own product. There's no question about that.
18 The question is whether an exclusive license, given by the
19 copyright owner creates a valid claim to share in the
20 cable royalty funds. That's all I have to say on that.

21 CHAIRMAN COULTER: Have you ventilated--

22 MR. KING: As to the sports interests, I think
23 here again that raises a serious question of ownership.
24 As Mr. Fitzpatrick said, one of us is entitled to the money,
25 the broadcasters or sports interests. Here again, is a

1 question of ownership. And I don't see the point in
2 resolving that at some later stage of the proceeding. I
3 think it would be appropriate to determine right up front
4 who is entitled to it. And to the extent interests are
5 not entitled to it, they are out of these proceedings.

6 I also think that, if that is done, it will
7 materially bring about a situation where there will be
8 meaningful settlement, negotiations. I think there's
9 simply more than two issues to be briefed--the entire
10 spectrum of ownership, sports, motion pictures and the
11 music interests in these various programs, broadcast
12 material.

13 I think it all has to be resolved at a
14 preliminary stage.

15 MR. FITZPATRICK: May I make just one, very
16 short paragraph. First, an abstract decision, early
17 decision isn't going to result in one party or the other
18 party no longer being at the table. You have both the
19 question of level of the Copyright Law and contract. WTCG,
20 which is turner station, has acknowledged that the Atlanta
21 Braves are the proper claimants here. Under any circumstances,
22 that baseball club is going to be the proper claimant.

23 Another contract says the Cubs--only two
24 broadcast stations specifically claim sports in their
25 compilation. That is--one of those two is WGN, where the

1 contract says the Cubs are the owners. These are the
2 facts. This is the background, the complication that you're
3 going to have. You're not going to bump one of us, I
4 don't believe, from the table, simply by trying to resolve
5 this as an abstract matter early.

6 MR. LESTER: My name is Arnold Lester with the
7 Law Firm of Dow, Lohnes & Albertson. We filed on behalf
8 of a number of broadcast licensees and a limited number of
9 program producers.

10 I'd like to just briefly address the question
11 of timing with respect to these matters. Just listening,
12 obviously, to the controversies already discussed, it's
13 obvious that the issues have been hammered out by the
14 parties for a number of months, but no resolution between
15 them has been made yet.

16 To the extent that the Tribunal is interested
17 in the participation, direct or indirect, of large numbers
18 of copyright claimants--and I speak in this regard for
19 primarily the broadcast television/radio stations--an
20 extremely expedited proceeding will probably discourage
21 larger participation.

22 I think the time scheduled laid out by NAB to
23 the extent that you're talking about 45 days for considera-
24 tion of some very complexed, novel copyright issues, it
25 seems to me to be unreasonable time frame to allow interested

1 parties to make their views known. To set a 10 or 15-day
2 time period, while moving the proceeding along very quickly,
3 I think could be quite short-sided to the extent that where
4 we're dealing with novel copyright issues and matters of
5 substantial complexity, I think you would sacrifice in the
6 short run for speed what could be gained by a longer, and
7 not necessarily lengthy--but, a longer 45-day period for
8 evaluation of these issues.

9 I'm distressed to the speed with which these
10 critical issues can be resolved. I think also that while
11 we are dealing with a year time frame which can be short
12 for adjudication of some of these complexed issues, if
13 these basic questions are resolved in a period of ultimately,
14 say, three months, this would give the parties an
15 additional period of time for resolution. And then, have an
16 expedited proceeding for final distribution.

17 I would just make the point, too, that at this
18 stage, we're dealing with a relatively small pool of
19 money as far as what is available to copyright claimants.
20 Obviously, the issues we're resolving in the next year
21 will have long ranged implications. Therefore, the stakes
22 ultimately will be substantial.

23 But, in terms of initial investments, looking
24 at the real claimants that are involved, there are limited
25 stakes in the early years. And I think this would be

1 short-sided in the interests of great expedition, fail to
2 take their long range interests into account and allow for
3 a slightly longer period for comments and briefing of
4 these issues, with the initial goal of making the
5 proceedings during next year as limited as possible in
6 terms of ultimate expense to the parties involved.

7 COMMISSIONER BURG: May I ask you why would an
8 expeditious schedule cut down on the participation?

9 MR. LESTER: I think as a practical matter,
10 the ability to brief some of these questions in a 10 or
11 15-day period is too hasty.

12 COMMISSIONER BURG: So, they would opt not to
13 involve--

14 MR. LESTER: I think it's a matter of
15 coordinating with clients getting their involvement during
16 the--just physically contacting them, explaining to them
17 what went on today. We have almost 100 claimants that
18 are involved.

19 COMMISSIONER BURG: I get it. Thank you very
20 much.

21 CHAIRMAN COULTER: I think that we have had--

22 MR. ATTAWAY: May I just make two observations.
23 One is--

24 CHAIRMAN COULTER: Identify yourself for the
25 record please?

1 MR. ATTAWAY: My name is Fritz Attaway, with
2 Motion Picture Association. I think that the first is that
3 every claimant in this proceeding has been on notice since
4 the First of August, that these fundamental differences
5 exist among the various clients.

6 Secondly, schedule suggested by Mr. King would
7 consume almost 20 percent of the time that this Tribunal
8 has remaining to settle the entire controversy. And I
9 would suggest that you cannot afford to consume one-fifth of
10 your time to threshold issues before you even begin the
11 overall hearing.

12 CHAIRMAN COULTER: In the brief submitted to
13 us, there was a second phase that I would urge from most
14 of them, and I think it would be rather hardening the lines
15 right on this (inaudible) first issue immediately, I think
16 it would be appropriate to discuss that, the second phase
17 of proceedings before us.

18 MR. KING: I think that it's very hard to focus
19 until this preliminary thing is resolved. I think that
20 after it's resolved, we would suggest a conference of the
21 type we're having this morning at the earliest opportunity,
22 which would set whatever ground rules have to be set and set
23 up whatever schedule you will have to set, so that they
24 could be implemented.

25 But I think it's very hard to focus on what form

1 those proceedings are going to take until these matters
2 have been resolved along the lines that we think they should
3 be resolved.

4 MR. FITZPATRICK: Very briefly, it seems to me,
5 that there are at least two or three things that are going
6 to have to happen after the resolution of the preliminary
7 issues. There is going to be a period of, hopefully, of
8 further discussion among the parties. And we--I think at
9 this point, we should now set up a set of procedures in
10 the event that those negotiations are not going to be
11 fruitful.

12 I think all of us need a sense of timing as to
13 when we're going to be before you in a litigated posture.
14 I think you've got a number of things that are going to be
15 before the Tribunal next year, and I would urge that we go
16 forward today and set a series of steps.

17 We have outlined in our paper three different
18 steps. One, exchange of direct testimony of which opening
19 written statements would be exchanged, studies, material
20 that one intends to introduce at trial in an attempt to
21 give notice to the other side and to avoid a great deal of
22 oral testimony, direct testimony, and let us each prepare
23 ourselves for cross.

24 That is clearly, I think, an expeditious step.
25 We have suggested that that be done on December 17th. Arthur

1 had it at a somewhat earlier date. We thought that there
2 may be some benefit in having a bit more elbow room between
3 the discussion and resolution of the preliminary legal
4 issues and the time that one has to come in with a direct
5 figure.

6 We then suggested a second pretrial in early
7 January, at which specific issues in terms of burden of
8 proof, order of presentation, determination of whether there
9 may be certain issues that could be stipulated, could be
10 considered. And then we had a trial date set for the end
11 of January, January 27th.

12 In that process, we had suggested, as part of
13 the first filing, that each of the parties identify the
14 programming on which they were basing their claim. Many of
15 the parties have done so already, and we've tried to some
16 filings--one by Metromedia, Number 314, filing 293 on
17 behalf of the Warner Brothers, and I think 166 on behalf of
18 Christian Broadcasting Company, in which individual parties
19 had identified the actual programming that they were
20 claiming for.

21 We think it is important for the Tribunal to
22 have before it, on behalf of the individual claimants,
23 a specification of the programming, which forms the basis
24 for their claim.

25 We have seen many of the parties have done so.

1 We further note that some of the claimant groups have
2 not had--have had only very spotty participation as far
3 as claiming for a particular programming. We made
4 reference to that in our paper.

5 We think that is an important first step in
6 the pretrial, and we outlined that in more detail in our
7 paper.

8 MR. SHINER: First, with respect to scheduling,
9 Mr. Fitzpatrick and I are largely in accord in terms of the
10 steps to be taken and the information to be submitted and
11 the matters to be considered in the course of these steps.

12 We differ only in the timing. And the timing,
13 the differences are not all that substantial. I set out in
14 the NPAA pleading that we have a somewhat tighter schedule.
15 We had some 10 days to two weeks, I believe. We would propose
16 the submission of a direct case on December 3, a prehearing
17 conference thereafter, commence with the hearing early in
18 January. Specific dates are set out in our pleading.

19 I once again urge that to the extent possible
20 that the Tribunal pick the tightest schedule for the two
21 following reasons: that if you're obliged to go to final
22 decision, you'd better build in as much lead time as possible;
23 second, I trust that such a tight schedule is more conducive
24 to a negotiated settlement than a more liberal schedule.

25 But, essentially, there is not any significant

1 disagreements between the sports and the broadcasters on
2 that score. There is one area that will not surprise you,
3 of very substantial disagreement--kind of a simple,
4 innocuous kind of suggestion, that each of the parties
5 identify all of their programming that already have been
6 advanced by Mr. Fitzpatrick without an understanding of
7 the nature of our business.

8 I analyzed what that proposal means. I've
9 reduced it to writing. I would like to make copies
10 available to the Tribunal and spend not more than a couple
11 of minutes on this. I have copies for other parties as
12 well.

13 Identify the name of the program, the station
14 hours they are broadcast and the number of times during the
15 relevant playing period when the program was broadcast,
16 was authorized to be broadcast. Now, that information
17 would be of zero value to the Tribunal unless it was
18 related to the carriage by cable television systems of
19 distant programs, because obviously, that is what the
20 inquiry is about.

21 And now, if you would be good enough to refer
22 to the paper that I distributed, the estimated number of
23 syndicated programs imported by all cable systems in 1978--
24 and you would skip to the bottom line of page two, paragraph
25 seven. Mr. Fitzpatrick is suggesting on a conservative

1 basis 47,123,325 bits of information.

2 COMMISSIONER GARCIA: Do you mean you couldn't
3 just whip that right out for us?

4 (General laughter.)

5 MR. SHINER: We might have a little difficulty.
6 And somewhat more responsively, to my knowledge--and this
7 is not a plug for the producer, and I don't know whether
8 others will disagree with it. We have taken a massive an
9 extensive study on a sampling basis. We have spent some
10 \$300,000 in out-of-pocket expenses in constructing the
11 data base, consisting of television programs, cable systems,
12 carriage and the copyright ownership of these programs.
13 It is on a sample basis. We trust and we will be urging
14 on you that it is truly representative and that you may
15 rely upon it. But that cost \$300,000.

16 I am advised by our expert that compliance
17 with Jim's simply little request, and I'm only reporting
18 at this time, would cost approximately \$5 million. Now,
19 we are, admittedly, a rather large claimant in this proceeding.
20 But, \$5 million is a very substantial part of the pot.

21 I trust that answers the Commissioner's
22 question. But in addition, the basic problem, the basic
23 flaw in the request is that it fails to recognize that of
24 necessity with this extraordinary amount of data, you
25 necessarily have to deal with a sample. But if you were to

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1 pursue our 47 million bits of information a step further,
2 Mr. Fitzpatrick's premise, I trust the Tribunal is aware
3 that the sports interests are claiming on the basis, not
4 limited to time, but to some concept of value in the
5 manner in which that is to be translated is not all that
6 clear at the moment. But, whatever that value basis is,
7 on his own theory, he would have to take that value criteria,
8 sets of critiera and apply it to the 47, 123,325 syndicated
9 programs that we're dealing with.

10 As a consequence, I would like to note my
11 opposition to that request.

12 MR. FITZPATRICK: May I make a suggestion here?
13 I think that \$5 million, may I say, if that's really the
14 case, that might be the greatest encouragement to
15 settlement than the Tribunal could devise.

16 I must say that this parade of horrors did
17 not seem to stagger Metromedia Producers Corporation.
18 Mr. Stabial (ph), the Vice President, in claim number 314,
19 did precisely what we said. I did not hear them squealing
20 and crying.

21 I think that there's an immense amount of
22 exaggeration here. The point is this: that, in fact, the
23 broadcasters, only a minor portion of the broadcasters
24 actually file claims, less than half of broadcasters actually
25 filed claim, by our count. We believe that not all of the

1 program producers have filed claims.

2 We think it is essential to have a data base
3 that permits the Tribunal to determine what claims are
4 actually before us. We don't see that you can deal in
5 some indifferntiated sense, with movies and sports and
6 broadcasting and music unless you know what claims have
7 been made.

8 I must say that, among other things, if we're
9 right that only a few of the syndicated programmers are
10 filed, and we counted up the number of syndicators that
11 had filed, and arithmetically, there was only a minor
12 portion of the total syndicators. In terms of volume,
13 those who filed is a very significant number.

14 But, we think that this first step--. We
15 don't see a parade of horribles; we don't want this
16 Tribunal to have 50 million pieces of useless data. But we
17 do believe that putting each of the claimants to prove,
18 to demonstrate what programs they are claiming on is an
19 important first step to shake out where each of these
20 parties are, in fact, in terms of the claims to be presented
21 by the Tribunal.

22 It wasn't that much of a problem for Metromedia.
23 I can't imagine that those experts that came up with a
24 \$5 million figure had the opportunity to consult with
25 Metromedia people who felt that that was a proper thing

1 for him to do in their claim.

2 CHAIRMAN COULTER: Mr. Koenigsberg?

3 MR. KOENIGSBERG: I believe, Mr. Chairman, the
4 question was what should the next stage of the proceedings
5 be. And, it seems to us, that there really should be two
6 further stages of the proceedings.

7 First of all, the Tribunal should determine
8 by an allocation of percentages of total royalty pool, what
9 each major group of claimants would get. That is to say,
10 music would get X percent, the broadcasters Y percent,
11 movie people and syndicators something else, and sports
12 something else.

13 The reason for taking that step next and not
14 narrowing the questions to individual claimants, would again
15 be to encourage some sort of voluntary settlement at some
16 point so that these proceedings don't have to go on to the
17 bitter end when they may not have to.

18 In the music world, for instance, we know that
19 the Tribunal is awarding the music interests certain
20 percentages. I would think that ASCAP, BMI could sit
21 down and add that percentage up without having to come
22 having to come back before the Tribunal and make an
23 argument before you.

24 But, if that was necessary, then that should be
25 a third step in the proceeding. It may be that the music

1 interests would have to come back to you and have you
2 decide what portion each organization would get. But it
3 may be that the syndicator and movie people would not, or
4 vice versa.

5 It would save, it seems to us, a lot of time
6 and expense and efforts on the part of everybody concerned.
7 If the Tribunal would follow that sort of stage proceeding
8 as to the details of how each of those stages should be
9 conducted, that's something that perhaps should not be
10 decided now because it's not at all here at this point
11 perhaps that those stages will be necessary.

12 The question would be, I suppose, something
13 like would the Tribunal like all the distinguished members
14 of the Bar here to cross examine every witness. Well, that
15 takes up another 20 percent of the time, as Mr. Attaway
16 suggested.

17 These questions--the questions of the actual
18 procedure to be followed at the hearings, the separate
19 stages can be decided when it becomes apparent that those
20 stages are necessary. It can be decided, it seems to me,
21 very quickly by a conference of this sort again.

22 As for the timing of those stages, we made
23 suggestions that are not far off from the suggestion
24 Mr. Shiner made, or Mr. Fitzpatrick made as far as
25 expeditiously taking each step of the proceeding to whatever

1 conclusion is necessary.

2 MR. KING: I would join with Mr. Shiner in
3 this instance in saying it shouldn't be necessary for us to
4 be sifting through material, type set for his presentation.
5 If we are interested in expedition, I think I would
6 certainly protract the proceedings to be validating
7 claims on the basis of his presentation by some 47 million
8 pieces of programming.

9 I think that seems totally unnecessary. And
10 insofar as Mr. Fitzpatrick's argument, this should be a
11 first step, it's totally inconsistent with his petition in
12 the earlier stage in the proceeding, when he said it's not
13 necessary to determine who the proper claimant is.

14 We had determined the proper claim, we should
15 know whether the sports interests are indeed a proper claim
16 as a matter of procedure.

17 CHAIRMAN COULTER: I don't think he was--

18 MR. FITZPATRICK: No. May I say that
19 Mr. Shiner's paper that I've just seen here is a real bit
20 of arithmetic hallucination. We are not suggesting
21 anything like that. And he knows it. What we're suggesting
22 is the program user identify what programming they were
23 planning to--what programming formed the basis of the claim.
24 It doesn't go any further than that.

25 Metromedia told us that the Groovy Goolies (ph)

1 in 1978, were licensed to 14 stations. And they had a
2 number of runs in the first half of '78 and the last half
3 of '78, and the total number of runs. What we're asking--
4 you don't have to go to cable systems, you don't have to
5 go through this bit of coming up with 47 million syndicated
6 programs.

7 What we're asking for is each program producer
8 simply to say: we are copyright owners of this, this and
9 this program, and these are the stations that carry it.
10 That's as far as it goes. So, we can establish what are
11 the claims of the individual, what are the claims of the
12 individual program producers and sports.

13 CHAIRMAN COULTER: You visualize this as a
14 later step though; is that right?

15 MR. FITZPATRICK: Yes, yes. I don't see this
16 as a--. This, we see, is a foundation for the factual,
17 for the litigated stage. And we don't say--we say that
18 this comes either at the trial or comes at a preliminary
19 stage. And we thought it would be preferrable to have that
20 in one of the earlier stages of pretrial, not on a cross
21 motion for summary judgement.

22 CHAIRMAN COULTER: Okay. Mr. Shiner?

23 MR. SHINER: I will avoid responding to such
24 words as "hallucination" and "squealing" and "squawking",
25 that my friend has used, and do my best to keep it in some

1 low key presentation.

2 MR. FITZPATRICK: I would have been less keyed
3 if I had seen this beforehand.

4 MR. SHINER: I did make a point at the outset
5 that in order to provide any relevance or probative value
6 to Mr. Fitzpatrick's request, one did have to relate to
7 the carriage of cable systems. And when you did that and
8 multiply that, the programs by the systems, then you came
9 up with this number.

10 And I thought to make any sense out of the
11 request, you would have to take the next step. And I
12 thought I made that clear at the outset.

13 Second, in order to get the information of
14 all programs, we cannot simply go to our files. Typically,
15 when a television producer or syndicator licenses a
16 program or series to a television broadcast station, it is
17 for a period of years and a specified number of runs.

18 And typically, it is absolutely within the
19 complete discretion of the licensee as to when those
20 number of runs are taken or accomplished. In order to
21 get that data, you have to go to some other source. And
22 when we put together our \$300,000 data base, we did go to
23 other sources to do it. We went to TV Guide. So, it isn't
24 a simple matter of pulling this out of our files.

25 If we can get passed this request, I think

1 we've devoted enough time to it, and I don't care to add
2 anything further to it. It seems to me that there are two
3 questions. There is substantial agreement on the type
4 of procedure and indeed even the timing of it.

5 There is a preliminary question raised by
6 Mr. King. And it's a serious question. And I happen to
7 disagree with his proposal, that the Tribunal--if I
8 understood you correctly, Mr. King, were you not proposing
9 that at the outset and prior to undertaking the submission
10 of direct cases, that the Tribunal address itself to the kind
11 of proof, the criteria to be applied. Was that your
12 proposal?

13 MR. KING: Yes, it was.

14 MR. SHINER: That's what I'm addressing at this
15 point. I think it would be very nice if we could have it.
16 I think next year when we're dealing with 1979 we will have
17 had the benefit of this year the effect of that kind of
18 guidance.

19 Unfortunately, I don't think we can have it
20 this year. I think what the proposal amounts to is a
21 request, and of necessity, that the Tribunal in a vacuum
22 make evidentiary rules on relevance, competence, probative
23 weight to be attached to different types of submission.
24 I am concerned that we will go through a very, very arguous
25 exercise and wind up, again out of necessity, with very little

1 guidance.

2 I think in this first precedential year, I
3 think what we are obliged to do is go forward in
4 reliance on our own best judgement as to the kind of data
5 that is genuinely competent and put our best case before
6 you and have you rule in the light of the submissions.

7 I don't think you can make judgements, for
8 example--the sports interests reliance on value and a
9 half dozen other factors they're about--that will enter
10 into their concept of the case, unless you have the case
11 before you.

12 I don't think you can make judgements about
13 the straight time approach which NAB has used, or a
14 weighted approach that the producers have used relatively
15 speaking, in a vacuum. I think you've got to have the
16 hard work in front of you and you've got to go through it.

17 So, regretfully, I don't think you have an
18 alternative. I don't think you can follow Mr. King's
19 suggestion. I think we have to go to proof, and hopefully
20 you will observe--

21 CHAIRMAN COULTER: Which suggestion are you
22 referring to?

23 MR. SHINER: Namely, that you have a preliminary
24 session in which you advise us of what you regard to be
25 competent and relevant types of information.

1 CHAIRMAN COULTER: This was his second category?

2 MR. SHINER: Yes. And I don't think it can be
3 done.

4 CHAIRMAN COULTER: Before getting to you, I'd
5 like to bring up the subject that we were dealing with
6 initially, which was the scheduling, second aspect of the
7 proceedings. And there were two of you who said another
8 conference such as this may be possible, once the first
9 issues have been dealt with. And then, subsequently
10 scheduling work-out. And two others said you'd prefer to
11 nail that down now.

12 If we felt it were inadvisable to nail it down
13 now, with some ensurance that whatever we did work out would
14 be as rapid as possible, would that make you amenable to
15 perhaps, not specifying any exact dates on that second part
16 right now?

17 MR. SHINER: Sir, I'm sorry. I'm not clear
18 on that. I'm not sure I follow you.

19 CHAIRMAN COULTER: Okay. Two of the parties
20 here suggested that we simply, after this first phase has
21 been completed, that we have another conference such as
22 this to specify the dates of the second aspect of the
23 hearing.

24 My question to you is if you're concerned
25 that because of the scheduling next year, that might not be

1 fast enough or tight enough. And if we are unable to do this
2 now, I'm just asking if we give you some kind of ensurance
3 that we'll be as fast as we can, that that will be
4 sufficient without having to specify or give a date for the
5 second phase. Is that clear now?

6 MR. SHINER: I think so. By the second phase,
7 I take it the Chairman is referring to the trial schedule?

8 CHAIRMAN COULTER: Yes, exactly, what you have
9 alluded to.

10 MR. SHINER: If the Tribunal is unable to
11 specify dates at this point, I would hope that they would
12 do so at the earliest date. I think the parties generally
13 need dates. We have a way of not addressing the problem
14 until we have a deadline. And I think having the date
15 would be very helpful.

16 CHAIRMAN COULTER: I'm sorry, you were saying?

17 MR. LESTER: I'm troubled somewhat by what is
18 being stated, as I articulated. As I understood, the last
19 six months the parties have been trying to iron out a
20 negotiation where essentially they were starting out with
21 different percentages of the whole pot, that they thought
22 they were entitled to, not necessarily in dollar figures, but
23 in percentage terms.

24 And that, it seems to me, made sense in terms
25 of an equitable way of dividing it, and within the individual

1 entities, local picture producers, sports interests,
2 broadcasters, they would then go to their primary sources
3 and divide it among themselves in a way which is more
4 equitable.

5 And that, it seems to me, in terms of initiating
6 my clients into the copyright area, into these claims,
7 that seems to me to be a practical way of doing it.
8 Apparently, what happened is the percentages got out of
9 hand and the amount of percentages equaled more than 100
10 percent. So, the parties were not able to reach agreement.
11 And some of these legal issues got complicated and positions
12 hardened.

13 If I understood Mr. Koenigsberg correctly, his
14 suggestion was let's address some of these crucial legal
15 issues which define the parameters of the parties' rights.
16 Then, as a next step, the Tribunal could issue a decision
17 regarding the division of the 100 percent pie, as to where
18 it would go in terms of broadcasters, motion picture
19 industry, sports interests and others. That, it seems to
20 me, makes sense. And it would avoid what I see as the
21 natural impetus toward a full scale hearing, trial,
22 burden of proofs, witnesses. I could foresee a client of
23 mine with a \$500 claim being brought forward and trying
24 to explain the justification for this program or that
25 program in relation to cable carriage. And with regard to

1 the potential benefits for individual broadcasters, it
2 doesn't make sense.

3 It would seem to me, that if the Tribunal
4 wants to truly deal with this on an expeditious basis,
5 and to avoid what is the possibility of an enormous legal
6 morass on highly technical and, to my mind, unnecessary at
7 this stage, bits of information, the presentation of a
8 compilation theory, if that is accepted and the program
9 generated thereunder, you could fill this room with the
10 program logs of broadcast stations.

11 I don't think that's necessary to resolve the
12 kinds of issues that you have the statutory burden to
13 resolve. I would assume, in terms of an orderly and
14 expeditious way to proceed, if you set a reasonable, and
15 not extremely--as I mentioned before--fast time table for
16 resolution of the core legal issues, and then an equal
17 period of time to the resolution of the distribution
18 formula, which would divide the percentages among these
19 various entities and interests involved. And then, allow
20 those individual entities, say it's 35 percent for the broad-
21 cast industry, 40 percent for producers, 25 percent for
22 sports interests, and then let those entities go ahead and
23 resolve.

24 I would assume that even though broadcasters
25 may dispute it, I think we can save a lot of time, effort

1 and money by working directly through NAB with its 25
2 percent. I would be glad, in terms of my clients, to
3 recommend that, you know, if this approach were taken,
4 we would work within NAB and avoid the Tribunal getting
5 involved in just what could be a proceeding that could go on
6 for years.

7 CHAIRMAN COULTER: A year.

8 (General laughter.)

9 MR. KING: I would like to go back to sort of the
10 guidelines on evaluation. You were talking about huge amounts
11 of money here, just the figures generated by NPAA and the
12 sports interests. Now, the problem that we have as
13 broadcasters, we have two claims to reflect. That, if the
14 Tribunal is going to accept the sports interests' evalua-
15 tion and all its ramifications, the NPAA interests and all
16 of its ramifications, I can see the broadcasting stations
17 having to spend huge amounts of money, generating the
18 information necessary to rebut their claims and prove their
19 own.

20 It's going to be in the millions and millions
21 of dollars, we could well exhaust whatever they're going to
22 get in the royalties. And that's why I'm encouraging each
23 side to brief at the earliest stage what it intends to
24 prove. And then this Tribunal will have an opportunity to
25 make rulings.

1 Now, I recognize that in the doubtful case the
2 Tribunal will hear evidence. But, it does seem to me that
3 a lot of expense can be eliminated, and a lot of time
4 saved. And I would strongly encourage that approach at the
5 earliest possible stage because it is going to save, I
6 think, a substantial amount of time, and very clearly, a
7 substantial amount of money. I mean, just to hear the
8 amounts of money being spoken to, in terms of the NPAA
9 research and the sports interests' research.

10 Now, those are two claims that we have to face.
11 If we have to do the same thing in each instance, it's
12 just going to run into huge millions of dollars.

13 CHAIRMAN COULTER: It still is a different
14 category than the threshold.

15 MR. KING: In a sense it is. But, in a sense,
16 it sets guidelines for the trial itself, because it's going
17 to take time to generate this information, and it's going to
18 take a lot of money to do it.

19 CHAIRMAN COULTER: Some of this is already in
20 the process of being generated.

21 MR. KING: Well, we're going to have to do it,
22 unless the questions that I urged be accepted. But I
23 just don't think that it's efficient. I think that guide-
24 lines can be given, again recognizing that in a doubtful
25 case, the Tribunal will, under its mandate, accept the

1 the testimony, then we would simply have to go ahead.

2 But, I think a lot of it can be eliminated, as
3 a matter of law, taking the position that the Tribunal
4 simply will not accept certain evidence because it's
5 too speculative. That means that we don't have to spend a
6 lot of time and money to get rebuttal evidence. That's what
7 I'm looking for.

8 I think it's fair; I think it's reasonable.

9 CHAIRMAN COULTER: I would like to just ask you
10 one question on your first concern which I think you termed
11 as the ownership interests. The issue of compilation,
12 exclusivity would fall under that category.

13 MR. KING: True. There are others though.
14 Sports interests would certainly fall in that category.
15 It's my understanding that only a few of the franchise
16 teams have contracts. In most instances, they do not. And
17 to the extent that they do not, it is our position that they
18 shouldn't be in these proceedings. I think that's another
19 ownership question that should be resolved in this preli-
20 minary stage.

21 CHAIRMAN COULTER: Are there any other remarks
22 or question by Commissioners?

23 MR. LESTER: One thought just occurred to me,
24 in terms of this expeditious--. I haven't been a party to the
25 direct negotiations, referring to the NAB's position. From

1 what I gather from what Mr. King said, there are obviously
2 crucial legal issues which primarily have been articulated.
3 If I can make this suggestion, in terms of dealing
4 expeditiously, if the parties that have been involved
5 and really for six months tried to hammer out and articulated
6 their positions among each other can, in a brief period of
7 time, 10 days say, be required to submit a summary of
8 what they view as the essential legal issues.

9 Then, the Tribunal can issue a notice to the
10 public upon receipt of that; in terms of the core legal
11 issues that have to be resolved; set a 30-day period on
12 that or something which will move this Tribunal quickly to
13 that resolution.

14 CHAIRMAN COULTER: I think we've done that.

15 MR. LESTER: If that has successfully been done
16 then for the Tribunal to issue that notice within the next
17 week and come out with a 30 or 45-day period for public
18 comment, resolve those issues, and then, as I stated
19 previously, go ahead and limit it to the extent possible
20 to avoid extended trial type hearings and focus on a rule-
21 making type of analysis.

22 COMMISSIONER JAMES: I just want to go back to
23 Mr. King one more time. I get the three major legal issues
24 that I think you've annunciated, including ownership. But
25 you seem to have indicated there is one or two more. You

1 mentioned sports as a separate legal issue?

2 MR. KING: Yes, the ownership interest has
3 three aspects to it: the compilation copyright, the syndicated
4 exclusivity, which is directly to the concern of the NPAA,
5 and then the ownership, copyrights of sports interests,
6 which is Mr. Fitzpatrick.

7 We recognize that compilation is our burden;
8 we accept that. As far as ownership is concerned, I
9 don't think it's our burden any more than it is theirs. We
10 each are asserting a claim. They claim to be owners and
11 we claim to be owners. I don't think it's our burden any
12 more than it is theirs. And that's why I suggested
13 simultaneous briefing on that question.

14 The other question had to do with the royalty
15 distribution. And I think I've just spoken to that one.

16 COMMISSIONER JAMES: Yes, I'm leaving that one
17 aside.

18 MR. KING: There are, as I see it, three
19 ownership interests: compilation, which we accept is ours;
20 syndicated exclusivity, we share with the NPAA; and the
21 sports programming, we share with Mr. Fitzpatrick. We have
22 no more burden on that than he does.

23 MR. KOENIGSBERG: Just to take issue, I don't
24 think anyone around the table, with the exception of the
25 broadcasters, ever--when we started our discussion--ever

1 expected a claim to be made on compilation or
2 syndicated exclusivity. Indeed, if you look through the
3 legislative history, which the Tribunal is familiar with,
4 I don't think there was ever any mention of these sort of
5 claims.

6 To the contrary to the legislative history,
7 there is indication that the parties you see before you all
8 have valid claims as we've set them forth. By bringing
9 this notion up, and it's a very new idea in the copyright
10 world, I do think the burden, as Mr. Shiner has suggested,
11 should be on the broadcasters to fully explain what their
12 position is. I know on my part, a full legal explanation
13 of what it is that they are claiming has never been given.
14 And I don't know what to respond to in any detail.

15 I think, therefore, that the point Mr. Shiner
16 made that the broadcasters are before you in the sense of
17 plaintiffs in arguing these legal issues, we're before you
18 as defendants in trying to argue against them, he's correct.
19 And a briefing schedule on that basis would be the best way.

20 MR. KING: The Copyright Law talks in terms of
21 copyright. Now, within the framework of copyright, there
22 is nothing unique about compilation. It was in the old
23 Act, and it's clear in this one. There is simply nothing
24 unique about the idea. It's there if you look for it,
25 if you want to see it.

1 And the same thing is true with syndicated
2 exclusivity. And that's there as well; and there is nothing
3 unique about it.

4 CHAIRMAN COULTER: I think it's hard not to,
5 at least for me personally, to come to the conclusion that
6 these threshold issues are ones that are somehow going to
7 have to be dealt with at the first stage.

8 I think that we would like just to absorb what
9 you've said to us right now and issue a schedule on the
10 issues that will be covered just as soon as possible. And
11 until we get that, hopefully, we will make some judgement
12 on that today. And we'll fill that out just as soon as
13 possible. And we have certainly listened to your
14 discussion on the schedule, and we'll abide by some version
15 of that.

16 Are there any other comments? Thank you very
17 much.

18 (Whereupon, the hearing was concluded at
19 11:29 a.m.)

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