Federal Register

Tuesday,
April 15, 1986

Part III

Copyright Royalty Tribunal

1983 Cable Royalty Distribution Proceeding; Notice of Final Determination

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. CRT 84-1 83CD]

1983 Cable Royalty Distribution Proceeding

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice of final determination.

SUMMARY: The Copyright Royalty Tribunal announces the adoption of its final determination in the proceeding concerning the distribution to certain copyright owners of royalty fees paid by cable systems for secondary transmissions during 1983.

FOR FURTHER INFORMATION CONTACT: Edward W. Ray, Chairman, Copyright Royalty Tribunal, 1111 20th Street, NW., Suite 450, Washington, DC 20036, (202) 653-5175.

SUPPLEMENTARY INFORMATION:

Authority

17 U.S.C. 111(d)(5)(B) requires the Copyright Royalty Tribunal (Tribunal) after the first day of August to determine whether a controversy exists concerning the distribution of cable royalty fees deposited by cable systems with the Copyright Office. Upon determination that a controversy exists, 17 U.S.C. 804(d) requires the Chairman of the Tribunal to publish in the Federal Register a notice announcing the commencement of distribution proceedings.

17 U.S.C.111(d)(4) states:

(4) The Royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright ownes who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

This Proceeding

In this proceeding, the Tribunal takes up the distribution of the royalty fees deposited by cable operators for the calendar year 1983. The Tribunal has made cable royalty distributions suosequent to fully litigated proceedings for calendar years 1978, 1979, and 1980. For 1981, all Phase I parties settled based upon the allocations for 1980; a Phase II hearing was held among Motion Picture Association of America, Inc. (MPAA), the National Association of Broadcasters (NAB) and Multimedia Entertainment, Inc. (Multimedia) in the Program Supplier category. For 1982, all Phase I parties settled, except the Devotional Claimants, again based on the 1980 allocations. In Phase II, Multimedia and MPAA litigated their claim in the Program Suppliers catetory, and the Tribunal allocated between the Joint Sports Claimants and Spanish International Network (SIN) in the Sports category. SIN has reached a full settlement for the 1983 proceeding. Therefore, the questions presented the Tribunal in the 1983 proceeding were: Have there been any factual changes since 1980, or in the case of the Devotional Claimants and Multimedia, since 1982, which justify a change in the awards peviously made? Has any party presented better evidence to entitlement than in the past? Or, do the cases presented confirm the cumulative experience and expertise developed by the Tribunal since 1978?

The cable royalty fund for 1983 differs significantly from any of the cable royalty funds the Tribunal previously considered. The cable royalty funds for 1978-1982 were derived entirely from the payments made by cable systems based on the rates set by Congress in Section 111 of the Copyright Act of 1976 (Act), as adjusted for inflation by the Tribunal. The 1983 cable royalty fund includes, for the first time, payments by cable systems based upon the 3.75% rate and the syndicated exclusivity surcharge adopted by the Tribunal in 1982 after deregulation of certain rules by the Federal Communications Commission (FCC). The question thus presented was: should the Tribunal continue to distribute the cable royalty fund as one fund, or does a basis exist, either in fact or in law, to justify the Tribunal dividing the fund into separate pools and making separate allocations?

The Claimants

680 individual or joint claims were filed with the Tribunal for the 1983 cable royalty fund. Section 111(d)(5)(A) of the Act states, ". . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them . . ." Pursuant to this provision, the claimants, except for Multimedia, coalesced into eight claimant groups.

Motion Picture Association of America, Inc. (MPAA). MPAA is a trade association which represents 83 producers and/or syndicators of syndicated movies, television series and specials. *Prehearing Statement of Program Suppliers.*

The Joint Sports Claimants (JSC). The Joint Sports Claimants consist of Major League Baseball, the National Basketball Association, the National Hockey League, the North American Soccer League, and the National Collegiate Athletic Association. *Prehearing Statement of the Joint Sports Claimants.*

Public Broadcasting Service (PBS). PBS is part of the noncommercial television claimant group consisting of PBS and 240 claimant member television stations, and 17 producers of public television programs. *Prehearing Statement of Public Broadcasting Service, as amended.*

National Association of Broadcasters (NAB). NAB is a trade association which represents 435 claimant United States television and radio stations. *Prehearing Statement of NAB, as amended.*

The Music Claimants (Music). The Music Claimants consist of three performing rights societies, The American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. *Prehearing Statements of the Music Claimant.*

The Devotional Claimants (DC). The Devotional Claimants consist of the Christian Broadcasting Network, Inc. (CBN), Old Time Gospel Hour (OTGH) and PTL Television Network (PTL). *Prehearing Statement of the Devotional Claimants, as amended.*

The Canadian Claimants (CC). The Canadian Claimants represent Canadian program broadcast by Canadian television stations. The Canadian Claimants consist of Canadian Broadcasting Corporation (CBC), CTV Television Network, Ltd. (CTV), Glen-Warren Productions Limited, CFTO-TV Limited, The Ontario Educational Communications Authority (CICA-TV, CICO-TV), Tele-Metropole, Inc. (CFTM-TV), Global Communications (CFAC-TV, Toronto) and New Wilderness Productions, Inc. *Prehearing Statement of the Canadian Claimants.*

National Public Radio (NPR). NPR represents NPR and 134 member noncommercial radio stations. *Prehearing Statement of NPR.*

Multimedia Entertainment, Inc. (Multimedia) Multimedia consists of Multimedia Entertainment, Inc. and Cox Communications, Inc. (CCI) which produce and distribute syndicated television series and films. *Prehearing Statement of Multimedia.*

Background and Chronology

On October 15, 1984, the Tribunal published a notice directing claimants to inform the Tribunal by November 15, 1984 whether a controversy existed with regard to the distribution of the 1983 cable royalty fees. Claimants were also advised to submit comments concerning hearing schedules and procedures. 49 FR 3930. In addition, the Tribunal sought recommendations from an independent law firm regarding changes in Tribunal hearing procedures. The report was submitted December 31, 1984.

After receiving the procedural recommendations from the parties, the Tribunal ordered the parties to produce a single joint memorandum identifying stipulated proposals, and, where the procedures could not be stipulated, the position of each party. 50 FR 9484. On March 26, 1985, the Tribunal held a pre-hearing conference to consider the joint memorandum. On April 8, 1985, the Tribunal published a notice announcing its determination that a controversy did exist concerning the distribution of the 1983 cable royalty fees, effective April 15, 1985. In the notice, the Tribunal adopted the schedule and the procedures which would apply to presentation of the 1983 Phase I direct cases. 50 FR 13845.

The Phase I parties filed their written direct cases on May 13, 1985. Evidentiary objections were filed by the parties on May 29, 1985. Oral argument on the objections were heard at a pre-hearing conference June 7, 1985. The Tribunal issued its rulings on the objections June 14, 1985, and on June 19, 1985 the Tribunal commenced hearing the direct cases of Phase I parties.

In response to a joint motion of all the Phase I parties, the Tribunal determined that 50% of the 1983 cable royalty fund could be distributed, while still retaining sufficient funds to satisfy all amounts in controversy. 50 FR 23350. The Tribunal made the partial distribution on June 27, 1985.

On July 29, 1985, the Tribunal approved a settlement for NPR reached by all parties. The settlement stipulated an award of 0.18% of the 1983 cable royalty fund to NPR. In response to a motion by NPR, the Tribunal published an order granting complete distribution to NPR amounting to 0.18% of the fund as of September 30, 1985. 50 FR 33617. The motion by NPR waived all interest in the growth of the fund after September 30, 1985.

Presentation of the Phase I parties' direct cases concluded on October 9, 1985 after 36 days of hearings. The Phase I written rebuttal cases were filed November 4, 1985. The hearing of the rebuttal cases commenced on November 18, 1985 and concluded on December 18, 1985 after 17 days of hearings. The Phase I record was closed December 23, 1985.

The parties filed Phase I Proposed Findings of Fact and Conclusions of Law on January 15, 1986. Reply findings were filed January 21, 1986, and oral argument was heard on January 24, 1986.

The Tribunal published its determination of the Phase I allocations on February 5, 1986. 51 FR 4415.

On February 18, 1986 the parties to Phase II filed their written direct cases. Evidentiary objections were filed February 26, 1986, and between March 6, 1986 and March 19, 1986 the Tribunal conducted hearings on Phase II allocations. The Phase II record was closed April 4, 1986.

The parties filed Phase II Proposed Findings of Facts and Conclusions of Law on March 28, 1986. Reply findings were filed April 2, 1986.

Structure and Criteria of Tribunal Analysis

In accordance with past procedure, the Tribunal resolved that the 1983 distribution proceeding would be conducted in two phases. Phase I would determine the allocation of cable royalties to specific categories of claimants. Phase II would allocate cable royalties to individual claimants within a category. The Phase I categories were: Program Suppliers, Sports, Public Broadcasting Service, U.S. Commercial Television, Music, Devotional Programs, Canadian Programs, Noncommercial Radio, and Commercial Radio. There were no disputes within the categories except for the Program Suppliers. In Phase II, the Tribunal took evidence from MPAA, NAB, and Multimedia to allocate cable royalties within the category of Program Suppliers.

Also, in accordance with past procedure, the Tribunal took evidence based on the criteria established by the Tribunal in the 1978 cable distribution proceeding: (a) The harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems, (b) the benefit derived from the secondary transmission of certain copyrighted work, (c) the marketplace value of the works transmitted; and to a secondary degree, (d) the quality of copyrighted program material, and (e) time-related considerations.

For the first time, the Tribunal took evidence on factual or legal reasons why the funds derived from the 3.75% rate, or the syndicated exclusivity surcharge should be allocated differently than the basic fund. Four parties took the position that three different allocations should be made: Program Suppliers, JSC, NAB, and Music. Three parties took the position that the Tribunal should treat the 1983 cable royalties as one fund: PBS, the Devotional Claimants, and the Canadian Claimants.

Phase I

The Tribunal's task in Phase I is to allocate among various program types their proper share of the copyright royalties paid by cable systems for the retransmission of nonnetwork programming on distant broadcast signals. The Tribunal's goal, as it has stated in the 1978 proceeding, is "to stimulate market valuation." 45 FR 63036. The achievement of this goal is frustrated by one consideration: cable operators do not obtain distant signal programming on a program-by-program basis. The operator "purchases" by compulsory license entire broadcast signals consisting of a variety of program types. Operators must take the distant signal as is or not at all. Therefore, the Tribunal must perform a judgment that does not occur in the distant signal marketplace. It assigns relative values among program types; the cable operator does not.

Phase I parties have attempted to give the Tribunal the evidence they consider the most relevant to the assignment of relative values. The Program Suppliers have submitted a special Nielsen study of the viewing by cable subscribers of distant signals in 1983 on the theory that cable subscribers' viewing habits are key elements in determining relative value among program types. Other parties argue that the Nielsen survey is not the most relevant evidence, because the "consumption" of distant signal programs by subscribers does not translate coextensively to a cable operator's decision to obtain a distant signal. They argue that cable systems sell subscriptions to an entire range of program offerings: local signals, distant signals, and non-broadcast programming services. Their ultimate concern is whether the whole package of cable services satisfies the subscribers. They will, therefore, be more interested in adding diverse programs to their offerings or responding to particular interests of segments of their market than in responding to raw viewing data. Consequently, four parties in this proceeding have presented "attitudinal" surveys which each ask cable operators to perform an assignment of relative values among program types.

In addition, the Phase I parties have addressed themselves to presenting

better evidence in areas where the Tribunal has found against them in prior proceedings. Further, some parties have offered evidence of changes in the distant signal marketplace from the last litigated calendar year. In the findings of fact which follow, we state the various facts that were found relevant to our determination, However, as in all our past determinations, the conclusions of the Tribunal have been based on all the data and evidence presented before us.

Findings of Fact—Phase I

Program Suppliers

The Nielsen Study. In two previous cable distribution proceedings, 1979 and 1980, MPAA, representing the Program Suppliers, offered a special Nielsen study as the centerpiece of its presentations. The study measured the number of hours of distant signal programming viewed by cable households. In both proceedings, MPAA calculated the percentage of subscriber viewing hours according to program category, and then offered the percentage representing syndicated television movies and series as a key element to its entitlement. 47 FR 9880; 48 FR 9554.

In the 1979 proceeding, MPAA chose 25 independent U.S. commercial stations and 25 network affiliated U.S. commercial stations, and requested from Nielsen distant viewing data on these 50 stations during four national "sweep" periods—February, May, July and November. The 1979 study was given validity by the Tribunal, but was criticized for the small number of stations in the sample, the method of section of those stations, and the fact that use of "sweep" periods in which program "hyping" occurs could have given the program suppliers an advantage. 47 FR 9881, 9892.

In the 1980 proceeding, MPAA selected for its study all U.S. commercial broadcast stations which were carried by Form 3 cable systems whose aggregate subscribers were 75,000 or more, rather than resort to a statistical selection requiring weighting. This resulted in a selection of 82 commercial stations—41 independent stations, 35 network affiliated stations, and 6 specialty stations. 48 FR 9553. Again, the study was based on four national "sweep" periods. MPAA responded to the criticism regarding use of "sweep" periods by offering certain viewing data compiled by the Warner-Amex QUBE system which sought to establish that there are not significant differences in viewing between sweep and nonsweep weeks. The Tribunal stated that the 1980 Nielsen survey did have probative value, but the Tribunal rejected the results of the QUBE cable system data because of the uniqueness of the system. 48 FR 9564.

The results of the 1980 Nielsen study were: syndicated series and movies—81.96% of total viewing, major and minor sports—7.62%, local programming—7.41%, devotional programming—0.92%, Other and unknown—2.09%. MPAA Ex. 17.

In this 1983 proceeding, MPAA selected all United States commercial and noncommercial television broadcast stations reaching a minimum average of 95,000 Form 3 cable television subscribers on a full-time distant signal basis during 1983. Kessler, MPAA Direct, p. 2. Using data from Cable Data Corporation available as of May, 1984, MPAA determined that there were 101 commercial and 16 noncommercial broadcast television stations which met the criteria. *Id.*, p. 4. During 1983, there were 622 U.S. broadcast television stations which were carried on a distant signal basis by at least one cable system. NAB Ex. 17X. MPAA stated that because of cost restraints, it was necessary to choose a limited sample and not to survey the entire universe of broadcast stations. Kessler, MPAA Direct, p. 2. MPAA believes that 117 stations is an appropriate stopping point, that the significance of information obtained by adding stations diminishes rapidly and only adds to MPAA's costs. Cooper, MPAA Direct, p. 12. Supporting its contention that 117 stations represents the great majority of distant signal broadcasting, MPAA noted that they represented 2.9 billion viewing hours, and that they accounted for 79.4% of the basic royalties, 90.0% of the 3.75% royalties, and 95.7% of the syndex royalties. *Id.*, p. 5; MPAA Ex. 19. However, MPAA conceded that it did not have knowledge of the total amount of viewing hours of distant broadcast signals which occurred in 1983. Tr. 786. MPAA further conceded that the Nielsen study measures viewing of only the 117 stations, and cannot be perfectly projected to the other stations. MPAA Proposed Findings, p. 66.

In response to previous Tribunal criticism, MPAA added two more viewing cycles to its study,—"partial sweeps" conducted in January and October. Cooper, MPAA Direct, p. 4. The Nielsen Station Index measures local television audiences in approximately 220 markets. The methodology used to generate ratings on a local basis is a viewing diary. Four times a year Nielsen conducts all market measurements. Each all market measurement, commonly called "sync cycles" or "sweeps" nets over 100,000 diaries. Lindstrom, MPAA Direct, p. 5. The "partial sweeps" in January and October measured 18 markets and 23 markets, respectively. Tr. 473. These "partial sweeps" representing the larger television markets, cover approximately 50% and 59% of television households, respectively. Tr. 497. For the two "partial sweep" periods, a procedure was used to adjust the viewing for the markets that were not surveyed and to project the results to the 220 markets of the country. Tr. 548.

Of the 117 stations, 60 were measured for six cycles, 13 stations were measured for five cycles, and 44 were measured for four cycles. MPAA Ex. 16. MPAA provided the Tribunal with the results of the Nielsen study based on four-cycle data solely, and based on combined data from all cycles. MPAA Ex. 17. The combined results were a simple summing up of data, so that the data of stations for which MPAA had four-cycle data was added to stations for which MPAA had five-cycle data, and stations for which MPAA had six-cycle data. Tr. 672–674. MPAA witness Allen Cooper indicated that Program Suppliers had no objection to relying on four-cycle data rather than the six-cycle data. Tr. 761–762.

The results of MPAA's 1983 Nielsen study were:

	Percent		
	4-Period cycles	2-Period cycles Jan. & Oct.	6-Period cycles
Syndicated Series	53.24	54.95	53.64
Movies	25.62	30.03	26.66
Major Sports	10.75	4.47	9.28
Minor Sports	1.79	2.10	1.87
Local	4.61	3.70	4.39
Educational	2.64	2.56	2.62
Devotional	0.65	0.63	0.65
Specialty	0.52	1.34	0.72
Other	0.18	0.21	0.19

NAB Ex. 18X.

Cooper stated that the major reason why syndicated series and movies went up in viewing during the two partial sweep months, January and October, was that major sports programming is at a lower level in January and October due to the absence of nonnetwork major league baseball. Tr. 770–772. Cooper further stated that the Nielsen survey which includes only 16 of 117 PBS stations carried on a distant signal basis probably understates PBS viewing. Tr. 1178. Cooper conceded that the programming on the three special stations were not subcategorized among the seven major claimant groups and could have included devotional programming. Tr. 1225–1229. Cooper

stated that the Nielsen survey does not take into account music, Canadian stations, or radio. Tr. 664–665.

Harm. Jack Valenti, President of MPAA, testified on the harm to program syndicators of distant signal retransmission by cable operators. Valenti, MPAA Direct. The license fees paid by the networks to the creators of first run television programs are less than what it costs to produce them. Tr. 311. Valenti cited typical examples of new network series with yearly deficits of $8 to $9 million. Tr. 311–313, 316. Not all programs go into syndication. To attain the desired number of episodes, a program must enjoy a network run of four to six years. If a program does not reach the necessary run for syndication, the deficit is borne by the program supplier. Tr. 319. The revenues from those programs that do make it into syndication must cover not only their own deficits, but the accumulated deficits of cancelled programs. Tr. 321–322.

Broadcast stations can experience audience decline for a program as a result of cable importation. Tr. 2622. MPAA witness Stanley Besen, an economist, stated that lost audience due to cable importation will lower syndication revenues. Tr. 6891–6892. MPAA argues that it is the Nielsen study which shows the widespread availability and viewership of syndicated program by distant signals on cable systems, thus harming syndicators attempts to sell their programs to broadcast stations. Cooper, MPAA Direct, p. 2.

Benefit. MPAA presented John Ridall, General Manager of Viacom Cablevision of Cleveland, to testify on the benefit of movies and syndicated series to cable operators. Ridall, MPAA Direct. Viacom Cablevision of Cleveland is the franchisee of 22 contiguous communities in the Cleveland area serving approximately 69,000 subscribers. Ridall, MPAA Direct, p. 1. The system provides 28 channels of basic service including three distant television broadcast stations: CFPL, London, Ontario, carried since 1971, WTBS, Atlanta, Georgia, carried since 1979, and WOR, Secaucus, New Jersey, carried since the late 1970's, *Id.*, pp. 1–2. Ridall attributed the value of these distant signals to movies, syndicated series and sports. *Id.*, p. 2. Specifically, in the case of CFPL, Ridall rated hockey most important. For WTBS and WOR, Ridall rated movies and series as most important. *Id.* Ridall gave no importance to local news programs on distant signals or to devotional programming. Ridall stated that these program types were adequately supplied by Cable Network News, CNN Headline News, and satellite-delivered religious networks. *Id.*, pp. 3–4.

On cross-examination, Ridall stated his system subscribed to Nielsen. Tr. 421. However, Ridall's system has never looked to Nielsen viewing on distant signals to make a decision about whether to replace a signal. Tr. 423. Ridall stated his system sometimes looks to surveys as one method to plan for changes in programming. Tr. 423–424. Ridall stated his system cares about the viewing patterns of subscribers to develop habits of viewing and induce the subscriber to retain his or her subscription. Tr. 424–425. Further, on cross-examination, Ridall stated his system carried distant signal radio, and further, he would include music as an element in the programs that were important to him. Tr. 450, 455, 458.

Criticisms of the Attitudinal Surveys. MPAA presented two witnesses, Stanley Besen and Alan Rubin, economists, to criticize the attitudinal studies performed by the other parties. Besen, MPAA Rebuttal, Rubin, MPAA Rebuttal. The criticisms by Rubin of survey methodology are incorporated later in the findings of the four other surveys.

Rubin criticized the reliability of the surveys. Rubin stated that they asked cable operators and/or subscribers to recall their behavior and sentiments two years previous to the time the question was asked. Rubin found the recall problem so great as to make the surveys unreliable. Rubin, MPAA Rebuttal, pp. 3–5. Rubin also criticized the constant-sum technique. Rubin stated that operators and subscribers were asked to break out specific categories of programs and to report how valuable each type of program was to them. This he found to be an activity that neither cable operators nor subscribers do in actuality; operators program whole signals and subscribers subscribe to whole packages. Rubin believed that this type of exercise conducted in a few minutes over the telephone would not accomplish the goals of the survey. *Id.*, pp. 5–6.

Besen criticized the attitudinal surveys on two grounds: they do not take into account the supply side of the marketplace equation and they measure the total value of the program types, not their marginal values. Besen, MPAA Rebuttal, pp. 4–17. Besen found it critical in ascertaining how much operators would pay for different program types to know the amount of supply of different programs and whether the supplier was willing to sell dearly, cheaply, or offer the programs for nothing. *Id.*, pp. 14–17. Besen also believed that when operators or subscribers were asked to valuate programs they were valuating programs and not valuating the marginal value of the program type on distant broadcast signals. *Id.*, pp. 5–13.

Joint Sports Claimants

The Brown, Bortz and Coddington (BBC) Attitudinal Survey

In each of the fully litigated cable distribution proceedings, 1978, 1979, 1980, and 1983, the Joint Sports Claimants (JSC) have presented "attitudinal" surveys, that is, surveys designed to measure the attitude of cable operators to the value of sports, and other categories of programming.

In the 1978 proceeding, JSC presented a survey of major cable MSO (multiple system operators) executives. This "industry leader" survey, designed and conducted by the advertising agency of Batten, Barten, Durstine and Osborne (BBDO), purported to demonstrate that the cable industry would spend 27 percent of their distant signal programming dollars on sports. 45 FR 63029. The Tribunal found there were deficiencies in the BBDO survey. 45 FR 63038.

In response to the Tribunal's concerns, BBDO made certain changes in the survey for the 1979 proceeding. The survey endeavored to distinguish between distant signal programming and made for cable programming, and between network and nonnetwork sports. The study also focused on only distant signal programming that was actually imported. Interviews were conducted by telephone and embraced 31 of the Nation's 50 largest MSO's and 53 out of 108 randomly selected Form 3 cable system managers. The method of the study was to ask each respondent what dollar value, out of $100, he or she would place upon each type of programming. 47 FR 9882. Reviewing the 1979 survey, the Tribunal stated that the expressions of preference as to the value of sports or any other category of programming cannot be directly quantified or converted into a royalty share allocation. 47 FR 9893.

In the 1980 proceeding, JSC's BBDO survey was a telephone interview survey of the senior marketing or program executives of 34 of the 50 largest MSO's, representing 53.6% of the cable subscribers in the United States. 48 FR 9555. The Tribunal repeated its view that the survey percentages could not be directly converted into a royalty share allocation. 48 FR 9563.

In this proceeding, JSC retained Browne, Bortz & Coddington, Inc. (BBC)

to conduct its attitudinal survey. Bortz, JSC Direct, p. 1. BBC reviewed the previous studies conducted for JSC by BBDO and made certain changes in methodology. *Id.*, pp. 2–3. Instead of MSO executives, BBC interviewed cable system operators because of their more detailed knowledge of programming value at the local level. JSC Ex. 1, p. 1. A stratified random sampling approach was used with the stratification based on copyright royalty payments during the second half of 1983. JSC Ex. 1, App. A., p. 19. Only Form III systems were surveyed, recognizing that these systems account for approximately 97 percent of the total 1983 copyright royalty payments. *Id.;* JSC Ex. 3, p. 4. The sample design included five strata of royalty classes: systems paying $100,000 and over in royalties, $42,000 to $99,999 in royalties, $21,000 to $41,999 in royalties, $9,000 to $20,000 in royalties, and $0 to $8,999 in royalties. JSC Ex. 1, App. A., p. 20. In the highest strata, $100,000 and over, BBC chose to take a complete census of the cable systems within that strata, or 51 systems out of 51. In the other strata, BBC chose to survey between 31 and 34 systems each. *Id.* The rationale for using a stratified survey was that BBC was attempting to measure the program valuation of cable operators in accord with their dollar contribution to the copyright royalty pool, and that if the program valuation characteristics of large systems were different than program valuation characteristics of small systems, the survey would reflect it. Bortz, JSC Direct, p. 3; Tr. 831.

Of the 183 cable systems in BBC's sample, 169 responded, yielding a response rate of 92.9%. JSC Ex. 1, App. A., p. 21.

The actual surveying was subcontracted to Burke Marketing Research. BBC did not inform Burke Marketing Research of the name of the party commissioning the study, or that the objective of the study related to copyright distribution. Tr. 833. Interviewing took place from March 5 to March 20, 1985. JSC Ex. 1, App. A, p. 21. The interviewers were instructed to speak only to those persons at the cable system "most familiar with programming carried by the system during 1983." *Id.*

The former BBDO survey used by JSC asked respondents to divide 100 hours of programming and $100 of "total" distant signal program value, in both cases using the constant-sum approach. In response to certain criticism from other claimant parties, BBC changed to approach for 1983 and asked respondents to think of the total value of distant signal nonnetwork programming as representing 100 percent, and then asked them to divide among five categories of programs, JSC Ex. 1, p. 4.

In each interview, the cable system employee was informed which distant signals his or her cable system carried in 1983. JSC Ex. 1, App. B., p. 26. The respondent was then asked, "Assume that the total value of all non-network programming on the (distant signal) stations I mentioned equals 100 percent. . . . What percentage, if any, of the 100 percent reflects the value of movies, live professional and college sports, syndicated shows and series, news and public affairs, and PBS and educational to your system in 1983 in terms of subscriber attraction and retention?" JSC Ex. 1, App. B., p. 28.

The results to the question were:

Category	Percent valuation	Absolute confidence interval (Percent)
Live professional and college sports	36.1	+2.4
Movies	30.2	2.0
Syndicated shows and series	18.6	1.5
News and public affairs	12.1	1.5
PBS, educational and other public television	3.1	1.0

JSC Ex. 1, App. A, p. 23.

If a system did not carry a PBS station on a distant signal basis in 1983, PBS was not included among the categories the respondent was asked to valuate. Tr. 845–846. 41 of the 169 responding cable systems, or 24 percent, carried PBS in 1983. Among those 41 systems, PBS received a valuation of 12.7%. Tr. 846. The 24 percent in the BBC sample corresponds to the 24 percent of the universe of Form 3 systems which carried PBS stations in 1983. *Id.*

BBC did not ask the respondents to valuate devotional or Canadian programming, or music. Tr. 969. JSC Witness Paul Bortz stated that in response to the open-ended question on the questionnaire referring to valued program types, only 3 out of 169 systems mentioned devotional programs. Tr. 847. In Mr. Bortz' opinion, this confirmed his pre-test results that devotional programming would be of very small value. Tr. 9968. In Mr. Bortz' opinion, this confirmed his pre-test results that devotional programming would be a very small value. TR. 968. Mr. Bortz stated that in designing the survey, it was his opinion that it was "realy these five categories . . . that drove the business." Tr. 969. As for the left-out category of devotional programming, Mr. Bortz stated that his study makes no attempt at valuation. *Id.* The questionnaire did not provide definitions for the five program categories. JSC Ex. 1, App. B.

Harm. David J. Stern, the Commissioner of the National Basketball Association, testified for JSC on the harm criterion. Stern, JSC Direct. Distant signal telecasts harm the exclusivity sold by teams in the local markets. Stern gave the example that in 1983, WKBD–TV in Detroit carried 15 Detroit Piston games; those telecasts had to compete with the importation of 113 basketball games over the three satellite-delivered superstations. Stern, JSC Direct, p. 3. The saturation of a club's home market with additional sports telecasts can fractionalize the viewing audience for the local team's telecast. When fewer people watch the local telecasts, advertisers will pay less for the right to sponsor the local team's games. *Id.* The NAB's 23 teams share in the copyright to each televised game. Tr. 724. JSC presented no evidence on the financial degree of this harm. Tr. 732.

Benefit. Richard Loftus, President of Trident Communications Group, testified on the benefit criterion for JSC. Loftus, JSC Direct. Loftus has worked in cable television for twenty five years including a ten year period with AmVideo, an MSO in Maryland, Virginia, and New Jersey, and eight years as a director of the Natonal cable Television Association. Loftus, JSC Direct, pp. 2–7. Loftus stated that sports and movies are the primary considerations for cable operators in choosing a distant signal. *Id.*, p. 10 Loftus considered PBS stations a necessary distant signal if the local market does not have a PBS station as a must-carry. *Id.*, p. 15. Loftus stated that a cable operator wants news and public affairs from the city most closely identified to the cable system; it does not consider distant signal news important. *Id.* pp. 15–16. Loftus believed devotional programs were available locally and through satellite services, and a cable operator did not need a distant signal for that purpose. *Id.* p.16. Loftus felt Canadian stations were attractive for their sports and movies. *Id.*, p. 17.

On cross-examination, Loftus considered syndicated series a minor element in decision-making. Tr. 1044. Loftus also considered the cost of importing the signal by tower, microwave or satellite, and the requirements of local franchising authorities to have an impact on decision-making. Tr. 1047–1049, 1062.

Changed Circumstances. Dr. Peter H. Lemieux performed an analysis of the 1983 cable royalty fund based on information compiled by Cable Data

Corporation and compared the analysis to the 1980 cable royalty fund. JSC Ex. 3. 6,454 cable systems filed statements of accounts with the Copyright Office for the first semiannual period of 1983; 6,896 systems filed for the second semiannual period. *Id.* p. 3. Of the 6,896 systems who filed in the second semiannual period, 1,573 were Form 3 cable systems (systems which grossed more than $214,000 semiannually and which paid royalties based on the type of distant signal they carried), and they accounted for 96.6% of all royalties paid into the fund. *Id.*, p. 5. These Form 3 systems carried, on average, 3.56 distant signals for a total of 5,606 different instances of distant signal carriage. *Id.*, p. 8. The type of distant signal carriage was broken down by Lemieux as follows:

INSTANCES OF CARRIAGE

	1980 2nd half	Percent	1983 2nd half	Percent
Superstations	1,322	24.0	2,201	39.3
Other Independents	1,466	26.6	1,307	23.3
All U.S. Independents	2,788	50.6	3,508	62.6
U.S. Networks	2,075	37.7	1,538	27.4
Noncommercial Stations	491	8.9	427	7.6
Canadian	133	2.4	114	2.0
Mexican	18	0.3	19	0.3
Totals	5,505		5,606	

JSC Ex. 3, p.9, 11; NAB Ex. 26X.

Between 1980 and 1983, superstations were carried a total of 879 more instances, an increase of 66.5%. During the same period, network affiliates were carried in 537 fewer instances, representing a decline of 25.9%. *Id.* Each of the three superstations, WTBS, WOR, WGN, is a professional sports "flagship" station, that is, one that originates the live telecasts of a professional sports team's events. All together, in 1983 the three superstations originated 553 live telecasts of professional baseball, basketball and hockey. JSC Ex. 3, p. 16. The promotion of these superstations to operators and subscribers is based on their sports programming. JSC Ex. 2, Superstation Promotional Material. JSC urged the Tribunal to consider the increased carriage of superstations as a changed circumstance justifying an increase in the award to the sports category. JSC Proposed Findings, para. 20–25.

PBS

The McHugh and Hoffman Attitudinal Survey

For the first time in any distribution proceeding, PBS presented an attitudinal survey. The most significant question of the survey asked cable operators to allocate $100 between distant signal commercial television and distant signal public television. PBS Ex. 29, p. 9. If an operator did not carry a distant PBS station, he was asked simply to allocate the $100 between commercial television and public television. *Id.*

PBS commissioned McHugh and Hoffman, Inc. (M & H), a communications consulting firm to conduct a survey of cable operators to reflect the value of distant signal public television programming. PBS Ex. 30, p. 1. The survey was subcontracted to KPR Associates, Inc. (KPR), a marketing research firm. *Id.*

M & H, in conjunction with KPR, determined that the survey's objectives could be adequately addressed by a random sample of 409 complete telephone interviews. PBS requested that 80% of these telephone interviews should be of Form 3 cable systems and that 20% should be Form 1 and Form 2 cable systems. A total of 409 completed interviews were conducted, of which, 325 (79.5%) were of Form 3 operators, and 84 (20.5%) were of Form 1 and Form 2 cable operators. PBS Ex. 30, p. 2. The response rate was approximately 80%. *Id.*

The survey results showed that operators carrying only a local PBS signal allocated, on average, $36.67 to "public television." Operators carrying at least one distant PBS station, in contrast, allocated an average of $27.50 to distant public television signals. Tr. 1697–1699. M & H believes that the results of the Form 3 operator interviews has a confidence factor of ±6%, and that of the Form 1 and Form 2 operator interviews has a confidence factor of ±11%. *Id.*

The interviews were conducted from February to April, 1985. PBS Ex. 30, p. 1. The first nine questions did not refer to the calendar year 1983. PBS witness Peter Hoffman (Hoffman) stated that he was interested in "top of mind awareness," to get the interviewee to give his or her personal feeling as of 1985. Hoffman stated, "It is a little hard to project what you thought several years ago, in terms of your current thinking." Tr. 1652. Questions 10b, 18b, and 19b attempted to relate the respondents thinking to 1983. Question 10b asked, "If you were answering this question on uniqueness in 1983, would you have answered in the same way as you just did, or differently?" PBS Ex. 30, App. C, p.3. 89 percent said they would answer it the same way. Tr. 1653. Questions 18b and 19b asked whether the respondent's answer regarding dilution of value due to duplication of cable originated programs for movies and sports would have been different in 1983. PBS Ex. 30, App. C., p. 6. 92% and 89% responded no difference, respectively. Tr. 1654.

The cable system employee responding to the survey was first told, "The study we are doing is concerned mainly with Public Television stations and how they fit into your thinking about cable channels." PBS Ex. 30, App. C., p. 1. The respondent was then asked a number of aided questions about PBS. *Id.*, p. 3. Question 8a asked the respondent to comment on the value of PBS programs such as Mister Rogers Neighborhood, Masterpiece Theater, NOVA, MacNeil/Lehrer, the Brain, etc. *Id.* Only after many aided questions about PBS was the respondent asked to valuate PBS programming. *Id.*, p. 4. On cross examination, Hoffman conceded that asking many questions about a subject prior to asking the respondent to rate that subject would probably raise the subject's rating. Tr. 1712–1713.

M & H asked the cable system employee whether his or her cable system carried any PBS as a distant signal. Distant signal was defined in the questionnaire as "those which originate outside your home market," and local was defined as a signal "that . . . originate(s) in your community." PBS Ex. 30, App. A, p. 2. 45% of all Form 3 cable operators said they carried at least one PBS distant signal. PBS Ex. 30, p. 4. However, according to Cable Data Corporation, only 24% of Form 3 cable operators actually carried at least one PBS distant signal in 1983. JSC Ex. 3, p. 22. Hoffman attributed the discrepancy to a belief that operators may have been only thinking of their local community and not of the entire metropolitan area. Tr. 1657–1658.

Some cross examination addressed whether the respondent was asked to simulate a business decision. When asked, what criteria did M & H expect the respondent to follow when asked to divide up the $100 of value, Hoffman stated, "this is a projective technique to give a feeling of worth or balance . . ." Tr. 1696–97. When asked, "It didn't say what value are these to you in your business," Hoffman replied, "No, it just says—the question just says what it says." Tr. 1697.

Harm. PBS President Bruce L. Christensen testified on the harm criterion. PBS does not produce its own programs. They are produced by local PBS-affiliated stations or independent producers. Tr. 1735. PBS puts together a schedule of programs and feeds them by satellite to its affiliates. Tr. 1725. Approximately one in ten public television viewers contribute to fund the program costs. Tr. 1743. Christensen

testified that when a viewer subscribes to a cable system, the viewing of public television goes up, but the likelihood of their contributing to public television goes down, because from information obtained from PBS surveys, some viewers believe their cable subscription fees go to contribute to public television. Tr. 1743. However, the extension of public television signals into additional areas by means of distant cable carriage serves the objectives of public television and PBS concedes there is no record basis to say that it causes any discernable harm to the copyright owners of the programs. Tr. 1576–79, 1630–34, 1600–01; PBS Proposed Findings, par. 11.

Benefit. PBS presented James Barthman, owner of a Form 1 cable system in Telluride, Colorado. PTV Ex. 32. Bartham testified as to the large sums his system plans to expend to obtain a public television signal based on ascertainment of subscriber interest. Tr. 1470–1472. PBS presented Steven Vedro, an official of public television station WHA–TV, Madison, Wisconsin, who testitied as to the benefit of several public television stations on the same cable system. PTV. Ex. 26. The Madison cable system had intended to drop one of its public television stations, but after a subscriber survey showing great interest in public television, they decided to retain the two stations and add another public television station. Tr. 1522. In 1983, the public television stations in Madison, Wisconsin, had the same programs but at different times, offering time diversity. Tr. 1526.

Instance of carriage percentage figures for PBS were 7.6% for Form 3 systems and 7.3% for Form 2 systems. JSC Ex. 3, p. 9, p. 11; PTV Ex. 21.

Marketplace value. Suzanne Weil, PBS Senior Vice President in charge of programming, Aida Barrera, a producer of PBS programs, Ossie Davis, a producer-performer of PBS programs, and John P. Madigan, Jr., an underwriter of PBS programs, testified that PBS programming is unique and has value which cannot be replicated by commercial television. PTV Exs. 6, 10–14, 18.

Duplication. The pattern for carriage of distant educational signals in the second half of 1983 was as follows:

Number of logical educational signals carried	Number of district educational signals carried			
	None	One	Two or more	Total
None	8	172	24	204
One	642	137	8	787
Two or more	539	35	8	582
Totals	1,189	344	40	1,573

JSC, Ex. 3, p. 22. Table 9.

Christensen testified that there is a certain amount of duplication of public television programs when two or more public television stations are carried by a given cable system, but that duplication is a conscious programming decision to give the viewing public the opportunity to view telecasts at different times, and, in the case of children's programming, to reinforce the child's learning process. PTV Ex. 19, pp. 5–6.

In approximately 50% of the instances of importation of a distant public television signal, in 1983, cable operators elected to provide a distant public television signal. JSC Ex. 3, p. 22, Table 9, PTV Ex. 23, p. 1.

NAB

The ELRA attitudinal surveys

In the 1980 proceeding, NAB presented an attitudinal survey of approximately 400 Form 2 and Form 3 cable operators who were asked to rate the value of station-produced programming in attracting and keeping subscribers on a scale from 1 to 5. 48 FR. 9556. In this proceeding, NAB changed the format of its surveying technique and presented two attitudinal surveys. In the first survey, cable operators were asked to allocate $100 amon five to seven program categories (depending on whether the system carried, in addition to five basic program categories, distant PBS and/or Canadian stations). Abel, NAB Direct, pp. 20–22. In the second survey, cable subscribers were asked to perform the same allocation task, except they were asked to divide $10, not $100. *Id.*, pp. 25–26. Comparing the two surveys, NAB argued that it is the cable operator's selection of distant signals which is the relevant marketplace, and therefore urged the Tribunal to give the greater significance to the operator surveys, and to view the subscriber survey as confirmation. NAB Proposed Findings, par. 92.

The result of the cable operator survey was as follows:

Program category	Mean value	95 percent confidence interval	
		High	Low
Sports programs	$35.66	$37.41	$33.91
Movies	25.02	26.27	23.77
Syndicated series	15.84	16.88	14.80
Station produced programs	13.33	14.34	12.32
Devotional programs	7.24	7.93	6.55
Public broadcasting	2.51	3.18	1.84
Canadian station programs	.40	.84	.00

NAB Ex. 9, p. 17

The result of the cable subscriber survey was as follows:

Program category	Mean value	95 percent confidence interval	
		High	Low
Sports programs	$2.54	$2.75	$2.33
Movies	2.62	2.80	2.45
Station produced programs	1.71	1.86	1.56
Syndicated series	1.70	1.83	1.56
Devotional programs	.78	.92	.63
Public broadcasting	.58	.80	.37
Canadian station programs	.07	.15	.00

NAB Ex. 10, p. 18.

John D. Abel, Senior Vice President of Research and Planning at National Association of Broadcasters (Abel) and Robert LaRose, Senior Vice President for Research of the ELRA Group (LaRose), testified regarding the ELRA surveys. Abel, NAB Direct; LaRose NAB Direct.

In 1979, Abel founded ELRA (East Lansing Research Associates) to do broadcast and cable consulting. Tr. 2004. ELRA started out conducting ascertainment surveys for broadcast stations, and then cable systems. Tr. 2005. In 1982, ELRA began to do a quarterly nationwide cable subscriber telephone survey measuring programming satisfaction called CableMark Probe. Tr. 2350; NAB Ex. 9, p. 8. For this proceeding, NAB retained the ELRA Group to perform random sample surveys of cable system operators and cable subscribers. Abel, NAB Direct, pp. 19–25.

Methodology—cable operator survey.—A random sample of 400 systems were drawn from those filing Form 3 statement of accounts with the Copyright Office for the second half of calendar year 1983. NAB Ex. 9, p. 5, p. 8. Interviewing took place between April 15, 1985, and April 24, 1985. Id., p. 8. ELRA completed 286 interviews out of 400, yielding a response rate of 71.5%. Id. Interviewers asked to speak to the system manager. After reaching the system manager, they asked if the system manager was with the system in 1983 and was familiar with programming decisions that were made in that year. If not, the interviewer asked to be referred to a person who was. If no such person could be located, the interview was terminated. This happened in 15 instances. Id., p. 5, p. 8.

Respondents were read a list of the distant stations carried by their system in 1983. Question 7 asked, "Thinking back to 1983, I would like to know about the value of the different types of programming that these distant stations carried. By value, I mean their value to your system in attracting and keeping subscribers. It might be helpful if you jot down the types of programs as I read them. Assume that the value of all non-network programs on the distant stations you carried in 1983 was $100. I would like to know how many of the 100 dollars you would allocate for: a. Live sports broadcast by the distant stations, b. News and other programs produced by commercial television stations, c. Syndicated series, d. Movies broadcast by distant stations, e. Religious programming broadcast by the distant stations, and if the system carried a distant PBS and/or Canadian station, f. Public Broadcasting programs, g. Canadian station programs." NAB Ex. 9, App. A., Q 7. If the system did not carry a PBS and/or Canadian station, a zero allocation was assigned. Id., p. 2.

Live sports was defined as not including "games distributed by the three television networks, news and other programs produced by commercial television stations was defined as including "children's programs, public affairs programs and talk shows hosted by the station's own personalities." It was further defined as not including "network news, or Independent Network News." Syndicated series was defined as including "series programs previously shown on the three television networks as well as non-network cartoons, game shows and talk shows hosted by national personalities." Movies were defined as not including those "distributed by the three television networks." Religious programming was defined as "specifically including the Old Time Gospel Hour, the 700 Club and PTL Club." Id.

Methodology—cable subscriber survey.—ELRA started with the list of cable subscribers it had contacted in conjunction with the CableMark Probe cable satisfaction surveys conducted in 1983. Tr. 2243. In 1983, ELRA had chosen a random sample of 100 cable systems out of a universe of all cable systems listed in the 1982 edition of the Cable Sourcebook. Another 10 systems under construction were also selected to represent the 10 percent increase in cable operations in 1983. NAB Ex. 10, App. B., p. 109.

The response rate for the 1983 CableMark Probe was approximately 60%. One quarter of the number of cable subscribers contacted in 1983 were randomly excluded to yield a sample of 3,358. NAB Ex. 10, p. 6.

Of the 3,358 in the sample, ELRA completed 1,099 interviews. NAB Ex. 10, p. 12. Interviewing took place from April 12, 1985 to April 21, 1985. Id., p. 10. Respondents were informed of the distant stations carried on his or her cable system in 1983. NAB, Ex. 10, App. A, Q. 3. The respondent was then asked how much of the monthly cable payment would the subscriber have spent to receive only the nonnetwork programming on the distant stations. Id., Q. 5, Q. 6. On the average, respondents stated they would pay slightly over $4 monthly in 1983 to receive the nonnetwork programming on the distant signals which their cable system carried. JSC/NAB Stipulation, October 31, 1985; Tr. 2267–70.

Of the 1099 who were interviewed, 7 respondents refused to make the allocations of $10 to program types, 13 failed to make the allocations correctly, and 265 respondents allocated zero value to distant signals or allocated all distant signal value to network programs. This left 821 respondents who made non-zero allocations to nonnetwork distant station programming and who correctly made the $10 allocations. NAB Ex. 10, p. 15.

The cable subscriber was asked to allocate $10 among program categories. The category definitions given the subscriber were: "(a) Live sports games broadcast by the distant stations. This includes regional broadcasts of pro basketball, baseball, hockey and soccer games, college sports, and games on the superstations like Braves, Cubs and Mets baseball. It does not include network sports such as the NBC Game of the Week, NFL football or the NCAA basketball tournament. (b) News and other programs hosted by the station's own personalities, including children's programs, public affairs programs and talk shows. This includes the WTBS Evening News and the 9 O'clock News from WGN. (c) Series Programs. This includes entertainment shows that used to be on the three television networks as well as non-network cartoons, game shows and talk shows. Examples are M.A.S.H., Flintstones, Tic Tac Dough, and PM Magazine. (d) Movies broadcast by the distant stations, not including those broadcast by the three television networks such as prime time movies of the week. It does include all other movies on these distant stations, such as Movie 17 on WTBS and the WGN Prime Movie. (e) Religious programming on these stations, specifically including the Old Time Gospel Hour, the 700 Club and PTL Club. (f) Public Broadcasting programs. (g) Canadian station programs not including the American Network programs they carry." NAB Ex. 10, App. A, Q. 7. Cable subscribers were asked to allocate value to PBS and Canadian stations only if their systems carried a distant PBS and/or Canadian station. Otherwise, PBS and Canadian stations were given a zero allocation. NAB Ex. 10, p. 2.

Of the 821 respondents, 59.3% were female and 40.7% were male. NAB Ex. 10, p. 16, Table 27. Males allocated 33% of their $10 to sports; females allocated 20% to sports. JSC Ex. 6X.

Television Compilation.—Harold E. Protter, President of Channel 38 Associates, Inc. licensee of WNOL–TV, New Orleans, Louisiana, testified on television compilation. Protter, NAB Direct. Protter attributed the success of one station versus another station in the same market with similar series and feature films to the superior scheduling of those programs and their promotion. Id. pp. 17–18. NAB witness John Abel testified that by importing a distant television station, the cable operator is spared the time and expense in creating his or her own compilation of programs. Abel, NAB Direct, p. 30. However, Protter stated that compilation is not done for and has no effect on contiguous markets. Tr. 2605.

When asked whether the compilation may nevertheless have utility in distant markets, Protter surmised that the "program schedule aspect of it may have some value in other places," but it was not something about which he worried. Id.

Commercial radio and radio compilation.—NAB presented the testimony of Raymond Nordstrand, general manager of WFMT(FM), Chicago, Illinois, and Studs Terkel, host of the Studs Terkel Show on WFMT(FM), to testify on the value of commercial radio and radio compilation. Nordstrand, NAB Direct; Terkel, NAB Direct. WFMT(FM) is carried outside of the Chicago area through United Video, Inc.'s satellite service by approximately 179 cable systems in 39 states. Nordstrand, NAB Direct, p. 1. These cable systems have 800,000 subscribers, but Nordstrand could not represent how many of the 800,000 subscribers, in fact, received WFMT in 1983. Tr. 2181. An additional 99 cable systems outside of the Chicago area in Illinois, Indiana, Iowa, Ohio and Wisconsin, not subscribing to the United Video satellite service, serving approximately 300,000 subscribers, carried WFMT(FM). Nordstrand, NAB Direct, pp. 1–2.

WFMT(FM) aired sport announcments during August and September, 1983 asking listeners to write in to respond to a questionnaire which would "enable WFMT(FM) to better know and serve listeners outside the Chicago area." Tr. 2823, 2826, 1.222 listeners responded. Tr. 2825. WFMT mailed these listeners the survey and 588 individuals responded. Tr. 2827. Nordstrand conceded that this was not a random sample undertaken to project the responses to the whole universe of those who have access to WFMT. Tr. 2827. Of the 588 respondents, 52.2% said they paid a surcharge to receive radio on their system, 37.6% said they did not, and 10.2% did not answer the question. NAB Ex. 14, p. 3; Tr. 2832.

The programming on WFMT, by time, is approximately 80% music and 20% non-music. Music Ex. 47X; Tr. 2759, 2760. The non-music programming consists of the Studs Terkel Show, Arts and Artists, News, Critics Choice, Writing and Writers, Fine Arts Calendar, Literary Features, Public Affairs, and commentary and interviews in musical programs. Nordstrand, pp. 4–6. Of the literary readings performed on WFMT, Nordstrand represented he had obtained a license to perform the works, but not the copyrights. Tr. 2743. In the survey, 35.4% said they heard and enjoyed the Studs Terkel Show, 70.0% said they found the newscasts interesting, 42.7% found the literary features interesting, and 32.8% found the advertising messages interesting. NAB Ex. 14, p. 5. Letters were submitted that praised the non-music portions of WFMT. NAB Ex. 15. On cross-examination, letters were introduced by Music citing disc jockey chatter, and talk as a reason to "tune out" the radio programming. Music Ex. 51X. Nordstrand attributed the appeal of WFMT to its creation of a special tone and texture due to its compilation of music and commentary. Nordstrand, NAB Direct, pp. 7–8.

Terkel testified that his show, broadcast on WFMT six time per week for one hour, contains discussions, interviews, commentary, documentaries, readings, and music. Terkel, NAB Direct, p. 2; Music Ex. 55X.

Criticism of Nielsen Data.—NAB criticized the Nielsen study as not being a valid measurement of the universe of distant signal viewing, especially as it applies to local programming. Abel, NAB Rebuttal, pp. 1–10. NAB first criticized the mix of independent stations and network affiliated stations in the Nielsen Survey. Id., p. 2. Local programming accounted for approximately 2.9% of the total viewing hours on the 42 independent stations Nielsen measured, and 29.1% of the viewing hours on the 56 network affiliated stations Nielsen measured. Cooper, MPAA Direct, p. 6. Of the 404 commercial stations which were carried by at least one cable system on a distant signal basis in 1983 which MPAA did not survey, 339 were network affiliates, and 65 were independents. Abel, NAB Rebuttal, p. 3 Therefore, NAB argues that the remainder of the distant signal universe which MPAA did not measure contained substantially higher local programming viewing, requiring an upward adjustment for local programming. Id., pp. 4–9.

NAB's second cirticism concerned the method by which MPAA Incorporated the data for the "partial sweep" months of January and October. The "partial sweeps" are in the largest markets, and in those large markets, there are a higher percentage of independent stations. NAB attributed the difference between 4.61% of the viewing in the four-cycle data and 3.70% of the viewing in the two-cycle data to the change in the mix of independent and network affiliated stations. Tr. 6258–6260; NAB Ex. 18.

NAB performed a straight line projection from the MPAA data for 117 stations to the universe of 622 stations for the four-cycle data only. Tr. 6268; NAB Ex. 23X. NAB's adjusted viewing figure for local programming was 6.07%. NAB Ex. 23X. MPAA witness Allen Cooper rejected the validity of NAB's projection because he stated that local programming on major market network affiliates was much higher than local programming on smaller market network affiliates, and that all that remained in the universe to be measured were the smaller market network affiliates. Tr. 1168–1169. In response to Cooper's criticism, NAB stratified the MPAA Nielsen data. Data was divided into four quartiles and NAB used viewing data for the included stations in each Quartile to estimate viewing for omitted stations in the same Quartile. Abel, NAB Rebuttal, p. 9; Tr. 6270.

The results of NAB's projection to the universe of broadcast signals were:

	117 stations' 4-cycle dataa (Percent)	622 station projection (Percent)
Syndicated series	53.24	52.29
Movies	25.62	24.48
Major sports	10.75	10.01
Minor sports	1.79	1.70
Local	4.61	5.59
Educational	2.64	4.61
Devotional	0.65	0.67
Specialty stations	.52	.48
Other	.18	.17

Nab Ex. 30R.

NAB also believed that MPAA had misclassified a number of programs. Abel, NAB Rebuttal, p. 6. NAB reclassified seveal programs appearing on WTBS, Atlanta, Georgia in 1983. NAB reclassified the following programs as local (MPAA classification is in parenthesis): "World Championship Wrestling" (Minor Sports);[1] "Good News" (Devotional); "Nice People" (Syndicated Series); "24-Hours Daytona" (Minor Sports); "Atlanta 500" (Minor Sports); "Riverside 500" (Minor Sports); "Richmond" (Minor Sports); "Portrait of Oregon" (Syndicated Series); Tr. 6272–6273. As a result of NAB's reclassification, the NAB projected viewing percentages for all 622 stations for local went up to 7.24%, for Syndicated Series went down to 51.87%, for Minor Sports went down to 0.50%, and for Devotional programming went down to 0.65%. NAB Ex. 31R.

Upon cross-examination, NAB witness Abel conceded that the projections NAB made were based on certrain assumptions regarding average subscriber viewing hours which might not necessarily be true for the stations not measured by Nielsen. Abel conceded this impaired the accuracy of the projection. Tr. 6684.

Music

Marketplace value. Hal David, songwriter and President of ASCAP, testified that feature songs contribute to the success of movies. David, Music Direct. Earle Hagen, a composer primarily for television, testified that music is an important contribution to syndicated series. Hagen, Music Direct. Frank Lewin, a composer of film, television, and theater scores, testified that background music in movies and syndicated series conveys the meaning of the works by non-visual, non-verbal means. Lewin, Music Direct.

Commercial Radio. The carriage of distant radio stations is almost exclusively of FM stations. Fagan, Music Direct, p. 10. In rebuttal of NAB's testimony regarding WFMT–FM, Music introduced a breakdown by time of programming on WFMT–FM in 1983 which yielded a ratio of music programs

[1] World Championship Wrestling was the subject of a stipulation and a Tribunal order. It was determined that a two-hour program called "World Championship Wrestling" and a program called "The Best of World Championship Wrestling" were local programs belonging in the NAB category, and that a one-hour program called "World Championship Wrestling" and a program called "Georgia Championship Wrestling" were syndicated series belonging in the Program Supplier category. Stipulation, dated December 18, 1985; *Order*, Docket No. 84–1 83CD, dated February 11, 1986.

to non-music programs of approximately 80–20. Music Ex. 47X. Music argued that earlier Tribunal proceedings established an 80–20 ratio as typical of the average commercial FM station. Fagan, Music Rebuttal, p. 4.

Changed Circumstances. Don Biederman, Vice President of Legal and Business Affairs for Warner Brothers Music, testified on the introduction of music videos as a new program type in 1983. Biederman, music Direct. In the mid to late 1970's, record companies began producing music videos and promotional aids to sell records and tapes and began supplying them to record stores, clubs and discotheques. The QUBE cable system in Cincinnati, owned by Warner Communications, had originally used music videos as fillers between programs. Finding them very popular, Warner created MTV in 1981, a 24-hour cable channel devoted entirely to music videos. Id., pp. 7–8.

The success of MTV led to the creation of music video programs on broadcast stations in 1983. WTBS began broadcasting videos in a program called "Night Tracks" every Friday and Saturday night for 6 hours each night in June, 1983. *Id.* p. 13. Superstation WOR added "FM TV" in 1983; Superstation WPIX added music videos to its music programs, "Solid Gold" and "Midnight Special." Id. "Night Tracks" on WTBS ranked 47th on MPAA's Nielsen list of most viewed distant cable programs in 1983. MPAA Ex. 21. The Nielsen study did not count viewing between the hours of 2:00 a.m. and 6:00 a.m., while "Night Tracks" was still on. Tr. 1218–21. Other broadcast stations also began airing music video programs. such as WPHL–TV, Philadelphia, and WDVM–TV, Washington, D.C. Music Ex. 16.

Devotional Claimants

ASI Market Research, Inc. attitudinal surveys. The Devotional Claimants presented two attitudinal surveys. The first survey asked cable operators to rate the importance of various program categories in the operators decision to carry a distant signal, and to estimate the value in the operator's opinion to their subscribers of various program categories carried on distant signals. Virts, DC Direct, p. 2; Ex. 6A, Ex. 6B. The second survey asked cable subscribes the importance of various program categories carried on distant signals and how often these program categories were actually viewed by the subscriber, Virts, DC Direct, p. 2. Ex. 13A, Ex. 13B. The results of the cable operator survey were:

IMPORTANCE OF VARIOUS PROGRAM CATEGORIES TO CABLE OPERATORS IN DECISION TO CARRY DISTANT SIGNALS

	Very important		Somewhat important	
Movies	59%	±6.2	35%	±6.0
Locally originated sports	44%	+6.3	35%	+6.0
Classic comedy programs	28%	±5.7	57%	±6.3
Local news	24%	±5.4	26%	±5.6
Classic dramatic programs	22%	±5.2	59%	±6.2
Religious programming	15%	+4.5	38%	+6.1

DC Ex. 6A; Tr. 4293–94.

CABLE OPERATOR'S OPINION AS TO VALUE TO THEIR SUBSCRIBERS OF VARIOUS PROGRAM CATEGORIES CARRIED AS DISTANT SIGNALS

	Very important		Somewhat important	
Movies	61%	±6.1	35%	±6.0
Locally originates sports	48%	±6.3	41%	±6.2
Local news	29%	±5.7	40%	±6.2
Classic comedy programs	28%	±5.7	63%	±6.1
Classic Dramatic programs	24%	±5.4	65%	±6.0
Religous programming	15%	±4.5	53%	±6.3

DC Ex 6B; Tr. 4294.

The results of cable subscriber survey were:

IMPORTANCE OF VARIOUS PROGRAM CATEGORIES CARRIED AS DISTANT SIGNALS TO CABLE SUBSCRIBERS

	Very important		Somewhat important	
Movies	41.53	±5.6%	38.34	±5.5%
Local news	27.71	±5.1%	18.79	±4.4%
Classic Comedy programs	24.28	±4.9%	30.67	±5.2%
Local originated sports	22.61	±4.7%	21.02	±4.6%
Classic dramatic programs	18.59	±4.4%	36.54	±5.5%
Religious programming	13.14	+3.8%	12 18	+3.7%

DC Ex. 13A, Tr. 4294–95.

INCIDENCE OF VIEWING VARIOUS PROGRAM CATEGORIES AS DISTANT SIGNALS BY CABLE SUBSCRIBERS

	3 or more times per week		Once or twice per week		1–3 times times per month	
Movies	43.91	±5.7	30.45	±5.2	16.67	±4.2
Local news	33.66	±5.4	14.56	±4.7	9.86	±3.4
Classic comedy	28.29	±5.1	23.15	±4.8	16.67	±4.2
Local originated sports	26.13	±5.0	17.74	±4.4	10.65	±3.5
Classic Dramatic programs	21.04	±4.6	15.52	±4.1	22.01	±4.7
Religious programming	7.12	+2.9	9.39	+3.3	7.44	+3.0

DC Ex. 13B; Tr. 4295.

Addressing the relevance of these figures, Dr. Paul Virts, witness for the Devotional Claimants, performed an analysis based on the relative strengths of the six categories. Tr. 4286–4289. Virts concluded that translating the value in the surveys resulted in an entitlement of approximately 7 percent for the Devotional Claimants. Tr. 4289.

Methodology of cable operator survey. Dr. Paul Virts, Manager of Research Services for the Christian Broadcasting Network, testified on behalf of the Devotional Claimants, regarding the methodology of the attitudinal surveys. Virts, DC Direct. In April, 1985, Virts designed the surveys working in consultation with ASI Market Research, Inc. (ASI). Virts, DC Direct, p. 1. In selecting the cable operators to be interviewed, systems were divided into two groups: systems with more that 12,000 subscribers, and systems with 3,000 to 11,999 subscribers. *Id.* p. 3. Virts and ASI decided that 70% of the cable operators would be interviewed from the larger systems, and 30% would be interviewed from the smaller systems. *Id.* The survey's goal was to reach 250 operators. Tr. 4215. ASI contacted 941 systems in order to get its goal. 252 responded yielding a response rate of 26.8%. Tr. 4218. ASI employees conduced the interviews. Tr. 4221–4222. The ASI employees know they were conducting the cable operator survey for CBN. Tr. 4265. 65% of the operators surveyed carried CBN Cable Network. Tr. 4104–08. However, the majority of Form 3 cable systems do not carry CBN Cable Network. Tr. 5757.

The first question asked the operator was to identify which distant signal his or her system currently imported. MPAA Ex.57X, Q. 1. Some of the answers were incorrect. Tr. 4111. The interviewer did not correct the operator if he or she incorrectly identified the distant signals. MPAA Ex. 57X. No attempt was made in the survey to have the operator recall the distant signal carriage for 1983. *Id.*; Tr. 4110–4111.

No attempt was made to ascertain whether the operator was an employee of the system in 1983. MPAA Ex. 57X. Cable operators were asked for each program type, whether it was important or unimportant in their decision to carry a distant signal. The follow-up question asked, "Is that very or somewhat (un)

important?" *Id.* A. 3. In making their evaluations, the operators were not informed about the distinction between net work programming and nonnetwork programming on distant signals. Tr. 4125. The six program categories in the operator survey were: locally originated sports, local news, movies, religious programming, reruns of classic comedy programs, reruns of classic dramatic programs. MPAA Ex. 57X, Q. 3, Q. 4. No definitions were provided the cable operators of these program categories. *Id.*

Methodology of Cable Subscriber Survey. ASI has access through cable system operators to cable subscriber lists in eight or ten cities nationwide for research purposes. Tr. 4063. ASI selected eight systems to do its study—Tidewater, Virginia; Riverside, California; Oklahoma City, Oklahoma; Las Vegas, Nevada; Louisville, Kentucky; Jefferson County, Kentucky; (surrounding Louisville, Kentucky); Omaha, Nebraska; and Wakefield, Massachusetts. Tr. 4063. MPAA Ex. 60X.

ASI called cable subscribers on a random basis in these eight systems. Virts, DC Direct, p. 3. Virts represented that the results of the random sample are projectable to the eight cable systems, but could not represent that the results are projectable to the entire cable universe of the United States. Tr. 4149. However, Virts believes that demographically, the eight systems are representative of cable systems nationwide. Tr. 4148–4151. Virts conceded, however, that all eight systems might be in the tope 100 markets and that all might have 35-channel capacity or greater, which would make them unrepresentative. Tr. 4151–52. Virts acknowledged that all eight system carried CBN Satellite Network. Tr. 4152–4153.

The cable subscriber questionnaire did not refer to the calendar year 1983, nor was any attempt made to ascertain whether the respondent subscribed to cable in 1983. Tr. 4110–4111; Tr. 4299.

The respondent was told, "Today we are talking to people about what are called distant stations. These are local television stations from *other* (emphasis theirs) cities that are shown over cable television. Distant stations are not the premium services you pay extra for, and are not the local television stations you can get with an antenna. Please tell me all of the distant stations you get with your cable subscription." MPAA Ex. 60X, Q. 1

On cross examination, Virts conceded that sometimes a distant station is on a premium channel, so that that part of the definition of distant stations, "not the premium services you pay extra for" was incorrect. Tr. 4159–4161. Confusion on the part of the subscriber as to what were distant broadcast stations and what were local broadcast station or non-broadcast services were apparent from the responses to Question 1. Tr. 4164–4165. 65 percent of the respondents identified a non-broadcast service or did not identify any distant signals. MPAA Ex. 63X.

Question 2 was an aided question in which the respondent was asked, "Do you receive X Channel?" MPAA, Ex. 60X, Q. 2. The subscriber was asked to state how often he or she watch that distant station and how often someone in the respondents' household watch the distant station. *Id.* Q. 3. The respondent was next asked how often he or she watch certain program types on the distant stations. When asked why measuring actual behavior was important, Virts said, "It's fairly widely known in the industry that when one asks people what they like and then you go and see what they actually watch, they may be two different things. . . . We watch attitudes, we listen to attitudes, but it is the actual viewing behavior which we really pay attention to . . . " Tr. 4186.

The categories were: locally originated sports, local news, movies, religious programs, reruns of classic comedy, reruns of classic dramatic programs. No definitions of these categories were provided the subscriber. *Id.*

Then the respondent was asked, "Is it important or unimportant to you to have *(READ TYPE)* available over these cable channels? Is that very or somewhat (un)important? *Id.* Q. 5, Q. 6.

Benefit. The Devotional Claimants presented two cable operators to testify on the benefit of devotional programming, E. Harold Munn, Jr., president of Coldwater Cablevision, Inc., Coldwater, Michigan and Columbia Cable, Inc., Jackson County, Michigan, and Victor C. Bosiger, part owner of cable systems in Myrtle Beach, South Carolina and Elgin, South Carolina. DC Ex. 3; DC Ex. 4.

Munn testified that in 1983, Coldwater Cablevision carried the distant signals of WKBD, Detroit, Michigan; WFFT–TV, Fort Wayne, Indiana; and for a brief period, CBET, Windsor, Ontario. In March, 1983, WFSL–TV, Lansing, Michigan was substituted for CBET. Tr. 3800–3823. It also carried a PBS distant station from East Lansing, Michigan. Tr. 3816. The system carried no superstations. In the judgment of the Coldwater cable operators, Coldwater, a vacation center, attracts people from Detroit, Lansing, and Fort Wayne, and they would be more interested in their home town stations than superstations. Tr. 3802. Munn stated that the section of Michigan where Coldwater is located has 23 or 24 identifiable denominations and it was his belief that the devotional programming his system offers accounts for approximately 5 percent of the subscribership his system has. Tr. 3809. On cross-examination, Munn acknowledged a good deal of duplication of local signal devotional programming and distant signal programming. MPAA Ex. 55X; Tr. 3843. This, he conceded, diminished his earlier stated 5% figure. Tr. 3844. The Coldwater system also carried the CBN Family Network. This second duplication of the 700 Club on the Coldwater system was conceded to lessen the value of devotional programming on distant signals. Tr. 3854.

Victor Bosiger testified on his ascertainment of programming preferences in the Lynchburg area of Virginia. He found that religious influence in that community is very high. DC Ex. 4, p. 7. Bosiger found significant demand for devotional programming in the system he was planning for Crewe, Virginia. Tr. 3956. The survey was not limited to demand for distant signals; it included demand for local signals, distant signals, and non-broadcast programming services. Tr. 3956. Crewe went on-the-air in January, 1983. It had a capacity of 12 channels. WGN and WTBS were two distant signals chosen to be carried among the superstations under consideration. Tr. 3957, 4027. WTBS had 2% devotional programming, by time, in 1983, and WGN had 1%. The superstation that was not chosen, WOR, had 10% devotional programming. DC Ex. 7–A; Tr. 4027. WGN and WTBS were chosen over WOR because that was the choice indicated by a random sample of subscribers and by opinions voiced at public hearings. Tr. 4028.

Time Plus Fee Generation. The Devotional Claimants presented a time-plus-fee generation formula for allocating value among program types on distant signals. DC Ex. 12. The fees generated by each broadcast station were calculated, and multiplied by the percentages each station carried devotional programming, by time. By this method, the Devotional Claimants calculated an entitlement of 4.63% for the first half of 1983, and 4.36% for the second half of 1983. DC Ex. 12A, p. 3, Ex. 12b, p. 4.

Criticism of the Nielsen Study. The Devotional Claimants criticized the Nielsen study because it was based on the diaries kept by the viewers. DC Ex. 4–R, pp. 3–9. Virts testified that people

experience recall problems and report in diaries only what they remember. *Id.*, p. 3. Virts believed that under-reporting exists in diaries and hurts devotional program ratings. A 1985 Nielsen study based on meters was introduced to illustrate that a meter-study shows greater viewing of devotional programming than a diary-based study. *Id.*, Table 1. No evidence was introduced to show whether devotional programming was comparatively disadvantages versus other program types by the diary method. *Id.*

Canadian Claimants

The Burke Qualitative Survey. For the first time in any distribution proceeding, the Canadian Claimants presented a "qualitative" survey of cable operations. Unlike the attitudinal surveys presented by the other parties in this proceeding, the purpose of the Canadian Claimants' was not to provide the Tribunal with any specific percentage figure as a measure of benefit to cable operators or marketplace value of Canadian programming or any other programming type. Its primary purpose was to respond to two findings of the Tribunal in the 1980 distribution proceeding: that record evidence did not show that there was an appeal to American audiences for Canadian programming in 1980, and that the Canadian Claimants did not show that French programming is of particular interest to American cable subscribers. CC Proposed Findings, paras. 65–66.

Methodology of the Cable Operator Survey. Don Lytle, Director of Corporate Program Services for the Canadian Broadcasting Corporation, commissioned Burke Marketing Research (Burke) to conduct a survey of cable operators. Lytle, CC Direct, para. 5, 11. Deidre Moulliet supervised the survey for Burke. *Id.* par. 11. Lytle provided Burke with a list of the ten Canadian stations most frequently carried on Form 3 systems in the United States in 1983 and the 96 individual cable systems which carried them. Tr. 4925. Burke sent out an introductory letter to between 50 and 57 of the 96 identified cable systems stating that Burke was working on a project to examine and evaluate attitudes toward Canadian programmers and that a Burke researcher would be calling to conduct an interview. Tr. 4802; CC Direct, Ex. CDN–S, App.

Burke completed 25 interviews during December 1984 and January 1985. CC Ex. CDN–S, Management Summary. The reason why many operators could not be interviewed was attributed by Moulliet to the holiday season. Tr. 4803.

The 25 respondents were asked if they had responsibility for deciding which distant signal to import in 1983. CC Ex. CDN–S, App., p. 2. 22 out of 25 said they were decision makers in 1983. *Id.*, Table 1.

The respondents were told, "The purpose of our research is to examine attitudes toward Canadian programming. To help us assess these attitudes, we will be asking you various questions about Canadian programming and the appeal or benefit of that programming to your cable system and to your subscribers. By Canadian Programming we mean programming which is Canadian-produced and broadcast on Canadian stations that are carried as distant signals by cable systems in the United States. Therefore, please focus your responses only on "Canadian Programming" which does not include U.S. network, U.S. syndicated, Major League Baseball or NHL Hockey programs. *Id.* App., p. 1.

After being reminded of the Canadian distant signal(s) the respondent's cable system carried in 1983, the respondent's was asked, "Do the Canadian signals offer benefits to the subscribers?" *Id.* 23 answered yes, 2 answered no. Tr. 4808. The respondents who answered yes were then asked to name three benefits of carrying Canadian signals. The most often named benefits were: Variety of programming/diversity (11 times), News/News slant (10 times), French-language programs (7 times), sports (5 times), hockey (3 times), movies/uncut movies (3 times). CC Ex. CDN–S. Table VI.

Moulliet stated this study was qualitative research and not a random sample survey which could be projected to the universe of cable systems carrying Canadian distant signals. Tr. 4798. However, Moulliet believed that one could say, based on this research, that operators have positive reactions to Canadian signals. Tr. 4798–4799.

Harm. CTV Television Network Ltd. (CTV) is a private Canadian national television network owned by its 16 affiliate stations. Fillingham, CC Direct, p. 3. Glen-Warren Productions, Ltd. is a program supplier for CTV and has produced most of the Canadian television programs on prime time on the CTV Network. *Id.*, pp. 5–6. Glen-Warren syndicates some of its programs in the United States. CC Ex. CDN–G. The CBC English network syndication entity, CBC Enterprises, exported $1,179,000 in programs to the U.S., CC Ex. CDN–0, Tr. 4661. More programs are syndicated to the U.S. via barter transactions, such as Sesame Street and the Journal. TR. 4666 Glen-Warren and CBC are grouped with the Program Suppliers for programming that it sells and syndicates in the U.S. Tr. 4868. Prehearing Statement of Program Suppliers. The Canadian Claimants allege harm in their attempts to sell Canadian programming to U.S. television stations because Canadian programming already reached 2 million cable subscribers in the U.S. by distant signal. Tr. 4896; CC Ex. CDN–EE.

Marketplace Value of Canadian Content Programming. Excluding U.S. network programming, CFTO–TV, Toronto, Ontario, carried 56.7% Canadian-content programming in 1983. CC Ex. CDN–C, Tr. 4869. This includes 99.5 hours of Toronto Blue Jay baseball for which the Canadian Claimants do not claim. *Id.* The content requirement for commercial stations in Canada is 60% Canadian content overall from 6 a.m. to midnight and at least 50% Canadian content from 6 p.m. to midnight. Tr. 4875–76.

On the Canadian Broadcasting Corporation stations, 73% of the prime time schedule was Canadian-content in 1983, and 63% of the entire programming schedule is Canadian. Tr. 4589; CC Ex. CBN–J. There are approximately 44 CBC owned and operated stations and affiliates. Of them, 10 stations were carried by 48 cable systems as a distant signal in 1983. Tr. 4607; CC Ex. CDN–FF. Included in the 63% Canadian-content figure was the Montreal Expos baseball broadcasts, Hockey Night in Canada, and the 1983 Stanley Cup Playoffs. Tr. 4609–4613. All ten CBC stations carried the Montreal Expos, Hockey Night in Canada and the 1983 Stanley Cup Playoffs. *Id.* These represent about 250 hours of programming a year. Tr. 4644.

To show the appeal of Canadian programs to American audiences, 38 letters from U.S. viewers, 11 of which represented distant viewing, were filed. CC Ex. CDN–Q; JSC/NAB/CC stipulation, October 29, 1985. Canadian witnesses Robin Fillingham (representing CTV, the private Canadian television network), Trina McQueen (representing CBC's English Television Network), Robert Roy (representing CBC's French Television Network), and Mark Starowicz (representing one program on CBC, The Journal) testified that their programming was unique and offered cable systems diversity. Fillingham, CC Direct; McQueen, CC Direct, Roy, CC Direct; Starowicz, CC Direct.

In 1983, there were 29 instances of full-time carriage of French-language Canadian stations by Form 3 cable operators. CC Ex., CDN–FF revised. In rebuttal of MPAA's witness John Ridall.

who said cable operators were interested in Canadian stations for the hockey games they carry, the Canadian Claimants presented Maurice Violette, an Augusta, Maine cable subscriber who stated that in Augusta, 35% of which is French speaking, a French-language station is important. Violette, CC Rebuttal.

Testimony of cable operators presented by other parties supported hockey programming as the important factor in choosing a Canadian station. John Ridall, an MPAA witness and Cleveland cable operator, stated "(U)nquestionably the National Hockey League programming [on the imported Canadian signal] is the major appeal to us and the subscribers." Tr. 439–40. E. Harold Mann, a Devotional Claimant witness and a Michigan operator stated that dropping CBET of Windsor, Ontario disappointed some subscribers because, "some people like the hockey games available from Canada." Tr. 3801. Richard Loftus, a JSC witness, cited sports as the sources of Canadian station appeal. Loftus, JSC Direct, p. 17.

Findings of Fact—3.75% Fund

The Act provides that if, after April 15, 1976, FCC should ever changes its regulations regarding the permitted carriage by cable systems of television broadcast signals beyond the local service area of the television signal, the royalty rates for the additional distant signal carriage may be established by the Tribunal, provided that no adjustment in royalty rates could be made for signals already permitted by the FCC. 17 U.S.C. 801(b)(2)(B).

In July 1980, the FCC deleted all restrictions on the importation of distant signals. *Report and Order*, 79 F.C.C. 2d (1980). The FCC decision was affirmed in June, 1981. *Malrite T.V. of New York, Inc.* v. *F.C.C.*, 652 F. 2d 1140 (2d Cir. 1981). The Tribunal instituted a proceeding and in November, 1982 set a royalty rate for newly permitted distant signals of 3.75% of gross receipts. 47 FR 52146. The new rate applied only to Form 3 systems located within a television market. The first year for which royalties were collected for the newly permitted distant signals was 1983. *Id.*

The FCC's distant signal rules, as they existed on April 15, 1976, allowed unlimited carriage of noncommercial educational television stations. 47 CFR 76.59(d), 76.61(d), 76.63(d). In addition, cable systems could carry any specialty stations, and any station while it is broadcasting a foreign language, religious or automated program. 47 CFR 76.59(d)(1), 76.61(e)(1). A specialty station was defined as any commercial station which broadcasted foreign-language, religious and/or automated programming during at least one-third of the average broadcast week and one-third total weekly prime-time hours. 47 CFR 76.5(kk).

In adopting the 3.76% rate, the Tribunal found, "The evidence also shows that while not conclusive, there is sufficient merit to the argument that copyright owners, particularly program syndicators, will suffer further harm as cable systems increase their penetration of metropolitan markets. Again, though not conclusive, the evidence indicates to a degree that audience diversion does have an economic impact primarily on the ability of syndicators to sell their product at a premium price. 47 FR 52157.

In MPAA's special Nielson study, viewing data was broken out for those broadcast stations in the survey which were carried at 3.75%. 32 stations in the Nielsen sample were carried at 3.75%. 16 were independent stations, 16 were network-affiliated stations. They were carried in 218 instances. The 32 broadcast stations, carried in 218 instances, accounted for 90.6% of the 3.75% royalties. MPAA Ex. 20.

Using six-cycle data, the viewing data was as follows: movies and syndicated series: 80.65%, major sports: 12.04%. local: 3.65%, minor sports: 2.37%, devotional 0.8%. *Id.* No other parties proposed corrections to this data, except for their criticisms which applied to all the Nielsen data.

JCS performed an analysis of the statements of accounts filed with the Copyright Office. They found 305 instances of carriage by 199 cable systems but performed no instance of carriage study. JSC believed that though the 3.75% payment resulted from the addition to television signals that could not formerly be carried under FCC rules, the 3.75% cannot always be attributed only to the added signal. JSC Ex. 4, App. B, p. 2. To illustrate its point, JSC posited this situation: a cable operator has been carrying two distant signals under former FCC rules, and is now permitted to add more. If the operator chooses to add another stations, he or she can drop one of the signals already being carried to avoid the 3.75% rate, or can carry three stations and pay one 3.75% rate. JSC thus chose to conceive of the cable operator's action as paying a 3.75% royalty for the right to carry all three signals and attributed an equal share of the royalty paid to each stations. *Id.* JSC believes this analysis is only proper where there is the choice of free substitution for the cable operator. Where there is not that choice, such as in the case where an operator is carrying a "grandfathered" station, and must pay 3.75% for the newly added signal, JSC allocated the entire 3.75% royalty to the new signal and none to the grandfathered signal. *Id.* Based upon that type of analysis, JSC reported that independent stations accounted for 88.8% of the 3.75% royalties, network affiliates accounted for 10.3%, Canadian stations account for 0.9%, and educational stations and specialty stations accounted for none of the 3.75% royalties. JSC Ex. 4, p. 9, Table 2.

JSC also found that the three superstations, WTBC, WOR, and WGN accounted for 62.9% of the 3.75% royalties and at least one superstation was carried by 156 of the 199 cable systems reporting carriage of a 3.75% station. *Id.*, p. 11, Table 3; p. 14, Table 4. Other flagship stations, accounted for 21.8% of the 3.75% royalties. *Id.*, p. 11, Table 3.

NAB provided a breakdown of their ELRA attitudinal survey of cable operators. Of the 284 cable operators who made the $100 allocation, 36 carried one or more stations at the 3.75% royalty rate. Their allocation among program types was reported as follows:

Program category	Does not carry a 3.75% station (248)	Carries a 3.75% station(s) (36)
Sports programs	35.70	35.37
Movies	25.16	24.07
Syndicated series	15.86	15.73
Station produces programs	13.10	14.93

NAB Ex. 9, p. 18, Table 3.2.

ELRA did not ask in its survey whether the cable operator viewed his or her allocation for stations carried at the 3.75% rate differently than for stations carried at the statutory rate. NAB Ex. 9, App. A.

The Canadian claimants performed an incidence of carriage study, and a percentages of fees study. In these studies, the Canadian Claimants credited a station with being a 3.75% rate station if it was the actual station named by the cable operator; no allocation to stations carried at the statutory rate was made:

	Instances	Percent of instances	Percent of fees
First Accounting Period			
U.S. independent stations	185	69.8	91.8
U.S. network stations	74	27.9	7.3
Canadian stations	3	1.1	0.6
U.S. educational stations	3	1.1	0.3
Total	265		

	Instances	Percent of instances	Percent of fees
Second Accounting Period			
U.S. independent stations	192	69.8	89.5
U.S. network stations	81	29.5	10.1
Canadian stations	2	0.7	0.4
U.S. educational stations	0	0.0	0.0
Total	275		

Because the Canadian Claimants felt that making no allocation to stations carried at the statutory rate underrepresented the carriage of Canadian stations, they provided a second analysis. In the first accounting period of 1983, there were 15 cable systems which carried a Canadian signal(s) and paid a 3.75% fee. These 15 cable systems carried 20 Canadian signals in all. CC Ex. CDN–GC. In the second accounting period of 1983, there were 17 cable systems which carried 21 Canadian signals in all. *Id.* An across-the-board allocation would raise the contribution of Canadian stations to the 3.75% fees to 2.43% for the first accounting period and 2.85% for the second accounting period, but the Canadian Claimants did not distinguish between situations where the cable operator has the option of free substitution and where the cable operator does not. *Id.*, Tr. 4977–4981.

Findings of Facts—The Syndex Fund

Background of the Syndicated Exclusivity Rules

In the 1960's, the FCC's concern regarding the cable industry was that the additional viewing options provided by cable systems and their ability to introduce distant signals in the local market introduced competition that was potentially "both inequitable and destructive" to broadcast stations. *Report and Order*, 79 F.C.C. 2d 663, 667 (1980). This was considered the "unfair competition" issue. *Report*, 71 FCC 951, 957 (1979).

The FCC also was concerned about copyright. The FCC first imposed restrictions on cable carriage of a program being exhibited on a local station in the *First Report and Order*, Dockets 14895, 15233, 38 F.C.C. 683 (1965), stating "(w)e think it apparent . . . that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs." *Id.*, p. 706.

In 1968, the Supreme Court found that cable operators did not violate the 1909 Copyright Act by retransmitting television broadcast signals, but urged the Congress to resolve the issue. *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

Concerns over competition and copyright converged at the FCC in the early 1970's, and was characterized by the Commission:

"The industries involved have variously argued—the cable industry, that cable technology will bring extra programming and other services to the public, both on distant signals and on locally originated channels; the broadcast industry, that distant signal importation will lead to smaller audiences and reduced revenues and thus threaten the existence of some broadcast stations or inhibit their ability to produce local public service programs; the television programming industry, that suppliers of programming should receive compensation for the use of their product by cable systems and that the exclusive sales of such programs in particular markets should be honored. *Cable Television Report and Order*, 36 F.C.C. 2d 143, 164 (1972).

A Consensus Agreement was reached among the three industries in November, 1971, with the participation of the Chairman of the FCC and the Director of the Office of Telecommunications Policy. *Id.*, p. 165, 291. Its central features were must-carry of local signals, a limitation on the import of distant signals, and protection for the exclusivity of nonnetwork programming against distant signals. The FCC stated, "The additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of television programming." 36 F.C.C. 2d 269. Chairman Burch, in a concurring statement, stated, "(T)he core of the consensus agreement, is the exclusivity protection for local broadcasters against distant stations, and more fundamentally, for the owner's rights to control the use of his product." *Id.*, p. 292. the Commission stated that since a consensus had been "hammered out by the principal industries . . . they ha(d) agreed to support legislation that resolves the remaining aspect of the copyright issue, that of copyright payments." *Id.*, p. 166.

Description of the Syndicated Exclusivity Rules. In the top 50 television markets of the country, program suppliers could demand that cable systems refrain from carrying a syndicated program on distant stations for one year after the first syndicated sale of that program anywhere in the United States; broadcast stations which had exclusive exhibition rights (both over-the-air and by cable) in the local market could demand that cable systems refrain from carrying a syndicated program on distant stations for the entire run of the contract. 47 CFR 76.151 (a) and (b). In the second fifty television markets, only broadcast stations had the right to prohibit cable retransmissions. However, distant syndicated programs did not have to be deleted if broadcast in prime time unless the requesting local station also planned to air the program in prime time. Also, exclusivity rights in these markets expired at specific time periods or on the occurrence of a specified event, depending on the type of programming. 47 CFR 76.151(b)(2) to (6).

The syndicated exclusivity rules did not extend to foreign stations. 47 CFR 76.5(b); 36 F.C.C. 2d at 181, fn. 51. The rules applied only to commercial stations. 47 CFR 76.151(b). The rules did not apply to live programming. 47 CFR 76.5(p). Sports programming is governed by another section of the FCC's rules. 47 CFR 76.67. Devotional programmers did not, as a practice, syndicate their programs on an exclusivity basis. Protter, NAB Direct, p. 4; Tr. 4484–4487.

Passage of the Copyright Act of 1976. Congress resolved the question of cable copyright liability in 1976. Cable retransmissions were defined as performances. "(A) cable television system is performing when it retransmits the broadcast to its subscribers . . ." H.R. Report No. 94–1476, p. 63. A compulsory license scheme was adopted for the carriage of signals comprising the secondary transmission by cable systems permitted under the rules, regulations, or authorizations of the FCC. 17 U.S.C. 111(c). Where the carriage of the signal comprising the secondary transmission was not permissible by the FCC, the cable system was liable for infringement. 17 U.S.C. 111(c)[2].

17 U.S.C 801(b)[2](C) stated that, "In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change."

Congress stated that "copyright royalties should be paid by cable operators to the creators of such programs." H.R. Rep. No. 1476, 94th Cong. 2d Session, at p. 89 (1976) (House Report). Congress further found that "the transmission of distant non-network programming by cable systems

causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmissions adversely affect the ability of the copyright owner to exploit the work in a distant market." *Id.*, p. 90.

Repeal of the Syndicated Exclusivity Rules: On October 19, 1976, Congress enacted the Copyright Act of 1976. Pub. L. 94–553. (94th Cong.) On November 4, 1976, the FCC adopted a Notice of Inquiry. Citing pleadings from the broadcast industry and the cable television, and the passage of the Copyright Act, the FCC stated, "We have now reached a point that calls for us to step back and reassess our syndicated exclusivity rules." *Notice of Inquiry*, Docket No. 20988, 61 F.C.C. 2d 746 (1976).

On April 25, 1979, the FCC adopted the results of its review of the purpose, effect, and desirability of the syndicated exclusivity rules. *Report*, Docket No. 20988, 71 F.C.C. 2d 951 (1979). The FCC found:

"The intent of the syndicated exclusivity rules plainly was 'to permit copyright holders to distribute programming in particular markets either by broadcast alone or, if they wish, by both broadcast and through distant signal carriage . . . . The legal effect was to ascribe a property right to copyright owners—the right to license a television broadcast exhibition of a copyrighted work and simultaneously to preclude its presentation in other markets through the mechanism of cable television—at a time when the existence of the right as a matter of copyright law was very much in doubt. The practical effect was to superimpose . . . . this agency's view of the proper balance to be struck between protecting the public's interest in obtaining reasonable access to creative (copyrighted) works while providing sufficient incentive to artists (copyright owners) to stimulate further creativity." *Id.*, p. 963.

The FCC went on further to say, "To the extend that the 'unfair competition' argument rests on cable television's operation outside the traditional marketplace . . . we believe that the new copyright law, . . . resolves the question. The 'unfair competition' issue of previous years is and always was, it is now quite evident, a copyright issue and nothing more . . . With Congressional resolution of the copyright issues and own findings . . . . that deletion of these rules will not result in 'debilitating economic competition,' we believe that the 'unfair competition' argument cannot support a continuation or expansion of rules found to be unnecessary." *Id.*, p. 969. In the Report, the FCC proposed to delete the syndicated exclusivity rules. *Id.* On July 22, 1980, the FCC adopted a Report and Order deleting the syndicated exclusivity rules, effective October 14, 1980. *Report and Order*, 79 F.C.C. 2d 663 (1980). The effective date was stayed pending Court of Appeals review of the decision.

The 1978 Cable Copyright Distribution Proceeding: In the 1978 cable copyright distribution proceeding, NAB argued that cable royalty fees must be awarded to broadcasters within the Program Supplier category whenever broadcasters had obtained market exclusivity from the program supplier. The broadcasters argued, "[S]ection 201(d)(2) of the Act gives explicit statutory recognition to the principle of divisibility of copyright, and that the owner of any particular exclusive right is entitled to all the remedies accorded a copyright owner . . . . including the right to receive compulsory fees." 45 FR 63032.

In its final determination published September 23, 1980, the Tribunal rejected NAB's argument:

"We find that section 111 and its legislative history reflects the Congressional intent, and the understanding of interested parties, that television stations are to be compensated only for eligible locally produced programs. We find, with regard to syndicated ---- programming, that Congress intended for royalties to be distributed to program syndicators and not to local stations.

The legislative history speaks decisively as to the understanding of the drafters and interested parties as to scope of compensation to broadcaster claimants. This understanding was shared by the leading spokesmen for the broadcast industry during the legislative proceedings on the copyrighted revision legislation. Mr. Vincent Wasilewski, President of the National Association of Broadcasters testified:

The broadcasters are not per se in that proposed legislation, asking for payments to them for the use of their signal per se. They are asking for payment to the copyright proprietor for the use of that programming material by the CATV, by the copyright proprietor, a motion picture producer, special sports interest, or what have you.'

The final text of section 111 was constructed by the House of Representatives Subcommittee as a substitute for the version passed by the Senate. In recommending this language to the House, Congressman Tom Railsback, the ranking minority member of the Subcommittee, stated:

'All parties are now satisfied with section 111, except the National Association of Broadcasters. They were not a party to the compromise bacause they are not a major party of interest.' " *Id.* pp. 63032–63033.

FCC and Tribunal Actions Affirmed; Adjustment of Royalty Rates

On June 16, 1981, the FCC decision to delete the syndicated exclusivity rules was affirmed by the Court of Appeals. *Malrite T.V. of New York, Inc.* v. *FCC*, 652 f. 2d 1140 (2d Cir. 1981). The stay of the effective date of the repeal of the rules was vacated on June 25, 1981. *Id.*

On April 9, 1982, the Court of Appeals affirmed the Tribunal's rejection of NAB's claim in the 1978 proceeding. *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, 675 F.2d 367, 379, fn. 21 (1982).

On November 19, 1982, the Tribunal issued its final determination adjusting the cable copyright royalty rates to reflect the FCC's repeal of the syndicated exclusivity rules. 47 FR 52146. In the preceeding, NAB had proposed a rate of 5% of gross receipts for the importation of newly permitted signals, but "offered on proposal regarding rates for signal carriage resulting from the FCC's repeal of its syndicated exclusivity rules." *Id.*, p. 52149. The Tribunal's analysis of the proper adjustment to be made was in response to evidence presented by the suppliers of broadcast programs and it found, "audience diversion does have an economic impact primarily of syndicators to sell their product at a premium price." *Id.*, p. 52157. The Tribunal adjusted the cable copyright rates, effective January 1, 1983. *Id.*, p. 52159.

NAB's Claim—This Proceeding

NAB presented two witnesses: Arthur Miller to testify on the Copyright Act and Harold Protter to testify on the harm incurred by broadcasters. Miller, NAB Direct; Miller, NAB Rebuttal; Protter, NAB Direct. NAB's claim in the 1983 proceeding can be summarized as follows: Under the 1909 Copyright Act, the purchase of an exclusive right in a work did not become a copyright owner of that work. Rather, the bundle of rights which accrued to a copyright owner were indivisible, that is, incapable of assignment in parts. The 1976 Copyright Act changed this situation, making exclusive rights holders copyright owners with respect to those exclusive rights. One of the exclusive rights which may be transferred is the right to perform publicly a motion picture or audiovisual work. 17 U.S.C. 201 (d), 106.

Except for the "pre-clearance" portion of the syndicated exclusivity rules, the only instances in which the syndicated exclusivity rules could be invoked was when a broadcast station had acquired an exclusive exhibition right against all other stations and cable systems in its market. Only the broadcast station could require the cable operator to delete the programming. Only the broadcast station would suffer the financial harm of duplication, because presumably, the broadcaster had

contracted for and paid the program supplier for market exclusivity.

The legislative history of the Act and the provisions of the Act recognizes the ability of a broadcast station to contract for a subdivided copyright in the exclusive exhibition rights in its market. The House and Senate reports state: "It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular right." Senate Report at 107, House Report at 123.

Sections 501 (b) (c) and (d) read as follows:

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it. . . .

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

Hubbard broadcasting v. *Southern Satellite Systems,* 593 F. Supp. 808 (D. Minn. 1984), *aff'd,* 777 F.2d 393 (8th Cir. 1985), is the only reported decision to address section 501(b) of the Copyright Act. Hubbard Broadcasting sued a cable television system and a television superstation for copyright infringements arising out of the retransmissions of five works it had obtained an exclusive license to perform in its market. The Court found that the plaintiff was the owner of the exclusive rights in the five works in particular geographic areas and that it had standing under 501(b) of the Act to sue. The question of standing under 501(c) was not reached because standing was recognized under 501(b). *Id.,* p. 811. The Court also found copyright ownership one of the five prima facie elements necessary for the plaintiff to establish infringement. The Court found that Hubbard had the necessary copyright ownership to establish a prima facie case, but found ultimately for the defendants on the ground that the defendant cable system had obtained a valid compulsory license. *Id.*

NAB urges that its claimant broadcast stations are the only relevant copyright owners for the purpose of the syndex fund, and that this has been affirmed by *Hubbard,* a decision occurring after the repeal of the syndicated exclusivity rules.

Program Suppliers Claim—This Proceeding

Jon Baumgarten, Nina Cornell, Henry Geller, and Paul Goldstein testified for the Program Suppliers regarding the syndex fund. Baumgarten, MPAA Direct and Rebuttal; Geller, MPAA Direct; Cornell, MPAA Rebuttal; Goldstein, MPAA Rebuttal. The position of the Program Suppliers may be summarized as follows:

The entire syndex fund, except for a portion for Music, should go to the Program Suppliers. Geller testified that the rulemaking history of the syndicated exclusivity rules demonstrates that they were designed to protect the ability of the program suppliers to control the exploitation of their product. Cornell testified that the repeal of the syndicated exclusivity rules were based on the belief by the FCC that Congress had resolved the copyright question and exclusivity protection for programmers were no longer necessary.

Baumgarten testified that the legislative history of the Act shows that Section 111 was intended to make whole the harm incurred by the suppliers of programs; that the Tribunal determined in the 1978 proceeding that obtaining an exclusive exhibition right from the program suppliers did not qualify the broadcast station to receive the royalties for that syndicated series.

Baumgarten rejected that the "divisibility" argument advanced by NAB to support their claim to Section 111 royalties. Section 201 affords the owner of any particular right the full protection of the Act to the extent of that right, but a television station cannot be an exclusive licensee against exhibitions by cable systems which comply with Section 111, so that the broadcasters' arguments must ultimately fail.

Goldstein testified that the FCC's definition for syndicated exclusivity purposes—against all other television stations licensed to the same city, and against all cable carriage of the same program in cable communities within 35 miles of that city—falls short of the exclusivity required by the Act as a condition of ownership of a particular right. There would be a likelihood that in almost all situations there would be signals which the broadcaster's contract did not prohibit coming into its geographic area which would act to deprive the broadcaster of the exclusivity necessary for an exclusive performance right.

Music's Position—This Proceeding

Only the Music Claimants, among all other claimants, expressed a position in its proposed findings about the relative merits of NAB's and the Program Suppliers' positions. They argue that the exclusive copyright at issue is not equivalent to the exclusive rights required by the FCC for exercise of the blackout right. The exclusive right is the right to collect Section 111 compulsory license royalties. The Program Suppliers initially own the exclusive copyright to collect Section 111 royalties. If that particular right was transferred to the broadcasters, the transferee has the burden of proving the transfer. No written transfer agreements were submitted and therefore the bulk of the syndex fund should be awarded to the Program Suppliers. Music, Proposed Findings, paras. 155–176.

Conclusions of Law—Three Funds

The Tribunal concludes that there are different factors underlying the royalties which derive from the statutory rates, the 3.75% rate, and the syndicated exclusivity surcharge, and that this justifies dividing the 1983 cable royalty fund and making three separate allocations.

The Devotional Claimants argue in their proposed findings that the Act does not sanction the treatment of either the 3.75% rate or the syndicated exclusivity surcharge as a separate fund. However, the legislative history of the Act specifically gives the Tribunal wide discretion: "The Committee recognizes that the bill does not include specific provisions to guide the [Tribunal] . . . The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the [Tribunal] should consider all pertinent data and considerations presented by the claimants." House Report No. 94–1476, p. 97. We have concluded after consideration of all pertinent data that a single analysis treating all royalties together would be inadequate, and that a separate analysis for the basic fund, the 3.75% fund, and the syndicated exclusivity surcharge would yield better decision-making and is fully warranted.

PBS and the Devotional Claimants assert that creating three funds is a "fee generation" approach, and that "fee

generation" has been consistently eschewed by the Tribunal in the past. It is accurate to say that we have rejected fee generation formulas as a mechanical means toward making our allocations, but we have also consistently held that our distributions are based on all the relevant data presented before us, including the amount that program types were carried and the degree to which cable systems were willing to pay for them. We believe it would be inconsistent with past actions to disregard now the different amount of carriage of program types which occurred pursuant to the new rates, or to ignore the different factors and rationale underlying the deleted FCC regulations. Consequently, we have made different allocations for the basic fund, the 3.75% fund, and the syndex fund, as follows.

Conclusions of Law—The Basic Fund

As earlier stated, the litigation of the 1983 cable copyright fund was marked by three distinctive features: the advancing of either viewing studies or attitudinal surveys as the most relevant evidence, relitigation of issues on which the Tribunal adversely held in the past, and changed circumstances.

Regarding the controversy between the Nielsen viewing study and attitudinal surveys, we stated in the 1979 cable distribution hearing, "We regard [the Nielsen report] as the single most important piece of evidence in this record. . . . It is a useful 'starting point' for the application of the criteria to the record evidence, but we have not accepted it as a talisman which fully reveals and determines the application of the criteria. A major reason for the Tribunal being unable to accord the Nielsen 'hard numbers' the weight urged upon us by MPAA is that we share the views advanced by certain other claimants, notably Joint Sports and NAB, that cable operators are interested in selling subscriptions and that viewership is of limited relevance to cable operators." 47 FR 9892.

After reviewing the evidence of the 1983 record, we reaffirm that conclusion. We recognize the positions advanced by those conducting the attitudinal surveys that cable operators are not so much influenced by the sheer viewing numbers as they are in offering a diverse slate of programs and satisfying small, but intense, segments of the viewership. However, for reasons we shall shortly spell out, the Nielsen study has features to it that are superior to an attitudinal survey, which have led us to give it far greater weight than any other piece of evidence. Secondly, to acknowledge that cable operators have narrowcasting considerations is not to make a virtue out of smallness. There must be some showing by a smaller claimant of the avidity of its viewers influencing the cable operator's decision to carry particular distant signals, so that the Tribunal may give credit toward its marketplace determination of the value of that type of programming. Several of the cable operator surveys and cable subscriber surveys proved to be so flawed as to give the Tribunal only the dimmest view of the effects of narrowcasting considerations. Following are our conclusions on the validity of each of the surveys.

The Nielsen Study. MPAA has considerably improved the Nielsen study over the years that it has presented it to the Tribunal. It now includes more broadcast stations than in the past, and for the first time, it includes noncommercial education stations. Its stability of results over the years, and even after proposed corrections by other claimants, tends to give the Tribunal confidence that its results are reliable. Our earlier criticism that MPAA may have been helped by only surveying the national "sweep" periods was addressed by MPAA in this proceeding. They surveyed two "partial sweep" periods, but due to criticism raised at hearing that the four-cycle data, the five-cycle data, and the six-cycle data were improperly combined, MPAA withdrew its reliance on the six-cycle data, and stated it was content to rely solely on the four-cycle data. NAB offered proposed corrections only to the four-cycle data. This leaves unanswered whether the two additional cycles would have altered the results. It appears that viewing data for Joint Sports is the most susceptible to seasonal changes. Aside from that, most other categories remain stable. The Tribunal is still uncertain that the four "sweep" periods are a projectable picture of viewing the year round, and would like more investigation into this area, but we are satisfied that MPAA's viewing figures are not as appreciably helped by surveying only the "sweep" periods as we had earlier suspected.

NAB offered specific criticisms that the viewing on the 117 broadcast stations could not be projected to the universe of viewing on all broadcast stations carried by cable systems in 1983 on a distant signal basis, and that MPAA miscategorized several programs. We agree with NAB's criticisms and have, for the purpose of our allocation decision, taken note of NAB's proposed corrections as they tend to provide more reliable Nielsen data results.

The Nielsen data results, therefore, which the Tribunal relied upon as one factor of the Tribunal's allocation decision, are as follows:

	Percent
Movies and Syndicated Series	76.35
Major Sports	10.01
Local	7.24
Educational	4.61
Devotional	0.65
Specialty Stations	0.52
Minor Sports	0.17

The Nielsen numbers, like all numbers in this proceeding, carry with them the psychological illusion of being hard and fast. They are not hard and fast for the following reasons: (1) They do not include the viewing figures for Canadian stations; (2) They do not include Music; (3) There is no breakdown for the program types on specialty stations, which contain religious programming, foreign language programming or automated programming; (4) NAB's first projection to the universe gave the local category 6.07%, but after adjusting for Mr. Cooper's one methodological criticism, it was reduced to 5.59%; (5) NAB's own witness John Abel conceded that another hypothesis of NAB's projection to the universe might be flawed; but, all in all, the Tribunal places higher weight on NAB's efforts at projection, than no projection at all; (6) The question of seasonal viewing patterns, shown most notably in the viewing figures for Joint Sports, affects the hardness of the results. (7) World Championship Wrestling was resolved to be four programs: two in the syndicated series category; two in the local category. (8) The question of diary-based data versus metered homes was raised by the Devotional Claimants. Although it might affect the results, it was not shown how the results were skewed in favor of or against any one program type.

With all these reservations in mind, the Tribunal still maintains that the Nielsen data are most useful, and help to develop the "zone of reasonableness" for the Tribunal's allocations.

We also favor Nielsen data over attitudinal surveys presented in this proceeding for several reasons. The Nielsen study was the only study conducted in 1983. All other surveys were conducted in late 1984 or 1985. We agree with the recall problem noted by the Program Suppliers. Although we appreciate the parties' difficulties in preparing for Tribunal proceedings, that difficulty does not cure the defect of the recall problem. More importantly, the Nielsen survey is the only survey to measure behavior. As Paul Virtz, a

surveyor testifying on behalf of the Devotional Claimants stated, it is recognized by surveyors that how people say they behave and how they do behave are quite different. This difference is exacerbated by the very nature of asking a subscriber or a cable employee over the phone to engage in a twenty minute exercise of allocating program preferences. The exercise is brief, takes into account no 'real world' factors such as supply, local franchising requirements, etc., and carries no consequences. We agree with Dr. Besen's criticism of attitudinal surveys that asking cable operators and/or subscribers to calculate programs does not take supply into account, so that all we are measuring is the benefit side of the equation, not marketplace value. We also agree with Dr. Besen's belief that the respondents were probably basing their responses on the total value of these programs to them, and not the marginal value of the programs to them on distant broadcast signals.

The PBS, Devotional Claimants and Canadian Claimants Surveys

We conclude that the surveys performed by PBS, the Devotional Claimants, and the Canadian Claimants are either so flawed, or so poorly designed, as to be of no value to the Tribunal in making its allocations.

The Canadian claimants did not offer their survey as an attitudinal survey. It was called a qualitative survey, because they specifically did not represent it to be a random sample survey projectable to the universe of cable carrying Canadian stations in 1983. The survey was only to those systems which carried Canadian signals. The cable operators were told by letter in advance that they would be surveys on Canadian programming. The interviewers for the Canadian Claimants asked questions only about Canadian programs and not about any other program types, and received almost uniformly encouraging replies from their respondents. It was not surprising that operators already carrying Canadian signals had good comments, but the survey did not aid the Tribunal in advancing toward a valuation of Canadian programming relative to other program types.

The PBS survey had many flaws. The interviewers knew the survey was for PBS. The respondent was told that the survey would be about PBS. Then the respondent was asked a number of aided questions about PBS we believe were phrased in a manner flattering to PBS. Only after many aided questions was the respondent asked to valuate PBS versus commercial television. PBS' own witness conceded such a sequence would raise PBS' rating.

The task the respondent was asked to perform was only a division between commercial and noncommercial television, when the Tribunal's task is to value all seven television program types. The resulting impact of a two-point scale, we believe, led to giving PBS a much higher value. More importantly, we have no way of translating such a result to a proper allocation, or even a plus or minus credit, to PBS.

Further, there was evident a great deal of confusion on the part of the respondent. 45% of them believed they carried a PBS distant signal, when, if the sample was reliably chosen, only 24% of them did. This was due, we believe, to a misleading definition of distant signals.

The respondent was not asked to relate his or her answer to the relevant question for the Tribunal—operator business decisions in 1983. Mr. Hoffman stated that his survey was designed for the operator's present state of mind, and was for measuring "worth," but not necessarily business decisions. Attempts to relate the questions back to 1983 were, in our opinion, ineffective, and, in any event, no attempt was made to relate back the particular questions which PBS wanted the Tribunal to consider most.

Both of the Devotional Claimants' surveys were too flawed to be accorded any weight. The cable operator survey had a very low response rate—26.8%. The interviewer knew the survey was being conducted for CBN. 65% of the operators surveys carried CBN Cable Network where the majority of Form 3 cable systems in 1983 did not carry CBN Cable Network. There was confusion on the part of the cable operator evident in incorrect identification of the distant signals carried by the operator's cable system.

The survey did not relate to 1983. The operator was asked about distant signals his or her system currently imported, but no attempt was made to have the operator recall the distant signal carriage for 1983. Nor was any attempt made to ascertain whether the operator was an employee of the system in 1983.

The operator was not explained the distinction between network programming and nonnetwork programming, and no definitions were given for the program categories.

The design of the survey does not aid the Tribunal. To ask an operator whether a program type is important or unimportant, and then to ask whether that is somewhat or very (un)important; is to ask the operator for an opinion so vague as to be almost meaningless. The results of the survey gave all program types high ratings, but we disagree that the relative strength exercise performed by Dr. Virts of those high ratings which resulted in a figure of 7% for the Devotional Claimants bears any relationship to the allocation task before the Tribunal.

The Devotional Claimants cable subscriber survey had many of the same flaws. The subscriber questionaire did not refer to 1983, nor was any attempt made to ascertain whether the respondent subscribed to cable in 1983. The program categories were not defined. The definition for distant signals was incorrect, and there was evident confusion on the part of the subscribers, because 65% of them misidentified their distant signals.

In addition, Dr. Virts conceded that the sample was not projectable to the universe of cable subscribers. We also believe that there might be some bias in the sample, because all eight cable systems in the study carries CBN Satellite Network.

Most importantly, as in the cable operator survey, we do not see how we are aided by the use of the important-unimportant type of questioning.

The NAB Surveys

We conclude that the surveys conducted for NAB were adequate in design and methodology, and can be accorded some weight. However, they contain flaws which limit their use, and contain the conceptual drawbacks observed by the Program Suppliers witnesses.

NAB properly attempted to reach the appropriate respondent at the cable system, and terminated the interview if it could not. The questionnaire did relate back to 1983 and program definitions were given. All program types under consideration by the Tribunal were placed before the respondent.

We believe, however, that there probably existed confusion among the cable operators about the proper categorization of program types. In addition, we believe as we have stated in previous proceedings, that asking an operator to allocate $100 renders the task just an exercise and does not sufficiently focus the operator on the hard business decisions that he or she makes. We believe that NAB's practice to automatically accord PBS a zero valuation when the system did not, if fact, carry a PBS distant signal in 1983 was improper. We believe this mixes "attitude" with "behavior." Supposing a cable operator faces the reality of being able to import only 4 distant signals, if

his attitude were only on the measure of approximately 5% toward PBS, he or she would not carry a PBS signal. Therefore, we suspect that there are many operators who did not carry a distant PBS signal whose "attitudes" might be greater than zero but short of actual behavior, that were ignored in the survey to the detriment of PBS. The same is also true of NAB's treatment of the Canadian station category, except that, by law, cable operators below the 42nd parallel and more than 150 miles from the U.S./Canadian border cannot carry Canadian stations and could never convert their attitude into behavior. Therefore, the detriment to the Canadian Claimants is less.

Regarding the NAB subscriber survey, we have reservations about the response rate. We also believe that male-female ratio improper. We are most concerned about subscriber confusion. We believe that giving some definitions is better than nothing at all, but we believe that the particular set of definitions given by NAB led to a considerable amount of guessing by the respondent. We also find support in the subscriber study for our belief that results of surveys are not directly translatable to Tribunal action. Cable subscribers were willing to spend $4 a month to receive distant signals according to the NAB study—which would lead to a cable rate of 14 to 15 times what it is now.

The Joint Sports Claimants Survey. We conclude that the survey conducted for the Joint Sports Claimants was adequate in design and methodology and can be accorded some weight. However, like the NAB survey, the JSC survey contains flaws.

JSC properly contacted out the interviewing so that the interviewer and the interviewee were unaware for whom the survey was being conducted. The response rate was high. The survey was designed to ascertain the proper individual. The allocation task was to divide 100%, not $100. The cable operator was asked specifically about the value of the program in terms of subscriber attraction and retention. No confusion existed for the operator regarding which distant signals were being discussed, because the signals were identified. However, the questionnaire did not include devotional programming or Canadian programming. Further, no definitions were given for the program categories. In addition, as in the case with NAB's surveys, operators who did not carry PBS were accorded an automatic 0%, whereas operators who did carry PBS were not accorded any automatic percentages.

Conclusions—The Program Suppliers

In the 1978 proceeding, we recognized the harm incurred by program suppliers, "Evidence was offered to show the difficulties and risks to program production that were substantially increased by distant signal carriage, and which effectively undermine the value to a broadcast station of a syndicated program in an area receiving the same program by distant signal carriage." 45 FR 63037. But in the 1979 proceeding, the Tribunal could not proceed from that general proposition to a precise measurement of harm, and rejected the Nielsen data as that measurement, stating. "Even if viewership of distant signal programs is an appropriate measure of harm, it would be change in audience, not absolute audience levels, which would have to be considered." 47 FR 9892. Again, in this 1983 proceeding, we accept the testimony of Mr. Valenti, and have accorded the Program Suppliers a credit for harm, but have found nothing in the record to show any hard figures as to the degree of harm incurred.

Regarding benefit, the record is consistent that movie packages and to a lesser degree, syndicated series, are attractive to operators and subscribers and are a key reason for importing a distant signal. Cable operators testifying on behalf of every claimant group have granted movies and series a large place in their programming decisions. The Nielsen data gives the category 76.35%; the Sport survey gives the category 58.8%; the NBA operator survey gives the category 50.86%; and the NAB subscriber survey gives the category 43.2%.

The marketplace value of movies continues to remain high in 1983 because it is the attractiveness of the movie packages which provides the distant signals with the marginal value to the cable operator motivating the operator to import the signal. The marketplace value of some syndicated series, to the extent they are already available from local signals, is less than for movies. This is an observation we made in the 1979 proceeding and we find record evidence again in this proceeding supporting it. Time, a secondary factor, is relevant to the extent it shows the supply of programs and the willingness of a broadcaster to apportion his or her day with that type of programming. In time, the Program Suppliers were on distant signals 61%.

The Tribunal has determined that the above factors have established a zone of reasonableness for determining an award. The previous determination gave Program Suppliers 69.2982% of the fund. We are reducing that allocation to 67.1% of the fund, giving less credit than we have in the past to the marketplace value of syndicated series, and allocating that difference to other claimant groups who by improved evidence or changed circumstances have shown greater entitlement.

The Joint Sport Claimants

In the 1978 proceeding, the Tribunal noted "the ephemeral quality of sports telecasts" and the legislative history of the Copyright Act which mainfest a special concern by Congress for the harm which may be caused to professional sporting leagues by secondary transmissions. 45 FR 63038. In this proceeding, we accept the assertion of attractive sports games harms the sports league's equal interest in maintaining the value of the less attractive sports games—a copyright in which all teams share—but as in the case of the Program Suppliers, no quantification of this harm was offered.

The Tribunal has in each proceeding consistently agreed with Joint Sports that the Nielsen data underrates sports. Sharp differences appear when the Nielsen data and the attitudinal data are compared for sports: Nielsen—10.01%; JSC's survey—36.1%; NAB's operator survey—35.66%; NAB's subscriber survey—25.4%. Sharp differences also appear from the enthusiasm with which every cable operator who has appeared before the Tribunal has spoken about a "10%" Nielsen program category. If the arguments of the parties who are not in agreement with the mere following of the Nielsen numbers are true for any claimant group, it is sports.

In the 1978 proceeding, the Tribunal awarded the sports category, 12%. In the 1979 proceeding, that award was raised to 15%. However, in the 1980 proceeding, the Tribunal rejected any further upward adjustment for sports. The Tribunal at that time was weighing the change in circumstances between 1979 and 1980. We stated, "Joint Sports' claim for an increased royalty share relied heavily upon the increase and proliferation of satellite retransmitted distant signals between 1979 and 1980. The Tribunal concurs that such a change in circumstances did take place; the Tribunal also does not dispute that sports are highly popular on these signals, in particular WTBS, WGN, and WOR. The Tribunal, however, was unpersuaded that there was any causal link between sports programming and retransmitted signals. Sports testimony and exhibits were convincing as to the increase in satellite retransmission and

as to the popularity of sports, but not as to its linkage." 48 FR 9565.

In reviewing the evidence in this proceeding, we believe that the linkage has been established, and that the change in circumstances have been greater for the period 1980–1983 than for 1979–1980. The cable systems do advertise their carriage of the superstations to a large degree based on their sports programming; testimony from cable operators show a consistent desire for flagship stations. Still, it is not a one-to-one linkage. However, sports has shown improvement in all areas of measuring benefit and marketplace—in the surveys, in the Nielsen data—and continues to hold up well in expert testimony, sufficiently to the point where it has persuaded us that our reservations in the 1980 proceeding about the strength of their showing has been lessened.

We note, however, that Dr. Besen's view about the critical role supply plays in the marketplace equation probably affects sports more than most claimant groups. The attitudinal surveys do not ask operators or subscribers to take into account the limit on the supply of major league and college games, so that we believe the respondents, free from that consideration, express a desire for more sports programming than available. The Nielsen data, which is made up of the actual supply of sports programs, and the actual viewing behavior, continues to provide a ballast for what might be a higher consideration for sports. Therefore, we have concluded to raise the allocation for Sports from the previous 14.8496% to 16.35%.

PBS

PBS had testified in earlier proceedings that in certain western areas of the country, importation of a distant PBS signal precludes the development of a local PBS station. In this proceeding, PBS president Bruce Christensen attributed some harm to a misconception by some cable subscribers that their subscription to cable obviates the need to support PBS, but PBS, in its proposed findings, acknowledged that PBS strives for wide dissemination of its programs and did not urge any finding of specific harm to the copyright owners of their programs. We conclude that any harm to PBS is negligible. It is not a consideration in our allocation.

PBS was carried on 24% of all Form 3 cable systems. Their percentage of instances of carriage was approximately 7.6%, for Form 3 systems, and 7.3% for Form 2 systems. We have, for the first time, Nielsen viewing data, which projects approximately 4.6% viewing of PBS stations.

In the 1979 proceeding, the Tribunal noted that PBS was carried in about 10% of all instances of carriage, but discounted the award to PBS to 5.25% because of the limited weight the Tribunal gives to total number of program hours, and because of record evidence establishing substantial duplication of PBS programming on local stations. In the 1980 proceeding, the Tribunal rejected PBS' re-argument of the duplication issue and found that circumstances had not materially changed.

In this proceeding, some parties have argued that PBS' carriage has declined since 1979–1980 from approximately 9–10% to just under 8% and PBS' award should be similarly lowered. On the other hand, PBS has asked the Tribunal to reconsider the duplication issue.

Having taken another look at the issue, we have modified our views about duplication as it relates to PBS. The basic question of duplication goes to whether it is reasonable to assume that a cable operator is importing a distant signal because of the marginal value of a type of programming, when that same program is already available from local signals and/or non-broadcast programming services. Generally, lacking any other evidence, the Tribunal has discounted several claimant groups for duplication. However, in the case of PBS, the doubt is somewhat removed regarding the cable operator's attitude toward the marginal value of PBS because PBS occupies the entire broadcast signal. Each time a cable operator chooses to import a PBS signal, even if it is already carried locally, the operator has made his or her desire known. In 1983, approximately 50% of PBS' carriage occurred when the cable operator already had a local PBS signal. PBS' argument concerning the value of an additional PBS signal has been confirmed by statistics, and, by the personal testimony of cable operators and Mr. Christensen.

We therefore conclude that any diminution in the value of PBS signals evidenced by less carriage in 1983 is offset by our readjustment of the discount for duplication. We also consider the new evidence concerning PBS—the Nielsen data, and the attitudinal surveys—which must be adjusted upward for their methodological bias against PBS—center the zone of reasonableness for PBS around the same allocation that they were awarded in 1982. Consequently, we have allocated to PBS 5.20%.

NAB

In the 1978 proceeding, the Tribunal found that there was no evidence that local broadcasters are harmed by cable carriage in distant markets of locally produced programs. This was not relitigated, and this continues to be our finding.

Additionally, in the 1978 proceeding, the Tribunal found no evidence that cable systems benefitted from their carriage of locally produced news and public affairs programs, a substantial sub-group of the locally produced program category. In the 1979 proceeding, we modified our view to give consideration to the benefit to cable operators and subscriber interest in station news and public affairs programming from nearby stations or from more distant stations in the same region. In the 1980 proceeding, we reaffirmed our previous findings for NAB, and continued to hold that station programming is only of marginal benefit to cable operators.

In this proceeding, we note that after all efforts made by NAB at correction of the Nielsen data, the figure for local programming for 1983 is approximately the same as for the 1980 data which, as mentioned, we discounted for lack of harm, and slight benefit. NAB argues that the key element to their relitigation of the question of benefit are the attitudinal studies conducted by the Joint Sports Claimants and NAB, which give NAB 12.8% and 13.3% respectively. The NAB subscriber survey gives NAB 17.1%.

We have already set forth the many reasons why even the best of the attitudinal surveys can only be given partial credit—respondent confusion, the recall problem, the question whether a twenty-minute exercise can be related to actual behavior, methodological flaws. Therefore, it is not necessary to reiterate why the Tribunal does not make the forward leap to full embracement of the attitudinal survey numbers. We do note, though, that there is a qualitative difference in the way the results of the surveys affect our analysis of sports and in the way they affect our analysis of NAB. For sports, the Tribunal had independent evidence corroborating Sports' argument that the value of sports had not been given its fullest consideration, so that the high ratings of sports in the attitudinal surveys only confirmed our other impressions of the record evidence. For local television broadcasters, we have evidence contradicting the attitudinal survey results, obtained over many proceedings from many different sources

that local programming's value had been adequately assessed in the 4.5% range.

We have concluded that the improvement of the reliability of the Nielsen data, due to the efforts of both MPAA and NAB, and the reduced credit which we can give to the results of the attitudinal studies permits the Tribunal to raise our allocation to U.S. television stations to 5%.

NAB relitigated the question of compilation of the broadcast day, and the local broadcasters' share to an award for radio. In the 1978 proceeding, the Tribunal rejected NAB's claim to any value for the local broadcasters' compilation of the broadcast day. In the 1980 proceeding, we reached the same conclusion stating, "cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion." 48 FR 9566 (1983). In this proceeding, NAB's witness Protter gave the Tribunal no new insight to modify our previously held views. In fact, he stated that a broadcast designs his broadcast day for the local market and not for the distant market, and as a broadcaster, how his scheduling would appeal to others outside of his market was not his concern. We continue to hold to our view that NAB's compilation claim has no value.

In the 1978 proceeding, the Tribunal found the record inadequate as to the carriage of distant signal commercial radio and its value. In the 1979 proceeding, the Tribunal included in the value of its award to the Music Claimants, some compensation for the use of music on distant signal radio, but found no evidence of the marketplace value or the benefit to cable operators of the remainder of the copyrightable interests on radio, and thus made no award to NAB for commercial radio. In the 1979 remand on this issue, we stated, "In reaching such a conclusion, the Tribunal relied more than customarily upon time-based considerations. Normally, the Tribunal has refrained from looking to time-based considerations as a justification for our decisions because of their failure to differentiate between the conditions in local broadcast markets and distant cable markets; but in the case of commercial radio, no other useful measurement standard was provided. The degree to which the broadcaster's share may also be strictly local in interest further clouds the value that may be attributable to non-music copyrighted programming. In our findings, we wished to declare that for radio, music is the proper recipient for whatever de minimis unquantifiable award there may be . . . (A)lthough we judged that such an award was justified, we were unable to quantify it and found it incalculable and extremely small." In the 1980 proceeding, the Tribunal reaffirmed its findings of the previous proceeding.

In this proceeding, NAB concentrated entirely on presenting evidence relating to one station—WFMT–FM, Chicago, Illinois. It presented no evidence on the nationwide carriage of radio stations. The breakdown between music and non-music on WFMT is 80–20, and its value, as far as we have considered it, is as a unique classical music station. Again, we hold that the value of commercial radio is entirely assignable to the Music category, and that any value to the carriage of distant signal radio outside of music is de minimis.

The Music Claimants

Music's share of the cable royalty fund was established by the Tribunal in the earlier proceedings at 4.25%, including an amount for commercial radio. We have referred to Music as one of the seven program types to be measured by the Tribunal, but Music prefers to be considered a program element, because it runs through all of the program types on distant broadcast signals. As a program element, it admits of almost no possible precise formula to determine its marketplace value, and the evidence offered by all the other parties has been conspicuous by their absence of proposed measuring rods for music.

Music did not offer any new evaluative measures, only urging the Tribunal to assess a greater contribution by music to the other program types than we have before, and to consider the changed circumstances of the rise of music videos. We accept that a new concept in programming occurred in the period between 1980 and 1983 and that there was more use of music in general, and we have made a slight upward adjustment to Music to 4.5%.

Devotional Claimants

In the 1979 proceeding, we stated that, "We regard as a fundmental distinction, the practice of [the Devotional Claimants] to buy time on television stations to broadcast their programs, while other syndicated programs are purchased by the stations . . . (C)able carriage may well benefit these claimants because the expanded carriage provides greater exposure and the potential of increased contributions from viewers." 47 FR 9897. The Tribunal further found no marketplace value for the programs of these claimants, and rejected the use of time based formulas, because they ignored market considerations and produced a distorted value of programming. We gave no award to the Devotional Claimants.

The Court of Appeals remanded the zero award to the Devotional Claimants for further consideration. On remand, the Tribunal modified its views on the special factors of the Devotional claim—the purchase of broadcast time, and certain perceived benefits to the claimants from cable retransmissions, resolving to give them less weight. It was this modification that was the basis of an award of 0.35% to the Devotional Claimants. The Tribunal gave the caveat that it expected further development of these issues in future proceedings. In addition, the Tribunal continued to find only minimal benefit of this program type to cable operators, "We do not find in the record any basis for concluding that cable operators chose distant signals because of devotional programming, nor have we been persuaded, based on this record, that cable operators welcome the inclusion of devotional programs on distant signals to balance the carriage of secular programs." 49 FR 20049.

In the 1980 proceeding, on remand, the Tribunal found no basis to view the entitlement of the Devotional Claimants more favorably than for 1979. The Tribunal continued to find a "negligible" marketplace value.

In the 1982 proceeding, the Tribunal determined to give "no weight" to the special factors, and in deciding to make a larger award to the Devotional Claimants gave weight to an attitudinal suvey of cable managers toward programming, as evidence of benefit, and a cable subscriber survey tending to show that obtaining access to devotional programming is a factor in the determination of some people to subscribe to cable televison.

In this proceeding, we reaffirm the position to which our previous decisions have led—that the consideration of the Devotional Claimants no longer includes the "special factors," but neither have the Devotional Claimants shown any harm.

In determining benefit, we have given no weight to the testimony of the two cable operators, Mr. Munn and Mr. Bosiger. It was clear from their testimony that although they may value devotional programming, in general, they did not necessarily assign any marginal value to the importation of additional devotional programming on distant signal above and beyond those programs already available locally and on non-broadcast programming services. Mr. Munn recognized a great degree of duplication in his area, and that the

main reason for the distant signals he chose was to bring in those stations familiar to his vacationers. Mr. Bosiger admitted that his subscribership wanted the two superstation signals which show far less devotional programming than the third under consideration.

We again reject any time-based formula, for, as we have said, they only serve to distort any marketplace analysis. We gave no credit to the Devotional surveys, and the Joint Sports survey omitted any valuation of devotional programming.

In making our award to the Devotional Claimants, we have taken into consideration the Nielsen data, their presence on specialty stations, and the attitudinal surveys. For reasons already stated, we can give only partial credit to the NAB attitudional surveys, mainly, we suspect, for the reason stated by Dr. Besen, that respondents were most likely thinking in terms of total value, and not in terms of marginal value. We continue to find that devotional programming has only slight marketplace value, but with the improvement in the showing that devotional programming could diversify the cable operator's offering to his or her subscribership, we have made a slight upward adjustment in the award from 1982 to 1.1%.

The Canadian Claimants

In the 1980 proceeding, the Tribunal found that there was no harm due to the retransmission of Canadian programming in the United States. The Canadian Claimants offered in this proceeding evidence on the amount of programming in the United States which they syndicated in 1983, and argue that sales of programs to the U.S. would have been more but for the availability of their programs via cable retransmissions to 2 million subscribers. We conclude that this argument does not state harm incurred by the Canadian Claimants, but for Program Suppliers. Indeed, Glen-Warren and the CBS are represented by the Program Suppliers in Phase I and harm as a factor for them has already been considered. We continue to find no harm to the Canadian Claimants.

Regarding benefit and marketplace value, we note that carriage of Canadian broadcast signals accounted for 2.1% of the instances of carriage in 1983. Yet, Canadian signals are not entirely Canadian-content. Canadian signals are composed of a majority of Canadian-content programming, the rest being U.S. network and non-network syndicated programming, and baseball and hockey represented here by the Joint Sports Claimants. The proper assessment of the value of the Canadian claim is problematic. There are no Nielsen data for Canadian stations which would aid us in breaking down the relative appeal of U.S. programs, sports and Canadian programs on Canadian stations. We have the opinions of cable operators for the Program Suppliers, the Joint Sports Claimants, and the Devotional Claimants which we believe were creditable, that sports, most notably hockey, was the reason they imported Canadian stations. The attitudinal surveys yielded limited results. The Joint Sports survey did not include Canadian stations.

The NAB surveys rated Canadian signals very low—0.4% and 0.7%. We have noted a bias in them as in the case of PBS, but it is a slight bias due to the fact that Canadian signals cannot be imported south of 150 miles below the U.S./Canadian border and the 42nd parallel. As stated earlier, we gave no weight to the Canadian survey as a means toward translating opinion to a percentage allocation. We believe the survey was flawed because it led the respondents to give very favorable impressions, and it did not survey those who did not carry Canadian stations, or ask the respondents to compare program types on the Canadian signals.

In the past the Tribunal has credited the appeal of Canadian-content programming in English and that of French-language programming as 0.75% of the fund. We note and appreciate that Canadian programming is different and uniques from American programming, but a nexus to marketplace value is still needed that is greater than that already recognized and reflected in past awards. We conclude that the evidence presented did not improve the record and we award the Canadian claimants 0.75% for 1983.

Conclusions of Law—3.75% Fund

The Tribunal concludes that the factual and legal circumstances underlying the distant carriage of broadcast stations at the 3.75% rate are sufficiently different from the facts and law underlying the distant carriage of broadcast stations at the statutory rate to justify creating separate fund and making different allocations from those made for the basic fund.

We recognize that much of the testimony and evidence applied to both basic and 3.75% distant signal carriage, and therefore we have looked to our allocations in the basic fund as our starting off point, and have viewed the 3.75% fund from the prespective of how does it modify our view of the basic fund.

We conclude that noncommercial educational stations could be carried on an unlimited basis prior to FCC deregulation, and that no cable operator paid the 3.75% rate to carry any noncommercial stations. For this reason, we have concluded that PBS shall receive no allocation from the 3.75% fund.

Second, we conclude that specialty stations could also be carried on an unlimited basis prior to FCC deregulation, and so to the extent that specialty stations carry devotional programs, and French-language programs, the award to the Devotional Claimants and the Canadian Claimants should be diminished in the 3.75% fund.

Regarding the Devotional Claimants, we believe a further diminution is warranted for any credit given the Devotional Claimants in the basic fund for the benefit to cable operators in offering a diverse program package. We believe that when it comes to the importations of a 3.75% rate station, a cost substantially higher than the statutory rate stations, the primary considerations are movies, sports, and syndicated series. Therefore, in the 3.75% fund, we have chosen to hew much closer to the Nielsen data. Consequently, we have concluded that the Devotional Claimants shall receive an award of 0.75%.

Regarding the Canadian stations, the evidence shows that in the first accounting period of 1983, only 3 Canadian stations were identified by cable operators as the 3.75% station, and in the second accounting period of 1983, only 2 Canadian stations were so identified. We believe, however, that Joint Sports is correct when it asserts that some across-the-board allocation to other distant signals carried by the same operator at the statutory rate who has the option of free substitution should be made. However, we feel the Canadian Claimants went too far in claiming a share of the fund each time a system paid 3.75% and carried a Canadian signal, because many of those instances did not include the possibility of free substitution. Accordingly, we have given the Canadian Claimants a small credit for more distant signal carriage than the amount identified by cable operators and we award the Canadian Claimants 0.25%.

We conclude that the awards to Music and NAB should be the same as the awards made for the basic fund. We note first of all that Music has never presented any claim that their contribution to the works on the 3.75% stations were somehow different than on stations carried at the statutory rate, and can see no justification for treating them differently. We also note that for

NAB, the Nielsen data drops noticeably for stations carried at 3.75%, but without the proffered corrections to that data, we have not chosen to penalize them. We also observe no difference in their attitudinal data for 3.75% stations.

For the Program Suppliers and the Joint Sports Claimants, we find that the Nielsen data accords them 92.6% of the viewing share, and we have accorded greater weight to the element of harm in the 3.75% fund than in the basic fund based upon our findings in the 1982 cable copyright rate adjustment hearings that movies, syndicated series, and sports were primarily harmed by the further penetration of imported distant signals. Accordingly, we have raised the allocations for the Program Suppliers and Joint Sports to 72.0 and 17.5%, respectively.

Conclusions—The Syndex Fund

After the Supreme Court in *Fortnightly* found no copyright liability for cable retransmissions, the pressure for some form of copyright relief fell on Congress and the FCC. While the power to shape copyright law belonged solely to Congress, there were administrative actions which the FCC could take. The FCC chose to strike a balance between permitted signals and nonpermitted signals. The FCC imposed a limit on the number of distant signals that could be imported, and in the case of particular programs which harmed the program syndicators' marketing abilities, it gave to the broadcast station (and for pre-clearance, the program supplier) the power to prevent the performance of those works. However, the balance was not complete. It was still up to Congress to mandate copyright payments for the permitted signals. The 1976 Copyright Act did this. It required copyright payments for FCC-permitted performances and authorized infringement suits for performances of works which the FCC did not permit.

Within weeks of the passage of the Act, the FCC proposed a full review of the syndicated exclusivity rules. In 1979, the FCC found that there was little regulatory justification, apart from copyright considerations, for giving a broadcast station the power to prevent the performance of works on a cable system, and proposed to delete the rules. The deletion of the syndicated exclusivity rules meant that there would be more performances of works on cable systems. The Tribunal, accordingly, made an upward adjustment in the copyright rates.

In the first distribution proceeding, the Tribunal found that for permitted signals, the legislative history of the Act made it clear that compulsory license royalties should go to the creators of those works, not to the broadcast stations airing them except when the broadcast stations are themselves the creator of those works. Our determination was affirmed by the Court of Appeals.

From March 31, 1972 to June 25, 1981, the FCC made it possible for a broadcast station to obtain the right to prevent certain performances of a work. After January 1, 1978, the Act made the performances of nonpermitted works actionable for infringement, and gave to broadcast stations the right to sue for infringement for nonpermitted works if they had obtained the pertinent right from the copyright owner. It is reasonable to believe, therefore, that if, between January 1, 1978 and June 25, 1981, a cable operator did not honor a broadcast station's notice to refrain from retransmitting a certain work and aired a nonpermitted performance, a station might have been able to sue for infringement, although cases have not been reported to us on that point.

However, after June 25, 1981, the broadcast stations lost the right to prevent performances. The performances became permitted. The *Hubbard* case shows that regardless of the wording of the contract between the program supplier and the broadcast station, the defense of compulsory license is absolute. The broadcast station cannot become an exclusive licensee in its market against permitted signals, and cannot prevail in a suit for infringement. Section 501(b) only authorizes an owner of an exclusive right to sue for infringement to the extent of that particular right. There is no right that anyone can obtain against the occurrence of a permitted performance; any contract clause the station might have had became moot.

In summary, we conclude that: (1) Section 111 was intended to effect a payment by cable systems for signals which the FCC permitted to copyright owners; (2) broadcast stations can obtain exclusive rights against nonpermitted signals and may sue for infringement under Section 501; (3) but broadcast stations can not obtain exclusive rights against permitted signals; thus defeating their claim to be the relevant copyright owner for copyright royalty distribution purposes.

By this analysis, we believe it is unnecessary to inspect the contracts between supplier and station.[1] NAB made an assumption in its pleading that the syndicated exclusivity fund derives from the number of syndicated exclusivity contracts between program suppliers and stations in 1983, and that as these number of contracts decline and finally disappear in subsequent years due to the impossibility of contracting for exclusivity against permitted signals, the syndicated exclusivity surcharge should similarly decline and disappear. This is not true. The surcharge does not derive from the contracts; it derives from the greater number of performances of works. Not is it necessary to address Prof. Goldstein's reservations about geographic exclusivity being in many instances impossible to achieve because of incoming signals from beyond the local market. That would be an argument to be considered in an infringement suit.

NAB also argues that broadcast stations paid for exclusivity against cable retransmissions, that they incurred the harm, and that equitably, they should be made whole. We only note that the broadcast industry was on notice from 1976 that the syndicated exclusivity rules were subject to change. The stations were also on notice by the consistent representation of the industries in the legislative history and the rulings of the Tribunal that royalties for permitted performances would be awarded to the creators of the works. We can only assume that this awareness was reflected in contract negotiations and accommodations, to the extent necessary, were made accordingly.

We conclude, therefore, that there are only two claimant categories which have shown their entitlement in this record to the royalties derived from the syndicated exclusivity fund: the Program Suppliers and the Music Claimants. The Joint Sports Claimants are not entitled because sports programming was not a part of the syndicated exclusivity rules and are still covered by FCC regulation. PBS is not entitled because the syndicated exclusivity rules did not apply to noncommercial stations. The Devotional Claimants are not entitled because the record shows that as a practice, suppliers of devotional programming did not syndicate on an exclusive basis. The Canadian Claimants are not entitled because the syndicated exclusivity rules did not apply to foreign stations. In determining the proper allocation between the Program Suppliers and the Music Claimants, we have chosen to follow the percentage awarded to Music in the basic and 3.75% funds, the record being

[1] In any event, NAB did not place into the record any contracts.

devoid of any reasonable basis to make a distinction among the three funds regarding the contribution and value of music. Therefore, we shall allocate 95.5% of the syndex fund to the Program Suppliers and 4.5% to the Music Claimants.

PHASE II

Findings of Fact

On January 29, 1986, Multimedia filed a motion with the Tribunal to establish certain procedures and requirements for Phase II to assure that all works represented by Phase II parties were, in fact, copyrighted works and not in the public domain. While rejecting some parts of Multimedia's request as unduly burdensome and coming late in the proceeding, the Tribunal did agree with Multimedia's overall objective seeking to establish a way in which a good faith examination of and challenge to copyright ownership could be effected. The Tribunal ordered each Phase II party to list every title of every program underlying its Phase II claim. The Tribunal further ordered that if any party wished to challenge any of the titles, it should file such a challenge before the close of the direct case, supported by all relevant documentation. The Tribunal would then consider whether the presumption of ownership had been rebutted and whether to require more information from the other parties. The Tribunal also expressed an intention to review its procedures for further proceedings. *Order* dated February 12, 1986.

MPAA's Phase II claim. MPAA urged the Tribunal to make its Phase II allocations strictly according to the results of its Nielsen study. Cooper, MPAA Ph. II Direct, pp. 1–4. For Phase I, MPAA had commissioned a special Nielsen study with respect to the viewing of individual programs via distant signals in cable households. Based on Nielsen's six-cycle data, the total number of household viewing hours attributed to approximately 7,000 syndicated series, movies, and specials, was 2,351,899,372. *Id.* p. 2.

MPAA listed 6,008 titles as belonging to its claimant group. MPAA Ph. II Ex. 3. MPAA employed an internal verification procedure in which each of its member claimants provided MPAA a notarized certification attesting that the claimant was entitled to receive cable copyright royalties by virtue of being either the copyright owner or the authorized agent of the copyright owner for each claimed title. Cooper, MPAA Ph. II Direct, p. 3; MPAA Ph. II Ex. 4. Household viewing hours attributable to the 6,008 titles amounted to 2,217,169,720. Cooper, MPAA Ph. II Direct, p. 2.

Multimedia listed its shows as follows: *Donahue*, 260 hours of shows, consisting of 240 original programs and 20 repeats in 1983; *Young Peoples' Specials*, one-half hour children's features; Country Music Specials, two-hour, prime time programs; *The Bob Braun Show*, 260 hours of talk/variety programs; *Nashville On the Road/Music City U.S.A.*, 26 half-hour country music programs; *Pop! Goes the Country*, 26 half-hour country music programs; *Austin City Limits*, 26 half-hour country music shows; *Georgia Farm Monitor*, a weekly half-hour information program; four coaches programs and one sports special. Thrall, Multimedia Ph. II Direct, p. 4. MPAA performed an analysis of Multimedia's programs and found they accounted for 7,998,202 viewing hours in their Nielsen study. MPAA Ph. II Direct Ex. 5.

NAB listed 52 broadcast stations which produced and syndicated 120 programs, 58 of which were series, 62 of which were specials. NAB Ex. 11–2. MPAA performed a Nielsen study analysis of nine series and one movie (*INN Midday News and INN Evening News, Wall Street Journal Report, From the Editor's Desk, Agronsky & Company, Clue You In, Goodby to M*A*S*H, Unofficial Guide to the Superbowl, March of the Wooden Soldiers*, and *The Dance Show*). This yielded a total of 9,954,010 household viewing hours. Cooper, MPAA Ph. II Rebuttal, pp. 8–9.

The results, therefore, of MPAA's breakdown of the Nielsen data were:

	Viewing hours	Percent
MPAA	2,217,169,720	94.271
NAB	9,954,010	0.423
Multimedia	7,998,202	0.340
Unclaimed titles	116,777,440	4.965
Total	2,351,899,372	

If the unclaimed titles are eliminated from the analysis, the relative strength in the Nielsen study of the three Phase II parties, according to MPAA, would be as follows:

	Viewing hours	Percent
MPAA	2,217,169,720	99.197
NAB	9,954,010	0.445
Multimedia	7,998,202	0.358
Total	2,235,121,932	

Criticism of MPAA's methodology by Multimedia and NAB. Multimedia asserted that although the Nielsen study may provide a valid guide for overall viewership of syndicated programming versus sports, local, devotional programming, etc., it is suited to provide an accurate assessment of indivdiual program shares. Multimedia Proposed Findings, p. 19. Multimedia witness Richard Thrall observed that as the Nielsen study focus narrows, the effect of sampling error on the object of study (i.e., the individual program) is exacerbated. Ph. II Tr. 359–360. MPAA witness Allen Cooper conceded that the study's reliability varies from program to program. Ph. II Tr. 148.

Multimedia questioned the selection of sample stations regarding its most important Phase II program, *Donahue*. *Donahue* was carried on 173 stations in November, 1983, of which only 21 (or 12 percent) were included in MPAA's Nielsen sample. In the January partial sweep, only six stations (or 3 percent) carrying *Donahue* were included. Multimedia Ex. 19. Multimedia found, on the other hand, that 10 of 39 stations (25 percent) carrying *The Merv Show* were included in the MPAA sample. *Id.* Multimedia disagrees that the Nielsen result giving *The Mery Show* more cable viewership than *Donahue* is accurate. Ph. II Tr. 519. In response, MPAA accounted for any disparate treatment of *Donahue* and *The Merv Show* as resulting from *Donahue* being carried 90% by network affiliates which are carried less by cable systems, and *The Merv Show* being carried more on independent stations. Ph. II Tr. 420.

NAB criticized MPAA's decision to study only 9 series and one movie in NAB's claim. MPAA did not report the viewing of *Elvira*, believing it was not properly within NAB's claim, when in actuality NAB has an interest in the "wrap around" portions of the series. Cooper, MPAA Ph. II Rebuttal, p. 6; Affidavit of Walter Baker. MPAA made an assumption that parades and telethons and programs of that nature were not to be included as syndicated series in their study, so therefore Nielsen never made a study of the viewing of *The Kentucky Derby Parade*. Ph. II Tr. 603. MPAA made similar assumptions regarding political programs, and syndicated minor sports programs. MPAA also attempted no measurement of programs on specialty stations. Ph. II Tr. 609, 612, 621. Therefore, MPAA did not include as syndicated series in their Nielsen study such programs as *Barry Goldwater I and II, Tribuna Publica*, high school sports and coaches shows, among others. Cooper, MPAA Ph. II Rebuttal, p. 6.

MPAA also did not report the viewing for NAB-represented programs broadcast on commonly-owned stations, believing that they should not qualify as syndicated series, since there was no

exchange of money between stations, and believing that they are primarily a device by licensees to divide costs of production. Ph. II Tr. 583–4. On cross-examination, Cooper conceded that MPAA did count the viewing for some MPAA-represented programs involving syndication on commonly-owned stations. Ph. II Tr. 585, 648.

Multimedia's Phase II claim. Multimedia witness Richard Thrall testified that Multimedia's claimed programs have significant marketplace value. Thrall, Multimedia Direct, pp. 4–9. Thrall noted that *Donahue* consisted in 1983 of 240 (out of 260) original productions, rather than repeats or reruns. *Id.*, p. 5. *Donahue* is a widely carried, popular and informative news/interview programs. Ph. II Tr. 346, 397. Multimedia's *Young People's Specials* is educational and continued to have substantial syndicated activity in 1983. Thrall, Multimedia Direct, p. 7. Multimedia continued in 1983 to be a significant syndicator of country music series and specials. *Id.*, p. 8.

Multimedia did not argue, however, that circumstances had significantly changed with respect to their claims for 1983 as compared with 1982. Certain additions and deletions of some country music series in Multimedia's claim were essentially a "wash." Ph. II Tr. 174–175; Multimedia Proposed Findings, p. 10.

Multimedia argued that MPAA's share of Phase II should be reduced because of the purported effect of direct compensation to program suppliers by WTBS. *Id.*, p. 28. Approximately 25 percent of the viewing hours for programs claimed by MPAA are attributable to programs broadcast by WTBS. Ph. II Tr. 160–161. Multimedia introduced an affidavit of Paul D. Beckham, Vice President and Controller of Turner Broadcasting Systems, filed in *Hubbard, supra*, which stated that license fees paid by WTBS for its programming had increased from $3.231,728 in 1979 to $13,569,777 in 1983. Multimedia Ex. 15. Another affidavit introduced in *Hubbard* signed by Charles Shultz, Vice President of Business Affairs for WTBS, listed increases in license fees for 22 series and 9 movie packages over the previous ten years and for years beyond 1983. Multimedia Ex. 16. However, on questioning from the Tribunal about prices in general for syndicated programs in the period 1974 and 1981, Thrall conceded that there were big increases for all stations during those years. Ph. II Tr. 473. Thrall did not have any comparable figures for other broadcast markets, or for other superstations. Ph. II Tr. 476. Thrall could not establish how much of the increases paid by WTBS were the result of higher program costs in the television market, and how much, if any, related to WTBS' greater carriage by cable systems. Ph. II Tr. 476–77.

Multimedia also argues that, in any event MPAA's award should be limited to the 94.27% Nielsen share it had established, and that anything above it would constitute a windfall to MPAA. Multimedia Proposed Findings, p. 35.

Challenge to copyright status of MPAA's works. Multimedia introduced certain certificates from the Copyright Office to raise a challenge to the copyright status of some works represented in MPAA's claim. Multimedia Exs. 2X–7X. Exhibit 2X was a Copyright Office certification that the copyright registration of five episodes of *Popeye* owned by Paramount Pictures Corp. could not be found, and that 17 episodes owned by Paramount Pictures Corp. were registered, but that no renewal registration could be found. Multimedia Ex. 2X. In response, however, MPAA witness Cooper stated that the episodes of *Popeye* in MPAA's Phase II claim were those episodes owned either by King Features or MGM–UA, not Paramount. Ph. II Tr. 215.

In Exhibit 3X, the Copyright Office certified that for 14 episodes of the *Lone Ranger*, no renewal registration could be found. Multimedia Ex. 3X. Cooper did not offer any explanation. However, he noted that there were 182 half-hour *Lone Ranger* episodes in the MPAA claim, and he did not know whether the 14 episodes in question were included in them. Ph. II Tr. 223.

Exhibit 4X purported to show 45 titles of *The L'il Rascals* which were registered during the early 1920's, but not renewed, and two in which no registration was found. Multimedia Ex. 4X. Cooper responded that MPAA only represented *Our Gang Comedy*, and that they were movies made after sound had been introduced. Tr. Ph. II Tr. 229.

In Exhibit 5X, the Copyright Office certified no copyright registration for the movie *Cast a Dark Shadow* (1955). In Exhibit 6X, the Copyright Office certified that *The Strange Love of Martha Ivers* (1946) was not registered, and that no renewal registration could be found for *My Dear Secretary* (1948), *Nicholas Nickleby* (1947), *The Perils of Pauline* (1947), *Rudyard Kipling's Jungle Book* (1942), *Tarzan's Revenge* (1938), and *The Thirty Nine Steps* (1935). In Exhibit 7X, the Copyright Office certified that no renewal registration could be found for *The Snows of Kilimanjaro* (1952). Multimedia Exs. 5X, 6X, 7X.

Cooper responded that *Nicholas Nickleby* had been culled from the list of 7,000 Phase I titles and did not appear on the list of 6,008 titles constituting MPAA's Phase II claim. Ph. II Tr. 234–237. Cooper also responded that *The Thirty Nine Steps* was properly represented by Janus Films, Inc. based upon a license from the copyright owner of the underlying work. Ph. II Tr. 238–240. The Tribunal subsequently agreed with MPAA's position on *The Thirty Nine Steps. Order*, dated April 4, 1986.

Cooper did not respond regarding the other titles. Ph. II Tr. 231–241. The Neilsen viewing data for those titles were as follows:

	Viewing hours
My Dear Secretary	343,948
The Perils of Pauline	265,008
Cast a Dark Shadow	264,618
Rudyard Kipling's Jungle Book	254,538
The Snows of Kilimanjaro	131,501
Tarzan's Revenge	130,494
The Strange Love of Martha Ivers	8,382
Total	1,398,489

MPAA Ph. II Direct Ex. 3.

If those seven movie titles were deleted from MPAA's claim, the relative strength in the Nielsen data would be:

	Viewing hours	Percent
MPAA	2,215,771,231	99.196
NAB	9,954,010	0.446
Multimedia	7,998,202	0.358
Total	2,233,723,443	

NAB's Phase II claim. NAB incorporated into the record of this proceeding testimony regarding the marketplace value and benefit of station-produced syndicated programs from the 1979 and 1981 Phase II proceedings, but offered no new evidence on these points. NAB Phase II Statement. NAB argued that it had strengthened its claim in terms of total number of works it represents. In 1981, it represented 44 broadcast stations, 85 syndicated programs of which 19 were syndicated series. In this proceeding, it represented 52 stations, syndicating 120 programs of which 58 were series. 1981 NAB Ex. CT/81–F; NAB Ex. II–2. However, NAB offered no evidence regarding the marketplace value of these additional works.

3.75% Fund and Syndex Fund

Multimedia listed the works it represents on those stations which were carried at a 3.75% rate by at least one cable system. Multimedia Ex. 17. No

other evidence was submitted on 3.75% carriage.

In 1978, when *Donahue* was carried live on WGN, station WOTV, Grand Rapids, Michigan had requested General Electric Cablevision Corporation and Muskegon Cable TV to black out their showing of *Donahue* on WGN in the Grand Rapids market pursuant to the then-existing syndicated exclusivity rules. The cable systems refused because WGN's *Donahue* was a live presentation, and Section 76.5(p) of the FCC's rules excluded live presentations from the definition of syndicated programs. The FCC agreed with the cable systems' position and would not grant WOTV any special relief. *Manhattan Cable Television, Inc.*, 79 F.C.C. 2d 24 (1979).

In 1983, *Donahue* was broadcast live on WBBM, Chicago, Illinois, and tapes were distributed to about 172 stations on a five week "bicycle." Thrall, Multimedia Direct, p. 5; Multimedia Ex. 19. WBBM is a network-affiliated station. It was carried by 13 cable systems on a distant signal basis in the second half of 1983. DC Ex. 7B. In 4 instances, it was paid for by the cable systems at the 3.75% rate. DC Ex. 11B. Payment of the 3.75% rate and the syndicated exclusivity surcharge are mutually exclusive. The surcharge is paid by cable systems in the top 100 markets for the stations which they carried after March 31, 1972 and before June 24, 1981. The 3.75% rate is paid for signals carried after June 24, 1981. 37 CFR 308.2 (c) and (d). No evidence was introduced whether the other nine cable systems were in the top 100 television markets or carried WBBM after March 31, 1972 and before June 24, 1981.

Conclusions of Law—Phase II

The Tribunal concludes that no change in the Phase II awards from the 1982 proceeding has been justified by the presentations of either MPAA, Multimedia or NAB.

MPAA relitigated the Tribunal's previously stated position—that while the Nielsen viewing data are reliable and can be accorded substantial weight, the Tribunal does not rely on the data as the sole means of making its royalty distribution. MPAA argued that its ability to continue to achieve a high degree of settlements within its group could be weakened if the Tribunal's award to non-settling claimants deviated significantly from the shares they would receive as MPAA-represented claimants. We repeat what we said in the 1979 proceeding, "The Tribunal welcomes voluntary agreements, however, when a Phase II case is presented, the Tribunal has the task of deciding the issues on the basis of the evidence before us, and the private agreement reached by parties in voluntary settlements cannot substitute for the Tribunal's judgment." 47 FR 9895.

Further we agree with some of the criticisms of the Nielsen methodology. Its overall reliability may be somewhat less when the focus in on individual programs. We are also not in accord with MPAA's definition of what is a syndicated program. We find MPAA's decision not to measure syndicated parades, political programs, minor sports programs, and specialty station programs arbitrary. Definitional problems, to the extent they exist, should be referred to the Tribunal, as was the case with wrestling programs. We would also have liked to look at the data regarding syndication on commonly-owned stations. To the degree that MPAA believes either that program distributed among commonly-owned stations are not really syndicated programs or that the weight they should be given by the Tribunal should be less than for other programs, these are matters to be argued before the Tribunal and not simply to be pre-determined by MPAA. For all these reasons, we believe that MPAA's Nielsen data somewhat underrated Multimedia and NAB's claims.

We also believe that the Nielsen data does not include all the criteria upon which the Tribunal bases its judgment. We have given credit in the past to the appeal of Multimedia's programs, the avidity of their viewership, and that their programs' value are enhanced by the substantial number of first-run productions as against repeats or reruns. We have also given credit to NAB's programs for their regional appeal.

Multimedia and NAB argued for increased awards, but their showings were lacking. Multimedia acknowledged there were no changed circumstances with regard to its claim since 1982, and it could not show any marketplace value for its works above and beyond the credit already reflected in its previous 1% award. NAB's sole argument for changed circumstances was a list of more works than it listed the last time it was a Phase II litigant, 1981. However, it made a minimal effort to establish the marketplace value for these programs.

Multimedia made three efforts to improve its relative position vis-a-vis MPAA. It argued that WTBS has already paid program suppliers on the basis of its being a superstation and therefore, any distribution from the Tribunal would be a form of double compensation. Its efforts at this argument fell short. Multimedia could only establish that WTBS' license fees have risen considerably. It could not make the necessary nexus that these increases were due to WTBS' special position in the cable distant signal market. Far more of a showing would be necessary to develop Multimedia's argument.

Multimedia's argument that MPAA had shown at most an entitlement to 94.27% of the Phase II fund, because it had only shown a 94.27% Nielsen share, is not correct. In Phase II, the Tribunal only attempts to appraise the relative worth of the works represented by the claimants before it. In making such an assessment, we eliminated from consideration the Nielsen data for unclaimed works, and arrived at a new "starting off point" (MPAA—99.177%, NAB—0.445%, Multimedia—0.358%). We then made our comparative analysis based on the entire record, as we have done in every distribution proceeding. *See*, 47 FR 9879.

Multimedia also argued that some of MPAA's claim consisted of works in the public domain. We agree with MPAA's explanations regarding Multimedia's challenges to *Popeye, The L'il Rascals/ Our Gang Comedy, Nicholas Nickleby,* and *The Thirty Nine Steps.* Since MPAA offered no explanation of 14 episodes of *The Lone Ranger* and seven movie titles, the Tribunal, under the procedures established in our *Order* dated February 12, 1986, could have determined that the presumption of ownership had been successfully rebutted and could have required more information from MPAA. However, the Tribunal performed an analysis assuming, for the sake of the analysis only, that those works were in the public domain. MPAA's Nielsen share would only have been reduced from 99.197% to 99.196%, and Multimedia's Nielsen share would have stayed at 0.358%. Clearly, those works to which Multimedia has raised a challenge constitute a negligible portion of MPAA's claim, and even by their elimination, the parties' relative position would not have changed. Therefore, the Tribunal chose not to require more information from MPAA. Neither were we persuaded that Multimedia's challenges represented the "tip of the iceberg." Many of the challenges were answered by reasonable explanations by MPAA. The possibility that there exists a sizable number of public domain works in MPAA's claim that would have been revealed but for the limitations of Multimedia's resources simply does not appear plausible to us.

Finally, the Tribunal considered whether there existed sufficient record evidence to make separate allocations in Phase II for the basic fund, the 3.75%

fund, and the syndex fund. We believe that the record developed in this proceeding does not justify making separate allocations. We found no evidence to determine whether the relative carriage of MPAA's, Multimedia's and NAB's works were different on stations paid for at the 3.75% rate than on stations paid for at the statutory rates. The Tribunal would like to see a more developed record in subsequent proceedings, including the relative worth of regionally syndicated programs versus nationally syndicated programs. As for syndex, we recognize that live presentations were not afforded syndicated exclusivity protection by the FCC, so that these live presentations might not properly share in the syndex royalties. However, *Donahue* is presented live on its flagship station only, and on tape on the rest of the 172 stations. Record evidence could not establish that any of the 13 cable systems paid a surcharge to carry WBBM in 1983. Four systems did not pay a surcharge, since they paid to carry WBBM at the 3.75% rate, and payment of the 3.75% rate and the syndicated exclusivity surcharge is mutually exclusive. We conclude that live presentations of *Donahue* in 1983 as a factor in our allocation in Phase II is de minimis. Accordingly, the Tribunal will make one allocation in Phase II. MPAA will be allocated 98.2%, Multimedia, 1%, and NAB 0.8%.

Allocations

After subtracting the stipulated award to National Public Radio of $144,497.85, the Tribunal has adopted the following allocation to categories of claimants in Phase I of the 1983 cable copyright royalty fees available for distribution:

Category	Basic pct.	3.75 pct.	Syndex pct.
Program suppliers	67.10	72.00	95.50
Joint sports	16.35	17.50	0
Public broadcasting service	5.20	0	0
Commercial television	5.00	5.00	0
Music	4.50	4.50	4.50
Devotional claimants	1.10	0.75	0
Canadian claimants	0.75	0.25	0
Commercial radio	0	0	0

The allocation adopted by the Tribunal under Phase II for the individual claimants is as follows:

Program suppliers:	*Percent*
Motion Picture Association of America, Inc.	98.2
Multimedia Entertainment, Inc.	1.0
National Association of Broadcasters	0.8

Dated: April 10, 1986.

Edward W. Ray,

Chairman.

[FR Doc. 86-8368 Filed 4-14-86; 8:45 am]

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