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HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870, and H.R. 5949

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THURSDAY, MAY 14, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Railsback, Sawyer, and Butler.

Also present: Bruce A. Lehman, chief counsel; Timothy Boggs, professional staff member; Thomas Mooney, associate counsel; Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

We will commence and we expect three of our colleagues to be here shortly. I am pleased to note that there is a large attendance this morning. Many of you may be here for the first time. Others of you have followed the subject or this particular aspect of it for years past and we greet you again.

It has been nearly 5 years since members of this subcommittee participated in the first recodification brought into being of the copyright laws. It is the first one in more than 50 years.

For the most part our work product seems to have met with success when put into actual practice, and there have been complaints about the new law.

However, the 1976 act failed to deal with several issues, and debate continues with respect to them: namely, performance rights for sound recordings and protection for ornamental design. We resolved the question of copyright in computer software last year by processing into law the recommendations of CONTU—the Commission on New Technological Uses of Copyrighted Works.

Other areas in which the 1976 act has provoked criticism involve: The right of not-for-profit groups such as veterans and fraternal societies to have unrestricted access to copyrighted music, criminal penalties for infringement, the phaseout of the so-called manufacturing clause, off-air taping for educational purposes, and the compulsory license for cable television systems.

With respect to off-air taping by educators, we expect an agreement soon among the parties as to how the 1976 act should be interpreted. This will relieve the subcommittee of legislative pressure on the issue. Several of the remaining issues will be dealt with in the hearings which are beginning today.

Next week we will hear testimony on our colleague's bill, H.R. 1805 which deals with commercial uses of sound recordings—the

performance rights issues. We have held extensive hearings on this issue in past Congresses.

We will also provide a forum during these hearings for those who wish to testify regarding the copyright liability of fraternal and veterans groups as well as those with views on the adequacy of existing criminal penalties. In July we expect a report from the Register of Copyrights on the manufacturing clause.

Today, we will hear from three witnesses who advocate change in the law regarding the compulsory license for cable television systems.

Since passage of the 1976 act the compulsory license has come under increasing criticism, largely as a result of three developments:

One, the enormous growth of cable and entry of giant corporations into the market;

Two, the development of satellite technology and the superstation, and

Three, deregulation of cable by the FCC.

I am aware that critics of the existing system—who will be testifying this morning—advocate abolishing the compulsory copyright license. Similarly, representatives of cable television vigorously oppose any change in the existing law.

The gentleman from Massachusetts, Mr. Frank, and I have both introduced legislation on the subject. He has introduced H.R. 3528, which would abolish the compulsory license for cable systems with more than 2,500 subscribers.

I have introduced for consideration H.R. 3560, which attempts to highlight problem areas without fully favoring one side over the other. My bill conditions the compulsory license upon continuation of distant signal and exclusivity rules, but at the same time, it relieves approximately 80 percent of the Nation's cable systems from any royalty liability for the retransmission of distant broadcast signals. I invite comment and criticism on each of these approaches.

Finally, before proceeding to testimony, I would like to observe that there has been a great deal of discussion about the efficacy of the Copyright Royalty Tribunal. While there is as yet no legislation directed at the Tribunal mechanism, the subcommittee has requested a General Accounting Office study of the Tribunal. That study will be presented to us on June 11 and should provide objective guidance as to how the Tribunal has been working and whether there should be any changes in its structure.

[Copies of H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528 H.R. 3530, H.R. 3560 and H.R. 5870 follow:]

I

97TH CONGRESS
1ST SESSION

H. R. 1805

To amend the copyright law, title 17 of the United States Code, to provide for royalties for the commercial use of sound recordings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 6, 1981

Mr. DANIELSON (for himself, Mr. BEILENSON, Mr. BONIOR of Michigan, Mr. JOHN L. BURTON, Mrs. CHISHOLM, Mr. CLAY, Mrs. COLLINS of Illinois, Mr. CONYERS, Mr. DELLUMS, Mr. DIXON, Mr. FAUNTROY, Mr. FLORIO, Mr. FORD of Tennessee, Mr. GRAY, Mr. GORE, Mr. HAWKINS, Mr. HYDE, Mr. MCDADE, Mr. MINETA, Mr. MITCHELL of Maryland, Mr. MITCHELL of New York, Mr. MYERS, Mr. RICHMOND, Mr. SOLARZ, Mr. WAXMAN, Mr. WEISS, Mr. WON PAT, Mr. YATES, and Mr. ZEFERETTI) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law, title 17 of the United States Code, to provide for royalties for the commercial use of sound recordings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Commercial Use of Sound Recordings Amendment".

SEC. 2. Section 101 of title 17 of the United States Code is hereby amended by deleting the definition of "perform" and inserting the following:

"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. In the case of a motion picture or other audiovisual work, to 'perform' the work means to show its images in any sequence or to make the sounds accompanying it audible. In the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists.".

SEC. 3. Section 106 of title 17 of the United States Code is hereby amended by deleting clause (4) and inserting the following:

"(4) in the case of literary, musical, dramatic, pantomimes and choreographic works, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly; and".

SEC. 4. Section 110 of title 17 of the United States Code is hereby amended as follows:

(a) in clause (2) insert the words ", or of a sound recording," between the words "performance of a non-dramatic literary or musical work" and "or display of a work,";

(b) in clause (3), insert the words "or of a sound recording," between the words "of a religious nature," and the words "or display of a work,";

(c) in clause (4), insert the words "or of a sound recording," between the words "literary or musical work" and "otherwise than in a transmission";

(d) in clause (6), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a governmental body";

(e) in clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment";

(f) in clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "nondramatic literary work," and "by or in the course of a transmission"; and

(g) in clause (9), insert the words "or of a sound recording embodying a performance of a dramatic literary work that has been so published," between the words "date of the performance," and the words "by or in the course of a transmission".

SEC. 5. Section 111 of title 17 of the United States Code is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the

antitrust laws," and "for purposes of this clause" the words "and subject to the provisions of section 114(c),".

SEC. 6. Section 112 of title 17 of the United States Code is hereby amended as follows:

(a) in subsection (a), delete the words "or under the limitations on exclusive rights in sound recordings specified by section 114(a)," and insert in their place "or under a compulsory license obtained in accordance with the provisions of section 114(c)," and

(b) in subsection (b), delete the reference to "section 114(a)" and insert "section 114(a)(5)".

SEC. 7. Section 114 of title 17 of the United States Code is hereby amended in its entirety to read as follows:

"§ 114. Scope of exclusive rights in sound recordings

"(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

"(1) the exclusive right under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of

motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording;

"(2) the exclusive right under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality;

"(3) the exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording;

"(4) the exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; and

"(5) the exclusive rights under clauses (1) through (4) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided,* That copies or phonorecords of said programs are not commercially

distributed by or through public broadcasting entities to the general public.

"(b) RIGHTS IN SOUND RECORDING DISTINCT FROM RIGHTS IN UNDERLYING WORKS EMBODIED IN RECORDING.—The exclusive rights specified in clauses (1) through (4) of section 106 with respect to a copyrighted literary, musical, or dramatic work, and such rights with respect to a sound recording in which such literary, musical, or dramatic work is embodied, are separate and independent rights under this title.

"(c) COMPULSORY LICENSE FOR PUBLIC PERFORMANCE OF SOUND RECORDINGS.—

"(1) Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

"(2) When phonorecords of a sound recording have been distributed to the public in the United States or elsewhere under the authority of the copyright owner, any other person may, by complying with the

provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

"(3) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the following requirements:

"(A) On or before January 1, 1983, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

"(B) The compulsory licensee shall deposit with the Register of Copyrights, at annual intervals, a statement of account covering the preceding calendar year, and a total royalty fee for all public performances during that calendar year, based on the royalty provisions of clause (7) or (8)

of this subsection. After consultation with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the filing and contents of the statement of account and royalty payment.

"(4) Failure to record the notice, file the statement, or deposit the royalty fee as required by clause (3) of this subsection renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

"(5) Royalties under this subsection shall be payable only for performances of copyrighted sound recordings fixed on or after February 15, 1972.

"(6) The compulsory licensee shall have the option of computing the royalty fees payable under this subsection on either a prorated basis, as provided in clause (7), or on a blanket basis, as provided in clause (8), and the annual statement of account filed by the compulsory licensee shall state the basis used for computing the fee.

"(7) If computed on a prorated basis, the annual royalty fees payable under this subsection shall be calculated in accordance with standard formulas that the

Copyright Royalty Tribunal shall prescribe by regulation, taking into account such factors as the proportion of commercial time, if any, devoted to the use of copyrighted sound recordings by the compulsory licensee during the applicable calendar year, the extent to which the compulsory licensee is also the owner of copyright in the sound recordings performed during said year, and, if considered relevant by the Tribunal, the actual number of performances of copyrighted sound recordings during said year. The Tribunal shall prescribe separate formulas in accordance with the following:

"(A) for radio or television stations licensed by the Federal Communications Commission, the fee shall be a specified fraction of the 1 per centum of the station's net receipts from advertising sponsors during the applicable calendar year;

"(B) for other transmitters of performances of copyrighted sound recordings, including background music services, the fee shall be a specified fraction of 2 per centum of the compulsory licensee's gross receipts from subscribers or others who pay to receive transmissions during the applicable calendar year; and

"(C) for other users not otherwise exempted, the fee shall be based on the number of days during the applicable calendar year on which performances of recordings took place, and shall not exceed $5 per day of use.

"(8) If computed on a blanket basis, the annual royalty fees payable under this section shall be calculated in accordance with the following:

"(A) for a radio broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend upon the total amount of the station's net receipts from advertising sponsors during the applicable calendar year:

"(i) receipts of at least $25,000 but less than $100,000: $250;

"(ii) receipts of at least $100,000 but less than $200,000: $750;

"(iii) receipts of $200,000 or more: 1 per centum of the station's net receipts from advertising sponsors during the applicable calendar year;

"(B) for a television broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend on the total

amount of the station's net receipts from advertising sponsors during the applicable calendar year:

"(i) receipts of at least $1,000,000 but less than $4,000,000: $750;

"(ii) receipts of $4,000,000 or more: $1,500;

"(C) for other transmitters of performances of copyrighted sound recordings, including background music services, the blanket royalty shall be 2 per centum of the compulsory licensee's gross receipts from subscribers or others who pay to receive transmissions during the applicable calendar year;

"(D) for commercial establishments such as discotheques, nightclubs, cafes, and bars at which a principal form of entertainment is dancing to the accompaniment of sound recordings, the blanket royalty shall be $100 per calendar year for each location at which copyrighted sound recordings are performed. This royalty fee shall not be applicable to establishments at which the performance of sound recordings is solely by means of coin-operated phonorecord players as defined in section 116(e)(1);

"(E) for other users not otherwise exempted, the blanket royalty per calendar year shall be established by the Copyright Royalty Tribunal within one year of the date this Act takes effect.

"(9) Public performances of copyrighted sound recordings by operators of coin-operated machines, as that term is defined by section 116, and by cable systems, as that term is defined by section 111, are subject to compulsory licensing under those respective sections, and not under this section. However, in distributing royalties to the owners of copyright in sound recordings under sections 116 and 111, the Copyright Royalty Tribunal shall be governed by clause (14) of this subsection. Nothing in this section excuses an operator of a coin-operated machine or a cable system from full liability for copyright infringement under this title for the performance of a copyrighted sound recording in case of failure to comply with the requirements of section 116 or 111, respectively.

"(10) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by

the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal, as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a compilation of all statements of account covering the relevant calendar year provided by subsection (c)(3) of this section.

"(11) During the month of May in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding calendar year shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(3) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may, subject to the provisions of clause (14) of this subsection, agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their

claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(12) After the first day of June of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees for which claims have been filed under clause (11) of this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(14) One-half of the royalties available for distribution by the Copyright Royalty Tribunal shall be paid to the copyright owners, as defined in subsection (e), and the other half shall be paid to the performers, as

also defined in subsection (e). With respect to the various performers who contributed to the sounds fixed in a particular sound recording, the performers' share of royalties payable with respect to that sound recording shall be divided among them on a per capita basis, without regard to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his or her right to the royalties provided in this subsection to the copyright owner or the performer, respectively.

"(d) EXEMPTIONS FROM LIABILITY AND COMPULSORY LICENSING.—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable calendar year, if during such year—

"(1) in the case of a radio broadcast station licensed by the Federal Communications Commission, its net receipts from advertising sponsors were less than $25,000; or

"(2) in the case of a television broadcast station licensed by the Federal Communications Commission, its net receipts from advertising sponsors were less than $1,000,000; or

"(3) in the case of other transmitters of performances of copyrighted sound recordings, including background music services, its gross receipts from subscribers or others who pay to receive transmissions were less than $10,000.

"(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

"(1) 'Commercial time' is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by or includes commercial matter.

"(2) 'Performers' are instrumental musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording, and, in the case of a sound recording embodying a musical work, the arrangers, orchestrators, and copyists who prepared or adapted the musical work for the particular performance of the sounds fixed in the sound recording. For purposes of this section, a person coming within this definition is regarded as a 'performer' with respect

to a particular sound recording whether or not that person's contribution to the sound recording was a 'work made for hire' within the meaning of section 101.

"(3) A 'copyright owner' is the owner of the right to perform a copyrighted sound recording publicly.

"(4) 'Net receipts from advertising sponsors' consist of gross receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies.

"(f) SOUNDS ACCOMPANYING A MOTION PICTURE OR OTHER AUDIOVISUAL WORK.—The sounds accompanying a motion picture or other audiovisual work are considered an integral part of the work that they accompany, and any person who uses the sounds accompanying a motion picture or other audiovisual work in violation of any of the exclusive rights of the owner of copyright in such work under clauses (1) through (4) of section 106 is an infringer of that owner's copyright. However, if such owner authorizes the public distribution of material objects that reproduce such sounds but do not include any accompanying motion picture or other audiovisual work, a compulsory licensee under sections 116 or 111 or under section (c) of this section shall be freed from further liability for the public performance of the sounds by means of such material objects.".

SEC. 8. Section 116 of title 17 of the United States Code is hereby amended as follows:

(a) in the title of the section insert the words "and sound recordings" after the words "nondramatic musical works" and before the colon;

(b) in subsection (a), between the words "nondramatic musical work embodied in a phonorecord," and the words "the exclusive right" insert the words "or of a sound recording of a performance of a nondramatic musical work,";

(c) in the first sentence of subclause (A) of clause (1) of subsection (b), delete the word "$8" and insert in lieu thereof the word "$9". In the second sentence of the same provision, delete the word "$4" and insert in lieu thereof the word "$4.50";

(d) in the third sentence of clause (2) of subsection (c), between the words "provisions of the antitrust laws," and "for purposes of this subsection," insert the words "and subject to the provisions of section 114(c),";

(e)(1) in clause (4) of subsection (c), redesignate subclauses (A), (B), and (C) as (B), (C), and (D), respectively, and insert a new subclause (A) as follows:

"(A) to performers and owners of copyright in sound recordings, or their authorized agents, one-ninth

of the total distributable royalties under this section, to be distributed as provided by section 114(c)(14);" and

(2) in the newly designated subclause (B), between the words "every copyright owner" and the words "not affiliated with" insert the words "of a nondramatic musical work".

SEC. 9. In section 801 of title 17 of the United States Code, amend subsection (b)(1) as follows: In the first sentence, between the words "as provided in sections" and "115 and 116, and" insert "114,"; and in the second sentence, between the words "applicable under sections" and "115 and 116 shall be calculated" insert "114,". Amend subsection (b)(3) by inserting, between the words "Copyrights under sections 111" and "116, and to determine" the following: ", 114,".

SEC. 10. In section 803 of title 17 of the United States Code, insert at the end of that section a new subsection (c) as follows:

"(c) With respect to the distribution of royalties under section 114, the Tribunal shall retain the services of one or more private, nongovernmental entities to perform the functions necessary to monitor the performance of sound recordings, to value said performances, to distribute royalty funds to recipients, and to perform such other functions as the Tribunal shall deem necessary, unless the Tribunal shall deter-

mine that it is inappropriate to do so. The performance of said functions by private entities shall not relieve the Tribunal of the responsibility to insure the fair and equitable distribution of royalty fees in accordance with section 801(b)(3).".

SEC. 11. In subsection (a) of section 804 of title 17 of the United States Code, insert "114," following the words "as provided in sections" and "115 and 116, and with", and at the end of clause (2) of subsection (a) add a new subclause (D), as follows:

"(D) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 114, such petition may be filed five years after the effective date of this Act and in each subsequent fifth calendar year.".

In subsection (d) of section 804, insert ", 114," between the words "circumstances under sections 111" and "or 116, the Chairman".

SEC. 12. Amend section 809 of title 17 of the United States Code by inserting ", 114," between the words "royalty fees under sections 111" and "or 116, the Tribunal".

SEC. 13. In section 804 of title 17 of the United States Code, insert at the end of that section a new subsection (f) as follows:

"(f) With respect to proceedings under section 801(b)(1), concerning the determination of reasonable terms and rates of

royalty payments as provided in section 114(c)(8)(F), the Tribunal shall proceed when and as provided by that subsection.".

SEC. 14. (a) Except as provided in subsection (b) of this section, this Act shall take effect on January 1, 1983.

(b) The provisions of section 114(c)(3)(A) of title 17 of the United States Code, as amended by section 7 of this Act, become effective upon the enactment of this Act.

I

97TH CONGRESS
1ST SESSION

H. R. 2007

To amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 23, 1981

Mr. YOUNG of Florida introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 110 of title 17 of the United States Code is amended—

(1) by striking out the period at the end of paragraph (8) and inserting a semicolon in lieu thereof;

(2) by striking out the period at the end of paragraph (9) and inserting ", and" in lieu thereof; and

(3) by adding at the end the following new paragraph:

"(10) performance of a musical work in the course of the activities of a nonprofit veterans' organization or a nonprofit fraternal organization.".

I

97TH CONGRESS
1ST SESSION

H. R. 2108

To amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements on the exclusive rights of copyright owners.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 1981

Mr. DONNELLY introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements on the exclusive rights of copyright owners.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 110 of title 17, United States Code, is amended—

(1) by striking out "a nonprofit educational institution" in paragraph (1) and inserting in lieu thereof "an educational institution"; and

(2) by inserting after paragraph (9) the following new paragraph:

"(10) performance of a nondramatic literary or musical work by a nonprofit veterans' or fraternal organization, without any purpose of direct or indirect commercial advantage, if the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for education, religious, or charitable purposes and not for private financial gain.".

SEC. 2. This Act does not affect the copyright protection for any work which is in the public domain on, or has been copyrighted on or before, the date of the enactment of this Act.

I

97TH CONGRESS
1ST SESSION

H. R. 3528

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. FRANK introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

SECTION 1. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by inserting immediately before the period the following: "in effect on July 1, 1980".

(b) Section 111(c)(2)(A) of chapter 1 of title 17 of the United States Code is amended by striking out "; or" and inserting in lieu thereof "in effect on July 1, 1980; or".

(c) Section 801(b)(2) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraphs (B) and (C) and redesignating subparagraph (D) as subparagraph (B).

(d) Section 804(a) of chapter 1 of title 17 of the United States Code is amended by striking out "(D)" in the first sentence and inserting in lieu thereof "(B)".

(e) Section 804(a)(2) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraph (A) and redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B) respectively.

(f) Section 804 of chapter 1 of title 17 of the United States Code is amended by striking out paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d) respectively.

SEC. 2. Effective January 1, 1983, section 111 of chapter 1 of title 17 of the United States Code is deleted in its entirety and the following substituted in its place:

"§111. Limitations of exclusive rights: secondary transmissions

"(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—Notwithstanding the provisions of section 106, the sec-

ondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

"(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission, and—

"(A) the secondary transmission is made within the local service area of such station; or

"(B) the signals are received by such establishment by means of the direct reception of a free space radio wave emitted by such station; or

"(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

"(3) the secondary transmission is made by any carrier, other than a satellite resale carrier, who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission con-

sist solely of providing wires, cable, or other communications channels for the use of others: *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

"(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

"(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided, however,* That such sec-

ondary transmission is not actionable as an act of infringement if—

"(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

"(2) the carriage of signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

"(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

"(c) CERTAIN SECONDARY TRANSMISSIONS BY CABLE SYSTEMS EXEMPTED.—

"(1) Notwithstanding the provisions of section 106 and subject to the provisions of clause (2) of this subsection, the secondary transmission to the public of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is not an infringement of copyright if carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authoriza-

tions of the Federal Communications Commission; and—

"(A) the cable system is located in whole or in part within the local service area of the primary transmitter; or

"(B) the secondary transmission is of a network television program that is not available from any television broadcast station located in whole or in part within the local service area served by the cable system; or

"(C) the cable system serves fewer than twenty-five hundred subscribers.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work otherwise exempt under clause (1) of this subsection is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter

during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided,* That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further,* That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

"(d) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

"A 'primary transmission' is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

"A 'secondary transmission' is the further transmitting of a primary transmission simultaneously with the primary transmission.

"A 'cable system' is a facility, located in any State, territory, trust territory, or possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the exemption under subsection (c)(1)(C), two or more cable systems under common ownership or control or operating from one headend shall be considered as one system.

"The 'local service area of a primary transmitter', in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations.

"The 'local service area of a primary transmitter', in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

"A 'network television program' is a program supplied by one of the television networks in the United States providing nationwide transmissions to television broadcast stations that are owned or operated by, or affiliated with, the television network".

SEC. 3. (a) Effective January 1, 1983, section 501(c) of chapter 1 of title 17 of the United States Code is amended by striking out "subsection (c) of section 111" and inserting in lieu thereof "section 106".

(b) Effective January 1, 1983, section 501(d) of chapter 1 of title 17 of the United States Code is amended by striking out "(3)" and inserting in lieu thereof "(2)".

(c) Effective January 1, 1983, section 510(a) of chapter 1 of title 17 of the United States Code is amended by striking out "(3)" and inserting in lieu thereof "(2)".

(d) Effective January 1, 1983, section 510(a) of chapter 1 of title 17 of the United States Code is amended by striking out ", and the remedy provided by subsection (b) of this section" both times it appears therein.

(e) Effective January 1, 1983, section 510 of chapter 1 of title 17 of the United States Code is amended by striking out paragraph (b).

(f) Effective January 1, 1983, section 804(a) of chapter 1 of title 17 of the United States Code is amended by striking out ", and with respect to proceedings under section 801(b)(2) (A) and (B)".

(g) Effective January 1, 1983, section 801(b) of chapter 1 of title 17 of the United States Code is amended by striking out subparagraph (2) and redesignating subparagraph (3) as subparagraph (2).

(h) Effective January 1, 1985, section 801(b)(2) of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 and" and inserting in lieu thereof "section".

(i) Effective January 1, 1985, section 804(d) of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 or" and inserting in lieu thereof "section".

(j) Effective January 1, 1985, section 809 of chapter 1 of title 17 of the United States Code is amended by striking out "sections 111 or" and inserting in lieu thereof "section".

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Union Calendar No. 297

97TH CONGRESS
2D SESSION

H. R. 3530

[Report No. 97–495]

To amend the copyright laws to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. FRANK (for himself, Mr. MOAKLEY, Mr. RAILSBACK, Mr. PEPPER, Mr. BUTLER, Mr. PHILLIP BURTON, Mr. FAZIO, Mr. RICHMOND, Mr. FRENZEL, Mr. VENTO, and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 29, 1982

Additional sponsors: Mr. WAXMAN, Mr. CROCKETT, Mr. FOGLIETTA, and Mr. KILDEE

APRIL 29, 1982

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend the copyright laws to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Piracy and Counterfeiting Amendments Act of ~~1981~~ *1982*".

SEC. 2. Section 506(a) of title 17, United States Code, is amended to read as follows:

"(a) Criminal infringement

"Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18.".

SEC. 3. Section 2318 of title 18, United States Code, is amended—

(1) by respectively redesignating subsections (b) and (c) as subsections (d) and (e); and

(2) by striking out the section heading and subsection (a) and inserting in lieu thereof the following:

"§ 2318. Trafficking in counterfeit labels for phonorecords, and copies of motion pictures ~~and~~ *or other* audiovisual works

"(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or to a copy of a motion ~~picture,~~ *picture* or ~~an~~ *other* audiovisual work, shall be fined not more than $250,000 or imprisoned for not more than five years, or both.

"(b) As used in this section—

"(1) the term 'counterfeit label' means an identifying label or container that appears to be genuine, but is not;

~~"(2) the term 'traffic' means to transfer or otherwise dispose of, to another, as consideration for anything of value or obtain control of with intent to so transfer or dispose; and~~

"(2) the term 'traffic' means to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of; and

"(3) the terms 'copy', 'phonorecord', 'motion picture', and 'audiovisual work' have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17.

"(c) The circumstances referred to in subsection (a) of this section are—

"(1) the offense is committed within the special maritime and territorial jurisdiction of the United States or within the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1958);

"(2) the mail or a facility of interstate or foreign commerce is used *or intended to be used* in the commission of the offense; or

"(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copyrighted ~~audiovisual work or motion picture,~~ *motion picture or other audiovisual work,* or a phonorecord of a copyrighted sound recording.".

SEC. 4. Title 18, United States Code, is amended by inserting after section 2318 the following new section:

"§ 2319. Criminal infringement of a copyright

"(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section *and such penalties shall be in addition to any other provisions of title 17 or any other law.*

"(b) Any person who commits an offense under subsection (a) of this section—

"(1) shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if the offense—

"(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings;

"(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least sixty-five copies infringing the

copyright in one or more motion pictures or *other* audiovisual works; or

~~"(C) involves a sound recording, motion picture, or audiovisual work, and is a second or subsequent offense under this section;~~

"(C) is a second or subsequent offense under either of subsections (b)(1) or (b)(2) of this section, where a prior offense involved a sound recording, or a motion picture or other audiovisual work;

"(2) shall be fined not more than $250,000 or imprisoned for not more than two years, or both, if the offense—

"(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; or

"(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or *other* audiovisual works; and

"(3) shall be fined not more than $25,000 or imprisoned for not more than one year, or both, in any other case.

~~"(c) As used in this section the terms 'sound recording', 'motion picture', 'audiovisual work', 'phonorecord', and 'copies' have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17.".~~

"(c) As used in this section—

"(1) The terms 'sound recording', 'motion picture', 'audiovisual work', 'phonorecord', and 'copies' have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; and

"(2) The terms 'reproduction' and 'distribution' refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 118 of title 17.".

SEC. 5. The table of sections for chapter 113 of title 18 of the United States Code is amended by striking out the item relating to section 2318 and inserting in lieu thereof the following:

"2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures ~~and~~ *or other* audiovisual works.
"2319. Criminal infringement of a copyright.".

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97TH CONGRESS
1ST SESSION

H. R. 3560

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1981

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

SECTION 1. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That the compulsory license for television broadcast signals

provided for herein shall be limited, except as provided in section 801(b)(3), to the secondary transmissions of primary transmissions authorized pursuant to the rules on carriage of television broadcast signals of the Federal Communications Commission in effect on July 1, 1980. Transmissions unauthorized pursuant to such rules shall be actionable as an act of infringement under section 501 and subject to the remedies provided by sections 502 through 506".

(b) Section 111(c)(2)(A) of chapter 1 of title 17 of the United States Code is amended by inserting "or the Copyright Royalty Tribunal pursuant to section 801(b)(3)" after "Commission".

(c) Section 111(d)(2) of chapter 1 of title 17 of the United States Code is amended by striking out the last sentence of subparagraph (A) and by striking out subparagraphs (B), (C), and (D) and inserting in lieu thereof the following:

"(B) in the case of cable systems with 5,000 subscribers or more, a just and reasonable royalty fee covered by the statement, as determined by the Copyright Royalty Tribunal.".

APPLICATION OF THE COMPULSORY LICENSE TO SPORTS PROGRAMING

SEC. 2. (a) Section 111(c)(1) of chapter 1 of title 17 of the United States Code is amended by striking out "Subject to the provisions of clauses (2), (3), and (4) of this subsection"

and inserting in lieu thereof the following: "Subject to the provisions of clauses (2), (3), (4), and (5) of this subsection.".

(b) Section 111(c) of chapter 1 of title 17 of the United States Code is amended by adding the following new clause:

"(5) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if—

"(A) the primary transmission consists of the broadcast of a game, or any part thereof, involving members of a professional sports league; and

"(B) the secondary transmission is made into an area which is (i) beyond the local service area of the primary transmitter, and (ii) within fifty miles of the place of a game of a member of that professional sports league.".

RATE DETERMINATION OF COPYRIGHT ROYALTY TRIBUNAL

SEC. 3. Section 801(b)(2) of chapter 8 of title 17 of the United States Code is amended to read as follows:

"(2) to make determinations concerning the establishment and adjustment of just and reasonable rates referred to in section 111".

APPLICATION TO THE COMPULSORY LICENSE TO SYNDICATED PROGRAMING

SEC. 4. Section 801(b) is amended by striking out "; and" at the end of paragraph (2) and inserting in lieu thereof a period, by redesignating paragraph (3) as paragraph (4), and by inserting after paragraph (2) the following new paragraph:

"(3) to establish rules under which syndicated copyrighted programing carried on those secondary transmissions for which a compulsory license is authorized in section 111(c).".

DISTRIBUTION OF ROYALTY FEES FOR RADIO PROGRAMING

SEC. 5. Section 801(b)(4) (as redesignated) is amended by inserting before the period at the end thereof the following: ": *Provided,* That in accordance with section 111(d)(4)(C), at least percent of such fees are distributed to copyright owners whose work consists exclusively of aural

signals, the distribution to those copyright owners to be based on the production of original programing".

PROCEEDINGS BEFORE THE TRIBUNAL

SEC. 6. (a) Section 804(a) of chapter 8 of title 17 of the United States Code is amended—

(1) by striking out "(A) and (D)" both times it appears therein.

(2) by striking out "1985" and inserting in lieu thereof "1982".

(3) by striking out "fifth" and inserting in lieu thereof "third".

(b) Section 804(b) of chapter 8 of title 17 of the United States Code is repealed and subsections (c), (d), and (e) of such section are redesignated as subsections (b), (c), and (d), respectively.

(c) Section 804 of chapter 8 of title 17 of the United States Code is amended by inserting at the end thereof the following new subsections:

"(e)(1) With respect to all proceedings under this chapter, the Tribunal shall be empowered to issue subpenas to compel the production of testimony of witnesses together with such documentary materials as are necessary to make determinations under this title.

"(2) If a person to whom a subpena is issued under this subsection refuses to comply with such subpena, the United

States District Court for the District of Columbia or for the judicial district within which such person is found or resides or transacts business may, upon application of the Chairman of the Tribunal, order such person to comply with the subpena. Failure to obey such order may be punished by such court as contempt thereof. Subpenas of the Tribunal shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure.

"(f) With respect to the authority provided under section 801(b)(3), the Tribunal shall initiate proceedings to establish or modify rules within thirty days of a petition by an owner or user of a copyrighted work subject to compulsory licensing under section 111(c).".

JUDICIAL STAY

SEC. 7. Section 809 of chapter 8 of title 17 of the United States Code is amended by striking out the first sentence and inserting in lieu thereof the following: "Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication.".

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 8. (a) Royalty rates established by the Copyright Royalty Tribunal pursuant to section 111(d)(2) and section 804 of title 17 of the United States Code and as modified by order of the Copyright Royalty Tribunal on January 5, 1981,

shall remain in effect pending a review by the Tribunal pursuant to the provisions of sections 2 and 4 of this Act and the implementation of a final order under section 809.

(b) Section 118 of title 17 of the United States Code is amended by striking out "in the Federal Register" wherever they appear therein.

(c) Sections 804(c) (as redesignated) and 810 of chapter 8 of title 17 of the United States Code are amended by striking out "in the Federal Register" wherever they appear therein.

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97TH CONGRESS
2D SESSION

H. R. 5870

To amend the manufacturing clause of the copyright law.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1982

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the manufacturing clause of the copyright law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 601(a) of chapter 6 of title 17 of the United States Code is amended by striking out "1982" and inserting in lieu thereof "1985".

Mr. KASTENMEIER. I am now pleased to welcome our opening panel of witnesses: Jack Valenti, president, Motion Picture Association of America; Vincent Wasilewski, president, National Association of Broadcasters; and Bowie Kuhn, Commissioner of Baseball. Each of whom is a national figure in his own right.

They have been witnesses before many committees of the Congress, indeed, of this subcommittee on a number of occasions. They are leaders of their industries, of sports, in the case of Mr. Kuhn. They are knowledgeable and we of course are very pleased to greet them.

First, I would like to greet Mr. Valenti, who represents they motion picture industry, who always expresses the views of his industry as eloquently as any person could imagine.

After Mr. Valenti, who I understand will open testimony, we will greet our other panelists.

Mr. Valenti.

TESTIMONY OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, ACCOMPANIED BY VINCENT WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS AND BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. VALENTI. I thank this committee very much and you particularly, Mr. Chairman, for giving us an opportunity to open a window on the Copyright Act of 1976. There are a number of us who believe with some vigor that what the Congress has wrought is not effective and is not sustainable in the years ahead due to the rather quick changing environment of the television marketplace. So I am grateful to you and I come to you really for two specific, and I hope simply stated, reasons.

The first is to ask this committee to respect the rights of copyright owners, of property owners, to respect the right of property owners. I think all of us on this panel believe that what people own should not be taken from them without their permission, without negotiating for the price to be paid, and without any knowledge by the owners to how, when and where their property is being used.

The question I might pose to this panel is what owners of other business enterprise in the Nation must sit idly by while property that belongs to them is taken without their permission by others who then sell it to the public for a profit.

I think it is fair to say that what we are asking this committee to do is to respect the right of a property owner which unhappily the act of 1976 does not do.

The second reason I am here is to ask this committee to establish competition in the television marketplace. It is not there now. What happens is that basic cable television has been given by the Congress a special grant of privilege which allows it to rummage in the market as it sees fit, taking programs it wants and then sell them for profit, paying only a pittance of the marketplace worth of that product.

At the same time, all of cable's competitors—independent television stations, network stations, pay cable, pay television, videocassettes, videodiscs, and soon direct broadcast satellite operations—must compete in the marketplace for their programs, negotiate with owners and pay market value for what they license.

Cable alone is exempt from competition: And to make matters worse, basic cable is a geographic monopoly, with no other cable systems operating in its area. To grant special privileges to a monopoly, no matter how benign that monopoly may appear, only multiplies the imbalance and anticompetitive nature of the cable marketplace.

To correct what is so plainly and clearly wrong, the MPAA proposes two reasonable revisions:

One, abolish the compulsory license for distant TV station programs imported by local cable systems.

Two, to protect localism and local programing for the community, the compulsory license should be retained only for local station programs required to be carried by cable systems under FCC rules.

That is all that needs to be done to recognize property rights, and to promote fair competition in the cable marketplace.

Two objective experts have examined this issue and have come to emphatic conclusions. Now remember, they are not on the payroll of anybody. They don't have clients in the business. Indeed, they are Government officials whose sworn duty it is to protect the public: Former Chairman of the Copyright Royalty Tribunal, Clarence James, has testified that the CRT is an unworkable mechanism and suggests it ought to be dismantled. David Ladd, the Register of Copyrights, has testified that the compulsory license is a blight on the competitive marketplace and should be abolished.

Cable interests will tell you, in the most plaintive tones, that: One, cable is really a mom and pop operation, with family owned systems the core of the cable community; two, that if you comply with our proposal, basic cable rates will have to be raised; and three, basic cable will not get programs because program suppliers will freeze them out.

Let me take each of their arguments and place before you what is both important and true:

One, is cable a mom and pop familiy operation? This may have been true some 5, 6, 7 years ago. It may even have had an element of truth in it when the Copyright Act of 1976 was passed. But not today. Consider the facts, all of which are verifiable by cable interests themselves:

Cable today is a big and profitable business. A mere 10 large companies control some 50 percent of all cable subscribers. Just 25 companies control over 60 percent of all cable subscribers. Only 50 companies control some 75 percent of all subscribers. This concentration of power and control by a few corporations grows stronger each week.

Cable systems have an average return on equity of almost 20 percent. This compares to an average of 14.4 percent return on equity for the Fortune 500 companies. I want to show you this in chart form because I think it is important; 12½ percent of all cable systems in America today have a return on equity of 40 percent or more. Cable Television Systems of Boston, in their proposal to the city of Boston, has committed themselves in an official document that it will achieve 57.5 percent return on equity in their third year of their operation in Boston.

Mr. SAWYER. If I may interrupt, without breaking your sequence, are those after taxes or pretax?

Mr. VALENTI. Pretaxes, I believe. Pretaxes on both sides, 20.8 percent of all cable systems return equity of 30 to 39 percent; 21.8 have return on equity of 20 to 29 percent. So 55 percent of all the cable systems in America have an average return of 20 percent or more. In the Fortune 500, only 15 percent of them have an average return on equity of 13.2 percent.

Some 55 percent of all cable systems in the United States reported net income—pretax—of 20 percent or more of owners' equity while only 15 percent of the 500 largest U.S. industrial corporations were able to match that figure.

Cable is an enormous money machine, called by Wall Street the only depression proof enterprise in the Nation. Today, cable revenues are $2.5 billion annually, and expected to rise to $8.5 billion in just 4 more years.

Yet, in a piece of sardonic irony, according to the FCC data for 1979, of all the expense categories for cable, if you took all the expense categories and put them in this little pie, copyright fees represent barely 1 to 2 percent of all the expenses of a cable system. The irony is that copyright costs are the lowest expense category sustained by a cable system.

The one identical item they must all have to stay in business is programing. It is the cheapest item on their expense ledgers. I find that rather amusing. It only hurts when I laugh.

Pretax income for cable in 1979 was up 45.4 percent over 1978. Total assets of cable were $3.2 billion in 1979, an increase of 12 percent over 1978.

Yet, according to FCC data for 1979, of all the categories of cable systems operating expenses, copyright fee payments represent only 1.2 percent of these expenses, the lowest of all expense categories in the cable operation. In other words, the most important single factor in a successful cable operation is programing, and that programing is the cheapest item in their expense ledgers. [See appendix III-a.]

Is cable today a mom and pop operation?

Consider these facts:

Daniels & Associates, the largest cable brokerage firm in the United States, values cable systems today at $650 or more per subscriber.

Mr. Chairman, let's talk about small systems, the so-called mom and pops. If you owned a 2,000-cable system, you could probably sell it on the open market today for $1.3 million. If you owned a 3,000-subscriber system you could sell it for over $2 million. If you owned a 5,000-subscriber system it would bring $3½ million.

Mr. Chairman, people who own these small systems are millionaires. Some of the companies which dominate the cable landscape today are Time, Inc., Westinghouse, the Los Angeles Times, General Electric, American Express, the New York Times, Cox Cable—which also owns huge chunks of newspapers and television—Newhouse Communications, also a newspaper dukedom, Warner Communications, and other giants are getting ready to get involved, like Knight Ridder newspapers, and Dow Jones, Inc., owners of the Wall Street Journal who want to buy U.S.-Columbia Cable. All these corporations, rich in resources and assets, are eager to buy small systems and to obtain franchises in the big cities.

My question to you: Does this sound like "small business?" Do these appear to be enterprises which need help from Congress? Is this the kind of corporate profit making center that deserves a subsidy, and especially a subsidy that comes out of the hide of those who own television programs?

I ask you, is it right, is it fair that program owners should have their property taken from them by some of the biggest corporations in the country? Is it fair that we should be subsidizing these hugh business operations?

Now, to the second argument of cable, which is if you pass this proposal, they will have to raise their basic cable rates. Mr. Chairman, Mr. Kuhn, Mr. Wasilewski, and every cable operator in America knows as a fact of life that all the cable proposals being made in the big cities, those big corporations, are pledging to bring in basic service at way less than $8 to $9 a month on the average and the proposal to Dallas by AMEX there says it is going to bring in basic service for $2.75 a month.

Cable operators, everyone of them—and the trade press is full of this—know that the profit action is not in basic cable. The profit action is in pay. Pay services. They want basic subscribers so they can load them up on pay services, which some operators predict will soon bring in $50 to $100 per month from each paying subscriber. No wonder the New York Times paid $120 million, $2,000 per subscriber to Irving Kahn for his 60,000-subscriber systems in New Jersey.

No wonder Westinghouse paid three-quarters of a billion dollars for Teleprompter.

Cable is also expanding advertiser supported programing, the hottest phenomenon in the cable business today. All of which, Mr. Chairman, is bargained for in the open market now.

Paul Kagan & Associates, the most respected research firm in the business, declares that cable revenues from advertising will amount in 1981 to $100.7 million, and in 1990 will rise to $2.2 billion.

Add to that revenues from pay cable, from ancillary pay services such as burglar alarms, fire alarms, two-way systems, and all their other revenue producing extras and you quickly perceive that the cable industry has four sources of huge revenues: One is basic cable subscribers; two is pay cable subscribers; three is advertising; and four is revenues from ancillary services.

Is there any doubt in any objective mind that a small increase in programing costs can be easily borne by any cable system without 1 cent increase in basic cable rates?

Let me give an example, Mr. Chairman. Today cable is paying about 1 percent of its subscriber basic revenues for programing. Let's suppose you took the compulsory license off and suppose what cable would then be paying triples to approximately 3 percent of their subscriber revenues.

You know what that would mean? It would mean that for each subscriber the cable system would incur an extra added cost of 16 cents per subscriber. From any pay cable subscriber the system now gets $10 a month for pay cable; the cable operator keeps 60 cents of every dollar, $6 out of the $10 and all he is adding is 16 cents to his basic programing cost. It does not make any sense.

The final argument of cable people—and then I am going to be through—cable systems won't get programs, either they will be frozen out or the administrative machinery will be too complicated. This is raw nonsense. I am going to tell you why:

First, the program suppliers are in the business to license programs, unlike broadcast stations which are in the business to broadcast programs. We have some 13,000 English language movies and 4,000 series ready to be licensed. New programs are being created every month. Cable systems can enter the bidding for popular programs against the local TV station, gaining exclusive rights to those programs.

Moreover, middlemen, like Ed Taylor's Satellite Program Network, will enter the business and license programs by the long ton to cable systems. After all, subscribers are not buying distant TV signals. They are buying programs. People in Virginia are not interested in news programs from Chicago or New York. In Madison, Wis., they don't care about watching Ed Koch or the mayor of Houston talking about sewer taxes and whether Westway will be built in the West Side of Manhattan. They are interested in programing.

Second, advertiser-supported programs will flood the cable market. Today there are some 35 cable networks doing just that, bringing in programs of all kinds, entertainment, sports, and religious programs. ABC, CBS, NBC, Rockefeller Center—the list grows daily—are all entering the cable program market.

Third, program suppliers today negotiate directly with some 600 television stations which program their stations from 16 hours to 24 hours a day. Bargaining with some 50 cable companies which reach some 75 percent of all cable subscribers and licensing to smaller systems via middlemen will be easier than dealing with 600 TV stations.

I dare say if programers negotiate with 150 companies—no more—they will reach 100 percent of all the cable systems in America, particularly if little tiny systems were exempted. Soon the FCC is going to order in or approve low-power and drop-in stations and you may have 2,000 television stations operating in the next several years and we will be negotiating directly with each one of them.

In comparison it will be a simple matter to negotiate with the country's cable systems and the recent trend in organizing statewide or regionwide cable networks will make it even easier. We call it interconnects in the business. This means groups of systems joining together sharing production facilities, acquisition of origination programing and sales forces, pooling all of this.

Cablevision magazine reports that by the end of the first quarter of 1981, approximately 80 systems representing 1.5 million subscribers will be linked in a dozen regional systems. This increases each week. For program suppliers to negotiate program license with such interconnects is practical, easy, and feasible.

Now, I want to sum up because I have used up my time and more than my time, and I thank you for it. I just want to sum up by asking a few questions:

Why would Congress want to persist in shielding cable from competition—basic cable, that is?

Why would the Congress feel it is in the public interest to protect Westinghouse and American Express and General Electric from the rigors of the competitive arena?

Does Congress believe cable, which is an explosive rapidly growing business should be subsidized? And if so, should not the Congress subsidize cable if it is in the public interest, rather than taking it out of the hides of private program owners?

Why would Congress persist in allowing profitmaking organizations to take things that don't belong to them and use it as they see fit without permission of the owner?

And finally, the final question that this Congress has to decide is does the Congress or does it not recognize and respect the rights of a proper owner?

Thank you very much.

[The complete statement of Mr. Valenti follows:]

A Plea To The Congress For Equity:

THE CASE FOR FAIR AND OPEN COMPETITION IN THE CABLE TELEVISION MARKETPLACE, INSTEAD OF THE ANTI-COMPETITIVE ARENA THAT EXISTS TODAY.

Presentation Of Jack Valenti, President
THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

For Hearings Before The
Subcommittee on Courts, Civil Liberties,
And The Administration Of Justice
On May 14, 1981
In The Rayburn Building
Of The U.S. House Of Representatives

CONTENTS OF THIS PLEA FOR EQUITY

EXHIBITS

(The arithmetic and numbers of the MPAA case)

Mr. Chairman, Members of the Committee, my name is Jack Valenti. I am president of the Motion Picture Association of America, Inc., whose members are the producers and distributors of theatrical and television programs in the United States. I also am the president of the Association of Motion Picture and Television Producers, Inc., in Hollywood, whose 80 members include the smaller producers and syndicators of television programming and theatrical films. Attached to my statement is a list of both MPAA and AMPTP Members.

THE MPAA POSITION

1. Congress should amend the Copyright Act of 1976 to require basic cable (as distinguished from "pay cable") to respect the property rights of program owners, and should abolish the anti-competitive statutory rate schedule which now governs the conventional cable program arena.

2. There should be no compulsory license for distant TV station programs imported by cable systems. This programming should be freely and openly bargained for between cable licensee and program licensor.

3. The compulsory license should be retained only for "local" station programs that are required to be carried by cable systems under FCC rules.

Simply put, property rights must be observed. Congress should return to the copyright owner his right of control over how his product is distributed.

If these revisions are made in the Copyright Act, then the principle of open and fair competition between cable systems, networks, broadcast stations, pay cable, videocassettes, videodiscs, direct broadcast satellites and all other new magic technology sure to make their appearance, will be observed to the benefit of the public.

Of the competitors listed above, only the cable system is a geographic monopoly. Only the cable system has the power of a monopoly. To grant special privileges to a monopoly, no matter how benign that monopoly may appear right now, only compounds the imbalance and anti-competitive nature of the cable marketplace. Monopoly breeds power, power corrupts, absolute power corrupts absolutely!

WHY THE COPYRIGHT ACT OF 1976 MUST BE REVISED

This Committee, and its Chairman, Mr. Kastenmeier, are to be commended for holding hearings to revisit the Copyright Act of 1976. We salute the Committee and its Chairman for their perception of how radically the cable environment has changed and how necessary it is to make congressional revisions to establish competition and thereby to keep pace with this still-whirling, still-changing marketplace.

These changes are necessary because:

1. The Federal Communications Commission has abolished its syndicated exclusivity and the distant signal importation regulations, rules that Congress had anticipated would keep the television marketplace in some kind of delicate balance when the Copyright Act of 1976 was written.

2. Vast new changes have taken place in communications technology and marketing techniques which have affected the distribution of television programs.

3. Cable's "compulsory license" and the statutory rate system to distribute basic cable copyright royalties are not working because the law prevents free negotiation in the marketplace as to the use and value of television programs.

4. There has been an enormous growth of cable. Giant multiple system owners now control major segments of the cable marketplace; 25 of the largest system owners control 60% of all subscribers. Small systems, individually owned, are vanishing like the mom-and-pop corner grocery.

These facts, well known to all informed persons, require the following changes in the law:

1. Congress should abolish the "compulsory license" for all imported distant TV station signals which basic cable (as distinguished from "pay cable") transmits to its subscribers. It is this compulsory license for distant television signals that gives basic cable an unfair advantage over its competitors.

2. Cable should continue to be granted a compulsory license to retransmit local programs required to be carried under FCC regulations. Cable should not be required to pay any copyright fee to copyright owners for using such programs. This policy is in accord with the concept of localism and better serves the public interest by protecting and guaranteeing the continued availability of locally-oriented programs. Thus cable viewers particularly would be assured of receiving local public affairs programs, local news and weather reports, and television coverage of events of local community interest.

For more than half a century since the enactment of the first Radio Act, it has been public policy in this country to foster local broadcasting service. To carry out this Congressionally-mandated policy, the FCC has encouraged the activation of additional television outlets: UHF stations, low-power "translators," and VHF "drop-ins." We believe that localism in television broadcasting best serves the public interest. Today there are 14,000 communities in

the United States that are not served by cable television. But even if cable service were available to all persons in this country, it is important to remember that distant television stations serve primarily the needs and requirements of their own local service areas, and not those of the distant communities into which their programs are imported by microwave and satellites for use by cable systems.

COPYRIGHT ROYALTY TRIBUNAL - AN INADEQUATE SOLUTION

It is simply not possible for any government agency, no matter how intelligently composed, to determine the marketplace value of television programs (television series and motion pictures). Only the marketplace can do that.

Cable interests have nourished the false belief that the Copyright Royalty Tribunal (CRT), which Congress established in 1976 to receive, distribute, and review basic cable copyright rates, has the authority and ability to set appropriate cable royalty fees. Mr. Chairman, your bill correctly recognizes the spurious nature of cable's claim that all is well in the operation of the Copyright Royalty Tribunal. You have heard testimony from CRT Chairman James on March 4, 1981 that the CRT is not functioning as it was intended and ought to be abolished.

The truth is that the Copyright Act does not grant the Tribunal sufficient flexibility to adjust royalty fees paid by cable systems to program owners nor can the Tribunal remedy the basic inequities that exist under that statute. The Copyright Act does not permit the CRT to change the rate schedule for signals that cable systems are presently permitted to carry

other than to maintain a constant dollar level of royalties.

But, most importantly, and this is absolutely crucial to the understanding of this complex issue, the CRT cannot set marketplace value. Therefore it is plain that even if the CRT were granted more power to set rates, how can five people, however intelligent they may be, but without any real knowledge of the marketplace, truly calculate what a program is worth? That is a matter between buyer and seller, and it varies from day to day, from market to market.

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BASIC CABLE USES PROGRAMS WITHOUT PERMISSION OF THE COPYRIGHT OWNER PAYING GOVERNMENT-ESTABLISHED ROYALTY RATES THAT ARE RIDICULOUSLY LOW

Three special grievances exist under the current Copyright Act: (1) programs are used by basic cable without permission of the copyright owners, (2) competition is blighted, and (3) the royalty rates are absurdly low.

The most important distortion is the use of programs without permission of the owner of the program. This is counter to every precept of free enterprise in this country. It causes the owner of the program to lose complete control of the marketing of his program. What other business enterprise in the nation must sit by helplessly while others use its product without its permission and, to compound the injury, sell to others for profit that which they have no permission from the owner to use?

Moreover, in the matter of ridiculously low fees, only the free, unregulated marketplace can establish fair and reasonable compensation for the programs that basic cable imports from distant television stations. No precise economic formula can ever determine what that compensation should be in every situation, but after

five years of experience with the compulsory license, the evidence clearly shows that the cable royalty rates mandated in the 1976 Act have no economic justification and are ridiculously low. Consider these facts:

1. Cable's primary competitor, local television broadcast stations, expended over $426 million for "rental and amortization of film and tape" (i.e., syndicated) programs in 1979. The copyright license fees paid by cable systems in 1979 for all retransmitted programs was $12.9 million. These FCC data indicate that in absolute dollars, television stations paid 33 times more for this programming than did the cable television industry.

2. Copyright fees are among cable's smallest expense items, averaging a miniscule 1.2% of the total cable operating expenses, the lowest category of cable system expenses.

3. Cable systems pay more for the postage to bill their subscribers than they do for distant signal programming under the compulsory license. CableData, an organization which provides billing services to 900 cable corporations and 9 million subscribers - about half of all subscribers - reported

that its postage cost in 1980 "ran well over $10,400,000." Total royalties paid in 1980 by all cable systems amounted to $18.9 million. (Source: Cable Marketing, 4/81, p. 40)

4. Because royalty payments are computed on the basis of gross receipts from basic subscription service only, even the pittance cable systems are now paying faces substantial erosion. Virtually all "new builds" in major markets include multi-channel "tiers" of basic service to subscribers either "free" or at minimal cost. If retransmitted programs are offered on a "no charge" basis, the license fee that such cable systems would pay is also zero. More common is an arrangement along the lines of the Cablevision Systems Boston proposal, whereby "Cablevision will charge only $2 monthly for its 50-channel basic service on the assumption that subscribers to other services (such as Home Box Office for $7 monthly) will make the total service pay for itself." (Broadcasting, 5/4/81, p. 74) Cablevision Systems Boston would not be subsidizing the 52-channels of programming: the program suppliers will!

THE 'GIANTS' ARE TAKING OVER THE CABLE INDUSTRY, CONCENTRATING POWER AND INCREASING REVENUES

Cable has now reached a powerful and profitable economic status. If five years ago cable needed some kind of "subsidy," it most certainly does not need one now. Indeed those who compete with cable may be the ones who need a subsidy!

Cable is no longer a "mom and pop" struggling business.

Today there are about 4,100 cable systems with approximately 19 million basic cable subscribers.

Authoritative estimates predict that in four years, there will be 28-to-30 million subscribers, rising to some 46 million by 1990!

Cable is now an enormous business with annual revenues of $2.5 billion, with that sum expected to rise in 1985 to $8.5 billion!

Equally important, cable is now dominated by large corporate enterprises, who each day are buying up small systems, and by obtaining local franchises, creating new systems.

Consider these facts that describe today's cable industry:

According to Donaldson, Lufkin & Jenrette, Wall Street brokers, as of October 1980 the 25 largest

multiple system owners (termed MSO's), controlled over 60% of all U.S. subscribers! The ten largest operators control over 48% of the total number of subscribers! Acquisitions since October 1980 by American TV & Communications and Tele-Communications Inc. and the pending acquisition of Teleprompter by Westinghouse have increased the top 10's control to approximately 50% of the total subscribers. (Exhibit 1). This domination grows larger every day.

Never forget that each cable system is a geographic monopoly, a small AT&T, if you please. It has total control of its geographic area, with no other cable system competing with it. Moreover it, alone among monopolies, has a special privilege, the congressionally mandated right to take all the programming it wants and needs, without asking permission of the copyright owner, and paying "below-marketplace-value" for that programming! It is as if someone turned upside down the principle of equity and competition.

Consider more fiscal facts about the new cable industry, now touted on Wall Street as the "depression proof business" of the future:

1. FCC data for 1979 reveal that cable systems have an average return on equity of about 19.3%. This compares to an average of 14.4% for Fortune 500 companies. More than half (55.1%) of cable systems reported net

income (pre-tax) of 20% or more of owners' equity in 1979 vs. only one-seventh (15.0%) of the 500 largest U.S. industrial corporations in 1980. (Exhibit 2.)

2. A few years ago the sales value of CATV systems based upon the strength of basic cable services was $300 per subscriber. Cable systems are now valued at $650 per subscriber, according to the 1980 report by Daniels & Associates, the largest cable brokerage firm in the U.S.

3. Westinghouse has just arranged to purchase Teleprompter, the largest cable system operator in America, for $636 million.

4. The New York TIMES recently paid $119 million for a 60,000 subscriber chain in New Jersey. The Los Angeles TIMES, American Express, Cox Cable, Newhouse Communications, General Electric, Warner Communications, TIME, Inc., and other business giants are into basic cable up to their corporate necks with powerful entities such as Dow Jones and Knight Ridder bidding to acquire existing systems and new franchises.

5. According to FCC data released December 29, 1980, operating revenues in 1979 of cable systems in the U.S. were $1.8 billion (up 20.3% vs. 1978).

Total assets of cable in 1979 were $3.2 billion (up 11.9% vs. 1978).

Pre-tax net income in 1979 was $199.3 million (up 45.4%, a spectacular increase)!

Two facts account for the tremendous increase in cable profitability:

a. Once the investment has been made in system trunk lines and head-end equipment, each additonal subscriber contributes more to the "bottom line" than every previous subscriber.

b. The same is true of other incremental revenue producing services, mainly pay cable, which require only moderate modification of "plant." Cable systems obtain an increase of 100% (or more) in revenues from each subscriber that takes pay cable services offered by the system. Industry analysts estimate that sixty percent of pay cable revenues is retained by the cable operator; the remaining 40% is split between the program distributor (HBO, Showtime, etc.) and the program supplier (the owner of the copyrighted program).

One more fiscal point: Of all categories of cable system operating expenses in the U.S., according to FCC data for 1979, copyright fee payments represent only 1.2% of those expenses. In other words, the most important factor in any cable system's operations - - retransmitted television station programming - - is one of the cheapest products (services, personnel, equipment, etc.) it purchases to operate its business! (Exhibit 3)

FCC data also show dramatically the difference between basic cable and pay cable with respect to expenses vs. revenue. For pay cable (negotiated in the markeplace) payments to program owners were 39.9% of revenues. For basic cable (non-negotiated) payments which included both copyright fees and "origination expenses," cable systems' costs were less than 2.8% of revenues - - a differential of 15 to 1! (Exhibit 4)

THE SYNDICATED PROGRAM MARKETPLACE -- CABLE CAN GET AN ABUNDANCE OF PROGRAMMING

A. Syndicated Program Marketplace

To understand the problem, it is necessary to describe the syndicated program marketplace, why it is important to the public, to the broadcast industry, and to the program supply industry, and how it relates to the Copyright Act.

A syndicated program is a program licensed directly to individual television stations for exhibition in their own local markets. Syndicated programs do not include shows presented by the national television networks or programs produced by local broadcast stations. They may be programs that were previously on a national network or new, "first-run" programs never before shown on television. Generally, they consist of series and special programs produced for television, and feature films that have been exhibited in theaters. Frequently, prime-time network programs do not recoup their costs while they are shown on a network.

Many of these shows are 'deficit-financed' and must look to the syndication market to recoup costs and show a profit. Without a flourishing syndication market, the TV program producer will be forced, eventually, to withdraw from the "free television" market and go directly to "pay cable" and other market alternatives.

Indeed, the value of a TV program is gauged by the ability of the program owner to successfully market his program to local television stations. Licensing his program for limited periods of time in the syndication market is the sole entry-point to investment recoupment. A broadcast station does not want to license a show that is being exhibited in the same market by a competing station or imported by a local cable system from a distant television station. The broadcaster seeks to identify his station in the minds of viewers tuning to his station for his programs. The availability of those programs to cable subscribers via distant signals fractionalizes the TV station's audience potential and erodes the value of its programs.

In 1976, when Congress revised the Copyright Act, it granted to basic cable systems:

1. a compulsory license to take distant television station signals off the air, bring them into a cable head-end, and sell a package of these television station programs to paying subscribers;

2. a statutory rate schedule for determining the compensation received by copyright owners that has no relevance to the marketplace value of programs exhibited by cable. Cable royalty fees are computed on the basis of cable systems' gross receipts derived solely from retransmitting broadcast signals to cable subscribers.

The effect of the 1976 Copyright Act was to skew the television marketplace. Every television station must negotiate for the right to obtain programs and must pay marketplace prices for them. But with the recent repeal of the FCC syndicated exclusivity and distant signal carriage rules, the local cable operator

is entitled by law to pick up any broadcast program under a compulsory license and is obligated to pay only government-preset copyright fees (a pittance of the program's true value). Competition between basic cable systems and local television stations (which "perform" many of the same programs in the same market) is blighted. It is as if the government in its zeal to deregulate airlines, gave to one airline the right to purchase its jet fuel at, say, one-tenth or one-fifth the cost its competitors must pay.

There is a terrible unfairness in the statutory right of a cable system to take all of its television broadcasts

-- without the permission of the copyright owner,

-- without negotiating with the copyright owner for an agreed price for programs, and

-- without payment of the true worth of distant television station programs.

B. Cable Can Get An Abundance of Programming.

The question is repeatedly asked: If there were no compulsory license for distant signals, how will basic cable get programming to serve its subscribers?

Basic cable is playing "the demogogic game" by trying to instill fear in the minds of Federal legislators and their own subscribers by declaring that copyright owners will not make programs available to basic cable -- and cable will be put out of business.

This argument is both false and absurd. Let me explain.

There are rational, economic and intelligent reasons why cable will be provided with a boundless sea of programming from which it can choose and for which it can pay a reasonable, market value price.

Reason #1: Self-interest.

To the program supplier, conventional cable is the "parent" of pay cable, which is a most attractive supplemental market for programs.

Pay cable cannot exist without basic cable, therefore, it is in the long-range self interest of program suppliers to make certain that basic cable is provided with all the programming it needs so that it grows, continues healthy, so that it can spawn more pay cable operations.

Reason #2: Program material today is underused -- a vast supply of programs is now available to cable.

Program suppliers are in the business of licensing program material. This is the copyright owner's life. It is the only reason for producing program material!

There is available now for syndication over 13,000 English language feature films and over 4,000 series and specials. New ones come on the market each year. The only syndicated programs that I can conceive not readily marketable to basic cable would be those programs contracted for limited periods of time by local television stations. Relatively few syndicated series are licensed to as many as 100 television stations so that even this restraint is of

minimal significance to cable systems seeking syndicated programming. But it is of the utmost importance to program owners and television stations to grant individual television stations an exclusive right to show a program in its market for a limited time. Should not a program owner have the basic right to market his product in the most intelligent fashion?

But this should pose no problem. Why should cable systems want to program their own channels with material already being exhibited on local TV stations? Cable systems have no need to duplicate programming now being viewed either over the local station cable channel or over an available "pay channel."

The Nielsen Report on Syndicated Programs for November 1980 lists 281 series (exclusive of religious programs) which were carried by 5 or more stations. Exhibit 5 shows that most of these series would be available to be licensed to the vast majority of cable systems in addition to many thousands of series and specials which were not sold to even five television stations.

Here is how I see the marketplace operating for cable's licensing of its own programs.

First, middlemen could package programs for basic cable systems and program suppliers just as they

now package programs for existing cable origination services. The Satellite Program Network, a service of Southern Satellite Systems, is already providing such a program service to over 300 cable systems. The marketplace would quickly adjust to the new procedures.

Packagers of cable programs would license programming material, take it to a satellite, and make a variety of programming available to cable systems. By catalogues and price lists, based upon a per subscriber rate, the packager would beam to the cable system whatever programming that system owner has chosen. Paperwork would be at a minimum. There would be no need for a forest of bureaucratic filings.

Second, advertiser-supported programs, purchased by basic cable systems, are growing in number and revenue. It is one of the hottest phenomena in an industry that is full of tremendous changes. Research conducted by Paul Kagan Associates, Inc. indicates that cable network advertising revenues in 1980 were over $30 million and should more than double in 1981 to over $65 million. Cable TV network ad revenue may exceed $1.6 billion by 1990, and overall total cable ad revenue may exceed $2.2 billion that year, according to Kagan! (Exhibit 6)

This will be a boon to the cable operator and will provide an additional source of large revenue, without relying on an increase in subscriber costs.

The cable operator will have an opportunity to encourage local merchants to advertise on one or more of his program channels. The local toy store, for example, could advertise on a children's channel. Other local merchants could very well choose a sports channel or a movie channel or a documentary or special-interest channel. The cable operator could more than recoup whatever added costs he might incur in programming by advertising revenues flowing into his cable system. Indeed, cable will, by advertising support, turn a generous profit on programming it negotiates for in the competitive market.

Today there are at least 35 "cable networks," ranging from Cable News Network to Home Box Office, according to Ogilvy & Mather Advertising Agency. These networks include both "pay TV" operations such as HBO and advertiser-supported operations such as the Modern Satellite Network and the Satellite Program Network. In addition to these, there are a number of networks operated by religious organizations. According to the Ogilvy & Mather tabulation, 18 of the 35 networks accept advertising. And the number of "cable networks" is expanding almost daily, including

new ventures (not listed among the 35) announced by ABC, CBS, Rockefeller Center, and others.

Multichannel News (April 13, 1981) reporting on a recent cable programming symposium stated:

> According to John Goddard, Viacom president and co-chairman of the organizing committee, the symposium is designed to help cable operators bridge the gap between the days when there was an abundance of channels for programming and the time when operators will be forced to choose among program options.
>
> "This conference represents a whole new way of thinking," he said. "With all the options suddenly available, it's time to pick and choose and those choices have to be profitable."

Third, direct negotiations between program suppliers and cable operators. Right now, as noted earlier, 25 MSO's control some 60% of all cable subscribers. This concentration will grow even faster in the future, as large companies merge and/or buy out smaller operators.

This concentration will simplify direct negotiations between program suppliers and cable systems. Program suppliers today negotiate directly with some 600 television stations. Bargaining and negotiating with the small handful of large cable operators will be much easier than with over 600 television stations customers.

Fourth, a more recent trend of significance is the development of state-wide and regional cable system networks. Referred to as "interconnects," groups of systems join together to share production facilities, advertising sales forces, and to acquire "origination programming." As the name implies, these systems are interconnected by microwave facilities. CableVision (3/9/81) reported that "by the end of the first-quarter of 1981, approximately 80 systems (representing 1.5 million subscribers) will be linked in almost a dozen regions. And if half of those who are talking about interconnecting do so, that number could almost double by the year's end." For program suppliers to negotiate program licenses with such "interconnects" is entirely practical and efficient for both the syndicators and the cable systems.

The cable advertising landscape will burgeon in the next decade. Advertising will be sold on a national, regional, system-wide, and partial-system basis to specific audiences. Cable subscribers need not, therefore, have to pay any additional subscriber fees for programming if the cable operator taps advertising revenues as the means of obtaining fresh, new diverse, quality programming from copyright owners. See Exhibit 7, which lists 16 satellite-delivered basic cable services - exclusive of "superstations."

Reason #3: Better cable customer service

With the marketplace making choices, cable systems will be able to serve their customers far better than they are now and will provide them more for their subscription fee. Today, by picking up distant signals, cable systems are bringing into their areas a large amount of programming that is absolutely without interest to their subscribers. Cable systems in Wisconsin, Virginia, Michigan, Texas, California, Massachusetts have no interest in New York, Atlanta, or Chicago local news programs, or community programs exploring local problems in those distant cities.

Basic cable systems have claimed from the outset their eager desire to provide diverse, innovative and useful programming to their subscribers. For the first time, by eliminating the incentive to rely on virtually free distant signals obtained via the compulsory license, cable systems would be encouraged to do what they claim they want to do, but have not done up to now.

THE FCC'S FINDINGS IN ITS RECENT DECISION ABOLISHING SYNDICATED EXCLUSIVITY AND DISTANT SIGNAL CARRIAGE RULES SHOULD NOT NARROW THE SCOPE OF THIS COMMITTEE'S INQUIRY OR DETERMINE HOW THE COPYRIGHT ACT SHOULD BE AMENDED

The scope of this Committee's inquiry must not be narrowed by basic cable's self-serving assertions that the FCC has already decided all issues relating to signal carriage limitations and syndicated exclusivity.

First, the FCC's conclusions concerning signal carriage and syndicated exclusivity regulations were grounded upon invalid analysis and factual errors. The FCC's staff placed major reliance on theoretical econometric studies published as far back as 1972, obviously outdated for the purpose of its study, and also upon seriously flawed statistical analysis (the Park study), which is replete with hundreds of errors, fully documented in our Comments filed with the Commission at that time. The reasonableness of the FCC's decision is now being reviewed by the Second Circuit Court of Appeals which has stayed its effective date.

Second, the cable deregulation decision rested upon the FCC's very narrow construction of its statutory authority to regulate cable under the "ancillary to broadcasting doctrine" established by the Supreme Court in Midwest Video. The FCC clearly stated: "The thrust of our analysis thus is that the syndicated exclusivity rules serve no necessary public purpose in terms of this Commission's regulatory responsibilities." (emphasis added) In the Matter of Cable Television Syndicated Program Exclusivity Rules, FCC 79-242.

The FCC did not even consider, much less decide, whether copyright owners were being fairly compensated for cable's use of their property, or whether cable deregulation was consistent with the Constitutional mandate to provide for the public welfare "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The FCC specifically left these copyright questions, to be decided by this Committee and the Congress. Those who argue that these issues have been settled by the FCC in

effect urge this Committee to subjugate its authority and responsibility to the judgments of an administrative agency with no interest in or legal authority with respect to copyright issues.

CABLE'S COMPULSORY LICENSE RESULTS IN PROGRAM DUPLICATION AT THE EXPENSE OF PROGRAM DIVERSITY AND HARMS LOCAL TELEVISION STATIONS

Cable's compulsory license to carry imported distant signals into the local cable market results in program duplication at the expense of program diversity.

This situation will be exacerbated by the Federal Communications Commission's decision to delete its syndicated exclusivity rule (which permits certain local broadcasters to exercise their exclusive program rights against cable systems that import the same programs from distant stations).

Exhibits 8 A-D illustrate how cable systems duplicate the programs licensed by local television stations. These exhibits portray graphically the basic inequity of a skewed marketplace where television stations must pay full copyright liability while cable systems must pay only a miniscule government-fixed rate.

Cable has long argued that the time diversity provided by broadcasting imported

distant television programs that often duplicate local television station programs is in the public interest. But is the public interest well served by broadcasting the SAME program at 4:30 p.m., 5:00 p.m., and 5:30 p.m. on three separate cable channels when it could damage local broadcasting services, and serve no useful public service?

The "compulsory license" is a dual impediment to the cable subscriber and the local television station. Cable subscribers are denied new and diverse programming because cable operators are encouraged to take the "cheapest route" by importing distant signals under "a take what you can" license. At the same time, local stations and their program suppliers are at the mercy of a governmental edict which says that once a program is licensed to any station it is fair game for any or all cable systems to use that program. This is so obviously unfair, there is no reason to continue what is terribly wrong.

VIEWS OF THE EXPERTS

A COMPENDIUM OF EXTRACTS FROM STATEMENTS MADE BY AUTHORITATIVE UNBIASED SOURCES THAT HOLD THAT THE EXISTING COPYRIGHT SYSTEM HAS NOT WORKED, IS UNFAIR AND SHOULD BE ABOLISHED

Nowhere has the case been better made for eliminating the compulsory license or the inadequacy of the Copyright Royalty Tribunal to deal with the problem of seeing to it that copyright owners are fairly treated and decently recompensed for their property than in the formal testimony of the Register of Copyrights, Dr. David Ladd, and by Clarence L. James, the retiring chairman of the Copyright Royalty Tribunal.

Dr. Ladd, in a letter to Senate Judiciary Committee Chairman, Strom Thurmond, on May 1 of this year, summarized testimony he planned to present before the Senate Judiciary Committee. The full text of Dr. Ladd's letter follows with pertinent points underlined.

Mr. James' May 1 letter of resignation to the President similarly summarizes his earlier testimony before this Subcommittee.

Once again, I have taken the liberty of underlining comments that urge the President to completely eliminate the Copyright Royalty Tribunal because, he says, its purpose to set adequate compensation for copyright owners is "impractical and unworkable". His strictures are aimed also at the compulsory license.

Dr. Ladd's letter strongly advocates the elimination of the compulsory license. This position, he explains, follows a lengthy, intensive study of the problem by the staff of the Copyright Office, the ultimate government authority on copyright matters.

April 21, 1981

- 37 -

The Honorable
Strom Thurmond
United States Senate
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The Copyright Office is preparing a statement for presentation at the Senate Judiciary Committee hearing on cable television under the Copyright Act, scheduled for April 29, 1981.

While the views of the Office will be presented in detail at that time, some members of Congress have indicated that it would be useful to have advance information about the general tenor of my testimony. I am therefore writing to express the general position of the Copyright Office regarding the compulsory license of section 111 of the Copyright Act.

The liability of cable television systems for secondary transmission of copyrighted works has been a major copyright law issue for almost 20 years. When I assumed the duties of Register of Copyrights last June, I decided that an evaluation of the compulsory license compromise embodied in the Copyright Act was in order. Then, in July 1980, the Federal Communications Commission ("FCC") announced a decision to "deregulate" cable television by deleting its rules with respect to importation of distant signals and syndicated program exclusivity. This decision is under appeal, and the court has granted a stay of the order. The debate on the merits of that decision and its effects continues into these scheduled hearings.

In the Copyright Office, we have made a thorough review of the cable compulsory license of section 111 of the Copyright Act, the probable impact of the FCC's decision (assuming it becomes effective), developments in technology and in marketing of programs, and changes in the cable television industry. The Copyright Office has concluded that the cable compulsory license of section 111 should be eliminated, or, at least, significantly modified.

Cable television systems perform copyrighted works for profit when they retransmit broadcast programming to their paying subscribers. As a matter of principle, the government should not impose a compulsory license mechanism on copyright owners that deprives them of full compensation for retransmission of their works. This was the conclusion reached originally by the Copyright Office when it drafted the 1964 and 1965 revision bills, the first bills in the modern effort that led to the Copyright Act of 1976. In its Supplementary Report, the Copyright Office reviewed the arguments by the copyright owners and cable systems for and against liability and concluded:

> On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill. [SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, (House Comm. print, 1965) at 42.]

In the course of legislative consideration of the various copyright revision bills from 1965-1976, Congress decided to impose a compulsory license for secondary transmissions by cable rather than full liability. This decision was influenced by two considerations. First, the Supreme Court in two cases [Fortnightly v. United Artists, 392 U.S. 390 (1968) and CBS v. Teleprompter, 415 U.S. 394 (1974)] ruled that cable systems did not "perform" copyrighted works within the meaning of the outdated Copyright Act of 1909 and hence did not infringe the copyrights when they retransmitted programs. Second, cable systems successfully argued that full copyright liability would likely stifle the growth of cable and perhaps drive most systems out of business, because of high transaction costs or the refusal by program owners and broadcasters to grant licenses to cable systems.

Under the principles of the current Act, it is clear that cable systems perform copyrighted works when they make secondary transmissions. The Supreme Court decisions in Fortnightly and Teleprompter simply represent interpretations of the former law. The Court recognized that copyright policy is set by Congress, and

the opinions in no way imply that cable systems have any entitlement to retransmit copyrighted programming except as Congress decides. The general principle of the copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. It is the opinion of the Copyright Office that copyright owners will be more confidently assured of rightful compensation, if that compensation is determined by contract and the market rather than by compulsory license.

In the last five years the cable industry has developed from an infant industry to a vigorous, economically stable industry with vast prospects. In our opinion, cable no longer needs the protective support of the compulsory license in order to flourish.

I will therefore urge in my testimony before the Senate Committee that the time has come to require that cable pay marketplace rates for the programs it retransmits. The fact that cable already pays full rates for programs it originates and thus makes a substantial contribution to the income received by copyright owners does not mean that cable should continue to carry retransmitted programming on a compulsory basis at rates that are clearly below the value of the programming.

If, as we shall propose, the cable compulsory license should be eliminated, the responsibilities of both the Copyright Royalty Tribunal and the Licensing Division of the Copyright Office will be much reduced, with a concomitant reduction in budget and personnel requirements. Moreover, administrative procedures will not, as now, delay compensation of copyright owners, whatever that is bargained to be.

A compulsory license mechanism is in derogation of the legitimate rights of authors and copyright owners. It should be utilized, I believe, only if compelling reasons support its existence. Compelling reasons may have existed in 1976 to justify the cable compulsory license. In our opinion, they no longer do.

In the event that Congress does find reasons for continuation of some form of a compulsory license, I will discuss alternative means of modifying the present system at the Senate hearing.

Sincerely yours,

David Ladd
Register of Copyrights

COPYRIGHT ROYALTY TRIBUNAL
UNITED STATES OF AMERICA

1111 20th Street, N.W.
Washington, D.C. 20036
(202) 653-5175

May 1, 1981

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In November, 1977, pursuant to the 1976 Copyright Act, the Copyright Royalty Tribunal was created. Its purpose, to set the adequate compensation to be received by copyright owners for the public use of their copyrighted work, has proven impractical and unworkable. After considerable thought and reasoning, I am convinced that the Copyright Royalty Tribunal should be eliminated.

The general principle of copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. It is my opinion that copyright owners will be more confidently assured of rightful compensation, if that compensation is determined by contract and the market rather than by a Federal Regulatory Agency. A copy of the contents of my presentation on March 4 before the House of Representatives Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, hereto attached, details the thrust and nature of my argument.

I am supportive of the policy and position that excessive government involvement in private industry is potentially harmful. The creation and further continuation of the Copyright Royalty Tribunal is a clear example of excessive government involvement in private industry. The budget and staff of the Copyright Royalty Tribunal is miniscule compared to those of other federal agencies. However, every penny saved in governmental dollars represents substantial savings to the American taxpayer.

So conclusive is the evidence supporting the inability of the Copyright Royalty Tribunal to fulfill the mandate of Congress, and so strong are my feelings that anything short of elimination is a blatant waste of taxpayer's money, I hereby respectfully submit my resignation as Chairman and Commissioner to the Copyright Royalty Tribunal, effective immediately.

Sincerely,

Clarence L. James, Jr.
Chairman

COPYRIGHT ROYALTY TRIBUNAL
UNITED STATES OF AMERICA

1111 20th Street, N.W.
Washington, D.C. 20036
(202) 653-5175

May 1, 1981

Honorable Strom Thurmond, Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

It is my understanding that Commissioner Brennan of the Copyright Royalty Tribunal presented testimony before your Committee on April 29, 1981. It is also my understanding that Commissioner Brennan stated that he represented my views.

I did concur, in principle, on the proposed draft of the testimony that was represented to me would be given. I would like to take this opportunity to say that in reviewing the testimony which was actually presented I find that it is not what I concurred in and in fact I am in substantial disagreement with it. Many of the views expressed completely contradicted my views.

I wish to inform you and the Committee in the strongest possible terms that my views are and will remain as stated before the House of Representatives Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on March 4, 1981, a copy of which is attached hereto.

I would sincerely hope that my fellow Commissioners would put aside their pecuniary and proprietary interest in the Tribunal. They could then, I believe, give an objective appraisal of the value of the Tribunal.

Thank you for your time and interest. I remain,

Very truly yours,

Clarence L. James, Jr.
Chairman

Attachment

THE KASTENMEIER BILL WILL NOT REMEDY THE INADEQUACIES OF THE COPYRIGHT ACT OF 1976

The Chairman of this Subcommittee, Mr. Kastenmeier, is to be applauded for making a serious effort to resolve the obvious flaws in the Copyright Act of 1976. Even so, the Kastenmeier bill will not remedy the great inadequacies of the Act. We strongly believe that the elimination of the compulsory license granted cable to import distant television signals is the only fair and efficient way to redress inequities of the present law. With this firm belief in mind, we offer these comments on the Chairman's legislation:

1. A government agency cannot perform the functions of the marketplace by setting "fair and reasonable" copyright royalties and establishing regulations maintaining syndicated exclusivity rights.

   (a) The CRT has a very limited budget (which may be reduced even further by this Congress) and no staff to execute the

major regulatory responsibilities that the Kastenmeier bill would impose on the CRT.

(b) Effective syndicated exclusivity provisions are essential to the operation of any compulsory licensing scheme intended to provide even minimal protection for the rights of copyright owners and their broadcast station licensees. Such provisions should be clearly set forth in the statute and not left to the vagaries and delay inherent to the administrative process.

2. Cable systems with up to 5,000 subscribers should not be completely exempt from copyright liability.

(a) No commercial enterprise, no matter how small, should be mandated to get programs free -- which it later sells to the public!

No business enterprise should be "excused" from compensating copyright owners whose material is being sold to the public for a profit.

(b) If some special treatment is to be afforded "small" systems, a more reasonable definition of "small" should be adopted. Cable systems with fewer than 5,000 subscribers represent over 80% of all cable industry systems, serve one-third of all cable subscribers and paid $1.3 million in all cable royalties in 1979. Moreover, such systems of 5,000 subscribers receives up to half a million dollars annually in basic subscribers revenues.

(c) No cable system owned by a large multiple-system-operator should be exempt from copyright liability. Large MSO's own or control more than 10% of all cable systems with fewer than

5,000 subscribers and such giant corporations should not benefit from provisions intended to assist so-called "mom & pop" systems.

(d) Cable systems located in the top-100 television markets should not be exempt from copyright fees. Cable systems in the nation's largest metropolitan areas which comprise the top-100 television markets have extensive growth potential, receive adequate (often abundant) local television broadcast services, and, if necessary, readily can join forces with neighboring cable systems to acquire programming for local origination. Cable systems located in these top-100 television markets have the ability, and should be required to compete openly in the marketplace for programming.

CONCLUSION AND RECOMMENDATION

Congress should declare that basic cable television must compete on an equal basis with all other segments of the television media in the program market with none having an unfair advantage.

MPAA recommends that the Congress:

1. Amend the Copyright Act of 1976 to require basic cable systems to respect the property rights of program owners and to abolish the anti-competitive statutory rate schedule which sets royalties for conventional cable.

2. Abolish the compulsory license for distant TV station programs imported by cable systems.

3. Retain the compulsory license only for "local" station programs that are required to be carried by cable systems under FCC rules.

EXHIBIT 1

CABLE'S TOP 25 MULTIPLE SYSTEM OPERATORS

(As of October 1, 1980)

SOURCE: Donaldson, Lufkin & Jenrette Study

		NUMBER OF SUBSCRIBERS	% OF TOTAL (17,500,000=100.0%)	
1.	Teleprompter	1,337,315	7.6	(1)
2.	ATC (Time, Inc.)	1,220,000	7.0	(2)
3.	Tele-Communications Inc.	1,034,000	5.9	(3)
4.	Cox Cable	883,585	5.0	
5.	Warner-Amex	725,000	4.1	
6.	Times-Mirror	545,361	3.1	
7.	Storer Cable	534,100	3.1	
8.	Viacom	467,000	2.7	
9.	Sammons	398,386	2.3	
10.	UA-Columbia	380,000	2.2	(4)
11.	United Cable	345,400	2.0	
12.	Continental Cablevision	325,000	1.9	
13.	General Electric	250,000	1.4	
14.	Cablecom - General (RKO General)	241,329	1.4	(5)
15.	Telecable Corp.	215,000	1.2	
16.	Service Electric Cable	210,200	1.2	
17.	Midwest Video	206,848	1.2	
18.	NewChannels (Newhouse)	202,590	1.2	(6)
19.	Liberty Communications	177,200	1.0	
20.	Heritage Communications	159,620	0.9	
21.	Cablevision Systems Development	157,000	0.9	
22.	Comcast Corp.	152,000	0.9	
23.	Vision Cable	145,400	0.8	
24.	Western Communications	142,300	0.8	
25.	Texas Community Antennas	140,300	0.8	
	TOP 25	10,595,134	60.5	

MAJOR CHANGES SINCE OCTOBER 1980

(1) Acquisition by Westinghouse pending. Westinghouse was #40 with 78,407 subscribers.
(2) Exclusive of acquisitions of Midwest Video (#17) and 59,000-subscriber Honolulu system. Current total (with acquisitions) 1.4 million subs.
(3) Exclusive of acquisitions of Horizon Communications (#29) with 125,600 subscribers.
(4) Acquisition by Dow Jones/Knight-Ridder pending.
(5) Acquired by Capital Cities.
(6) Exclusive of acquisition of Vision Cable (#23) and Daniels Properties. Current total in excess of 500,000 subscribers.

EXHIBIT 2

RETURN ON EQUITY

CABLE SYSTEMS vs. FORTUNE 500

	CABLE SYSTEMS (1979 - FCC)			FORTUNE 500 (1980)		
RETURN ON EQUITY	#	%		#	%	
10% or Less	590	30.8		132	26.4	
10 - 19.9%	271	14.1		293	58.6	
20 - 29.9%	419	21.8		66	13.2	
30 - 39.9%	400	20.8	55.1	7	1.4	15.0
40% or More	239	12.5		2	0.4	
TOTAL	1,919	100.0		500	100.0	
AVERAGE	19.3% (Mean)			14.4% (Median)		

SOURCE: Cable systems - FCC Cable Television Industry Financial Data, 1979.
Fortune 500 - Fortune Magazine (May 4, 1981)

EXHIBIT 3

CABLE TELEVISION OPERATING EXPENSES, 1979

(Source: TV Broadcast Financial Data--1979)

"SERVICE" EXPENSES		
Pole and Duct Rentals	$ 38,911,213	3.68%
Microwave Services	21,419,753	2.02
Payments to Pay-Cable Suppliers	133,248,410	12.60
All Other "Service" Expenses	376,892,517	35.63
TOTAL	$570,471,893	53.93%
"ORIGINATION" EXPENSES		
TOTAL	21,984,342	2.08
"SELLING, GENERAL & ADMINISTRATIVE" EXPENSES		
Franchise Fees	$ 41,295,303	3.90%
Copyright Fees	12,917,644	1.22
All Other "S G & A" Expenses	411,203,825	38.87
TOTAL	$465,416,772	43.99
TOTAL OPERATING EXPENSES	$1,057,873,007	100.0%

SOURCE: FCC Cable Television Industry Financial Data, 1979, Schedule 2. Issued December 29, 1980.

EXHIBIT 4

PROGRAM REVENUES AND EXPENSES, 1979

PAY-CABLE	
Pay-Cable Revenue	$ 333,693,966
Payments to Pay-Cable Program Suppliers	$ 133,248,410
% Payments of Revenues	39.93%
BASIC CABLE	
Regular Subscriber Revenue	$1,261,480,701
Copyright Fees	$ 12,917,644
% of Regular Subscriber Revenue	1.02%
Origination Expenses	$ 21,984,342
% of Regular Subscriber Revenue	1.74%
Copyright Fees and Origination Expenses	$ 34,901,986
% of Regular Subscriber Revenue	2.76%

SOURCE: FCC Cable Television Industry Financial Data, 1979, Schedule 2. Issued December 29, 1980.

EXHIBIT 5

NUMBER OF STATIONS CARRYING POPULAR SYNDICATED TELEVISION SERIES DURING NOVEMBER 1980

Source: Nielsen Report on Syndicated Program Audiences

(Limited to non-religious series carried by five or more stations.)

NUMBER OF STATIONS	NUMBER OF SERIES	%
5 to 24	160	57.0
25 to 49	56	19.9
50 to 74	32	11.4
75 to 99	15	5.3
100 or more	18	6.4
TOTAL	281	100.0

EXHIBIT 6

FORECAST OF ADVERTISER-SUPPORTED PROGRAM REVENUES FOR BASIC CABLE

Paul Kagan Associates, Inc., a most respected research firm specializing in forecasting the future of cable television advertising, predicts that advertising-supported cable TV networks will have enormous growth over the next decade. Here is a summary of the Kagan projections:

Year	Cable TV Network Ad Revenue (millions)	% Change	Natl./Local Spot Cable (millions)	% Change	Total Cable Ad Revenue (millions)	% Change
1980	$ 30.1	-----	$ 15.0	-----	$ 45.1	-----
1981	65.7	+118.3%	35.0	+133.3%	100.7	+123.3%
1982	113.3	+ 72.5	63.0	+ 80.0	176.3	+ 75.1
1983	180.8	+ 59.6	99.0	+ 57.1	279.8	+ 58.7
1984	269.4	+ 49.0	143.0	+ 44.4	412.4	+ 47.4
1985	390.1	+ 44.8	195.0	+ 36.4	585.1	+ 41.9
1986	541.3	+ 38.8	255.0	+ 30.8	796.3	+ 36.1
1987	730.1	+ 34.9	323.0	+ 26.7	1,053.1	+ 32.3
1988	972.1	+ 33.2	399.0	+ 23.5	1,371.1	+ 30.2
1989	1,266.2	+ 30.3	483.0	+ 21.1	1,749.2	+ 27.6
1990	1,649.8	+ 30.3	575.0	+ 19.1	2,224.8	+ 27.2
Average annual growth.....		+ 51.2%		+ 47.2%		+ 50.0%

SOURCE: Paul Kagan Associates, Inc., Cable TV Advertising, February 18, 1981.

EXHIBIT 7

BASIC CABLE PROGRAM NETWORKS

(Source: Panorama Magazine, April 1981)

NETWORK	DESCRIPTION OF NETWORK
Appalachian Community Service Network (ACSN)	Broadcasts college-credit courses, teleconferences, continuing-education courses and general-interest community programming. This nonprofit network has 45 colleges (most in Appalachian region) affiliated with its services. Viewers can receive college credit for courses shown on ACSN.
Black Entertainment Television	Nation's first and only black-oriented cable network. Features mainly tape-delayed sporting events from black colleges, black films such as Which Way Is Up? and black special events. Advertiser-supported.
Cable News Network (CNN)	Round-the-clock live information network featuring news, interviews, commentary, reviews, business reports, sports and weather coverage. Commentators include Barry Goldwater, Coretta Scott King, Bella Abzug. Daniel Schorr is the anchor on the Washington desk. The network is owned and operated by cable-TV entrepreneur and sportsman Ted Turner. Advertiser-supported.
Cable Satellite Public Affairs Network (C-SPAN)	Televises gavel-to-gavel proceedings of the U.S. House of Representatives. Also covers National Press Club luncheon speeches and produces a highschool government series called Close-Up.
Christian Broadcasting Network (CBN)	The network's avowed purpose is to present family entertainment with a moral perspective that reaches a Catholic and Protestant audience. Shows movies, dramas, variety shows, holiday specials and kids' programs. Supported by its own telethons, which raise over 90 percent of the operating cost of the network.
Entertainment and Sports Programming Network (ESPN)	Round-the-clock sports network. Last year telecast more than 45 different types of sports, including Australian-rules football, tractor-pulling contests and table-tennis tournaments. Most programming focuses on NCAA basketball, boxing, tennis, skiing, and college and Canadian football. Backed by Getty Oil. Advertiser-supported.

NETWORK	DESCRIPTION OF NETWORK
Modern Satellite Network (MSN)	Division of Modern Talking Picture Service, distributor of sponsored films. This network is geared to the homemaker. Televises programs on health, cooking and consumer inquiries. Regular series include The Home Shopping Show, Fun and Fitness and Financial Inquiry.
National Christian Network (NCN)	Religiously oriented network representing over 70 denominations, which produce many of the shows televised. Programs include Faith for Today (Seventh Day Adventist), At Home with the Bible (Southern Baptist Convention) and Christopher Close-up (Catholic).
National Spanish TV Network (SIN)	Spanish-language television network televising sports, movies, sitcoms, variety shows and news. Advertiser-supported.
Nickelodeon	First and only young people's channel. Produced, created and packaged by Warner Amex Satellite Entertainment Company. Programming for preschoolers through teen-agers. Shows include Livewire, teen-age talk/variety program; and Pinwheel, a magazine-format show for preschoolers.
People That Love (PTL)	Network run by James Bakker, ordained Assembly of God Evangelist. All programming has religious overtones. Features talk shows (including The PTL Club, which is also carried by over-the-air broadcasters), preachers like Oral Roberts, children's shows, and two fund-raising telethons a year.
Satellite Program Network (SPN)	Varied programming mix featuring talk shows, how-to's, classic movies and women-oriented shows. Broadcasts Telefrance, a three-hour series of French movies and variety programs, seven nights a week. Other regular programs include Jimmy Houston Outdoors, The Gourmet and Real Money.
The Women's Channel	A TV network geared to women. Tapes previously written material from magazines like Family Circle and Women's Sports, adapts it to audio-script form, and then picks graphics to accompany the material. Video portion of network in slow scan; new image appears every 12 seconds giving the effect of a slow slide show. Programming includes Feeling Your Best & On the Job.

NETWORK	DESCRIPTION OF NETWORK
Trinity Broadcasting Network (TBN)	Christian programming representative of 18 mainstream denominations including Catholic, Baptist and Methodist. Network produces 48 regular series featuring variety programs, quiz shows, musicals and live special events. All have a Christian flavor.
USA Network	Seventy-five percent of programming devoted to sports, including professional baseball, basketball, hockey and soccer. Other programming features Calliope, the children's show, six days a week, eight hours total. Also televises The English Channel, a series of culturally oriented shows, most of which are produced in England. At press time, USA Network was on the sales block and several companies--including broadcast giant CBS--were bidding for acquisition.

EXHIBIT 8A

CABLE SYSTEM	:	Wilmington, Delaware
OWNER	:	Rollins Cablevision
SUBSCRIBERS	:	6/30/79 50,867
GROSS RECEIPTS	:	(1st Accounting Period, 1979) $2,475,139
DSE'S	:	4.0 % OF GROSS: 1.950
COPYRIGHT ROYALTY FEE PAID:		$48,264

LOCAL SIGNALS

Philadelphia:

KYW (NBC)
WTAF (IND)
WPVI (ABC)
WPHL (IND)
WCAU (CBS)

Camden:

WNJS (PBS)

Wilmington:

WHYY (PBS)

DISTANT SIGNALS

Baltimore:

WBAL (NBC)
WMAR (CBS)
WJZ (ABC)
WBFF (IND)

New York:

WOR (IND)

Washington:

WTTG (IND)

Lancaster:

WGAL (NBC)

SOURCE: Statement of Account filed at Copyright Office (Remittance #09646).

EXHIBIT 8B

SYNDICATED SERIES CARRIED BY TWO OR MORE

OF THE LOCAL AND/OR DISTANT COMMERCIAL STATIONS RETRANSMITTED

BY THE WILMINGTON CABLE SYSTEM, MONDAY, APRIL 20, 1981 4-8 P.M.

	LOCAL STATIONS		DISTANT STATIONS	
Evening Magazine	KYW	7:00 p.m.	WJZ	7:30 p.m.
Family Feud	WCAU	7:30 p.m.	WBAL	7:30 p.m.
Good Times	WPHL	5:00 p.m.	WMAR	4:30 p.m.
Happy Days Again	WTAF	6:00 p.m.	WBAL WTTG	5:00 p.m. 6:30 p.m.
I Love Lucy	----	----	WBFF WTTG	5:00 p.m. 5:30 p.m.
John Davidscn Show	KYW	4:00 p.m.	WJZ	4:30 p.m.
Joker's Wild	WTAF	6:30 p.m.	WMAR WOR	7:30 p.m. 6:00 p.m.
M*A*S*H	WTAF	7:00 & 7:30 p.m.	WBAL WTTG	5:00 p.m. 7:30 p.m.
Merv Griffin	WPVI	4:00 p.m.	WGAL	4:00 p.m.
Scooby Doo	WTAF	5:00 p.m.	WBAL	4:30 p.m.
Tic Tac Dough	WPVI	7:00 p.m.	WOR	6:30 p.m.
Tom & Jerry	WCAU	4:00 p.m.	WMAR	4:00 p.m.
Welcome Back, Kotter	WPHL	5:30 p.m.	WBAL WTTG	4:30 p.m. 7:00 p.m.
What's Happening?	WTAF	5:30 p.m.	WBAL	4:00 p.m.

SOURCE: TV Guide Program Schedules for listed stations.

EXHIBIT 8C

CABLE SYSTEM	:	Bellaire, Texas
OWNER	:	Gulf Coast Cable Television
SUBSCRIBERS	:	6/30/79 3,806
GROSS RECEIPTS	:	(1st Accounting Period, 1979) $165,542
DSE'S	:	2.0 % OF GROSS: 1.10
COPYRIGHT ROYALTY FEE:		$1,821

LOCAL STATIONS

Houston:

KPRC (NBC)
KUHT (PBS)
KHOU (CBS)
KTRK (ABC)
KRIV (IND)
KHTV (IND)

DISTANT SIGNALS

Atlanta:

WTBS (IND)

Chicago:

WGN (IND)

SOURCE: Statement of Account filed at Copyright Office (Remittance #11708).

EXHIBIT 8D

SYNDICATED SERIES CARRIED BY TWO OR MORE
OF THE LOCAL AND/OR DISTANT COMMERCIAL STATIONS RETRANSMITTED
BY THE BELLAIRE CABLE SYSTEM, MONDAY, APRIL 20, 1981, 3-7 P.M.

	LOCAL STATIONS		DISTANT STATIONS	
All In the Family	KRIV	6:30 p.m.	WTBS	6:00 p.m.
Barney Miller	KRIV	6:30 p.m.	WGN	6:00 p.m.
Bob Newhart Show	KPRC	4:30 p.m.	WTBS	5:30 p.m.
Brady Bunch	KHTV	4:30 p.m.	WTBS	3:30 p.m.
Carol Burnett	----	----	WTBS WGN	5:00 p.m. 6:30 p.m.
Gilligan's Island	KHTV	4:00 p.m.	WGN	4:30 p.m.
Good Times	KRIV	4:30 p.m.	WGN	5:00 p.m.
Sanford & Son	KRIV	5:30 p.m.	WTBS	6:30 p.m.
Welcome Back, Kotter	KRIV	5:00 p.m.	WGN	5:30 p.m.

SOURCE: TV Guide program schedules for listed stations.

The eleven major producers and distributors of theatrical and television programs in the United States comprise the membership of the Motion Picture Association of America, Inc. These companies are:

Avco Embassy Pictures Corp.

Columbia Pictures Industries, Inc.

Walt Disney Productions and Buena Vista Distribution Co., Inc.

Filmways Pictures, Inc.

Metro-Goldwyn-Mayer Film Co.

Orion Pictures Company

Paramount Pictures Corporation

Twentieth Century-Fox Film Corporation

United Artists Corporation

Universal Pictures, a division of Universal City Studios, Inc.

Warner Bros., Inc.

MEMBERS OF THE

ASSOCIATION OF MOTION PICTURE &

TELEVISION PRODUCERS, INC.

AARON SPELLING PRODUCTIONS, INC.
A & S PRODUCTIONS, INC.
(THE) ALPHA CORPORATION
AMERICAN INTERNATIONAL PRODUCTIONS
ANDRAS ENTERPRISES, INC.
ARTANIS PRODUCTIONS, INC.
ASPEN PRODUCTIONS
AUBREY SCHENCK ENTERPRISES, INC.
BING CROSBY PRODUCTIONS, INC.
BRISTOL PRODUCTIONS, INC.
(THE) BURBANK STUDIOS
CHARLES FRIES PRODUCTIONS
CHARLESTON ENTERPRISES, CORP.
CHRISLAW RPODUCTIONS, INC.
CINE FILMS, INC.
CINE GUARANTORS, INC.
CINEMA PAYMENTS INCORPORATED
OF CALIFORNIA
CINEMA VIDEO COMMUNICATIONS, INC.
COLUMBIA PICTURES INDUSTRIES, INC.
C-O-P PRODUCTIONS, INC.
DAISY PRODUCTIONS, INC.
DANNY THOMAS PRODUCTIONS
DARR-DON, INC.
DUBIE-DO PRODUCTIONS, INC.
EDPROD PICTURES, INC.
EGS INTERNATIONAL
FILMWAYS FEATURE PRODUCTIONS, INC.
FILMWAYS PICTURES, INC.
FILMWAYS PRODUCTIONS, INC.
FINNEGAN ASSOCIATES
FOUR STAR INTERNATIONAL, INC.
FRANK ROSS PRODUCTIONS
GJL PRODUCTIONS, INC.
GEOFFREY PRODUCTIONS
GUS PRODUCTIONS, INC.
HANNA-BARBERA PRODUCTIONS, INC.
HAROLD HECHT COMPANY
HERBERT LEONARD ENTERPRISES, INC.
JACK CHERTOK TELEVISION, INC.

JACK ROLLINS AND CHARLES H.
JOFFE PRODUCTIONS
JOE R. HARTSFIELD PRODUCTIONS, INC.
LANCE ENTERPRISES
LASSIE FILMS, INC.
LASSIE PRODUCTIONS, INC.
LASSIE TELEVISION, INC.
LEONARD FILMS, INC.
LEVY-GARDNER-LAVEN PRODUCTIONS, INC.
LOCATION PRODUCTIONS, INC.
LUCILLE BALL PRODUCTIONS, INC.
(THE) MALPASO COMPANY
MARBLE ARCH PRODUCTIONS, INC.
MAX E. YOUNGSTEIN ENTERPRISES, INC.
MC DERMOTT PRODUCTIONS
METEOR FILMS, INC.
(THE) MIRISCH CORPORATION OF
CALIFORNIA
MURAKAMI-WOLF PRODUCTIONS, INC.
NGC TELEVISION, INC.
NORLAN PRODUCTIONS, INC.
PAX ENTERPRISES, INC.
PAX FILMS, INC.
PROSERCO OF CALIFORNIA, LTD.
RAINBOW PRODUCTIONS
RASTAR ENTERPRISES, INC.
RASTAR PRODUCTIONS, INC.
RASTAR TELEVISION, INC.
RFB ENTERPRISES
ROBERT B. RADNITZ PRODUCTIONS
INC.
RUBY SPEARS PRODUCTIONS, INC.
SAMUEL GOLDWYN JR. PRODUCTIONS,
INC.
SHELDON LEONARD PRODUCTIONS
SPELLING-GOLDBERG PRODUCTIONS
STANLEY KRAMER PRODUCTIONS, LTD.
SUMMIT FILMS, INC.
SUNCREST CINEMA CORPORATION
T & L PRODUCTIONS, INC.
TORI PRODUCTIONS, INC.
TWENTIETH CENTURY-FOX FILM CORP.
WARNER BROS., INC.
(THE) WOLPER ORGANIZATION, INC.
WRATHER ENTERTAINMENT INTERNATIONAL

Mr. KASTENMEIER. Thank you, Mr. Valenti.

Do you want to ask any questions of Mr. Valenti?

Mr. RAILSBACK. Why don't we hear from everyone and then ask questions.

Mr. KASTENMEIER. Next, we would like to call on the Commissioner of Baseball, the Honorable Bowie Kuhn, who is one of our distinguished witnesses. We are pleased to meet again, Mr. Kuhn.

TESTIMONY OF BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. KUHN. Thank you, Mr. Chairman, members of the subcommittee.

I am delighted to have this opportunity to appear here and speak to you, as the chairman indicates, on behalf of professional sports. While I speak specifically on behalf of the 26 major league baseball teams, my statement is supported by the National Basketball Association, National Football League, National Hockey League, and North American Soccer League, all of whom have interests common to ours in this extremely troublesome area of cable television and its effects on professional sports. So on behalf of all of us, I would like to speak to the subject of the chairman's bill and the general subject of compulsory licensing.

I am very happy to tell you, and you will be delighted to know, that my remarks have been substantially reduced by the fine work of Wilt Chamberlain, on my left.

Our grave concern here is that unless something is done to dramatically alleviate the problem that we in professional sports face, there will be a significant loss in the vast quantity of over the air television presented to the American public by professional sports in North America.

This, for us, is a very grave concern and I believe it should be a grave concern for the subcommittee, for the Congress, and for the public at large, because obviously the vast amount of sports programing which is out there today over the air is one of the most valuable and cherished broadcast properties that come to the American public.

I find in the whole situation an extremely rich irony—perhaps more ironic for professional sports than for anyone else. That irony is that we are indeed subsidizing the cable industry. Perhaps, one could understand going back in 1975, when this subcommittee had hearings and when cable was more or less in its infancy, that possibly industries like ours could be asked to give a helping hand, so to speak. We objected to giving a helping hand, but we were asked to do so.

That was the result of the copyright law and obviously we gave it. And it has been an extremely valuable helping hand to a cable industry which has boomed in the intermediate years and has reached the proportions which Mr. Valenti has so effectively described. One has only to look at the Westinghouse, the Times Mirrors, New York Times, Dow Jones and Knight-Ridder to see the enormous conglomerate companies that have come into this business, attracted by the tremendous profitability and the prospect for profitability .

What we find so particularly ironic from the point of view of professional sports is that we in professional sports are continuing

under present law the subsidy, at a time when we are struggling very badly to make ends meet in terms of the finances of our businesses. It is characteristic of professional sports teams that they are marginal enterprises, is from an economic point of view.

The most recent year for which we in professional baseball have a comparative analysis of our profitability is 1979. Ernst and Whinney have made an analysis of that year for professional baseball. Their analysis shows that professional baseball was a loss operation in 1979. Eleven of our clubs made money. The rest either lost money or broke even in 1979.

We are an industry which is very significantly subsidizing the cable industry. There is something radically wrong with that arrangement. To make it worse, while cable has the most glowing prospect for the future—as Mr. Valenti has clearly demonstrated with the charts he has shown—Ernst and Whinney's projections for professional baseball show that we will suffer losses 10 times greater for the next 5 years than we have had in the last 5. So not only are our problems bad, but they promise to get very much worse. We must ask the subcommittee what sense does it make for us to be subsidizing cable under the circumstances such as these?

I suggest the answer obviously is that it makes no sense at all for the Fortune 500 to be subsidized by professional baseball and by the other professional sports who overall present a very marginal economic picture.

In 1975 when hearings were held on the revision of the copyright law, it was obvious everyone anticipated that the Federal Communications Commission would maintain a balance of regulation. Thus, we in professional sports reasonably expected, and the Congress I believe reasonably expected, that the Commission would see to it that, as far as distant signal carriage was concerned, there were reasonable regulations in place—regulations which would give reasonable protection to professional sports in the face of the compulsory license, which was imposed on us over our most strenuous objections.

Obviously, that expectation has not been fulfilled. As the chairman correctly stated in his opening remarks, what we have seen is a pattern of deregulation by the Commission to a point where, in the past year, the Commission has dropped its syndicated exclusivity rules and its distant signal rules. This has been the final blow to us in professional sports, taking away from us virtually the last vestige of the limited protection which we have had. Thus, the pattern of a balanced system of legislation and administrative regulation has vanished.

We, the subsidizers of cable are left with our product purloined on a daily basis and without help at this time from the Commission—except for the very limited sports rule, to which I will address a few remarks later.

Let's look at another direction—at the dramatic technological change which has occurred in cable television in those 5 or 6 years since you had hearings on the copyright revision bill. These dramatically impact on professional sports.

None is more dramatic than the superstation status of WTCG in Atlanta, now known as WTBS. In 1976 it became a superstation. Today, WTBS reaches almost 12 million cable homes in the United

States—in almost every State, if not every State, in the Union. WTBS reaches 56 percent of the cable homes in the United States, carries a schedule in 1981 of 150 Atlanta Braves games, which have plainly been added to the fare on WTBS so there would be additional baseball programing available.

Going on to look at the other superstations, all of whom have something very interesting in common, as you will perceive. WTBS is the flagship station of the Atlanta Braves obviously.

WSBK, which has been approved for superstation status but is not retransmitted via satellite carrier at the present time, is the flagship station of the Boston Red Sox.

WGN is the flagship station of the Chicago Cubs. WGN is also the flagship station of the Chicago White Sox.

KTTV, which has been approved for superstation status, is the flagship station of the Los Angeles Dodgers.

WOR is the flagship station of the New York Mets.

WPIX, New York, for which application has been filed and is pending is the flagship station of the New York Yankees.

And KTVU, for which application has been approved, is the flagship station of the San Francisco Giants.

Those are the actual or approved or pending flagship stations in the United States and every one is a flagship station of a major league baseball team. And I may tell you all—I am sure you realize this is so—it did not happen by chance. They were looking for baseball programing when they made their applications to the Federal Communications Commission for superstation status for these stations.

If you added up all of the professional sports programing available on those stations which I have just listed, from baseball, basketball, hockey, and soccer, you would have an average of three telecasts of major league sports events available to cable on each and every day of the year—this is an enormous flood of sports programing which is being put out into the marketplace.

This is done through the medium, as you know, of the resale carriers. The resale carriers do not seek the consent of baseball or basketball or football or hockey or soccer. They pay us nothing. They do not pay us even a compulsory licensing fee. And in the bargain they are among the most active advertisers and promoters of the value of the property of professional sports which they purloin.

We have attached as exhibits to our statement a number of the ads which appear on behalf of these resale carriers. They are quite dramatic.

Take WGN Chicago, the resale carrier of which is United Video. I have in front of me an add which appears among our exhibits. What this ad shows the logo of the Chicago Cubs on one side, logo of the Chicago White Sox on the other and says "Cubs if by day, Sox if by night. All on WGN." Because Chicago Cubs home games are played during the day, we've added the White Sox at night, the only American League schedule on satellite. This exciting combination features more than 200 American and National League games.

Mr. RAILSBACK. I am not watching the Cubs anymore.

Mr. KUHN. Somebody has to be out there, Congressman.

In addition to this kind of advertising by the resale carriers we have as exhibit 2 to my prepared statement, an ad that was run in Los Angeles at the beginning of April by Theta Cable Television. In this ad they say "39 games in April. If you run through it, they are all the superstations—the Braves, the Cubs, the White Sox, the Mets, all the superstations and they have games from everyone."

They lead in with this statement:

For the first time you will have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live, as it happens.

Four hundred games pumped into Los Angeles. It may be at the present time the Dodgers can withstand that kind of competition. But you can imagine how their flagship station feels; it thought that it had purchased exclusive television rights, and then there are 400 games coming into Los Angeles from around the country. Take this and transpose it to some of our struggling franchises. Look at Cleveland. Imagine what effect this would have in the Cleveland market. Look at Minnesota, a struggling club, and imagine what effect it would have on the Twins' gate, and on their ability to sell local television programing.

I can tell you that the impact would be enormous, and the destabilizing potential for professional sports is even more enormous. We pride ourselves in professional sports in trying to keep our franchises where they are. In baseball, we have prided ourselves, not with total success, but in the last decade, I am happy to say, with success in keeping our franchises stable. How long will we have stable franchises with this situation?

The Pittsburgh Pirates, one of our worst hit, has had to contend with 40 percent cable penetration. One of our worst hit franchises has actually had conversations with New Orleans about moving the Pittsburgh Pirates to New Orleans. One does not have to put too much imagination into it to think cable penetration has a role in the problems that the Pittsburgh Pirates are facing.

In 1979 the Pittsburgh Pirates won the National League pennant, won the World Series, and lost a million dollars. That was confirmed by a published, audited financial statement. There is no question that it is accurate.

That is the kind of problem we are facing in professional sports. When a world champion team loses a million bucks and plays in the World Series, which is a very valuable thing for a team to do, and loses a million bucks—this is the kind of problem that professional baseball is having and this could be multiplied throughout the other professional sports. And we are the ones who are subsidizing the cable industry today.

So for us, the ultimate conclusion is that while we struggle to create home markets where there is intensive interest in our product, where we can attract our own fans, bring them to the ball park, sell local broadcasting rights and make our franchises viable, the effort is undermined by the threat of enormous flooding and saturation of the markets by cable television.

It is a desperately serious problem for professional sports and I would ask that the panel and the Congress give serious consideration to the gravity of the problem which professional sports faces today in large measure because of cable television.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you for that informative statement.

[The complete statement of Mr. Kuhn follows:]

STATEMENT OF

BOWIE K. KUHN
COMMISSIONER OF BASEBALL

Before the House Subcommittee on
Courts, Civil Liberties and the
Administration of Justice

97th Congress, First Session

May 14, 1981

INDEX

Mr. Chairman, I am Bowie K. Kuhn, the Commissioner of Baseball. I appreciate the opportunity to appear before you and your Subcommittee to testify on the pressing need to alter the cable television compulsory licensing provisions of the Copyright Revision Act of 1976. In this regard, Mr. Chairman, your proposed bill, dated May 7, 1981, provides an enlightened starting point for discussion.

I am here today specifically representing the twenty-six clubs of Major League Baseball. However, the views that I will present are supported by the other major professional sports leagues -- the National Football League, the National Basketball Association, the National Hockey League and the North American Soccer League. They share Baseball's conviction that the existing compulsory licensing scheme is grossly inequitable, anachronistic and unnecessary, and that it will ultimately reduce the amount of sports programming on free television.

I. Summary of Position -- The Compulsory Licensing of Live Sports Telecasts Should Be Abolished; At the Very Least, the Limitations on Compulsory Licensing in Sections 1 and 2 of Chairman Kastenmeier's Proposed Bill Should Be Enacted.

The professional sports leagues strongly support the provisions of your draft bill, Mr. Chairman, which would restrict the overly-broad compulsory license now enjoyed by the cable industry. In particular, Section 1 would remove from compulsory licensing any programming not authorized to be carried under the FCC's signal carriage rules in effect on July 1, 1980, including the distant signal rules which the FCC recently voted to rescind. Section 2 would subject to copyright liability the retransmission of distant signal professional sports telecasts into the area within the home territory (50-mile radius) of a league member.

These amendments would correct some of the most serious shortcomings of the current statutory scheme. Indeed, absent the restrictions imposed by Sections 1 and 2, there would be virtually no limit to the vast amount of distant signal sports programming that cable systems might import into those major urban markets upon which sports clubs depend for their existence. Such home territory protection is especially critical

to the Major League Baseball clubs, which currently derive some 75 percent of their revenues from gate receipts.

While the amendments that you have proposed, Mr. Chairman, are sound and necessary, they do not completely address the inequities of the existing compulsory licensing scheme. This fundamental unfairness will continue to exist unless the Congress imposes full copyright liability upon cable for its retransmission of distant signal live professional sports events. Indeed, there is no justification for the compulsory licensing of any distant signal programming. But the case for sports is particularly compelling.

Live sports telecasts are unique among all programming fare. They are current, topical and ephemeral; unlike most other programming which can be shown time and time again, and from which revenues can be derived repeatedly, a live sports telecast has little or no value after the game is played. Accordingly, throughout the decade-long debate on the copyright revision legislation, the sports leagues have consistently maintained that compulsory licensing is inappropriate for sports telecasts. The leagues were never a party to, and indeed steadfastly opposed, the

compulsory licensing compromise between the Motion Picture Association and the National Cable Television Association which was incorporated into the 1976 Act.

It is important to note that, for a number of years, the copyright bills considered by Congress excluded sports from compulsory licensing. Those responsible for this exclusion correctly recognized that sports programming deserves "special consideration" because of its unique ephemeral nature and because

> "Unrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmission of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games."1/

These legitimate concerns, are of course, essentially the same as those which led Congress to enact the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 et seq.

In short, Mr. Chairman, the professional sports clubs create a very special product involving great

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1/ Senate Judiciary Comm., 93d Cong., 2d Sess., "Draft Report To Accompany S. 1361" at 33 (1974); Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., "Draft Report to Accompany S. 543" at 29 (1969).

effort, expense and risk. We strongly endorse the provisions in your draft bill which would afford sports some limited measure of control over the distribution of this product. However, our judgment continues to be that all distant signal professional sports programming should be excluded from compulsory licensing.

As you know, Mr. Chairman, we are not alone in our belief that compulsory licensing should be eliminated. During his recent testimony before the Senate Judiciary Committee, the Register of Copyrights, Mr. David Ladd, provided a thoughtful analysis of the theoretical underpinnings of the compulsory licensing scheme, its actual operation and technological and industry developments since 1976. Based upon this analysis the Register came to the unqualified conclusion that compulsory licensing of distant, non-network programming should be eliminated, explaining:

> "A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do." Ladd Statement at 56 (April 29, 1981).

The same position has been espoused by Mr. Henry Geller, the former head of the National Telecommunications and Information Administration of the Department of Commerce, and by others. In doing so, these eminent authorities have focused in part upon the "anomalies" and "unique problems" that compulsory licensing poses for sports. Certainly, there can be no stronger evidence of the need to reappraise the current compulsory licensing scheme than the recommendations of these individuals who have absolutely no economic stake in the controversy.

II. Basis for Position -- Compulsory Licensing of Sports Programming Is Inequitable, Anachronistic and Unncessary and Will Ultimately Lead To a Lessening of the Amount of Live Sports Programming on Conventional Television.

We earnestly believe, Mr. Chairman, that the retransmission of distant signal live sports telecasts never should have been subjected to compulsory licensing by cable. But we need not debate whether Congress' contrary determination in 1976 was appropriate. Since the enactment of the copyright revision legislation there have been a number of unforeseen and dramatic changes that have completely transformed the cable industry. These changes compel the conclusion that the current statutory telecasts must not be perpetuated.

A. Compulsory Licensing of Sports Programming Is Simply Inequitable -- It Requires Professional Sports Clubs, Which Typically Enjoy Only Marginal Economic Success, To Provide an Enormous Subsidy To the Cable Industry, Which Has Become Dominated By Some of the Nation's Largest and Most Profitable Conglomerates.

There is no question, Mr. Chairman, that the compulsory licensing fees paid by cable bear no relationship whatsoever to marketplace realities. They are shockingly inadequate. Consider, for example, the following facts --

> -- In 1979 the programming expenses negotiated by all U.S. television stations amounted to $1.34 billion, or approximately 25 percent of their gross broadcast revenues.2/
>
> -- In 1979 the cable industry, in bargaining with program suppliers, incurred $133.2 million in pay cable programming expenses, which comes to approximately 40 percent of its total pay cable revenues.3/

In stark contrast, the cable industry in 1979 paid $15.7 million in compulsory licensing fees4/ -- or less than

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2/ See FCC, TV Broadcast Financial Data -- 1979, at Tables 4 and 5 (Dec. 9, 1980).

3/ See FCC, Cable Industry Financial Data -- 1979, at Tables II and IV (Dec. 29, 1980).

4/ Ladd Testimony at 18.

one percent of its total operating revenues.5/

These facts illustrate the size of the huge subsidy that all program suppliers have been forced to provide to the cable industry by way of cable's importation of distant signals under the compulsory licensing scheme. But the subsidy that has been extracted from the sports interests is even more telling.

In 1978, the first year of compulsory licensing, some 4,000 cable systems paid just under $13 million in royalties for their distant signal programming. The Copyright Royalty Tribunal allocated only 12 percent of this pool for all professional and collegiate sports telecasts, while the Motion Picture Association, which had negotiated the unrealistic fee schedule embodied in the Act, came away with 75 percent.6/ What this

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5/ See FCC, Cable Industry Financial Data -- 1979, at Table II (Dec. 29, 1980).

6/ Perhaps the most disturbing aspect of this entire chapter is the attempt by certain broadcasters to deprive the sports clubs of even this pittance. At several points during the decade-long consideration of the copyright legislation, representatives of the NAB and other major broadcast groups expressly asserted, before this committee and elsewhere, that the sports clubs would own the copyright in the telecasts of their games. Nevertheless, in the proceedings before the Copyright Royalty Tribunal, the NAB reversed its position and claimed that broadcasters are the copyright owners

[Footnote continued on following page]

means is that an average cable system, which might have imported some 200 live sports telecasts during 1978, would have paid less than $2 for each one of these telecasts. By way of comparison, individual television stations may pay tens of thousands of dollars for the right to televise a single regular season professional sports event locally, while a national network telecast of such an event may command hundreds of thousands of dollars.

It is simply wrong to require professional sports to provide such an enormous subsidy to any private commercial enterprise. But the absolute absurdity of it all is that the major recipients of these "contributions" are not small, struggling operations; to the contrary, they are the large, immensely successful conglomerates that now dominate the cable industry, entities such as --

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[Footnote continued]
entitled to the sports royalties. The Tribunal correctly rejected this argument, but the NAB has appealed the Tribunal's ruling to the United States Court of Appeals for the District of Columbia Circuit. See Copyright Royalty Tribunal Final Notice of Determination, 45 Fed. Reg. 63,026 (1980), appeals pending sub nom., National Association of Broadcasters v. Copyright Royalty Tribunal, Nos. 80-2273 et al. (D.C. Cir., filed Oct. 20, 1980).

-- Westinghouse, which has contracted to purchase the nation's second largest multiple system operator (MSO), Teleprompter, for an estimated price of $646 million.

-- Time, Inc., which in 1978 purchased American Television Communications, for $179.6 million, and which has recently purchased Midwest Video, to become the nation's largest MSO.

-- The Times-Mirror Company, which became the nation's sixth largest MSO when it purchased Communications Properties, Inc. for $128 million.

-- American Express and Warner Communications, which entered into a joint venture to become the nation's fifth largest MSO.

-- The New York Times, which purchased a chain of cable systems in New Jersey for $119 million.

-- Dow Jones/Knight Ridder, which has made a tender offer of $365 million for the stock of the nation's tenth largest cable company, UA-Columbia.

-- And a number of other major corporations, including the Hearst Corporation, Taft Broadcasting, Viacom, Newhouse Broadcasting, General Tire, Cox Broadcasting, Storer Broadcasting.

The domination of the cable industry by these corporate giants is beyond question. Industry sources disclose that the 25 largest MSOs control over 60 percent of all cable subscribers in the United States. Just the top 10 control nearly one-half of these subscribers.

It is not surprising that such prominent business concerns have rushed to take over the cable industry. According to the FCC's most recently available financial data, the cable industry had a pre-tax net income in 1979 of nearly $200 million, up over 45 percent just from 1978. This $200 million figure also represents an increase of some 640 percent over the approximately $27 million in net income that the cable industry had in 1975, just before Congress enacted the compulsory licensing scheme.7/ Moreover, industry sources disclose that in 1975 cable systems were purchased at a cost of approximately $300 per subscriber; today, the purchase price has tripled to some $900 per subscriber.

These glowing financial reports for the cable industry present a striking contrast to the situation of Major League Baseball. Indeed, in 1979 when the cable industry enjoyed its record high profit of some $200 million, only 11 of the 26 Major League Baseball clubs showed a profit. Baseball as a whole actually lost money.

7/ FCC, Cable Industry Financial Report -- 1979, at Table II (Dec. 29, 1980).

There is no doubt of the great popularity of Baseball. But popularity does not always translate into profitability. Because of the high costs associated with providing the public with quality baseball entertainment, more than half of the major league teams operate below or very near the break-even point. This pattern has been consistent over the last 15 years. Current projections show that losses in the next five years will be 10 times those of the previous five.

The question must be asked, Mr. Chairman: What justification can possibly exist for requiring business concerns which enjoy only marginal economic results, such as the Major League Baseball clubs, to subsidize some of the most successful of the Fortune 500 conglomerates? We submit that there is no basis, in reason or equity, to permit these corporate giants to expropriate the property of professional sports clubs pursuant to a compulsory licensing scheme.

B. In Light of Dramatic Technological and Regulatory Changes, the Compulsory Licensing of Sports Programming Has Become Anachronistic.

When your Subcommittee conducted hearings on the cable television aspects of the copyright legislation in the Fall of 1975 just before the passage of the

Copyright Act, technological and regulatory limitations permitted cable systems to import television signals only from the closest geographic markets. This situation has changed dramatically.

1. The Development and Proliferation of "Superstations," With Their Extensive Amounts of Sports Programming.

One year after you completed your 1975 hearings, Mr. Chairman, the signal of the Atlanta, Georgia television station WTCG (now WTBS) was first placed on satellite by a so-called "resale common carrier" and made available to cable systems throughout the country. The nationwide exposure of that signal has been phenomenal. As of March 31, 1981, WTBS reached a total of over 13 million homes on over 3,000 cable systems in virtually every state in the Union;[8/] this constitutes 65 percent of the approximately 20 million cable homes in America. The number of cable subscribers to WTBS is currently growing at the rate of some 57 percent each year.[9/] Other "resalers" have also placed

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8/ Cablevision Magazine, April 20, 1981 at p. 22.

9/ Id.

the signals of WGN-TV (Chicago, Illinois) and WOR-TV (New York, New York), on satellite. These signals are received by some 5.4 million and 3.3 million homes, respectively.10/

The lack of transponder capacity has apparently prevented the retransmission via satellite of other television signals. However, as a result of FCC authorization of additional satellites, this shortage will likely be alleviated in the next few years. When it is, there appears to be little doubt that additional superstations will be created. Indeed, the FCC has already approved the applications of various resalers who have sought authority to place the following signals on satellite -- WSBK-TV (Boston, Massachusetts); KTTV (Los Angeles, California); and KTVU-TV (San Francisco, California). Additional interest has also been exhibited in placing station WPIX-TV (New York, New York) on satellite.

It is no coincidence that a prime characteristic of each of the existing or potential superstations is its heavy concentration of sports programming. Each

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10/ Id.

of these stations is, in fact, the flagship station of one of the major league baseball clubs and televises a significant number of baseball games:

Station	Club	1981 Scheduled Telecasts
WTBS	Atlanta Braves	150
WSBK	Boston Red Sox	103
WGN	Chicago Cubs	146
WGN	Chicago White Sox	64
KTTV	Los Angeles Dodgers	49
WOR	New York Mets	100
WPIX	New York Yankees	109
KTVU	San Franciso Giants	31
	Total	752

When the 310 professional basketball, hockey and soccer games televised by these superstations are included, the total number of all sports telecasts swells to over 1062 per year. That means that superstation carriage of sports events averages nearly 3 telecasts each and every day of the year.

It is important to emphasize that the middlemen who place these sports telecasts on satellite and then sell them, for a profit, to cable systems nationwide have not sought the consent of the clubs concerned. Nor have they paid any compensation whatsoever to the clubs. To add insult to injury, these modern day pirates

market their superstation offerings by specifically promoting the programming that the sports clubs have created.

Attached as Exhibit 1 to this Statement are examples of the resalers' promotional literature. The emphasis that they place on sports programming is clear and unmistakable. It is also quite understandable since the cable systems themselves -- the customers of the resalers -- attempt to solicit their paying subscribers by emphasizing the sports telecasts on the superstation.

When you last conducted hearings on this matter in the Fall of 1979, Mr. Chairman, you emphasized that: "With respect to cable television the 1976 Act has been rapidly overtaken by changing business practices brought about by satellite technology . . . ."11/ FCC Commissioner Quello has also eloquently observed that "the advent of satellite distribution of TV signals has added a cataclysmic new dimension to copyright and to cable carriage of TV signals," and that: "There is a threat of gross basic inequities in program property

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11/ Cable Television and Performance Rights: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 96th Cong. 1st Sess. 2 (1979).

rights and also to an orderly system of TV allocations if satellite carriers continue to transmit broadcast signals to thousands of cable systems without retransmission consent."12/

There may be no better illustration of the point made by you and Commissioner Quello than that provided by the advertisement which one cable system placed in the Los Angeles Times at the start of this year's Baseball season.13/ (Exhibit 2.) The ad, which reprints the television schedule of the superstation baseball teams, is self explanatory:

> "For the first time you'll have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live, as it happens.
>
> "It's Theta's biggest baseball season! And you can reserve your box seat now by installing Theta Cable TV.

12/ Statement of Commissioner Quello on H.R. 3333, Before the House Communications Subcommittee, 96th Cong., 1st Sess. 3 (May 16, 1979).

13/ The ad was placed by Theta Cable, a 100,000 subscriber system which operates in the Los Angeles area. Theta Cable is owned by Teleprompter, the nation's second largest MSO.

"And that's not all. This year Theta also brings you pro basketball and hockey playoffs -- and more sports than any other single-channel subscription TV system in town!

"They're exclusive on Theta 24 hours a day. All at no extra charge to Theta subscribers who have a Channel Selector."

2. The FCC's Abdication of Responsibility for Cable Regulation.

Like the technology, the regulatory picture has changed drastically since the passage of the 1976 Act. During the six years since your Subcommittee considered the then-pending copyright legislation, the FCC has, for example --

-- deleted its "leapfrogging" rules, which generally prevented cable systems from importing independent television signals from any but the two closest television markets.

-- exempted cable systems with less than 1,000 subscribers from essentially all regulation.

-- eliminated the process by which it certified cable operations, thereby allowing cable systems to switch from one sports station to another on a seasonal, monthly and even daily basis.

-- expanded the categories of television signals which cable systems need not delete under the network nonduplication rules.

-- eliminated virtually all restrictions on the licensing of earth stations, which are used by cable systems for the reception of television signals from satellites.

-- as a result of court action, deleted its rules restricting the amount of sports and other programming available to pay cable.

-- as a result of court action, deleted its rules requiring cable systems to afford the public access to their facilities.

-- significantly relaxed its standards for granting waivers of the signal carriage rules which limit the number of distant signals cable systems may import; in so doing, it suggested that cable systems in major markets would typically receive such waivers.

As if this were not enough, a four-to-three majority of the FCC voted an end to virtually the last vestiges of cable regulation -- the signal carriage and syndicated exclusivity rules. The Commission majority, of course, did so notwithstanding your reasoned request and that of other Congressmen to defer such a substantial upheaval of the cable rules. If the Commission's action is upheld in the courts, the result will be that cable systems may carry any syndicated programming they wish without regard to the exclusivity arrangements for which syndicators and broadcasters

have bargained in the marketplace. Even more significant from our standpoint, the end of the distant signal restrictions will mean that cable systems may expropriate as much of our product as they wish -- subject only to the minimal, and wholly inadequate, restrictions of the Sports Rule discussed below. Indeed, recognizing the immense value of live sports programming, middlemen (such as the superstation resalers) may soon attempt to "cherry pick" this prcgramming from a variety of television stations and to offer to cable systems throughout the country a single channel of highly desirable sports events.

In proposing elimination of the signal carriage and syndicated exclusivity rules, the FCC relied upon a number of studies that purportedly gauge the impact of this action on various parties. Significantly, the FCC studies fail even to mention, let alone discuss, the effect of eliminating these rules on professional sports. Although the leagues pointed this glaring omission out to the FCC, the FCC never undertook any separate study which attempted to assess the impact of its action on sports.14/

14/ The FCC's failure in this regard forms the basis of the sports leagues' separate petition for review of the Commission's action in the United States Court of Appeals for the Second Circuit. We respectfully

[Footnote continued on following page]

In short, we can understand, although we do not necessarily agree with, the decision to award cable the compulsory licensing privilege in recognition of heavy FCC regulation of that industry.15/ But we are at an absolute loss to comprehend the continued exemption of the cable industry from normal marketplace forces in light of today's virtually complete deregulation of that industry. Quite simply, Mr. Chairman, we do not believe Congress ever intended that cable should have it both ways.

3. The FCC's Failure to Impose Any Meaningful Restrictions on Cable Importation of Distant Signal Sports Programming.

As noted above, for a number of years the copyright bills considered by Congress excluded sports

[Footnote continued]
request that a copy of our brief on appeal, which we shall provide the committee, be incorporated into the transcript of this hearing.

15/ In its report accompanying the copyright legislation, the House Judiciary Committee noted:

> "[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

programming from compulsory licensing. However, it was later determined that because the FCC had initiated a rulemaking proceeding with respect to cable carriage of sports programming, such a legislative exclusion would be premature. Congress therefore included sports programming in the compulsory licensing scheme "without prejudice to the arguments advanced" by the sports interests.16/ As one leading proponent of this approach suggested: "[I]f the FCC's rules appear to reflect an improper balance between the concerns of sports and CATV, the Congress could investigate and hold full hearings for remedial legislations."17/

16/ The Senate Judiciary Committee noted:

> "The committee has considered excluding from the scope of the compulsory license granted to cable systems the carriage in certain circumstances of organized professional sporting events. . . . Without prejudice to the arguments advanced in behalf of these proposals, the committee has concluded that these issues should be left to the rule-making process of the Federal Communications Commission or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce." S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975) (emphasis added.)

17/ 120 Cong. Rec. S. 16155 (daily ed. Sept. 9, 1974) (remarks of Sen. Tunney) (emphasis added). See also 120 Cong. Rec. S. 16158 (remarks of Sen. Hruska).

The FCC's "Sports Rule," 47 C.F.R. § 76.67, reflects just such an improper balance. It does no more than prevent cable systems located within 35 miles of the home team's community from importing the distant signal telecast of a game involving that team -- provided that the home team does not televise the game locally; provided that the cable system does not have less than 1,000 subscribers; provided that the distant signal is not "grandfathered" on the system; and provided that the home team complies with all of the notice requirements adopted by the FCC.

As an illustration, if the California Angels were playing the Chicago White Sox in Anaheim, the only protection afforded is against the imporation by Los Angeles area cable systems of the signals from the White Sox television station, WGN-TV. These cable systems can still import the telecasts of games of all the other 24 major league teams, as well as the telecasts of any Angels' away games, thereby destroying the exclusivity granted to the Angels' flagship station and affecting the Angels' home gate. As noted above, Theta Cable boasts that it will import the telecasts of <u>over 400</u> baseball games on the three superstations in Atlanta, Chicago, and New York. Of this number, the Angels can

request, under the Sports Rule, that Theta Cable delete only 6 telecasts.18/

Furthermore, the Sports Rule's ban on cable's importation of the home game extends only 35 miles. Thus, the distant signal telecast of the home game is available to cable systems in scores of suburbs within an easy hour's drive of the home stadium. Ironically, the Commission refused to extend the zone of protection beyond 35 miles primarily because its signal carriage rules -- most of which it has now decided to repeal -- were geared to the 35-mile zone. See Report and Order in Docket 19417, 54 F.C.C.2d 265, 282 (1975).

Even where the Sports Rule does apply, there is no guarantee that cable systems will comply with it. In a recent pleading before the FCC, Baseball has documented its frustrating experiences with those cable systems which repeatedly seek to excuse their violations of the Sports Rule by advancing the cable industry talisman of "inadvertence."19/ We have asked the

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18/ The Dodgers can request the deletion of an additional 15 telecasts.

19/ We request that this pleaing, which will be provided to the Committee, be incorporated into the transcript of these hearings. See also Ladd Statement at 38, concerning "inadvertant" violations of the Sports Rule.

Commission to exercise its monetary forfeiture authority against certain systems in the hope that this will deter future violations. We anxiously await the Commission's response.20/

When the Sports Rule was adopted, the National Cable Television Association conceded that it is reasonable. See Report and Order in Docket 19417, 54 F.C.C.2d 265, 281 (1975). And, to be sure, the rule affords a measure of relief which is critically important. But this minimal protection is wholly inadequate and does not reflect that proper balancing of competing interests that Congress apparently envisioned when it last considered excluding sports programming fromrom compulsory licensing.

20/ Approximately one and one-half years ago, on December 6, 1979, and then again on February 1, 1980, the National Basketball Association filed similar petitions to initiate forfeiture proceedings against cable system that had allegedly violated the Sports Rule. The FCC is required to initiate such a proceeding within one year after the alleged violation. 47 C.F.R. § 1.80(c). The FCC has yet to take any responsive action. The failure of the Commission to take any such action to date means that it no longer has the authority to impose a forfeiture in the NBA cases.

C. In View of the Actual Marketplace Dealings Between the Sports Club and Cable, Compulsory Licensing of Sports Programming Is Unnecessary.

Congress adopted a compulsory license scheme believing that it would be "impractical and unduly burdensome" to require cable systems to negotiate with copyright owners. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976). Cable's experience in bargaining with the sports interests for the carriage of our games during the past several years conclusively demonstrates that there is no factual basis for this theoretical assumption.

For the third season in a row, Baseball has negotiated a contract with USA Network to distribute via satellite a game-of-the-week to cable systems across the country; the National Basketball Association, National Hockey League, North American Soccer League and other professional and collegiate sports interests also cablecast a number of their events over USA Network. Another cable program packager, the Entertainment and Sports Programming Network (ESPN), has contracted with professional, collegiate and amateur sports interests; it presents continuous sports programming to cable systems throughout the United States. Both USA Network and ESPN are currently received by more cable subscribers

than all but two of the approximately 30 program services available to cable systems via satellite.21/

It is also important to underscore that a number of individual professional sports clubs have successfully negotiated with cable systems and subscription television operations. As a result, the public has been offered telecasts of games that would not otherwise have been available:

Professional Sports Clubs
With Cable Deals

Club	Cable Packager	No. of Games
New York Mets	Cablevision Program Services	40
New York Yankees	Cable Vision Services	40
Pittsburgh Pirates	Action TV	12
Philadelphia Phillies	Prism	30
Cincinnati Reds	Warner Qube	7
	Reds on Cable	8
New York Islanders	Cablevision Program Services	40
New York Rangers	MSG Cable	40
	USA Network	37
Buffalo Sabres	International Cable	25
Philadelphia Flyers	Prism	40
Hartford Whalers	ESPN	10
Washington Capitals	ESPN	10
	USA Network	5
New York Knicks	MSG Cable	41
New Jersey Nets	Cablevision Program Services	41
Philadelphia 76ers	Prism	25
San Antonio Spurs	UA Columbia	10

21/ Station WTBS ranks No. 1; the Christian Broadcasting Network, whose service is available gratis, ranks No. 2. Another satellite package, C-SPAN, has approximately the same number of subscribers as USA Network. Cablevision Magazine, Apr. 20, 1981, at p. 22.

Moreover, a number of other clubs have successfully negotiated deals with subscription television operations, including the Los Angeles Dodgers, California Angels, Milwaukee Brewers, Detroit Tigers, Cincinnati Reds, Los Angeles Kings, Detroit Red Wings, New Jersey Nets, Los Angeles Lakers, Phoenix Suns, and Dallas Mavericks.

There is further evidence that the cable industry has the ability to negotiate in the marketplace for sports programming, and that it does not need a compulsory license. As discussed above, the cable industry has become dominated by some of the nation's largest corporate enterprisers who surely, at the very least, are the equals of the sports clubs at the bargaining table. Indeed, many of these enterprises are already bargaining for sports programming through their broadcast subsidiaries; there is no reason whatsoever that they could not bargain for the programming on their cable subsidiaries. As the following chart illustrates many of our clubs' "flagship" stations are owned by corporations with significant cable interests:

Professional Flagship Stations
With Cable Interests

Club	Station	Corporate Parent of Station
Chicago Cubs	WGN	Tribune Co.
Chicago White Sox	WGN	Tribune Co.
Chicago Sting	WGN	Tribune Co.
Chicago Bulls	WGN	Tribune Co.
Denver Nuggets	KWGN	Tribune Co.
Colorado Rockies	KWGN	Tribune Co.
Pittsburgh Pirates	KDKA	Westinghouse
San Francisco Giants	KTVU	Cox
Boston Red Sox	WSBK	Storer
Boston Bruins	WSBK	Storer
Los Angeles Kings	KHJ	General Tire
Los Angeles Lakers	KHJ	General Tire
New York Cosmos	WOR	General Tire
New York Mets	WOR	General Tire
New York Knicks	WOR	General Tire
New York Islanders	WOR	General Tire
New York Rangers	WOR	General Tire
New Jersey Nets	WOR	General Tire
Boston Celtics	WBZ	Westinghouse
Cincinnati Reds	WLWT	Multimedia
Hartford Whalers	WVIT	Viacom

Can one believe that Westinghouse, which negotiated on behalf of station WBZ with the Boston Celtics, would not be able also to negotiate on behalf of Teleprompter cable, which it has offered to purchase for approximately $646 million?

The sports leagues are in business to do business; they cannot afford to ignore obvious and valuable business opportunities. The Baseball clubs alone present nearly 1,600 broadcasts each season over conventional television (Exhibit 3), as well as a number

of others over cable and STV. Moreover, as the Register of Copyrights recently testified before the Senate Judiciary Committee, "Cable is aggressively moving to satisfy the insatiable American appetite for sports. Its widening success belies the need for a compulsory license to supply sports programs." Ladd Statement at 39. In short, when the marketplace has been left to function, there have not been any practical barriers to dealings between cable and the sports interests. Thus, the basis on which compulsory licensing has been explictly justified in the past simply does not exist.

D. Allowing Cable To Expropriate Our Product in a Way Which Is Destructive of the Very Concept of a Sports League Will Ultimately Result in a Reduction of Sports Telecasts. Thus, Compulsory Licensing Is Contrary to the Public Interest.

We earnestly believe, Mr. Chairman, that there is ample justification for eliminating the compulsory licensing scheme wholly apart from the direct effect that it has on the sports interests. This scheme is, as we have detailed above, inequitable, ill-suited to the present technological and regulatory climate, and plain unnecessary. Nevertheless, in our judgment, the most disturbing aspect of all is that compulsory licensing deprives the sports clubs of the inherent

right of any entrepreneur -- the right to control the distribution of his own product; and it permits cable to expropriate this product in a way which maximizes cable's profits but is squarely contrary to the best interests of the clubs themselves.22/

A sports club cannot continue to exist unless it successfully cultivates the loyalty and support of its hometown fans. It depends upon these local fans to come to the ball park and to view the club's games over television. As noted, some 75 percent of a Major League Baseball club's revenues are derived from gate receipts, and an additional 12 percent comes from local broadcast revenues -- obviously all of this is attributable to the local fan.

The professional sports interests have had over 30 years of experience dealing with conventional television. It is this experience which convinces us of the harm posed by the uncontrolled importation of a large number of competing telecasts. If the leagues

---

22/ We have detailed our concerns over the effect of compulsory licensing on sports in several pleadings filed with the FCC. We request that our comments in the FCC's proceeding to eliminate the distant signal rules, which we will supply, be made a part of the transcript of these hearing to the Committee.

could successfully function with the clubs invading each others' home markets with their telecasts, the clubs would have long since changed their telecasting patterns to take advantage of the additional revenues which this extraterritorial telecasting would provide. However, as we have understood for years, the introduction of substantial amounts of competing telecasts over either conventional television or cable television poses a serious threat to the very determinant of a club's success -- to the following of its hometown fans as that is reflected in the size of its gate and the value of its broadcast rights.

The weaker teams in particular are susceptible to the potentially devastating effect of having their home territories saturated by a glut of sports telecasts from distant markets. And, as Congress concluded, when it passed the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 et seq., "Should these weaker teams be allowed to founder, there is danger that the structure of the league could become impaired and its continued operation imperiled."23/

23/ H.R. Rep. No. 87-1178, 87th Cong., 1st Sess. 3 (1961); S. Rep. No. 87-1087, 87th Cong., 1st Sess. 2 (1961).

The sports interests cannot long live with the effects of cable's uncontrolled importation of distant signal sports telecasts pursuant to the existing compulsory licensing scheme. For Baseball, at least, the only alternative may be to change its established telecasting practices by reducing the number of games available over local television stations. This is a result that we earnestly wish to avoid.

III. Conclusion -- The Congress Must Act Now Before Cable Becomes Entrenched in Those Major Urban Markets Upon Which the Clubs Depend.

In sum, Mr. Chairman, the professional sports leagues urge the abolition of compulsory licensing for sports programming. As we have discussed above, there are a number of reasons which compel this conclusion.

First, the present law is grossly inequitable. It requires professional sports clubs -- many of which are only marginally viable -- to subsidize the increasingly concentrated, profitable and rapidly growing cable industry, which has become dominated by some of the nation's largest and most financially viable conglomerates. Cable certainly can afford to enter the marketplace to bargain for its programming.

Second, compulsory licensing has become an anachronism. Since the Act's adoption in 1976 there have been profound changes in communications technology and the virtually total abdication of regulatory responsibility for cable by the FCC. The basic conditions of the communications industry, which were then thought to underlie compulsory licensing, no longer exist.

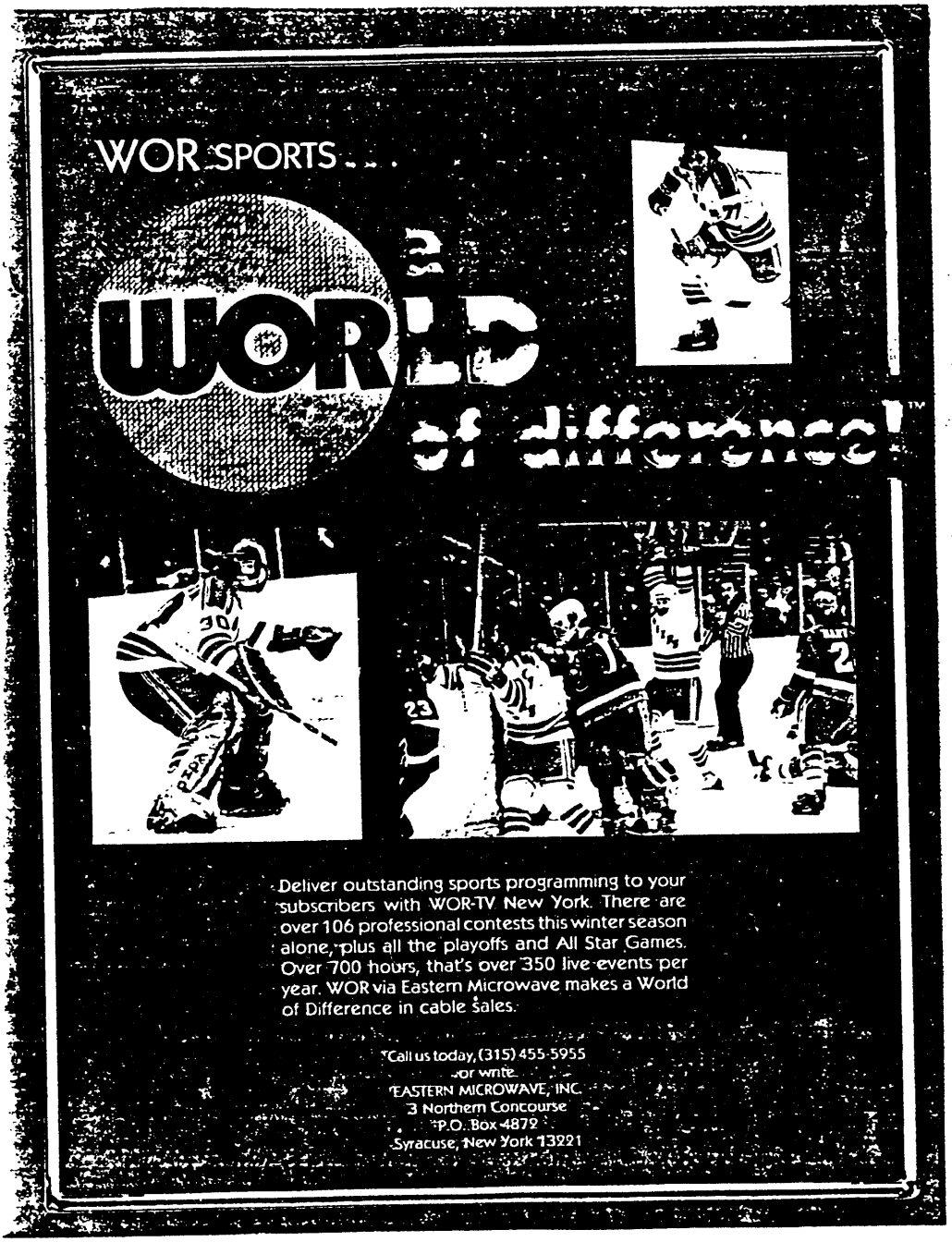
Third, cable companies have had no trouble in successfully negotiating with sports interests when they have wanted to do so. Our history of dealing with cable systems as entrepreneurs makes it clear that the fear that cable TV could not obtain programming in the marketplace is groundless.

Fourth, the inexorable result of the present statutory system will be a decrease in live, over-the-air broadcasts of sports events. Only in this way can the sports interests ensure the successful operation of the league.

Mr. Chairman, for all the above reasons the professional sports leagues strongly urge you to abolish compulsory licensing. At the least, we urge adoption of Sections 1 and 2 of your proposed bill, which provide

some limitation on the overly-broad compulsory licensing scheme. Above all, Mr. Chairman, we urge you to act immediately. Cable is how entering those major urban markets upon which we depend so critically; virtually every one of these markets is in one stage or another of the cable franchising process. Don't wait for an autopsy before you take that action which is so pressingly needed.

EXHIBIT 1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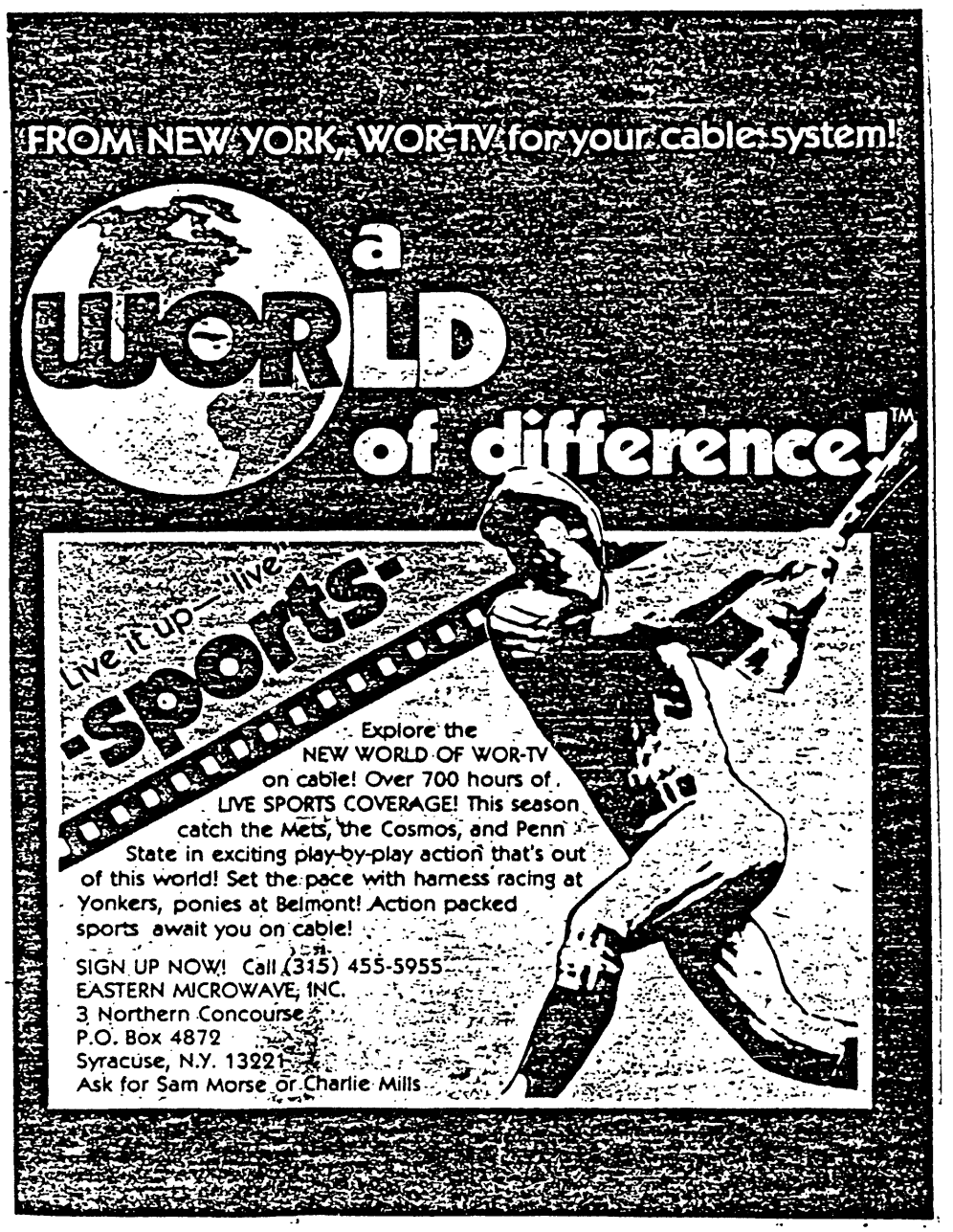
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EXH - EXHIBITION TWI-TWI NIGHT DH - DOUBLEHEADER

EXHIBITION SCHEDULE

					NYCT
MARCH					
Mon.	23	**Mets**	Los Angeles	at St. Petersburg	7:30 PM
APRIL					
Thurs.	2	**Mets**	Cincinnati	at St. Petersburg	7:30 PM
Sun.	5	**Mets**	Atlanta	at St. Petersburg	1:30 PM

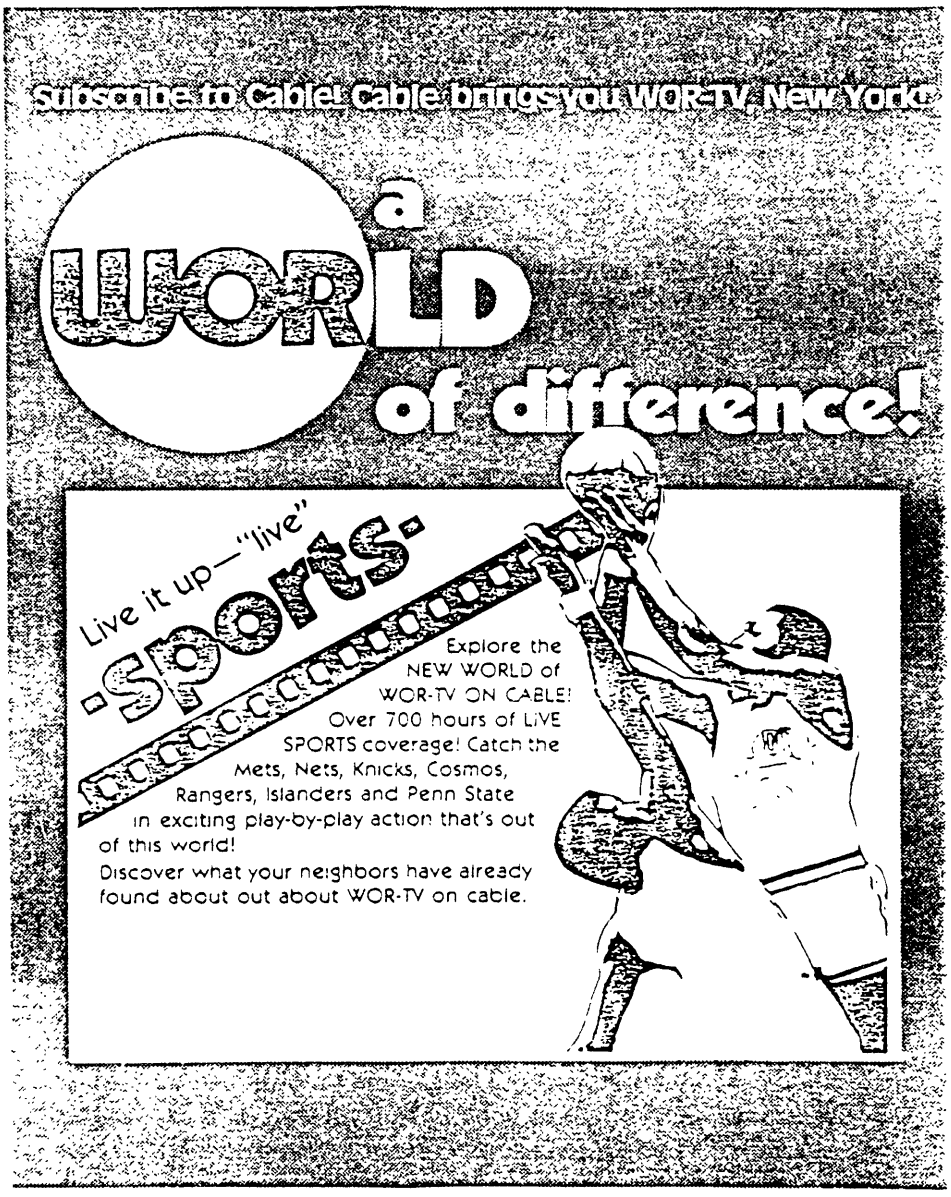
REGULAR SEASON SCHEDULE

Thurs.	9	**Mets**	Chicago	Away	2:30 PM
Sat.	11	**Mets**	Chicago	Away	2:15 PM
Sun.	12	**Mets**	Chicago	Away	2:15 PM
Tues.	14	**Mets**	St. Louis	**Home** (Open Day)	2:00 PM
Sat.	18	**Mets**	Montreal	**Home**	2:00 PM
Sun.	19	**Mets**	Montreal (DH)	**Home**	1:00 PM

					NYCT
APRIL					
Wed.	22	Mets	Pittsburgh	Away	7:30 PM
Sat.	25	Mets	Montreal	Away	1:30 PM
Sun.	26	Mets	Montreal	Away	1:30 PM
Wed.	29	Mets	Pittsburgh	Home	8:00 PM
MAY					
Sat.	2	Mets	San Diego	Home	2:00 PM
Sun.	3	Mets	San Diego (DH)	Home	1:00 PM
Wed.	6	Mets	San Francisco	Home	8:00 PM
Fri.	8	Mets	Los Angeles	Home	8:00 PM
Sat.	9	Mets	Los Angeles	Home	2:00 PM
Sun.	10	Mets	Los Angeles	Home	2:00 PM
Wed.	13	Mets	San Diego	Away	10:00 PM
Sat.	16	Mets	Los Angeles	Away	10:00 PM
Sun.	17	Mets	Los Angeles	Away	4:00 PM
Tues.	19	Mets	San Francisco	Away	10:30 PM
Fri.	22	Mets	St. Louis	Away	8:30 PM
Sun.	24	Mets	St. Louis	Away	2:15 PM
Mon.	25	Mets	Philadelphia	Home	2:00 PM
Wed.	27	Mets	Philadelphia	Home	8:00 PM
Fri.	29	Mets	Chicago	Home	8:00 PM
Sat.	30	Mets	Chicago	Home	2:00 PM
Sun.	31	Mets	Chicago	Home	2:00 PM
JUNE					
Wed.	3	Mets	Philadelphia	Away	7:30 PM
Fri.	5	Mets	Houston	Away	8:30 PM
Sat.	6	Mets	Houston	Away	8:30 PM
Tues.	9	Mets	Cincinnati	Home	8:00 PM
Thurs.	11	Mets	Cincinnati	Home	8:00 PM
Fri.	12	Mets	Houston	Home	8:00 PM
Sat.	13	Mets	Houston	Home	7:00 PM
Sun.	14	Mets	Houston	Home	2:00 PM
Thurs.	18	Mets	Cincinnati	Away	7:30 PM
Sat.	20	Mets	Atlanta	Away	7:30 PM
Sun.	21	Mets	Atlanta	Away	2:00 PM
Tues.	23	Mets	Montreal	Away	7:30 PM

JUNE					NYCT
Fri.	26	Mets	St. Louis	Home	8:00 PM
Sat.	27	Mets	St. Louis	Home	7:00 PM
Tues.	30	Mets	Chicago	Home	8:00 PM
JULY					
Wed.	1	Mets	Chicago	Home	8:00 PM
Sat.	4	Mets	Pittsburgh	Away	5:00 PM
Sun.	5	Mets	Pittsburgh (DH)	Away	1:00 PM
Tues.	7	Mets	St. Louis	Away	8:30 PM
Thurs.	9	Mets	St. Louis	Away	8:30 PM
Fri.	10	Mets	Philadelphia	Away	8:00 PM
Sat.	11	Mets	Philadelphia (DH)	Away	5:30 PM
Sun.	12	Mets	Philadelphia	Away	1:30 PM
Fri.	17	Mets	San Diego	Home	8:00 PM
Sat.	18	Mets	San Francisco	Home	7:00 PM
Sun.	19	Mets	San Francisco	Home	2:00 PM
Wed.	22	Mets	Los Angeles	Home	8:00 PM
Fri.	24	Mets	San Diego	Away	10:00 PM
Sat.	25	Mets	San Diego	Away	10:00 PM
Sun.	26	Mets	San Diego	Away	4:00 PM
Tues.	28	Mets	Los Angeles	Away	10:30 PM
Wed.	29	Mets	Los Angeles	Away	10:30 PM
Fri.	31	Mets	San Francisco	Away	10:30 PM
AUGUST					
Sat.	1	Mets	San Francisco	Away	4:00 PM
Sun.	2	Mets	San Francisco	Away	4:00 PM
Fri.	7	Mets	Pittsburgh	Home	8:00 PM
Sat.	8	Mets	Pittsburgh	Home	2:00 PM
Tues.	11	Mets	Chicago	Away	2:30 PM
Fri.	14	Mets	Philadelphia	Home	8:00 PM
Sat.	15	Mets	Philadelphia	Home	4:00 PM
Sun.	16	Mets	Philadelphia	Home	2:00 PM
Tues.	18	Mets	Atlanta	Away	7:30 PM
Sat.	22	Mets	Cincinnati	Away	7:00 PM
Sun.	23	Mets	Cincinnati	Away	2:15 PM

AUGUST					NYCT
Tues.	25	Mets	Houston	Home	8:00 PM
Wed.	26	Mets	Houston	Home	8:00 PM
Fri.	28	Mets	Cincinnati	Home	8:00 PM
Sat.	29	Mets	Cincinnati	Home	7:00 PM
Sun.	30	Mets	Cincinnati	Home	2:00 PM
SEPTEMBER					
Tues.	1	Mets	Houston	Away	8:30 PM
Wed.	2	Mets	Houston	Away	8:30 PM
Sat.	5	Mets	Atlanta	Home	2:00 PM
Sun.	6	Mets	Atlanta	Home	2:00 PM
Wed.	9	Mets	Pittsburgh	Away	7:30 PM
Fri.	11	Mets	St. Louis	Away	8:30 PM
Sun.	13	Mets	St. Louis	Away	2:15 PM
Tues.	15	Mets	Philadelphia	Home	8:00 PM
Wed.	16	Mets	Philadelphia	Home	8:00 PM
Sat.	19	Mets	St. Louis	Home	2:00 PM
Sun.	20	Mets	St. Louis	Home	2:00 PM
Mon.	21	Mets	Pittsburgh	Home	8:00 PM
Sat.	26	Mets	Montreal	Away	1:30 PM
Sun.	27	Mets	Montreal	Away	1:30 PM
Wed.	30	Mets	Chicago	Home	8:00 PM
OCTOBER					
Sat.	3	Mets	Montreal	Home	2:00 PM
Sun.	4	Mets	Montreal	Home	2:00 PM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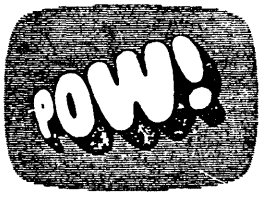

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WOR-TV offers full range programming that includes movie classics, popular original shows and sports. The incomparable sports line-up includes baseball, basketball, hockey, soccer and football, and makes for a strong schedule and loyal viewers.

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WOR has years of experience offering alternatives to its audiences in the most competitive entertainment market in the world ...metro New York. They offer top rate, station produced programming that draws an audience throughout the broadcast day

NOW AVAILABLE FROM EASTERN MICROWAVE— THE VARIETY YOUR SUBSCRIBERS DEMAND

WOR Takes Command, Captures Profits

Very significant subscriber increases have been recorded by cable systems that have added WOR via Eastern Microwave. It takes a great independent to be a success in the biggest, most competitive market in broadcasting

See Eastern Microwave at booth #191, NCTA Show, or call Sam Morse or Charlie Mills at (315)455-5955.

EASTERN MICROWAVE, INC.

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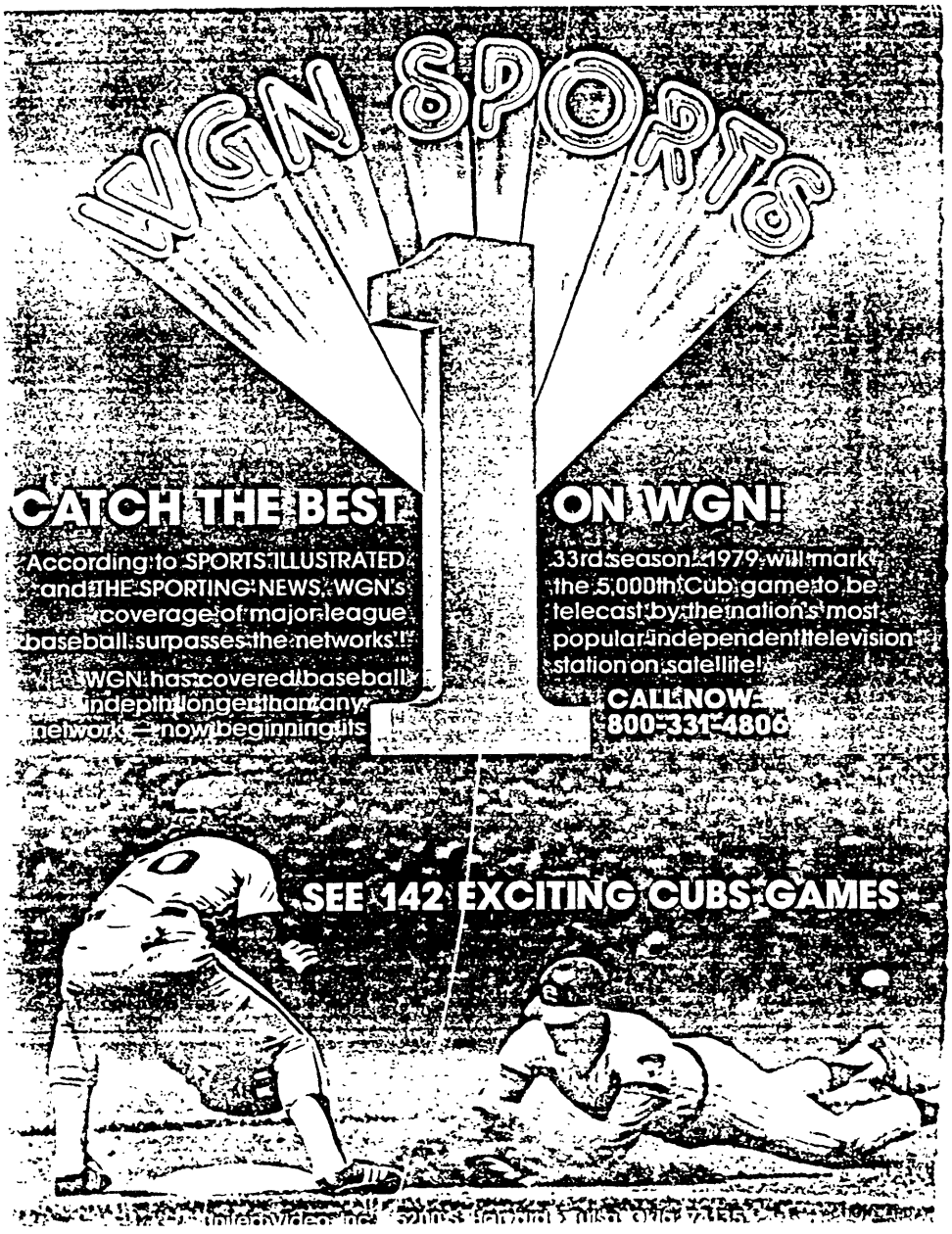
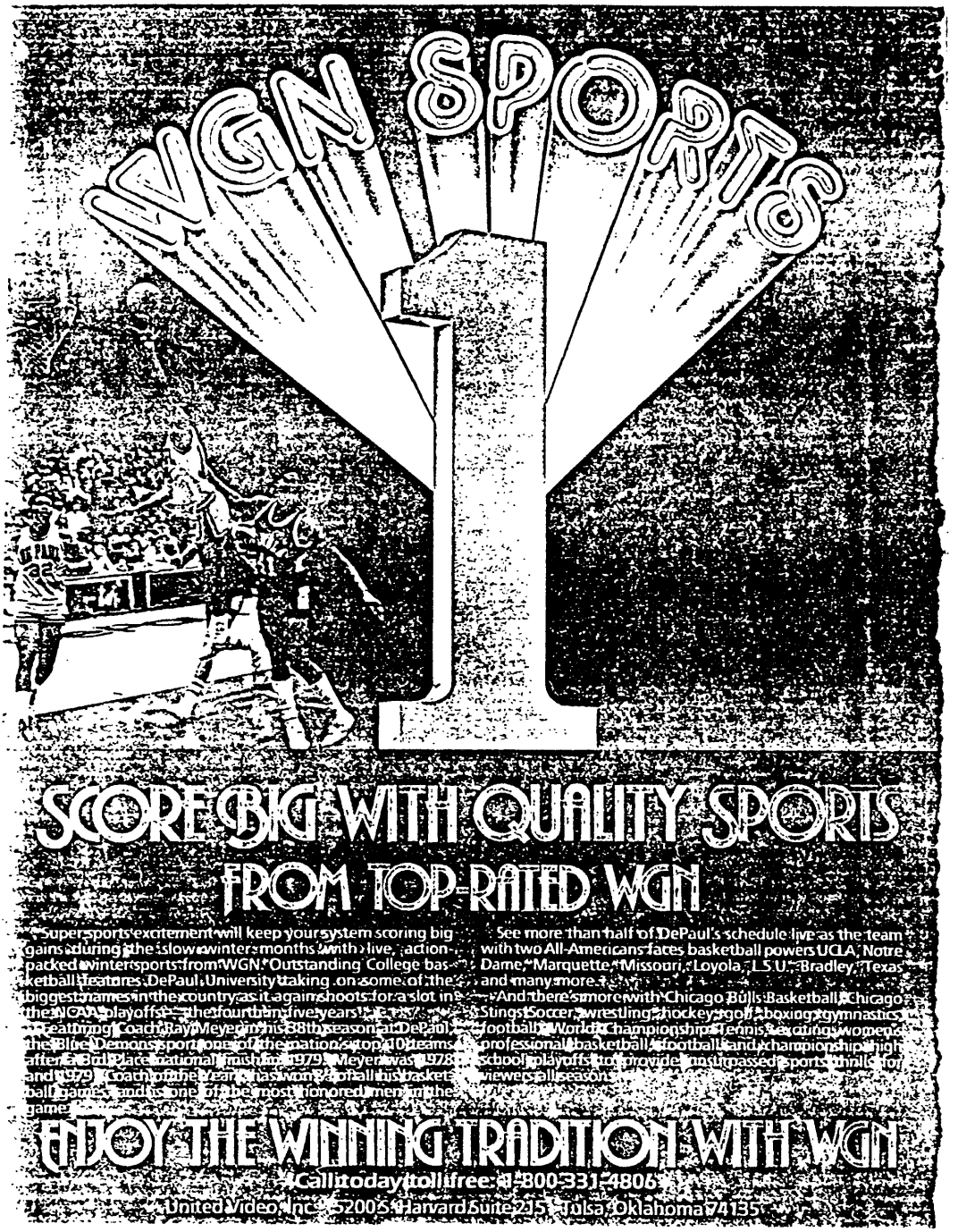
P O. Box 4872
Syracuse, NY 13221

ACTION CARD 61

EXHIBIT 2


WGN SPORTS
CATCH THE BEST
ON WGN!
According to SPORTS ILLUSTRATED and THE SPORTING NEWS, WGN's coverage of major league baseball surpasses the networks!!
WGN has covered baseball in depth longer than any network — now beginning its
33rd season, 1979 will mark the 5,000th Cub game to be telecast by the nation's most popular independent television station on satellite!
CALL NOW:
800-331-4806
SEE 142 EXCITING CUBS GAMES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SCORE BIG WITH QUALITY SPORTS
FROM TOP-RATED WGN
Super-sports excitement will keep your system scoring big gains during the slow winter months with live, action-packed winter sports from WGN. Outstanding College basketball features DePaul University taking on some of the biggest names in the country as it again shoots for a slot in the NCAA playoffs — the fourth time in five years. Featuring Coach Ray Meyer in his 38th season at DePaul, the Blue Demons sport one of the nation's top 10 teams after a 3rd Place national finish in 1979. Meyer was 1978 and 1979 Coach of the Year. He has won 724 basketball games and is one of the most honored men in the game.
See more than half of DePaul's schedule live as the team with two All-Americans faces basketball powers UCLA, Notre Dame, Marquette, Missouri, Loyola, L.S.U., Bradley, Texas and many more.
And there's more with Chicago Bulls Basketball, Chicago Stings Soccer, wrestling, hockey, golf, boxing, gymnastics, football, World Championship Tennis, exciting women's professional basketball, football and championship high school playoffs to provide unsurpassed sports thrills for viewers all season.
ENJOY THE WINNING TRADITION WITH WGN
Call it today toll free: 1-800-331-4806
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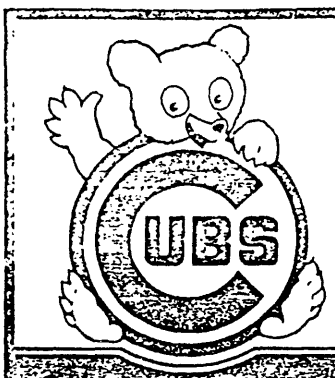
Cablevision, January 12, 1981, Pages 62-63



If By Day!

All on...

Because Chicago Cubs' home games are played during the day, we've added the White Sox at night, the only American League schedule on satellite. This exciting combination features more than 200 American and National League games, more than all other super stations combined.

United Video, Inc. • 5200 S. Harvard

Theta opens its biggest season ever!

For the first time you'll have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live as it happens.

It's Theta's biggest baseball season! And you can reserve your box seat now by installing Theta Cable TV.

And that's not all. This year Theta also brings you pro basketball and hockey playoffs — and more sports than any other single-channel subscription TV system in town!

There are exchanges on Theta 24 hours a day. All at no extra charge to Theta subscribers who have a Channel Selector.

829-4711
Santa Monica, Pacific Palisades, Beverly Hills, West Los Angeles, Marina del Rey, West Hollywood

501-2000
Sherman Oaks, Bel Air, Beverly Glen, Studio City, Hollywood, Tarzana, Encino, Woodland Hills

254-4131
Los Feliz, Eagle Rock, Highland Park

(714) 983-9685
Ontario, Upland, Montclair

39 games in April

		Pre-Season:		
Thur	4/2	NY Mets vs Cincinnati Reds	4:30	PM
Sat	4/4	Atlanta Braves vs St. Louis Cardinals	10:30	AM
Sun.	4/5	NY Mets vs Atlanta Braves	10:30	AM
		Regular Season:		
Thur	4/9	NY Mets at Chicago Cubs	11:30	AM
Fri	4/10	Cincinnati Reds at Atlanta Braves	4:30	PM
Sat	4/11	NY Mets at Chicago Cubs	1:15	AM
		Cincinnati Reds at Atlanta Braves	4:30	PM
Sun	4/12	Cincinnati Reds at Atlanta Braves	11:00	AM
		NY Mets at Chicago Cubs	11:15	AM
Mon.	4/13	Atlanta Braves at Houston Astros	5:30	PM
Tues.	4/14	St. Louis Cardinals at NY Mets	11:00	AM
		Atlanta Braves at Houston Astros	5:30	PM
		Chicago Cubs at Montreal Expos	10:30	AM
Wed.	4/15	Atlanta Braves at Houston Astros	5:30	PM
Fri	4/17	Chicago Cubs at Philadelphia Phillies	5:00	PM
Sat	4/18	Montreal Expos at NY Mets	11:00	AM
		San Francisco Giants at Atlanta Braves	4:30	PM
Sun	4/19	Montreal Expos at NY Mets	10:00	AM
		San Francisco Giants at Atlanta Braves	11:00	AM
Mon	4/20	Chicago Cubs at St. Louis Cardinals	12:00	noon
Tues.	4/21	Atlanta Braves at Cincinnati Reds	4:30	PM
Wed.	4/22	NY Mets at Pittsburgh Pirates	4:30	PM
		Baltimore Orioles at Chicago White Sox	5:30	PM
Thur	4/23	Atlanta Braves at San Francisco Giants	1:00	PM
Fri	4/24	Philadelphia Phillies at Chicago Cubs	11:30	AM
		Atlanta Braves at San Francisco Giants	7:30	PM
Sat	4/25	NY Mets at Montreal Expos	10:30	AM
		Philadelphia Phillies at Chicago Cubs	11:15	AM
		Atlanta Braves at San Francisco Giants	1:00	PM
Sun	4/26	NY Mets at Montreal Expos	10:30	AM
		Atlanta Braves at San Francisco Giants	12:00	noon
		DOUBLEHEADER!		
Mon	4/27	Chicago White Sox at Baltimore Orioles	4:30	PM
Tues	4/28	St. Louis Cardinals at Chicago Cubs	11:30	AM
		Houston Astros at Atlanta Braves	4:30	PM
Wed	4/29	St. Louis Cardinals at Chicago Cubs	11:30	AM
		Houston Astros at Atlanta Braves	4:30	PM
		Pittsburgh Pirates at NY Mets	5:00	PM
Thur	4/30	Houston Astros at Atlanta Braves	4:30	PM

Note: **All games subject to change of time, date & blackout restrictions.**
Eagle Rock, Highland Park, Ontario viewers receive Atlanta Braves games only.

THETA CABLE TV
A Telecommunications Company

EXHIBIT 3

MAJOR LEAGUE BASEBALL SCHEDULED TELECASTS -- 1981

Team	Number of Games			
	Home	Away	Exhibition	Total
Atlanta Braves	77	70	3	150
Baltimore Orioles	5	50	2	57
Boston Red Sox	31	69	3	103
California Angels	5	25	1	31
Chicago Cubs	81	65	0	146
Chicago White Sox	12	52	0	64
Cincinnati Reds	0	43	2	45
Cleveland Indians	25	45	1	71
Detroit Tigers	14	38	0	52
Houston Astros	0	76	7	83
Kansas City Royals	0	44	1	45
Los Angeles Dodgers	0	45	4	49
Milwaukee Brewers	0	60	1	61
Minnesota Twins	4	46	0	50
Montreal Expos	22	17	0	39
New York Mets	50	47	3	100
New York Yankees	45	61	3	109
Oakland Ahtletics	10	20	0	30
Philadelphia Phillies	14	63	3	80
Pittsburgh Pirates	3	41	1	45
San Diego Padres	0	39	3	42
St. Louis Cardinals	0	38	2	40
San Francisco Giants	0	30	1	31
Seattle Mariners	0	19	1	20
Texas Rangers	0	26	1	20
Toronto Blue Jays	13	9	0	22
	411	1,138	43	1,592

Next, the Chair would like to call on Mr. Vincent Wasilewski representing the National Association of Broadcasters. Mr. Wasilewski is president of the NAB and has also been a witness before this committee. We are pleased to greet him.

Mr. WASILEWSKI. Thank you. I will cut down my statement also Mr. Chairman, and try not to be too redundant. We thank you for the opportunity to present our views. We are most appreciative that you are conducting these hearings as part of the process of reviewing and revising the nature of cable television's copyright liability under the 1976 Copyright Act. We enthusiastically endorse and support your effort. Your willingness to revisit and reopen a complex, controversial subject which you thought resolved once and for all only 5 years ago, is especially praiseworthy.

From our perspective, Mr. Chairman, the marketplace should be permitted to function freely unless there are compelling public interest reasons dictating governmental intervention.

Thus, we urge that cable carriage of distant signals no longer receive the special treatment accorded it by the present compulsory license. Cable carriage of the signals of local broadcast stations, which is required by FCC regulation, for valid reasons, should be subject to a gratis compulsory license. Apart from the communications policy rationale for requiring local signal carriage and justifying special copyright treatment, carriage of local signals poses none of the problems of harm or unfairness which demand normal liability for carriage of distant signals. In 1976, you recognized this by requiring no specific additional payment for carriage of local signals. This should carry through into the revision of the law you are now undertaking. We would suggest, however, that you also require carriage of all local signals. It would disrupt the present marketplace tremendously to open the door to noncarriage of local signals. Broadcasters produce the purchase programing on the basis of complete access to the audience within their service areas. Cable operators should not be permitted to foreclose competition from their local broadcast competitors. They should not be permitted to deny broadcasters access to the audience they rightfully anticipated serving in securing rights to show programing. In short, leaving cable operators total discretion to carry or not to carry local signals would unsettle the existing marketplace for copyrighted program product.

Without a doubt, the compulsory license does give cable systems an unfair competitive advantage not only over their broadcast station competitors, but also over any other video programing service such as MDS, the multipoint microwave service which now provides entertainment programing to hotels, apartments, condominimums, and private homes in certain areas. The compulsory license permits cable systems literally to escape the marketplace in the acquisition and exhibition of programing carried on distant broadcast signals. All they need do is pay miniscule royalty fees to the Copyright Office on a semiannual basis. Those fees range from a minimum of $15 to several percent of the systems' basic service revenus. In contrast, a broadcaster must enter the marketplace and compete with other stations for programing. Prices and terms are set in marketplace negotiations. Each program package or series is the subject of separate competition and negotiations. As a result,

the average broadcast station devotes over 26 percent of its revenues to production and procurement of programing to provide one channel of service, while its cable competitor provides multiple channels of comparable programing for or 2 percent of its subscriber revenue from that service.

On an industrywide basis, this disparity translates into a glaring inequity. In 1979, the latest year for which records are available, broadcast stations and networks paid over $4 billion for the programing they broadcast, while cable systems paid less than $16 million for the compulsory license to retransmit the same programing to their subscribers. We have attached as an appendix to my statement a more detailed program cost comparison which confirms that any way one looks at it, cable systems pay only 1 or 2 percent of the marketplace cost borne by broadcasters to show the same programing to a potential audience of comparable size. The disparity in program costs for the same programing, beyond its inherent unfairness, causes harm to broadcast stations. Bargain basement compulsory license fees have enabled cable sytems to carry multiple channels of broadcast programing. This subsidized competition has fragmented local stations' audiences. Because broadcast station revenue bears a close relationship to the station's audience, stations suffer economic harm. Consequently, the quality of program service they can provide deteriorates, and the majorty of the public which finds cable unavailable or unaffordable suffer that loss of service. Notably, the FCC in its so-called economic inquiry never denied the adverse effect of cable importation of distant signals on local stations' audiences. In fact, the FCC's studies, like those of NAB, confirmed that increased carriage of distant signals would produce increasing audience losses, which would be compounded by concurrent growth of cable television. In short, the present compulsory license subsidizes activities which result in economic harm to broadcasters. More to the point, it grants a further advantage to the cable system in that the harm from this subsidized activity is visited on a direct competitor, the local broadcaster.

The dramatic effect which cable televisions's carriage of distant signals can have on local station audiences is illustrated by audience data from Bakersfield, Calif., a heavily cabled market with substantial distant signal carriage. Those data are submitted in an appendix to this statement.

Despite its advantageous position outside the marketplace, cable relies on its compulsory license to flout and disrupt the program marketplace—again, in a manner especially harmful to broadcast stations. Syndicated programing is programing which is sold by a program producer or authorized distributor ("syndicator") directly to a local broadcast station for its use in its market. Network affiliated stations, as well as independent stations, purchase syndicated programing to complement their local and network programs. Although broadcast stations invariably bargain with producers for exclusive rights to show programs in their markets, and the producers agree not to permit other competing media to show the program, cable systems need not respect the contractual exclusivity provisions bargained for and paid for by local broadcast stations in their acquisition of syndicated programing. Thus, for

example, a Madison, Wis., station may purchase the syndicated version of "The Mary Tyler Moore Show" with exclusivity against exhibition of the show by both other broadcast stations and cable systems within its local market area—35-mile zone. Under the compulsory license a cable system still may carry "The Mary Tyler Moore Show" on a distant signal from Chicago or New York, for example, without the slightest regard for the exclusivity rights agreed to by the broadcaster and the program supplier. In fact, the cable system could import numerous signals in which "The Mary Tyler Moore Show" appears. The Madison station, having paid a substantial price for an exclusive right to exhibit "The Mary Tyler Moore Show" in its market then may find that the cable system is also showing it 10 or 15 times a week via carriage of distant stations which broadcast "The Mary Tyler Moore Show." To the local broadcaster who has paid a small fortune for "The Mary Tyler Moore Show," this represents real and present inhibition on his ability to compete and to provide the most attractive service to all the viewers in his community. The broadcaster simply may find especially attractive syndicated programing unaffordable if exclusive rights cannot be enforced. To the viewer, this may mean a program of lesser expense and lesser quality than an especially attractive series like "The Mary Tyler Moore Show" which enjoyed a long and successful network run. To the station it is uncertainty and confusion. Syndicated program purchases made, perhaps, well in advance of exhibition dates ultimately may prove to be unwise when local cable systems change distant signals or the distant stations themselves change their program schedules. In short, stations may be expected to compete with competitive stations or exhibitors who are on the same footing in the marketplace. It is something else, and indeed, nearly impossible, to anticipate the unknown, namely, what many local cable systems and more numerous distant broadcast stations will do in the selection and scheduling of syndicated programing.

The effect on the local station's audience is again illustrated by the Bakersfield example. The substantial potential for injury in dollar terms is discussed more thoroughly in the statement of David Polinger, vice president of WPIX in New York, also appended to this statement.

Congress and this subcommittee never intended that the deep and widespread economic harm and disruption would result from the establishment of a compulsory license to cover cable carriage of broadcast signals. As this subcommittee stated in its 1976 report on section 111, the compulsory license was designed to operate in concert with FCC rules which among other things limited the number of distant signals which could be carried and required cable systems in some circumstances to recognize local stations' contractual exclusive rights to show syndicated programs.

Now as the chairman pointed out, last July, the Commission repealed those rules. In the process, the Commission just closed its eyes to the concerns you expressed about the effect of its actions on the compulsory license scheme. Although they remain in effect pending judicial review of the Commissions's order, their demise would create a gigantic loophole and transform the compulsory

license into an instrument of substantial harm which Congress never envisioned or intended.

Cable now is a multibillion dollar industry, capable of standing on its own two feet and coping with the reality of marketplace competition which its competitors face daily. Cable, like its competitors, should succeed or fail on the basis of its ability to provide attractive services to consumers. If reuse of another industry's programing must remain part of that mix, then cable certainly can afford to pay marketplace prices.

I am quite confident that cable industry representatives, nonetheless, will bemoan the difficulties they believe they will encounter if each cable system must secure a license to retransmit each distant signal program. They will tell you that programing will not be licensed to cable and that even if the parties were willing, the so-called transaction costs or the costs of establishing licensing arrangements with numerous producers would be prohibitive.

Mr. Chairman, it is difficult to imagine any program supplier walking away from a sales opportunity. No rational entrepreneur will turn down a sale. They will seize opportunties to enhance sales and increase revenues. I fail to see any incentive rationale or otherwise to deny cable systems access to programing.

The supposed specter of cable systems thwarted from use of distant signals by the inability to deal with numerous program suppliers is no more than self-serving, unsupported, speculation by the cable industry. An industry which has embraced the marketplace to argue against regulation has no business withdrawing its confidence in the marketplace for purposes of retaining an advantageous regulatory scheme. When sellers have products that buyers want to buy, the pressure of supply and demand usually provides a mechanism for the sale. There is no reason to expect that will not happen if the compulsory license mechanism is abandoned.

On the other hand, continuation of the present compulsory license will prove increasingly unworkable. For example, the once simple determination of what constitutes basic subscriber revenues will become much more difficult, if not impossible to make. This will result from the growing inclination of cable systems to resort to tiering of services. Each of several tiers on a cable system may consist of a combination of distant and local signals and various pay and nonpay channels. Some subscribers will take some tiers of service, some others. Sorting out what proportion of the fee constitutes the charge for basic retransmission of broadcast signals will be an accountant's nightmare.

The present method of distributing royalties also creates problems for copyright owners. Putting aside the amounts awarded to the various claimants, let me just discuss for a moment the process by which the Tribunal reached its decision. It is extraordinarily burdensome: Day after day of hearings, page after page of testimony, and hour after hour of lawyers' time. No one can predict, and, indeed, we probably will never know the total amount of money expended by the parties in litigating the 1978 distribution proceeding. A safe guess, however, would place the answer into the millions of dollars. For parties which have been allocated less than a whopping share of the royalties—and broadcasters are not alone in that respect—the cost of the Tribunal's process ultimately may be

so great that the amount of royalties actually paid to claimants will be too small to justify participation in the process at all.

Why must the copyright owners who are entitled to royalties endure this ritual year after year after year? Certainly, the marketplace could handle this task much more efficiently than the Tribunal or any other governmental body. I might add the recently resigned Chairman of Copyright Royalty Tribunal has expressed the same view.

Last, Mr. Chairman, I would like to address portions of the legislation just recently introduced. Generally, we are pleased that the legislation proposed by yourself and Mr. Frank reflects your desire to remedy the difficulties we have discussed. We will study each bill closely and look forward to working with you in resolving the cable copyright problem through passage of legislation.

At this point, however, I would like to discuss two specific elements of your bill, Mr. Chairman. First, it would exempt all cable systems with fewer than 5,000 subscribers from any copyright liability. We oppose elimination of copyright liability for any cable system. The 1976 act established liability, even if minimal, for all cable systems. We see no reason to abandon that approach. The harm to broadcasters and the disruption of the marketplace is no less in the case of 10 1,000-subscriber cable systems than it is in the case of 1 10,000-subscriber system. If any rational basis exists for treating small systems differently, then at least maintain their present de minimis liability under a compulsory license.

We also question the use of a 5,000-subscriber cutoff. Up to 80 percent of the Nation's cable systems serving roughly a quarter of the Nation's cable subscribers could be exempt from copyright liability under such a high-exemption level. Among the 1,041 cable systems which paid royalties based on the regular distant signal equivalent formula in the first half of 1979, some 276 or 27.2 percent would have been exempt at a 5,000-subscriber level.

Add to which, many of these potential exempt systems are owned by multiple system operators. According to FCC records for 1979, the over 8,000 different communities served by cable reflected only 2,809 so-called "financial entities" or common owners. If an exemption of any sort is to be maintained, it should require meeting not only a per system subscriber count test, but also an aggregate per owner test. We urge you to review carefully current cable ownership patterns before establishing either per system or per owner exemption levels.

Second, we oppose a grant of broad subpena power to the Tribunal. Such subpena power would enable the Tribunal to conduct fishing expeditions and to expose highly confidential business information. This would serve to discourage otherwise proper participants from appearing before the Tribunal to assert their rights and make their cases. A broadcast claimant entitled, for example, to only several hundred dollars hardly can be expected to risk such substantial exposure to a Tribunal subpena for such an insubstantial stake.

Furthermore, the need for Tribunal subpena power is lacking. Already, the Tribunal conducts adversary proceedings. In the first royalty distribution proceeding, for example, every witness was subjected to cross-examination by counsel for numerous other par-

ties. Parties also were permitted to present evidence in a rebuttal phase. This process provides ample means for determining the probative value of evidence submitted.

Subpenas and the attendant legal proceedings involved in resisting them or securing their enforcement would add more clutter and confusion to an already burdensome and inefficient process.

In sum, Mr. Chairman, the marketplace is a far better determinant of program price than a fee schedule imposed rigidly by the Government and requiring an additional layer of regulation to adjust and apportion those fees in a manner easily leading to arbitrary results.

Cable interests also will insist that the present fees are fair and reasonable. If that is the case, the marketplace will bear them out, and their financial burden from normal copyright liability will not exceed royalties paid under the present scheme. When the cable industry sought deregulation at the FCC, it hawked a marketplace theory. Now, let it own up to its embrace of the marketplace and support efforts to get the Government out from between the cable industry and the suppliers of distant signal programing.

Thank you very much, Mr. Chairman.

[The complete statement of Mr. Wasilewski follows:]

Statement of Vincent T. Wasilewski
President
National Association of Broadcasters
before the
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary
United States House of Representatives

May 14, 1981

Mr. Chairman. My name is Vincent T. Wasilewski. I am President of the National Association of Broadcasters in Washington, D.C. NAB numbers among its members 662 of the nation's broadcast television stations and the nationwide commercial broadcast networks.

We thank you for the opportunity to present our views. We are most appreciative that you are conducting these hearings as part of the process of reviewing and revising the nature of cable television's copyright liability under the 1976 Copyright Act. We enthusiastically endorse and support your effort. Your willingness to revisit and reopen a complex, controversial subject which you thought resolved once and for all only five years ago, is especially praiseworthy.

No crystal ball could have predicted the rapid and compelling changes in the communications arena since 1976. We applaud your desire to revise the law in light of these changes. We hope that specific differences between our approaches, which we might suggest today, in no way obscure that we seek movement in the same direction, in response to the same problems, and

toward the same goal as you do -- namely, greater reliance on marketplace forces and less reliance on government intervention and regulation.

Broadcasters, of course, recognize that they will be -- as they have been -- competing with new technologies. In essence, these new technologies are nothing new. They are simply other means of delivering video programming to the consumer. When consumers turn on their television sets, do they really care whether the program is transmitted by a broadcast station over-the-air, through a cable, from a satellite, via microwave, or through the mails in the form of a cassette or disc? Broadcasters are willing and able to compete with those who use other transmission systems to provide programming, but ask only that competition be fair, that one competitor not be required to give another competitor a leg-up or compete with its own hands tied. Broadcasters, least of all among video technologies, should be required to operate with a copyright handicap or to subsidize, as they have for years, the growth and development of a competitive medium.

The commercial television broadcast system of this nation, engendered by Congress in the Communications Act of 1934, provides a level of video program service unparallelled anywhere else in the world.

The program services provided to the public by commercial television stations and networks in marked contrast to the services of cable television or the so-called "new tech-

nologies" are free and ubiquitous. They are available to all viewers, and they are available without charge.

Nearly everyone can receive numerous broadcast stations.

- There are over 78 million television households in the United States
- Ninety-eight percent of all households own at least one television set; 85% own color television sets; more than 50% own two or more sets.
- Ninety-seven percent of television households can receive 4 or more stations; 71% can receive 7 or more stations, and 43% can receive ten or more stations -- creating an extremely competitive environment within the television industry.

Today, it seems, program diversity is the holy grail of policy makers and new technologies constantly are portrayed more as ends in themselves rather than as a means of providing the public with something really new and distinctive.

"Diversity" and "new technologies" are nothing new to broadcasters. Mr. Chairman, you and several of your colleagues were able to attend our annual convention last month. You saw an exhibition of broadcast technology which stands as a monument to broadcasters' unceasing quest to improve and develop communications technology. Broadcasters have remained at the forefront of technological development not for the sake of doing the same thing a different way, but because technological development

enables them to provide more and better service to the public. Use of the latest newsgathering and satellite transmission techniques, for example, enabled this nation to share cohesively in the anxiety and joy of the release and return of the 52 American hostages from their captivity in Iran. Millions of Americans watched them land in Algiers, recuperate in Wiesbaden, and motorcade through Washington. Local stations' coverage also enabled entire communities to join in the homecoming of individual hostages. Broadcast television news, not surprisingly, consistently is rated the most trusted and relied upon news source in this country.

Diversity in broadcast programming just begins with the news. A wide variety of programming ranging from popular entertainment and sports programs to programming designed to serve the special needs and tastes of children and minorities is provided to the public by national and regional networks and local stations each and every day. Vigorous competition among stations and networks has assured that the public receives this great diversity of television programming.

That is why we are here today, Mr. Chairman. We are seeking the opportunity to compete with what many consider our most significant competition on a fair and equitable basis. We are seeking to establish a true marketplace and true competition, to dismantle a burdensome and wholly unnecessary regulatory framework, and to let the marketplace -- not government -- make determinations appropriately left to buyers and sellers of program product.

From our perspective, Mr. Chairman, the marketplace should be permitted to function freely unless there are compelling public interest reasons dictating governmental intervention. Thus, we urge that cable carriage of distant signals no longer receive the special treatment accorded it by the present compulsory license. Cable carriage of the signals of local broadcast stations, which is required by FCC regulation, for valid reasons, should be subject to a gratis compulsory license. Apart from the communications policy rationale for requiring local signal carriage and justifying special copyright treatment, carriage of local signals poses none of the problems of harm or unfairness which demand normal liability for carriage of distant signals. In 1976, you recognized this by requiring no specific additional payment for carriage of local signals. This should carry through into the revision of the law you are now undertaking. We would suggest, however, that you also require carriage of all local signals. It would disrupt the present marketplace tremendously to open the door to non-carriage of local signals. Broadcasters produce and purchase programming on the basis of complete access to the audience within their service areas. Cable operators should not be permitted to foreclose competition from their local broadcast competitors. They should not be permitted to deny broadcasters access to the audience they rightfully anticipated serving in securing rights to show programming. In short, leaving cable operators total discretion to carry or not to carry local signals would unsettle the existing marketplace for copyrighted program product.

Furthermore, if public policy considerations are relied upon to establish the continuing need for a compulsory license, we see no reason why other presently recognized public interest requirements could not be reflected in the legislation. A compulsory license is, after all, a form of subsidy to the cable operator and a public interest quid pro quo as a condition of receiving that subsidy hardly seems out-of-place.

Cable's use of distant signals pursuant to the present compulsory license presents serious problems as a matter of copyright law and policy. While we urge fairness, marketplace values and a deregulatory approach, we would not have the superficial appeal of these concepts stand alone as a rationale for revision. They are substantive concerns of injury already suffered by broadcasters and program suppliers, quantitative and qualitative losses of service to the public, and the demonstrable fact that cable systems simply have no need for a continuation of the compulsory license distant signal subsidy.

Without a doubt, the compulsory license does give cable systems an unfair competitive advantage not only over their broadcast station competitors, but also over any other video programming service such as MDS, the multi-point microwave service which now provides entertainment programming to hotels, apartments, condominiums, and private homes in certain areas. The compulsory license permits cable systems literally to escape the marketplace in the acquisition and exhibition of programming carried on distant broadcast signals. All they need do is pay

miniscule royalty fees to the Copyright Office on a semi-annual basis. Those fees range from a minimum of $15 to several percent of the systems' basic service revenues. In contrast, a broadcaster must enter the marketplace and compete with other stations for programming. Prices and terms are set in marketplace negotiations. Each program package or series is the subject of a separate competition and negotiation. As a result, the average broadcast station devotes over 26% of its revenues to production and procurement of programming to provide one channel of service, while its cable competitor provides multiple channels of comparable programming for a percent or two of its subscriber revenue from that service.

On an industry wide basis, this disparity translates into a glaring inequity. In 1979, the latest year for which records are available, broadcast stations and networks paid over four billion dollars for the programming they broadcast, while cable systems paid less than 16 million dollars for the compulsory license to retransmit the same programming to their subscribers. We have attached as an Appendix to my statement a more detailed program cost comparison which confirms that any way one looks at it, cable systems pay only one or two percent of the marketplace cost borne by broadcasters to show the same programming to a potential audience of comparable size. The disparity in program costs for the same programming, beyond its inherent unfairness, causes harm to broadcast stations. Bargain basement compuslory license fees have enabled cable systems to carry multiple channels of broadcast programming. This subsi-

dized competition has fragmented local stations' audiences. Because broadcast station revenue bears a close relationship to the station's audience, stations suffer economic harm. Consequently, the quality of program service they can provide deteriorates, and the majority of the public which finds cable unavailable or unaffordable suffers that loss of service. Notably, the FCC in its so-called Economic Inquiry never denied the adverse effect of cable importation of distant signals on local stations' audiences. In fact, the FCC's studies, like those of NAB, confirmed that increased carriage of distant signals would produce increasing audience losses, which would be compounded by concurrent growth of cable television. In short, the present compulsory license subsidizes activities which result in economic harm to broadcasters. More to the point, it grants a further advantage to the cable system in that the harm from its subsidized activities is visited on a direct competitor, the local broadcaster.

The dramatic effect which cable television's carriage of distant signals can have on local station audiences is illustrated by audience data from Bakersfield, California, a heavily cabled market with substantial distant signal carriage. Those data are submitted in an Appendix to this statement.

Despite its advantageous position <u>outside</u> the marketplace, cable relies on its compulsory license to flout and disrupt the program marketplace -- again, in a manner especially harmful to broadcast stations. Syndicated programming is

programming which is sold by a program producer or authorized distributor ("syndicator") directly to a local broadcast station for its use in its market. Network affiliated stations, as well as independent stations, purchase syndicated programming to complement their local and network programs. Although broadcast stations invariably bargain with producers for exclusive rights to show programs in their markets, and the producers agree not to permit other competing media to show the program, cable systems need not respect the contractual exclusivity provisions bargained for and paid for by local broadcast stations in their acquisition of syndicated programming. Thus, for example, a Madison, Wisconsin, station may purchase the syndicated version of "The Mary Tyler Moore Show" with exclusivity against exhibition of the show by both other broadcast stations and cable systems within its local market area (35 mile zone). Under the compulsory license, a cable system still may carry "The Mary Tyler Moore Show" on a distant signal from Chicago or New York, for example, without the slightest regard for the exclusivity rights agreed to by the broadcaster and the program supplier. In fact, the cable system could import numerous signals in which "The Mary Tyler Moore Show" appears. The Madison station, having paid a substantial price for an exclusive right to exhibit "The Mary Tyler Moore Show" in its market, then may find that the cable system is also showing it ten or fifteen times a week via carriage of distant stations which broadcast "The Mary Tyler Moore Show". To the local broadcaster who has paid a small fortune for "The Mary Tyler Moore Show ," this represents a real and

present inhibition on his ability to compete and to provide the most attractive service to all the viewers in his community. The broadcaster simply may find especially attractive syndicated programming unaffordable if exclusive rights cannot be enforced. To the viewer, this may mean a program of lesser expense and lesser quality than an especially attractive series like "The Mary Tyler Moore Show" which enjoyed a long and successful network run. To the station it is uncertainty and confusion. Syndicated program purchases made, perhaps, well in advance of exhibition dates ultimately may prove to be unwise when local cable systsms change distant signals or the distant stations themselves change their program schedules. In short, stations may be expected to compete with competitive stations or exhibitors who are on the same footing in the marketplace. It is something else, and indeed, nearly impossible, to anticipate the unknown, namely, what many local cable systems and more numerous distant broadcast stations will do in the selection and scheduling of syndicated programming.

The effect on the local stations audience is again illustrated by the Bakersfield example. The substantial potential for injury in dollar terms is discussed more thoroughly in the statement of David Polinger, Vice President of WPIX in New York, also appended to this statement.

Congress and this Subcommittee never intended that deep and widespread economic harm and disruption result from the establishment of a compulsory license to cover cable carriage of

broadcast signals. As this Subcommittee stated in its 1976 report on Section 111, the compulsory license was designed to operate in concert with FCC rules which among other things limited the number of distant signals which could be carried and required cable systems in some circumstances to recognize local stations' contractual exclusive rights to show syndicated programs.

Last July, the Commission repealed those rules. In the process, the Commission just closed its eyes to the concerns you expressed about the effect of its actions on the compulsory license scheme. Although they remain in effect pending judicial review of the Commission's order, their demise would create a gigantic loophole and transform the compulsory license into an instrument of substantial harm which Congress never envisioned or intended.

Indeed, among the numerous changes in the legislative milieu since 1976, the Commission's action is the most significant. Congress never envisioned the FCC's gutting its regulatory scheme by eliminating its rules limiting distant signal carriage and providing varying degrees of syndicated program exclusivity protection. Yet, this is precisely what the Commission has done. In the same stroke, it has converted cable's compulsory license into a boundless supply of broadcast programming at bargain basement prices.

Beyond severely compounding the harm to broadcasters and program producers, this expansion of the compulsory license

confounds the whole purpose of copyright. It hardly encourages creativity and diversity to award substantial price concessions to cable operators who choose to reuse another medium's programs rather than invest in creation of truly new programming. This point was not lost on the FCC in 1972. Apart from its concern about permitting distant signal carriage to undermine local broadcast service to the public, the Commission recognized that limiting cable's use of distant signals would encourage cable systems to turn elsewhere, to create their own programming and provide its subscribers with something newer and more diverse than an echo of what broadcasters already provided.

The present compulsory license is little more than massive subsidization of cable's use of distant signals in a manner which can serve only to stifle the creativity which the copyright law is designed to promote and nurture.

Perhaps, at a time when the cable industry had nowhere else to turn and faced serious difficulties in raising capital in a recessionary environment, a compulsory license permitting subsidized use of broadcast signal programming appeared appropriate.

Today, however, cable needs no Robin Hood copyright law, subsidizing its basic service at the expense of broadcasters and program producers which provide distant signal programming.

Cable now is a multibillion dollar industry, capable of standing on its own two feet and coping with the reality of marketplace competition which its competitors face daily. Cable,

like its competitors, should succeed or fail on the basis of its ability to provide attractive services to consumers. If reuse of another industry's programming must remain part of that mix, then cable certainly can afford to pay marketplace prices.

The cable industry is a dynamic, growing industry. FCC Cable Television Financial Data for 1979 reveals substantial growth since 1976 when the present compulsory license was enacted. Specifically, it shows:

A 19% increase in the number of communities served;

A 35% increase in the number of subscribers (These two figures reveal that cable has expanded in communities already served in 1976);

A 14% increase in the average subscriber rate;

A 82% increase in operating revenues; and

A 246% increase in net income.

The data table from the FCC report is appended to this statement. Cable penetration now stands at 25.3%. Cable is expected to serve 50% of the nation before the end of this decade, perhaps as early as 1985. In every respect, current growth trends in cable lend credence to that prediction.

Cable's treatment in the stock market also indicates the enormity of its success. The following stock values are illustrative:

	October 27, 1976	May 6, 1981	%Change
Teleprompter	6 5/8	33 3/4	+409
Tele-Communi-cations	3 1/8	28 1/2	+812
Viacom	9	59	+556
UA Columbia	14 1/2	79 1/4	+447

An extensive review of the cable industry's strength was supplied the FCC by NAB in comments opposing the lifting of the FCC's distant signal and syndicated exclusivity rules. Relevant portions are appended to this statement.

A more detailed compilation of relevant cable growth data is attached to this statement. The picture that emerges sharply is that of a strong, vibrant cable industry reaching new heights of development every day. Certainly, it is not the type of industry which one normally thinks of when special subsidies and insulation from marketplace risks are considered.

More significantly, an important element of cable's success has been its ability to develop its own sources of programming and to do so in the marketplace subject to normal copyright liability. In this respect,the cable industry of 1981 only minimally resembles the cable industry of 1976. Then, cable still was a completely parasitic service. It provided its sub-

scribers with a solid diet of retransmitted broadcast signals only rarely enriched by local origination or the programming of a fledgeling pay cable industry.

The era of satellite program distribution, facilitated by FCC deregulation of satellite reception dishes, has succeeded in turning that scenario on its head. Now, an expansive and increasing variety of satellite fed programming is available to virtually every cable system in the country. It includes seven pay television movie channels, two ad supported sports channels, two childrens' programming channels, four news and public affairs channels, four religious program channels, and five specialized advertiser supported entertainment channels. Eight additional program services are standing in the wings. In short, the cable industry stands on the verge of supporting thirty-five non-broadcast program channels, all of which have developed subject to normal copyright liability.

Thus, the context of this renewed debate over copyright treatment of cable's use of broadcast signals is much different today than it was only five years ago. Cable has demonstrated through its own actions that it can afford to pay marketplace prices for numerous channels of attractive programming. Secondly, cable systems now have numerous alternative program sources. In 1976, cable still had to rely almost exclusively on broadcast signals to provide an appealing service. Today, that obviously no longer is true, with an increasing array of non-broadcast programming available via satellite.

Further evidence of cable financial strength comes from the intense competition for major urban franchises. Any of these systems probably will cost more to build than the entire cable industry will pay in copyright royalties. For example, the cost of wiring Washington, D.C., has been estimated at $60 million, three times what the cable industry paid in royalties in 1980. The deep pockets of the cable industry also are reflected sharply by the often lavish service proposals of the companies competing for franchises.

No one can say that the cable industry cannot afford to enter the marketplace and compete effectively for program product. Certainly, a subsidy in any form is unnecessary.

I am quite confident that cable industry representatives, nonetheless, will bemoan the difficulties they believe they will encounter if each cable system must secure a license to retransmit each distant signal program. They will tell you that programming will not be licensed to cable and that even if the parties were willing, the so-called transaction costs or the costs of establishing licensing arrangements with numerous producers would be prohibitive.

Mr. Chairman, it is difficult to imagine any program supplier walking away from a sales opportunity. No rational entreprenuer will turn down a sale. They will seize opportunities to enhance sales and increase revenues. I fail to see any incentive rational or otherwise to deny cable systems access to programming. The only possible limitation is one which arises

from marketplace forces, namely, exclusive rights to show programs for limited periods of time in limited geographical areas. Such exclusive arrangements are the product of bargaining between buyer and seller. Traditionally, exclusive licenses have been considered beneficial to both buyers and sellers of television programming. Contractual exclusivity provisions, however, do not stand as a wholesale bar on the ability of program suppliers to sell programming to cable systems. First, not every program is sold in every market. Second, many cable systems lie outside all television markets. Third, any decrease in availability is likely to be marginal because FCC rules have given some effect to existing exclusive program contracts. Fourth, the marketplace will determine the nature and extent of exclusivity granted to broadcasters or other program users in the future. The quest for exclusivity is not reserved to broadcasters. Cable program services, as illustrated by the recent Premiere proposals and litigation, value and pursue exclusive program rights, too. Cable would have a full, equitable opportunity to compete for and secure exclusive use of programs.

The supposed spectre of cable systems thwarted from use of distant signals by the inability to deal with numerous program suppliers is no more than self-serving, unsupported, speculation by the cable industry. An industry which has embraced the marketplace to argue against regulation has no business withdrawing its confidence in the marketplace for purposes of retaining an advantageous regulatory scheme. When sellers have products that buyers want to buy, the pressure of supply and

demand usually provides a mechanism for the sale. There is no reason to expect that will not happen if the compulsory license mechanism is abandoned.

Again, the 1976 environment and the present environment are worlds apart. Cable has proven its ability to secure rights to carry attractive programs. In essence, middlemen or networks -- usually using satellites to distribute programs nationally -- have shouldered the burden of securing exhibition rights. The same sort of approach appears feasible for distant signal program usage. Indeed, certain distant signals already are distributed via satellite. Additionally, computer technology is easily capable of implementing a clearinghouse or similar mechanism of dispensing distant signal program rights.

On the other hand, continuation of the present compulsory license will prove increasingly unworkable. For example, the once simple determination of what constitutes basic subscriber revenues will become much more difficult, if not impossible to make. This will result from the growing inclination of cable systems to resort to tiering of services. Each of several tiers on a cable system may consist of a combination of distant and local signals and various pay and non-pay channels. Some subscribers will take some tiers of service, some others. Sorting out what proportion of the fee constitutes the charge for basic retransmission of broadcast signals will be an accountant's nightmare.

Similarly, the latest rate increase to assure that cable royalties keep pace with inflation will produce arbitrary results. The 21% increase adopted by the Tribunal will apply equally to cable operators whose rates have kept pace with or exceeded inflation as to those whose rates have not. Ironically, it arbitrarily penalizes those whose rates have increased while providing a windfall to cable systems which have maintained low rates vis-a-vis inflation. Tiering, again, will produce an inherent cross-subsidization between broadcast retransmission and other non-broadcast services. Congress recognized this possibility, that basic service rates might be kept artificially low through raising of pay and other non broadcast service fees. A straight 21% increase still permits cable operators to escape the effect of the rate increase by doing just that.

The present method of distributing royalties also creates problems for copyright owners. Putting aside the amounts awarded to the various claimants, let me just discuss for a moment the process by which the Tribunal reached its decision. It is extraordinarily burdensome: day after day of hearings, page after page of testimony, and hour after hour of lawyers' time. No one can predict, and, indeed, we probably will never know the total amount of money expended by the parties in litigating the 1978 distribution proceeding. A safe guess, however, would place the answer into the millions of dollars. For parties which have been allocated less than a whopping share of the royalties -- and broadcasters are not alone in that respect -- the cost of the Tribunal's process ultimately may be

so great that the amount of royalties actually paid to claimants will be too small to justify participation in the process at all.

Why must copyright owners who are entitled to royalties endure this ritual year after year after year? Certainly, the marketplace could handle this task much more efficiently than the Tribunal or any other governmental body. I might add the recently resigned Chairman of Copyright Royalty Tribunal has expressed the same view.

Lastly, Mr. Chairman, I would like to address portions of the legislation just recently introduced. Generally, we are pleased that the legislation proposed by yourself and Mr. Frank reflects your desire to remedy the difficulties we have discussed. We will study each bill closely and look forward to working with you in resolving the cable copyright problem through passage of legislation.

At this point, however, I would like to discuss two specific elements of your bill, Mr. Chairman. First, it would exempt all cable systems with fewer than 5,000 subscribers from any copyright liability. We oppose elimination of copyright liability for any cable system. The 1976 Act established liability, even if minimal, for all cable systems. We see no reason to abandon that approach. The harm to broadcasters and the disruption of the marketplace is no less in the case of ten 1000 subscriber cable systems than it is in the case of one 10,000 subscriber system. If any rational basis exists for treating small systems differently, then at least maintain their present de minimis liability under a compulsory license.

We also question the use of a 5000 subscriber cut-off. Up to 80% of the nation's cable systems serving roughly a quarter of the nation's cable subscribers could be exempt from copyright liability under such a high exemption level. Among the 1041 cable systems which paid royalties based on the regular distant signal equivalent formula in the first half of 1979, some 276 or 27.2% would have been exempt at a 5000 subscriber level.

Add to which, many of the these potential exempt systems are owned by multiple system operators. According to FCC records for 1979, the over 8000 different communities served by cable reflected only 2809 so-called "financial entities" or common owners. If an exemption of any sort is to be maintained, it should require meeting not only a per system subscriber count test, but also an aggregate per owner test. We urge you to review carefully current cable ownership patterns before establishing either per system or per owner exemption levels.

To reiterate, however, all cable systems presently are subject to copyright liability pursuant to the compulsory license, and we see no reason to retreat from that approach.

Second, we oppose a grant of broad subpoena power to the Tribunal. Such subpoena power would enable the Tribunal to conduct fishing expeditions and to expose highly confidential business information. This would serve to discourage otherwise proper participants from appearing before the Tribunal to assert their rights and make their cases. A broadcast claimant entitled, for example, to only several hundred dollars hardly can

be expected to risk such substantial exposure to a Tribunal subpoena for such an insubstantial stake.

Furthermore, the need for Tribunal subpoena power is lacking. Already, the Tribunal conducts adversary proceedings. In the first royalty distribution proceeding, for example, every witness was subjected to cross-examination by counsel for numerous other parties. Parties also were permitted to present evidence in a rebuttal phase. This process provides ample means for determining the probative value of evidence submitted.

Subpoenas and the attendant legal proceedings involved in resisting them or securing their enforcement would add more clutter and confusion to an already burdensome and inefficient process.

In sum, Mr. Chairman, the marketplace is a far better determinant of program price than a fee schedule imposed rigidly by the government and requiring an additional layer of regulation to adjust and apportion those fees in a manner easily leading to arbitrary results.

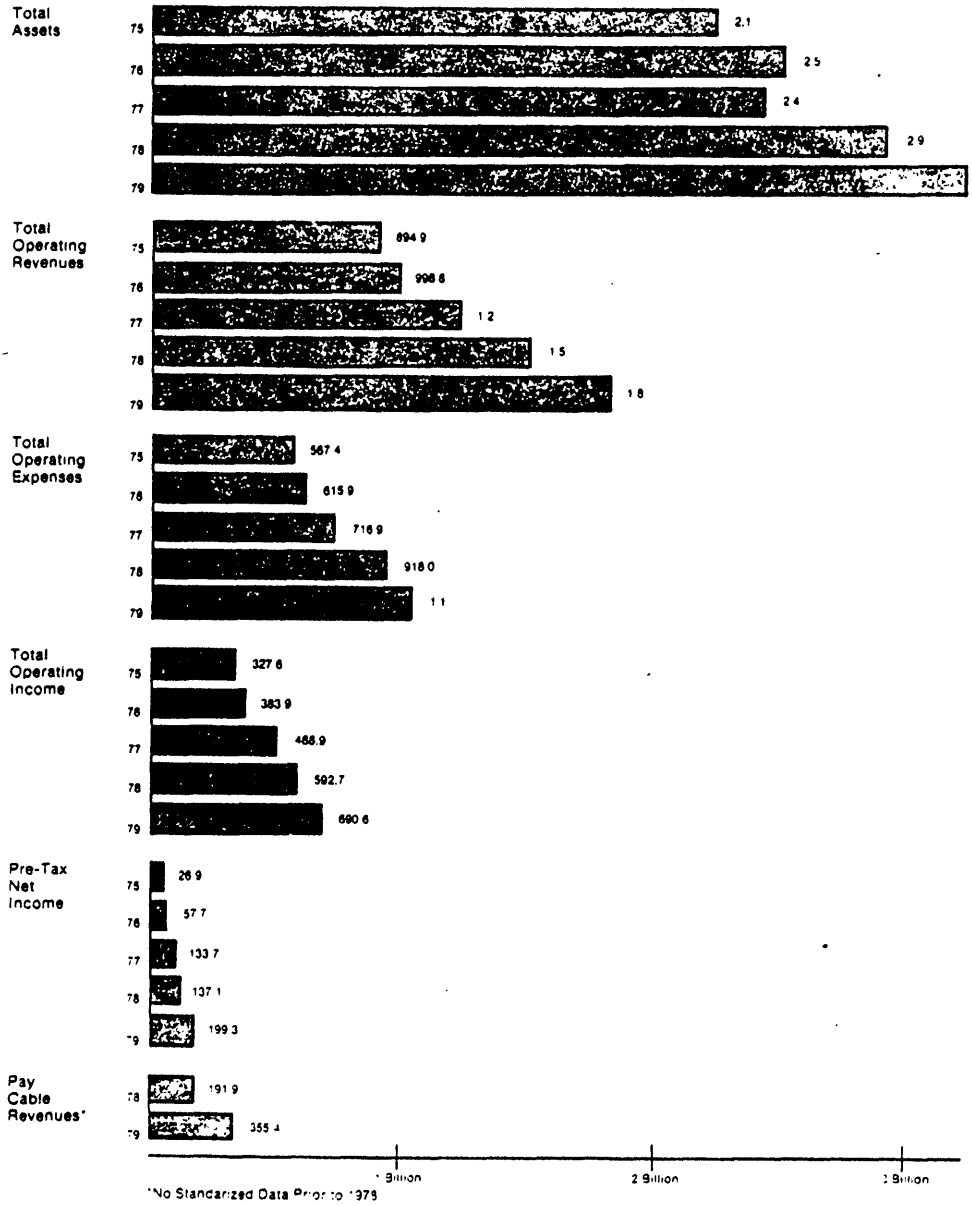
Cable interests also will insist that the present fees are fair and reasonable. If that is the case, the marketplace will bear them out, and their financial burden from normal copyright liability will not exceed royalties paid under the present scheme. When the cable industry sought deregulation at the FCC, it hawked a marketplace theory. Now, let it own up to its embrace of the marketplace and support efforts to get the government out from between the cable industry and the suppliers of distant signal programming.

Again, we appreciate and support your effort to revisit and revise Section 111 of the Act. Thank you very much.

LIST OF TABLES

Cable Television Industry
Financial Highlights 1975 thru 1979
(in millions of dollars)

Table I



*No Standardized Data Prior to 1978

SELECTED FINANCIAL DATA
1975 THRU 1979

	1975	1976	%CHANGE '75-'76	1977	%CHANGE '76-'77	1978	%CHANGE '77-'78	1979	%CHANGE '78-'79	%CHANGE '75-'79
Communities	6,265	7,198	14.9	8,369	16.3	8,200	-2.0	8,539	4.1	36.3
Financial Entities	2,443	2,349	-3.9	2,557	8.9	2,865	12.1	2,992	4.4	22.5
Subscribers	9,863,020	11,648,498	18.1	12,832,014	10.2	14,113,945	10.0	15,759,500	11.7	59.8
Average Subscriber Rate	$6.21	$6.49	4.5	$6.85	5.6	$7.03	2.6	$7.37	4.8	18.7
Operating Revenues	$ 894,918,101	$ 999,753,785	11.7	$1,205,875,773	20.6	$1,511,028,545	25.3	$1,817,144,960	20.3	103.1
Operating Expenses	$ 567,360,186	$ 615,882,714	8.6	$ 716,950,304	16.4	$ 918,025,164	28.1	$1,126,595,322	22.7	98.6
Net Income	$ 26,884,313	$ 57,662,612	114.5	$ 133,736,554	131.9	$ 137,120,149	2.5	$ 199,328,409	45.4	641.4
Total Assets	$2,131,526,689	$2,515,732,873	18.0	$2,450,458,111	-2.6	$2,870,739,878	17.2	$3,211,574,387	11.9	50.7

TABLE III

CATV INDUSTRY FINANCIAL DATA FISCAL YEAR ENDING BETWEEN JAN - DEC 1979
BY STATE

STATE OR TERITORY	NUMBER OF COMMUN	NUMBER FINAN. ENTIT.	NUMBER OF SUBSCRIBERS	AVERAGE SUBS RATE	AVERAGE INST FEES	TOTAL OPERATING REVENUES	PAY TV REVENUES	TOTAL OPERATING EXPENSES	NET INCOME BEFORE TAXES	TOTAL ASSETS	% OF SUBS NOT INCLUDED
ALABAMA	132	58	311,650	7.71	19.21	38,708,176	8,342,112	22,864,114	7,129,660	65,954,581	2.7
ALASKA	15	12	16,874	17.88	22.03	4,710,029	648,224	3,446,502	593,944	4,226,209	0.0
ARIZONA	68	36	94,890	9.47	20.67	12,446,594	1,794,945	7,842,184	576,831	28,239,021	2.1
ARKANSAS	130	80	199,218	6.94	15.50	24,926,333	2,021,218	14,962,824	2,090,650	50,045,650	0.0
CALIFORNIA	517	188	1,965,136	7.57	17.10	239,673,775	53,210,147	141,279,392	31,797,322	415,976,153	4.7
COLORADO	80	35	115,119	7.99	18.83	11,426,413	2,091,336	6,816,535	126,403	25,684,847	0.0
CONNECTICUT	74	16	265,402	8.61	20.79	30,321,290	5,100,853	16,176,972	4,254,724	67,923,986	4.8
DELAWARE	31	7	97,516	7.34	26.67	11,783,093	1,795,041	6,311,175	3,732,478	14,566,985	0.0
FLORIDA	335	93	737,065	7.39	21.92	85,963,215	18,634,771	57,942,594	515,384	194,804,299	0.0
GEORGIA	163	73	352,447	7.70	18.60	38,046,738	7,269,711	23,323,396	6,868,323	58,123,425	13.0
HAWAII	30	10	117,158	8.30	34.06	12,430,453	760,475	7,324,585	399,892	25,463,577	0.0
IDAHO	71	27	78,475	7.61	21.55	8,218,075	1,254,651	4,602,605	1,488,222	12,104,946	0.0
ILLINOIS	197	72	379,699	7.26	16.32	41,514,653	7,554,997	25,223,513	6,162,754	64,805,238	17.1
INDIANA	140	63	274,342	7.22	16.31	30,033,160	6,120,469	18,534,621	1,072,841	54,334,394	7.4
IOWA	93	46	182,792	7.79	16.78	22,478,399	5,187,533	13,019,254	4,550,011	42,657,410	0.0
KANSAS	137	86	245,320	7.81	12.71	21,716,783	3,841,049	13,754,092	500,158	50,306,859	2.9
KENTUCKY	251	118	227,880	7.26	18.00	26,526,511	2,033,405	15,143,360	5,222,168	48,919,072	4.0
LOUISIANA	94	39	239,000	7.30	16.27	22,612,029	5,169,520	13,561,185	2,341,980	53,356,195	21.4
MAINE	72	22	94,921	7.57	15.28	9,908,921	1,555,578	6,245,223	-784,630	22,962,420	6.4
MARYLAND	117	29	184,052	7.68	15.95	11,505,994	1,675,034	8,708,216	-75,590	19,166,013	7.7
MASSACHUSETTS	102	36	315,970	7.56	17.79	31,765,047	4,769,101	20,812,630	2,831,769	49,569,601	0.0

STATE OR TERRITORY	NUMBER OF COMMUN	NUMBER FINAN. ENTIT.	NUMBER OF SUBSCRIBERS	AVERAGE SUBS RATE	AVERAGE INST FEES	TOTAL OPERATING REVENUES	PAY TV REVENUES	TOTAL OPERATING EXPENSES	NET INCOME BEFORE TAXES	TOTAL ASSETS	% OF SUBS NOT INCLUDED
MICHIGAN	242	62	401,944	7.14	16.94	44,113,523	8,685,673	26,343,458	5,614,169	84,654,431	5.6
MINNESOTA	144	84	194,789	7.36	17.20	20,531,488	3,202,972	11,906,124	3,581,667	39,156,129	0.0
MISSISSIPPI	99	54	347,278	4.68	11.69	23,388,502	4,153,757	13,259,312	5,870,004	35,041,337	6.4
MISSOURI	126	73	188,8[illegible]	7.11	13.49	21,079,486	2,590,617	13,199,161	3,055,401	29,956,488	0.2
MONTANA	54	28	102,414	8.72	21.88	12,822,315	2,179,160	7,488,003	3,526,788	25,707,239	1.8
NEBRASKA	53	27	98,484	7.72	14.05	5,580,059	902,408	3,244,095	147,625	7,282,557	4.7
NEVADA	14	9	40,493	7.16	13.35	5,422,483	1,693,309	3,224,767	1,430,831	7,840,484	10.0
NEW HAMPSHIRE	55	17	76,988	7.00	19.88	6,853,825	453,222	3,928,999	1,608,162	9,179,171	25.6
NEW JERSEY	239	37	469,612	7.00	20.21	60,309,165	20,584,595	41,007,166	4,154,425	131,069,628	0.0
NEW MEXICO	67	29	132,114	7.93	15.18	16,666,658	3,221,358	10,160,273	3,603,712	25,826,474	0.0
NEW YORK	598	121	1,110,3[illegible]	7.66	16.64	142,670,156	36,135,268	93,802,740	11,054,123	221,782,581	8.6
NORTH CAROLINA	130	54	344,134	7.39	14.01	37,051,207	8,551,876	22,075,324	3,072,574	68,346,681	0.0
NORTH DAKOTA	46	38	49,367	7.96	16.93	5,186,336	411,371	3,586,209	305,002	9,777,993	16.8
OHIO	448	108	739,5[illegible]	7.16	14.69	81,321,693	15,114,902	58,116,334	-11,400,320	186,060,438	8.1
OKLAHOMA	101	76	277,629	7.42	12.53	27,624,757	6,385,909	15,415,635	5,320,747	49,655,760	0.0
OREGON	141	62	225,[illegible]44	7.44	18.40	24,187,244	3,302,639	16,214,783	4,630,973	33,674,132	8.1
PENNSYLVANIA	1,194	188	1,163,[illegible]43	6.47	15.39	109,256,629	18,499,595	63,888,834	17,323,077	172,194,906	11.7
SOUTH CAROLINA	85	31	175,[illegible]21	7.85	15.86	21,296,303	5,479,324	14,325,393	-243,111	44,304,215	5.3
SOUTH DAKOTA	19	17	46,490	7.70	17.84	4,693,535	442,620	2,951,198	93,958	3,273,294	22.0
TENNESSEE	114	55	208,[illegible]15	7.52	14.43	30,888,284	3,751,423	22,392,817	-1,422,297	57,003,423	1.2
TEXAS	331	200	851,517	7.25	15.60	98,050,950	17,308,223	60,353,037	13,287,314	170,337,483	6.3

CATV INDUSTRY FINANCIAL DATA FISCAL YEAR ENDING BETWEEN JAN - DEC 1979
BY STATE

STATE OR TERITORY	NUMBER OF COMMUN	NUMBER FINAN. ENTIT.	NUMBER OF SUBSCRIBERS	AVERAGE SUBS RATE	AVERAGE INST FEES	TOTAL OPERATING REVENUES	PAY TV REVENUES	TOTAL OPERATING EXPENSES	NET INCOME BEFORE TAXES	TOTAL ASSETS	% OF SUBS NOT INCLUDED
UTAH	19	7	20,130	7.68	18.94	1,860,292	378,377	1,983,448	-2,373,152	10,886,876	11.7
VERMONT	73	17	56,636	6.25	18.60	5,377,751	603,332	3,092,327	1,412,058	4,729,737	14.5
VIRGINIA	138	52	264,007	7.29	16.09	29,173,284	6,613,007	18,692,802	-130,303	67,290,387	6.6
WASHINGTON	190	69	341,792	8.01	20.13	46,023,820	12,474,232	27,402,892	7,666,023	71,429,675	17.0
WEST VIRGINIA	280	82	215,197	6.94	16.24	40,451,278	3,362,827	21,445,008	14,698,540	34,098,390	38.9
WISCONSIN	109	45	162,370	7.55	15.01	32,576,591	2,887,229	21,218,202	4,850,198	41,729,467	19.6
WYOMING	52	21	79,658	7.97	21.19	11,412,498	2,587,273	6,631,112	4,800,678	16,364,341	3.5
OTHER	8	4	30,143	9.14	20.30	3,709,327	737,058	2,622,977	236,636	4,843,751	0.0
U.S. TOTALS	8,018	2,809	14,798,171	7.37	16.99	1,706,299,117	333,693,966	1,057,873,007	187,169,376	3,015,668,349	8.1
U.S TOTALS PROJECTED TO 100%	8,539	2,992	15,759,500	7.37	16.99	1,817,144,960	355,371,636	1,126,595,322	199,328,409	3,211,574,387	0.0

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	5,268	TOTAL FINANCIAL UNITS	2,809
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.37	TOTAL COMMUNITIES	8,018
AVERAGE PAY TV RATE	$ 8.73	TOTAL NUMBER OF SUBSCRIBERS	14,728,171
AVERAGE INSTALLATION FEE	$16.99	TOTAL NUMBER OF HOMES PASSED	27,047,914
AVERAGE PENETRATION RATE	54.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	1,261,480,701	85.25
PAY TV REVENUES	333,693,966	22.55
TOTAL OPERATING REVENUES	1,706,299,117	115.30
SERVICE EXPENSES	437,223,483	29.55
PAY TV EXPENSES	133,248,410	9.00
POLE RENTALS	38,293,712	2.59
MICROWAVE COSTS	21,419,753	1.45
ORIGINATION EXPENSE	21,984,342	1.49
SELLING GEN & ADM EXPENSES	465,416,772	31.45
TOTAL SALARIES	354,127,623	23.93
TOTAL OPERATING EXPENSES	1,057,873,007	71.49
TOTAL OPERATING INCOME	648,426,110	43.82
DEPRECIATION & AMORTIZATION	305,200,605	20.61
INTEREST EXPENSES	150,731,468	10.19
NET INCOME BEFORE TAXES	187,169,376	12.65

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	301,936,216	20.40
ACCUMULATED DEPRECIATION	1,389,621,574	93.90
FIXED ASSETS	2,095,738,590	141.62
TOTAL ASSETS	3,015,668,349	203.79
CURR LIAB & DEFER CREDITS	657,579,583	44.44
LONG TERM LIABILITIES	1,266,397,426	85.58
TOTAL OWNERS EQUITY	959,985,317	64.87

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	57.6%
PRE-TAX PROFIT MARGIN	11.0%	PRE-TAX RETURN ON ASSETS	6.2%
% OF CATV SYSTEMS W/PAY TV.	48.5%	NO. CATV SYSTEMS W/ PAY TV	1361
COMMUNITIES W/ PAY TV	4887		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	1,406	TOTAL FINANCIAL UNITS	12
AVERAGE MONTHLY SUBSCRIBER RATE	$17.88	TOTAL COMMUNITIES	15
AVERAGE PAY TV RATE	$12.65	TOTAL NUMBER OF SUBSCRIBERS	16,874
AVERAGE INSTALLATION FEE	$22.03	TOTAL NUMBER OF HOMES PASSED	20,425
AVERAGE PENETRATION RATE	82.6%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	3,629,363	215.09
PAY TV REVENUES	648,224	38.42
TOTAL OPERATING REVENUES	4,710,029	279.13
SERVICE EXPENSES	458,937	27.20
PAY TV EXPENSES	284,413	16.86
POLE RENTALS	29,404	1.74
MICROWAVE COSTS		.00
ORIGINATION EXPENSE	445,076	26.38
SELLING GEN & ADM EXPENSES	2,258,076	133.82
TOTAL SALARIES	1,307,298	77.47
TOTAL OPERATING EXPENSES	3,446,502	204.25
TOTAL OPERATING INCOME	1,263,527	74.88
DEPRECIATION & AMORTIZATION	437,893	25.95
INTEREST EXPENSES	105,394	6.25
NET INCOME BEFORE TAXES	593,944	35.20

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,262,697	74.83
ACCUMULATED DEPRECIATION	1,573,556	93.25
FIXED ASSETS	2,203,538	130.59
TOTAL ASSETS	4,226,209	250.46
CURR LIAB & DEFER CREDITS	1,080,775	64.05
LONG TERM LIABILITIES	590,462	34.99
TOTAL OWNERS EQUITY	1,921,561	113.88

FINANCIAL RATIOS

CURRENT RATIO	1.3	DEBT RATIO	35.7%
PRE-TAX PROFIT MARGIN	12.6%	PRE-TAX RETURN ON ASSETS	14.1%
% OF CATV SYSTEMS W/PAY TV.	75.0%	NO. CATV SYSTEMS W/ PAY TV	9
COMMUNITIES W/ PAY TV	12		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	5,373	TOTAL FINANCIAL UNITS	58
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.71	TOTAL COMMUNITIES	132
AVERAGE PAY TV RATE	$ 9.42	TOTAL NUMBER OF SUBSCRIBERS	311,650
AVERAGE INSTALLATION FEE	$19.21	TOTAL NUMBER OF HOMES PASSED	540,067
AVERAGE PENETRATION RATE	57.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	28,106,771	90.19
PAY TV REVENUES	8,342,112	26.77
TOTAL OPERATING REVENUES	38,708,176	124.20
SERVICE EXPENSES	8,984,549	28.83
PAY TV EXPENSES	3,530,844	11.33
POLE RENTALS	735,246	2.36
MICROWAVE COSTS	216,406	.69
ORIGINATION EXPENSE	414,824	1.33
SELLING GEN & ADM EXPENSES	9,933,897	31.88
TOTAL SALARIES	6,884,515	22.09
TOTAL OPERATING EXPENSES	22,964,114	73.36
TOTAL OPERATING INCOME	15,844,062	50.84
DEPRECIATION & AMORTIZATION	5,842,052	18.75
INTEREST EXPENSES	2,733,236	8.77
NET INCOME BEFORE TAXES	7,129,660	22.88

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	7,725,137	24.79
ACCUMULATED DEPRECIATION	26,119,620	83.81
FIXED ASSETS	47,683,355	153.00
TOTAL ASSETS	65,954,581	211.63
CURR LIAB & DEFER CREDITS	17,537,177	56.27
LONG TERM LIABILITIES	20,401,860	65.46
TOTAL OWNERS EQUITY	27,780,583	89.14

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	47.9%
PRE-TAX PROFIT MARGIN	18.4%	PRE-TAX RETURN ON ASSETS	10.8%
% OF CATV SYSTEMS W/PAY TV.	50.0%	NO. CATV SYSTEMS W/ PAY TV	29
COMMUNITIES W/ PAY TV	79		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,492	TOTAL FINANCIAL UNITS	80
AVERAGE MONTHLY SUBSCRIBER RATE	$ 6.94	TOTAL COMMUNITIES	130
AVERAGE PAY TV RATE	$ 8.63	TOTAL NUMBER OF SUBSCRIBERS	199,328
AVERAGE INSTALLATION FEE	$15.50	TOTAL NUMBER OF HOMES PASSED	291,540
AVERAGE PENETRATION RATE	68.4%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	21,109,447	105.90
PAY TV REVENUES	2,021,218	10.14
TOTAL OPERATING REVENUES	24,926,333	125.05
SERVICE EXPENSES	6,760,014	33.91
PAY TV EXPENSES	823,243	4.13
POLE RENTALS	432,777	2.17
MICROWAVE COSTS	390,253	1.96
ORIGINATION EXPENSE	42,492	.21
SELLING GEN & ADM EXPENSES	7,337,075	36.81
TOTAL SALARIES	6,504,671	32.63
TOTAL OPERATING EXPENSES	14,962,824	75.07
TOTAL OPERATING INCOME	9,963,509	49.99
DEPRECIATION & AMORTIZATION	4,618,435	23.17
INTEREST EXPENSES	2,923,773	14.70
NET INCOME BEFORE TAXES	2,090,650	10.49

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,229,821	16.20
ACCUMULATED DEPRECIATION	15,615,186	78.34
FIXED ASSETS	23,421,211	117.50
TOTAL ASSETS	50,045,650	251.07
CURR LIAB & DEFER CREDITS	6,323,081	31.72
LONG TERM LIABILITIES	15,109,794	75.80
TOTAL OWNERS EQUITY	7,880,686	39.54

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	40.0%
PRE-TAX PROFIT MARGIN	8.4%	PRE-TAX RETURN ON ASSETS	4.2%
% OF CATV SYSTEMS W/PAY TV	28.8%	NO. CATV SYSTEMS W/ PAY TV	23
COMMUNITIES W/ PAY TV	44		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,636	TOTAL FINANCIAL UNITS	36
AVERAGE MONTHLY SUBSCRIBER RATE	$ 9.47	TOTAL COMMUNITIES	68
AVERAGE PAY TV RATE	$ 9.24	TOTAL NUMBER OF SUBSCRIBERS	94,890
AVERAGE INSTALLATION FEE	$20.67	TOTAL NUMBER OF HOMES PASSED	143,722
AVERAGE PENETRATION RATE	66.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	9,234,691	97.32
PAY TV REVENUES	1,794,945	18.92
TOTAL OPERATING REVENUES	12,446,594	131.17
SERVICE EXPENSES	3,235,641	34.10
PAY TV EXPENSES	734,872	7.74
POLE RENTALS	170,033	1.79
MICROWAVE COSTS	400,644	4.22
ORIGINATION EXPENSE	25,403	.27
SELLING GEN & ADM EXPENSES	3,846,268	40.53
TOTAL SALARIES	2,460,007	25.92
TOTAL OPERATING EXPENSES	7,842,184	82.64
TOTAL OPERATING INCOME	4,604,410	48.52
DEPRECIATION & AMORTIZATION	2,328,186	24.54
INTEREST EXPENSES	1,706,925	17.99
NET INCOME BEFORE TAXES	576,831	6.08

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,160,885	12.23
ACCUMULATED DEPRECIATION	8,890,770	93.70
FIXED ASSETS	18,143,855	191.21
TOTAL ASSETS	28,239,021	297.60
CURR LIAB & DEFER CREDITS	6,363,836	67.07
LONG TERM LIABILITIES	8,932,000	94.13
TOTAL OWNERS EQUITY	7,770,225	81.89

FINANCIAL RATIOS

CURRENT RATIO	.5	DEBT RATIO	39.9%
PRE-TAX PROFIT MARGIN	4.6%	PRE-TAX RETURN ON ASSETS	2.0%
% OF CATV SYSTEMS W/PAY TV.	69.4%	NO. CATV SYSTEMS W/ PAY TV	25
COMMUNITIES W/ PAY TV	45		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	10,453
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.57
AVERAGE PAY TV RATE.....	$ 9.48
AVERAGE INSTALLATION FEE.....	$17.10
AVERAGE PENETRATION RATE.....	54.1%

TOTAL FINANCIAL UNITS.....	188
TOTAL COMMUNITIES.....	517
TOTAL NUMBER OF SUBSCRIBERS.....	1,965,136
TOTAL NUMBER OF HOMES PASSED.....	3,633,590

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	172,272,301	87.66
PAY TV REVENUES	53,210,147	27.08
TOTAL OPERATING REVENUES	239,673,775	121.96
SERVICE EXPENSES	51,399,068	26.16
PAY TV EXPENSES	19,225,388	9.78
POLE RENTALS	3,203,354	1.63
MICROWAVE COSTS	990,956	.50
ORIGINATION EXPENSE	3,024,707	1.54
SELLING GEN & ADM EXPENSES	67,630,229	34.42
TOTAL SALARIES	51,720,123	26.32
TOTAL OPERATING EXPENSES	141,279,392	71.89
TOTAL OPERATING INCOME	98,394,393	50.07
DEPRECIATION & AMORTIZATION	45,680,331	23.25
INTEREST EXPENSES	17,173,011	8.74
NET INCOME BEFORE TAXES	31,797,322	16.18

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	50,624,379	25.76
ACCUMULATED DEPRECIATION	237,204,216	120.71
FIXED ASSETS	291,779,543	148.48
TOTAL ASSETS	415,976,153	211.68
CURR LIAB & DEFER CREDITS	74,015,178	37.66
LONG TERM LIABILITIES	173,848,783	88.47
TOTAL OWNERS EQUITY	165,091,061	84.01

FINANCIAL RATIOS

CURRENT RATIO.....	.9	DEBT RATIO.....	54.9%
PRE-TAX PROFIT MARGIN.....	13.3%	PRE-TAX RETURN ON ASSETS...	7.6%
% OF CATV SYSTEMS W/PAY TV.	61.7%	NO. CATV SYSTEMS W/ PAY TV	116
COMMUNITIES W/ PAY TV	327		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	3,289
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.99
AVERAGE PAY TV RATE.....	$ 8.71
AVERAGE INSTALLATION FEE.....	$18.83
AVERAGE PENETRATION RATE.....	47.1%

TOTAL FINANCIAL UNITS.....	35
TOTAL COMMUNITIES.....	80
TOTAL NUMBER OF SUBSCRIBERS.....	115,119
TOTAL NUMBER OF HOMES PASSED.....	244,450

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	8,716,805	75.72
PAY TV REVENUES	2,091,336	18.17
TOTAL OPERATING REVENUES	11,426,413	99.26
SERVICE EXPENSES	3,070,123	26.67
PAY TV EXPENSES	708,457	6.15
POLE RENTALS	198,882	1.73
MICROWAVE COSTS	567,339	4.93
ORIGINATION EXPENSE	66,000	.57
SELLING GEN & ADM EXPENSES	2,971,955	25.82
TOTAL SALARIES	2,190,279	19.03
TOTAL OPERATING EXPENSES	6,816,535	59.21
TOTAL OPERATING INCOME	4,609,878	40.04
DEPRECIATION & AMORTIZATION	2,165,844	18.81
INTEREST EXPENSES	1,809,628	15.72
NET INCOME BEFORE TAXES	126,403	1.10

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,408,695	12.24
ACCUMULATED DEPRECIATION	14,417,519	125.24
FIXED ASSETS	17,718,812	153.92
TOTAL ASSETS	25,684,847	223.12
CURR LIAB & DEFER CREDITS	4,404,683	38.26
LONG TERM LIABILITIES	9,226,758	80.15
TOTAL OWNERS EQUITY	8,808,117	76.51

FINANCIAL RATIOS

CURRENT RATIO.....	.6	DEBT RATIO.....	44.0%
PRE-TAX PROFIT MARGIN.....	1.1%	PRE-TAX RETURN ON ASSETS...	.5%
% OF CATV SYSTEMS W/PAY TV.	37.1%	NO. CATV SYSTEMS W/ PAY TV	13
COMMUNITIES W/ PAY TV	44		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	15,963
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 8.61
AVERAGE PAY TV RATE.....	$ 9.38
AVERAGE INSTALLATION FEE.....	$20.79
AVERAGE PENETRATION RATE.....	56.4%

TOTAL FINANCIAL UNITS.....	16
TOTAL COMMUNITIES.....	74
TOTAL NUMBER OF SUBSCRIBERS.....	255,402
TOTAL NUMBER OF HOMES PASSED.....	452,838

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	23,765,617	93.05
PAY TV REVENUES	5,100,853	19.97
TOTAL OPERATING REVENUES	30,321,290	118.72
SERVICE EXPENSES	5,487,946	21.49
PAY TV EXPENSES	1,588,873	6.22
POLE RENTALS	729,334	2.86
MICROWAVE COSTS	89,368	.35
ORIGINATION EXPENSE	217,913	.85
SELLING GEN & ADM EXPENSES	8,882,240	34.78
TOTAL SALARIES	4,578,907	17.93
TOTAL OPERATING EXPENSES	16,176,972	63.34
TOTAL OPERATING INCOME	14,144,318	55.38
DEPRECIATION & AMORTIZATION	6,116,240	23.95
INTEREST EXPENSES	3,413,288	13.36
NET INCOME BEFORE TAXES	4,254,724	16.66

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,542,793	17.79
ACCUMULATED DEPRECIATION	18,803,075	73.62
FIXED ASSETS	53,869,135	210.92
TOTAL ASSETS	67,923,986	265.95
CURR LIAB & DEFER CREDITS	13,622,707	53.34
LONG TERM LIABILITIES	28,214,491	110.47
TOTAL OWNERS EQUITY	26,086,788	102.14

FINANCIAL RATIOS

CURRENT RATIO.....	.3	DEBT RATIO.....	59.0%
PRE-TAX PROFIT MARGIN.....	14.0%	PRE-TAX RETURN ON ASSETS...	6.3%
% OF CATV SYSTEMS W/PAY TV.	62.5%	NO. CATV SYSTEMS W/ PAY TV	10
COMMUNITIES W/ PAY TV	47		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	13,931	TOTAL FINANCIAL UNITS	7
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.34	TOTAL COMMUNITIES	31
AVERAGE PAY TV RATE	$ 8.69	TOTAL NUMBER OF SUBSCRIBERS	97,516
AVERAGE INSTALLATION FEE	$26.67	TOTAL NUMBER OF HOMES PASSED	187,673
AVERAGE PENETRATION RATE	52.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	9,039,750	92.70
PAY TV REVENUES	1,795,041	18.41
TOTAL OPERATING REVENUES	11,783,090	120.83
SERVICE EXPENSES	2,653,036	27.21
PAY TV EXPENSES	744,718	7.64
POLE RENTALS	210,848	2.16
MICROWAVE COSTS	58,170	.60
ORIGINATION EXPENSE	160,491	1.65
SELLING GEN & ADM EXPENSES	2,752,930	28.23
TOTAL SALARIES	1,916,219	19.65
TOTAL OPERATING EXPENSES	6,311,175	64.72
TOTAL OPERATING INCOME	5,471,915	56.11
DEPRECIATION & AMORTIZATION	2,112,802	21.67
INTEREST EXPENSES	313,027	3.21
NET INCOME BEFORE TAXES	3,732,478	38.28

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,306,588	13.40
ACCUMULATED DEPRECIATION	13,924,967	142.80
FIXED ASSETS	10,930,822	112.09
TOTAL ASSETS	14,566,985	149.38
CURR LIAB & DEFER CREDITS	3,367,495	34.53
LONG TERM LIABILITIES	3,381,568	34.68
TOTAL OWNERS EQUITY	7,714,412	79.11

FINANCIAL RATIOS

CURRENT RATIO	.5	DEBT RATIO	40.2%
PRE-TAX PROFIT MARGIN	31.7%	PRE-TAX RETURN ON ASSETS	25.6%
% OF CATV SYSTEMS W/PAY TV.	71.4%	NO. CATV SYSTEMS W/ PAY TV	5
COMMUNITIES W/ PAY TV	24		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	7,925	TOTAL FINANCIAL UNITS.....	93
AVERAGE MONTHLY SUBSCRISER RATE.....	$ 7.39	TOTAL COMMUNITIES.....	335
AVERAGE PAY TV RATE.....	$ 8.22	TOTAL NUMBER OF SUBSCRIBERS.....	737,065
AVERAGE INSTALLATION FEE.....	$21.92	TOTAL NUMBER OF HOMES PASSED.....	1,566,874
AVERAGE PENETRATION RATE.....	47.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	59.676,032	80.96
PAY TV REVENUES	18,634,771	25.28
TOTAL OPERATING REVENUES	85.963,215	116.63
SERVICE EXPENSES	22.900,200	31.07
PAY TV EXPENSES	8.958,513	12.15
POLE RENTALS	2.669,951	3.62
MICROWAVE COSTS	984,482	1.34
ORIGINATION EXPENSE	1,463,407	1.99
SELLING GEN & ADM EXPENSES	24.620,474	33.40
TOTAL SALARIES	17.271,132	23.43
TOTAL OPERATING EXPENSES	57.942,594	78.61
TOTAL OPERATING INCOME	28.020,621	38.02
DEPRECIATION & AMORTIZATION	19.290,481	26.17
INTEREST EXPENSES	7.284,885	9.88
NET INCOME BEFORE TAXES	515,364	.70

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	11,646,049	15.80
ACCUMULATED DEPRECIATION	92,093,531	124.95
FIXED ASSETS	148,164,714	201.02
TOTAL ASSETS	194,804,299	264.30
CURR LIAB & DEFER CREDITS	45,415,561	61.62
LONG TERM LIABILITIES	65,772,986	89.24
TOTAL OWNERS EQUITY	78,806,880	106.92

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	47.3%
PRE-TAX PROFIT MARGIN.....	.6%	PRE-TAX RETURN ON ASSETS...	.3%
% OF CATV SYSTEMS W/PAY TV.	66.7%	NO. CATV SYSTEMS W/ PAY TV	62
COMMUNITIES W/ PAY TV	249		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,828	TOTAL FINANCIAL UNITS.....	73
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.70	TOTAL COMMUNITIES.....	163
AVERAGE PAY TV RATE.....	$ 8.56	TOTAL NUMBER OF SUBSCRIBERS.....	352,447
AVERAGE INSTALLATION FEE.....	$16.60	TOTAL NUMBER OF HOMES PASSED.....	645,072
AVERAGE PENETRATION RATE.....	54.6%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	27,858,761	79.04
PAY TV REVENUES	7,269,711	20.63
TOTAL OPERATING REVENUES	38,046,738	107.95
SERVICE EXPENSES	8,299,704	23.55
PAY TV EXPENSES	3,288,941	9.33
POLE RENTALS	838,128	2.38
MICROWAVE COSTS	127,334	.36
ORIGINATION EXPENSE	244,352	.69
SELLING GEN & ADM EXPENSES	11,490,399	32.60
TOTAL SALARIES	7,544,968	21.41
TOTAL OPERATING EXPENSES	23,323,396	66.18
TOTAL OPERATING INCOME	14,723,342	41.77
DEPRECIATION & AMORTIZATION	5,325,796	15.11
INTEREST EXPENSES	2,665,468	7.56
NET INCOME BEFORE TAXES	6,866,323	19.48

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	10,256,224	29.10
ACCUMULATED DEPRECIATION	29,772,065	84.47
FIXED ASSETS	38,602,389	109.53
TOTAL ASSETS	58,123,425	164.91
CURR LIAB & DEFER CREDITS	10,011,667	28.41
LONG TERM LIABILITIES	28,257,947	80.18
TOTAL OWNERS EQUITY	15,349,277	43.55

FINANCIAL RATIOS

CURRENT RATIO.....	1.1	DEBT RATIO.....	64.2%
PRE-TAX PROFIT MARGIN.....	18.0%	PRE-TAX RETURN ON ASSETS...	11.8%
% OF CATV SYSTEMS W/PAY TV.	41.1%	NO. CATV SYSTEMS W/ PAY TV	30
COMMUNITIES W/ PAY TV	90		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	11,716	TOTAL FINANCIAL UNITS.....	10
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 8.30	TOTAL COMMUNITIES.....	30
AVERAGE PAY TV RATE.....	$ 9.48	TOTAL NUMBER OF SUBSCRIBERS.....	117,158
AVERAGE INSTALLATION FEE.....	$34.06	TOTAL NUMBER OF HOMES PASSED.....	212,560
AVERAGE PENETRATION RATE.....	55.1%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	10,239,213	87.40
PAY TV REVENUES	760,475	6.49
TOTAL OPERATING REVENUES	12,430,453	106.10
SERVICE EXPENSES	2,435,413	20.79
PAY TV EXPENSES	150,219	1.28
POLE RENTALS	226,012	1.93
MICROWAVE COSTS	140,999	1.20
ORIGINATION EXPENSE	429,703	3.67
SELLING GEN & ADM EXPENSES	4,309,250	36.78
TOTAL SALARIES	2,455,703	20.96
TOTAL OPERATING EXPENSES	7,324,585	62.52
TOTAL OPERATING INCOME	5,105,868	43.58
DEPRECIATION & AMORTIZATION	2,992,565	25.54
INTEREST EXPENSES	1,799,836	15.33
NET INCOME BEFORE TAXES	393,892	3.41

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,770,776	15.11
ACCUMULATED DEPRECIATION	9,660,981	82.46
FIXED ASSETS	19,856,378	169.48
TOTAL ASSETS	25,463,577	217.34
CURR LIAB & DEFER CREDITS	5,411,256	46.19
LONG TERM LIABILITIES	18,205,759	155.39
TOTAL OWNERS EQUITY	1,846,562	15.76

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	86.5%
PRE-TAX PROFIT MARGIN.....	3.2%	PRE-TAX RETURN ON ASSETS...	1.6%
% OF CATV SYSTEMS W/PAY TV.	50.0%	NO. CATV SYSTEMS W/ PAY TV	5
COMMUNITIES W/ PAY TV	21		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	3,974	TOTAL FINANCIAL UNITS.....	46
AVERAGE MONTHLY SUBSCRISER RATE.....	$ 7.79	TOTAL COMMUNITIES.....	93
AVERAGE PAY TV RATE.....	$ 8.27	TOTAL NUMBER OF SUBSCRIBERS.....	182,792
AVERAGE INSTALLATION FEE.....	$16.78	TOTAL NUMBER OF HOMES PASSED.....	322,668
AVERAGE PENETRATION RATE.....	56.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	16,136,464	88.28
PAY TV REVENUES	5,187,533	28.38
TOTAL OPERATING REVENUES	22,478,399	122.97
SERVICE EXPENSES	5,165,610	28.26
PAY TV EXPENSES	2,064,092	11.29
POLE RENTALS	633,736	3.47
MICROWAVE COSTS	288,947	1.58
ORIGINATION EXPENSE	267,168	1.46
SELLING GEN & ADM EXPENSES	5,522,384	30.21
TOTAL SALARIES	4,310,652	23.58
TOTAL OPERATING EXPENSES	13,019,254	71.22
TOTAL OPERATING INCOME	9,459,145	51.75
DEPRECIATION & AMORTIZATION	3,611,997	19.76
INTEREST EXPENSES	1,688,179	9.24
NET INCOME BEFORE TAXES	4,550,011	24.89

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	6,048,721	33.09
ACCUMULATED DEPRECIATION	16,116,506	88.17
FIXED ASSETS	28,382,490	155.27
TOTAL ASSETS	42,657,410	233.37
CURR LIAB & DEFER CREDITS	17,764,679	97.19
LONG TERM LIABILITIES	10,948,521	59.90
TOTAL OWNERS EQUITY	11,534,632	63.10

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	61.2%
PRE-TAX PROFIT MARGIN.....	20.2%	PRE-TAX RETURN ON ASSETS...	10.7%
% OF CATV SYSTEMS W/PAY TV.	34.8%	NO. CATV SYSTEMS W/ PAY TV	16
COMMUNITIES W/ PAY TV	46		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	2,832
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.61
AVERAGE PAY TV RATE.....	$ 9.76
AVERAGE INSTALLATION FEE.....	$21.55
AVERAGE PENETRATION RATE.....	63.1%

TOTAL FINANCIAL UNITS.....	27
TOTAL COMMUNITIES.....	71
TOTAL NUMBER OF SUBSCRIBERS.....	76,475
TOTAL NUMBER OF HOMES PASSED.....	121,228

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	6,295,391	82.32
PAY TV REVENUES	1,254,651	16.41
TOTAL OPERATING REVENUES	8,218,075	107.46
SERVICE EXPENSES	2,036,648	26.63
PAY TV EXPENSES	551,505	7.21
POLE RENTALS	157,057	2.05
MICROWAVE COSTS	161,855	2.12
ORIGINATION EXPENSE	31,061	.41
SELLING GEN & ADM EXPENSES	1,983,393	25.94
TOTAL SALARIES	1,842,061	24.09
TOTAL OPERATING EXPENSES	4,602,605	60.18
TOTAL OPERATING INCOME	3,615,470	47.28
DEPRECIATION & AMORTIZATION	1,577,643	20.63
INTEREST EXPENSES	494,235	6.46
NET INCOME BEFORE TAXES	1,488,222	19.46

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,055,848	13.81
ACCUMULATED DEPRECIATION	5,467,100	71.49
FIXED ASSETS	8,930,765	116.78
TOTAL ASSETS	12,104,946	158.29
CURR LIAB & DEFER CREDITS	2,003,332	26.20
LONG TERM LIABILITIES	4,983,446	65.16
TOTAL OWNERS EQUITY	4,035,138	52.76

FINANCIAL RATIOS

CURRENT RATIO.....	.5	DEBT RATIO.....	56.3%
PRE-TAX PROFIT MARGIN.....	18.1%	PRE-TAX RETURN ON ASSETS...	12.3%
% OF CATV SYSTEMS W/PAY TV.	33.3%	NO. CATV SYSTEMS W/ PAY TV	9
COMMUNITIES W/ PAY TV	34		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	5,274	TOTAL FINANCIAL UNITS.....	72
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.26	TOTAL COMMUNITIES.....	197
AVERAGE PAY TV RATE.....	$ 8.70	TOTAL NUMBER OF SUBSCRIBERS.....	379,699
AVERAGE INSTALLATION FEE.....	$16.32	TOTAL NUMBER OF HOMES PASSED.....	659,095
AVERAGE PENETRATION RATE.....	57.6%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	31,145,934	82.03
PAY TV REVENUES	7,554,997	19.90
TOTAL OPERATING REVENUES	41,514,653	109.34
SERVICE EXPENSES	10,835,100	28.54
PAY TV EXPENSES	2,659,965	7.01
POLE RENTALS	938,077	2.47
MICROWAVE COSTS	590,741	1.56
ORIGINATION EXPENSE	772,218	2.03
SELLING GEN & ADM EXPENSES	10,961,230	28.87
TOTAL SALARIES	8,887,895	23.41
TOTAL OPERATING EXPENSES	25,228,513	66.44
TOTAL OPERATING INCOME	16,286,140	42.89
DEPRECIATION & AMORTIZATION	6,722,075	17.70
INTEREST EXPENSES	3,180,712	8.38
NET INCOME BEFORE TAXES	6,162,754	16.23

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	10,311,687	27.16
ACCUMULATED DEPRECIATION	35,693,077	94.00
FIXED ASSETS	45,158,905	118.93
TOTAL ASSETS	64,805,238	170.68
CURR LIAB & DEFER CREDITS	16,583,805	43.68
LONG TERM LIABILITIES	27,933,798	73.57
TOTAL OWNERS EQUITY	19,449,832	51.22

FINANCIAL RATIOS

CURRENT RATIO.....	.7	DEBT RATIO.....	63.5%
PRE-TAX PROFIT MARGIN.....	14.8%	PRE-TAX RETURN ON ASSETS...	9.5%
% OF CATV SYSTEMS W/PAY TV.	55.6%	NO. CATV SYSTEMS W/ PAY TV	40
COMMUNITIES W/ PAY TV	146		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,355
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.22
AVERAGE PAY TV RATE.....	$ 8.97
AVERAGE INSTALLATION FEE.....	$16.31
AVERAGE PENETRATION RATE.....	52.3%

TOTAL FINANCIAL UNITS.....	63
TOTAL COMMUNITIES.....	140
TOTAL NUMBER OF SUBSCRIBERS.....	274,342
TOTAL NUMBER OF HOMES PASSED.....	524,731

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	22,437,413	81.79
PAY TV REVENUES	6,120,469	22.31
TOTAL OPERATING REVENUES	30,033,160	109.47
SERVICE EXPENSES	7,841,316	28.58
PAY TV EXPENSES	2,835,134	10.33
POLE RENTALS	998,163	3.64
MICROWAVE COSTS	467,907	1.71
ORIGINATION EXPENSE	180,984	.66
SELLING GEN & ADM EXPENSES	7,677,187	27.98
TOTAL SALARIES	6,496,369	23.68
TOTAL OPERATING EXPENSES	18,534,621	67.56
TOTAL OPERATING INCOME	11,498,539	41.91
DEPRECIATION & AMORTIZATION	5,552,034	20.24
INTEREST EXPENSES	3,928,660	14.32
NET INCOME BEFORE TAXES	1,072,841	3.91

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	7,420,586	27.05
ACCUMULATED DEPRECIATION	23,488,948	85.62
FIXED ASSETS	36,362,729	132.55
TOTAL ASSETS	54,334,394	198.05
CURR LIAB & DEFER CREDITS	20,033,236	73.02
LONG TERM LIABILITIES	24,285,132	88.52
TOTAL OWNERS EQUITY	9,393,367	34.24

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	78.9%
PRE-TAX PROFIT MARGIN.....	3.6%	PRE-TAX RETURN ON ASSETS...	2.0%
% OF CATV SYSTEMS W/PAY TV.	60.3%	NO. CATV SYSTEMS W/ PAY TV	38
COMMUNITIES W/ PAY TV	83		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,853	TOTAL FINANCIAL UNITS	86
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.81	TOTAL COMMUNITIES	137
AVERAGE PAY TV RATE	$ 9.21	TOTAL NUMBER OF SUBSCRIBERS	245,320
AVERAGE INSTALLATION FEE	$12.71	TOTAL NUMBER OF HOMES PASSED	413,562
AVERAGE PENETRATION RATE	59.3%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	16,635,384	67.81
PAY TV REVENUES	3,841,049	15.66
TOTAL OPERATING REVENUES	21,718,783	88.53
SERVICE EXPENSES	6,028,560	24.57
PAY TV EXPENSES	1,663,776	6.78
POLE RENTALS	452,228	1.84
MICROWAVE COSTS	541,696	2.21
ORIGINATION EXPENSE	416,333	1.70
SELLING GEN & ADM EXPENSES	5,645,423	23.01
TOTAL SALARIES	4,076,154	16.62
TOTAL OPERATING EXPENSES	13,754,092	56.07
TOTAL OPERATING INCOME	7,964,691	32.47
DEPRECIATION & AMORTIZATION	3,299,099	13.45
INTEREST EXPENSES	2,807,984	11.45
NET INCOME BEFORE TAXES	500,158	2.04

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,934,214	16.04
ACCUMULATED DEPRECIATION	21,554,084	87.86
FIXED ASSETS	26,787,018	109.19
TOTAL ASSETS	50,306,859	205.07
CURR LIAB & DEFER CREDITS	12,022,821	49.01
LONG TERM LIABILITIES	30,114,651	122.76
TOTAL OWNERS EQUITY	4,240,285	17.28

FINANCIAL RATIOS

CURRENT RATIO	.4	DEBT RATIO	77.3%
PRE-TAX PROFIT MARGIN	2.3%	PRE-TAX RETURN ON ASSETS	1.0%
% OF CATV SYSTEMS W/PAY TV.	37.2%	NO. CATV SYSTEMS W/ PAY TV	32
COMMUNITIES W/ PAY TV	82		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	1,931	TOTAL FINANCIAL UNITS	118
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.26	TOTAL COMMUNITIES	251
AVERAGE PAY TV RATE	$ 8.76	TOTAL NUMBER OF SUBSCRIBERS	227,880
AVERAGE INSTALLATION FEE	$18.00	TOTAL NUMBER OF HOMES PASSED	332,764
AVERAGE PENETRATION RATE	68.5%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	22,050,301	96.76
PAY TV REVENUES	2,033,485	8.92
TOTAL OPERATING REVENUES	26,526,511	116.41
SERVICE EXPENSES	8,214,757	36.05
PAY TV EXPENSES	854,802	3.75
POLE RENTALS	569,522	2.50
MICROWAVE COSTS	125,775	.55
ORIGINATION EXPENSE	180,606	.79
SELLING GEN & ADM EXPENSES	5,893,195	25.86
TOTAL SALARIES	6,843,863	30.03
TOTAL OPERATING EXPENSES	15,143,360	66.45
TOTAL OPERATING INCOME	11,383,151	49.95
DEPRECIATION & AMORTIZATION	4,534,368	19.90
INTEREST EXPENSES	2,164,819	9.50
NET INCOME BEFORE TAXES	5,222,168	22.92

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,428,001	19.43
ACCUMULATED DEPRECIATION	13,669,439	59.99
FIXED ASSETS	30,649,736	134.50
TOTAL ASSETS	48,919,072	214.67
CURR LIAB & DEFER CREDITS	4,707,782	20.66
LONG TERM LIABILITIES	23,779,005	104.35
TOTAL OWNERS EQUITY	13,874,157	60.88

FINANCIAL RATIOS

CURRENT RATIO	1.0	DEBT RATIO	57.6%
PRE-TAX PROFIT MARGIN	19.7%	PRE-TAX RETURN ON ASSETS	10.7%
% OF CATV SYSTEMS W/PAY TV.	23.7%	NO. CATV SYSTEMS W/ PAY TV	28
COMMUNITIES W/ PAY TV	61		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	6,289	TOTAL FINANCIAL UNITS	38
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.30	TOTAL COMMUNITIES	94
AVERAGE PAY TV RATE	$ 8.90	TOTAL NUMBER OF SUBSCRIBERS	239,000
AVERAGE INSTALLATION FEE	$16.27	TOTAL NUMBER OF HOMES PASSED	433,477
AVERAGE PENETRATION RATE	55.1%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	15,752,240	65.91
PAY TV REVENUES	5,169,520	21.63
TOTAL OPERATING REVENUES	22,612,029	94.61
SERVICE EXPENSES	5,857,218	24.51
PAY TV EXPENSES	1,415,705	5.92
POLE RENTALS	456,639	1.91
MICROWAVE COSTS	238,690	1.00
ORIGINATION EXPENSE	173,450	.73
SELLING GEN & ADM EXPENSES	6,114,812	25.58
TOTAL SALARIES	4,999,762	20.92
TOTAL OPERATING EXPENSES	13,561,185	56.74
TOTAL OPERATING INCOME	9,050,844	37.87
DEPRECIATION & AMORTIZATION	3,833,280	16.04
INTEREST EXPENSES	2,727,172	11.41
NET INCOME BEFORE TAXES	2,341,980	9.80

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,876,848	20.41
ACCUMULATED DEPRECIATION	15,919,930	66.61
FIXED ASSETS	38,638,149	161.67
TOTAL ASSETS	53,356,195	223.25
CURR LIAB & DEFER CREDITS	4,951,304	20.72
LONG TERM LIABILITIES	22,612,904	94.61
TOTAL OWNERS EQUITY	25,238,927	105.60

FINANCIAL RATIOS

CURRENT RATIO	1.2	DEBT RATIO	49.9%
PRE-TAX PROFIT MARGIN	10.4%	PRE-TAX RETURN ON ASSETS	4.4%
% OF CATV SYSTEMS W/PAY TV	52.6%	NO. CATV SYSTEMS W/ PAY TV	20
COMMUNITIES W/ PAY TV	56		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	8,777	TOTAL FINANCIAL UNITS.....	36
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.56	TOTAL COMMUNITIES.....	102
AVERAGE PAY TV RATE.....	$ 8.71	TOTAL NUMBER OF SUBSCRIBERS.....	315,970
AVERAGE INSTALLATION FEE.....	$17.79	TOTAL NUMBER OF HOMES PASSED.....	632,495
AVERAGE PENETRATION RATE.....	50.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	25,047,557	79.27
PAY TV REVENUES	4,769,101	15.09
TOTAL OPERATING REVENUES	31,765,047	100.53
SERVICE EXPENSES	6,114,941	19.35
PAY TV EXPENSES	1,867,813	5.91
POLE RENTALS	1,227,725	3.89
MICROWAVE COSTS	167,137	.53
ORIGINATION EXPENSE	339,653	1.07
SELLING GEN & ADM EXPENSES	12,490,223	39.53
TOTAL SALARIES	5,649,038	17.88
TOTAL OPERATING EXPENSES	20,812,630	65.87
TOTAL OPERATING INCOME	10,952,417	34.66
DEPRECIATION & AMORTIZATION	5,369,898	16.99
INTEREST EXPENSES	2,589,864	8.20
NET INCOME BEFORE TAXES	2,831,769	8.96

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,200,461	13.29
ACCUMULATED DEPRECIATION	27,790,966	87.95
FIXED ASSETS	39,139,379	123.87
TOTAL ASSETS	49,569,601	156.88
CURR LIAB & DEFER CREDITS	11,446,590	36.23
LONG TERM LIABILITIES	21,848,761	69.15
TOTAL OWNERS EQUITY	15,566,307	49.27

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	64.9%
PRE-TAX PROFIT MARGIN.....	8.9%	PRE-TAX RETURN ON ASSETS...	5.7%
% OF CATV SYSTEMS W/PAY TV.	69.4%	NO. CATV SYSTEMS W/ PAY TV	25
COMMUNITIES W/ PAY TV	59		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,002	TOTAL FINANCIAL UNITS.....	26
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.68	TOTAL COMMUNITIES.....	117
AVERAGE PAY TV RATE.....	$ 8.40	TOTAL NUMBER OF SUBSCRIBERS.....	104,052
AVERAGE INSTALLATION FEE.....	$15.95	TOTAL NUMBER OF HOMES PASSED.....	195,521
AVERAGE PENETRATION RATE.....	53.2%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	9,043,622	86.91
PAY TV REVENUES	1,675,034	16.10
TOTAL OPERATING REVENUES	11,505,994	110.58
SERVICE EXPENSES	3,516,196	33.79
PAY TV EXPENSES	817,169	7.85
POLE RENTALS	322,206	3.10
MICROWAVE COSTS	133,481	1.28
ORIGINATION EXPENSE	293,620	2.82
SELLING GEN & ADM EXPENSES	4,081,231	39.22
TOTAL SALARIES	3,743,726	35.98
TOTAL OPERATING EXPENSES	8,709,216	83.69
TOTAL OPERATING INCOME	2,737,778	26.89
DEPRECIATION & AMORTIZATION	2,139,216	20.56
INTEREST EXPENSES	881,397	8.47
NET INCOME BEFORE TAXES	-75,590	-.73

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	2,115,560	20.33
ACCUMULATED DEPRECIATION	10,316,787	99.15
FIXED ASSETS	13,466,356	129.42
TOTAL ASSETS	19,166,013	184.20
CURR LIAB & DEFER CREDITS	6,183,925	59.43
LONG TERM LIABILITIES	9,250,627	88.90
TOTAL OWNERS EQUITY	3,279,784	31.52

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	74.2%
PRE-TAX PROFIT MARGIN.....	-.7%	PRE-TAX RETURN ON ASSETS...	-.4%
% OF CATV SYSTEMS W/PAY TV.	34.6%	NO. CATV SYSTEMS W/ PAY TV	9
COMMUNITIES W/ PAY TV	63		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,315
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.57
AVERAGE PAY TV RATE.....	$ 7.90
AVERAGE INSTALLATION FEE.....	$15.28
AVERAGE PENETRATION RATE.....	58.1%

TOTAL FINANCIAL UNITS.....	22
TOTAL COMMUNITIES.....	72
TOTAL NUMBER OF SUBSCRIBERS.....	94,921
TOTAL NUMBER OF HOMES PASSED.....	163,244

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	7,973,164	84.00
PAY TV REVENUES	1,555,578	16.39
TOTAL OPERATING REVENUES	9,908,921	104.39
SERVICE EXPENSES	2,430,748	25.61
PAY TV EXPENSES	704,720	7.42
POLE RENTALS	263,404	2.77
MICROWAVE COSTS	221,275	2.33
ORIGINATION EXPENSE	66,604	.70
SELLING GEN & ADM EXPENSES	3,043,156	32.06
TOTAL SALARIES	1,802,197	18.99
TOTAL OPERATING EXPENSES	6,245,228	65.79
TOTAL OPERATING INCOME	3,663,693	38.60
DEPRECIATION & AMORTIZATION	2,148,714	22.64
INTEREST EXPENSES	2,186,021	23.03
NET INCOME BEFORE TAXES	-784,630	-8.27

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,723,819	39.23
ACCUMULATED DEPRECIATION	5,930,864	62.48
FIXED ASSETS	15,262,861	160.80
TOTAL ASSETS	22,962,420	241.91
CURR LIAB & DEFER CREDITS	6,204,403	65.36
LONG TERM LIABILITIES	9,889,894	104.19
TOTAL OWNERS EQUITY	6,830,966	71.96

FINANCIAL RATIOS

CURRENT RATIO.....	.6	DEBT RATIO.....	69.8%
PRE-TAX PROFIT MARGIN.....	-7.9%	PRE-TAX RETURN ON ASSETS...	-3.4%
% OF CATV SYSTEMS W/PAY TV.	45.5%	NO. CATV SYSTEMS W/ PAY TV	10
COMMUNITIES W/ PAY TV	38		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	6,483	TOTAL FINANCIAL UNITS	62
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.14	TOTAL COMMUNITIES	242
AVERAGE PAY TV RATE	$ 8.17	TOTAL NUMBER OF SUBSCRIBERS	401,944
AVERAGE INSTALLATION FEE	$16.94	TOTAL NUMBER OF HOMES PASSED	755,513
AVERAGE PENETRATION RATE	53.2%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	32,517,231	80.90
PAY TV REVENUES	8,685,673	21.61
TOTAL OPERATING REVENUES	44,113,523	109.75
SERVICE EXPENSES	11,737,841	29.20
PAY TV EXPENSES	3,496,664	8.70
POLE RENTALS	1,345,409	3.35
MICROWAVE COSTS	722,378	1.80
ORIGINATION EXPENSE	465,705	1.16
SELLING GEN & ADM EXPENSES	10,643,248	26.48
TOTAL SALARIES	7,460,362	18.56
TOTAL OPERATING EXPENSES	26,343,458	65.54
TOTAL OPERATING INCOME	17,770,065	44.21
DEPRECIATION & AMORTIZATION	8,060,278	20.05
INTEREST EXPENSES	3,500,629	8.71
NET INCOME BEFORE TAXES	5,614,169	13.97

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	7,300,261	18.16
ACCUMULATED DEPRECIATION	33,389,131	83.07
FIXED ASSETS	49,522,942	123.21
TOTAL ASSETS	64,654,431	160.85
CURR LIAB & DEFER CREDITS	9,180,410	22.84
LONG TERM LIABILITIES	26,575,986	66.12
TOTAL OWNERS EQUITY	27,874,012	69.35

FINANCIAL RATIOS

CURRENT RATIO	1.0	DEBT RATIO	62.4%
PRE-TAX PROFIT MARGIN	12.7%	PRE-TAX RETURN ON ASSETS	8.7%
% OF CATV SYSTEMS W/PAY TV.	64.5%	NO. CATV SYSTEMS W/ PAY TV	40
COMMUNITIES W/ PAY TV	184		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,319
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.36
AVERAGE PAY TV RATE	$ 9.20
AVERAGE INSTALLATION FEE	$17.20
AVERAGE PENETRATION RATE	58.3%
TOTAL FINANCIAL UNITS	84
TOTAL COMMUNITIES	144
TOTAL NUMBER OF SUBSCRIBERS	194,789
TOTAL NUMBER OF HOMES PASSED	334,039

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	15.931,761	81.79
PAY TV REVENUES	3.282,972	16.85
TOTAL OPERATING REVENUES	20,531,488	105.40
SERVICE EXPENSES	4.940,261	25.36
PAY TV EXPENSES	1,354,442	6.95
POLE RENTALS	416,245	2.14
MICROWAVE COSTS	516,458	2.65
ORIGINATION EXPENSE	186,441	.96
SELLING GEN & ADM EXPENSES	5,424,980	27.85
TOTAL SALARIES	3.995.118	20.51
TOTAL OPERATING EXPENSES	11.905,124	61.12
TOTAL OPERATING INCOME	8.625,364	44.28
DEPRECIATION & AMORTIZATION	4.068,967	20.89
INTEREST EXPENSES	1,279,967	6.57
NET INCOME BEFORE TAXES	3,581,667	18.39

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	5,218,507	26.79
ACCUMULATED DEPRECIATION	17,377,650	89.21
FIXED ASSETS	25,504,805	130.94
TOTAL ASSETS	39,156,129	201.02
CURR LIAB & DEFER CREDITS	17,044,596	87.50
LONG TERM LIABILITIES	8,186,280	42.03
TOTAL OWNERS EQUITY	11,656,153	59.84

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	41.7%
PRE-TAX PROFIT MARGIN	17.4%	PRE-TAX RETURN ON ASSETS	9.1%
% OF CATV SYSTEMS W/PAY TV.	33.3%	NO. CATV SYSTEMS W/ PAY TV	28
COMMUNITIES W/ PAY TV	71		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,583	TOTAL FINANCIAL UNITS	73
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.11	TOTAL COMMUNITIES	126
AVERAGE PAY TV RATE	$ 8.73	TOTAL NUMBER OF SUBSCRIBERS	188,560
AVERAGE INSTALLATION FEE	$13.49	TOTAL NUMBER OF HOMES PASSED	309,569
AVERAGE PENETRATION RATE	60.9%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	17,229,202	91.37
PAY TV REVENUES	2,590,617	13.74
TOTAL OPERATING REVENUES	21,079,486	111.79
SERVICE EXPENSES	6,150,742	32.62
PAY TV EXPENSES	925,039	4.91
POLE RENTALS	449,739	2.39
MICROWAVE COSTS	292,830	1.55
ORIGINATION EXPENSE	193,448	1.08
SELLING GEN & ADM EXPENSES	5,923,932	31.42
TOTAL SALARIES	4,711,290	24.99
TOTAL OPERATING EXPENSES	13,199,161	70.00
TOTAL OPERATING INCOME	7,880,325	41.79
DEPRECIATION & AMORTIZATION	3,376,705	17.91
INTEREST EXPENSES	1,494,655	7.93
NET INCOME BEFORE TAXES	3,055,401	16.20

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,906,892	20.72
ACCUMULATED DEPRECIATION	15,230,250	80.77
FIXED ASSETS	19,645,157	104.19
TOTAL ASSETS	29,956,488	158.87
CURR LIAB & DEFER CREDITS	4,700,407	24.93
LONG TERM LIABILITIES	17,053,250	90.44
TOTAL OWNERS EQUITY	5,435,302	28.83

FINANCIAL RATIOS

CURRENT RATIO	.9	DEBT RATIO	71.2%
PRE-TAX PROFIT MARGIN	14.5%	PRE-TAX RETURN ON ASSETS	10.2%
% OF CATV SYSTEMS W/PAY TV	39.7%	NO. CATV SYSTEMS W/ PAY TV	29
COMMUNITIES W/ PAY TV	59		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	6,431	TOTAL FINANCIAL UNITS.....	54
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 4.68	TOTAL COMMUNITIES.....	99
AVERAGE PAY TV RATE.....	$ 4.89	TOTAL NUMBER OF SUBSCRIBERS.....	347,278
AVERAGE INSTALLATION FEE.....	$11.69	TOTAL NUMBER OF HOMES PASSED.....	311,968
AVERAGE PENETRATION RATE.....	11.3%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	17,463,085	50.29
PAY TV REVENUES	4,153,757	11.96
TOTAL OPERATING REVENUES	23,388,502	67.35
SERVICE EXPENSES	5,942,681	17.11
PAY TV EXPENSES	1,243,111	3.58
POLE RENTALS	380,273	1.10
MICROWAVE COSTS	152,578	.44
ORIGINATION EXPENSE	110,091	.32
SELLING GEN & ADM EXPENSES	5,963,429	17.17
TOTAL SALARIES	4,841,942	13.94
TOTAL OPERATING EXPENSES	13,259,312	38.18
TOTAL OPERATING INCOME	10,129,190	29.17
DEPRECIATION & AMORTIZATION	2,989,803	8.61
INTEREST EXPENSES	1,295,301	3.73
NET INCOME BEFORE TAXES	5,870,004	16.90

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	5,713,897	16.45
ACCUMULATED DEPRECIATION	15,990,564	46.05
FIXED ASSETS	24,837,274	71.52
TOTAL ASSETS	35,041,337	100.90
CURR LIAB & DEFER CREDITS	5,815,839	16.75
LONG TERM LIABILITIES	14,155,363	40.76
TOTAL OWNERS EQUITY	13,971,393	40.23

FINANCIAL RATIOS

CURRENT RATIO.....	1.1	DEBT RATIO.....	54.2%
PRE-TAX PROFIT MARGIN.....	25.1%	PRE-TAX RETURN ON ASSETS...	16.8%
% OF CATV SYSTEMS W/PAY TV.	51.9%	NO. CATV SYSTEMS W/ PAY TV	28
COMMUNITIES W/ PAY TV	63		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	3,658	TOTAL FINANCIAL UNITS.....	28
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 8.72	TOTAL COMMUNITIES.....	54
AVERAGE PAY TV RATE.....	$ 9.86	TOTAL NUMBER OF SUBSCRIBERS.....	102,414
AVERAGE INSTALLATION FEE.....	$21.88	TOTAL NUMBER OF HOMES PASSED.....	157,947
AVERAGE PENETRATION RATE.....	64.8%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	9,853,988	96.22
PAY TV REVENUES	2,179,160	21.28
TOTAL OPERATING REVENUES	12,822,315	125.20
SERVICE EXPENSES	3,259,702	31.83
PAY TV EXPENSES	1,024,672	10.01
POLE RENTALS	187,060	1.83
MICROWAVE COSTS	1,015,363	9.91
ORIGINATION EXPENSE	371,948	3.63
SELLING GEN & ADM EXPENSES	2,831,681	27.65
TOTAL SALARIES	1,908,186	18.63
TOTAL OPERATING EXPENSES	7,488,003	73.12
TOTAL OPERATING INCOME	5,334,312	52.09
DEPRECIATION & AMORTIZATION	1,399,862	13.67
INTEREST EXPENSES	82,703	.81
NET INCOME BEFORE TAXES	3,526,788	34.44

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,062,773	10.38
ACCUMULATED DEPRECIATION	9,246,799	90.29
FIXED ASSETS	9,829,145	95.97
TOTAL ASSETS	25,707,239	251.01
CURR LIAB & DEFER CREDITS	1,170,686	11.43
LONG TERM LIABILITIES	263,049	2.57
TOTAL OWNERS EQUITY	23,834,330	232.73

FINANCIAL RATIOS

CURRENT RATIO.....	1.1	DEBT RATIO.....	4.6%
PRE-TAX PROFIT MARGIN.....	27.5%	PRE-TAX RETURN ON ASSETS...	13.7%
% OF CATV SYSTEMS W/PAY TV.	67.9%	NO. CATV SYSTEMS W/ PAY TV	19
COMMUNITIES W/ PAY TV	43		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT.... 6,410
AVERAGE MONTHLY SUBSCRIBER RATE..... $ 7.39
AVERAGE PAY TV RATE..... $ 8.03
AVERAGE INSTALLATION FEE..... $14.01
AVERAGE PENETRATION RATE..... 55.8%

TOTAL FINANCIAL UNITS..... 54
TOTAL COMMUNITIES..... 130
TOTAL NUMBER OF SUBSCRIBERS..... 346,134
TOTAL NUMBER OF HOMES PASSED..... 620,647

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	24,086,548	69.59
PAY TV REVENUES	8,551,876	24.71
TOTAL OPERATING REVENUES	37,051,207	107.04
SERVICE EXPENSES	7,098,265	20.51
PAY TV EXPENSES	3,859,176	11.15
POLE RENTALS	999,757	2.89
MICROWAVE COSTS	392,628	1.13
ORIGINATION EXPENSE	163,616	.47
SELLING GEN & ADM EXPENSES	10,954,267	31.65
TOTAL SALARIES	6,726,805	19.43
TOTAL OPERATING EXPENSES	22,075,324	63.78
TOTAL OPERATING INCOME	14,975,883	43.27
DEPRECIATION & AMORTIZATION	6,484,085	18.73
INTEREST EXPENSES	4,752,355	13.73
NET INCOME BEFORE TAXES	3,072,574	8.88

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	6,186,572	17.87
ACCUMULATED DEPRECIATION	24,573,642	70.99
FIXED ASSETS	49,464,775	142.91
TOTAL ASSETS	68,346,681	197.46
CURR LIAB & DEFER CREDITS	13,169,127	38.05
LONG TERM LIABILITIES	32,050,599	92.60
TOTAL OWNERS EQUITY	21,854,585	63.14

FINANCIAL RATIOS

CURRENT RATIO..... .5
PRE-TAX PROFIT MARGIN..... 8.3%
% OF CATV SYSTEMS W/PAY TV. 64.8%
COMMUNITIES W/ PAY TV 92

DEBT RATIO..... 63.5%
PRE-TAX RETURN ON ASSETS... 4.5%
NO. CATV SYSTEMS W/ PAY TV 35

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	1,291	TOTAL FINANCIAL UNITS	38
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.96	TOTAL COMMUNITIES	46
AVERAGE PAY TV RATE	$ 9.37	TOTAL NUMBER OF SUBSCRIBERS	49,067
AVERAGE INSTALLATION FEE	$16.93	TOTAL NUMBER OF HOMES PASSED	72,755
AVERAGE PENETRATION RATE	67.4%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	3,451,241	70.34
PAY TV REVENUES	411,371	8.38
TOTAL OPERATING REVENUES	5,186,336	105.70
SERVICE EXPENSES	1,780,006	36.28
PAY TV EXPENSES	303,490	6.29
POLE RENTALS	65,675	1.34
MICROWAVE COSTS	309,324	6.28
ORIGINATION EXPENSE	46,101	.94
SELLING GEN & ADM EXPENSES	1,451,612	29.58
TOTAL SALARIES	959,231	19.55
TOTAL OPERATING EXPENSES	3,586,209	73.09
TOTAL OPERATING INCOME	1,600,127	32.61
DEPRECIATION & AMORTIZATION	772,879	15.75
INTEREST EXPENSES	481,988	9.82
NET INCOME BEFORE TAXES	305,002	6.22

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	877,108	17.88
ACCUMULATED DEPRECIATION	4,173,838	85.06
FIXED ASSETS	8,015,400	163.36
TOTAL ASSETS	9,777,993	199.28
CURR LIAB & DEFER CREDITS	1,735,946	35.38
LONG TERM LIABILITIES	7,763,150	158.22
TOTAL OWNERS EQUITY	-145,259	-2.96

FINANCIAL RATIOS

CURRENT RATIO	.5	DEBT RATIO	96.7%
PRE-TAX PROFIT MARGIN	5.9%	PRE-TAX RETURN ON ASSETS	3.1%
% OF CATV SYSTEMS W/PAY TV.	13.2%	NO. CATV SYSTEMS W/ PAY TV	6
COMMUNITIES W/ PAY TV	16		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	3,647	TOTAL FINANCIAL UNITS	27
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.72	TOTAL COMMUNITIES	53
AVERAGE PAY TV RATE	$ 7.60	TOTAL NUMBER OF SUBSCRIBERS	98,464
AVERAGE INSTALLATION FEE	$14.05	TOTAL NUMBER OF HOMES PASSED	174,303
AVERAGE PENETRATION RATE	56.5%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	4,371,383	44.40
PAY TV REVENUES	902,488	9.17
TOTAL OPERATING REVENUES	5,580,059	56.67
SERVICE EXPENSES	1,815,904	18.44
PAY TV EXPENSES	310,497	3.15
POLE RENTALS	89,402	.91
MICROWAVE COSTS	331,254	3.36
ORIGINATION EXPENSE	40,797	.41
SELLING GEN & ADM EXPENSES	1,076,897	10.94
TOTAL SALARIES	995,909	10.11
TOTAL OPERATING EXPENSES	3,244,095	32.95
TOTAL OPERATING INCOME	2,335,964	23.72
DEPRECIATION & AMORTIZATION	1,288,388	13.08
INTEREST EXPENSES	573,665	5.83
NET INCOME BEFORE TAXES	147,625	1.50

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	457,155	4.64
ACCUMULATED DEPRECIATION	5,871,673	59.63
FIXED ASSETS	4,074,206	41.38
TOTAL ASSETS	7,282,557	73.96
CURR LIAB & DEFER CREDITS	10,414,055	105.77
LONG TERM LIABILITIES	1,510,859	15.34
TOTAL OWNERS EQUITY	-5,381,345	-54.65

FINANCIAL RATIOS

CURRENT RATIO	.0	DEBT RATIO	63.2%
PRE-TAX PROFIT MARGIN	2.6%	PRE-TAX RETURN ON ASSETS	2.0%
% OF CATV SYSTEMS W/PAY TV.	44.4%	NO. CATV SYSTEMS W/ PAY TV	12
COMMUNITIES W/ PAY TV	15		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,529	TOTAL FINANCIAL UNITS.....	17
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.00	TOTAL COMMUNITIES.....	55
AVERAGE PAY TV RATE.....	$ 8.50	TOTAL NUMBER OF SUBSCRIBERS.....	76,988
AVERAGE INSTALLATION FEE.....	$19.88	TOTAL NUMBER OF HOMES PASSED.....	121,344
AVERAGE PENETRATION RATE.....	63.4%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	6,160,880	80.02
PAY TV REVENUES	453,222	5.89
TOTAL OPERATING REVENUES	6,953,825	89.02
SERVICE EXPENSES	1,644,325	21.36
PAY TV EXPENSES	203,201	2.64
POLE RENTALS	231,597	3.01
MICROWAVE COSTS	39,860	.52
ORIGINATION EXPENSE	30,884	.40
SELLING GEN & ADM EXPENSES	2,050,589	26.64
TOTAL SALARIES	1,370,042	17.80
TOTAL OPERATING EXPENSES	3,928,999	51.03
TOTAL OPERATING INCOME	2,924,826	37.99
DEPRECIATION & AMORTIZATION	1,027,526	13.35
INTEREST EXPENSES	235,227	3.06
NET INCOME BEFORE TAXES	1,603,162	20.89

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	-1,414,304	-18.37
ACCUMULATED DEPRECIATION	5,890,107	76.51
FIXED ASSETS	8,061,782	104.71
TOTAL ASSETS	9,179,171	119.23
CURR LIAB & DEFER CREDITS	1,490,772	19.36
LONG TERM LIABILITIES	1,270,446	16.50
TOTAL OWNERS EQUITY	6,052,783	78.62

FINANCIAL RATIOS

CURRENT RATIO.....	-1.0	DEBT RATIO.....	29.1%
PRE-TAX PROFIT MARGIN.....	23.5%	PRE-TAX RETURN ON ASSETS...	17.5%
% OF CATV SYSTEMS W/PAY TV.	35.3%	NO. CATV SYSTEMS W/ PAY TV	6
COMMUNITIES W/ PAY TV	16		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	12,692	TOTAL FINANCIAL UNITS	37
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.00	TOTAL COMMUNITIES	239
AVERAGE PAY TV RATE	$ 9.04	TOTAL NUMBER OF SUBSCRIBERS	469,612
AVERAGE INSTALLATION FEE	$20.21	TOTAL NUMBER OF HOMES PASSED	979,281
AVERAGE PENETRATION RATE	48.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	35,891,640	76.43
PAY TV REVENUES	20,584,595	43.83
TOTAL OPERATING REVENUES	60,309,165	128.42
SERVICE EXPENSES	12,314,562	26.22
PAY TV EXPENSES	9,556,033	20.35
POLE RENTALS	1,151,805	2.45
MICROWAVE COSTS	854,923	1.82
ORIGINATION EXPENSE	1,966,381	4.19
SELLING GEN & ADM EXPENSES	17,170,190	36.56
TOTAL SALARIES	11,535,642	24.56
TOTAL OPERATING EXPENSES	41,107,166	87.32
TOTAL OPERATING INCOME	19,301,999	41.10
DEPRECIATION & AMORTIZATION	10,844,650	23.09
INTEREST EXPENSES	6,730,460	14.33
NET INCOME BEFORE TAXES	4,154,425	8.85

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	15,411,902	32.82
ACCUMULATED DEPRECIATION	37,219,086	79.25
FIXED ASSETS	96,516,561	205.52
TOTAL ASSETS	131,049,628	279.06
CURR LIAB & DEFER CREDITS	51,575,510	109.83
LONG TERM LIABILITIES	64,527,639	137.41
TOTAL OWNERS EQUITY	13,494,782	28.74

FINANCIAL RATIOS

CURRENT RATIO	.9	DEBT RATIO	62.3%
PRE-TAX PROFIT MARGIN	6.9%	PRE-TAX RETURN ON ASSETS	3.2%
% OF CATV SYSTEMS W/PAY TV.	86.5%	NO. CATV SYSTEMS W/ PAY TV	32
COMMUNITIES W/ PAY TV	211		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	4,555	TOTAL FINANCIAL UNITS	29
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.93	TOTAL COMMUNITIES	67
AVERAGE PAY TV RATE	$ 9.00	TOTAL NUMBER OF SUBSCRIBERS	132,104
AVERAGE INSTALLATION FEE	$15.18	TOTAL NUMBER OF HOMES PASSED	215,372
AVERAGE PENETRATION RATE	61.3%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	12,260,816	92.81
PAY TV REVENUES	3,221,358	24.39
TOTAL OPERATING REVENUES	16,668,658	126.18
SERVICE EXPENSES	4,352,518	32.95
PAY TV EXPENSES	1,301,176	9.85
POLE RENTALS	312,389	2.36
MICROWAVE COSTS	720,543	5.45
ORIGINATION EXPENSE	134,528	1.02
SELLING GEN & ADM EXPENSES	4,372,051	33.10
TOTAL SALARIES	3,105,161	23.51
TOTAL OPERATING EXPENSES	10,160,273	76.91
TOTAL OPERATING INCOME	6,508,385	49.27
DEPRECIATION & AMORTIZATION	2,465,599	18.66
INTEREST EXPENSES	572,444	4.33
NET INCOME BEFORE TAXES	3,603,712	27.28

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	2,178,251	16.49
ACCUMULATED DEPRECIATION	11,839,700	89.62
FIXED ASSETS	17,565,525	132.97
TOTAL ASSETS	25,826,474	195.50
CURR LIAB & DEFER CREDITS	2,842,171	21.51
LONG TERM LIABILITIES	10,653,911	80.65
TOTAL OWNERS EQUITY	12,046,689	91.19

FINANCIAL RATIOS

CURRENT RATIO	1.2	DEBT RATIO	46.2%
PRE-TAX PROFIT MARGIN	21.6%	PRE-TAX RETURN ON ASSETS	14.0%
% OF CATV SYSTEMS W/PAY TV.	72.4%	NO. CATV SYSTEMS W/ PAY TV	21
COMMUNITIES W/ PAY TV	51		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	4,499	TOTAL FINANCIAL UNITS.....	9
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.16	TOTAL COMMUNITIES.....	14
AVERAGE PAY TV RATE.....	$10.32	TOTAL NUMBER OF SUBSCRIBERS.....	40,493
AVERAGE INSTALLATION FEE.....	$13.35	TOTAL NUMBER OF HOMES PASSED.....	79,730
AVERAGE PENETRATION RATE.....	50.8%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	3,411,214	84.24
PAY TV REVENUES	1,693,309	41.82
TOTAL OPERATING REVENUES	5,422,483	133.91
SERVICE EXPENSES	1,145,134	28.28
PAY TV EXPENSES	779,749	19.26
POLE RENTALS	58,279	1.44
MICROWAVE COSTS	202,274	5.00
ORIGINATION EXPENSE	2,893	.07
SELLING GEN & ADM EXPENSES	1,296,991	32.03
TOTAL SALARIES	914,851	22.59
TOTAL OPERATING EXPENSES	3,224,767	79.64
TOTAL OPERATING INCOME	2,197,716	54.27
DEPRECIATION & AMORTIZATION	676,851	16.71
INTEREST EXPENSES	41,567	1.03
NET INCOME BEFORE TAXES	1,430,831	35.34

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	211,109	5.21
ACCUMULATED DEPRECIATION	4,183,527	103.31
FIXED ASSETS	6,958,590	171.85
TOTAL ASSETS	7,840,484	193.63
CURR LIAB & DEFER CREDITS	756,575	18.68
LONG TERM LIABILITIES	333,324	8.23
TOTAL OWNERS EQUITY	6,514,350	160.88

FINANCIAL RATIOS

CURRENT RATIO.....	.2	DEBT RATIO.....	13.6%
PRE-TAX PROFIT MARGIN.....	26.4%	PRE-TAX RETURN ON ASSETS...	18.2%
% OF CATV SYSTEMS W/PAY TV.	44.4%	NO. CATV SYSTEMS W/ PAY TV	4
COMMUNITIES W/ PAY TV	6		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT.... 9,177
AVERAGE MONTHLY SUBSCRIBER RATE..... $ 7.66
AVERAGE PAY TV RATE..... $ 8.58
AVERAGE INSTALLATION FEE..... $16.64
AVERAGE PENETRATION RATE..... 50.2%

TOTAL FINANCIAL UNITS..... 121
TOTAL COMMUNITIES..... 598
TOTAL NUMBER OF SUBSCRIBERS..... 1,110,368
TOTAL NUMBER OF HOMES PASSED..... 2,211,643

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	99,591,967	89.69
PAY TV REVENUES	36,135,268	32.54
TOTAL OPERATING REVENUES	142,670,156	128.49
SERVICE EXPENSES	34,338,887	30.93
PAY TV EXPENSES	14,144,145	12.74
POLE RENTALS	3,543,653	3.19
MICROWAVE COSTS	1,859,099	1.67
ORIGINATION EXPENSE	4,793,554	4.32
SELLING GEN & ADM EXPENSES	40,526,154	36.50
TOTAL SALARIES	28,329,198	25.51
TOTAL OPERATING EXPENSES	93,802,740	84.48
TOTAL OPERATING INCOME	48,867,416	44.01
DEPRECIATION & AMORTIZATION	25,505,127	22.97
INTEREST EXPENSES	13,819,281	12.45
NET INCOME BEFORE TAXES	11,054,123	9.96

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	15,172,817	13.66
ACCUMULATED DEPRECIATION	126,040,465	113.51
FIXED ASSETS	173,272,543	156.05
TOTAL ASSETS	221,782,581	199.74
CURR LIAB & DEFER CREDITS	59,399,105	53.49
LONG TERM LIABILITIES	109,392,669	98.52
TOTAL OWNERS EQUITY	50,847,963	45.79

FINANCIAL RATIOS

CURRENT RATIO..... .3
PRE-TAX PROFIT MARGIN..... 7.7%
% OF CATV SYSTEMS W/PAY TV. 52.9%
COMMUNITIES W/ PAY TV 424

DEBT RATIO..... 69.6%
PRE-TAX RETURN ON ASSETS... 5.0%
NO. CATV SYSTEMS W/ PAY TV 64

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT.... 6,857
AVERAGE MONTHLY SUBSCRIBER RATE..... $ 7.16
AVERAGE PAY TV RATE..... $ 8.42
AVERAGE INSTALLATION FEE..... $14.69
AVERAGE PENETRATION RATE..... 52.2%

TOTAL FINANCIAL UNITS..... 108
TOTAL COMMUNITIES..... 448
TOTAL NUMBER OF SUBSCRIBERS..... 740,508
TOTAL NUMBER OF HOMES PASSED..... 1,417,524

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	62,096,169	83.86
PAY TV REVENUES	15,114,902	20.41
TOTAL OPERATING REVENUES	81,321,693	109.82
SERVICE EXPENSES	25,810,740	34.86
PAY TV EXPENSES	5,840,775	7.89
POLE RENTALS	2,206,119	2.98
MICROWAVE COSTS	490,346	.66
ORIGINATION EXPENSE	685,612	.93
SELLING GEN & ADM EXPENSES	25,779,807	34.81
TOTAL SALARIES	20,135,567	27.19
TOTAL OPERATING EXPENSES	58,116,934	78.48
TOTAL OPERATING INCOME	23,204,759	31.34
DEPRECIATION & AMORTIZATION	19,955,228	26.95
INTEREST EXPENSES	13,815,198	18.66
NET INCOME BEFORE TAXES	-11,400,320	-15.40

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	14,459,614	19.53
ACCUMULATED DEPRECIATION	84,801,125	114.52
FIXED ASSETS	130,433,440	176.14
TOTAL ASSETS	186,060,438	251.26
CURR LIAB & DEFER CREDITS	33,754,599	45.58
LONG TERM LIABILITIES	94,120,019	127.10
TOTAL OWNERS EQUITY	55,766,897	75.31

FINANCIAL RATIOS

CURRENT RATIO..... .6
PRE-TAX PROFIT MARGIN..... -14.0%
% OF CATV SYSTEMS W/PAY TV. 39.8%
COMMUNITIES W/ PAY TV 233

DEBT RATIO..... 62.3%
PRE-TAX RETURN ON ASSETS... -6.1%
NO. CATV SYSTEMS W/ PAY TV 43

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	3,645
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.42
AVERAGE PAY TV RATE.....	$ 8.70
AVERAGE INSTALLATION FEE.....	$12.53
AVERAGE PENETRATION RATE.....	60.0%

TOTAL FINANCIAL UNITS.....	76
TOTAL COMMUNITIES.....	101
TOTAL NUMBER OF SUBSCRIBERS.....	277,029
TOTAL NUMBER OF HOMES PASSED.....	461,427

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	19,071,659	68.84
PAY TV REVENUES	6,385,989	23.05
TOTAL OPERATING REVENUES	27,624,757	99.72
SERVICE EXPENSES	6,523,532	23.55
PAY TV EXPENSES	2,079,802	7.51
POLE RENTALS	398,867	1.44
MICROWAVE COSTS	600,497	2.17
ORIGINATION EXPENSE	342,730	1.24
SELLING GEN & ADM EXPENSES	6,469,571	23.35
TOTAL SALARIES	4,503,819	16.26
TOTAL OPERATING EXPENSES	15,415,635	55.65
TOTAL OPERATING INCOME	12,209,122	44.07
DEPRECIATION & AMORTIZATION	4,364,496	15.75
INTEREST EXPENSES	2,401,441	8.67
NET INCOME BEFORE TAXES	5,320,747	19.21

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	6,265,209	22.62
ACCUMULATED DEPRECIATION	19,791,704	71.44
FIXED ASSETS	36,829,961	132.95
TOTAL ASSETS	49,655,760	179.24
CURR LIAB & DEFER CREDITS	9,231,148	33.32
LONG TERM LIABILITIES	13,497,121	48.72
TOTAL OWNERS EQUITY	24,617,409	88.86

FINANCIAL RATIOS

CURRENT RATIO.....	.8	DEBT RATIO.....	42.4%
PRE-TAX PROFIT MARGIN.....	19.3%	PRE-TAX RETURN ON ASSETS...	10.7%
% OF CATV SYSTEMS W/PAY TV.	52.6%	NO. CATV SYSTEMS W/ PAY TV	40
COMMUNITIES W/ PAY TV	68		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	3,606	TOTAL FINANCIAL UNITS	62
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.44	TOTAL COMMUNITIES	141
AVERAGE PAY TV RATE	$ 9.30	TOTAL NUMBER OF SUBSCRIBERS	223,584
AVERAGE INSTALLATION FEE	$18.40	TOTAL NUMBER OF HOMES PASSED	392,328
AVERAGE PENETRATION RATE	57.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	19,495,818	87.20
PAY TV REVENUES	3,302,639	14.77
TOTAL OPERATING REVENUES	24,187,244	108.18
SERVICE EXPENSES	7,408,571	33.14
PAY TV EXPENSES	1,305,574	5.86
POLE RENTALS	321,704	1.44
MICROWAVE COSTS	434,328	1.94
ORIGINATION EXPENSE	171,802	.77
SELLING GEN & ADM EXPENSES	7,324,836	32.76
TOTAL SALARIES	5,851,760	26.17
TOTAL OPERATING EXPENSES	16,214,783	72.52
TOTAL OPERATING INCOME	7,972,461	35.66
DEPRECIATION & AMORTIZATION	2,917,883	13.05
INTEREST EXPENSES	358,476	1.60
NET INCOME BEFORE TAXES	4,630,973	20.71

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	1,323,962	5.92
ACCUMULATED DEPRECIATION	17,224,818	77.04
FIXED ASSETS	25,543,678	114.25
TOTAL ASSETS	33,674,132	150.61
CURR LIAB & DEFER CREDITS	14,025,220	62.73
LONG TERM LIABILITIES	2,082,856	9.32
TOTAL OWNERS EQUITY	16,315,842	72.97

FINANCIAL RATIOS

CURRENT RATIO	.1	DEBT RATIO	31.9%
PRE-TAX PROFIT MARGIN	19.1%	PRE-TAX RETURN ON ASSETS	13.8%
% OF CATV SYSTEMS W/PAY TV.	43.5%	NO. CATV SYSTEMS W/ PAY TV	27
COMMUNITIES W/ PAY TV	73		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	6,191	TOTAL FINANCIAL UNITS.....	188
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 6.47	TOTAL COMMUNITIES.....	1,194
AVERAGE PAY TV RATE.....	$ 8.33	TOTAL NUMBER OF SUBSCRIBERS.....	1,163,993
AVERAGE INSTALLATION FEE.....	$15.39	TOTAL NUMBER OF HOMES PASSED.....	1,940,389
AVERAGE PENETRATION RATE.....	60.0%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	86,613,280	74.41
PAY TV REVENUES	18,499,595	15.89
TOTAL OPERATING REVENUES	109,255,829	93.86
SERVICE EXPENSES	26,700,277	22.94
PAY TV EXPENSES	7,689,610	6.61
POLE RENTALS	3,110,011	2.67
MICROWAVE COSTS	1,081,594	.93
ORIGINATION EXPENSE	876,432	.75
SELLING GEN & ADM EXPENSES	28,622,515	24.59
TOTAL SALARIES	21,523,710	18.49
TOTAL OPERATING EXPENSES	63,988,834	54.89
TOTAL OPERATING INCOME	45,367,795	38.98
DEPRECIATION & AMORTIZATION	18,527,601	15.92
INTEREST EXPENSES	10,621,932	9.13
NET INCOME BEFORE TAXES	17,323,077	14.88

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	15,495,298	13.31
ACCUMULATED DEPRECIATION	94,945,366	81.57
FIXED ASSETS	112,303,636	96.48
TOTAL ASSETS	172,194,908	147.93
CURR LIAB & DEFER CREDITS	35,296,278	30.32
LONG TERM LIABILITIES	82,581,316	70.95
TOTAL OWNERS EQUITY	49,182,094	42.25

FINANCIAL RATIOS

CURRENT RATIO.....	.4	DEBT RATIO.....	67.4%
PRE-TAX PROFIT MARGIN.....	15.9%	PRE-TAX RETURN ON ASSETS...	10.1%
% OF CATV SYSTEMS W/PAY TV.	42.0%	NO. CATV SYSTEMS W/ PAY TV	79
COMMUNITIES W/ PAY TV	815		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT.... 5,656
AVERAGE MONTHLY SUBSCRIBER RATE..... $ 7.85
AVERAGE PAY TV RATE..... $ 8.59
AVERAGE INSTALLATION FEE..... $15.86
AVERAGE PENETRATION RATE..... 50.0%

TOTAL FINANCIAL UNITS..... 31
TOTAL COMMUNITIES..... 85
TOTAL NUMBER OF SUBSCRIBERS..... 175,351
TOTAL NUMBER OF HOMES PASSED..... 351,027

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	14,774,068	84.25
PAY TV REVENUES	5,479,324	31.25
TOTAL OPERATING REVENUES	21,286,303	121.45
SERVICE EXPENSES	5,053,065	28.82
PAY TV EXPENSES	2,529,140	14.42
POLE RENTALS	665,765	3.80
MICROWAVE COSTS	110,404	.63
ORIGINATION EXPENSE	191,879	1.09
SELLING GEN & ADM EXPENSES	6,551,309	37.36
TOTAL SALARIES	3,885,375	22.16
TOTAL OPERATING EXPENSES	14,325,393	81.70
TOTAL OPERATING INCOME	6,970,910	39.75
DEPRECIATION & AMORTIZATION	5,274,820	30.08
INTEREST EXPENSES	1,823,113	10.41
NET INCOME BEFORE TAXES	-243,111	-1.39

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,802,664	27.39
ACCUMULATED DEPRECIATION	15,320,855	87.37
FIXED ASSETS	34,393,099	196.14
TOTAL ASSETS	44,304,215	252.66
CURR LIAB & DEFER CREDITS	15,341,650	87.49
LONG TERM LIABILITIES	25,203,625	143.73
TOTAL OWNERS EQUITY	3,476,369	19.83

FINANCIAL RATIOS

CURRENT RATIO..... .9 DEBT RATIO..... 68.4%
PRE-TAX PROFIT MARGIN..... -1.1% PRE-TAX RETURN ON ASSETS... -.5%
% OF CATV SYSTEMS W/PAY TV. 71.0% NO. CATV SYSTEMS W/ PAY TV 22
COMMUNITIES W/ PAY TV 65

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,735	TOTAL FINANCIAL UNITS	17
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.70	TOTAL COMMUNITIES	19
AVERAGE PAY TV RATE	$ 8.78	TOTAL NUMBER OF SUBSCRIBERS	46,490
AVERAGE INSTALLATION FEE	$17.84	TOTAL NUMBER OF HOMES PASSED	76,641
AVERAGE PENETRATION RATE	60.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	3,928,883	84.51
PAY TV REVENUES	442,620	9.52
TOTAL OPERATING REVENUES	4,693,535	100.96
SERVICE EXPENSES	1,334,681	28.71
PAY TV EXPENSES	255,245	5.49
POLE RENTALS	98,774	2.12
MICROWAVE COSTS	396,411	8.53
ORIGINATION EXPENSE	45,764	.98
SELLING GEN & ADM EXPENSES	1,315,508	28.30
TOTAL SALARIES	800,737	17.22
TOTAL OPERATING EXPENSES	2,951,198	63.48
TOTAL OPERATING INCOME	1,742,337	37.48
DEPRECIATION & AMORTIZATION	1,083,725	23.31
INTEREST EXPENSES	408,882	8.80
NET INCOME BEFORE TAXES	93,958	2.02

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	427,397	9.19
ACCUMULATED DEPRECIATION	5,129,097	110.33
FIXED ASSETS	4,825,716	103.80
TOTAL ASSETS	6,273,294	134.94
CURR LIAB & DEFER CREDITS	1,716,902	36.93
LONG TERM LIABILITIES	4,234,246	91.08
TOTAL OWNERS EQUITY	-534,072	-11.49

FINANCIAL RATIOS

CURRENT RATIO	.2	DEBT RATIO	93.8%
PRE-TAX PROFIT MARGIN	2.0%	PRE-TAX RETURN ON ASSETS	1.5%
% OF CATV SYSTEMS W/PAY TV.	23.5%	NO. CATV SYSTEMS W/ PAY TV	4
COMMUNITIES W/ PAY TV	7		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT....	3,791	TOTAL FINANCIAL UNITS.....	55
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.52	TOTAL COMMUNITIES.....	114
AVERAGE PAY TV RATE.....	$ 8.55	TOTAL NUMBER OF SUBSCRIBERS.....	208,515
AVERAGE INSTALLATION FEE.....	$14.43	TOTAL NUMBER OF HOMES PASSED.....	409,710
AVERAGE PENETRATION RATE.....	50.9%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	25,253,565	121.11
PAY TV REVENUES	3,751,423	17.99
TOTAL OPERATING REVENUES	30,988,284	148.13
SERVICE EXPENSES	13,774,457	66.06
PAY TV EXPENSES	1,027,429	4.93
POLE RENTALS	1,111,439	5.33
MICROWAVE COSTS	64,718	.31
ORIGINATION EXPENSE	111,160	.53
SELLING GEN & ADM EXPENSES	7,479,771	35.87
TOTAL SALARIES	8,084,337	38.77
TOTAL OPERATING EXPENSES	22,392,817	107.39
TOTAL OPERATING INCOME	8,595,467	40.74
DEPRECIATION & AMORTIZATION	5,957,456	28.57
INTEREST EXPENSES	3,791,920	18.19
NET INCOME BEFORE TAXES	-1,122,297	-6.82

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	8,106,350	38.88
ACCUMULATED DEPRECIATION	17,159,593	82.29
FIXED ASSETS	36,266,038	173.93
TOTAL ASSETS	57,003,423	273.38
CURR LIAB & DEFER CREDITS	12,313,846	59.05
LONG TERM LIABILITIES	35,685,451	171.14
TOTAL OWNERS EQUITY	7,318,589	35.10

FINANCIAL RATIOS

CURRENT RATIO.....	.6	DEBT RATIO.....	84.1%
PRE-TAX PROFIT MARGIN.....	-4.6%	PRE-TAX RETURN ON ASSETS...	-2.5%
% OF CATV SYSTEMS W/PAY TV.	61.8%	NO. CATV SYSTEMS W/ PAY TV	34
COMMUNITIES W/ PAY TV	81		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	4,158	TOTAL FINANCIAL UNITS	200
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.25	TOTAL COMMUNITIES	331
AVERAGE PAY TV RATE	$ 9.13	TOTAL NUMBER OF SUBSCRIBERS	831,517
AVERAGE INSTALLATION FEE	$15.60	TOTAL NUMBER OF HOMES PASSED	1,532,093
AVERAGE PENETRATION RATE	54.3%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	74,716,929	89.86
PAY TV REVENUES	17,393,223	20.92
TOTAL OPERATING REVENUES	98,050,950	117.92
SERVICE EXPENSES	29,025,329	34.91
PAY TV EXPENSES	5,960,715	7.17
POLE RENTALS	1,985,699	2.39
MICROWAVE COSTS	2,154,059	2.59
ORIGINATION EXPENSE	680,804	.82
SELLING GEN & ADM EXPENSES	24,686,189	29.69
TOTAL SALARIES	19,909,422	23.82
TOTAL OPERATING EXPENSES	60,353,037	72.58
TOTAL OPERATING INCOME	37,697,913	45.34
DEPRECIATION & AMORTIZATION	15,893,344	19.11
INTEREST EXPENSES	8,100,008	9.74
NET INCOME BEFORE TAXES	13,287,914	15.98

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	24,313,177	29.24
ACCUMULATED DEPRECIATION	70,352,181	84.61
FIXED ASSETS	105,101,469	126.40
TOTAL ASSETS	170,337,483	204.85
CURR LIAB & DEFER CREDITS	37,587,886	45.20
LONG TERM LIABILITIES	65,651,852	78.95
TOTAL OWNERS EQUITY	56,561,554	68.02

FINANCIAL RATIOS

CURRENT RATIO	.9	DEBT RATIO	54.1%
PRE-TAX PROFIT MARGIN	13.6%	PRE-TAX RETURN ON ASSETS	7.8%
% OF CATV SYSTEMS W/PAY TV.	51.0%	NO. CATV SYSTEMS W/ PAY TV	102
COMMUNITIES W/ PAY TV	209		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,876	TOTAL FINANCIAL UNITS	7
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.88	TOTAL COMMUNITIES	19
AVERAGE PAY TV RATE	$ 9.23	TOTAL NUMBER OF SUBSCRIBERS	20,130
AVERAGE INSTALLATION FEE	$18.94	TOTAL NUMBER OF HOMES PASSED	51,889
AVERAGE PENETRATION RATE	38.8%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	1,307,400	64.95
PAY TV REVENUES	378,377	18.80
TOTAL OPERATING REVENUES	1,860,292	92.41
SERVICE EXPENSES	1,026,964	51.02
PAY TV EXPENSES	149,432	7.42
POLE RENTALS	72,037	3.58
MICROWAVE COSTS	378,208	18.79
ORIGINATION EXPENSE	34,583	1.72
SELLING GEN & ADM EXPENSES	772,469	38.37
TOTAL SALARIES	541,472	26.90
TOTAL OPERATING EXPENSES	1,983,448	98.53
TOTAL OPERATING INCOME	-123,156	-6.12
DEPRECIATION & AMORTIZATION	986,796	49.02
INTEREST EXPENSES	1,205,722	59.90
NET INCOME BEFORE TAXES	-2,373,152	-117.89

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	201,908	10.03
ACCUMULATED DEPRECIATION	2,540,275	126.19
FIXED ASSETS	8,342,078	414.41
TOTAL ASSETS	10,886,876	540.83
CURR LIAB & DEFER CREDITS	454,259	22.57
LONG TERM LIABILITIES	8,386,261	416.61
TOTAL OWNERS EQUITY	1,758,107	87.34

FINANCIAL RATIOS

CURRENT RATIO	.4	DEBT RATIO	80.6%
PRE-TAX PROFIT MARGIN	-27.6%	PRE-TAX RETURN ON ASSETS	-21.8%
% OF CATV SYSTEMS W/PAY TV.	42.9%	NO. CATV SYSTEMS W/ PAY TV	3
COMMUNITIES W/ PAY TV	8		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	5,077	TOTAL FINANCIAL UNITS	52
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.29	TOTAL COMMUNITIES	138
AVERAGE PAY TV RATE	$ 8.06	TOTAL NUMBER OF SUBSCRIBERS	264,007
AVERAGE INSTALLATION FEE	$16.09	TOTAL NUMBER OF HOMES PASSED	706,859
AVERAGE PENETRATION RATE	37.3%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	20,774,515	78.69
PAY TV REVENUES	6,613,007	25.05
TOTAL OPERATING REVENUES	29,173,284	110.50
SERVICE EXPENSES	6,945,035	26.31
PAY TV EXPENSES	3,150,800	11.93
POLE RENTALS	802,819	3.04
MICROWAVE COSTS	362,065	1.37
ORIGINATION EXPENSE	88,064	.33
SELLING GEN & ADM EXPENSES	8,508,903	32.23
TOTAL SALARIES	7,094,081	26.87
TOTAL OPERATING EXPENSES	18,692,802	70.80
TOTAL OPERATING INCOME	10,480,482	39.70
DEPRECIATION & AMORTIZATION	7,094,853	26.87
INTEREST EXPENSES	2,530,530	9.59
NET INCOME BEFORE TAXES	-130,303	-.49

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	5,830,720	22.09
ACCUMULATED DEPRECIATION	24,119,433	91.36
FIXED ASSETS	53,116,182	201.19
TOTAL ASSETS	67,290,387	254.88
CURR LIAB & DEFER CREDITS	10,370,767	39.28
LONG TERM LIABILITIES	35,446,344	134.26
TOTAL OWNERS EQUITY	19,969,273	75.64

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	65.9%
PRE-TAX PROFIT MARGIN	-.4%	PRE-TAX RETURN ON ASSETS	-.2%
% OF CATV SYSTEMS W/PAY TV.	40.4%	NO. CATV SYSTEMS W/ PAY TV	21
COMMUNITIES W/ PAY TV	60		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	3,332	TOTAL FINANCIAL UNITS	17
AVERAGE MONTHLY SUBSCRISER RATE	$ 6.25	TOTAL COMMUNITIES	73
AVERAGE PAY TV RATE	$ 8.47	TOTAL NUMBER OF SUBSCRIBERS	56,636
AVERAGE INSTALLATION FEE	$18.60	TOTAL NUMBER OF HOMES PASSED	71,593
AVERAGE PENETRATION RATE	79.1%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	4,514,458	79.71
PAY TV REVENUES	603,332	10.65
TOTAL OPERATING REVENUES	5,377,751	94.95
SERVICE EXPENSES	1,208,698	21.34
PAY TV EXPENSES	292,223	5.16
POLE RENTALS	100,139	1.77
MICROWAVE COSTS	44,200	.78
ORIGINATION EXPENSE	1,656	.03
SELLING GEN & ADM EXPENSES	1,589,750	28.07
TOTAL SALARIES	1,270,299	22.43
TOTAL OPERATING EXPENSES	3,092,327	54.60
TOTAL OPERATING INCOME	2,285,424	40.35
DEPRECIATION & AMORTIZATION	612,835	10.82
INTEREST EXPENSES	97,155	1.72
NET INCOME BEFORE TAXES	1,412,058	24.93

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	546,871	9.66
ACCUMULATED DEPRECIATION	4,527,678	79.94
FIXED ASSETS	3,193,523	56.39
TOTAL ASSETS	4,729,737	83.51
CURR LIAB & DEFER CREDITS	941,119	16.62
LONG TERM LIABILITIES	569,438	10.05
TOTAL OWNERS EQUITY	3,044,516	53.76

FINANCIAL RATIOS

CURRENT RATIO	.7	DEBT RATIO	28.2%
PRE-TAX PROFIT MARGIN	26.3%	PRE-TAX RETURN ON ASSETS	29.9%
% OF CATV SYSTEMS W/PAY TV.	29.4%	NO. CATV SYSTEMS W/ PAY TV	5
COMMUNITIES W/ PAY TV	16		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	4,954	TOTAL FINANCIAL UNITS	69
AVERAGE MONTHLY SUBSCRIBER RATE	$ 8.01	TOTAL COMMUNITIES	190
AVERAGE PAY TV RATE	$ 9.47	TOTAL NUMBER OF SUBSCRIBERS	341,792
AVERAGE INSTALLATION FEE	$20.13	TOTAL NUMBER OF HOMES PASSED	749,832
AVERAGE PENETRATION RATE	45.6%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	31,067,352	90.90
PAY TV REVENUES	12,474,232	36.50
TOTAL OPERATING REVENUES	46,023,820	134.65
SERVICE EXPENSES	8,955,281	26.20
PAY TV EXPENSES	5,271,599	15.42
POLE RENTALS	667,593	2.01
MICROWAVE COSTS	294,733	.86
ORIGINATION EXPENSE	196,763	.58
SELLING GEN & ADM EXPENSES	12,979,249	37.97
TOTAL SALARIES	8,773,527	25.67
TOTAL OPERATING EXPENSES	27,402,892	80.17
TOTAL OPERATING INCOME	18,620,928	54.48
DEPRECIATION & AMORTIZATION	7,344,223	21.49
INTEREST EXPENSES	2,566,283	7.51
NET INCOME BEFORE TAXES	7,666,023	22.43

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	4,375,894	12.80
ACCUMULATED DEPRECIATION	35,135,055	102.80
FIXED ASSETS	51,597,836	150.96
TOTAL ASSETS	71,429,675	208.99
CURR LIAB & DEFER CREDITS	5,799,323	16.97
LONG TERM LIABILITIES	14,798,661	43.30
TOTAL OWNERS EQUITY	48,979,613	143.30

FINANCIAL RATIOS

CURRENT RATIO	.7	DEBT RATIO	29.5%
PRE-TAX PROFIT MARGIN	16.7%	PRE-TAX RETURN ON ASSETS	10.7%
% OF CATV SYSTEMS W/PAY TV.	43.5%	NO. CATV SYSTEMS W/ PAY TV	30
COMMUNITIES W/ PAY TV	122		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	3,608	TOTAL FINANCIAL UNITS	45
AVERAGE MONTHLY SUBSCRIBER RATE	$ 7.55	TOTAL COMMUNITIES	109
AVERAGE PAY TV RATE	$ 8.36	TOTAL NUMBER OF SUBSCRIBERS	162,370
AVERAGE INSTALLATION FEE	$15.01	TOTAL NUMBER OF HOMES PASSED	302,585
AVERAGE PENETRATION RATE	53.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	23,196,368	142.86
PAY TV REVENUES	2,887,229	17.78
TOTAL OPERATING REVENUES	32,576,591	200.63
SERVICE EXPENSES	14,965,044	92.17
PAY TV EXPENSES	1,155,694	7.12
POLE RENTALS	714,135	4.40
MICROWAVE COSTS	195,542	1.20
ORIGINATION EXPENSE	419,027	2.58
SELLING GEN & ADM EXPENSES	4,678,437	28.81
TOTAL SALARIES	9,282,270	57.17
TOTAL OPERATING EXPENSES	21,218,202	130.68
TOTAL OPERATING INCOME	11,358,389	69.95
DEPRECIATION & AMORTIZATION	4,560,807	28.09
INTEREST EXPENSES	2,057,286	12.67
NET INCOME BEFORE TAXES	4,850,198	29.87

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,595,596	22.14
ACCUMULATED DEPRECIATION	16,287,219	100.31
FIXED ASSETS	20,210,775	124.47
TOTAL ASSETS	41,729,467	257.00
CURR LIAB & DEFER CREDITS	4,394,461	27.06
LONG TERM LIABILITIES	16,379,646	100.88
TOTAL OWNERS EQUITY	7,686,844	47.34

FINANCIAL RATIOS

CURRENT RATIO	.9	DEBT RATIO	48.7%
PRE-TAX PROFIT MARGIN	14.9%	PRE-TAX RETURN ON ASSETS	11.6%
% OF CATV SYSTEMS W/PAY TV.	51.1%	NO. CATV SYSTEMS W/ PAY TV	23
COMMUNITIES W/ PAY TV	68		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT	2,624	TOTAL FINANCIAL UNITS	82
AVERAGE MONTHLY SUBSCRIBER RATE	$ 6.94	TOTAL COMMUNITIES	280
AVERAGE PAY TV RATE	$ 9.09	TOTAL NUMBER OF SUBSCRIBERS	215,197
AVERAGE INSTALLATION FEE	$16.24	TOTAL NUMBER OF HOMES PASSED	257,490
AVERAGE PENETRATION RATE	83.6%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	35,679,557	165.80
PAY TV REVENUES	3,362,827	15.63
TOTAL OPERATING REVENUES	40,451,278	187.97
SERVICE EXPENSES	14,373,997	66.79
PAY TV EXPENSES	1,487,486	6.91
POLE RENTALS	1,126,885	5.24
MICROWAVE COSTS	52,723.	.24
ORIGINATION EXPENSE	108,527	.50
SELLING GEN & ADM EXPENSES	5,474,990	25.44
TOTAL SALARIES	8,929,971	41.50
TOTAL OPERATING EXPENSES	21,445,008	99.65
TOTAL OPERATING INCOME	19,006,270	88.32
DEPRECIATION & AMORTIZATION	3,897,817	18.11
INTEREST EXPENSES	917,050	4.26
NET INCOME BEFORE TAXES	14,698,540	68.30

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	2,637,640	12.26
ACCUMULATED DEPRECIATION	16,258,924	75.55
FIXED ASSETS	11,887,544	55.24
TOTAL ASSETS	34,098,390	158.45
CURR LIAB & DEFER CREDITS	4,148,620	19.28
LONG TERM LIABILITIES	6,687,096	31.07
TOTAL OWNERS EQUITY	7,545,400	35.06

FINANCIAL RATIOS

CURRENT RATIO	.6	DEBT RATIO	31.3%
PRE-TAX PROFIT MARGIN	36.3%	PRE-TAX RETURN ON ASSETS	43.1%
% OF CATV SYSTEMS W/PAY TV	39.0%	NO. CATV SYSTEMS W/ PAY TV	32
COMMUNITIES W/ PAY TV	118		

AVERAGE NUMBER OF SUBSCRIBERS PER FINANCIAL REPORTING UNIT...	3,793	TOTAL FINANCIAL UNITS.....	21
AVERAGE MONTHLY SUBSCRIBER RATE.....	$ 7.97	TOTAL COMMUNITIES.....	52
AVERAGE PAY TV RATE.....	$ 9.72	TOTAL NUMBER OF SUBSCRIBERS.....	79,658
AVERAGE INSTALLATION FEE.....	$21.19	TOTAL NUMBER OF HOMES PASSED.....	135,811
AVERAGE PENETRATION RATE.....	58.7%		

SELECTED CONSOLIDATED INCOME STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
SUBSCRIBER REVENUES	7,847,943	98.52
PAY TV REVENUES	2,587,273	32.48
TOTAL OPERATING REVENUES	11,412,498	143.27
SERVICE EXPENSES	2,891,390	36.30
PAY TV EXPENSES	742,361	9.32
POLE RENTALS	105,874	1.33
MICROWAVE COSTS	447,958	5.62
ORIGINATION EXPENSE	147,454	1.85
SELLING GEN & ADM EXPENSES	2,849,907	35.78
TOTAL SALARIES	2,215,900	27.82
TOTAL OPERATING EXPENSES	6,631,112	83.24
TOTAL OPERATING INCOME	4,781,386	60.02
DEPRECIATION & AMORTIZATION	1,230,441	16.20
INTEREST EXPENSES	357,929	4.49
NET INCOME BEFORE TAXES	4,800,678	60.27

SELECTED BALANCE SHEET STATEMENT ACCOUNTS

ACCOUNTS	TOTAL	PER SUBSCRIBER
CURRENT ASSETS	3,918,259	49.19
ACCUMULATED DEPRECIATION	7,833,226	98.34
FIXED ASSETS	9,064,752	113.80
TOTAL ASSETS	16,364,341	205.43
CURR LIAB & DEFER CREDITS	1,526,736	19.17
LONG TERM LIABILITIES	4,138,876	51.96
TOTAL OWNERS EQUITY	10,435,429	131.00

FINANCIAL RATIOS

CURRENT RATIO.....	3.4	DEBT RATIO.....	32.2%
PRE-TAX PROFIT MARGIN.....	42.1%	PRE-TAX RETURN ON ASSETS...	29.3%
% OF CATV SYSTEMS W/PAY TV.	81.0%	NO. CATV SYSTEMS W/ PAY TV	17
COMMUNITIES W/ PAY TV	38		

NATIONWIDE

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNTIES	549	627	1,990	834	1,508	1,182	1,328	8,018
NUMBER FINANCIAL ENTITIES	476	413	892	266	368	235	159	2,809
NUMBER OF SUBSCRIBERS	120,764	304,189	1,815,094	1,114,323	2,659,121	3,288,810	5,495,870	14,798,171
AVERAGE SUBSCRIBER RATE	7.57	7.78	7.45	7.46	7.48	7.30	7.46	.65
SUBSCRIBERS INCLUDED								94%
SUBSCRIBER REVENUES	18,820,024	29,614,904	192,954,352	89,686,352	214,498,374	270,503,678	445,403,017	1,261,480,701
PAY TV REVENUES	604,055	1,543,963	19,880,840	17,945,231	51,166,486	77,473,581	165,079,810	333,693,966
TOTAL OPERATING REVENUES	22,117,555	34,468,582	235,101,908	116,801,162	280,320,589	368,628,066	648,881,255	1,706,299,117
SERVICE EXPENSES	8,398,565	11,988,132	91,743,337	31,325,677	66,743,158	78,188,659	148,835,957	437,223,483
PAY TV EXPENSES	138,195	599,814	8,532,113	7,909,779	20,248,131	31,846,657	63,913,721	133,248,410
POLE RENTALS	374,070	828,623	5,947,437	2,713,799	6,507,426	8,424,374	13,497,983	38,293,712
MICROWAVE COSTS	249,975	996,588	5,273,086	2,231,337	4,914,268	3,937,290	3,817,209	21,419,753
ORIGINATION EXPENSES	252,172	259,390	1,394,181	1,254,474	3,091,072	3,680,407	12,052,646	21,984,342
SELLING GEN & ADMIN EXPENSES	4,202,087	10,871,693	56,098,077	36,444,352	82,045,061	101,098,507	174,656,995	465,416,772
TOTAL SALARIES	5,301,328	9,213,339	60,156,971	26,348,818	54,888,593	65,460,297	132,758,277	354,127,623
TOTAL OPERATING EXPENSE	13,051,019	23,719,029	157,767,708	76,934,282	172,127,420	214,814,230	399,459,319	1,057,873,007
TOTAL OPERATING INCOME	9,066,536	10,749,553	77,334,200	39,866,880	108,193,169	153,813,836	249,401,936	648,426,110
DEPRECIATION & AMORTIZATION	4,327,408	8,047,512	41,386,466	22,538,305	49,320,897	58,486,268	120,895,749	305,000,605
INTEREST EXPENSE	1,503,119	4,206,890	17,650,573	11,817,354	24,475,117	30,789,728	60,288,687	150,731,468
NET INCOME BEFORE TAXES	3,051,921	-1,332,388	17,726,035	7,412,790	33,625,531	63,268,184	63,417,303	187,169,376
CURRENT ASSETS	1,218,586	3,628,334	52,021,474	23,737,343	64,806,475	47,912,500	108,611,504	301,936,216
ACCUMULATED DEPRECIATION	4,519,494	13,295,797	171,112,629	99,546,690	239,991,714	288,878,734	572,276,516	1,389,621,574
FIXED ASSETS	10,928,898	18,770,676	252,372,410	179,934,711	368,984,118	430,205,470	834,542,307	2,095,738,590
TOTAL ASSETS	40,664,091	83,019,377	418,061,239	253,830,782	541,954,011	585,091,428	93,047,421	3,015,668,349
CURR LIAB & DEFERRED CREDITS	6,881,275	6,691,588	105,903,419	54,419,609	127,537,688	110,536,874	245,609,130	657,579,583
LONG TERM LIABILITIES	5,187,718	15,520,030	187,598,617	142,375,390	205,412,603	257,658,795	452,644,273	1,266,397,426
TOTAL OWNERS EQUITY	1,426,734	3,182,334	77,757,047	57,035,783	208,893,642	216,895,759	394,794,018	959,985,317

TABLE VII

REGIONAL CATV INDUSTRY FINANCIAL DATA: FISCAL YEAR ENDING BETWEEN JAN — DEC 1979
BY SIZE OF SYSTEM (SUBSCRIBER COUNT)

REGION: NEW ENGLAND STATES.
MAINE, VT, N.H, MASS., CONN, RI

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	15	12	51	67	92	83	58	378
NUMBER FINANCIAL ENTITIES	11	8	23	18	23	20	7	110
NUMBER OF SUBSCRIBERS	2,577	5,424	53,499	75,671	160,295	293,610	212,455	803,531
AVERAGE SUBSCRIBER RATE	7.18	7.12	7.47	7.05	7.54	7.86	8.06	7.74
SUBSCRIBERS INCLUDED								82%
SUBSCRIBER REVENUES	270,418	451,928	4,538,983	5,806,917	12,275,765	25,211,230	19,212,201	67,767,442
PAY TV REVENUES	6,415	1,024	803,009	858,762	1,966,235	4,133,049	4,720,007	12,488,501
TOTAL OPERATING REVENUES	281,872	479,429	5,607,044	7,387,041	15,053,636	30,965,767	24,764,507	84,539,296
SERVICE EXPENSES	106,587	184,869	1,577,333	1,807,805	2,658,110	5,940,915	4,706,477	16,982,098
PAY TV EXPENSES	45,513		324,387	242,665	811,983	1,594,184	1,644,431	4,663,163
POLE RENTALS	11,786	22,769	205,821	201,997	475,187	999,043	646,359	2,562,962
MICROWAVE COSTS	10,740		72,887	62,140	204,207	170,232	41,634	561,840
ORIGINATION EXPENSES		250	3,746	8,083	132,099	253,723	258,809	656,710
SELLING GEN & ADMIN EXPENSES	73,499	163,903	2,211,984	2,788,044	6,267,424	9,455,122	7,206,853	28,166,829
TOTAL SALARIES	50,443	160,825	1,124,558	1,649,654	2,708,806	5,223,656	3,860,198	14,777,940
TOTAL OPERATING EXPENSE	225,599	349,022	4,117,450	4,846,597	9,869,616	17,243,944	13,816,570	50,468,798
TOTAL OPERATING INCOME	56,273	130,407	1,489,594	2,540,444	5,184,020	13,721,823	10,947,937	34,070,498
DEPRECIATION & AMORTIZATION	56,995	124,771	1,096,239	1,128,533	2,968,232	5,301,554	4,618,733	15,295,057
INTEREST EXPENSE	32,443	13,646	570,200	588,295	1,279,504	3,435,614	2,601,853	8,521,555
NET INCOME BEFORE TAXES	-32,843	-44,258	-112,969	767,254	679,562	4,298,957	3,834,682	9,390,385
CURRENT ASSETS	35,047	26,713	724,511	1,173,327	2,543,600	3,298,886	3,811,293	11,613,377
ACCUMULATED DEPRECIATION	48,566	179,674	3,764,972	5,602,707	12,907,055	23,523,041	17,088,084	63,114,099
FIXED ASSETS	348,228	214,869	6,779,576	8,536,209	23,026,406	47,879,767	32,943,866	119,728,921
TOTAL ASSETS	614,828	943,386	9,523,313	11,154,909	31,169,515	57,879,599	43,521,375	154,806,925
CURR LIAB & DEFERRED CREDITS	109,180	20,900	4,589,989	2,211,440	8,323,517	10,917,272	7,581,405	33,753,711
LONG TERM LIABILITIES	272,495	69,705	2,366,976	4,397,715	10,444,733	24,878,570	19,362,836	61,793,030
TOTAL OWNERS EQUITY	9,560	152,912	2,202,516	4,545,746	12,401,265	22,083,757	16,577,134	57,972,890

REGION: MIDDLE ATLANTIC STATES.
N.Y. PENN. N.J.

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	77	90	305	122	468	417	557	2,036
NUMBER FINANCIAL ENTITIES	65	39	75	24	63	45	36	347
NUMBER OF SUBSCRIBERS	14,924	28,050	162,432	102,940	437,009	632,905	1,389,353	2,768,413
AVERAGE SUBSCRIBER RATE	7.09	6.82	6.39	6.92	7.33	6.52	7.31	7.06
SUBSCRIBERS INCLUDED								90%
SUBSCRIBER REVENUES	943,335	2,312,331	11,557,157	7,942,210	34,029,611	48,336,416	119,078,299	224,199,359
PAY TV REVENUES	46,511	94,018	2,237,088	2,889,121	8,807,248	14,414,306	47,461,809	75,950,101
TOTAL OPERATING REVENUES	1,236,781	2,609,889	14,546,253	12,317,085	44,929,298	65,410,461	174,200,078	315,249,845
SERVICE EXPENSES	490,888	1,112,692	5,296,039	3,005,683	10,973,135	12,683,829	40,556,051	74,118,317
PAY TV EXPENSES	7,311	29,726	1,136,413	1,477,603	3,411,667	6,435,893	19,174,362	31,672,975
POLE RENTALS	37,411	101,963	444,664	332,253	1,157,502	1,821,545	3,983,019	7,878,357
MICROWAVE COSTS	6,387	76,062	376,636	222,289	891,453	697,013	1,525,776	3,795,616
ORIGINATION EXPENSES	63,017	35,645	60,008	414,816	1,227,838	869,750	5,070,379	7,741,453
SELLING GEN & ADMIN EXPENSES	323,614	733,354	4,922,290	4,477,579	13,256,867	18,506,012	45,065,494	87,285,210
TOTAL SALARIES	262,574	641,071	3,734,691	2,518,784	8,731,323	10,453,180	35,870,767	62,212,390
TOTAL OPERATING EXPENSE	884,830	1,911,417	11,414,750	9,375,681	28,869,507	38,495,484	109,866,286	200,817,955
TOTAL OPERATING INCOME	351,951	698,472	3,131,503	2,941,404	16,059,791	26,914,977	64,333,792	114,431,890
DEPRECIATION & AMORTIZATION	234,195	573,157	3,136,581	2,425,844	7,218,108	11,103,701	30,659,613	55,351,199
INTEREST EXPENSE	45,705	243,827	1,620,185	1,185,311	4,095,683	8,128,760	16,087,984	31,407,455
NET INCOME BEFORE TAXES	46,128	-68,728	-1,666,864	-262,977	6,755,251	8,658,209	19,231,230	32,692,249
CURRENT ASSETS	39,835	108,835	5,832,400	2,855,049	6,416,650	5,506,833	25,545,171	46,304,773
ACCUMULATED DEPRECIATION	146,219	1,064,006	14,110,117	10,458,801	36,695,192	47,097,719	151,045,639	260,617,693
FIXED ASSETS	167,386	808,631	23,315,504	15,121,200	53,014,387	81,599,067	211,692,729	385,718,904
TOTAL ASSETS	4,675,411	4,747,216	42,251,046	21,047,279	69,191,524	108,660,518	278,409,086	528,982,080
CURR LIAB & DEFERRED CREDITS	15,253	343,328	9,028,210	4,794,595	21,811,442	22,211,578	89,902,494	148,106,900
LONG TERM LIABILITIES	98,346	782,277	27,306,458	13,427,337	30,619,722	65,178,585	124,375,911	261,788,636
TOTAL OWNERS EQUITY	103,534	-134,055	5,400,563	2,825,347	16,760,360	21,270,355	64,130,681	110,356,785

REGION: EAST SOUTH CENTRAL STATES.
KENTUCKY, TENN., MISS., ALA.

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	65	80	193	61	108	80	11	596
NUMBER FINANCIAL ENTITIES	56	49	104	24	28	20	6	285
NUMBER OF SUBSCRIBERS	12,380	34,866	205,002	97,714	194,083	271,145	280,133	1,095,323
AVERAGE SUBSCRIBER RATE	6.37	7.63	7.27	7.65	7.57	7.76	7.48	7.54
SUBSCRIBERS INCLUDED								86%
SUBSCRIBER REVENUES	7,305,806	2,957,332	25,336,128	6,386,036	15,687,089	22,941,558	12,259,773	92,873,722
PAY TV REVENUES	5,089	189,325	1,394,457	1,083,758	3,670,591	5,447,534	6,490,023	18,280,777
TOTAL OPERATING REVENUES	7,848,528	3,379,164	28,716,868	8,311,559	20,702,155	29,955,579	19,597,620	119,511,473
SERVICE EXPENSES	2,627,612	1,352,668	14,983,284	2,365,369	4,735,559	7,493,364	3,358,588	36,916,444
PAY TV EXPENSES	1,739	92,355	327,296	451,806	1,378,127	2,106,891	2,297,972	6,656,186
POLE RENTALS	51,810	96,509	903,937	197,298	421,531	780,747	344,648	2,796,480
MICROWAVE COSTS	15,233	24,252	133,381	56,703	63,391	207,625	58,892	559,477
ORIGINATION EXPENSES	49,610	8,347	124,483	97,302	61,254	199,583	276,102	816,681
SELLING GEN & ADMIN EXPENSES	578,562	786,239	5,445,074	2,283,799	5,988,458	9,057,125	5,131,035	29,270,292
TOTAL SALARIES	1,888,217	810,623	8,667,129	1,965,107	3,992,953	6,177,207	3,153,421	26,654,657
TOTAL OPERATING EXPENSE	3,257,523	2,239,609	20,880,137	5,198,276	12,163,398	18,856,963	11,063,697	73,659,603
TOTAL OPERATING INCOME	4,591,005	1,139,555	8,836,731	3,113,283	8,538,757	11,098,616	8,533,923	45,851,870
DEPRECIATION & AMORTIZATION	1,303,690	660,502	4,276,912	2,037,424	2,883,763	5,472,466	2,688,922	19,323,679
INTEREST EXPENSE	111,199	348,852	2,058,962	729,330	2,175,360	2,143,179	2,418,394	9,985,278
NET INCOME BEFORE TAXES	2,956,671	144,984	2,437,355	359,216	3,307,878	4,257,937	3,325,494	16,799,535
CURRENT ASSETS	30,767	1,196,307	3,773,541	2,673,736	11,322,377	5,784,499	1,192,158	25,973,385
ACCUMULATED DEPRECIATION	128,697	1,410,199	17,803,259	6,782,010	16,211,158	22,297,368	8,306,517	72,939,216
FIXED ASSETS	73,541	1,907,727	24,536,938	15,751,180	25,831,461	39,535,727	31,799,821	139,436,403
TOTAL ASSETS	3,744,529	8,524,073	34,987,140	25,126,830	44,847,736	49,838,662	39,849,435	206,918,413
CURR LIAB & DEFERRED CREDITS	1,781	761,131	7,479,328	5,404,903	12,282,751	7,122,275	7,322,475	40,374,644
LONG TERM LIABILITIES	46,398	1,418,452	18,034,211	12,030,589	22,509,278	21,631,822	18,350,929	94,021,679
TOTAL OWNERS EQUITY	56,129	1,594,677	8,288,267	7,691,346	10,055,707	21,084,565	14,176,031	62,944,722

REGION: SOUTH ATLANTIC STATES.
DEL., MD., W VA., VA., N C., GA., FLA

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	80	98	362	152	246	187	156	1,279
NUMBER FINANCIAL ENTITIES	63	55	131	39	62	43	25	418
NUMBER OF SUBSCRIBERS	15,371	42,431	269,763	161,417	436,991	597,490	768,306	2,291,769
AVERAGE SUBSCRIBER RATE	6.71	8.00	7.37	7.30	7.51	7.45	7.40	7.43
SUBSCRIBERS INCLUDED								73%
SUBSCRIBER REVENUES	1,399,975	3,398,592	40,717,450	13,165,151	34,888,652	50,051,419	57,311,614	200,932,853
PAY TV REVENUES	95,730	184,581	3,103,217	2,770,355	9,402,712	15,356,349	22,468,647	53,381,591
TOTAL OPERATING REVENUES	1,672,392	4,031,297	46,389,468	17,012,190	46,476,909	70,680,494	89,008,359	275,271,109
SERVICE EXPENSES	538,531	1,489,019	17,352,810	5,392,601	11,898,531	15,640,647	18,527,559	70,839,498
PAY TV EXPENSES	45,345	87,850	1,664,432	1,342,202	4,209,551	6,970,590	10,515,973	24,835,943
POLE RENTALS	46,513	142,018	1,441,644	543,822	1,476,578	1,750,695	2,235,089	7,636,359
MICROWAVE COSTS	9,809	14,988	372,015	117,751	437,835	612,079	656,810	2,221,287
ORIGINATION EXPENSES	17,722	18,204	96,665	118,016	488,518	576,416	1,398,415	2,713,956
SELLING GEN & ADMIN EXPENSES	446,684	1,762,640	9,949,899	5,449,520	15,081,021	18,545,508	23,199,239	74,434,511
TOTAL SALARIES	329,673	1,282,627	12,041,420	3,625,926	10,243,609	12,418,968	17,171,054	57,113,277
TOTAL OPERATING EXPENSE	1,048,282	3,357,713	29,063,606	12,302,339	31,677,621	41,733,161	53,641,186	172,823,908
TOTAL OPERATING INCOME	624,110	673,584	17,325,862	4,709,851	14,799,288	28,947,333	35,367,173	102,447,201
DEPRECIATION & AMORTIZATION	294,123	1,186,272	7,394,553	4,779,071	10,415,249	11,180,002	16,370,600	51,619,870
INTEREST EXPENSE	132,916	566,006	3,036,510	2,909,283	3,756,255	5,568,466	5,181,389	21,170,825
NET INCOME BEFORE TAXES	338,965	-979,014	7,457,452	-2,940,093	473,588	11,493,387	12,591,990	28,436,275
CURRENT ASSETS	162,069	536,500	8,801,275	2,671,344	10,653,076	11,193,849	10,763,904	44,782,017
ACCUMULATED DEPRECIATION	822,198	3,646,727	26,581,930	12,133,349	44,682,831	60,003,878	78,509,291	226,380,204
FIXED ASSETS	344,595	4,270,545	45,092,941	35,867,391	83,377,837	73,714,608	117,357,964	360,025,881
TOTAL ASSETS	3,216,746	11,055,152	83,286,294	43,747,302	114,778,017	94,850,769	149,766,115	500,700,395
CURR LIAB & DEFERRED CREDITS	183,308	685,925	14,460,192	6,569,149	35,537,467	15,751,556	34,821,215	108,008,812
LONG TERM LIABILITIES	1,006,368	4,172,383	36,276,692	30,451,564	43,059,113	41,649,291	49,435,381	206,050,792
TOTAL OWNERS EQUITY	82,958	78,646	11,966,909	6,726,589	36,181,437	37,449,922	65,509,519	157,995,980

REGIONAL CATV INDUSTRY FINANCIAL DATA: FISCAL YEAR ENDING BETWEEN JAN — DEC 1979
BY SIZE OF SYSTEM (SUBSCRIBER COUNT)

REGION: WEST NORTH CENTRAL STATES.
N.D., S.D., MINN., NEB., IOWA, KS., MO.

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	92	92	219	73	70	22	50	618
NUMBER FINANCIAL ENTITIES	89	79	122	37	27	9	8	371
NUMBER OF SUBSCRIBERS	24,549	55,913	249,735	153,949	198,674	107,872	214,790	1,005,482
AVERAGE SUBSCRIBER RATE	8.02	7.70	7.52	7.53	7.52	7.62	7.65	7.58
SUBSCRIBERS INCLUDED								83%
SUBSCRIBER REVENUES	4,170,455	4,667,217	20,562,922	11,962,984	13,788,125	8,487,876	14,044,739	77,684,318
PAY TV REVENUES	11,767	159,402	2,036,197	2,532,776	2,841,240	2,361,339	6,715,929	16,658,650
TOTAL OPERATING REVENUES	4,778,067	5,252,718	24,194,794	15,523,972	17,856,199	11,687,944	21,974,392	101,268,086
SERVICE EXPENSES	2,077,680	1,855,261	6,911,713	4,218,789	4,623,753	2,095,219	5,433,349	27,215,764
PAY TV EXPENSES	19,284	53,314	811,305	1,086,511	1,261,293	830,094	2,799,780	6,881,581
POLE RENTALS	83,161	130,535	509,514	335,350	353,117	226,477	567,645	2,205,799
MICROWAVE COSTS	61,957	396,573	820,933	524,480	653,085	142,518	76,366	2,675,920
ORIGINATION EXPENSES	370	104,613	197,652	68,737	249,768	135,992	444,920	1,202,052
SELLING GEN & ADMIN EXPENSES	907,976	1,270,554	6,771,752	4,211,490	5,046,977	3,067,527	5,084,452	26,360,736
TOTAL SALARIES	1,200,468	928,005	5,290,404	3,317,590	3,291,000	1,937,102	3,884,522	19,849,091
TOTAL OPERATING EXPENSE	3,005,310	3,283,742	14,692,422	9,585,535	11,201,791	6,128,832	13,762,501	61,660,133
TOTAL OPERATING INCOME	1,772,757	1,968,976	9,502,372	5,938,437	6,654,408	5,559,112	8,211,891	39,607,953
DEPRECIATION & AMORTIZATION	667,271	1,505,669	4,651,676	2,432,094	2,983,525	1,817,488	3,444,037	17,501,760
INTEREST EXPENSE	429,118	473,305	2,006,795	987,713	1,102,813	1,382,998	2,352,578	8,735,320
NET INCOME BEFORE TAXES	613,955	193,540	2,365,266	2,038,304	1,844,341	2,313,531	2,866,885	12,233,822
CURRENT ASSETS	187,501	301,396	10,150,118	1,793,215	3,367,985	1,742,155	3,327,624	20,869,994
ACCUMULATED DEPRECIATION	967,641	1,701,959	25,480,345	11,405,564	16,622,521	9,488,776	19,788,292	85,453,098
FIXED ASSETS	1,708,042	2,440,136	29,216,233	18,244,655	30,512,078	12,218,295	22,895,353	117,234,792
TOTAL ASSETS	6,048,555	10,736,213	50,550,915	24,277,265	43,734,418	20,215,262	29,848,102	185,410,730
CURR LIAB & DEFERRED CREDITS	781,631	1,526,718	20,784,617	10,903,895	8,727,397	2,639,166	20,035,982	65,399,406
LONG TERM LIABILITIES	1,464,052	2,088,658	21,815,251	11,013,729	19,337,769	12,113,815	11,977,683	79,810,957
TOTAL OWNERS EQUITY	-367,283	-713,610	6,671,056	2,359,641	15,559,174	5,462,281	-2,165,563	26,805,696

REGION: EAST NORTH CENTRAL
STATES:
MICH, ILL, WISC,
IND, OHIO

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	55	67	293	124	238	166	193	1,136
NUMBER FINANCIAL ENTITIES	37	41	134	34	48	31	25	350
NUMBER OF SUBSCRIBERS	11,683	31,136	270,310	142,817	326,356	430,308	746,273	1,958,863
AVERAGE SUBSCRIBER RATE	7.46	7.10	7.05	7.25	7.08	7.20	7.34	7.22
SUBSCRIBERS INCLUDED								86%
SUBSCRIBER REVENUES	1,050,555	2,162,699	30,047,842	10,860,837	25,988,616	36,165,556	65,107,010	171,393,115
PAY TV REVENUES	120,772	151,065	2,183,506	1,591,705	4,818,405	11,555,858	19,943,959	40,363,270
TOTAL OPERATING REVENUES	1,246,856	2,568,433	40,050,945	13,388,562	32,314,891	50,287,755	89,702,178	229,559,620
SERVICE EXPENSES	609,034	924,091	18,849,425	3,531,679	8,648,126	11,349,287	27,278,399	71,190,041
PAY TV EXPENSES	17,401	40,254	882,193	603,274	1,912,361	4,427,111	8,105,838	15,988,232
POLE RENTALS	58,862	92,506	1,088,857	387,117	942,798	1,183,764	2,448,001	6,201,903
MICROWAVE COSTS	16,842	41,290	574,978	280,689	556,071	492,228	504,816	2,466,914
ORIGINATION EXPENSES	26,707	12,179	239,578	296,050	217,166	709,617	1,022,241	2,523,546
SELLING GEN & ADMIN EXPENSES	379,133	826,689	6,795,537	3,981,039	8,160,247	12,788,446	26,808,818	59,739,909
TOTAL SALARIES	252,244	638,587	12,302,387	3,688,190	6,460,268	8,981,022	19,939,765	52,262,463
TOTAL OPERATING EXPENSE	1,032,275	1,803,213	26,766,733	8,412,050	18,937,900	29,274,461	63,215,096	149,441,728
TOTAL OPERATING INCOME	214,581	765,220	13,284,212	4,976,512	13,376,991	21,013,294	26,487,082	80,117,892
DEPRECIATION & AMORTIZATION	450,053	581,490	6,649,093	2,715,290	5,624,539	7,160,634	21,670,315	44,851,422
INTEREST EXPENSE	126,334	353,141	2,612,277	1,531,867	2,831,086	3,639,268	15,188,512	26,482,485
NET INCOME BEFORE TAXES	-335,918	-214,493	3,661,254	1,021,256	4,728,577	9,571,777	-12,132,811	6,299,642
CURRENT ASSETS	119,211	221,634	8,046,254	4,239,267	6,300,811	7,011,435	17,149,132	43,087,744
ACCUMULATED DEPRECIATION	1,016,162	949,443	24,129,674	18,044,250	29,412,775	37,356,546	82,750,650	193,659,500
FIXED ASSETS	864,715	2,454,003	30,099,226	30,694,209	38,371,396	50,413,949	128,791,293	281,608,791
TOTAL ASSETS	3,379,122	6,817,456	56,112,717	46,108,685	55,069,340	80,182,384	163,914,264	411,583,968
CURR LIAB & DEFERRED CREDITS	278,583	1,272,156	14,959,025	9,139,055	11,816,288	22,557,038	23,924,366	83,946,511
LONG TERM LIABILITIES	1,110,017	2,501,311	19,713,646	26,484,313	17,471,372	26,118,769	95,895,153	189,294,581
TOTAL OWNERS EQUITY	-374,650	-980,263	9,657,546	10,485,317	25,781,680	31,506,577	44,094,745	120,170,952

REGION: WEST SOUTH CENTRAL
STATES:
TEXAS, OKLA., ARK., LA.

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	74	77	231	81	78	58	57	656
NUMBER FINANCIAL ENTITIES	73	69	141	38	39	21	13	394
NUMBER OF SUBSCRIBERS	19,392	52,652	276,824	157,089	298,396	310,762	431,759	1,546,874
AVERAGE SUBSCRIBER RATE	7.33	7.57	7.50	7.38	7.05	7.31	7.07	7.25
SUBSCRIBERS INCLUDED								82%
SUBSCRIBER REVENUES	1,778,245	9,043,034	29,984,775	12,842,940	23,472,817	23,349,181	30,181,283	130,650,275
PAY TV REVENUES	77,253	480,574	3,310,255	2,113,591	6,455,183	6,142,714	12,395,380	30,974,950
TOTAL OPERATING REVENUES	2,177,777	10,401,935	36,158,496	16,188,132	31,827,346	31,300,313	45,160,070	173,214,069
SERVICE EXPENSES	886,205	2,747,498	15,729,385	4,319,224	6,701,982	6,308,602	11,473,217	48,166,093
PAY TV EXPENSES	12,813	137,851	1,272,178	964,990	2,425,955	2,859,902	2,605,776	10,279,465
POLE RENTALS	38,495	137,712	723,299	268,800	601,571	586,469	917,636	3,273,982
MICROWAVE COSTS	24,072	213,831	1,365,601	383,202	447,748	534,491	414,554	3,383,499
ORIGINATION EXPENSES	76,956	30,301	130,313	29,606	267,245	95,960	609,095	1,239,476
SELLING GEN & ADMIN EXPENSES	619,449	3,452,954	8,255,910	4,655,705	8,147,393	8,187,772	11,288,464	44,607,647
TOTAL SALARIES	700,513	3,002,417	8,178,526	3,472,494	5,982,255	6,299,529	8,181,940	35,817,674
TOTAL OPERATING EXPENSE	1,595,423	6,368,604	25,387,766	9,969,525	17,542,575	17,452,236	25,976,552	104,292,681
TOTAL OPERATING INCOME	582,354	4,033,331	10,770,730	6,218,607	14,284,771	13,848,077	19,183,518	68,921,388
DEPRECIATION & AMORTIZATION	642,404	2,151,782	5,995,383	2,372,729	4,895,805	5,017,076	7,634,376	28,709,555
INTEREST EXPENSE	301,281	1,592,465	1,647,741	1,328,144	2,872,049	1,596,552	6,620,167	16,158,399
NET INCOME BEFORE TAXES	-368,948	260,614	3,017,659	2,643,666	6,076,387	6,794,386	4,617,547	23,041,291
CURRENT ASSETS	537,360	654,854	5,968,415	5,190,213	6,679,419	3,948,952	15,705,842	38,685,055
ACCUMULATED DEPRECIATION	779,830	2,751,089	24,244,958	12,627,737	24,404,452	22,946,408	33,924,547	121,679,001
FIXED ASSETS	6,545,218	2,571,747	39,927,643	21,416,719	33,542,893	38,331,169	61,655,401	203,990,790
TOTAL ASSETS	11,786,717	27,106,913	58,508,161	30,157,953	50,950,939	51,705,657	93,178,748	323,395,088
CURR LIAB & DEFERRED CREDITS	5,364,798	1,261,147	19,026,947	4,658,565	10,821,677	6,824,749	10,135,536	58,093,419
LONG TERM LIABILITIES	824,336	1,969,757	20,158,907	16,280,076	15,885,904	17,544,975	44,207,716	116,871,671
TOTAL OWNERS EQUITY	1,319,573	799,983	12,544,921	9,219,312	24,243,358	27,335,933	38,835,496	114,298,576

REGION: MOUNTAIN STATES.
IDAHO, MONT., WYO., NEV., UTAH, COLO. ARIZ., N M

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	33	38	168	55	75	43	13	425
NUMBER FINANCIAL ENTITIES	32	26	78	17	25	12	2	192
NUMBER OF SUBSCRIBERS	6,959	19,233	158,874	73,355	190,817	164,818	47,227	661,283
AVERAGE SUBSCRIBER RATE	8.40	8.26	8.56	8.20	8.24	7.95	7.73	8.20
SUBSCRIBERS INCLUDED								91%
SUBSCRIBER REVENUES	796,479	1,579,929	14,963,875	6,787,771	16,815,525	14,565,698	3,418,971	58,928,248
PAY TV REVENUES	186,652	122,914	2,662,150	1,194,580	3,833,658	5,363,190	1,837,257	15,200,409
TOTAL OPERATING REVENUES	1,505,111	2,188,460	19,195,174	8,648,971	21,915,333	21,323,129	5,501,150	80,277,328
SERVICE EXPENSES	587,395	978,455	5,597,100	2,484,809	5,746,854	4,617,088	1,006,417	21,018,118
PAY TV EXPENSES	7,518	50,636	1,173,547	458,633	1,638,690	1,886,830	776,370	5,992,224
POLE RENTALS	18,697	42,751	318,420	123,679	399,713	305,176	52,975	1,261,611
MICROWAVE COSTS	100,798	160,672	1,343,448	389,133	1,258,880	618,923	22,330	3,894,184
ORIGINATION EXPENSES	1,601	12,055	140,610	80,867	266,635	306,850	5,252	813,870
SELLING GEN & ADMIN EXPENSES	423,835	684,594	5,564,634	2,060,840	5,827,104	5,046,127	1,317,573	20,924,715
TOTAL SALARIES	307,060	614,060	3,990,543	1,709,427	4,108,245	3,388,540	1,060,042	15,177,917
TOTAL OPERATING EXPENSE	1,020,349	1,725,740	12,475,891	5,085,157	13,479,283	11,856,895	3,105,612	48,748,927
TOTAL OPERATING INCOME	484,762	462,720	6,719,283	3,563,814	8,436,050	9,466,234	2,395,538	31,528,401
DEPRECIATION & AMORTIZATION	369,056	519,944	3,332,504	1,315,254	3,575,346	2,889,886	889,032	12,891,022
INTEREST EXPENSE	260,488	321,149	2,304,647	401,714	1,740,331	198,312	1,044,512	6,271,153
NET INCOME BEFORE TAXES	-144,385	-400,163	700,740	3,327,019	2,582,814	6,652,142	462,146	13,180,313
CURRENT ASSETS	80,606	227,248	3,304,921	854,439	3,158,021	3,210,233	382,260	11,197,728
ACCUMULATED DEPRECIATION	211,636	505,298	15,965,795	6,658,871	17,731,652	14,110,238	9,235,426	64,418,916
FIXED ASSETS	613,565	1,457,417	27,166,371	9,437,885	25,158,242	21,282,846	11,437,196	96,553,522
TOTAL ASSETS	4,351,061	5,302,553	43,787,164	13,388,710	44,207,672	29,768,457	11,848,611	152,654,228
CURR LIAB & DEFERRED CREDITS	142,144	491,025	8,565,460	2,577,889	4,114,733	2,761,350	869,677	19,522,278
LONG TERM LIABILITIES	324,141	451,703	19,786,672	4,229,423	11,836,216	6,951,152	3,338,318	46,917,625
TOTAL OWNERS EQUITY	237,757	787,518	11,642,418	6,581,390	28,256,723	20,055,955	7,640,616	75,202,385

REGIONAL CATV INDUSTRY FINANCIAL DATA: FISCAL YEAR ENDING BETWEEN JAN -- DEC 1979 PAGE: 65
BY SIZE OF SYSTEM (SUBSCRIBER COUNT)

REGION: PACIFIC
STATES:
WASH, ORE., CAL., ALASKA, HAWAII

	LESS THAN 500	500 TO 999	1,000 TO 3,499	3,500 TO 4,999	5,000 TO 9,999	10,000 TO 20,000	OVER 20,000	TOTAL
NUMBER OF COMMUNITIES	58	75	167	99	135	126	233	893
NUMBER FINANCIAL ENTITIES	50	47	83	35	55	34	37	341
NUMBER OF SUBSCRIBERS	12,949	33,684	166,566	149,371	416,500	479,900	1,405,574	2,664,544
AVERAGE SUBSCRIBER RATE	9.49	9.50	8.16	7.92	7.78	7.30	7.70	7.71
SUBSCRIBERS INCLUDED								87%
SUBSCRIBER REVENUES	1,096,756	3,041,842	14,897,898	13,931,506	37,552,174	41,394,744	124,789,127	236,704,047
PAY TV REVENUES	53,866	161,060	2,150,961	2,910,575	9,373,214	12,699,242	43,046,799	70,395,717
TOTAL OPERATING REVENUES	1,370,171	3,557,257	18,859,896	18,023,650	49,244,822	57,016,624	178,952,901	327,025,321
SERVICE EXPENSES	474,633	1,343,579	5,326,626	4,199,710	10,757,106	12,059,706	36,495,900	70,657,270
PAY TV EXPENSES	41,271	107,828	902,914	1,282,095	3,178,504	4,735,162	15,993,419	26,241,193
POLE RENTALS	27,135	61,860	303,089	323,483	679,431	770,458	2,302,611	4,468,067
MICROWAVE COSTS	4,137	68,920	213,207	194,942	401,598	462,181	516,031	1,861,016
ORIGINATION EXPENSES	16,189	37,796	392,579	140,989	180,549	532,516	2,967,433	4,268,051
SELLING GEN & ADMIN EXPENSES	449,335	1,190,766	6,055,714	6,536,320	14,269,570	16,444,868	49,555,067	94,501,640
TOTAL SALARIES	310,136	1,135,124	4,673,510	4,401,646	9,370,334	10,581,093	39,636,568	70,108,411
TOTAL OPERATING EXPENSE	981,428	2,679,569	12,677,833	12,159,122	28,385,729	33,772,254	105,011,819	195,668,154
TOTAL OPERATING INCOME	388,743	877,288	6,182,063	5,864,528	20,859,093	23,244,370	73,941,082	131,357,167
DEPRECIATION & AMORTIZATION	309,621	743,925	4,769,385	3,330,050	8,756,330	8,543,461	32,920,121	59,372,901
INTEREST EXPENSE	63,635	274,499	1,593,256	2,155,697	4,622,036	4,496,579	8,793,298	21,999,000
NET INCOME BEFORE TAXES	-31,704	-224,870	-141,568	461,145	7,177,153	9,227,858	28,620,140	45,088,154
CURRENT ASSETS	46,190	354,847	5,355,604	2,286,753	14,364,536	6,215,658	30,734,120	59,357,708
ACCUMULATED DEPRECIATION	398,545	1,087,422	18,470,358	15,833,393	41,324,078	52,054,760	171,630,070	300,798,626
FIXED ASSETS	293,608	2,645,601	25,858,365	24,865,255	56,149,418	65,230,042	215,968,684	390,980,973
TOTAL ASSETS	2,847,122	7,786,415	38,607,713	38,821,841	88,004,850	91,990,120	282,711,685	550,769,746
CURR LIAB & DEFERRED CREDITS	8,597	329,258	6,967,501	8,160,110	14,102,416	19,751,890	51,015,980	100,331,752
LONG TERM LIABILITIES	41,565	2,065,784	21,817,870	24,060,644	34,248,496	41,591,816	85,700,346	209,526,521
TOTAL OWNERS EQUITY	359,756	1,596,526	9,302,139	6,601,087	39,653,938	30,646,414	145,995,359	234,154,639

SCHEDULE 2 CABLE TELEVISION REVENUES AND EXPENSES PAGE: 66

LINE NO.	ITEM	AMOUNT
	OPERATING REVENUES	
1	INSTALLATION REVENUE	81,595,674
2	REGULAR SUBSCRIBER SERVICE	1,261,480,701
3	PER PROGRAM OR PER CHANNEL GROSS REVENUE (PAY TELEVISION)	333,693,966
4	ADVERTIZING REVENUE	4,973,738
5	SPECIAL SERVICE REVENUE	4,385,849
6	OTHER REVENUE	20,169,189
7	TOTAL OPERATING REVENUES	1,706,299,117
	OPERATING EXPENSES	
	SERVICE EXPENSES	
8	SALARIES, WAGES, AND EMPLOYEE BENEFITS	213,210,183
9	POLE RENTALS	38,293,712
10	DUCT RENTALS	617,501
11	PRIVATE MICROWAVE SERVICE (CARS)	3,790,140
12	COMMON CARRIER MICROWAVE SERVICE	17,629,613
	TOTAL TARIFF (LEASEBACK) CHARGES (APPLIES TO SYSTEMS RECEIVING TELEPHONE COMPANY CHANNEL SERVICE.)	1,466,543
14	ALL OTHER SERVICE EXPENSES	162,215,791
15	PAYMENTS TO PAY CABLE PROGRAM SUPPLIES	133,248,410
	ORIGINATION EXPENSES	
16	SALARIES, WAGES, AND EMPLOYEE BENEFITS	8,080,116
17	ALL OTHER ORIGINATION EXPENSES	13,904,226
	SELLING, GENERAL, AND ADMINISTRATIVE EXPENSES	
18	SALARIES, WAGES, AND EMPLOYEE BENEFITS	132,837,324
19	FRANCHISE FEES	41,295,303
20	COPYRIGHT FEES	12,917,644
21	ALL OTHER SELLING, GENERAL, AND ADMINISTRATIVE EXPENSES	278,366,501
22	TOTAL OPERATING EXPENSE	1,057,873,007
23	TOTAL OPERATING INCOME	648,426,110
	DEPRECIATION AND AMORTIZATION	
24	DEPRECIATION	281,422,424
25	AMORTIZATION	23,578,181
	OTHER INCOME AND EXPENSES	
	OTHER INCOME	
26	TOTAL OTHER INCOME	13,915,930
	OTHER EXPENSES	
27	INTEREST	150,731,468
28	MISCELLANEOUS	25,031,128
29	TOTAL OTHER INCOME (OR LOSS)	161,846,666-
30	EXTRAORDINARY ITEMS	5,590,537
31	TOTAL INCOME (OR LOSS) BEFORE TAXES	187,169,376

SCHEDULE 3 BALANCE SHEET INFORMATION PAGE: 67

LINE NO.	ITEM	AMOUNT
	ASSETS	
	CURRENT ASSETS	
1	CASH	76,335,538
2	ACCOUNTS RECEIVABLE	82,055,581
3	OTHER CURRENT ASSETS	149,386,525
4	TOTAL CURRENT ASSETS	301,936,216
	FIXED ASSETS	
5	LAND AND BUILDINGS	85,033,921
6	HEADEND	190,934,162
7	TRUNK AND DISTRIBUTION SYSTEM	2,120,633,926
8	SUBSCRIBER DEVICES	584,185,777
9	PROGRAM ORIGINATION EQUIPMENT	62,650,279
10	CONSTRUCTION WORK IN PROGRESS	144,250,778
11	OTHER FIXED ASSETS	286,405,099
12	PLANT ADJUSTMENT	11,268,222
13	LESS: ACCUMULATED DEPRECIATION	1,389,821,574
14	TOTAL FIXED ASSETS	2,095,738,590
	OTHER ASSETS	
15	OTHER ASSETS	604,199,263
16	LESS: ACCUMULATED AMORTIZATION	118,984,595
17	TOTAL OTHER ASSETS	486,422,819
18	TOTAL ASSETS	3,015,668,349
	LIABILITIES	
	CURRENT LIABILITIES	
19	LOANS PAYABLE	94,432,905
20	ACCOUNTS PAYABLE	138,558,716
21	OTHER CURRENT LIABILITIES	245,630,174
22	TOTAL CURRENT LIABILITIES	475,980,886
	DEFERRED CREDITS	
23	TOTAL DEFERRED CREDITS	181,598,697
	LONG TERM DEBT	
24	TOTAL LONG TERM DEBT	1,266,397,426
	OWNERS EQUITY	
25	TOTAL STOCK ISSUED	228,345,347
26	PROPRIETORS EQUITY	135,214,834
27	RETAINED EARNINGS	48,819,095
28	OTHER OWNERS EQUITY	547,606,041
29	TOTAL OWNERS EQUITY	959,985,317
30	TOTAL LIABILITIES AND OWNERS EQUITY	2,883,962,326

METHODS OF DEPRECIATION USED

(1) STRAIGHT LINE	1724	(3) DOUBLE DECLINING BALANCE	121	(5) OTHER	297		
(2) DECLINING BALANCE	55	(4) SUM-OF-THE-YEARS-DIGITS	22	NONE OF ABOVE	590	TOTAL	2809

APPENDICES

A. Statement of David H. Polinger

B. Bakersfield, California: A Striking Illustration of the Effect of Unlimited Distant Signal Importation Without Syndicated Program Exclusivity

C. Comments of the National Association of Broadcasters, FCC Docket Nos. 21284 and 20988 (Relevant portions)

D. FCC News Release, "Cable Television Industry Revenues Continued to Increase in 1979...." and Selected Tables

E. TV Broadcast Financial Data - 1979 (Table 5)

APPENDIX A

STATEMENT OF DAVID H. POLINGER

I am Vice-President and Assistant to the President of WPIX, Inc., licensee of WPIX(TV), Channel 11, New York, New York. WPIX is an independent television station serving the metropolitan New York area. My responsibilities include oversight of copyright matters and ensuring that WPIX is afforded all the protection it is due from cable television systems. I have held my current position for 5 years.

The amount charged by a television station for a unit of advertising time depends upon the size of the station's audience. The ability of a television station to serve the needs and interests of its market therefore depends directly upon its ability to attract the viewing public to the programming it offers. An independent station, such as WPIX, having no network upon which it can rely for the bulk of its programming, must contract for and acquire programming made available by program syndicators. That programming must yield an audience level which will generate advertising revenues sufficient to meet expenses and to produce a profit. Because the audience attracted to a program is thus such a key factor in the economics of operating television stations, they must bargain for and pay for exclusive rights to such programming within their respective markets. Thus, for example, in acquiring Happy Days, WPIX obtained the exclusive

right to broadcast that series within the New York market.

Under the FCC's syndicated exclusivity rules, a television station was entitled to request protection from duplication of its programming by distant stations imported into its market by cable television systems. The right to such protection extended to all cable television systems located within the station's specified zone, or circle with a radius of 35 miles. In the case of New York, that zone contains 25 cable television systems, with in excess of 750,000 subscribing households. Approximately 15 percent of all television households in the New York market subscribe to cable television. That rate has doubled in the last 4 years in that market and that trend is expected to continue.

Cable television systems regularly import distant television signals against which local stations has requested protection. In addition, other signals are available to cable television systems and are used to fill in when syndicated programs are deleted as requested by local stations. For example, WPIX's staff must regularly check the programming schedules of 22 distant television stations and send periodic notices of programs to be deleted to 25 cable television systems.

An independent station's investment in syndicated programming is its most substantial asset. WPIX has agreed to pay, after competitive bidding, in excess of $50 million for the exclusive rights to a number of program series for

present and future years which it feels are necessary to ensure successful operation of the station. That large programming investment was made in reliance upon the continued existence of protection against duplication in the New York market.

For example, WPIX has bargained for exclusive rights to the popular series Star Trek. That program is carried by five distant stations imported by cable television systems into the New York market. Other programs, such as The Odd Couple, appear on at least three stations imported into the New York market. WPIX's investment in those programs is dependent on nonduplication protection. It is inevitable that WPIX would lose some portion of its audience in the cable homes if they have a choice of watching those programs on different channels at different times.

The recent decision of the FCC to delete its syndicated exclusivity rule deprives all television stations of the protection necessary to maintain their investments in programming. That decision, if upheld on appeal, would deprive those stations of their ability to request deletion of duplicating programming on imported distant signals cable television systems in their markets. As a result, New York market cable subscribers will, for example, have six choices for viewing Star Trek. WPIX's audience will thus be fragmented. Since revenues are dependent on audience levels, that fragmentation will translate directly into a revenue reduction which, in

turn, will affect WPIX's profitability and ability to serve the public.

While television stations would, as a result of abrogation of the rule, suffer significant revenue reductions, their large financial commitments for programming would continue. Existing contracts for programming generally have no provision which would reduce the price paid for programming if the bargained for exclusivity provisions cannot be enforced. Moreover, many such agreements providing for full exclusivity extend well into the future. For example, the price WPIX negotiated with Paramount Pictures for feature films to be broadcast between 1985 and 1992 was based upon maintaining exclusive rights in the New York market. Furthermore, WPIX invested over $15 million in exclusive rights to three popular series, Barney Miller, Laverne and Shirley, and The Jeffersons, which would only be available for first broadcast beginning in the Fall of 1980, 1981, and 1982, and through the ensuing five years. As a result of the Commission's action, television stations must continue paying, for years to come, for rights they will not receive, despite the bargain for exclusive rights they struck in the marketplace which the FCC action would take away.

David H. Polinger
Vice President & Asst. to President
WPIX, Inc.

APPENDIX B

BAKERSFIELD, CALIFORNIA: A STRIKING ILLUSTRATION OF THE EFFECT OF UNLIMITED DISTANT SIGNAL IMPORTATION WITHOUT SYNDICATED PROGRAM EXCLUSIVITY

The importation of an unlimited number of distant signals by cable systems which provide no syndicated exclusivity to local television stations has two very serious effects on local stations:

-- First, each local station's audience, particularly in a small market whose cable systems are flooded with big city stations, is severely reduced in size simply by reason of viewership diverted to the distant stations.

-- Second, each local station's audience for the particular syndicated programs it has chosen to purchase on an "exclusive" basis for its market is further reduced in size when that exclusivity is destroyed by the same syndicated programs being brought into local cable homes on distant stations.

The Bakersfield, California, television market provides an excellent illustration of each of these effects.

Bakersfield is approximately 100 miles from Los Angeles and there is virtually no off-the-air viewing of Los Angeles stations in the market. More than 60% of all television homes in Bakersfield are cable-connected. The area's cable systems have long had "grandfather rights" permitting them to carry all of the Los Angeles VHF stations as well as non-network station KMPH from Visalia, approximately 60 miles away.

Studies based upon Nielsen or Arbitron rating data show markedly different viewing patterns in Bakersfield cable homes as compared with non-cable homes. In past FCC studies, the extent of these differences has been masked because the FCC has averaged together viewing reported in cable and non-cable homes, and because the FCC has also averaged out viewing during portions of the day in which local stations are broadcasting network progrmming (and receiving network exclusivity on cable systems) with other portions of the day in which the local stations are broadcasting local and syndicated programming and are totally unprotected against the Los Angeles stations.

The hours of 4:30 to 7:30 p.m. on weekdays are known as "early fringe time." During these hours, local stations broadcast syndicated and local programming, including local news. Stations typically receive a disporportionately large

share of their total revenues from advertising in "early fringe" time. Viewership during these hours is thus of critical importance.

The first impact of unlimited distant signal carriage by cable systems -- extreme fractionation of local stations' audiences -- may be seen in rating data obtained from Arbitron by station KERO-TV, Bakersfield, for viewership in cable homes in the Bakersfield market in 1979 and 1980.[1/] The percentage viewing shares in Bakersfield cable homes in "early fringe hours (4:30-7:30 p.m.), Monday through Friday) for the three local Bakersfield stations and for other stations carried by cable were as follows:

Station	City of License	Share of Homes Viewing Television
KERO	Bakersfield	25%
KTLA	Los Angeles	11
KTTV	Los Angeles	10
KBAK	Bakersfield	10
KNBC	Los Angeles	9
KABC	Los Angeles	7
KHJ	Los Angeles	6

1/ The data are based upon Arbitron market surveys conducted in May and November, 1979, and February, 1980.

Station	City of License	Share of HOmes Viewing Television
KMPH	Visalia (Tulare)	5
KPWR	Bakersfield	4
KNXT	Los Angeles	4
KCOP	Los Angeles	3
KCET	Los Angeles	2
Other	--	2
KMEX	Los Angeles	1

The table above shows that in the most lucrative portion of the broadcast day, the second, third, fifth, sixth, seventh, and eighth most viewed television stations in Bakersfield cable homes (which comprise 60% of the market) were out-of-market stations. Of the three local Bakersfield stations, one tied for third in viewership, and a second managed only a tie with KNXT, Los Angeles, for ninth position in its own market.

Bakersfield is one of the smallest television markets in the country. It has only 101,400 homes, and ranks 155th in the country according to that standard. Given the market's very small size, the viewer diversion shown above in a critical day part cannot help but have a devastating effect on stations such as KBAK and KPWR.

The destruction of syndicated programming exclusivity is also well illustrated in the Bakersfield market. None of the three stations in Bakersfield has ever been entitled to syndicated exclusivity protection under the FCC's Rules. (The rules provide such protection only to stations in the 100 largest markets.) In studies submitted to the FCC by McGraw-Hill Broacasting Company, Inc. and Storer Broadcasting Company in May, 1978,[2/] the results of this lack of exclusivity protection were strikingly demonstrated. The data submitted showed dramatic differences in the viewership of specific syndicated programs broadcast by the Bakersfield stations in cable homes as contrasted with viewership of the same programs in non-cable homes. The data also showed that the Bakersfield stations lost a far greater percentage of viewership for such programs in Bakersfield cable homes than did San Diego stations for the very same syndicated programs in San Diego cable homes. Unlike the Bakersfield stations, San Diego stations receive a substantial measure of syndicated exclusivity from that area's largest cable systems.

2/ "Reply Comments" in Docket 21284, filed with the FCC May 15, 1978.

During the rating period covered by the data, "Merv Griffin," "Mike Douglas" and "Dinah" were three prime syndicated programs broadcast by Bakersfield stations. The purchase of first run syndicated series such as these was a major investment for the local stations. "Merv Griffin," for example, was one of the most expensive syndicated program series owned by KERO-TV, McGraw-Hill's Bakersfield station. All three syndicated series were, however, duplicated on Los Angeles stations carried by Bakersfield cable systems. The audience share losses for the three programs in Bakersfield cable homes -- as compared with non-cable homes -- during the measured time segments covered by the data submitted were striking:

Program	Bakersfield Station & Time Segment	Audience Share, Non-Cable Homes	Audience Share, Cable Homes	Reduction in Audience Share
Merv Griffin	KERO-TV			
	4:45-5:00	41.21%	8.93%	-78.3%
	5:00-5:15	45.78	14.30	-68.8
	6:30-5:45	50.73	15.62	-69.2
Mike Douglas	KBAK-TV			
	4:45-5:00	14.09	5.23	-62.9
	5:00-5:15	9.30	5.75	-38.2
Dinah	KBAK-TV			
	9:00-9:15	21.45	11.08	-49.7
	9:30-9:45	18.42	9.59	-47.9

All of the programs listed above were purchased by Bakersfield stations on a supposedly "exclusive" basis for the Bakersfield market.[3/] This was also true when the same programs were purchased by San Diego stations for broadcast in that market. In San Diego, however, the market's major cable systems deleted the programs in question when they were broadcast by Los Angeles stations carried on the systems. The result was a great difference in the audiences obtained for the programs by local stations in San Diego cable homes as compared with the audiences achieved by local Bakersfield stations in Bakersfield cable homes. Bakersfield station KERO-TV, for example, had lost approximately 70% of its audience for the "Merv Griffin" show in cable homes, while station KGTV in San Diego lost only about 19% of its "Merv Griffin" audience in cable homes. Where the Bakersfield cable audience for "Mike Douglas" was about 50% lower in cable homes than in non-cable homes, the San Diego "Mike Douglas" audience share in cable homes was approximately

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3/ In prior comments filed with the FCC, McGraw-Hill had demonstrated that its annual cost for the "Merv Griffin" series alone had been approximately 30% as high as all of the annual copyright fees paid into the national copyright fund by all cable systems within 35 miles of Bakersfield in exchange for the right to carry all of the syndicated programs broadcast by all seven Los Angeles television stations. At the time, Bakersfield cable penetration was already greater than 50%.

the same as that in San Diego non-cable homes. And the San Diego station broadcasting the "Dinah" program -- a program which had lost 50% of its audience in Bakersfield cable homes -- actually increased its audience share in San Diego cable homes in the hour that "Dinah" was broadcast.[4/]

The Storer-McGraw-Hill 1978 filing also provided other illustrations of the value of program exclusivity. A single additional example is offered here. Bakersfield station KERO-TV had broadcast both a network and a syndicated version of the game show called "Hollywood Squares." The network version was broadcast by KERO-TV at 9:30 a.m., the same time as it was broadcast by KNBC in Los Angeles. KERO-TV's broadcast was therefore protected on Bakersfield cable systems under the network non-duplication rules. KERO-TV's audience for the network version of "Hollywood Squares" actually showed a slight gain in cable homes during the two weekly time segments analyzed. On the other hand, the syndicated version of "Hollywood Squares" was broacast at 7:30 p.m. on Tuesdays and Fridays during the rating period. At that hour, no program imported from Los Angeles was subject to deletion

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4/ The San Diego station broadcasting "Dinah" was KCST-TV, a UHF station, and apparently benefited to some degree from its carriage by cable systems. Even giving consideration to any UHF benefit afforded KCST in cable homes, however, it seems clear that there was no material loss of audience for the exclusivity-protected "Dinah" show in San Diego cable homes.

on cable under any program exclusivity rule. On Tuesday during the measured 7:30-7:45 p.m. time segment, the KERO-TV broadcast of the syndicated "Hollywood Squares" suffered a 68.5% audience share loss in cable homes and on Friday, during the same time period, the program suffered a 69% share loss.

Shown in tabular form, the figures summarized above are as follows:

Program & Time Period	KERO-TV Audience Share: Non-Cable	KERO-TV Audience Share: Cable	Gain or Loss in Cable Households
Hollywood Squares (Network), Wed. & Thu., 9:30 a.m.	27.75%	30.94%	+11.5%
Hollywood Squares (Syndicated), Tues, 7:30 p.m.	57.11	17.81	-68.8
Fri., 7:30 p.m.	48.82	15.12	-69.0

The facts summarized above speak for themselves. Unlimited distant signal importation by cable systems with no requirement that such systems protect the exclusivity rights purchased in the marketplace by local stations plainly destroys a large portion of the value of the expensive programs the local stations have purchased. Local stations receive virtually no compensation for this loss from the national cable copyright fund.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television	)	Docket No. 21284
	)	
Cable Television Syndicated Program Exclusivity Rules	)	Docket No. 20988

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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September 17, 1979

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in the public interest. If the Commission continues on its present course, the day inevitably will arrive when the Commission will look out upon a decimated broadcast industry, and, like Marie Antoinette before the empty bread bins, say "let them watch cable." Like the starving peasants of France left to "eat cake" which never existed, viewers who must continue to rely on broadcast service will have no cable to watch.

1. Cable Possesses Every Regulatory Advantage Over Broadcasting.

The cable industry long has complained that the Commission has favored broadcasting in its regulation of cable television. It even has complained that the Commission favors translators over cable television. In truth, of course, in many critical public interest areas broadcasting is tightly regulated and cable not regulated at all. This lack of regulatory constraints necessarily is a tremendous advantage to the cable industry and its ability to compete with broadcasting. By way of perspective, NAB does not wish to suggest that cable is not in some instances subjected to burdensome state and local regulation; nor does NAB wish to suggest in any way that cable television should be subjected to more stringent federal regulation. What NAB wishes to emphasize is that cable has been given every regulatory and competitive advantage by the Commission and, more importantly, that continuation of this course

flies in the face of the Commission's Congressional mandate to promote service "to all the people of the United States." 47 U.S.C. §151.[18/]

Even a superficial comparison of the Commission's regulation of broadcast television and cable television reveals a substantial disparity which favors cable tremendously. First, unlike broadcasting, cable has no public interest obligations. In contrast, broadcast television is subjected to stringent regulation "in the public interest." 47 U.S.C. §§303(g) and 307. As Justice Frankfurter once observed, the FCC has become a traffic cop which not only directs traffic, but also affects the composition of the traffic.[19/] Broadcast licensees are required to ascertain community needs laboriously pursuant to highly specific and detailed procedures prescribed by the Commission and to present programming responsive to the ascertained needs and interests of its community. Furthermore, broadcast television stations may not program entertainment to the exclusion of news, public affairs, local and other informational programming. Cable systems have no such obligations -- which is rather ironic in view of their position as natural

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18/ Ideally, perhaps, cable television and broadcast television both would be deregulated and both would compete fairly and equitably in the acquisition and exhibition of programming.

19/ National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943).

monopolies. When consumers subscribe to cable, they place total control of television reception in their homes in the hands of the cable operator. The irony, of course, of that what normally is a competitive service (i.e., broadcasting) is regulated while the monopoly service is not. The situation recently was described most succinctly (and with typical flair) by Jack Valenti, President of the Motion Picture Association of America (MPAA):

> Again, let us be clear. A cable system is a geographic monopoly, with all the power, hidden or otherwise, that is the mark of the monopolist. If you want to buy cable services in a particular community, there is only one store in town to buy from, and that cable operator has the sole authority to decide what goes or does not go on his channels. Keep in mind conventional cable creates nothing, invests virtually nothing in new programming, rides the back of what has already been bought by others.20/

Unfortunately, the Commission's present proposal to eliminate the distant signal and syndicated exclusivity rules will only serve as an added disincentive for cable to provide any sort of local or informational programming.21/

20/ "The Hobbes Alert," Remarks of Jack Valenti, President, Motion Picture Association of America, Before the 57th Annual Convention of NAB, Dallas, Texas, March 26, 1979. [hereinafter cited as "Hobbes Alert"].

21/ See Section III, infra.

Second, unlike cable television, the broadcast industry has been subjected to stringent limitations on multiple ownership and crossownership to insure diversification of ownership and a multiplicity of voices and program sources. In contrast, the cable television industry is subject to virtually no ownership restrictions. Broadcast licensees may own no more than seven television stations, including five VHF stations and two UHF stations. A cable multiple system operator (MSO) may own any number of cable systems serving any number of subscribers without limitations. In recent years, cable has become an increasingly concentrated industry.22/ If present trends continue, a handful of large cable firms ultimately might control all television service available to a substantial portion of the nation's viewers. Similarly, broadcast networks may own no more than five broadcast television stations. No rule prevents a cable network from owning any number of systems serving any number of subscribers. Similarly, local newspapers may own local cable systems. Although most existing newspaper-broadcast cross-ownership has been grandfathered, it no longer is possible for a local newspaper to put a broadcast station on the air, or for a local broadcast station to publish

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22/ Howard, Herbert H., "Ownership Trends in Cable Television: 1972-1979," Communications Research Center, University of Tennessee, Knoxville (September, 1979). Attached hereto as Exhibit C.

a newspaper in its service area. Finally, alien ownership or control of broadcast stations is prohibited. In contrast, a cable system (or any number of cable systems) holding monopoly control over telecommunications services to consumers may be owned or controlled by aliens or foreign interests. In short, the diversity of programming and the diversification of ownership in broadcasting is regulated. In cable, it is not -- and to reiterate, cable television is a natural monopoly. The inherent dangers or anti-competitive conduct by monopoly cable operators have led some to suggest that cable television be treated like a common carrier, or, at least, the control of transmission facilities be divorced from control of the content of programming transmitted via those facilities.[23/]

Again, NAB is not suggesting that the Commission embark on a course of extensive cable regulation. NAB only wishes to emphasize that cable has been granted extensive regulatory breathing space which broadcasters do not enjoy. This regulatory disparity inevitably affects the respective abilities of each industry to compete with the other -- with cable obviously having the upper hand. NAB only wishes to submit that it defies common sense as well as fulfillment

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23/ See, e.g., The Cabinet Committee on Cable Communications, "Report to the President" (1974) at Chapter III, p. 1 et. seq.; see also Research and Policy Committee of the Committee for Economic Development, "Broadcasting and Cable Television: Policies for Diversity and Change" (April, 1975) at 71.

of the Commission's statutory responsibility to adopt the Commission's present proposals which serve only to further subsidize an unregulated medium incapable of becoming a ubiquitous, universally available service, at the expense of the one industry, broadcasting, which the Commission at the insistence of Congress, successfully has made available to the entire public and which operates and is regulated in the public interest.

2. Cable Holds An Advantageous Position In The Program Acquisition And Exhibition Marketplace.

Cable's competitive advantage in the program marketplace is no secret. It is reflected in a provision of U.S. Copyright Law which was rooted on inter-industry agreements, broken promises, and political maneuvering. It was not a law, as is now obvious, that was based on any degree of foresight or appreciation of the true nature of the issues involved. It was, perhaps, prototypical of the proverb which states that for every complex problem there is a simple solution -- and, usually, it is wrong; or, as Jack Valenti quotes Thomas Hobbes: "Hell is truth seen too late."[24/]

The advantage which the present Copyright Law affords cable in the acquisition and exhibition of programming should be so well known to the Commission by now that no more need be said. Unfortunately, the Commission's myopic and disingenuous position exalting the marketplace rather

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24/ "Hobbes Alert," supra, at 1.

than regulation as the preferred solution rests on a totally invalid appreciation of the present situation capriciously embraced by a Commission with apparent intent on deregulating cable regardless of the true facts. The Commission may not simply wash its hands of the problem and leave the affected industries to slug it out in a "marketplace" which can be perceived only with liberal use of blue smoke and mirrors. The Commission may not leave an industry which it is required to maintain, develop, and regulate in the public interest (and which operates in the public interest in an incomparable manner) defenseless and prey to a competing medium the Commission itself recognizes will serve only a selected subscriber elite.

The Commission rationally cannot fail to realize that lifting the distant signal and syndicated exclusivity rules would leave broadcast and cable television to "compete" in a "marketplace" in which governmental intervention has accorded cable television several tremendous advantages. Cable's first advantage is in the program acquisition marketplace. Cable has a compulsory license to retransmit broadcast programming. Unlike broadcasters, cable operators need not bargain for and purchase programming. They simply fill out the required forms, pay the required fee, and distribute as many broadcast signals as Commission's rules permit to their subscribers. If the Commission were to delete the distant signal rules, as it has proposed to do, then cable systems

could carry as many broadcast signals as they could physically deliver to their systems for the very nominal fees specified in the Copyright Act, 17 U.S.C. §101 et seq.

The extent of cable's advantage in not having to enter the program acquisition marketplace is demonstrable in dollar terms. The "average" cable system's copyright fee for providing the same service to the same number of viewers represents less than 1% of the program expense the local broadcast station would incur. NAB has determined what the "average" cable system paid in copyright fees for carrying distant independent and network stations. During the first six months of 1978, according to cable systems' statements of account filed with the Copyright Office, cable systems reported 7,727 instances of distant signal carriage. This included 2,624 instances of independent station carriage, 4,230 instances of network affiliate carriage, and 873 instances of noncommercial station carriage.[25/] Under the terms of the Copyright Act, this translates into 3,900 distant signal equivalents. Assuming for purposes of argument that cable systems paid 14 million dollars in copyright royalties during 1978, the payment for a full distant signal equivalent was $3,589.74. Because an independent counts as a full distant signal equivalent, the "average" cable system paid $3,589.74 for the right to carry

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25/ See "NAB Suggested Broadcasters Justification," Exhibit E, filed July 31, 1979, before the Copyright Royalty Tribunal.

a distant independent station. Because a network affiliate counts as .25 distant signal equivalents, the "average" cable system paid $897.44 for the right to carry a distant network affiliate. To make a proper comparison one must compare what the cable system would have paid to serve the comparably situated stations' entire audience; therefore, it is necessary to extrapolate what the system would have paid serving 100% of the viewers in a market. Assuming that the "average" system served 20% of the viewers (20% representing the nationwide cable penetration figure), then the royalty fee figures must be multiplied by five to provide a comparable figure. The resultant fee estimates are $17,948.72 for carriage of a distant independent station to all viewers and $4,487.18 for carriage of a distant network affiliate to all viewers. To make the most favorable comparison for the cable systems' purposes, one can compare these figures with the film and tape rental expense of the average independent and affiliated stations. Based on the NAB 1979 Television Financial Report, reflecting 1978 financial figures for stations, the typical independent station paid $1,329,200.00 in film and tape rental expense. The average network affiliated station paid $173,800.00 in film and tape rental expense. The cable system's fee for providing one distant independent represents 1.35% of a local independent's film and tape rental expense. Similarly, cables' copyright fee for carrying a network affiliate

constitutes approximately 2.6% of the local affiliate's film and tape rental expense. A more proper comparison involves comparing the cable system's copyright royalty fee with the total program expense of a similar station. Thus, for example, while the local cable system would be paying $17,948.72 for importing a distant independent station available to all viewers in the market, the local independent stations would have been paying $2,790,200.00 to provide a similar channel of independent programming. Similarly, while the cable system would have been paying $4,487.18 to carry a distant network affiliate (the local network affiliate) would have paid $877,900.00 for its programming. In either case, the cable system ends up paying less than 1% of what the local stations pay for providing the same service to the same number of subscribers. Another perspective comes from MPAA President Jack Valenti:

> The fact is that some 75 percent of the 3,500-plus cable systems (with some 14 million customer homes) in the United States pay more for postage stamps to mail out their monthly bills to customers than for all the network and individual TV station programming they use! It is charity on a grand scale.26/

These program cost comparison figures are placed in further perspective by comparing the relative position

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26/ Valenti, Jack, "Why Such Charity for Cable TV?," Washington Post, March 8, 1979, at A-15.

of the cable operator and a broadcast competitor. The cable operator constructs its physical facilities, pays the nominal copyright fee, and begins to provide service. A new broadcast station constructs its facilities, but may not begin to provide service until it has entered the program acquisition marketplace. One competitor, the cable system, provides numerous channels, perhaps, for a nominal fee. The new broadcast station provides a single channel at marketplace prices. The only distinction in the service provided is that the cable operator has chosen to distribute his signals via cable, while the broadcaster has determined to distribute a signal over-the-air. The only real distinction is the technological means of program distribution. Yet, the cable operator pays nominal compulsory license fees, while the broadcaster pays prices established in the marketplace. Similarly, one might compare the cable system with a translator facility which also will retransmit a distant signal over the air, rather than by cable. Again, the cable operator pays its nominal compulsory license fee. In contrast, the translator operator, whether profit or non-profit, must obtain consent from the originating station, i.e., retransmission consent.[27/] Furthermore, unless the translator operates on a not for profit basis, then its transmission of broadcast programming is subject to full

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27/ 47 U.S.C. §325(a).

copyright liability.[28/] Parenthetically, NAB must concur with the consistent call of the National Cable Television Association (NCTA) for parity between cable systems and translators. Indeed, NAB will heartily join hands with NCTA in seeking retransmission consent and full copyright liability for profit-oriented cable television systems.

Cable's highly advantageous treatment in the copyright law further permits cable systems to flout the marketplace. Cable systems need not respect exclusivity provisions bargained and paid for by local broadcast stations in their acquisition of syndicated programming. While the Commission's present rules provide some protection, these are precisely the rules the Commission proposes to eliminate. Presently, in hundred plus markets and to a substantial degree in "second fifty" markets (and ultimately, in all markets if the Commission has its way), cable systems may ignore otherwise valid contractual agreements reached in the course of marketplace negotiations. Thus, for example, a station in city A may purchase the syndicated version of "Happy Days" with exclusivity against exhibition of the show by both other broadcast stations and cable systems within its local market area (35 mile zone,. Unless the Commission's rules provide otherwise, a cable system still may carry "Happy Days" on a distant signal

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28/ 17 U.S.C. §§106 and 111(a)(4).

without the slightest regard for the exclusivity rights agreed to by the broadcaster and the program supplier. In fact, the cable system could import numerous signals in which "Happy Days" appears. A local station, having paid a substantial price for an exclusive right to exhibit "Happy Days" in its market, may then find that the cable system is also showing "Happy Days" ten or fifteen times a week via carriage of distant stations which broadcast "Happy Days".29/

Again, by way of comparison, if the local cable system wanted to show "Happy Days" on an origination basis, then it would have to enter the program acquisition marketplace and bargain against the station for the right to show the program or at least against the station's exclusive right. However, when the cable system elects to show "Happy Days", the same program to the same audience, but via importation of a distant signal, it never need enter the marketplace nor pay a marketplace price. Similarly, a local system channel lessee will be disadvantaged by cable's compulsory license. If, for example, an entrepreneur wishes to acquire and show movies or syndicated programs on local leased access channels, any exclusivity arrangement it may make with the program supplier will be meaningless with respect to the system's importation of the same program on a distant signal.

29/ This is not uncommon. See Comments of NAB Docket No. 20988, filed March 1, 1977, Volume II, Exhibit C.

For some reason, the Commission now is prepared to relegate these concerns about the present competitive disparity to the growing heap of "historical curiosities."[30/] To the local broadcaster who has paid a small fortune for "Happy Days," this is not historical curiosity. It is a real and present inhibition on his ability to compete and to provide the most attractive service to all the viewers in his community. To the viewer, it may mean a program of lesser expense and lesser quality than an especially attractive off-network series like "Happy Days". To the station it is uncertainty and confusion. Syndicated program purchases made, perhaps, well in advance of exhibition dates ultimately may prove to be unwise when local cable systems change distant signals or the distant stations themselves change their program schedules. In short, stations may be expected to compete with competitive stations or exhibitors who are on the same footing in the marketplace. It is something else, and indeed, nearly impossible, to anticipate the unknown, namely, what many local cable systems and more numerous distant broadcast stations will do in the selection and scheduling of syndicated programming.

The Commission's rules, as adopted in 1972, at least lend a semblance of balance or parity to the

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30/ Notice, supra, at ¶61.

competitive relationship of broadcast and cable television - which is exactly what they were designed to do! In proposing to scrap the distant signal and syndicated exclusivity rules, the Commission would substantially enhance cable television's already advantageous position. In no way could such a course of action be squared with the Commission's statutory mandate to promote service to the entire public. Instead, it would promote service to an elite minority of cable subscribers at the expense of service to all the public.

3. The Commission Arbitrarily Is Ignoring The Critical Nexus Between Its Rules And The Copyright Law.

The Commission's rather baldfaced attempt to skirt this issue by relegating the "unfair competition" issue to the realm of historical curiosity blinks reality. Since well before (and long after) adoption of the 1972 rules, the Commission, Congress, and the various affected interests never viewed either the signal carriage and exclusivity rules or copyright liability for cable retransmission of broadcast signals in isolation. The necessity and propriety of various regulatory and legislative alternatives invariably were judged in relation to each other. NAB recounts the following historical facts not to reopen old wounds or reargue dead letters such as the 1971 consensus agreement. The point, ignored with a wink and a blink by the Commission, is the real and crucial interrelationship between cable's use of distant signals and the nature of its copyright liability and, more significantly, that neither Congress nor the Commission ever contemplated, much less intended, that cable television be accorded its present competitive advantage.

Both the Commission in 1972 and the Congress in 1976 recognized the critical nexus between the Commission's rules

and the copyright law and intended that their mutually counterbalancing effects would provide a pragmatic, balanced and fair solution to a thorny dilemma. Neither Congress nor the Commission sought to provide any industry, interest, or group with an advantage. For example, cable's advantage in escaping full copyright liability for a compulsory license at nominal fees was counterbalanced by rules restricting cable systems' use of distant signals. Similarly, broadcasters would face a "subsidized" competitor but only to a limited extent. In both cases, the public would gain through removal of practical obstacles to cable's growth and development, while the continuing expansion and improvement of broadcast television service and an increasing supply of program product were assured.[31/]

31/ Although, as then FCC Chairman Dean Burch recognized broadcasters finished last when all was said and done. Cable Television Report and Order, 36 FCC2d 141, 291 (1972) (Concurring Statement of Chairman Dean Burch) (hereinafter cited as CTRO).

a. The Commission Consistently Has Recognized The Interrelationship Of Its Rules And The Copyright Law.

In 1968, the Commission began its inquiry into the long-range development of cable television.[32/] Among other things, the Commission hoped "to establish general guidelines and procedures governing television broadcast signal carriage so as to eliminate the necessity for the burdensome evidentiary hearings required by the 1966 rules."[33/] Many new and innovative proposals, such as retransmission consent and commercial substitution, were advanced as solutions to the distant signal dilemma. Nonetheless, following oral presentations and panel discussions in March, 1971, the Commission returned to its previous regulatory strategy -- exclusivity and a limitation on the number of distant signals to be imported. In August, 1971, the Commission issued a letter of intent to Congress outlining its proposed regulatory program for cable.[34/]

32/ Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 18397, 15 FCC2d 417 (1968).

33/ CTRO, 36 FCC2d at 148.

34/ Id., Appendix C, 36 FCC 2d at 260.

Meanwhile, since 1966, the issue of copyright liability for CATV carriage of broadcast television programming had been the subject of hearings in Congress and negotiations between the cable industry and program owners. However, neither the Congress nor the industry negotiators had come near resolving the cable copyright issue when the Commission initiated its 1968 inquiry. During the course of that inquiry, several attempts were made by cable, broadcast and copyright interests to resolve their differences. Despite the blessings and encouragement of Congress, the Commission and the White House Office of Telecommunications Policy (hereinafter OTP), these attempts failed.

In the late fall of 1971, OTP undertook the task of attempting to draft a compromise on signal carriage and copyright which might be agreeable to the principal industries concerned. On November 5, 1971, the OTP compromise was presented to representatives of NCTA, the copyright owners (MPAA), the Association of Maximum Service Telecasters (hereinafter MST) and NAB. All parties were given approximately one week to accept or reject the proposal as presented. The compromise was accepted in principle by the NAB Board

of Directors on November 11, 1971. NCTA, MST and the copyright owners followed suit and the Consensus Agreement was born. 35/

When NAB's Board of Directors accepted the OTP compromise, it did so reluctantly:

> The Board of Directors of the National Association of Broadcasters reluctantly accepts the compromise plan put forth by the Office of Telecommunications Policy on a "package" basis as the best of any present alternative. 36/

The broadcast industry's reluctance to accept the OTP plan stemmed from its very nature -- compromise. As Broadcasting magazine noted on November 16, 1971 (at 16), "[I]t's more than broadcasters would have preferred to give up."

The concessions broadcasters made to the cable industry were indeed substantial. First, the broadcast industry reluctantly consented to substantial distant signal importation by CATV systems in every size market.

35/ For a full history of the 1971 Consensus Agreement, see Petition for Rule Making, RM-2537, filed February 11, 1975, by NAB. [hereinafter "NAB Consensus Petition"]. A copy is attached as Exhibit D.

36/ Id., Appendix A.

Second, broadcast interests acceded to a reduction in network program exclusivity (non-duplication) protection.[37/]

Third, in agreeing to the Consensus, broadcasters had to settle for less restrictive "leapfrogging" provisions.

Finally, NAB and the broadcast industry made significant concessions regarding specific terms of the copyright legislation embodied in the Consensus. First, the Consensus provided for a broader scope of compulsory licensing than broadcasters desired. NAB had supported a more limited compulsory license which would have applied only to CATV carriage of required local signals and retransmission of outside signals into outlying areas and into smaller markets where an adequate volume of service was not available from local stations. NAB squarely opposed any compulsory license covering the importation of distant signals into larger markets, thus requiring CATV systems to bargain with and pay copyright owners for a license to retransmit their programming, just as broadcasters do.

37/ Apparently, even this was not enough for NCTA, which, notwithstanding its agreement to the Consensus, filed a petition for rule making in early 1973, looking toward eventual elimination of non-duplication protection. See id.

The Consensus, however, provided for a compulsory license for local and distant signals authorized by the Commission's initial rules plus any grandfathered signals. No compulsory license was provided for any additional signals which might eventually be authorized by the Commission's rules.

Another broadcast industry compromise in the terms of copyright legislation concerned non-network program exclusivity. NAB had posited that whenever a television station had bargained and paid for copyright exclusivity for a particular program or series of programs against other television stations in the same market, the station should automatically receive exclusivity for that program or series on any CATV system in that market which retransmitted a lower priority (based on predicted signal grade) television signal from another market. According to NAB's position, this automatic exclusivity as against CATV retransmission would cover a reasonable number of years and a reasonable area. It would apply in all markets, regardless of size. Finally, NAB had submitted that copyright legislation provide a reasonable period of pre-sale exclusivity to prevent CATV

retransmission of programming into smaller markets where that programming had not yet been sold despite its sale to major market stations.[38/]

The Consensus, while providing for limited regulatory exclusivity, contained no provision to insure copyright exclusivity for non-network programs. The Consensus provided only that as to subsequently authorized distant signals, the Commission could place no limit on the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings. Even the regulatory non-network program exclusivity provided in the Consensus fell far short of the broadcasters' position. First, it applied only to CATV systems in the top 100 markets. The smaller markets were left without programming protection. Second, pre-sale exclusivity was limited to the top 50 markets. Finally, existing CATV systems were grandfathered and, thereby, exempt from any future obligation to respect copyright exclusivity agreements or to delete (pursuant to the regulatory exclusivity provisions) any non-network program from any signal that was carried, or that any other CATV system in the community was carrying prior to March 31, 1972.

38/ NAB Position on CATV Copyright Legislation, March 24, 1971, Id., Appendix B.

Broadcasters made these compromises primarily in return for the cable industry's major concession -- namely, to support the copyright legislation as specified in the Consensus. Again, the point is not to chide the cable industry for its nearly immediate departure from the provisions of the Consensus, but to emphasize from broadcasters perspective the inextricable tie between the copyright liability of cable systems and the rules adopted by the Commission in 1972.

What is more important for present purposes, however, is that the Commission itself also recognized the necessary interrelationship between its rules and the copyright law. In fact, the single most important aspect of the Commission's public interest determination was copyright. Copyright's key public interest role in the development of cable was described by the Commission as follows:

> We believe that adoption of the consensus agreement will markedly serve the public interest:
>
> (i) First, the agreement will facilitate the passage of cable copyright legislation. It is essential that cable be brought within the television programming distribution market. There have been several attempts

> to do so, but all have foundered on the opposition of one or more of the three industries involved. It is for this reason that Congress and the Commission have long urged the parties to compromise their differences.
>
> (ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. The development of the industry, at least with respect to assessing copyright costs, would be settled by the new copyright legislation and its future no longer tied to the outcome of pending litigation.
>
> (iii) Finally, the enactment of cable copyright legislation by Congress -- with the Commission's program before it -- would in effect reaffirm the Commisson's jurisdiction to carry out that program, including such important features as access to television facilities. 39/

The Commission's views were echoed in the concurring statement of Commissioner Richard Wiley:

> Edmund Burke has said: 'All government - indeed . . .every prudent act - is founded on compromise.' Ultimately, I have been persuaded that the adoption of this compromise package for the further development of cable television in this country is, administratively, a prudent act ....
>
> ....

39/ CTRC, 36 FCC 2d at 166-167.

> ...Fundamentaly, the decision which each member of the Commission had to address was whether or not the compromises involved resulted in a program which, in the final analysis, served the public interest.
>
> I have made that decision. I concur. 40/

Because copyright legislation was central to the FCC's regulatory program for cable, the Commission had solicited and received the views of Congress in the course of its deliberations. For example, in its August 5, 1971, "Letter of Intent," the Commission sought the advice of Congress:

> We welcome your participation in this most important matter and, in effect, a continuing partnership. 41/

Thus, in making its public interest determination regarding the Consensus, FCC Chairman Burch sought Senator McClellan's advice. Specifically, the Chairman noted the efforts of the Senator to promote achievement of an agreement:

> I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus. 42/

40/ CTRO, 36 FCC 2d at 324, 325. (Concurring Statement of Richard E. Wiley.)

41/ CTRO, Appendix C, 36 FCC 2d at 278, 279.

42/ Letter from Hon. Dean Burch to Hon. John McClellan, January 26, 1972, CTRO, Appendix E, 36 FCC 2d at 286.

In response, Senator McClellan acknowledged his efforts to bring about resolution of the copyright issue and expressed his belief that the Consensus served the public interest:

> I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.
>
> ....
>
> ...[I]t is the intention of the subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules. 43/

Thus, with Congressional affirmation of its adoption of the regulatory provisions of the Consensus and with the expectation that copyright legislation would be enacted, the Commission adopted its CTRO on February 2, 1972.

The Commission's concern about the interrelationship between its rules and the copyright law did not end in 1972. The Commission on several occasions expressed concern

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43/ Letter from Hon. John L. McClellan to Hon. Dean Burch, January 31, 1972, CTRO, Appendix E, 36 FCC 2d at 237.

that copyright legislation as envisioned in the consensus to complement its rules might not be enacted. Despite its express expectations that the parties would cooperate to achieve passage of copyright legislation as specified, the Commission squarely addressed the possibility that it might not be enacted.

In its 1972 CTRO the Commission emphasized that "for full effectiveness, the Consensus agreement requires Congressional approval, not just that of the Commission."[44/] In recognition of this, the Commission then virtually committed itself to revisit the rules if Congress failed to act:

> Without Congressional validation, however, we would have to reexamine some aspects of the program. [45/]

The Commission was no less firm in its commitment to revisit the rules when it rejected broadcast requests to postpone the effective date of the 1972 rules until the parties had agreed on the language of copyright legislation:

44/ CTRO, 36 FCC 2d at 167.

45/ Id.

> Finally, we reach ABC's contention that the Commission will have to take action if copyright legislation is not forthcoming within a reasonable period of time. We agree with this position, and have so stated in Paragraph 65 of the Report. It would be premature to speculate now what action would be necessary in that event. We hope never to reach that point since it is our expectation that the parties will expeditiously reach an accord and that copyright legislation will be enacted once these rules become effective. [Footnote omitted]. We have decided after much study and debate to take the first step. We will revisit the matter if our estimate proves wrong that adoption of our program will facilitiate copyright legislation. 46/

A year after the Commission adopted its 1972 rules, FCC Chairman Burch reiterated the Commission's intent to revisit those rules during Congressional "oversight" hearings. Responding to a question from Senator Cook, the Chairman stated:

> Mr. Burch: In a sense - in our report, Senator, we said that if no copyright legislation were forthcoming, that we would have to revisit, reevaluate that which we have done.
>
> ....

46/ Reconsideration of CTRO, 36 FCC 2d at 329.

> I will say this: If this bill [S.1361] is not introduced and passed within a reasonable period, I would say within a year and a half, we are simply going to have to revisit. 47/

Of course, as is now all too well known, the Consensus soon became a dead letter due largely to the failure of the National Cable Television Association to support the copyright legislation which it had agreed to support in the Consensus. 48/ Again, NAB does not raise this in order to cast aspersions on NCTA's past actions. What NAB wishes to do is remind the Commission that it has never articulated a rational explanation for its present position of ignoring the critical nexus between its rules and the nature of cable television's copyright liability for use of broadcast signals. Despite the Commission's consistent recognition of this critical connection, it now has seen fit to properly ignore it as "historical curiosity" and walk away from the entire issue. This is not a rational or responsible course of action, nor is it one which can be squared with the intent of Congress or the Commission's statutory obligations.

47/ Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, 93rd Cong., 1st Sess. at 75 (1973) (Overview of FCC).

48/ For a fully documented presentation of NCTA's failure, See NAB Consensus Petition, supra.

b. The Legislative Process Leading To Enactment Of The 1976 Copyright Act Also Reflects The Interrelationship Between Copyright and The Commission's Rules.

The nexus between the Commission's rule and the copyright law is no more apparent than it was during the legislative process leading up to enactment of the new copyright law. Following adoption of the Commission's rules in 1972, Senator John McClellan introduced S. 1361 to revise the copyright law. Unlike the consensus provision concerning fees, Section 111(d)(2)(B) provided for a statutory fee schedule for cable's compulsory license to retransmit broadcast signals. Moreover, the scope of the compulsory license was much broader than that envisioned by the Commission. The compulsory license in the Bill would have covered cable carriage of local and distant signals according to the Commission's rules (much as does the present law). The Commission, however, had envisioned a law in which only those signals authorized or "grandfathered" under its 1972 rules would be subject to the compulsory license. Subsequently, authorized distant signals could be carried by cable systems only pursuant to licensing agreements negotiated by the cable systems with the respective copyright owners of the programming they wish to transmit. After over a year of legislative

debate, the cable trade press was positing that it might well be possible for the cable industry to keep copyright legislation off the books indefinitely. The following statements in the CATV trade press are indicative:

> "How much will enough be before some of the other MSO's realize that complete elimination of Section 111 of S.1361 is within our grasp? 49/
>
> There is an excellent chance that the copyright bill will be passed without cable even being mentioned as being liable for copyright fees. 50/
>
> S.1361 is not inevitable. In fact, copyright liability of any kind need not be considered inevitable. There is a long way to go before legislation can be enacted. There will be significant opportunity along the way to resist -- to offer substitute legislation, to work for a separate bill for cable, to kill off copyright completely. 51/

In that environment, Section 111 remained in the Bill, but in substantially watered-down form. The specific terms of Section 111 primarily reflected an agreement reached by the National Cable Television Association and the Motion Picture Association of America. From MPAA's

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49/ Cable News, January 6, 1975, at 14.

50/ Cable News, December 2, 1974, at 22.

51/ Cable News, October 14, 1974, at 13.

perspective, that agreement did little more than stem the growing tide towards elimination of Section 111 completely. States Jack Valenti:

> On behalf of the Motion Picture Association of America, I agreed to the formula now locked in the law. But I submitted not because I thought it was right, but because if I didn't agree, God only knows how miniscule the copyright fee schedule might have been, perhaps zero. We all know the original plan offered by the late Senator McClellan contemplated a fee schedule of about 5% of gross cable revenues. In successive amendments in successive committee actions that fee schedule began to dissolve like snow under a blinding sun. When it had reached the 0.675% level because of the political clout of the cable industry, the MPAA, in the urgent manner of one whose main artery has been severed, applied a political tourniquet to stop the flow of copyright blood. At another time, in another place, perhaps we could bring some facts and truth into the argument so that the merits of free competition might have another chance to be viewed, weighed and accepted. 51A/

However, in the absence of consideration of the merits of real competition, MPAA premised its agreement on the existence of FCC rules limiting distant signal carriage and providing for syndicated exclusivity protection. Broadcasters, too, also

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51A/ "Hobbes Alert," supra, at 4-5.

resisted the temptation to mount substantial opposition to enactment of the law primarily because of the ameliorating and counterbalancing effects of the Commission's rules. Again, NAB is not bemoaning the cable industry's successful attempts to reduce their copyright liability to a nominal level, but pointing to the continuing nexus between the nature and extent of cable's copyright liability and the Commission's rules. This nexus is fully reflected in the legislative history of the copyright law as it is in the Commission's action in adopting the Rules.

c. The Enactment Of The Copyright Compulsory License Provision For Cable Use Of Broadcast Signals In No Way Reflected Congressional Intent To Give Cable An Advantage In The Marketplace.

The new Copyright Law and its legislative history hardly permit the Commission to walk away from the public interest questions arising from cable's favored position in the marketplace; nor does it evidence any Congressional intent that cable should be favored in the marketplace.

First, the compulsory license was adopted not with the intent of giving cable a competitive advantage. Primarily, it was adopted for reasons of practicality:

> The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.52/

Nowhere did Congress express or imply any intent to favor cable. The fundamental concern was establishing copyright liability for cable use of broadcast signals, given Congress' finding that:

> Cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to creators of such programs.53/

52/ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976).

53/ Id.

Thus, the compulsory license was a product of practicality, not policy.

In enacting the Copyright Law, Congress intended to establish a mechanism for payment of royalties by cable systems for their use of broadcast programming, not to tamper with communications policy. If anything, enactment of the Copyright Law confirmed the Commission's responsibility to regulate signal carriage. Congress stated explicitly that it was aware of the Commission's rules and had no intention of interfering with them:

> In particular, any statutory scheme that imposed copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.54/

Furthermore, Congress did not signal the Commission that the very rules designed to restore competitive balance to the cable-broadcast relationship should be eliminated with the passage of copyright legislation. Congress specifically

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54/ Id. at 39.

warned the Commission not to seize on the passage of copyright legislation as the rationale for substantial revisions in its cable television rules:

> We would, therefore, caution the Federal Communications Commission... not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas were the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.55/

Congress, while establishing a scheme of nominal payments to copyright owners, clearly intended that the Commission retain the responsibility to regulate the extent of cable's use of broadcast signals as a matter of communications policy. Thus, just as Congress recognized the nexus between the copyright provisions and the Commission's regulations, the Commission also must recognize how the copyright law affects matters of communications policy. Furthermore, the Commission must not view the present copyright law as an excuse for washing its hands of the present competitive disparity, but must squarely face the issue as a matter of communications policy. Given the Commission's clear statutory mandate to promote and develop broadcast

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55/ Id.

service and, generally, to regulate in the interest of the entire public, the Commission must at the very least establish competitive parity between broadcasting and cable through regulatory means.

In sum, the Commission, like Congress, also must recognize the interplay between the provisions of the copyright law and its distant signal and syndicated exclusivity rules. The Commission's rules are the very foundation of the compulsory license provision. While Congress may have recognized the need to modify the Commission's rules, it did not envision operation of the compulsory license scheme in a regulatory void. Thus, if anything, the Commission is constrained not to remove a basic structure of regulation assumed by Congress in enacting the copyright law.[56/]

56/ The Commission also must consider how another really major development resulting from cable deregulation has served to unsettle the present compulsory license scheme. That particular development was the initiation of nationwide satellite distribution of certain independent broadcast stations, which resulted from elimination of the so-called "leapfrogging" rules. Elimination of the distant signal and syndicated exclusivity rules would permit satellite distribution to alter even more drastically the scenario visioned by Congress in opting for the compulsory license in lieu of full copyright liability.

APPENDIX D

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05034

December 29, 1980 - CT

Cable Television Industry Revenues Continued to Increase In 1979 Total Assets Exceeded $3 Billion

Today, the FCC released financial data based on the reported results of the cable television industry's operations for 1979. Operating revenues totaled over $1.8 billion, a 20% increase over 1978 revenues.

Total operating expenses were $1.1 billion, leaving an operating income of $690 million or a 38.5% operating margin before expenses of depreciation/amortization, interest and taxes.

Net income before taxes was approximately $199 million and the cable industry's total assets had a book value of $3.21 billion (up 12% from 1978).

Pay cable services yielded revenues of $355 million or 19.6% of total revenues. The percentage of total revenues attributable to pay cable operations increased by 6.6% in 1979.

The national average monthly subscriber rate for basic service was $7.37 in 1979, ranging from an average low of $4.00 in Washington, D.C. to a high of $17.88 in Alaska. The national average cable television installation fee was $16.99, ranging from $10.00 in Rhode Island to $60.00 in Washington, D.C.. The national average monthly rate for pay cable TV was $8.73, ranging from $4.39 in Mississippi to $13.67 in Washington, D.C..

In 1979, pay cable services were offered by 1,361 financial entities comprising 4,887 communities in nearly every state. California, New York and New Jersey continued as the leading states in terms of pay cable revenues.

(over)

Approximately 8,500 communities with over 15 million subscribers (households) were served by cable television in 1979. These 8,500 communities were consolidated into almost 3,000 financial entities for reporting purposes. A financial entity is defined as one or more cable TV community systems which report to the Commission as one business entity -- upon meeting certain ownership and technological requirements.

The average financial entity had approximately 5,250 subscribers and total revenues of $607,000 in 1979.

The attached tables provide financial data nationally, by region (as defined by the Census Bureau), by state and by size of system. (See List of Tables).

These financial reports are based on filings covering 94 percent of all cable subscribers in the nation. The remaining 6 percent are subscribers to systems whose filings are incomplete, inaccurate, or delinquent. National totals have been estimated for the entire industry predicated on the large number of filings in the data base. The totals appear at the end of Table III under the heading "United States (estimated based upon 100% of subscribers)".

Several financial ratios providing liquidity, leverage and profitability information are displayed in Tables IV and V.

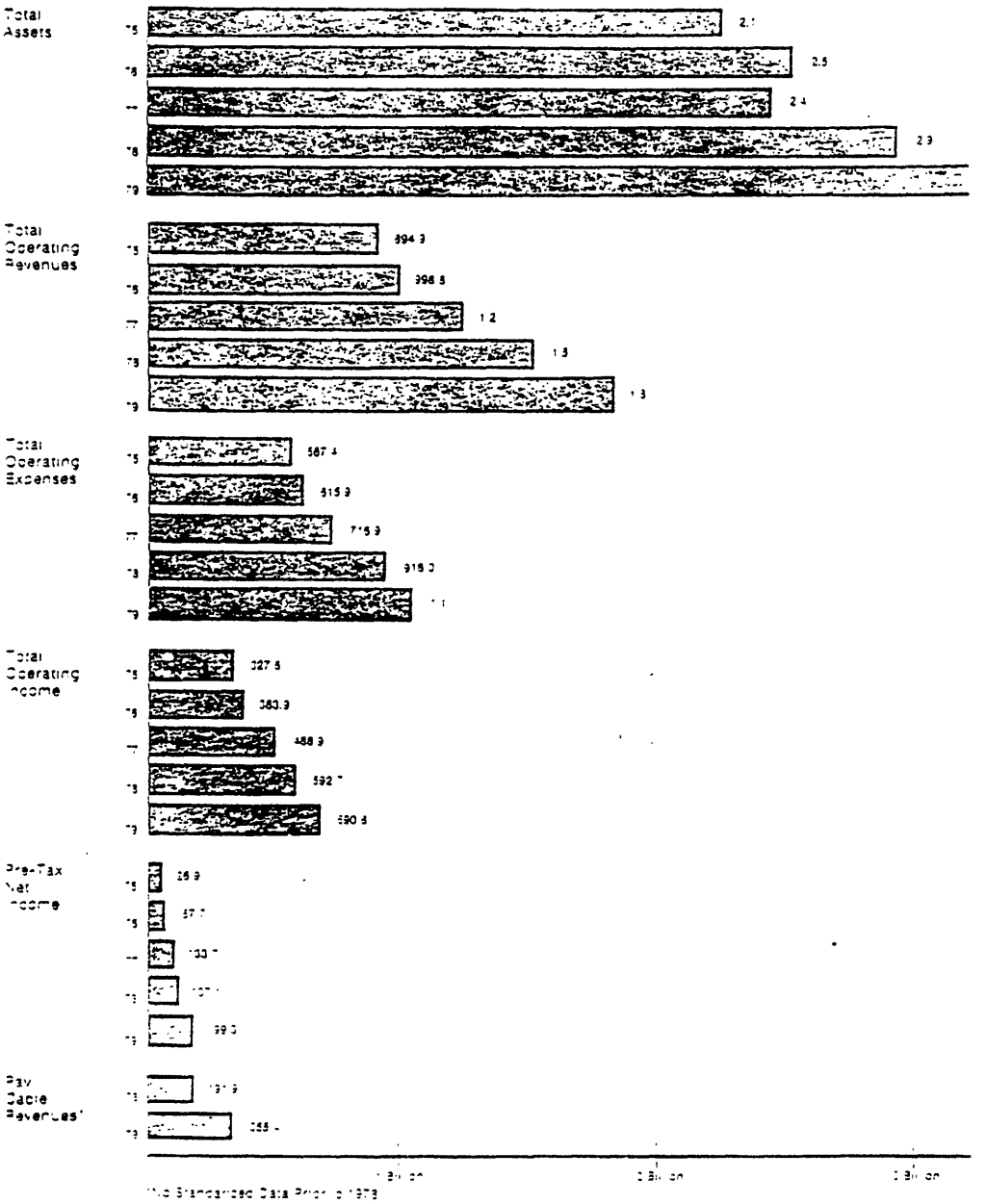
The Commission noted that Tables I through VII present only major categories of financial information and are not designed to provide a complete income state or balance sheet picture. For example, total revenue and expense figures will not necessarily equal the sum of the accounts immediately preceding. For a more complete picture, see Tables VIII and IX. It should also be noted that, because entities with less than 1,000 subscribers are not required to file liability and equity information, the reported sum of industry-wide assets will not equal the sum of liabilities and owner's equity.

Comments on the data and suggestions for further information should be addressed to the Research Division of the Cable Television Bureau.

- FCC -

LIST OF TABLES

Financial Highlights 1975 thru 1979
(in millions of dollars)



*Not Standardized Data Prior to 1978

TABLE II

SELECTED FINANCIAL DATA
1975 THRU 1979

	1975	1976	%CHANGE '75-'76	1977	%CHANGE '76-'77	1978	%CHANGE '77-'78	1979	%CHANGE '78-'79	%CHANGE '75-'79
Communities	6,265	7,198	14.9	8,369	16.3	8,200	-2.0	8,539	4.1	36.3
Financial Entities	2,443	2,349	-3.9	2,557	8.9	2,866	12.1	2,993	4.4	22.5
Subscribers	9,863,020	11,648,498	18.1	12,832,014	10.2	14,113,945	10.0	15,759,500	11.7	59.8
Average Subscriber Rate	$6.21	$6.49	4.5	$6.85	5.6	$7.03	2.6	$7.37	4.8	18.7
Operating Revenues	$ 894,918,101	$ 999,753,785	11.7	$1,205,875,773	20.6	$1,511,028,545	25.3	$1,817,144,960	20.3	103.1
Operating Expenses	$ 567,360,186	$ 615,882,714	8.6	$ 716,950,304	16.4	$ 918,025,164	28.1	$1,176,595,172	22.7	98.6
Net Income	$ 26,884,313	$ 57,662,612	114.5	$ 133,736,554	131.9	$ 137,120,149	2.5	$ 199,128,409	45.4	641.4
Total Assets	$2,131,526,689	$2,515,732,873	18.0	$2,459,458,111	-2.6	$2,870,739,878	17.2	$3,211,574,187	11.9	50.7

APPENDIX E

Table 5

BROADCAST EXPENSE DATA OF 3 NATIONAL TELEVISION NETWORKS AND STATIONS,
(Amount in Millions of Dollars) 1/

Broadcast Expenses	3 National Networks	15 VHF Owned and Operated VHF	Other VHF Stations		UHF Stations		Total VHF	Total UHF	Total TV Stations	3 Networks and TV Stations
			Affiliates	Independents	Affiliates	Independents				
Technical expenses, Total	2/	$ 46.9	$ 199.5	$ 36.1	$ 35.5	$ 30.7	$ 280.5	$ 65.7	$ 346.3	2/
Technical payroll	2/	26.6	130.7	26.7	18.6	16.7	192.0	35.3	227.3	2/
All other technical expenses	2/	20.3	68.8	7.4	16.9	13.9	88.5	30.4	119.0	2/
Program expenses, Total	$2,699.7 2/3/	239.6	723.8	380.2	82.7	116.0	1,146.9	196.7	1,343.6	$4,309.6
Payroll for employees considered "talent"	331.2 2/	21.1	65.2	8.4	5.8	7.5	94.7	7.5	102.2	1,088.2
Payroll for all other program employees		93.8	260.2	75.5	32.3	15.7	379.6	48.0	427.6	
Rental and amortization of film and tape	1,757.6 4/	44.8	198.6	106.5	31.8	62.6	343.8	94.1	436.1	2,193.5
Records and transcriptions	6.3	0.6	1.7	0.1	0.1	0.3	2.2	0.3	2.5	8.7
Cost of outside news services	NA	6.3	16.7	3.8	2.3	0.9	23.8	3.1	26.9	26.9
Payments to talent	NA	13.7	7.1	1.2	0.5	1.0	20.9	1.4	22.4	22.4
Music license fees	13.2	11.6	45.4	6.4	4.8	3.8	63.4	9.6	73.0	85.3
Other performance and program rights	169.4	11.8	14.1	10.1	1.1	20.5	35.2	11.6	46.9	216.3
All other program expenses	422.3	48.0	126.8	19.8	15.3	16.8	189.8	37.1	237.1	750.4
Selling expenses, Total	143.3	64.1	249.6	39.5	37.6	39.3	353.3	76.8	430.2	573.6
Selling payroll	26.8	17.9	130.8	16.9	21.9	16.1	165.6	30.8	203.6	230.6
All other selling expenses	116.5	46.3	118.8	22.6	15.6	23.3	187.7	38.9	226.6	343.0
General and Administrative expenses, Total	241.8	82.3	639.8	81.8	87.8	88.8	883.8	177.8	988.8	1,221.8
General and administrative payroll	100.2	15.8	96.1	12.7	15.9	12.8	124.2	27.9	152.2	252.8
Depreciation and amortization	36.5	10.6	144.4	14.8	24.3	19.2	169.8	43.5	213.3	247.8
Interest	NA	-	63.8	7.1	11.7	10.9	58.1	22.3	72.4	72.4
Allocated costs of management from home office or affiliate(s)	NA	27.1	72.8	5.2	6.8	7.2	106.3	14.1	118.3	118.3
Other general and administrative expenses	105.8	28.8	208.4	41.2	28.2	31.8	356.6	69.2	423.8	530.5
Total broadcast expenses	3,086.3 3/	432.8	1,816.1	936.8	253.8	263.8	2,583.7	516.8	3,100.6	6,186.9

1/ Last digits may not add due to rounding.

2/ Because methods of treating technical and program expense differ among the networks, the two figures were combined.

3/ Includes $60,306,672 for cost of inter-city and intra-city program relay circuits.

4/ Amortization expense on programs obtained from others.

5/ The networks reported spending $328 million on their news and public affairs operations: this figure contains costs already included in other expense items.

NA Individual details not reported.

Mr. KASTENMEIER. That concludes the panel's presentation. I think there are a number of questions to be asked and I would like to defer my own. The gentleman from Michigan may be leaving shortly so I would like to extend an opportunity to him before he leaves.

Mr. SAWYER. Thank you, Mr. Chairman. I do have an unavoidable fixed time commitment. I only have a couple of questions. One, Mr. Wasilewski, I was interested whereas you are against the compulsory licensing you seem to favor compulsory carriage of local signals. Do you not think that is a little inconsistent?

Mr. WASILEWSKI. I think it is good public policy.

Mr. SAWYER. Would you trade off to get rid of compulsory licensing and also eliminate compulsory buying.

Mr. WASILEWSKI. I would not want to trade that off.

Mr. SAWYER. You would rather have compulsory licensing than give up the compulsory buying?

Mr. WASILEWSKI. I am talking about marketplace and I do not think compulsory licensing provides the marketplace for the profession of program products.

Mr. SAWYER. But compulsory carriage is just as much out of the open marketplace as compulsory selling and I want to know, are you sufficiently against the elimination of the compulsory carriage that you would forgo eliminating the compulsory license?

Mr. WASILEWSKI. No; I do not think that is a quid pro quo operation. I think compulsory carriage of local signal has a direct relationship to the copyright law. For example the local broadcaster purchases and negotiates and purchases a product from the copyright proprietor. When that price is made the copyright proprietor expects to get paid a fee that would represent basically the totality of the coverage area of the local station. To give to the cable operator the right to interfere with that negotiation process and not carry the programing of the local station in effect is denying the copyright proprietor of the honest fruits of his efforts.

Mr. SAWYER. Follow what I am saying. If you eliminate the compulsory license you could not agree to let the local cable carrier use the local signal, but you want the local cable operator to be compelled to carry your signal. Now it seems to me that is an inconsistent position. I might say my two local VHF stations would be perfectly happy to have them not carry their signals and are much more interested in the elimination of the compulsory license. I make that as a comment. I may say I am not unsympathetic at all with the positions of the panel here, but I am always inclined, as a lawyer, to ask unsympathetic questions.

Mr. KASTENMEIER. May I interrupt only to say generally witnesses ought to take that as a proposition that what appear to be hostile questions are only for the purpose of——

Mr. KUHN. Sometimes.

Mr. SAWYER. Addressing Mr. Kuhn, I suppose that Exxon would lose money if they paid everybody $300,000 and up that worked for them. So obviously, the charm and value of big support franchises is not the profit they make. Otherwise, obviously, they would not be competing against each other up into million-dollar-a-year salaries for players.

Mr. KUHN. I am sorry to say that our business is one that has traditionally run into this problem, whether it is in the free agent era or even before. This pattern I have described holds true in baseball for the last 15 years and I think probably it would hold pretty well in basketball and hockey and soccer. The difficulty we have is that, on the one hand, we are in a free agent market where you have a very short supply of a very highly sought after commodity, that is, major league baseball players. That is taken together with labor laws in our country which prohibit the guys who are buying that commodity from doing anything to control it as a group.

Mr. SAWYER. If their primary interest to the franchise holder was making what would be a reasonable return on very high prices they pay for these franchises, they would not be bidding against each other to the point they bid for the cost of material up to where they are all in a loss position or close to it. So it seems to me that the value of these franchises is really not a fair comparison on how much they make or how much they lose because that does not seem to be the inherent value.

Mr. KUHN. I do not defend every price that has been paid. I have been publicly critical of some of the prices paid. But at the same time, if a club does not go out and pay the prices to try to be competitive for its fans, there is plenty of evidence in our business the fans will turn their backs on you.

Mr. SAWYER. Mr. Valenti, you were stressing the big corporations, and that is never a very appealing argument to me because a lot of little people own all the big corporations. But on your side of the fence you have Charley Bluehdorn and Gulf & Western who is not picking up Paramount for fun either and while you gave the rundown on what seemed to me to be very reasonable pretax earnings of cable as a whole, you could almost do as well with a portfolio of municipal bonds. You did not give us any figures on what your clientele or your industry make.

Mr. VALENTI. I will be happy to respond to that.

Mr. SAWYER. I am sure it would not be as dismal a figure as Mr. Kuhn's.

Mr. VALENTI. Big difference, Mr. Congressman. None of my industry is shielded from the competition. Every motion picture company has to bargain in the open marketplace for every service, for every piece of equipment for every creative entity. The reason why I brought out the equity return of the large corporations going into cable is they are shielded. They have a compulsory license. Our companies do not. Of course our companies are in the business to make money otherwise they would not be in business. But we have no competitive advantage whereas these corporations I am telling you about do have the competitive advantage and that is why I am suggesting that they do not need the competitive advantage because their profits are high. They should not be shielded from competition.

Mr. SAWYER. Except you are in effect dealing with patented products, or what is the equivalent of that, and if you get a modern day "Gone With the Wind" you do not have any competition either on that particular program.

Mr. VALENTI. "Gone With the Wind" came out in 1939. That is once every 30 years you get something like that. It is not something you want to count on but the only reason I mentioned profits is not to discourage profits because I am very congenial toward profits——

Mr. SAWYER. So am I, as a matter of fact. Unfortunately, they are hard to come by in this job.

Mr. VALENTI. You should not shield and protect, put under glass profitmaking organizations. That is all I am suggesting.

Mr. SAWYER. Thank you Mr. Valenti. Thank you, Mr. Chairman, for allowing me to get in ahead.

Mr. KASTENMEIER. I was hoping you would get on with your hostile questions. I thank my colleague from Michigan. The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. My question is to Mr. Wasilewski. I agree with the general thrust that we should abolish compulsory licenses. There are a number of things the Government does not do well in deciding what the price should be for copyrighted programs. It seems to be high on the list of things we should not do at all. Now the distant signal and exclusivity which the chairman's bill would reinstate, how do those weigh in your mind vis-a-vis doing away with compulsory licenses?

Mr. WASILEWSKI. We are in a situation where FCC is proposing to do away with it and I think it is all the more incumbent for you to do away with that.

Mr. FRANK. Would you rather have them all or do away with them?

Mr. WASILEWSKI. I would rather have full and open——

Mr. FRANK. You would take abolition of compulsory licenses and not try to reinstate exclusivity?

Mr. WASILEWSKI. Yes, sir.

Mr. FRANK. On the must-carry. Here I do share Mr. Sawyer's suggestion. You said that TV station negotiation with someone to buy the program, the cable system should not be allowed to interfere. Not showing the program is a strange definition of interfering.

Mr. WASILEWSKI. In the long run it denies that copyright proprietor the marketplace opportunity because it increases the price the local station will pay to the copyright proprietor in the long run.

Mr. FRANK. Who are they denying it to, the people that want to watch?

Mr. WASILEWSKI. I was pointing out the——

Mr. FRANK. I do not understand why the market should not be allowed to take that too. I am a TV station and I buy the guy's program. It seems to me you are suggesting the cable people have some obligation because of that contract that two other guys made to show the program. What is their obligation?

Mr. WASILEWSKI. I think their obligation arises from historical context; namely, there would be no cable without over-the-air broadcasting. There would be no industry. They took the free over-the-air signal, built an economic base on it and now they are going into making it a pay television operation.

Mr. FRANK. You are here on behalf of a change in policy. I agree with that. I do not think it is a good idea to change in one area. We

are assuming a regime. I would agree in the current situation there is a problem. I think that is what happens when you get into these kinds of regulations. You have to have compulsory licenses and you have to have distant signal. I do not understand why we do not get rid of all of it.

Mr. WASILEWSKI. If we would start all over again your point would be well taken.

Mr. FRANK. Why can we not start now?

Mr. WASILEWSKI. We will never get there, sir.

Mr. FRANK. I am glad to see you agree in principle that is where we should be. What are the obstacles? Why not now?

Mr. WASILEWSKI. In the first place we may have a transitional problem where some people have signed contracts on the assumption there would be a must-carry but for the future there is no problem in any contract. As long as two contracting parties know the universe there is no problem of expectation. This is in a transitional period. I signed a contract last year. There was a must-carry. Abolish the must-carry next year—if I had a 3-year contract and I had a year in which I did not expect it but if we establish a data as of x date there will be no must-carry for any new signed contracts. I do not see any problem whatsoever in terms of any expectation.

Mr. VALENTI. May I intervene. This is more Vince's problem although I support it but there are two elements, Mr. Frank, that give Mr. Wasilewski's argument some credence and some weight. The first element has to do with localism and that is how much does the Congress believe it is important to have local programs to knit together the local community. I am not arguing for it or against it. I am saying that is important. The second is more important. That is cable is a monopoly. Once you go on a cable system you are no longer able for technological reasons to see any program except what comes on your channels on your cable set.

Mr. FRANK. You can see VHF and UHF?

Mr. VALENTI. No, you cannot. FCC tried some years ago to have a switch made, required, that a cable subscriber could switch and go to off-the-air and the other switch, he is on cable. The cable industry fought that. If I were a cable man I would have fought it too. That gives them more power. For example, the cable operator—he may not like the personality of the local television station. He gets in a quarrel with him. He will cut him off his cable system and——

Mr. FRANK. You are suggesting the personalities might overbear market considerations. Then the cable argument is in reverse. Suppose a TV station does not like me and they refuse to sell me the copyright. I do not see how you can make that a one-way argument for suspending the license without making it a two-way argument.

Mr. VALENTI. The cable system will pay nothing to carry the local station. The local station's compulsory license means there is no copyright fee.

Mr. FRANK. I am talking about doing away with it.

Mr. VALENTI. Only for local stations. I do not want to cloud this issue. I am for a free market. I think everybody should compete. I merely say there may be some public policy that would deny to the cable operator his monopolistic power to shut out all local stations

and bring in nothing but advertiser-supported programing on which he will make a lot more money. Remember when he carries a local station——

Mr. FRANK. I do not understand how you can pick and choose. We agreed making a lot more money was not a bad idea in this business.

Mr. VALENTI. I am with you.

Mr. KASTENMEIER. Would the gentleman yield for one question, a technical question. Are you saying if one has a television set that is linked to a cable system one cannot get off the air signals from channels 4, 5, 7, and 9 locally?

Mr. VALENTI. That is what I am saying.

Mr. KASTENMEIER. I would not think that would be true except by virtue——

Mr. VALENTI. I am not a technical man and there may be people here who are far more expert than I am on this point.

Mr. WASILEWSKI. It used to be you could get off the air but not now. Your television set hooked up by cable in your home.

Mr. FRANK. You would have to have two sets which makes it more competitive. What we are saying, cable and UHF and other things have broadened the potential of consumer choice. Most people have more than one set now. I still do not see—if the argument is we want to force the local cable people to carry local television programs to knit together the community—I guess I do not buy that one. I watched my share of local television programing and I have seen too many dropped stitches to think the cohesion would work.

Mr. WASILEWSKI. I want to thank Jack for his attempt to help me. It is just good public policy to have the local cable operation, in my judgment, carry local stations plus it is also good business for the local station and cable operation.

Mr. FRANK. If it is good business for the cable operator he or she would do it. I do not think we should be imposing—I do not think we have to force him by statute to follow on good business judgment.

Mr. WASILEWSKI. I happen to think it is good business. I agree it is good business.

Mr. FRANK. If it is good business for cable operators to carry local stations let us not worry about it. I am not prepared to assume a majority of cable operators are going to be dumb business people so I do not think it is an argument we should be forcing them to follow on good business practices.

Mr. KUHN. Not only do I think it is good business, I am confident enough about the strength of sports programing to think local cable would carry that because it would want to carry it very much. But let me go further and say I strongly support the philosophy of your bill on the marketplace, probably more strongly than anybody because we in sports have one distinction that puts us in a different boat from other program suppliers. That is for all practical purposes our programs, once shown, are finished. Occasionally you will see a replay of a sports program but mostly you do not. Therefore we have one shot and we are done. We have ephemeral value. We cannot benefit from even a fair copyright fee because,

once shown, it is gone, and we really need the free marketplace more than anybody.

Mr. FRANK. Your comment with regard to if you had to choose—if it was a package you would keep compulsory licenses, you would prefer to have must-carry and not compulsory licensing but if you had to choose you would take that package whereas on the other side if it was distant signal exclusivity and compulsory licenses you would throw out the whole package.

Mr. WASILEWSKI. I would take it to my board of directors which is meeting in June before I made that decision. That package has not been proposed to us yet.

Mr. FRANK. It has now.

Mr. WASILEWSKI. I am not in a position to respond. I hope you appreciate that. One other thing I would like to point out. The copyright law since 1909 has not been the great example of principle and logic.

Mr. RAILSBACK. I am glad I never had to try cases against you because by the time you finished your closing argument, I would still be concentrating on what you said in the first couple of sentences. He thinks a lot faster than I do and I have trouble keeping up with him.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. I want to make it very clear I have only—as he knows—the highest admiration for Barney. I just have trouble keeping up with him. Getting back to what the chairman said, I think all of you have been around long enough and you are all veterans of the wars. We are asking questions that may appear to be hostile, but you know we are just trying to hopefully get the facts. I would like to go back, if you are able to give information Mr. Valenti, to a question asked by Mr. Sawyer before he left. It may be of a proprietary nature, and you might not want to respond although you already mentioned the revenues and profits and particularly the return on equity of the cable systems. What about the program supplier's return on equity? I would like to ask about the networks, and I do think Mr. Kuhn has a different problem, but if you have that information would you provide us with it?

Mr. VALENTI. Yes, sir. On all publicly owned corporations, that information is readily available. I might add all revenues for the first quarter of 1981 are down for the motion picture companies substantially.

Mr. RAILSBACK. Can you then provide us with the same kind of information that you listed in your statement relating to return on equity? I realize I made a distinction. You pointed out they have a built-in monopoly in effect which you do not have, and you have to negotiate and so forth, but I wonder where the program suppliers would be, say in the Fortune 500 or the Fortune 100, as far as return on equity. Where would they likely be?

Mr. VALENTI. I do not think any motion picture company is in the Fortune 500. They are below that. Gulf & Western is Fortune 500 and Trans America is and a motion picture company is a subsidiary of those operations but I will be glad to supply you with the publicly held corporation return on equity. There is no problem. But I must, Mr. Railsback, again say remember that the motion picure companies are operating in the competitive arena.

They have no subsidy. We, the motion picture companies, are subsidizing these people.

Mr. RAILSBACK. You made that point and you pointed out their average return on equity I think at something like 19.3 percent.

Mr. VALENTI. There is return on equity of 55 percent of the cable systems or from 20 to 40 percent or more.

Mr. RAILSBACK. I understand but in your statement I think the aggregate figure is something like 19.

Mr. VALENTI. Around 20 percent, the aggregate figure.

Mr. RAILSBACK. Let me ask you this. How much money or revenues do cable systems derive from pay TV and how much do the program suppliers get?

Mr. VALENTI. I will give you that Mr. Railsback. Pay cable is usually sold anywhere from $10, $11, $12, $14, $15 a month to the subscriber. The cable operator keeps 60 percent of that. The other 40 percent goes to the middleman who licensed the program originally from the program supplier and then he splits that with the middleman so it breaks down like this: Sixty percent to the cable operator, 40 percent to the middleman which means middleman maybe keeps 20 or 25.

Mr. RAILSBACK. Who would be a middleman?

Mr. VALENTI. Movie Channel, Home Box Office, Showtime. These are middlemen. They license the movie from the motion picture company and they retail it or wholesale it to the cable operator so the cable operator keeps 60 percent, Showtime will keep 20 to 25 percent; the program supplier will get 15 to 20 percent. [See appendix III 6.]

Mr. RAILSBACK. Given the fact of deregulation of the distant signal and syndicated exclusivity and given the emergence of satellites which are not now paying copyright, what is to prevent, and what is your prognosis—why do not the program suppliers then start selling to the pay TV and then let pay television emerge and become more of a fact, which apparently it is anyway. What would be the ultimate effect of that on free programs from the networks? I am trying to see where we are going. Say we do not do anything about distant signal importation or syndicated exclusivity, would it not likely be—and I think you said this before—that the program suppliers might then decide to really emphasize selling for pay TV purposes and I would be dealing then with the cable system.

Mr. VALENTI. Mr. Chairman, I think it is a fact of life that if this compulsory license is not abolished, if syndicated exclusivity is not made a fact of life, programs suppliers are businessmen and they are not going to be able to recoup their investment. They have to recoup their investment in the syndicated market, not in prime time television. They either deficit finance that or break even so they must wait until their program goes into syndication to recoup their investment and make a potential profit. If the area is denied to them—and it will be with the lack of any exclusivity in the marketplace—you cannot sell your syndicated programs for their true worth. I think it is without any question that by 1985 when you have 15 to 20 million pay cable subscribers that the great majority of the intelligent and most creative programers will be going into pay cable and will depart the free television marketplace. I do not think there is any question about that in my mind.

Mr. RAILSBACK. So, then that decision which your members have some control over would really impact or could impact seriously—if what you are saying is right—on the networks.

Mr. VALENTI. I do not think there is any question about it. The programer would like to stay in free television because then he can go to pay cable at a later time. He would like to stay in pay television because that is where his marketplace is but if that area is denied of the true value of his program he can never recoup his costs and profit potential erodes so he would do what a prudent businessman does. He will get out after a landscape that is marred and barred to him by these hedgerows of no exclusivity.

Mr. RAILSBACK. Why are you worried about that, if your members can make a lot of money going that route?

Mr. VALENTI. Because I think that is a great loss to our company's syndicated program market. That is worth $600 million.

Mr. RAILSBACK. What I am saying is you charted for us what can happen, and what can be done, by your members to really go in a different direction that would still be a very great revenue producing direction for them to go, and why do you care——

Mr. VALENTI. We care very much. You have two markets now, syndicated and pay cable. If you now so pollute this market with these barriers we will lose this market and only have one left instead of two. Every businessman would like to have several markets into which he can insert his product. Sooner or later this market will become so barren of opportunity, we will have to leave it, not because we want to because there is nothing there for us.

Mr. RAILSBACK. Even in respect to Ted Turner's channel, for instance superstation—my understanding now is that the program suppliers are really increasing their charges to channel 17 and that they are charging more naturally. Now they are reaching a larger audience. They are making the effort to charge more for advertising because of the fact that they are now reaching, whatever it is—somebody said 12 million. So even with the satellite, even with channel 17, your people are charging accordingly, are they not?

Mr. VALENTI. No, sir. As a matter of fact, that is why a number of program suppliers are not selling their product to Ted Turner, because there is a compensatory balance that is out of whack. Maybe 10 percent or 15 or 20 percent extra money that Ted Turner will pay them will not compensate for the 40 percent losses they will suffer in those 12 million subscribers in the communities where they can get in and the syndication market is lowered.

Mr. RAILSBACK. Is that all he is paying? You are saying he is paying only 10 percent more——

Mr. WASILEWSKI. I am saying that Ted Turner will pay 10, 15, 20 percent more than he would ordinarily pay for the Atlanta market if he were just selling the Atlanta market but the extra money being received by some program suppliers in their judgment does not compensate them for the loss of syndicated revenues in the outer markets. Therefore a number of program suppliers are not dealing with Turner because it is a loss situation for them.

Mr. RAILSBACK. I think Mr. Chairman that I have used up my first 5 minutes or more. I hope we have a second go-around today. I think these are all very important witnesses.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman. I apologize to the panel for having to leave briefly. My bankers were visiting me and I had to give them priority according to the marketplace. We are here because of a copyright problem. That is the jurisdiction of our subcommittee and I do not want to go back to basics, but our legislative authority is in the Constitution, and I quote "To promote the progress of science and useful arts by securing for limited times to authors and inventors exclusive rights to their respective writing or discovery." That is the touchstone that is the basis on which our jurisdiction proceeds. Now, I am concerned about promoting the progress of science and useful arts, and I would like to know from you particularly, Mr. Valenti, and all of the panel, what course of action by this committee would most likely improve the quality of the televison programs available to the viewing public?

Mr. VALENTI. Abolition of compulsory license.

Mr. BUTLER. Why?

Mr. VALENTI. Then there would be a marketplace which the authors would be free as the Constitution I think intended for them to be, to license or sell or rent their product to those who want to see it or read it or view it.

Mr. BUTLER. You talk about protecting the true worth of your product. That disturbs me a little bit because I cannot believe the true worth of some of these things is what they have to pay for them. And I am genuinely concerned about whether we are not, through this process here, protecting the true worth of a product that really is not of the quality that the American people are entitled to receive. That is the reason for my question and, of course, what you are saying in response to it is that this will make more money available or assure that the continued price will be received by the vendor, who is the preparer of your product. Does that truly assure us that the quality will be there?

Mr. VALENTI. I gave you the wrong impression. The most important aspect of what I am saying is not the money. It is the control over the use of a product, that the author or the owner should control the use of that product. Just as you control the use of your automobile. You do not put your automobile in front of your house and I come and take it from you and I drive it around at night and I return it the next morning and I pay you for the gas and you said "Why did you take my car?" I answer, "I have a perfect right to use it, it is in the public interest." But of course that is what I am talking about, is the fact that you have taken away control over ownership of our product with the compulsory license. That is the principal defect that must be cured.

Mr. BUTLER. That is in the public interest.

Mr. VALENTI. I have to assume that in the environment of this land that the respect for private ownership or property is so deeply embedded both in the rubric of the land as well as the passage of laws that there ought not be any quarrel about that.

Mr. BUTLER. I do not think there is a quarrel about that.

Mr. VALENTI. I would say maybe the Government should own all property. I do not believe that but I am merely saying if you believe that the author should not control his property then you ought not to be able to control your house, or your car or your business.

Mr. BUTLER. I am concerned about what will make the author grind out something a little more palatable to me.

Mr. VALENTI. My response to that is I think the public in the long run determines what it is they want to read and to see and eventually to think. I personally find a lot of what is viewed and read unpalatable to me. It is not to my taste but unless I am able to inflict my judgment on others I have to give them the same right to inflict their judgment on me so that is what a free marketplace is all about Mr. Butler. That which is tawdry and meretricious sometimes finds its way along with that which is excellent in quality.

Mr. BUTLER. That has been borne out by television programing.

Mr. Kuhn, if I may direct myself to much the same question that you are asking us. FCC apparently left in place some syndicated room for sports that in effect is a territorial exclusivity. What public purpose would be served by or what way would progress and science and useful arts be promoted by Congress granting your industry a right to territorial exclusivity?

Mr. KUHN. I believe territorial exclusivity in professional sports is the best way to assure the reasonable financial stability of sports franchises. And with financial stability of franchises comes the location stability of franchises, which is a matter about which the public is concerned. If we have financial stability, we also have a much better chance in professional sports to be able to maintain a price level for our tickets at which the public will feel able to come to our events this will, in my judgment, also protect the public interest. One of the problems we face today in baseball is that—because of the great swings between the more profitable and less profitable clubs—there is a tendency to make moves in the free agent market which are unreasonable in order to be sure you will be one of the guys who is doing well and not one of the guys who is doing badly. If we were able to develop more markets for our copyrighted products, I think we could bring a leveling off of that process, which would also be in the public interest.

Mr. BUTLER. I am having the same problem Hal Sawyer has. What we will do is insure that we pay the gentlemen well for their services which we do not enjoy watching. I have that same problem with what it is costing you to get the services of your actors, if I may use that word.

Mr. KUHN. Can I make one observation on that, Mr. Butler. Even in the face of free agents in the last 5 years and a tremendous upswing in the salaries that are being paid in professional baseball as well as in other professional sports, the ticket price in baseball has risen less than inflation during those 5 years. Today the average ticket price in baseball is only $4.98. What has happened is that our people have gone out and worked to produce new revenues for our business, to attract more people to our business, to market better and to serve the public better. The result has been that our new revenues have passed through to our players, and the ownership remains in the same condition in terms of profitability as it was before.

Mr. BUTLER. That is an interesting observation. You would like for your pay to keep pace with the cost of a baseball team. The broadcasters, of course, are necessarily concerned about the FCC

findings. My reading is that the FCC has found that cable does not reduce broadcast audiences, except in special circumstances and then only marginally. What is the evidence to rebut that conclusion?

Mr. WASILEWSKI. I submitted a Bakersfield study that points out where you had grandfathered signals being brought in from Los Angeles, that the local television stations are impacted greatly. Now, the evidence of Bakersfield, I think, is going to be repeated over and over again as cable comes into the major metropolitan areas. Basically cable has not come in with distant signals to the major big markets and it is going there now as has been pointed out previously and I think that is why everybody starts to get very concerned about this, Mr. Butler, because they realize this economic base for cable is going to be increased greatly. For example, when cable first started I was a lawyer. I was trying to find a broadcaster or a motion picture producer or movie company or anybody to sue and establish the copyright law as against the cable back in the early 1950's. At that time it was beneficial I guess you would say to broadcasters to have this signal picked up and carried and nobody was about to go in and try to assert those rights. But as cable has grown, as cable has become a big industry in and of itself and since 1976 with the changes, the growth, satellite and superstation and the modified FCC rules, we have a whole new ball game here where the impact is going to be very great upon not just stations in small markets but other stations as well unless we recognize the proprietary interest as represented basically by Mr. Kuhn's sports people, but Mr. Valenti and producers and for broadcasters, too. I think the impact from distant signals without any fair compensation or payment is going to be very great and it will injure the public, too.

Mr. BUTLER. The problem I have with that—outside of the one study you mentioned—is apprehension about the unknown enemy.

Mr. WASILEWSKI. That is what FCC kept saying and they do not even accept the Bakersfield study. We point out the difference between Bakersfield and San Diego is a very big difference in impact. It will be exacerbated as more and more cable goes into the bigger markets, unless there is some firefighting for programing.

Mr. BUTLER. I appreciate your view. Let me turn to one more point, if I may, and this comes back to Mr. Valenti. The cable operators are always telling me that if we change the law going into the open marketplace, he simply will not get programing. If he does bargain, the program owners will want more than they can afford to pay and all this will make it necessary to increase cable subscriber rates if they are to survive. Now, is there some truth in that?

Mr. VALENTI. Absolutely none, Mr. Butler. I will tell you why. First and foremost it is in the selfish self-interest of program suppliers to want to keep cable viable and healthy. Not basic cable but you need basic cable to get to the one market, the two markets that program suppliers see for the future. One is pay cable. Pay cable is built on basic subscribers. If the basic subscriber drops off you have lost your pay cable market. Two, advertisers supported programs. These have to be bargained in the marketplace now. As that business grows it is a better market for us ergo we must keep

cable systems alive and growing, if for nothing else than we are selfish and avaricious which may be the most compelling human motive of all for the benefit of cable, but having said that, for example I just pointed out we only have to deal with 50 companies and we will have covered 75 percent of the cable subscribers. The way the marketplace works is that there is no monolith of program suppliers. There are hundreds of them, literally hundreds, so if I charge too much for my show the cable operator says the hell with you I will go over and get a program from Wasilewski or Time-Life or CBS or Grant Tinker or Norman Lear or Larimore, you name them, programing is available by the long ton, so the marketplace adjusts to this. No. 2, there will be middlemen springing up as I pointed out. Wherever there is a market an entrepreneur is lurking. Therefore a middleman such as Ed Taylor who runs Southern Satellite which takes WTBS superstation programing and hurls it with the speed of light to some 12 million people has a thing called Program Satellite Network. He wants to be in the business of maybe licensing 1,000 pieces of program material at one-tenth of a cent a subscriber, or even one-fiftieth of a cent a subscriber. Then he takes his catalog and by his computer, through satellite, beams the program to 3,000 cable systems if he so desires. Such middlemen are ready to spring up and finally I think you will also see that advertisers' support is going to be the thing of the future. If you really peel back the conscience of the cable operator he will tell you 5 years from now distant signals are out. It will all be advertiser-supported programing. Instead of bringing in WTBS for which he pays 10 cents a subscriber, now he will have two advertisers who will pay cable to show his program. He will bring in the same programs. WTBS could have bought them except this time he has local advertisers supporting the purchase and distribution. So he not only recoups the investment on what he has paid for the program, he will make a whopping big profit on it through advertising revenue. There is no question about it. My aide here just said that VIACOM, which is a major cable operator, is trying to bridge the gap when there was an abundance of channels for programing and when operators will be forced to choose among program options. There are going to be so many program options according to VIACOM that they will have a problem in deciding which option they choose. Finally, I would think one document I would like this committee to read in answer to your question, Mr. Butler—when the cable industry comes before you they tell you they are going to be frozen out and they are in deep trouble and they are little mom and pops and they are in a terrible situation but when they sent a report in April of this year to Senator Packwood not dealing with copyright but dealing with the first amendment, they had a different melody to which their lyrics were attached. Cable television has grown explosively over the past two decades. It says, "We used to be CATV. We are not any more." I quote you the following paragraph and I will file this with you, Mr. Chairman. I think you should have it. "Today the situation with regard to cable—" by the way the author of this document is the National Cable Television.

Today the situation with regard to cable has changed dramatically. While cable operators continue to transmit television broadcast systems, they also transmit programs that they produce or purchase and that are shown only on cable. News,

public affairs, entertainment is available to the cable operators from a variety of nonbroadcast sources including national cable networks made possible by satellite delivery systems.

Now what they are talking about Mr. Butler is what I am talking about. A variety of nonbroadcast sources is now available and in the document to Senator Packwood they confess it and put it on paper. So the anxiety and concern issued in plaintive terms by the cable industry is simply in the minds of cable operators today nonexistent.

Mr. BUTLER. Thank you very much.

Mr. KUHN. Could I add to that because it is an important point whether there is a market we could sell to. In our statement we point out that today we in professional sports are already selling heavily to cable—the New York Mets, Yankees, Pirates, Phillies, Reds, in baseball, Islanders and Raiders in hockey are all selling. There is a lot of willingness on the part of professional sports to deal with cable. We see it as an important supplementary market to our over-the-air. Coming back to a question Mr. Railsback asked before, we would be reluctant to give up our over-the-air television. For sound public relations and promotional reasons we think it is important for us to televise over the air to the public. But we see cable as an important supplement to what we do, so it is a nice mixture of things for us to see cable develop. We want to do business with cable, so does hockey, so does basketball. There is no question professional sports could deal with cable and would be happy to do and are doing so.

Mr. BUTLER. I thank you very much for the response to the questions. I think it will be interesting to see when we get the cable television operators to where we will be able to pick this up and peel back the conscience. Then we will find the melody to which the lyrics are truly attached. I look forward to that experience. I thank you for showing us the way.

Mr. VALENTI. May I quote you, Mr. Butler.

Mr. BUTLER. It is not copyrighted.

Mr. KASTENMEIER. After those lyrics, Mr. Frank.

Mr. FRANK. Mr. Wasilewski, briefly there is a switch available you can buy privately that allows it to be adaptable for both but in any case technologically it is possible from what you tell me. My guess is today there is no great demand for convertibility but if we were to abolish must-carry there would be a demand for convertibility and I take it technology would not be too difficult to make television sets adaptable for both.

Mr. WASILEWSKI. I am a lawyer like you I guess but I think it would be very simple.

Mr. FRANK. I would accept it. The point is if we dealt with must-carry mandating convertibility would be a reasonable way to go. Let me go beyond that to the question of what the obstacles of the current situation are. I apologize if this was covered before I got here but what in each of your various groups—what is the state of your expectation from the cable tribunal? When will you get some money?

Mr. VALENTI. I have back here one of our attorneys, Mr. Cooper, our vice president, and Mr. Attaway, also a vice president, both of

whom performed for weeks before that tribunal in 1978. Distribution has been hung up in the courts.

Mr. FRANK. That is the first year's distribution under the new law?

Mr. VALENTI. That is right, 1978. Now the copyright tribunal even though the case is pending before the courts and may be hung up there for quite a while they have ordered I think 50 percent of the 1978 royalties distributed but the other 50 percent is hung up in court. And 1979 will probably also be appealed and it will be hung up.

Mr. FRANK. This is the same for everybody?

Mr. VALENTI. Yes, sir.

Mr. FRANK. One of the proposals you made—one possible response is to change the formula. Am I correct if we were to change the formula we then would have a whole new round of appeals to go through so if we change the formula to continue compulsory licenses then we would have another 3- or 4-year period before you got full distribution, is that correct?

Mr. VALENTI. Of course it is. As long as you have an overture you can make to the court some people will take it and you are hung up.

Mr. FRANK. I foresee a single—no one proposed to my satisfaction a formula for allocating what 12 "I Love Lucy's" are worth. It seems to me we would have a cycle in which we changed the formula every few years and we would have to go through these appeals and you would get paid once every 5 years and your cash flow problems would be significant.

Mr. KUHN. You can be sure we would be appealing. As an example, the tribunal determined that sports, including amateur sports and the NCAA would end up with only 12 percent of the 1978 royalty pool. That determination was made in the face of the key role that sports played in developing cable. We are unhappy with 12 percent, and we are one of the people appealing and complaining. Unless our share reaches a considerably higher level, we would still be appealing.

Mr. FRANK. So we have total amount, allocation—could there exist a reasonable set of allocation formulas?

Mr. KUHN. Ours is.

Mr. WASILEWSKI. Ours is, too.

Mr. FRANK. And they are mutually exclusive. It was suggested to me he did not like that section of the chairman's bill which proposed a more specific set of instructions about how to allocate because it was so hard to do. If that is the case that is more of an argument against the compulsory licensing.

Mr. VALENTI. CRT recently granted a 21-percent increase in overall royalty because of inflation in the last 5 years. Even that has been taken to court by the cable people. They do not want to pay the inflation rate so it may be tied up for months. Two, I think the problem is that when you take five people or seven people or three people, no matter how intelligent or well meaning, it is very difficult for them to be able to say what a seller and a buyer would agree on as a true worth of some program in Spokane or in Madison or in Chicago. It is impossible.

Mr. FRANK. I gather we will be having government people testify later on. One of the arguments that has been made against abolition of compulsory licensing is transaction cost. I would be interested in some of your transaction costs. You were talking about vice presidents and counsel. I think we should be clear these are not one time only costs if we assume there were to be changes in the pricing. These are only one time costs if figures are set forever and that is unlikely. I would be interested if you could submit for the record some estimate of transaction costs you have undergone with regard to this whole process and what presumably they would be if there were to be legislative mandated changes in the formula, what your costs would be. I would be interested in seeing also what the government has done.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Is there any indication that the basic service charge for cable subscribers has gone down? I know it is due partially to the increase in pay TV. Is there any indication that in some of the new cable program areas—I guess Boston is one place where they are reducing the subscriber charge so the copyright royalty rates would be the formula on which the rates are figured, although I think it is based on what gross receipts are of the basic service charge. You are not making the charges that they are doing that to reduce their copyright royalty payments.

Mr. VALENTI. No, sir; they are not doing it to reduce copyright royalties which is a pittance. They are doing that to load up basic subscribers so they can increase their with pay services. We know Warner-Amex in its proposal in Dallas is tiering and the basic service is $2.75 a month. There was one cable system in Hawaii giving it away, zero. That sort of thing.

Mr. RAILSBACK. I have a big problem. Fankly—maybe you can help—in the event you eliminate compulsory licensing and go to something like retransmission consents, given the fact that you have 4,000 cable systems, you have the program suppliers, you have the broadcasters, you have others, you may have middlemen, how in the world are the cable systems going to be able to actually negotiate with all those different entities?

Mr. VALENTI. Very simple. In my original testimony I pointed out Mr. Railsback, that 50 companies—you could sit down with 50 people and reach 75 percent of all the cable subscribers in America right now.

Mr. RAILSBACK. The way you look at it you are talking about the program suppliers providing the programs and being a copyright holder and then the program suppliers negotiate with the broadcasters.

Mr. VALENTI. There is no transmission consent. Dismiss that from your mind. Under retransmission consent the broadcaster had to give consent to the program being shown on cable. Under the abolition of compulsory license the broadcaster is out of it except for the specific programing he owns.

Mr. RAILSBACK. That is what I am saying. Suppose then that the program supplier sells to a station and gives him exclusive license, and then suppose the cable system which also overlaps that area wants to carry a program. At that point—you are not just talking

about the program supplier. You also have to worry about that station and that market area that has some exclusivity.

Mr. VALENTI. That is why I am saying we want to retain control of our product. If we can sell exclusivity for a limited period of time either to cable systems——

Mr. RAILSBACK. But you see what I mean. In other words, you have a problem there. Wherever you have a station that has any kind of exclusivity, then that cable system is going to have to worry about that particular station as well as negotiating with the program supplier.

Mr. VALENTI. That is not so difficult. We do that with television stations all the time whose signals overlap, Mr. Chairman. This is something we do every day with 600 television stations. We are going to be doing it with 1,500 to 2,000 lower powered stations and dropins. We will be doing it that way. For example Showtime, Home Box Office, and Movie Channel, are today negotiating with over 3,000 cable systems. They are doing it with 3,000 cable systems. They are programing their pay channels. Sometimes they have one, two and three pay channels all being programed by these three organizations. They are doing it with 3,000 cable systems. It is simple.

Mr. RAILSBACK. Let me ask you this. What would be wrong with having some kind of a free marketplace negotiation, but in the event of what appears to be something similar to what happened in the late 1960's when the cable systems simply were not able to negotiate for the program, what about having something in the nature of a compulsory license subject to free market negotiation backed up by compulsory arbitration?

Mr. VALENTI. Let me say first, Mr. Railsback, the 1968 so-called experiment was retransmission consent. There were two factors in that 1968 experiment that are not present today. One, the broadcast station had to give permission. Two, there were only a handful of cable systems.

Mr. RAILSBACK. But the broadcast station, where it has an exclusive license from the program supplier, is still going to have to consent.

Mr. VALENTI. No, Mr. Railsback, we are going to sell to a cable system; the broadcast station is not the seller. Forget him. We have a contract with the broadcast station for exclusive rights to Mash in say the Chicago area. We are not going to sell Mash to a cable system, but we have 4,000 other series we can sell to the cable system.

Mr. RAILSBACK. You would not sell to Ted Turner one of the superstations that paid you a great deal of money for it?

Mr. VALENTI. Absolutely not. Because that destroys the exclusivity provision of our contracts. We will sell to Ted Turner a lot of programs that he would probably not seek to get exclusive rights on. We will give them to Ted Turner and let him go nationwide or for example, the San Diego cable system may say "I want Mash on my cable system, I will outbid the local television station," for it, so we will exclusively license Mash to the San Diego system and television stations then cannot get that program.

Mr. RAILSBACK. There will be arguments on the other side about how this would work which a lot of people see as similar to, if not

analogous, to a retransmission consent, given exclusive contracts with the particular station at a particular area and the impact it might have. Getting back to the other part of my question, what would be the matter with compulsory, within your case, abolishing the Copyright Royalty Tribunal but coming in with something in its stead, namely free market negotiation backed up by compulsory arbitration in support of a compulsory license?

Mr. VALENTI. First, Mr. Chairman, I do not know how that would work. I suspect the so-called phrase, "Transaction cost might be pretty high." But you are obviously including syndicated exclusivity as part of the package because without it we have lost control of our programs so we have the matter of exclusive use of a program.

Mr. RAILSBACK. That is true and that is an additional question. Now what I am trying to think of—I am thinking about the old days of music when ASCAP was formed and they got into the business of nightclubs and into the business of making records, and so forth. So what you have, as I understand it, under a consent decree—I think it was a 1949 consent decree—you had outfits like VMI and ASCAP that were able to negotiate for the composers who had formed this society and it has worked fairly well. In the event one of the users challenges or wants to challenge, then under that consent decree, they can go to court and challenge. I am talking about something like that.

Mr. VALENTI. The big difference is you might hear a piece of music at 4:30 and like it so much you want to hear it at 6 and 7 and 9. You might hear the same song 5 or 6 times a day but if you see Sanford and Son at 4:30 it is unlikely you will want to see the same episode at 6:30 or next week or 2 months from now. It is the fungibility of the program that comes into question. Music can be played over and over again and is ad infinitum but a program, as Mr. Kuhn pointed out with his baseball game, there is a kind of a fragile life to it and you have to put it to rest for a while then bring it back again. That is why the exclusivity part is very important.

Mr. RAILSBACK. But the rules of exclusivity would still be under control, I would think, although this would be entirely a separate question. In other words, I would think that would be something that we would want to consider, whether to present exclusivity if the FCC deregulation goes through. In other words, if the actions are upheld which have been challenged, then you no longer have exclusivity.

Mr. VALENTI. True.

Mr. RAILSBACK. Forgetting the exclusivity, you know what our job is as I see it. We are talking, as Mr. Butler said—not about a communications policy, but a copyright policy designed to do what the Constitution assigned to us the responsibility of doing. That is very important from your standpoint, I realize that. But in doing that, I think some of us feel, or I feel, we have a number of options. We can reform the Copyright Royalty Tribunal. We can do something like the chairman has suggested be done, a reform of the tribunal to make it work better. I for one think the tribunal has not had equipment. It has been understaffed have there has been a lot of problems. No superpower. I realize what your comments are

about, the superpower, Mr. Wasilewski. That is one alternative. Another is to abolish compulsory licensing and see what happens. The cable people will say that would be chaos and they are apprehensive about it. Third, we could go back to something similar to what happened in music and try to give the parties the right to voluntarily negotiate, but with some kind of banning mechanism if that mechanism should prove to be needed. That is what I am saying. We have a tough job and I think anything we do we are going to give a lot more thought to than what we did originally with the Copyright Royalty Tribunal which came into light in the copyright reform.

Mr. WASILEWSKI. I agree with Jack. If you do do away with compulsory license and you do impose total liability, that there would be mechanisms developed rapidly to make that sale and it would be a highly computerized operation to protect exclusivity, as he pointed out. As you know, ASCAP and BMI came into existence not because of anything this Congress did. They came into existence as voluntary representatives—ASCAP in particular—and then after Victor Herbert heard them sing the song, they came into existence to represent the authors and composers and publishers. They made out their own deal where half the revenue went to authors and composers and the other half to publishers.

There is one distinction that I do not grant exclusive rights for playing of a particular song, but they do have highly computerized operations to determine what is a fair and equitable payment out to the authors and composers.

Mr. RAILSBACK. They have a backup, do they not? I am told that with the consent decree—if a complaining user of music wants to ask the U.S. District Court for the Southern District of New York to review royalty rates, they can do that.

Mr. WASILEWSKI. In 1949—but not because of anything this Congress did. That was a result of a Justice Department inquiry and antitrust signing of consent decrees back in 1949. When they were a monopoly at one time in 1940, they were going to increase their fees to broadcasters by 100 percent. That is when this started. ASCAP came into existence as a voluntary representative of a group because they were so monopolistically oriented. There is where arbitration came.

I am saying that could come about as a natural result of doing away with compulsory license and giving full liability.

Mr. KASTENMEIER. Does the gentleman from Virginia have further questions?

Mr. BUTLER. Along the line Mr. Railsback is pursuing, of how this world you all envision will function, I have 16 cable systems in my district. That is about one for every 3 miles.

Now, how would those little fellows survive in the world of a free marketplace? How would they go about getting decent programs for their community? That world sounds very good to me, but these people have a lot of money out there. That is a lot of money to them and a little cable system represents a substantial investment. How would they survive?

Mr. VALENTI. I am looking at Salem's cable system in your district. I am looking at the system. It has a total number of subscribers of 4,799.

Mr. BUTLER. That is one of my larger ones.

Mr. VALENTI. It could carry what would be defined as local signals. In other words, it would have the three network stations at no charge, and no copyright fee, whatever else complemented local signals. They may want to program two or three pay channels in which they would seek out the middlemen who deal in programing pay channels, as they are going right now.

Then they would seek out a middleman, Ed Taylor, or they would have any number of representatives call on them and program three or four other channels. They might want to program a children's channel, a series channel. They might want to program a suspense channel, whatever they wanted to program. It would be easily done with all sorts—they will have more people offering them programs than they can use at prices they can afford based on per-subscriber cost. But now they would have something else, Mr. Butler, they don't have by bringing in WTTG and WTBS. They will be able on those channels they program themselves to go to the local people in that area and seek advertising. They will now add another source of revenue that they are not able to provide now, and that is, advertiser-supported programs. The proliferation of programs is so abundant, Mr. Butler, for any one to question whether or not there will be any programs in our business is almost absurd because there are so many programs available.

Mr. BUTLER. I am accepting that. I am concerned about the small operator who does not have the resources to do all these negotiations and to pull it all together.

Mr. VALENTI. He will probably join what is known as the cable networks and regional networks. They will spring up, entrepreneurs who will be bookers or buyers, as they call them in the television business, who will program maybe 500 cable systems. They will license everything from the program producers and from middlemen, and they will go and program 200, any number of cable systems.

Small theaters do that today. They don't have resources to book all these films, so there are bookers who represent maybe 40 or 50 small theaters and who do the transactions with the theatrical producers and books these theaters. That is how small theaters stay in business.

The same thing would happen with small systems. The big systems would have large enterprises, but you are talking about something that is easily done because it is done in other areas of the business today.

Mr. BUTLER. Thank you.

Mr. VALENTI. I pointed out about Cablevision, talking about where cable systems are sharing facilities and costs and they are bringing in channels of advertiser-supported programs.

Mr. BUTLER. Thank you.

Mr. KASTENMEIER. On the same note, whether these small cable companies are, for example, in Caldwell Butler's district, or if they are a company which merely retransmits local signals, what interest are they to you in terms of copyright? Any?

Mr. VALENTI. None, sir. We don't urge copyright liability for local signals.

Mr. WASILEWSKI. The local station paid for that coverage area.

Mr. KASTENMEIER. To that extent, retransmission of local signals is not involved in this formula or debate?

Mr. VALENTI. No, sir.

Mr. KASTENMEIER. Nor, in fact, in the bringing in of paid programing; that is to say, which is most of it. In Virginia, across the river here in Arlington, there is a system more typical of big city systems, bringing in C-Span, which is Congress. There's no copyright question there.

To the extent that HBO and Cinimax are already paid for, those are negotiated contracts in the open market. C-Span is the Ted Turner news network.

Mr. VALENTI. That is original programing, for which cable systems pay 10 cents a subscriber, about 8 or 10 or 12 cents a subscriber.

Mr. KASTENMEIER. Then there is the USA network and C-Span, also, who purchase their programs——

Mr. VALENTI. Thirty-five of those.

Mr. KASTENMEIER. So ultimately all the rest are local programing. We get down to importation of two distant signals, Atlanta and New York, or it might have been some other combination. These appear to be the only questions essentially, since cable is either paid for in one form or another, or an extension of local programing. These are the the sole cause of all the difficulty. These are the penetrators of local programing, of local exclusivity, in terms of contracts.

Isn't that correct?

Mr. WASILEWSKI. Yes. What you are saying is there is full liability and payment has been made for all the other programs except those that come in without any competitive payment.

Mr. KASTENMEIER. Exactly. So in most markets, up to the present time, it is not significant.

I was impressed when Mr. Valenti at the outset suggested the big deal is the pay services. These are the things that attract people to the cable. And there are a series of services, notwithstanding the efforts of the long distance to impart the distant signal importations.

If we could solve this limited area. If the removal of the FCC rule becomes final, and it does become significant if, while all these other things are expanding, there is an expansion in the importation of distant signals in the way that Atlanta, Chicago, and New York WOR experience.

Other than that, there really doesn't appear to be a problem.

Mr. KUHN. I am not so sure that is right, Mr. Chairman. Just to give an example, from the point of view of baseball, I happen to live in northern New York, in a suburb of New York City. I have cable and I can sit there and watch not only the Mets and the Yankees over the air, but Ted Turner's Braves, and WGN with the Cubs and White Sox. I can also watch the Red Sox and Phillies coming in by microwave relay, which is a troublesome part of the problem from the point of view of professional sports.

Our problems in Pittsburgh are not attributable to the superstation exclusively, but to microwave relays of baseball games in the Pittsburgh markets.

Those examples could be multiplied in basketball and hockey.

Mr. KASTENMEIER. I would have to add in that equation not only superstations but any distant stations reported by any other means of which there are a number.

Mr. WASILEWSKI. That's the point I was going to make. You used the term "two", but more stations are imported than just the three big superstations.

Mr. KASTENMEIER. I was thinking of the local example which only imports two superstations.

Mr. WASILEWSKI. But if the FCC does away with the rules, it would be unlimited potential for importation of stations.

Mr. KASTENMEIER. Someone else—I think Mr. Turner—was giving me an example of—He would like to get into Syracuse. Syracuse brings in one superstation, WOR, and one nonsuperstation, WPIX in New York. For obvious reasons, I want to isolate the problem because I think, in terms of total impact of cable, in terms of messing up the market, it is rather more limited and the potential would be more limited because of the most attractive programing really, not the old reruns that come in on some of these stations.

Mr. VALENTI. I was going to suggest, I think it is very insightful what you are saying, because what we are suggesting is simply what you are pointing to. That is, the abolition of compulsory license for distant imported signals by microwave or satellite. And until the FCC abolished the distant signal rules, you were restricted to about two, except in the grandfather system. So essentially what you have is—you have rightly pointed out—is an isolated thing.

Everything else the cable systems are doing now on their own. They are originating advertiser-supported programing. They have pay channels. We are just talking about the importation of distant signals.

Mr. WASILEWSKI. If the cable does go, and get this programing and does originate, they have exclusivity against the local stations, which the local station does not have against them, again pointing out a basic unfairness. They can contract and keep the local stations from rebroadcasting that program from Baltimore because of their exclusivity arrangement.

Mr. KASTENMEIER. But as was pointed out in earlier colloquy, I would hate to see us mess up any particular liability for local retransmission or, indeed, disturb most must-carry rules. At least I would think that would be gratuitous because then both sides, if thrown on the open market, one would claim they were doing something for the other for which the other ought to pay, as the cable interests have already done.

They suggested we don't have a must-carry rule; we will judge whether we should charge stations to enhance their signals. So as I say, some of this could lead to gratuitous economic conflict, which I think would be counterproductive.

In any event, I would like to ask Mr. Kuhn, in terms of the existing FCC regulations permitting team control over broadcasts, it is within 35 miles of the stadium.

Is this adequate and, if it is not adequate, why wouldn't you be interested in 50 miles?

Mr. KUHN. In terms of the mileage?

Mr. KASTENMEIER. Miles, yes.

Mr. KUHN. We suggested 50 as compromise, although even that we think is probably not really as good as we should have. Thirty-five is not adequate because professional sports draw from well beyond 35 and, indeed, they draw from beyond 50.

Take Kansas City with an extremely small market. In order to survive, they have to draw from 100 or 200 miles away. So the 35-mile rule is plainly not adequate.

I think even the statutory foundation has disappeared. I don't think there is adequate protection. There are many other problems besides mileage.

Mr. KASTENMEIER. Would this have any relevance for what would be termed the distant signal or market? It would also relate to that question.

Mr. KUHN. I would think if there were some such approach taken 35 miles would not be a fair area. Hopefully it would be considerably more. Ideally there would be a free marketplace.

I might say, indeed, it should be a free marketplace.

Mr. KASTENMEIER. I know you announced this, Mr. Wasilewski before, but I think for the record it should be asked:

Inasmuch as we are dealing with recent FCC findings to this effect, that there would be no serious economic harm to the broadcast industry as a result of the repeal of syndicated exclusivity distant signal rules—they obviously made that finding—they made it on the basis of a study. What is your response to that? They are just wrong?

Mr. WASILEWSKI. I think they were wrong, and I think the U.S. Supreme Court was wrong in their first two initial decisions. But that does not change the law. It was a 4-to-3 vote by the FCC, and the Supreme Court was 6 to 3, so there was substantial argument even then on whether retransmission by cable was public performance for profit.

I think the FCC conclusions, in response to your specific questions, are unsound and they are grossly overgeneralized. I think, more importantly, as I responded earlier, that without the FCC rules the sort of expansive distant signal found in Bakersfield soon could be typical as could 60 percent cable penetration.

When you get that kind of penetration in the larger markets, there is bound to be impact. So to say there is no impact is unreasonable and unsound.

Mr. KASTENMEIER. You say there is bound to be an impact, but you are not able to document that?

Mr. WASILEWSKI. We have nothing more than what we submitted up to this time, sir.

Mr. RAILSBACK. Are you talking about the FCC data or to us today?

Mr. WASILEWSKI. Other than what we submitted today and the FCC.

Mr. RAILSBACK. I was going to say I am familiar with your *Bakersfield* case, but I think it is very important that you update your submission to the FCC and give us any other relevant economic data.

I was going to ask you to do that, so I am glad the chairman did.

Mr. WASILEWSKI. I think the distinctions between San Diego, which had protection, and Bakersfield, which did not have protection because of the grandfathering, are very significant. We will do that.

Mr. RAILSBACK. It is significant that the FCC made the rule that it did based on presumable economic data which was supplied both by you and cable, and other parties. So, I am sure cable is going to come in and say that—even in respect to baseball—your attendance is up, that you're broadcast revenues are up, and if you have anything to counter that, because I know they are going to make that claim.

Mr. WASILEWSKI. We will have a lot of new people, and it is worthwhile for us to make that presentation.

Mr. VALENTI. I think all you are saying is true, and we are always asked to show harm. My answer is: Why should we have to show harm because somebody is taking our property? Why should we have to show that we are harmed and that it is a real problem when somebody takes our property without asking us for it.

Mr. KASTENMEIER. The answer is, Because you claim harm.

Mr. VALENTI. I claim harm, Mr. Chairman, because I know what producers in Hollywood are saying, and I know what they are saying about these markets drying up.

There are two points that should be made about the FCC. One is, the FCC was dealing with fraud data. Some of the data goes back to 1972 in the so-called park study. Two, they were dealing with harm, Mr. Chairman, on a rule which was still in effect.

How can you prove the harm that a rule, if it is deleted, is going to cause when the rule is still in effect? In other words, I am unable to show you harm—for example, I say I am going to be mugged on the streets of Washington some day. I can't show you that until I am actually mugged.

Now, we are going to get mugged when this rule is deleted, and our property is no longer exclusively useful to anybody. I don't think you have to be a Harvard MBA in the FCC to understand that that is going to denude the worth of that product. That is a business judgment that everybody understands in our business. That's the answer I guess I would give.

Mr. KASTENMEIER. Are you anticipating that the court, indeed, will uphold the FCC rules?

Mr. VALENTI. I learned never to anticipate court decisions or election results, but I think it is fair to say that I suspect the courts will uphold them. I don't think the court will look at this data and see if it's fraud or do searching and analyze that as MPAA did.

I suspect they will look at this to see if the judgment of the FCC was not unduly arrived at. I would guess that is the way they would handle it.

Mr. KASTENMEIER. I am not searching for a long discourse on the subject, but one thing we have not covered is how minor league sports—and I suppose baseball is essentially minor league—that is to say, has essentially most minor leagues—there are other hockey leagues, there may be one other professional basketball association, the NBA. Are not these entities more adversely affected than even the majors? I would think, for example, small, let's say, middle-

sized communities in the South who are watching the 150 Braves games each year, how can they be expected to turn out to support the local team at Richmond or Charleston or any other such community if they are watching major league games on television?

Mr. KUHN. There is no question that the proliferation——

Mr. KASTENMEIER. Are the minor leagues also your responsibility?

Mr. KUHN. They are in this sense. There are about 20 minor baseball leagues today in the United States, Mexico, and Canada, and those leagues exist in the United States and Canada because they are heavily subsidized by major league baseball. But there is no question that the proliferation of baseball hurts the minor leagues. There is also no question that major league baseball can hurt the minor leagues. But major league baseball works out an annual deal with the minor leagues to support them. There is no effort obviously to be made by the cable people to do anything to help the problems with the minor league.

Mr. KASTENMEIER. One question, and we have discussed it before. I will restate the question and ask Mr. Valenti, about the suggestion implicit that there really is no need for legislation. Since there is a massive shift to cable originated programing, it will take precedence over the imported signal, and the imported signal will tend to die away as a major competitive factor in the market. That it is decreasingly a factor in terms of growth of cable and the form of programing that cable will offer.

Mr. VALENTI. I think there is much to be said that the cable landscape is going to be greatly and radically changed by just the entrance of that kind of an event.

However, Mr. Chairman, it blights our efforts if, say, half the market is not depending upon distant signal or 30 percent of the market. It becomes very difficult to have control over the direction of your product, when you have pockmarked all over the land these little isolated enclaves where the compulsory license is still in effect and being used, it causes terrible problems, therefore, I would come at you conversely, that if this is the wave of the future, then it will not hurt cable at all to remove the compulsory license, because they are going down a different track, so I am saying it would be easier to remove that compulsory license, and cable is not going to be harmed by this at all, and we certainly do not want to harm cable because, as I said to Mr. Butler, I guess it is human nature to desire profits.

Mr. KASTENMEIER. Well, the hour is late, and I want to thank all three of you for staying so late. I notice you have other engagements as well, thanks for staying this late and contributing as much of this time to our deliberations on this question. The committee is indebted to all three of you. We hope we can keep in touch with you and representatives of your various offices and others who are interested in this question. I hope we will have access to some of the facts, figures and other materials that you have brought with you here today, as these hearings continue on the subject.

On behalf of the committee, let me extend our thanks to all of you.

Mr. VALENTI. Thanks to you all. We appreciate it very much.

Mr. KASTENMEIER. Until next week, the subcommittee stands adjourned.

[Whereupon at 12:50 p.m. the subcommittee adjourned to reconvene the following week.]

COPYRIGHT—COMMERCIAL USE OF SOUND RECORDINGS AMENDMENT

WEDNESDAY, MAY 20, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Sawyer, and Butler.

Staff present: Bruce A. Lehman, counsel: Timothy A. Boggs, professional staff member; Joseph Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning the subcommittee convenes for its second day of hearings on copyright matters. We will also consider today a second issue—commercial use of sound recordings, specifically H.R. 1805, which would create a performance right in sound recordings.

This constitutes the subcommittee's third set of hearings directed at this question of performance right legislation. We held 4 days of hearings on H.R. 6063 in the 95th Congress and 1 day of hearings on H.R. 997 in the 96th Congress. Both of those bills in preceding Congresses were similar—I'm not sure that they were the same; we'll try to discover that—to H.R. 1805, before us today.

In addition, we have the benefit of a 1,200-page study of the issue by the Copyright Office. That study was specifically mandated in the 1976 Copyright Act.

This morning we will hear from two leading proponents of the bill. On June 10 we will receive the testimony of opponents, and I expect that we will again receive fully the views of the Copyright Office on a date subsequent to that.

The chief sponsor of H.R. 1805 is the gentleman from California, George Danielson. He has long been identified with the issue and has been joined by 35 other colleagues who are cosponsors. The gentleman from Massachusetts, Mr. Frank, is one of those cosponsors.

Normally I would call on Mr. Danielson at this point to make a statement. He is, however, busy attending a caucus meeting at which I believe he will make a presentation. So I am expecting him momentarily.

[At this point Mr. Danielson entered the hearing room.]

[Laughter.]

Mr. DANIELSON. My timing is either good or bad.

Mr. KASTENMEIER. I was just saying you were busy at the caucus, Mr. Danielson, and I was going to invite you to make a comment.

Mr. DANIELSON. I managed to sneak out, Mr. Chairman, when the chairman wasn't looking. He was looking for Kastenmeier. [Laughter.]

I don't know what's gone on before, and it takes either a fool or a brave man to proceed.

Mr. KASTENMEIER. Actually, I just convened the hearing and suggested we were hearing today from proponents of your bill, H.R. 1805. I gave a brief history of it and indicated we would be hearing on June 10 from opponents; indicated that you had 35 other cosponsors, including the gentleman from Massachusetts, Mr. Frank, from the subcommittee. And I was going to call on you to make any statement you cared to at the present time.

Mr. DANIELSON. I recognize the chairman knows more about running his subcommittee than I do, so I'll not take up any time except to say I am certainly pleased to welcome here two of the persons who know more about sound recording, I guess, than anybody else in the United States. And I will just defer my comments until later, if I may, and then we can hear from the witnesses.

Mr. KASTENMEIER. Before proceeding to the witnesses, the Chair would like to announce that the hearing on H.R. 3530, relating to criminal penalties for copyright infringement which had been scheduled for next Wednesday, May 27, will be postponed to Thursday, June 18. The hearing for testimony of Government witnesses which had been scheduled for June 18 will be rescheduled to a later date.

I am very pleased to greet our two witnesses this morning. We have tried to reserve enough time for them. They are Mr. Victor Fuentealba, president of the American Federation of Musicians, AFL-CIO, and Mr. Stanley Gortikov, president of the Recording Industry Association of America.

Both Mr. Fuentealba and Mr. Gortikov are well known to this committee. They are experts. They are spokesmen for not only their own association and federation, but they speak more broadly on the subject on behalf of a rather long list of proponents of performance rights. So I am very pleased personally to greet them both again.

Which of you would like to proceed first?

TESTIMONY OF VICTOR W. FUENTEALBA, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO

Mr. FUENTEALBA. Thank you, Mr. Chairman.

I am here today actually wearing three hats: as president of the American Federation of Musicians, which, as you know, is the largest entertainment union in the world; as general vice president of the Department for Professional Employees of the AFL-CIO, which represents all of the unions representing workers in the performing arts; and also as a member of the board of the National Music Council.

With me today and seated in the audience is Jack Golodner, the director of the department for professional employees, and also one of our members, Bill Reichenback, from the Washington area, who

has done many recordings with the famous jazz group the Charlie Bird Trio, and will be available if anyone wishes to ask him any questions concerning the plight of the musicians in the recording industry.

I have been a professional musician since the days of high school, and I have been in this business continually since that date. And I have seen the erosion of jobs that has taken place for musicians through the use of recordings, and the total inequities which have been created by the fact that there is no means available to musicians to protect their jobs other than through legislation through Congress.

We negotiate with employers, we negotiate with the recording companies, but when a phonograph record is sold on the market, it no longer remains the property of the recording company and we are in no way legally able to negotiate for any use of that record once it becomes public property by being offered for sale.

As you know, I have appeared before this committee twice before. This is my third visit. Since my last appearance, conditions are getting even worse as far as musicians are concerned.

One of the biggest problems we have representing professional musicians is convincing the public that musicians have to eat, musicians have to live and work, they must have job opportunities.

I am certain all of you have children, relatives, or friends who have studied music. But where do they go after they have studied music? The job opportunities are growing slimmer and slimmer. And one of the greatest causes of the loss of jobs has been the use of recordings.

Unfortunately, as I say, there is no recourse available to us to prevent this in any way or to be compensated in any way other than through legislation.

When the new copyright bill was drafted in 1976, Congress realized that there was a certain aspect of the law that was lacking, and that was protection for the performer. And I was hopeful that as a result of the new copyright law legislation would be passed very quickly protecting the rights of performers in their product.

Unfortunately, as we know, this has yet to happen, and I hope that we will be successful, with the help of your committee, in this session of Congress.

In addition to the use of records on radio, which, as you know, is the prime source of entertainment and programing that the majority of radio stations offer to the public, for which the musicians receive absolutely nothing—I think it's a perfect example of unjust enrichment because without records the radio stations couldn't survive. But it is even going beyond that today, and as each day progresses and new technological developments are made, more and more musicians are losing jobs through the use of recordings.

This legislation would offer some protection to those musicians whose recordings are being used to displace musicians. I don't feel that the compensation is adequate in certain areas, but I do feel that it is a step forward to create the principle of performance rights for musicians.

Coincidentally, when I flew down from New York yesterday, I happened to meet Irving Feld, who is the head of Ringling Brothers-Barnum and Bailey Circus, and who also operates several ice

shows. And he said to me, "Vic, what's happening in New York City? I went to the Rainbow Room and they have a full production going on with no music, just records."

I said, "I wasn't even aware of it."

He said, "What are you doing about such and such circus which is now using records? What are you doing about this organization which is just using records?"

Just 2 weeks ago, one of my two assistants went to Atlantic City to testify before the Gaming Commission. All of the casinos have petitioned the Gaming Commission for the right to do away with the entertainment requirements. Even before they had done that, some of the casinos had displaced the musicians by using recordings for their entertainment backing the various musical acts.

This is spreading throughout the United States and Canada like wildfire. More and more producers of products—entertainment—are using records instead of musicians.

The unfortunate part about it is that we, the musicians, create the product that is putting us out of work.

We have a membership of approximately 300,000 throughout the United States and Canada. We have locals in every area of the United States. We did a survey 2 years ago which indicated that less than 25 percent of our members are able to earn their full livelihoods from music because of the use of recordings in discotheques, because of the use of recordings in broadcasting, because of the use of recordings for ballets, for ice shows, for circuses, for all types of music requirements where normally musicians would be hired.

To make it even more ironical, there are even more children studying music in the schools today than ever before. But there are no jobs. To become a professional musician today is the biggest gamble in the world. We have a handful of people who earn a good livelihood, but the majority of our people can't do it regardless of their ability. And the biggest source of that problem is the indiscriminate use of recordings with no restrictions whatsoever, and no compensation whatsoever to anyone.

I think it is totally unfair, and I think that the United States should realize the merits of this bill in just looking at the rest of the world, where you have 62 countries as of a year ago that have adopted legislation or policies creating performance rights in recordings.

I think the time has come, if you want to preserve music, live music, in the United States, to seek passage of this legislation.

Thank you, Mr. Chairman. I would be very happy to answer any questions you might have.

Mr. KASTENMEIER. Thank you, Mr. Fuentealba.

I think I will raise a question to you before we turn to Mr. Gortikov, because it seems to me you have raised some new questions in which you and Mr. Gortikov are perhaps not in agreement, because he may not object to the use of recordings in place of live musicians.

But the question of displacement of live musicians has been an issue for a generation or so. I remember long before I came to Congress that that was a very keen issue, "What do we do about

displacement of live musicians?" So that, in a sense, is not new, but it is a troubling one, I take it.

I am wondering why the present market mechanism, let's say for services, is inadequate for the hiring of live musicians.

Mr. FUENTEALBA. Well, I think, Congressman, it is caused by several factors.

First of all, they've improved the technology. I'll give you a perfect example. My wife and I went to the White House during the Carter administration to dinner and to view a performance of "West Side Story". And as the show progressed, I couldn't see the musicians, and the music was excellent. And I am a professional musician, and I thought I knew the difference between taped and live music.

And I said to my wife, "Where are the musicians?"

And she said, "I don't see them, either."

At the end it was announced that the Marine Corps Band had graciously prerecorded the music so there would be more seats available to view the show.

I couldn't tell the difference—and that is the problem we are having today. The industry has developed the reproduction qualities to the extent that it is very difficult, if not impossible, to detect the difference between live and recorded music.

And it is because of these developments, the ease with which they can be recorded, that we are suffering more now than ever before with the use of recordings, particularly to back live acts.

Mr. KASTENMEIER. But may I make this observation—I do this conscientiously. It seems passage of this bill will not go toward making the use of live musicians more popular or more efficient, but, rather, provide merely some additional compensation for musicians on the playing of recordings involving musicians. So that we will not achieve, if it is a desire to achieve it, the goal of employing more live musicians, but will merely provide compensation for recordings in which musicians may appear.

Mr. FUENTEALBA. Sure, but I think it's a step forward to recognize the fact that the commercial use of a recording is totally unfair to the entertainer, to the artist. I realize that the compensation in itself is not going to create work for the displaced musician. But we have a situation today where the musician is being displaced, the recordings are being used, with no compensation to anyone. And I think that is totally unfair, for anyone to use recordings for a commercial purpose without some compensation.

Mr. KASTENMEIER. I yield to my colleague, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. I was going to make the same observation you did. I fail to see how this bill would, in any way, stop the displacement or replacement of musicians. It would, as I see it, merely pay more money to those who are displacing them.

Mr. FUENTEALBA. But at the same time there is no compensation to anyone when the recordings are used.

Mr. SAWYER. But as I understood, one of your basic tenets as you were talking, or one of your themes, as I understood it, was the fact that records are replacing live musicians, and in some way or other I got the impression you thought this bill would help that. I don't see the nexus at all.

Mr. FUENTEALBA. I think it would help, Mr. Sawyer, because of the fact that right now there is no control whatsoever over the use; there is no payment whatsoever. And I feel any type of control or payment, regardless of how small, will in some way help the working musician.

Mr. SAWYER. Also, one thing is bothering me—and it bothered me back when I heard the testimony during the last Congress. That is, how is this different from, let's say, the maker of the musical instrument having a right every time it is played to get some compensation for it, or, in a more mundane area, the builder of a bus, and the United Auto Workers, who are certainly in equal employment trouble, being able to take a share of the fares every time a bus is used.

This is one part of this issue that bothers me.

Mr. FUENTEALBA. I think there is a basic difference. The bus can't reproduce itself and make another bus, but in the case of music, when the music is on a record it can be used over and over again to avoid the employment of musicians.

Mr. SAWYER. Well, in a sense, though, a bus or a taxicab can be repetitively used for moneymaking purposes, and presumably displace the use of some additional automobiles.

Let's say the maker of the violin, which presumably requires great skill and art—at least I presume it does—why wouldn't he then have a right to say, "Every time that is played on a record by a musician, why shouldn't I get some additional royalty out of this?"

Mr. FUENTEALBA. The maker of the violin is compensated when he sells the violin. He charges what he feels the violin is worth.

Mr. SAWYER. Isn't that true of a musician making a record, too?

Mr. FUENTEALBA. No, that is not true, Congressman.

Mr. SAWYER. Well, then, isn't that a question of bad bargaining?

Mr. FUENTEALBA. No, there is only so much you can bargain for with a recording company, because we are not talking about a problem with the recording company itself. We are talking about a product that gets out of the hands of the recording company and goes on the market.

Mr. SAWYER. But the recording company sells it just like the violin maker sells it, and if he gets charged more for the artistry going into the making of the record, he has the option to charge more in selling his record on the market.

Mr. FUENTEALBA. But he has to keep his product price to the point where he can continue to sell the product. When you are talking about the violin or any other musical instrument, there are various grades of musical instruments. The top grades go for the highest prices.

Mr. SAWYER. I presume that is true of artists also.

Mr. FUENTEALBA. First of all, I should make it clear that we are talking about the musician who does not get any royalty when he makes a record.

There are two categories of artists. For example, there are the musicians that are hired to do the music for the average recording, say for a Frank Sinatra recording, and receive no compensation other than $146.82 for a 3-hour recording session. That is what he is paid. The contract Frank Sinatra has with the recording compa-

ny may provide he gets a certain percentage of the net sales of the recording, but that does not inure to the benefit of the musicians.

Mr. SAWYER. Well, why couldn't the musicians make the same kind of a deal?

Mr. FUENTEALBA. I don't think it would be possible, because when the recordings are sold, the sales are based on the name of the artist, not usually on the background.

It is quite possible—there are certain rock groups, for example, self-contained units, that do make such deals. But they are in the minority when we talk about the number of musicians employed. For example, last year there were 45,000 musicians that had recording dates of varying degrees, and I would say in excess of 40,000 of them worked for the basic union rate for making that recording. The only ones that ever share in any type of royalty are the self-contained name groups and the artist himself or herself.

Mr. SAWYER. Of course, telephone operators, I presume, before you had recordings that come on and tell you, "That line is disconnected," they had to have somebody sitting there and doing that. I went to Disneyworld not too long ago, and for a lot of the things there, the guide, if you want to call it that, or the announcer, is all recorded.

Where would it stop if we start saying that everybody that makes a recording—obviously if the recording is used by the telephone company for routine statements, it is displacing somebody that would have to sit there live and do it, and I presume in announcements you have the same problem. Where does it stop?

Mr. FUENTEALBA. We consider music to be an art, and it is my opinion that you just can't take any individual, give him a musical instrument, and say, "Play," and it is going to come out with a distinctive sound. And the reason why some musicians are more popular than other musicians is their ability to create certain sounds with their instrument, which makes the difference between the run-of-the-mill musician and the artist.

And I don't think you can compare the telephone operator to a musician. A musician has to study for many, many years to perfect his ability on his instrument. And you can always detect the differences between two players, regardless of how good they are, because there is a certain element of their ability which is distinctive. And there is a certain creativity they have, and that puts musicians in an entirely different category.

And that is why we feel we should have performance rights in recording, because musicians are artists when they are creating those records.

Mr. SAWYER. I yield.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Thank you.

Thank you, Mr. Fuentealba. I think you gave an excellent presentation, and I am glad you touched on some of the things you did.

I would like to direct my inquiry to probably an effort to clear up some ambiguities that may remain in the state of the record at this moment.

On this subject matter of displacing live musicians, as I see it this bill neither is intended to, nor could it, prevent the displacement of live musicians, but it is aimed at providing some compen-

sation to those musicians who do create the sound that is in the recording which is used. Even though they may not be rehired, they are going to get some kind of a royalty over the lifespan of the copyright.

Isn't that the idea?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. So instead of necessarily creating more live jobs, particularly in the above-scale type, the artist who can demand a certain fee—but for the hiring-hall type of artists who do create so much of this music, it would be a continuing source of revenue during the life of the copyright; is that not correct?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. Second, it just might provide some additional live jobs if those who are using sound recordings commercially for profit would have to pay a royalty. They might then in some instances be inclined to employ a musician once in a while. I presume that would be a small number, but there might be some jobs in that respect.

Let's get back to the trumpet and the bus, if I may. If the Kahn Co. made a trumpet and sold it, the buyer owns the trumpet. He owns it lock, stock, and barrel. He can use it, he can destroy it, he can sell it, he can give it away—he can do all of those things that we can do with property that we own. Is that not correct?

Mr. FUENTEALBA. True.

Mr. DANIELSON. But if the buyer of the trumpet uses it to play a musical composition commercially, he must pay a royalty to the writer of the composition; isn't that correct, under normal circumstances?

Mr. FUENTEALBA. Normally the musician is not responsible for the payment of the fees to the publishing organizations. No, it is usually paid by the owner of the establishment or the station.

Mr. DANIELSON. If Lawrence Welk has an orchestra which has a lot of musical instruments in it and he renders the compositions and broadcasts them, plays them in his program, there is a royalty that goes back to the composer of those works of art, is there not?

Mr. FUENTEALBA. Yes. And that is usually paid by the broadcaster.

Mr. DANIELSON. I don't care about the mechanics of it. But it carries with it an obligation to pay for the use, is what I am talking about.

Mr. FUENTEALBA. True.

Mr. DANIELSON. Most musicians, most artists, have some kind of a repertory and they make payments back through channels to those who compose those works of art, provided they are still covered by copyright.

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. What we are talking about is an intellectual creation, an intellectual property, when we are talking about these sound recordings; isn't that correct?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. You are not talking about the piece of—I don't know what they make them out of today; it used to be shellac—vinyl, I guess it is, some kind of a compound. Someone who buys a

phonograph record can, like the man with the trumpet, use it, give it away, sell it, do whatever he wants with the physical object.

What you are talking about is the sound that is placed into that recording by a phonographic process. That is what we are talking about here, isn't it?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. So when someone utilizes that record to reproduce the sound, he is not selling the record, he is selling the sound. And that is what we are trying to reach through this bill; is that not correct?

Mr. FUENTEALBA. Correct.

Mr. DANIELSON. Be it a radio station which makes up about 85 percent of its programing through the reproduction of that sound, or the discotheque, which probably makes up 98 percent of its program—I guess those flashing lights are worth something—and you mentioned a circus, et cetera. It's the sound that you are talking about here, is it not? And it is the sound that is the work of art?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. That is the creation of the musicians—the arrangers, the conductors, the instrumentalists, who actually render the sound which is engraved into this recording. And that is what you are talking about.

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. And also it is the creation of those who put those sounds together, who have the technical and artistic skill to blend the sounds and to reduce them to a sound engraving which is capable of being reproduced.

That is what we are driving at in this bill. It is to provide some compensation to the artists who create the thing of beauty which is being sold commercially, and not the vinyl record itself, which could be given away or thrown away—who cares?—it's the reproduction of the sound we are trying to reach; is that so?

Mr. FUENTEALBA. True.

Mr. DANIELSON. I might add that a trumpet does not have a copyright; a sound recording does. A bus is not copyrighted; a sound recording is. Today we have both civil and criminal penalties against the unlawful reproduction of a sound recording, but the playing of a sound recording, which is the only purpose for which it is reproduced in the first place, escapes scot free, even under commercial usage, and that is the thing we are trying to patch up in this particular instance.

I don't really have any serious questions. I have been trying to recap here a little bit. You have covered the subject here so very well that I hesitate to go into it any farther.

Sixty-two nations of the world have already recognized the performance right; isn't that true?

Mr. FUENTEALBA. Yes; correct.

Mr. DANIELSON. The discotheques—I mentioned the flashing lights. I would imagine that the operator of the discotheque pays the electric company for the electricity which flashes in those lights. They probably pay Westinghouse for the bulbs through which it flashes. No doubt they pay their ever-loving landlord for the use of the space in which they run the discotheque.

But what do they sell? Music. And they pay nothing for the music. Is that not true?

Mr. FUENTEALBA. That is my point, yes.

Mr. DANIELSON. I rest. I am done, Mr. Chairman.

Mr. KASTENMEIER. Without objection, both Mr. Fuentealba's statement and Mr. Gortikov's statement in their entirety will be placed in the record.

[The complete statement of Mr. Fuentealba follows:]

STATEMENT

OF

VICTOR W. FUENTEALBA, PRESIDENT

AMERICAN FEDERATION OF MUSICIANS, AFL-CIO

Mr. Chairman, I am Victor W. Fuentealba, President of the American Federation of Musicians (AFM) whose 300,000 American members and nearly 600 locals are located in nearly every city and town in the United States. Today, in addition to the AFM, I am speaking on behalf of the AFL-CIO, and also of its Department for Professional Employees, of which I am General Vice President.

I am here to urge the Subcommittee to act favorably and expeditiously on H.R. 1805 - the Commercial Use of Sound Recordings Amendment to the Copyright Law - which has been introduced by your colleague, the Honorable George Danielson, for himself and 35 other Members of the House of Representatives. This is my third appearance before this Subcommittee, Mr. Chairman, to urge enactment of this legislation which in fairness should have been adopted as part of the rewrite of the Copyright Law in 1976.

Instead, substantive provisions similar to H.R. 1805, were stripped out of the 1976 rewrite and replaced by provisions calling for a study of performance rights in sound recordings by the Register of Copyrights. That study and the report on it were completed over three years aso. They constitute one of the most exhaustive and definitive undertakings ever carried out on any legislative issue dealing with all of the legal, economic, and social questions which have been raised over the years with regard to this issue.

Probably the best and most succinct synthesis of that voluminous report was made before this Subcommittee in 1979 by the then Register of Copyrights and author of the reports, Barbara Ringer. She stated:

The Copyright Office believes that the lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and recording arts. Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax". However, any economic burden on the users of recordings for public performances is heavily outweighed, not only by the commercial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized used of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or

compensation for their widespread commercial use can no longer be justified.

We do not believe that arguments to the effect that sound recordings are not "writings" and that performers and record producers are not "authors" can be considered tenable. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976. If sound recordings are "the writings of an author" for purposes of protection against unauthorized duplication, they must be considered "the writings of an author" for purposes of protection against unauthorized performance.

Broadcasters and other user have argued that the benefits accruing to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists. While this argument may be valid in the case of some "hit records," we do not believe

> that these unpredictable benefits in certain cases justify the outright denial of performing rights to all records. That denial is inconsistent with the underlying philosophy of the copyright law: that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain. (Mazer v.Stein, 347 U.S.201(1954)).

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* Copyright Issues: Cable Television and Performance Rights;Hearings...Nov. 15,26, 27, 1979, Serial no. 28, pp. 16-17

Over the years, awareness has grown of the basic unfairness of our copyright laws in denying to performers on sound recordings any financial return from commercial exploiters of their creative product. Some of the organizations which have endorsed legislation like H.R. 1805 are:

- the United States Department of Labor;
- the United States Department of Commerce;
- the United States Copyright Office;
- the National Endowment for the Arts;
- the Democratic Party
- the Republican Party
- the American Federation of Television and Radio Artists;
- the Consumer Federation of America;
- the American Council for the Arts;
- the American Arts Alliance;
- the American Guild of Musical Artists;
- the Patent, Trademark, and Copyright Section of the American Bar Association;
- the National Citizens Communications Lobby;
- the Recording Industry Association of America;
- the Muzak Corporation.

Indeed, today 62 of the more technologically advanced nations of the World provide by law for performance rights in sound recordings. I should note, Mr. Chairman, that failure to enact such legislation in the United States - the world leader in the creation of sound recordings - denies to our citizens the protection and benefits of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations entered into at Rome in 1971 and generally referred to as the "Rome Convention".

Well then, who opposes this legislation? To my knowledge, Mr. Chairmen, only those who have a direct and highly lucrative stake in the present inequitable system - broadcasters, juke box operators, and a few but not all, background music companies.

Probably the most vociferous opponents of H.R. 1805 are the broadcasters. The same broadcasters who are currently pleading with this Subcommittee to rewrite the provisions of the copyright law granting a compulsory license to cable television systems, because the royalty fee they, the broadcasters, receive for the use of <u>their</u> product from cable system operators is inadequate. I trust the irony of this situation is not lost on the members of the Subcommittee. The average radio broadcaster devotes about 75 percent of commercially available time to playing recorded music. Recorded music is the basis on which a radio broadcaster advertises and takes the profits from his "money machine". Yet the performers on those sound recordings receive nothing in return for their creative work.

Broadcasters try to place their opposition to the legislation on a higher plane than the narrow financial self interest on which it really rests. Time and again you will hear them assert that they provide compensation in the form of free air time which promotes record sales and the popularity of the performers. This self-serving and unsubstantiated assertion totally ignores:

- that radio broadcasters select sound recordings on only one basis - do the recordings increase their audience, which in turn will increase their advertising rates and profitability;
- that many listeners tape record music from broadcasts thus undercutting the sale of sound recordings, and;
- that many radio stations as a matter of practice do not announce the artists and performers whose records they are playing.

Another old saw which I'm sure will be repeated in the course of the hearing is that recording artists are, for the most part, affluent and that this legislation will only make them more so. Oh, were it only true. Certainly, some of them are doing well financially, but not all, or even most of them. This also ignores the provisions of H.R. 1805 which provides that the 50% of the royalty fees distributed to performers on any sound recording will be evenly divided among all of the performers on that recording. Thus, Frank Sinatra would receive no more under the bill than any member of the orchestra backing him on any recording. I know my members, Mr. Chairman. A far more accurate picture of their financial situation is drawn by the Register of Copyrights report, Performance Rights

in Sound Recordings, 1978, It states:

> Returning to the two issues raised at the beginning, are performers already benefiting from the existing procedures in regard to the production and sales of records and are they receiving adequate compensation for their efforts, survey data indicate negative answers to both questions. Only a small proportion of those engaged in the production of sound recordings receive any financial benefits from the sale of those records. In the three groups most affected only 23 percent of the musicians benefit from sales, 5 percent of the musical artists and 17 percent of the radio and TV artists. Furthermore, annual earnings of performers as a group are generally low, with almost a third of the musicians, and two-fifths of the musical artists and radio and TV artists earning $7,000 a year or less." (pp.119-120)

Mr. Chairman, this legislation will help my members and other artists and performers who make sound recordings. If it didn't, I wouldn't be here working for its enactment. And my members need help as the excerpt from the Registers report graphically illustrates. Musicians are one of the first professions whose members were displaced by technological change and what is particularly ironic about our plight is that to a large extent we have displaced ourselves with our own creations on sound recordings. Our music fills the airwaves without cost to broadcasters - and offices, shopping centers, bars, restaurants, and discos without cost to background music companies and juke box proprietors who profit from our creations. All without compensation to us. Because of this profusion of music from sound recordings most musicians cannot find jobs after spending as much time in preparation for their profession as many accountants and lawyers.

But that is not the basis on which I appeal to you to enact H.R. 1805. I ask you to enact this legislation because it is the right and fair thing to do. I trust that you will do so; that I will not have to appear before you again in the 98th Congress to urge the adoption of such legislation.

Thank you.

Mr. KASTENMEIER. Mr. Gortikov.

TESTIMONY OF STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. GORTIKOV. Thank you. I represent the Recording Industry Association whose members create and market over 90 percent of the recordings sold in the United States. And a lot has changed since I last appeared before this group. We now operate in a totally different environment. Congressman Danielson anticipated that environment once before in these hearings when he described or envisioned a celestial jukebox, and that vision happened to come true. It's real now; it is here. And it is part of a technological revolution in which we will be increasingly involved.

That technological revolution is exciting to us, but it is also ominous. And it is the ominous factor that I would like to address today as I go on.

We are not here today, however, as a special interest seeking your special favors. We are not a Chrysler; we are not an automobile industry; we are not a New York City looking for a handout or a bailout. What we want is only what everybody else has. We are a vital, integral part of the creative and copyright community. We deserve to be treated just the same as others in that same community. In short, we are asking for full copyright protection—full protection just like all other copyrighted works enjoy here and throughout much of the rest of the world. At this moment we are the only copyrighted work capable of being performed that does not enjoy a performance right for a performance royalty when our product is used for the profit of somebody else. No other copyrighted work suffers that same penalty—not movies, not dramas, not books, not screenplays, not television programs, not original cable programs—nobody else, only sound recordings. And that is just not fair.

Every single sound recording is a unique and creative performance. It is a special one-of-a-kind expression of a musical composition. And that composition is nothing more than black ink on white paper until it is performed and captured in the recording. And that recording deserves the same full copyright protection as the musical composition itself.

A few moments ago I mentioned what Congressman Danielson once described as the celestial jukebox, and said it was almost here—and it is.

Let me sketch quickly some technological changes and their perils for the risk-takers and the recording industry. Let me talk about the impact of that technology and the risks.

First, as to the impact:

The changing technology is going to revolutionize how consumers and listeners are going to hear and acquire recorded music, and how that recorded music is going to be delivered to them.

As far as the basic risks of that same technology, it is going to become easier than ever both to avoid and evade paying for that recorded music. And more and more profitmakers are going to be using our recorded music for their financial benefit, and just skip the need to pay for it, unless this Congress acts.

You have heard about superstations, about satellites, about microwave relays, and who knows what's going to be next.

Let me paint a specific picture for you. Presume you are sitting in your living room. You are now a subscriber to a special cable broadcast service that features only recorded music—the latest hit sound recordings, all-time best sellers, key jazz, key classic. And you have just received in the mail your monthly summary from the cable service that you subscribe to, listing the exact date and hour that each album recording is going to be played, start to finish, uninterrupted by commercials.

And you note on that list that you paid for from the service that you have also paid for, that Barbra Streisand's newest hit album is going to be played tonight at 9 o'clock. You would like to own it. Now you take some action to do so. And your action is that you make one toll-free telephone call, plus you push a few buttons on an encoder box that has been provided to you as part of what you pay for, by the cable system. Then your own tape recorder in your own living room is going to be triggered by a computer, and it is going to record that Streisand album at 9 o'clock tonight, start to finish, in perfect digital sound, and you are going to be charged on your credit card for that album.

What I described to you is not fantasy. It is reality, and it is going to start in 1982.

This system, sophisticated as it is, may be just a horse-and-buggy portent of things that are going to come about later on.

Technical forecasters see the day when a cable TV subscriber need merely press a few buttons to hear a particular album, or even a particular selection, of his choice at the time he wants to hear it.

Here is another example that is also a reality:

A major cable system now wants to set up a special subscriber—that means paid for—video cable system featuring hit sound recordings and hit stars, that is going to play those recordings and accompany them with appropriate visuals. That cable system can use our sound recordings free because Congress has not enacted a performance right.

Take a look at this [indicating]. This is a regular album, a 33-long-playing album, by Blondie, which is a very popular rock act today. This, when played, gets absolutely no performance rights for the record company copyright owner, for the musicians, or for the vocalist.

This [indicating] is a videocassette, also of Blondie. It has virtually the same content, except it has a visual component to it. But the music is the same as in here [indicating]. This, when played, will earn a performance right. Congress has granted that performance right and royalty on the music played out of this [indicating], but not that same music when played out of this [indicating].

Now, is that fair?

Still another example of technological change:

Centralized satellite broadcast systems now want to beam recorded music programs via satellite to local radio stations nationwide. So therefore those local radio stations need have no program preparation costs, no local disk jockeys. Instead, they are going to get top-drawer national disk jockey announcers, national advertisers,

and eventually those satellites are going to bring recordings into homes not just via radio stations, but by rooftop receivers.

Should we in our industry applaud all these technological changes? Sure we should, because they provide opportunities—except for one unchanging unfairness in all those plans, that there is no money for the recording musicians, none for the vocalists, none for the stars, none for the copyright owners.

Five years ago, broadcasters, movies, sports interests, told you they wanted to be paid when technological developments threatened them, and Congress agreed. And today cable television stations pay performance royalties. Only a few days ago, those same broadcasters, movies, and sports interests were back here asking for even more protection from even newer technological developments. They all want fair income when their copyrighted programs are used for profit by others. So do we.

We make the same basic request of Congress—reasonable payments, full copyright protection, a performance right, the same equal protection enjoyed by those broadcasters and every other originator of copyrighted work. We ask that Congress treat us just the same.

The copyright law in its text recognizes owners of creative works and users of those works. Let me now focus on the users, in this case the users of sound recordings.

Picture, as Congressman Danielson so aptly did a few moments ago, a discoteque. As he observed, a disco's form of program in entertainment is strictly sound recordings. It sells tickets, gains income and profit, and its customers dance to that music. No individual pays for the use of the records, and without the records it wouldn't exist. Doesn't it seem fair that a disco should pay reasonably for the use of those recordings, and if so, shouldn't the other major users of recordings also pay—jukeboxes, theaters, nightclubs, dance halls? And shouldn't the same logic follow for still another major user of recordings for profit, the radio station?

So if a performing right makes sense for a disco, it makes just as much sense, doesn't it, for a radio station? Even more, because a radio station uses records even more broadly to attract its audiences, to sell commercial time, to make profits, to build the equity value of the station.

Radio devotes about 75 percent of its commercial time to playing recordings. Radio has to pay for every other form of programing—sports, news, financial services, drama, disc jockeys, personalities, syndicated features, game shows. But radio pays nothing for its programing mainstay, records. And just like a disco, so should radio pay a reasonable royalty for this reasonable right.

Radio says a performance royalty is going to cost too much. Is 68 cents a day too much for a radio station with revenues below $100,000—only 68 cents for three-fourths of its programing? Is $2.05 per day too much for a station with revenues below $200,000 for three-fourths of its programing?

For a station with $1 million in revenue is $27.40 per day—that's $1.14 an hour—too much for that station for three-fourths of its programing?

But never mind what I think about how much is too much. Here's what the president of the National Radio Broadcasters'

Association said before this subcommittee in 1978—and the National Radio Broadcasters' Association is increasingly the definitive voice of radio stations. He said, "If I came along and said broadcasters could not afford this, I don't think I could back that up." That is the head of a definitive radio broadcasters' association.

And here is what the Copyright Office study says:

"Radio stations would be able to pay a record music license fee without any significant impact either on profits or the number of stations in operation."

Radio also says that it already pays for recorded music via its performance royalties to ASCAP, BMI, and SESAC. But those payments pay only for the underlying musical compositions, for the words and music. The money goes only to the composers and to the businessmen publishers—not 1 cent to the recording companies, and not 1 cent to the musicians or vocalists. So they are paying only for the notes on a sheet of paper, nothing for the valuable performance of those notes.

Radio's excuses not to want to pay make no sense if a radio buys an Associated Press service and then expects a news broadcaster to broadcast it for free.

Radio also says it should not pay because radio helps sell records. Radio does help sell records, some records, mostly new releases, mostly in the early life of those releases. Radio does not play those as a public service to recording companies and performers; but, to grab audiences, to sell commercials, to attract advertisements for buyers of deodorants, beer, or dogfood. Radio does not protest its ASCAP or BMI payments even though composers' income may be enhanced by air play.

Every week recording companies release over 700 newly recorded tunes. A pop radio station, however, only adds about three to six new tunes on its play list every week. So all of our sales are hardly dependent on radio.

Furthermore, of the 75 percent of the radio programing that is devoted to records, 53 percent of that air play is confined to older records, records that are no longer selling substantially, records whose air play no longer creates sales.

Two nights ago I watched the Grammy Hall of Fame on television, and I saw the playing of some fantastic old recorded performances by some fantastic performers—Bing Crosby doing "White Christmas," Nat Cole doing "Unforgettable," "Ten O'Clock Jump" by Count Basie, and Artie Shaw, and Tommy Dorsey. These are the kinds of records that no longer sell appreciably at all. Yet they get air-played continuously.

So only a few of the records played over the air help sales, but all recordings played over the air benefit the broadcasters.

If the sales promotion factor is to be considered in evaluating whether H.R. 1805 should be passed, it should influence how much royalty is paid. It should not determine whether that royalty should be nonexistent.

A few years ago the TV program of Alex Haley's "Roots" expanded the sales of his book. But broadcasters did not say that they shouldn't pay for the TV show just because the book sales were expanded. So neither should radio avoid all payment for the use of recordings just because some sales are helped.

A performance right is certainly nothing new to the rest of the world, as was observed here a moment ago. It is recognized in 62 nations. And even recently, since 1970, 27 nations have either granted or expanded or reaffirmed that right.

Now, the anomaly is that American recordings are the most popular recordings in the whole world. But since there is no performance right here in the United States, many other nations that respect a performance right won't pay performance royalties on the use of U.S. recordings, even though they pay domestically. Germany, Italy, Sweden, and Denmark are examples. They play a lot of U.S. recordings over there, but few payments flow over here because of no reciprocal right here. So our companies, our performers and musicians, are denied that foreign income. Our U.S. balance of payments is unfairly impacted negatively.

So here we have money sitting over there, available theoretically to us, and we can't have it. So passage would correct that inequity and trigger the payment of that deserved income.

Let me comment quickly on performance royalty and the arts.

A few years ago, my board of directors, the presidents of the principal record companies, made a pledge to donate 5 percent of any performance royalty proceeds to the National Endowment for the Arts, and to further arts and culture. Now, that longstanding pledge takes on a fresh and even more important significance this year, because with Government funding of the arts seeming to decline, private sector money sources become particularly vital to sustain the arts and culture. And this new projected contribution from performance royalties would add another resource to foster the arts.

Support for the performance right is rather widespread. It varies all the way from the Commerce Department to the American Bar Association, to the Consumer Federation of America, to the National Association of Recording Merchandisers—those are the wholesalers and retailers who are represented by their counsel Mr. Ruttenberg in the audience today—and support from the U.S. Copyright Office was the most carefully researched of all.

When Congress passed the copyright revision law in 1976, the performance rights issue was deliberately excluded. It was deemed too controversial, too likely to invite the wrath of the broadcaster and complicate the passage of the omnibus bill. So this subcommittee then commissioned the U.S. Copyright Office to undertake a thorough study of the issue and then also asked for its recommendations. And this was done.

In 1978 the Copyright Office presented to you an 1,100-page exhaustive study with an accompanying economic report, together with its final recommendation. And that recommendation was "Do pass," with strong reasons to do so.

So I respectfully ask that you heed that recommendation that you directly solicited.

And what we ask today echoes that recommendation of the Copyright Office. We are here again not to ask for something new, not to get something special. We are just trying to catch up to other copyright owners. They get paid; we do not. We just want the same full copyright protection they already enjoy, thanks to Congress.

We, too, respectfully request that you support the basic copyright principle which is: One who uses another's creative work for profit pays the creator of that work. That makes sound recordings different from buses.

We want the same treatment as others who come before you, the same as motion picture interests who want fair compensation for the use of their copyrighted works, the same as the network broadcaster, the same as the music publisher copyright owner, the same as the sports copyright owner, the same as creators of television, the same as radio itself when it had original programs.

We ask Congress to do just the same for us as it did for the broadcasters in 1976. Broadcasters said then that cable systems should be required to pay broadcasters when cable TV picks up their over-the-air signals. Congress agreed. You did right then. Please do it again now.

Thank you.

[The complete statement of Mr. Gortikov follows:]

STATEMENT OF

STANLEY M. GORTIKOV

ON BEHALF OF THE

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This Statement is submitted by Stanley M. Gortikov, President of the Recording Industry Association of America, Inc. (RIAA), a trade association of 49 companies whose members help create and market about 90 percent of the sound recordings sold in the United States.

SUMMARY

H.R. 1805, the "Commercial Use of Sound Recordings Amendment," introduced by Representative George Danielson and a bipartisan group of 35 cosponsors, including Mr. Frank of this Subcommittee, would establish rights and royalties for the public performance of copyrighted sound recordings. RIAA strongly endorses this legislation and urges prompt and favorable consideration of it by Congress.

Background. The owner of a copyright has historically been granted a number of exclusive rights with respect to the copyrighted product, among which is the right to authorize the performance of the copyrighted work. Thus, those who own copyrights on plays, musical compositions, books and motion pictures, to name a few, are legally entitled to be paid a royalty

when others perform these copyrighted works in public, in a theatre, on radio or TV, or anyplace else.

The sound recording is the only copyrighted work capable of being performed that does not have a performance right and royalty. That is largely because the copyright laws have not kept up with changing technology.

The Danielson bill (H.R. 1805) would remedy this long-standing inequity by establishing rights and royalties for the public performance of copyrighted sound recordings. Dance halls, discos, background music services, jukebox owners, broadcasters and others who presently use sound recordings for profit would be required to compensate vocalists, musicians and record companies for the commercial use of sound recordings. And those who stand to benefit from new uses of the sound recording would also pay royalties for their commercial use of the product.

<u>New technology threatens the very existence of the recording industry</u>. We are not far from the day when communications technology may significantly reduce record sales. Already, one company has announced plans to offer in 1982 a sophisticated system for home

listening and recording of recent record releases through cable TV hookups. Soon to come will be the complete in-home jukebox, where the consumer, by the mere push of a button, will be able to select a recording from a vast bank of recorded music. Without the full copyright protection of a performance right, performing artists and record companies face a bleak and uncertain future.

There was a time -- not all that long ago -- when radio and other users of sound recordings paid for the talents of vocalists and musicians. The advent of the sound recording changed all of that dramatically. The performers' vast live audiences turned instead to the sound recording. But performers were left without protection for their unique and creative performances. As the Register of Copyrights noted, "[t]he results have been tragic: the loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings."

Today performers and record companies face a major technological revolution. Although extending full copyright protection to the sound recording cannot compensate performers and record companies for the inequities of the past, it will at least spare them

the same economic suffering and hardship their colleagues bore earlier.

Fairness demands that a performance right in sound recordings be granted. Unlike other copyrighted performable works, performing artists and record companies receive no compensation for the commercial use of their unique recordings. As a result, those who rely almost exclusively on the sound recording, including discos, jukebox operators, nightclubs, background music services and broadcasters, gain income from the creativity of others without paying any compensation.

Radio in particular makes extensive use of records at no cost. Sound recordings account for three quarters of radio's programming. Yet broadcasters -- who must pay for all their other types of programming -- pay nothing to performers or record companies for this, their basic source of programming material.

While some have argued that performers already make adequate income from live performances and record sales, the Register of Copyrights' 1978 study concluded otherwise. The study found that most recording artists receive no royalties from record sales and that the

income levels of most of these performers are quite low. The performance royalties called for in H.R. 1805 would provide badly needed income to thousands of vocalists and musicians.

Opponents of a performance right also have argued that they need not pay a royalty because their commercial use of recordings boosts record sales. While this may be true for a limited number of current "hits," it is not true for most recordings. A recent survey found that over 50% of the records played on radio are "oldies" -- records which no longer achieve significant record sales.

In any event, these economic considerations are irrelevant to the basic principle underlying the performance right in copyright law -- that the creator is entitled to compensation for the commercial use of his creative product. That principle is not conditioned on who benefits from what. For example, the televised production of Alex Haley's "Roots" enhanced the sales of his book dramatically, but no one suggested that ABC should not pay Haley for the right to use his creative product.

<u>The creation of a performance right in sound recordings would bring the United States into accord</u>

with prevailing international practice. The United States is one of the few Western nations that does not recognize a performance right in sound recordings. Sixty-two nations currently recognize that right. Since 1970 alone, 27 nations have enacted or amended laws either granting, expanding or otherwise affirming the performance right.

Moreover, many nations granting a performance right will not pay royalties to American performers and record companies because the U.S. does not offer a reciprocal right. For example, Canada cancelled its performance right for records because the U.S. did not reciprocate. As a result, U.S. performers and record companies are denied deserved compensation from abroad, and the U.S. is denied a positive contribution to its balance of payments.

Fundamental principles of copyright require that sound recordings be accorded a performance right. The basic premise of copyright law is that one who uses another's product for commercial gain should compensate the creator of that work. This principle currently applies to every copyrighted product that is capable of being performed except the sound recording. Thus, a record company that holds a copyright on a musical

performance recorded on videotape has the right to be compensated for the commercial use of that performance. In contrast, if the same musical performance is recorded on a disc, tape, cassette, or cartridge, the copyright owner is entitled to no compensation whatsoever for the commercial performance of that creative work. There simply is no justification for continuing to discriminate against the sound recording in this fashion. The 1978 Register of Copyrights' Report agreed, stating "to leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified."

By comparison, composers and publishers have had a performance right since 1889. Certainly, the recording artist's interpretation of a tune is no less a contribution to the recorded product than the composer's original lyrics and score. Indeed, it is often the artist's performance as much as -- or more than -- the composer's tune that makes the recording attractive to both record buyers and audiences.

Similarly, the record company makes a unique and creative contribution to the production of the sound recording -- sifting, identifying and selecting the talent and components; editing, mastering, and

overdubbing with the highly sophisticated electronic procedures that characterize today's inventive recording techniques; and ultimately consolidating all of these elements into a finished copyrightable recording.

Broadcaster programming, too, has a performance right. In 1976, broadcasters successfully argued that they needed a further expansion of their performance right to protect against the commercial expropriation of their product by cable television companies. The arguments the broadcasters used then apply with equal force here; record companies and performing artists are asking for precisely the same protection from commercial expropriation.

H.R. 1805 would benefit the public and would have no adverse impact on users. As the law now stands, the costs of creating sound recordings are borne entirely by record buyers. A performance right would redress this inequity by requiring those who profit from the records to pay something for the value they receive. That is a major reason why consumer groups support this legislation.

The public would benefit as well from the pledge of leading companies of RIAA to finance a Recording

Industry Music Cultural Fund by contributing 5% of the performance royalties they receive through enactment of this legislation. With federal funding likely to decline, it is essential that private funding sources such as that proposed here be developed to foster the creative arts in this country.

Commercial users of the sound recording can easily afford to pay the modest royalties proposed in H.R. 1805. They are only a fraction of what currently is paid to composers and publishers through BMI and ASCAP. Discos and dance halls would pay only $100 per year. Thirty-seven percent of the commercial radio stations would pay a fee ranging between nothing and $750 annually. The remaining stations -- those with revenues above $200,000 a year -- would pay a fee equal to 1% of their net receipts from advertisers, and this fee would be reduced for those stations who use less than the average amount of recordings. As a spokesman for the radio broadcasters recently conceded, "if I came along and said broadcasters could not afford this, I don't think I could back that up." The 1978 study by the Register of Copyrights agreed that "radio stations would be able to pay a record music license fee without any significant impact."

In any event, as broadcasters themselves argued in 1976, the "ability to pay" argument relates more to the royalty rate that should be established rather than to the basic fairness of granting the right itself.

INTRODUCTION

It is a fundamental principle of copyright law that one who uses another's creative work for profit must pay the creator of that work. The owner of a copyright is granted a number of exclusive rights with respect to the copyrighted product, among which is the "performance right" -- the right to authorize the performance of the copyrighted work.[1/] Thus, those who own copyrights on books, plays, and musical

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1/ 17 U.S.C. § 106 provides that the copyright owner has the following exclusive rights:

> "(1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

compositions, to name a few, are legally entitled to be paid a royalty when others perform these copyrighted works in public, in a theater, on radio or TV, or anyplace else.

Only one copyrighted work capable of performance does not have this "performance right" -- the sound recording.

This distinction is largely explained by the slow evolution of U.S. copyright law. When this country's basic copyright law was enacted in 1909, the future popularity of sound recordings was hardly even a dream.

Since that time, the sound recording has emerged as one of the world's major cultural media. The rasping wax cylinder of 1909 has been replaced by progressive improvements in sound reproduction -- high-fidelity LP records, stereophonic disks, 8-track cartridges, cassettes, and now digitally encoded recordings -- which enable music-lovers to hear concert quality performances in their own living rooms. Records have become a major medium of communication, bringing American music and culture to people around the world. Records have become the mainstay of radio programming, replacing the

musicians and vocalists who provided the sounds radio broadcast only a few decades ago.

Until now, performers and record companies could rely upon the sale of records as a means of recovering their investment and, hopefully, making a profit. However, dramatic space-age technological developments are now being brought to market which threaten the vitality of the industry itself. They offer an alternative means of delivery of a sound recording to the home that could make the purchase of the record unnecessary. Thus, the need for a performance right in sound recordings is more acute now than ever before.

Congress has taken some steps to respond to the emergence of sound recordings as a major cultural medium. In 1971, Congress amended the Copyright Act to provide limited copyright protection to sound recordings in response to the growing threat to the industry of record and tape piracy. In 1974, Congress made permanent the antipiracy copyright status it had granted three years earlier. And in the 1976 Copyright Revision Act, Congress extended to sound recordings most of the copyright protections given to other creative works, such as books, plays and motion pictures, which have long enjoyed copyright protection. But Congress

did not grant sound recordings a performance right. Instead, Congress directed the Register of Copyrights to examine the issue and report to Congress on "the status of such rights in foreign countries, the views of major interested parties and specific legislative or other recommendations."2/

In June 1978, the Report of the Register of Copyrights on Performance Rights in Sound Recordings, a comprehensive 1100-page analysis of the issue, was presented to Congress.3/ It strongly endorsed the creation of a performance right in sound recordings, concluding that there is no legal or factual justification for discriminating against the sound recording. RIAA and a host of other organizations agree.4/ We

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2/ 17 U.S.C. § 114(d).

3/ "Performance Rights in Sound Recordings," Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) (Comm. Print No. 15) [hereinafter "Register's Report"].

4/ Supporters of H.R. 1805 include:

the AFL-CIO,
the American Federation of Musicians (AFM),
the American Federation of Television and Radio Artists (AFTRA),
the American Guild of Musical Artists (AGMA),
Actors' Equity Association,
the American Council for the Arts,
the American Symphony Orchestra League,

[Footnote continued on following page]

strongly urge that Congress act now to extend to sound recordings the same protection afforded all other copyrighted works by creating a performance right in sound recordings.

H.R. 1805, THE "COMMERCIAL USE OF SOUND RECORDINGS AMENDMENT"

Under existing law, copyright ownership carries with it the right to control the use of the creative product, including the right to copy and reproduce the work, the right to prepare derivative works, and, with the sole exception of sound recordings, the right to perform the work publicly. H.R. 1805, the Danielson bill, would extend the performance right to the sound recording and create a royalty for its commercial use.

Compulsory Licensing

As a matter of administrative convenience, the performance right in sound recordings would be subject to compulsory licensing under H.R. 1805. This means

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[Footnote continued]
the Consumer Federation of America,
the Department of Commerce,
the National Endowment for the Arts,
the Copyright Section of the American Bar Association,
the American Patent Law Association,
the Black Music Association,
and the National Association of Recording Merchandisers (NARM).

that any person would be authorized to perform all copyrighted sound recordings simply by complying with the statutory provisions for securing a license -- namely, the filing of a form with the Copyright Office and the payment of an annual royalty fee. This compulsory licensing procedure is virtually identical to the compulsory licensing systems Congress created in 1976 in connection with the introduction of new performance royalties for the use of copyrighted works by cable TV systems, jukebox operators and public broadcasters.5/

5/ Recently, proposals have been made to the Congress that some of these compulsory licenses be eliminated. Compulsory licensing is not, however, a prerequisite for the creation of a performance right in sound recordings. For many years, music composers and publishers have licensed their songs for public performance through voluntary organizations (ASCAP, BMI and SESAC) that were established to administer the performance right. Such an organization could be created to implement a performance right in sound recordings, or one of the existing performance rights societies could expand its operations to encompass sound recordings.

Nevertheless, RIAA supports the compulsory licensing provision of H.R. 1805 as a useful, if not exclusive, means for achieving the objectives of the legislation. Just as the compulsory licenses Congress created in 1976 provided an appropriate mechanism for introducing and administering the new copyright obligations Congress prescribed, so we believe a compulsory license here would facilitate the implementation of a performance right in sound recordings.

Royalties

Under the legislation, compulsory license fees would be paid either on a pro rata basis or on a blanket royalty basis. Users of sound recordings would be able to choose which method of calculating royalties they prefer.

The blanket royalty fees depend upon the type of commercial use to which the sound recording is put. Discotheques, nightclubs, cafes and bars which feature dancing to records would pay a royalty of $100 per year. Background music services would pay 2% of their gross receipts per year. Jukebox owners would pay one ninth of the compulsory licensing fee that they pay per jukebox per year. Television and radio broadcasters would pay a blanket royalty fee that varies with the station's annual advertising revenues as follows:

Radio Stations

Annual Advertising Revenues	Annual Royalty
$ 25,000 - $ 99,999	$ 250
$ 100,000 - $ 199,999	$ 750
$ 200,000 and over	1% of net advertising receipts

Television Stations

Annual Net Advertising Revenues	Annual Royalty
$ 1,000,000 - $ 3,999,999	$ 750
$ 4,000,000 and over	$ 1,500

The legislation directs the Copyright Royalty Tribunal to set fair and reasonable rates for other present and unknown future commercial users of sound recordings. The legislation also instructs the Copyright Royalty Tribunal to review the royalty rates every 5 years to ensure their continuing fairness. This rule-making activity would be undertaken pursuant to the specific criteria set forth in Section 801(b)(1) of the Copyright Revision Law.

The pro rata basis for computing royalty fees would also be determined by the Copyright Royalty Tribunal taking into account such factors as the amount of commercial time the compulsory licensee devotes to the use of sound recordings and the actual number of performances of copyrighted sound recordings during the relevant year.

The legislation also exempts a number of users of sound recordings from paying any royalties. These include:

(a) Radio stations with net receipts from advertising sponsors under $25,000 per year.

(b) Television stations with net receipts from advertising sponsors under $1 million per year.

(c) Background music services with revenues under $10,000 per year.

(d) Public broadcasting organizations.

Distribution of Royalties

Royalty fees would be deposited by users with the Register of Copyrights. These fees would be distributed to copyright owners and performers by a private nongovernmental entity, based on data assembled by private parties. That entity would operate under the supervision of the Copyright Royalty Tribunal, but its costs would be borne by the private parties. The procedures are modeled after the procedures that performing rights societies such as ASCAP and BMI currently employ to assemble such data for purposes

of distributing performance royalties to composers and publishers.6/

The legislation specifies that 50% of the royalties would be provided to the copyright owner (the record company) and 50% to the performers. The bill requires that the performers' royalties be divided equally among all artists and musicians who performed in the recording.

The legislation would become effective on January 1, 1983.

Estimated Royalty Income

According to an analysis by the Cambridge Research Institute, the total royalties that radio broadcasters would have paid in 1979 for their use of all copyrighted sound recordings would have been between $19.4 and $26.5 million. (The derivation of these figures is set out in Exhibit 1.) The total performance royalties paid by television stations would have amounted to $639,000. (See Exhibit 2.) Clearly, the performance royalties proposed in H.R. 1805 are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces.

6/ See Appendix A for a discussion of the procedures that can be used to implement a performance right in sound recordings.

Exhibit 1

RANGE OF PERFORMANCE ROYALTIES
THAT WOULD BE PAID BY RADIO STATIONS -- 1979
UNDER H.R. 1805

Revenue Category of Radio Stations [1/]	Number of Stations in 1979	Lowest Estimated Performance Royalty (Based on 1979 Revenues)	Highest Estimated Performance Royalty (Based on 1979 Revenues)
Less than $25,000	41	0	0
$25,000 - $100,000	493	$ 96,000	$ 124,000
$100,000 - $200,000	1,270	$ 694,000	$ 952,000
Over $200,000	3,038	$ 19,181,000	$ 25,575,000
TOTAL	4,842	$ 19,971,000	$ 26,651,000

1/ Net sponsor receipts.

Source: Analysis made by Cambridge Research Institute based on the Federal Communications Commission's "AM-FM Financial Data, 1979," issued April 1, 1981.

EXHIBIT 2

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY TV STATIONS -- 1979 UNDER H.R. 1805

Revenue Category of TV Stations	Number of Stations	Annual Performance Royalty per Station	Total Performance Royalty Paid per Year
$1-4 million	279	$750	$209,250
More than $4 million	287	$1,500	$430,500
TOTAL	566		$639,750

Source: Federal Communications Commission, "TV Broadcast Financial Data - 1979."

* * * * *

RIAA urges prompt and favorable consideration of H.R. 1805. The sound recording is entitled to the full copyright protection that this legislation would provide.

ARGUMENT

I. TECHNOLOGICAL DEVELOPMENTS MAKE IT ESSENTIAL THAT THE PROTECTION OF A PERFORMANCE RIGHT BE GIVEN TO SOUND RECORDINGS

The threat of technological innovation makes the need for a performance right more compelling today than ever before. At the present time, the people who create sound recordings are at the peril of technological advances. Perhaps the most important effect of a performance right would be to lessen the dependency of the recording industry on the technological status quo. Indeed, without a performance right, the future of the recording industry may well be at stake.

For other creative artists confronted with new technology, the performance right has meant the difference between continued vitality and financial ruin. Consider, for example, what would have happened to the movie industry with the advent of television if movie producers had not had the right to demand royalties for the performance of their work. What incentive would have existed for motion picture studios to create films, if those creative properties could have been expropriated at will by television networks, without compensation to their owners? Under existing law, copyright owners

of all copyrighted products except sound recordings have the right to demand performance royalty payments -- no matter what the technology.

Recording artists and record companies face the very real prospect that the only existing source of income for record companies and performers at this time -- proceeds from the sale of records -- may be significantly reduced as a new wave of technology moves into American homes. Yet, because a performance right in sound recordings is lacking, performers and record companies are denied the opportunity to protect their creative endeavors from expropriation.

The Impact of New Technology
Threatens Performers and Record Companies

Talk of new technology is no Buck Rogers fantasy, as members of this Subcommittee have reason to know. The new technology is here now, with more on the way. "Superstations," satellite and microwave relays, who knows what will be next? A "celestial jukebox" for the home, as Mr. Danielson has suggested?

A recent article in Variety reported on the plan of a Washington, D.C. based firm to bring stereo music into the home via local cable TV hookups. For a fee, a subscriber would have access to five

commercially uninterrupted background music channels broadcasting 22 to 24 hours a day. In addition, two channels of the system would be devoted to the "sale" of sound recordings. By dialing a toll free number, the consumer could order a particular sound recording from a catalog of recent releases provided by the operator of the system. The order would be recorded in the company's computer and, at a later point, the computer would automatically activate a cassette recorder in the consumer's home and broadcast the recording for home taping. The company plans to have the system operating in early 1982.

This system may be but a horse and buggy portent of things to come. Technical forecasters anticipate the day when a cable TV subscriber need merely press a few buttons to signal his desire to hear a particular album or even a particular selection. This technology can make the need to purchase records obsolete. Who would need to buy records if the latest and most popular releases are available at any time upon request?

The Lack of a Performance Right Has Already Had an Adverse Impact on Performers

The unfairness inherent in current law is evidenced dramatically by the impact the lack of a

performance right has had on the performing arts profession in the United States. There was a time -- not all that long ago -- when radio and other users of sound recordings paid for the live performances of vocalists and musicians. In those days, many radio stations had their own orchestras. The NBC Symphony, conducted by Maestro Toscanini, was famous throughout the world.

That all changed with the advent of the sound recording. With records, radio stations could get all the benefits of these performers' talents free of charge. The Register of Copyrights described the effect the advent of the sound recording had on performers:

> "Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.
>
> "The results have been tragic: The loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programming, have been equally malign.

> Most of all it is the U.S. public that has suffered from this process."7/

Today recording artists and record companies face a technological revolution with an impact that may even exceed that which the sound recording had years ago. The question is whether these performers and companies must endure the same economic suffering and hardship their colleagues bore. We agree with the Register of Copyrights on the response that is required:

> "Congress cannot repair these past wrongs, but it can and should do something about avoiding or minimizing them in the future. There is, in the United States today, no more vital and creative force than that of performed music.
>
> "Adequate protection for those responsible for this creative force involves much more than economics and the ability or willingness of various communications media to pay performing royalties.
>
> "It is, first of all, a matter of justice and fairness; but beyond that it is in the paramount national interest to insure that growth in the creativity and variety of the performing

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7/ Performance Royalty: Hearing on S. 1111 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 94th Cong., 1st Sess. 11 (1975) (Statement of Barbara Ringer, Register of Copyrights).

> arts in this country is actively encouraged by reasonable protection, rather than stunted or destroyed by lack of it."[8]

II. EQUITY REQUIRES THAT A PERFORMANCE RIGHT IN SOUND RECORDINGS BE GRANTED

Basic notions of fairness also underlie the request for a performance right in sound recordings. Discotheques, nightclubs, jukebox and background music operators and broadcasters are gaining income off the creative recorded works that others have produced; they pay not one cent for the privilege of using them. And, as we have shown, recent technological advances suggest the very real prospect that record sales -- the only current source of income from sound recordings for performers and record producers -- may soon be a thing of the past. Fairness demands that vocalists, musicians and recording companies be granted equitable compensation for the commercial exploitation of their creative works.

Radio Makes Extensive Use of Records at No Cost

The basic staple of radio programming is recorded music. Indeed, 73 percent of commercially available

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8/ Id.

time on radio is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of radio stations' net revenues -- or about $2.1 billion annually. Yet broadcasters -- who must pay for all of their other types of programming, including news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, commentators, financial and business services -- pay nothing to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

The broadcasters have argued that they already pay composers and publishers for the music, and that a performance royalty for the sound recording would constitute a burdensome double tax. But broadcasters are not being asked to pay twice for the same commodity. The payments they currently make through ASCAP, BMI and SESAC are to music composers and publishers alone, as compensation for the use of the underlying musical composition performed on the record.

The performance right provided by H.R. 1805 relates to a completely separate and distinct creation of value -- a copyrightable recorded musical performance, a performance that makes the original musical composition

come to life in a form usable for broadcasting and public performance. Music is important, but it is only black ink on white paper. Radio stations don't play sheet music; they play recordings of unique performances. Paying for the performance is no more duplicative than a station paying a news broadcaster to deliver the news and at the same time paying the Associated Press for furnishing the news over its wire service.

The Expropriation of Sound Recordings Gives Commercial Users an Unfair Competitive Advantage

Ironically, the very firms that profit off the labor and talent of others without compensating them are bestowed an unfair advantage over their competitors. Thus, because radio stations can obtain three-quarters of their programming material virtually for free, they are able to charge advertising rates that are relatively cheaper than those of competing media which must pay for all of their programming material.

Also placed at a competitive disadvantage are background music services which choose not to expropriate the talents of others. U.V. Muscio, President of Muzak, has written:

> "Since Muzak was organized in 1936, we have created our own renditions of popular musical compositions, using recording artists we hire especially

> for this purpose. Other background music services, however, have been unwilling ~~to~~ commit the necessary creative and financial resources to the production of their musical offerings. Instead, they have simply spliced together selections from the most popular sound recordings available. Our competitors have been able to offer their customers the talents of the world's greatest performing artists for the nominal cost of a record.
>
> "We believe this practice to be unfair and unjust, both to the creators of the sound recordings, and to companies such as ours. Because Muzak does not expropriate the talents and efforts of others for its own enrichment, we have been put at a competitive disadvantage in the marketplace."9/

The creation of a performance right would eliminate this inherent unfairness.

Royalties from Record Sales
Do Not Sustain Most Performers

Broadcasters have argued that performers do not need either the income that radio once afforded them or the income that a performance royalty would bring them. Performers, they say, receive ample income from record sales and live concerts.

9/ Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 94th Cong., 1st Sess. 91 (1975) (Letter of U. V. Muscio).

This myth was conclusively laid to rest in the Register of Copyrights' 1978 review of the legal and factual basis for a performance right.[10/] As part of a detailed analysis of the economic impact of a performance right, the Report sampled members of five performing arts unions.[11/] That survey revealed that most recording artists received no royalties at all from record sales and that many have incomes at or below the poverty level:

> "Only a small proportion of those engaged in the production of sound recordings receive any financial benefits from the sale of those records. In the three groups most affected only 23 percent of the musicians benefit from sales, 5 percent of the musical artists and 17 percent of the radio and TV artists. Furthermore, annual earnings of performers as a group are generally low, with almost a third of the musicians, and two-fifths of the musical artists and radio and TV artists earning $7,000 a year or less." (Emphasis supplied.)[12/]

10/ Register's Report, Part V "Economic Analysis," at 57.

11/ Id. at 114. The five groups surveyed were the American Federation of Musicians, the American Guild of Musical Artists, the American Federation of Radio and Television Artists, Actor's Equity, and the Screen Actors Guild.

12/ The fact that few artists benefit from record sales should not be surprising. The large majority of

[Footnote continued on following page]

Performance royalties would provide badly needed income to thousands of vocalists and musicians. Moreover, unlike royalties from the sale of records, performance royalties under H.R. 1805 would not be earmarked for the superstars alone. All performers would share and share alike. If Johnny Cash, for example, were to record with 15 other musicians and three background singers, or a total of 19 recording artists including himself, then there would be 19 recipients of equal shares of any performers' royalties generated by that recording.

Performance fees from broadcasting would supplement the income of at least some of these artists who produce records that do not even reach the break-even point in sales. Such fees would provide needed income to classical artists, jazz artists, and many popular artists as well. As the late Stan Kenton described, such performers

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[Footnote continued]
recordings do not even recover their costs, let alone make a profit, and the proportion of unprofitable recordings is rising. In 1979 over 84 percent of the "popular" LP records released did not have sufficient sales to break even. Classical recordings fared even worse. In 1979, 94 percent of classical record albums were produced and marketed at a loss.

> "never burst into stardom because their appeal is only felt by a narrow segment of the public. They may never have a hit record, although they may have many, many records which are performed time and again for commercial profit."13/

Performance royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Many famous artists, such as Ernie Ford, Mitch Miller, and Pat Boone, sell few records today, but airplay of their old records and other "golden oldies" remains heavy. Many radio stations still offer the recorded music of Nat King Cole, and

> ". . . everyone benefits but Nat Cole's widow and children. The sponsor attracts an audience with one of the top vocalists of our generation, and the radio stations sell time to the sponsor, the writers and publishers of the songs are paid performance fees for the broadcast of these songs, but Nat Cole's widow and children receive absolutely nothing, nor does the record company that spent 20 years building him as a top recording artist, and owns the masters which are used for these delayed performances."14/

13/ Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 542-43 (1967).

14/ Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 500 (1967) (Statement of Alan W. Livingston).

Such performers (and their heirs) should be compensated for the continued commercial expropriation of their endeavors by others.

Any Benefit from Radio Airplay Is Fundamentally Irrelevant to the Fairness of a Performance Royalty

Broadcaster opponents of a performance right have also argued, ad nauseum, that radio airplay boosts the sales of sound recordings. From this they conclude that it would be unfair to require broadcasters to pay royalties to performers and record companies.

There is no question that airplay helps sell some sound recordings. It should be just as apparent that sound recordings provide valuable radio programming material which sells advertising, builds station audiences, and increases station equity.

These facts, however, while of interest, are not relevant to the merits of a performance right. While economic factors may fairly be considered in setting the level of the royalty rate for sound recordings, they should have no bearing on the right itself.

The principle underlying the performance right in copyright law is that the creator is entitled to compensation for the commercial use of his creative product. That principle is not conditioned on who benefits from what. For example, the televised production of Alex Haley's "Roots" enhanced the sales of his book dramatically, but no one suggested that ABC should not pay Haley for the right to dramatize his creative product because he happened to derive some collateral benefit from it.

The cable TV operators once claimed that they should not have to pay performance royalties to the broadcasters, arguing that they expand the broadcasters' audience and profits when they use copyrighted broadcast programs. The jukebox operators, too, sought to avoid paying performance royalties to composers and publishers of musical compositions on the ground that "jukeboxes represent an effective plugging medium that promotes record sales and hence mechanical royalties."15/ Congress, with the vocal support of the broadcasters, rejected these claims as untenable.

15/ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 113 (1976).

Moreover, composers and publishers clearly benefit from the airplay of sound recordings in the form of added royalties resulting from increased sales. Nevertheless, they have long received performance royalties from broadcasters. No one, including the broadcasters, contends that the owner of music copyrights should not receive performance royalties because of airplay.

In any event, radio stations are not playing sound recordings to do recording companies and performers a favor. They do it because it is in their own interest -- sound recordings attract an audience, which, in turn produces advertisers, and, ultimately, advertising revenues for the broadcasters.

Moreover, radio stations select relatively few records for airplay. Around 700 newly recorded tunes are released each week. Yet, only three to six new tunes are added each week to the play list of the average "Top 40" radio station.

In addition, the benefits of airplay on record sales are frequently overrated. For one thing, the sales period for a popular hit, from which most recording company revenues are derived, is extremely brief. The

average "chart life" is very short, and when a hit has fallen from the charts, its propensity to generate additional record sales is sharply reduced. Thus, to the extent that radio airplay is devoted to tunes which have left the charts or have been out more than six months, i.e., "oldies," the airplay benefits radio stations without providing any promotional value for recording companies and artists.

In fact, these so-called "oldies" comprise over one-half of the recorded music played on radio. In 1977 the Cambridge Research Institute conducted a telephone survey of program directors of 267 radio stations in seven major markets to determine the extent to which oldies are played over the radio. According to the survey results, 53 percent of the recorded music played on radio consists of "oldies."

Even though "oldies" achieve only relatively minor sales for recording companies, both older recordings as well as new ones lure radio audiences and enable stations to make sales through advertisers. And yet, no compensation is ever paid for the artistry, know-how, enterprise and investment that went into creating that vast repertory which has unequaled commercial value for radio stations.

In sum, we suggest that airplay of sound recordings does far more to attract advertising profits to radio stations than it does to sell sound recordings. Only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters -- old recordings, new recordings, popular ones, and classics. They all build audiences for the broadcasters and enable them to sell time to advertisers. That is why radio stations play records. And that is why radio stations should pay just compensation to those who created those records.

Record Sales Are Likewise Irrelevant
To the Fairness of a Performance Royalty

Just as performers' earnings are irrelevant in principle to the granting of a performance right, so, too, the fact that recording companies derive profit from the sales of some recordings should not be used as a pretext for denying them a performance right.16/ Other copyright owners routinely earn income from multiple sources. Composers receive royalties from the sale of records, from record-related songbooks,

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16/ In any event, most recordings do not even recover their costs, let alone make money. See note 12, supra.

and from the playing of their music over the air, as well as from other users of their music. Radio and TV broadcasters record, syndicate and sell for re-use programs which have already created advertising revenues for them. Motion picture producers are paid royalties for the use of their movies not just in theatres, but also on broadcast television, on cable TV and on video-cassettes and video disks. There is no just reason why record producing companies should not likewise earn additional legitimate income from those who use their recordings to sell broadcasting time, aspirin and automobiles.

III. CREATION OF A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD BRING THE UNITED STATES INTO ACCORD WITH PREVAILING INTERNATIONAL PRACTICES

A performance right in sound recordings is neither new nor experimental. Sixty-two nations already grant such a right to producers and/or performers of sound recordings by law. (See Table 1.) Thus, enactment of a performance right in the United States would bring this nation's copyright law into accord with prevailing international practices.

Table 1

COUNTRIES RECOGNIZING A PERFORMANCE RIGHT IN SOUND RECORDINGS

Argentina	Ireland
Australia	Israel
Austria	Italy
Bahamas	Jamaica
Bangladesh	Japan
Barbados	Liechtenstein
Belgium*/	Mauritius
Botswana	Mexico
Brazil	The Netherlands*/
Burma	New Zealand
Chile	Norway
Colombia	Pakistan
Costa Rica	Paraguay
Czechoslovakia	Philippines
Denmark	Poland
Dominican Republic	Roumania
Ecuador	Seychelles
El Salvador	Sierre Leone
Fiji	Singapore
Finland	Spain
France*/	Sri Lanka
East Germany	Sudan
West Germany	Sweden
Grenada	Switzerland*/
Guatemala	Taiwan
Guyana	Thailand
Holy See	Trinidad and Tobago
Hungary	Turkey
Iceland	United Kingdom
India	Uruguay
Iraq	U.S.S.R.

*/ In these countries, royalties are paid to record producers even though no formal statutory right exists.

Sources: International Producers of Phonograms and Videograms, "International Conventions and Copyright/Neighboring Rights Legislation as of March 31, 1980"; United Nations, "Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions," 416-18 (1977). Copyright Law Survey, by the International Bureau of the World Intellectual Property Organization, 1979.

In addition to the large number of nations which already recognize a performance right, there exists a clear trend among Western nations toward the establishment of such a right. Since 1970, 27 nations have enacted or amended laws either granting, expanding or otherwise affirming this right. In addition, Article 12 of the Rome Convention, formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, specifically provides for a performance right in sound recordings:

> "If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

To date, the Rome Convention has been ratified or acceded to by 20 nations.

America is the World Leader in the Creation of the Sound Recording

For years the U.S. has set the standard for the world in sound recordings. American music is heard all over the globe. American jazz, for example, is

constantly heard on the radio behind the Iron Curtain. It is therefore anomalous that the U.S. should be one of the few Western nations that fails to provide a performance right in sound recordings. It is time for this country to bring its copyright law into accord with international practice.

The Absence of Reciprocity Has Denied U.S. Performers and Record Companies Deserved Royalty Compensation from Foreign Countries

Foreign nations are frequently unwilling to grant a right -- and the royalties that go with it -- to a country which does not offer a reciprocal right.17/ Thus, because U.S. law currently provides for no reciprocal performance royalties, U.S. record producers and performers are often denied performance royalties from abroad.

> "For example, in Denmark, payment is made only for the performance of recordings originating in Denmark itself or in a country which grants reciprocal rights to recordings of Danish origin.

17/ It is noteworthy, for example, that seven of the nations which have ratified or acceded to the Rome Convention filed reservations under Article 16 which, in essence, require reciprocity for Article 12 to be fully applicable. These nations include Austria, Czechoslovakia, Denmark, the Federal Republic of Germany, Italy, Sweden and the United Kingdom.

As a result, no payment is made for the use of U.S. recordings there."[18/]

Canada recently abandoned performance fees for performers and record companies precisely for this reason. The Register's Report found that a performance right in Canada did not benefit Canadians; most royalty payments were remitted to United States recording artists and United States record makers, with no reciprocity for Canadian artists in the United States.[19/]

Because of the variety of bases on which royalties are paid in the various foreign nations, and the unpredictable impact that enactment of a performance right in the United States will have on the fee schedules in those nations, we are unable to assess definitively the amount of the remuneration that would be paid to U.S. record companies and performers. Certainly, more performance fees would flow into this country than would flow out. In 1980, for example, ASCAP received from abroad over $27 million in performance fees for composers and publishers, but it paid out considerably less to

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18/ Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 508 (1967) (Statement of Sidney Diamond).

19/ Register's Report, at 219.

foreign performing rights societies. Were the performance right enacted, the performance fees paid to U.S. artists and recording companies would contribute positively to the balance of international payments. Moreover, whatever the amount collected, it would provide deserved compensation to U.S. performers and record companies for the expropriation of their creativity abroad.20/

IV. FUNDAMENTAL PRINCIPLES OF COPYRIGHT LAW REQUIRE THAT SOUND RECORDINGS -- THE ONLY PERFORMABLE WORK WITH--OUT A PERFORMANCE RIGHT -- BE GIVEN FULL COPYRIGHT PROTECTION

Fundamental principles of copyright law also warrant that the performance right be extended to the sound recording. The principle that one who uses another's product for commercial gain should compensate the creator of that work has been applied to every copyrighted product that is capable of being performed

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20/ In countries where performance royalties are paid, nearly half divide the fees equally between companies and performers. In those countries where the royalties are not shared equally, the overwhelming majority pay the larger share to the record company. Thus, there is substantial international precedent for the 50/50 split jointly recommended by the RIAA, the American Federation of Musicians, and the American Federation of Television and Radio Artists, whose membership creates the sound recording.

except the sound recording. This anomaly should be eliminated.

Consider: the copyright owner of a musical performance recorded on videotape now has the right to be compensated for the commercial use of that performance. Yet if the same musical performance is recorded on a disk, tape, cassette, or cartridge, the copyright owner is entitled to no compensation whatsoever for the commercial performance of his creative work. There simply is no justification for discriminating against the sound recording in this fashion.

Congress has already recognized the creative and aesthetic attributes of sound recordings and has agreed that they possess those special qualities that make them eligible for copyright protection.21/ But the right that has accompanied the grant of copyright status to every other performable product -- the right of performance -- has still been withheld from sound recordings.

In the 1978 Report, the Register of Copyrights wrote:

21/ See Pub. L. No. 92-140, The Sound Recording Copyright Act of 1971, Section 114 of Pub. L. No. 94-553.

> "In all other areas the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified."22/

It is remarkable that this basic element of copyright protection has been denied sound recordings for so long. It flies in the face of both basic principles of fairness and the most elemental concepts underlying the entire body of copyright law.

Performers and Recording Companies Merit a Performance Right Similar to that Enjoyed by Composers and Publishers

Composers and publishers have had a performance right since 1889, but record companies, musicians and vocalists still do not have one today. In 1980, ASCAP alone collected over $154 million in royalties from broadcasters for the performance of musical compositions, a substantial portion of which were performed on sound

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22/ Register of Copyrights, "Addendum to the Report on Performance Rights in Sound Recordings," Performance Right in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 95th Cong. 2d Sess. 114 (1978).

recordings.[23] Yet the performers and record companies who brought those musical compositions to life collected not one cent for those same performances. It is difficult to comprehend the justification that can be offered to withhold from performers and record companies the same performance right and royalty that composers and publishers have enjoyed for the last 92 years.

Performers Make a Unique Creative Contribution to the Sound Recording

Certainly, the performer's interpretation of a tune is a unique contribution to the recorded product. Consider, for example, how the performer's rendition of the tune "Hello Dolly" gave rise to a different recorded product when it was sung by Carol Channing, by Louis Armstrong, or by Pearl Bailey. And in virtually every recorded rendition, skillful musicians and supporting vocalists intricately weave their artistry around the star performer, fortifying, enriching, complementing, underscoring, accenting -- making the performance even more definitive.

23/ Moreover, under the Copyright Revision Act of 1976, jukebox operators are now required to pay royalties to composers and publishers for the commercial use of the musical composition underlying the sound recording. 17 U.S.C. § 116.

Indeed, it is often the artist's performance as much as -- or even more than -- the composer's tune that makes the recording attractive to both record buyers and radio audiences. The artist as much as the tune have made hits of Barbra Streisand's "People," Frank Sinatra's "My Way," and the like. Can anyone doubt that a performance by Beverly Sills, Luciano Pavarotti, or Willie Nelson is a unique performance? There must be a hundred versions of "White Christmas," but it is Bing Crosby's special rendition which is so popular every Christmas. Listeners are eager to hear albums by Andy Williams or the Boston Pops Orchestra, but may be less concerned with any particular song or its composer. In some cases a song which enjoyed little success in one recording becomes a hit when a new recording is made with a different artist or arrangement. Yet, ironically, the performer who makes a composer's tune into a hit, and earns that composer substantial royalties for the performance of the record, receives no performance royalty.

The significance of the performer is not restricted to popular music, either. The performer makes an important creative contribution to every type of recording. The original interpretation of a musical

composition by the highly talented jazz musician is often far removed from the original tune set down in the notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As Erich Leinsdorf, then Music Director of the Boston Symphony Orchestra, stated,

> "Improvisation is one of the earmarks of the performer in music. . . . You're engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?"24/

Record Companies Make a Unique Creative Contribution to the Sound Recording

The record company, too, makes a unique and creative contribution to the production of a sound recording, which Congress recognized in granting copyright protection and the courts recognized in upholding the grant.25/ The role of the recording

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24/ Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 821 (1967).

25/ "Sound recording firms provide the equipment and organize the diverse talents of arrangers, performers,
[Footnote continued on following page]

company begins when it sifts, identifies and selects the talent components ultimately consolidated into a finished copyrightable recording. The range of creative actions performed under the umbrella of the record company is wide indeed -- selecting the recording artists; determining or influencing the musical presentation or character of the key artist; finding or assisting the producer who will best be able to highlight the artist's unique talents; molding the artist's pre-recording musical preparation; sifting and identifying potential songs to be recorded; hiring or working with the appropriate musical arranger attuned to the uniqueness of the song and the artist; picking or assisting in the selection of support musicians and/or background singers who, in combination, will most enhance the recorded product; providing or assisting in the selection of recording studios properly equipped for the sound effects required; providing or assisting engineers and technical talent for multitrack recording, editing, mastering, overdubbing, and performing the complete range of highly sophisticated electronic procedures and discretions that mark today's inventive

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[Footnote continued]
and technicians. These activities satisfy the requirements of authorship found in the copyright clause . . . ." Shaab v. Kleindienst, 345 F. Supp. 589 (D.D.C. 1972) (three judge panel).

recording techniques; developing the album cover graphics and writings that have become an integral artistic component of the recording; and assuring the proper technical quality control and manufacturing processes to assure the maintenance and integrity of the original recorded creative input.

Broadcaster Programming, Too,
Has a Performance Right

The principle underlying H.R. 1805 is identical to that supported by the broadcasters in 1976, when the general copyright revision bill was enacted. At that time, broadcasters argued that cable television companies should pay royalties for their secondary transmissions of broadcaster telecasts, and Congress agreed.

That same argument supports a performance right for sound recordings. Just as broadcasting companies sought -- and won -- compensation from cable TV for the commercial expropriation of their product, performers and recording companies are seeking performance fees from radio and television broadcasting companies. Since cable TV is required to pay for the use of copyrighted programming created by others, broadcasters should likewise be required to pay for the use of copyrighted

recordings created by others. Since cable TV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

Congress and the Courts Have Found That a Performance Right Is Constitutional

In the past, the opponents of a performance right retreated to the superficial claim that the grant of such a right would be unconstitutional. They claimed that record companies and performers are not "authors," and that sound recordings are not "writings." They claimed that the grant of a performance right is not necessary "to promote the useful arts and sciences," and that such a grant would therefore be beyond the power of Congress.

Significantly, these claims, and a variety of additional novel arguments disguised as constitutional claims, are now rarely advanced by critics of the performance right. Copyright protection, of course, has never been limited to the "writings" of "authors" in the literal words of the Constitution. To the contrary, Congress has granted copyright protection to a wide variety of works embodying creative or intellectual effort, including such "writings" as musical

compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, television and cable programming, printed and pictorial illustrations and merchandise labels.

There is no constitutional basis for distinguishing these creative works from those of performing artists. It is probably the Register of Copyrights who put it best:

> "Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute."[26/]

Indeed, Congress has already recognized that sound recordings may be granted copyright protection

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26/ 120 Cong. Rec. 27340, 27341 (1974).

under the Constitution.[27] The courts have likewise rejected the notion that there is a constitutional barrier to granting copyright protection to sound recordings.[28]

In the 1978 Report to Congress on a Performance Right in Sound Recordings, the Register of Copyrights put the constitutional issue to rest once and for all:

> "Arguments that sound recordings are not 'writings' and that performers and record producers are not 'authors' have become untenable. The Courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976."[29]

27/ The Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution." S. Rep. No. 92-72, 92d Cong., 1st Sess. 4-5 (1971). See also, S. Rep. No. 93-983, 93d Cong., 2d Sess. 139-40 (1974).

28/ Shaab v. Kleindienst, 345 F. Supp. 589 (D.D.C. 1972) (three judge panel); see Goldstein v. California, 412 U.S. 546 (1973).

29/ Register's Report at 7.

V. A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD BENEFIT THE PUBLIC AND WOULD HAVE NO ADVERSE IMPACT ON USERS

Record Buyers Would Benefit

As the law now stands, the costs of creating sound recordings are borne entirely by record buyers. Not only is this inconsistent with the standard for other copyrighted products -- for which multiple income sources are customary -- but it is also unfair. That is one reason why the Consumer Federation of America supports the creation of a performance right in sound recordings:

> "Consumers now finance the creation and production of recordings -- all of it. We believe it is time for those who profit from the use of records to start paying something for the substantial economic benefits they receive."30/

As the CFA concluded:

> "As a matter of principle and precedent there is no good reason for continuing to make the sound recording the only copyrighted work which does not have

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30/ Letter from Kathleen O'Reilly, Executive Director, Consumer Federation of America, to The Honorable Robert W. Kastenmeier, dated March 21, 1980.

a performance right, and force consumers to pay for that policy."31/

The Public Would Benefit from the Creation of a Music Cultural Fund

While many think of recording companies most often in terms of the popular music they produce, the RIAA companies serve a number of other cultural interests. They record classical music, folk music, ethnic music, country music, and experimental music, plays, poetry and educational material. They help find and develop young artists, musicians and composers, and bring much-needed income to some symphony orchestras.

The recording companies take seriously the responsibility to provide all types of music on sound recordings, and to foster and encourage the creation, performance and enjoyment of music.

For this reason, some of the leading companies of RIAA have suggested the creation of a special Recording Industry Music Cultural Fund, to foster serious music projects throughout the United States. These companies have pledged to finance this Fund by the contribution of 5% of the performance royalties received

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31/ Id.

by participating recording companies, when this legislation is enacted. They have further suggested that the Fund be administered through the National Endowment for the Arts, perhaps in cooperation with States Arts Councils.

At a time when the federal government is attempting to reduce its role in the arts, it is essential that private funding sources be developed to ensure that organizations like the National Endowment for the Arts can continue to foster the creative arts in this country. The pledge of these RIAA member companies to share the benefits of a performance royalty with the NEA is a significant step in that direction.

Users of Sound Recordings
Would Not Be Harmed

Those who use sound recordings for their own commercial gain have been quick to argue that they cannot afford to pay, or should not have to do so. It seems clear, however, that neither ability to pay nor desire to pay is a material consideration here. Economic arguments are irrelevant to the issue of whether such a right should be granted.

Moreover, as we earlier described, the broadcasters themselves were singularly unresponsive

to cable operators' pleas of inability and lack of desire to pay.

In any event, available data prove that the performance royalty rates proposed in H.R. 1805 would have minimal impact on the principal users of sound recordings -- radio broadcasters.

The Proposed Royalty Rates Are an Incredible Bargain

Discos, night clubs, jukebox operators and broadcasters can easily afford the royalty rates set by this legislation. Discos and nightclubs that use sound recordings would pay $100 per year; jukebox operators would pay one ninth of the compulsory licensing fee that they pay per jukebox per year. Radio stations with annual revenues of less than $25,000 would be completely exempt from the performance royalty. Stations with revenues between $25,000 and $100,000 (10 percent of all stations in 1979) would pay only a token performance royalty of $250 a year, or 68¢ a day. Stations with revenues between $100,000 and $200,000 (26 percent of all stations in 1979) would pay a performance royalty of just $750 a year, or $2.05 a day. Only the remaining stations, which have revenues above $200,000 a year, would pay the full performance fee equal to 1 percent

of their net receipts from advertisers, and even this fee would be reduced for those stations using less than the usual amount of recordings. Thus, a station earning revenues of $1 million annually would pay a maximum of only $27.40 daily, or $1.14 per hour to compensate all vocalists, musicians and record companies for the expropriation of their creative efforts. In total, 37 percent of all stations would be exempt or pay only a token performance right to performers and recording companies.

Broadcasters Can Easily Absorb or Pass On the Costs of a Performance Royalty

The broadcasters' claims of poverty notwithstanding, the radio and television industries can easily afford to pay a performance royalty, especially as modest a royalty as is proposed in H.R. 1805. As a spokesman for the radio broadcasters candidly conceded in testimony before this Subcommittee, "if I came along and said broadcasters could not afford this, I don't think I could back that up."32/ All indications are that radio

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32/ Performance Rights in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Comm., 95th Cong., 2d Sess. 77-78 (1978) (Testimony of James Gabbert, National Radio Broadcasters' Association).

and television are growing and prosperous industries. Radio stations are worth more than ever, substantially attributable, we believe, to the audience attraction of programming based on sound recordings.

Moreover, it is likely that broadcasting companies would choose to pass this new expense forward just as they have successfully passed on other cost increases in the form of higher advertising rates. Because of its distinct advantages to advertisers, radio has in the past been able to raise its advertising rates without losing its advertisers to different media. In fact, the competition that radio faces is from other radio stations, more so than other advertising media. Since a performance royalty for sound recordings would affect all radio stations of a similar size equally, it would not substantially affect inter-station competition. There could be a slight increase in the cost of radio as a medium relative to all other media, but the distinct advantages that radio offers advertisers will more than outweigh the modest cost of a performance royalty, thus assuring that radio will retain its competitive advantage unimpaired. It follows that radio would certainly be able to pass along to advertisers

the cost of the royalty proposed in this legislation.[33/] Indeed, it would be equitable for the stations to pass along such costs, because radio advertisers benefit directly from the audiences that sound recordings attract.

Radio offers advertisers unique qualities, an enormous audience (encompassing almost the entire population of the United States), and extremely low rates. It comes as no surprise, therefore, that radio has a growing share of all advertising revenues. Even if radio chose not to pass the cost on to advertisers, therefore, it would easily be able to absorb the small additional cost required to compensate the creators of the bulk of the programming material that radio uses.

Again, the 1978 Register's Report bears this out. After an extensive analysis of all radio stations licensed by the FCC between 1971 and 1975, the Report concludes:

> "radio stations would be able to pay a record music license fee without any significant impact either on profits or the number of stations in operation.

33/ See Register's Report at 60-62.

In addition there is evidence that the radio broadcasting industry would be able to pass on any increase in the costs of operation without loss of business or revenues."34/

34/ Id. at 61.

APPENDIX A

H.R. 1805 PROVIDES EFFICIENT AND ECONOMICAL IMPLEMENTATION PROCEDRES

The Danielson bill directs the Copyright Royalty Tribunal to retain the services of private, nongovernmental entities in the administration, collection and distribution of performance royalties for sound recordings. There are a number of entities which currently perform these functions efficiently and economically and could do the same for sound recordings.

For example, ASCAP, BMI and SESAC now administer, collect and distribute royalties for music copyright owners. They use statistically valid sampling techniques to monitor airplay. Many of the sources they currently monitor in connection with the existing performance right for composers and publishers would be identical to the sources to be monitored for a new performance right for record companies and performers. Accordingly, one of these entities might be willing to take on all or part of the administrative functions required for a performance right in sound recordings.

This would be advantageous to all parties, because the sharing of administrative costs should result in greater net income to the holders of the music copyright, as well as to those who would receive royalties from sound recordings.

If for some reason those organizations are not involved, an independent agency could be set up by the various participants, just as it was possible once to establish an ASCAP or BMI. Alternatively, an existing research and computer-oriented commercial enterprise could undertake the task.

As regards distribution of the royalty proceeds, the information is readily at hand. The identity of the proposed recipients will not be in doubt. Every recording company is clearly identified on the label of each recording subject to performance. The identification of the musicians and vocalists -- whether stars or background performers -- is routinely included in listings on recording session forms contractually required by both AFM and AFTRA. Of course, the techniques for making distributions would be based on well-established statistical sampling methods. The procedures are already routinely performed in this country and throughout the world.

Mr. KASTENMEIER. Thank you, Mr. Gortikov. I compliment you on your statement. You have raised some new issues and, I think, suggested some variations conceptually on this whole theme.

The difficulty with being consistent—and you suggest that a visual recording is protected but a sound recording is not, and perhaps they ought to be consistent in that regard—is that it may be somewhat difficult. The musician who appears in the visual, in the film, would not presumably have a copyright under existing law, but if he appeared in a broadcast, in a sound recording, he would have; is that not correct?

So we are still not making them consistent.

Mr. GORTIKOV. Well, the copyright owner, of course, where the musician appears in the motion picture, is the producer of the motion picture.

Mr. KASTENMEIER. Exactly.

Mr. GORTIKOV. So a performance right is paid in behalf of that music that appears in there.

I don't see why consistency need be evil. Why is it?

Mr. KASTENMEIER. I am saying that would not be consistent if we pass this bill in which, in fact, the musician directly has a royalty-type interest, but in doing so we would not make it consistent with the law as it affects a film and the musician's or other performer's interest in the film.

Mr. GORTIKOV. But they gain income from the reuses of those works.

Mr. KASTENMEIER. Through separate contract.

Mr. GORTIKOV. Yes.

Mr. KASTENMEIER. But I was saying they are not consistent. And the question is raised ultimately: If we go this route, should we make films consistent in terms of deriving direct income?

Mr. FUENTEALBA. But there is a distinction, Mr. Chairman. In the case of films, they are controlled by the producers of the films, so when we negotiate with the producers we can negotiate terms and conditions for supplemental uses of that product. But with the phonograph record, the control is lost by the producer of the record when it is put on the market for sale, and as a result we cannot negotiate beyond that point. And we have no control. We do have control over video.

Mr. KASTENMEIER. Yes, that is a point, but, of course, one could argue that it is not necessary to give anyone a copyright beyond the recording industry, that is, the recording company, because they are in the same position as the motion picture company. They have to negotiate with musicians or performers, as, indeed, the motion picture companies do, and therefore we should make only the recording company the holder of the copyright.

Mr. FUENTEALBA. But the motion picture companies don't sell their product on the market as recording companies do. The motion picture companies retain control of their product, whereas the recording companies don't. The recording companies manufacture their product specifically for the retail market. Motion pictures are not made for that purpose. It is only recently that motion pictures have been put into video discs and video cassettes for public sale, and we have been able to negotiate terms and conditions for that product in our original bargaining agreement.

But that is not the same situation with recordings. Recordings are made primarily for retail sale. Motion pictures are not made for retail sale.

Mr. KASTENMEIER. Well, the marketing process is different; I concede that.

You raised the question of cable and suggested we did something in that industry whether it is the networks or the program producers or professional sports. Of course, that is very much up in the air in 1981. And there has been a lot of criticism of compulsory licensing as we used it to solve that particular problem 5 years ago.

What I am suggesting is that if you are using that as a model, it is a very imperfect model, presumably, and we are facing the results of it now.

Mr. GORTIKOV. Sir.

Mr. KASTENMEIER. Yes.

Mr. GORTIKOV. The model that I am using is a performance right that creates an obligation to pay for a use.

Now, that can be manifested in various ways, and the way you chose for cable is one way, via that compulsory license. That form of compulsory license is not necessarily the only option or the perfect option. I am asking that the right be created and the obligation to pay be created. Any format for accomplishing that can be flexible.

But an unacceptable option would be to avoid us and to tell us to go away again and be unlike all other copyright owners.

Mr. KASTENMEIER. Well, the implication of my question is that we may run into—and I am not arguing that one should or should not pass a bill creating this right, but should the Congress do so, it may find it has many unanswered questions in having done so, and probably will have a lot of unresolved problems that it would face if it did create this right, if the past is any prologue.

Let me ask you, first of all, how much would this bill derive in terms of revenues, and what would the general plan for distribution be in terms of who would get what?

Mr. GORTIKOV. As best we can estimate from FCC statistics, the yield on the royalty schedule in Mr. Danielson's bill would be somewhere between $19 to $26 million. Now, that amount may be overstated because that presumes that stations would be totally carrying music. If a given radio station, for example, is all news, it wouldn't have any obligation to pay, or if it was half news, half music, its obligation would be 50 percent. If it didn't play copyrighted recordings it wouldn't have an obligation to pay under the terms of this bill. Oldies would not generate income.

So the yield would be that at the outside.

The mechanism that is set up in the bill is that the Copyright Office would be the collector of the money. The distribution would be under the aegis of the Copyright Royalty Tribunal. But the bill calls for the creation of a private entity that would accomplish that collection and distribution. And that is not a pioneering requirement. All over the world there are entities set up that do this every day of the week, including right here in the United States. ASCAP and BMI are perfect examples. We would hope that ASCAP, BMI, and SESAC would choose to do this work, too. If they didn't, the creation of a separate private entity is no big deal.

We had a private firm research that and found it was plausible to do, and to do with reasonable accuracy and reasonable administrative cost.

So the options are clear and accessible, with ample precedent all over the world as to how to do it.

Mr. KASTENMEIER. Does the distribution plan provide for not more than 50 percent to the recording industry, and the remainder, not less than 50 percent, to performers or musicians? And of the recording industry's portion, 5 percent, would you say, would go to the performing arts?

Mr. GORTIKOV. Yes. The language is explicit in the bill. It calls for a royalty sharing of 50 percent to the record company copyright owners and 50 percent to the performers. That amount has also been agreed to by the representatives of the vocalists, musicians, and recording companies. It also is a worldwide pattern.

If there is a skew worldwide in the other countries, it favors a higher-than-50-percent yield to the producing company, and a less-than-50-percent yield to the performer. But the general pattern is the 50-50 split.

Now, the split to the actual performers on the recording is equal. There is an example that was cited. If Frank Sinatra has three backup vocalists and five musicians, or a total of five musicians plus three vocalists plus Frank Sinatra, or nine, the performers' share would be split nine equal ways rather than skewing a balloon in favor of the star.

Mr. KASTENMEIER. And is it contemplated that the individual performer—musician, singers, whatever—that that individual would receive a royalty, or would there be created some sort of trust to receive that? Because I would assume in some cases it would be a very small amount, and it would be very difficult in fact to trace individual musicians.

Mr. FUENTEALBA. That would be no difficulty whatsoever, because we have records of every recording session, every musician, every composer—anyone who is involved in the production of a record. We have that information on file. And distribution would be no problem.

Mr. KASTENMEIER. At this point I am going to yield to my colleagues who have been patiently waiting.

Mr. Sawyer.

Mr. SAWYER. I just want to get the record clear that we are not just talking about music. This would be a recital, an audition, or anything else under the definition of the bill.

I wonder, when you look at what would be really very little additional remuneration to the average musician in a band, whether the administrative costs on the part of everybody—radio stations or whoever—in handling it, would really make it worthwhile.

Mr. GORTIKOV. The estimated cost of administration, if we had even to create a new separate entity, would be a maximum of a million dollars a year out of a total yield of $26 million.

Mr. SAWYER. That is probably true as to the administering entity, but when you take the cumulative amount of administrative work on the part of broadcasters and everybody else, I'm sure it would be a lot more than that.

Mr. GORTIKOV. Then, sir, is that an excuse for no payment whatsoever?

Mr. SAWYER. No, but I always have some question on these kinds of things, how cost-effective they are? There is no point to putting a big burden on a lot of people that doesn't produce something commensurate somewhere else.

Mr. GORTIKOV. There is a better reaction to that and a better solution, and that is to increase the yield to a more reasonable amount. We are not satisfied with that amount as being a fair amount.

When the publishers and composers share over $200 million for their underlying musical compositions in this record, why the heck should Mr. Fuentealba's constituents and the vocalists and the record company copyright owners get any less, realistically? But we are here to request the basic right with a modest royalty. After that, Congress in its judgment can decide what alterations in that number, if any, would be fair and equitable to the user.

Mr. SAWYER. You know, the record company's part of this isn't as apparent to me as maybe the musician's or the artist's would be. What is the record company's artistry in making the disc?

Mr. GORTIKOV. The record company is parallel to the music publisher who also gets 50 percent share of the $200 million royalty. The record company is a copyright owner and asking for the protection accorded all other copyright owners. The record company is a copyright owner because the record company exerts a strong creative component in the making of this record. We are not just in the business of making pieces of vinyl with holes in them. We undertake all sorts of creative activities.

The members of this committee, for example, during the Los Angeles hearings were taken into a recording studio and were able to see firsthand the extensive contribution of the record company.

Perhaps no artist is more self-contained than the Beatles were—as song writers, as creators, as performers. I was president of Capitol Records—I was an executive at Capitol Records during the Beatles era and ultimately its president. And I can remember when the creative contribution to the Beatles by George Martin, who was the employed record company producer of VMI—that is the British company through which the Beatles were released—made a tremendous creative contribution to the Beatles which they have acknowledged over and over again.

So the creative contribution has sustained recognition by Congress of the record company as a copyright owner, and therefore to the entitlement.

Mr. SAWYER. Well, how about the technicians and whatnot hired by the record company that in effect do all this? Do they get any kind of a participation in it also?

Mr. GORTIKOV. Generally not. Many of them do, however. Producers, for example—many have a royalty sharing arrangement with record companies. But when you get down to lower-level employees, the answer is no.

Mr. SAWYER. Well, that's about the same as it works now with respect to the performers. The stars get some kind of an overriding deal with the record companies, but the guy playing the tuba or

something in the band does not. Doesn't that work about the same with the record company's employees, too?

Mr. GORTIKOV. Well, it would be completely—the performer, the musician, gets his income from doing his performance on the recording dates, and he also gets shares of contributions made by the record company that represent a percentile share from the sales of the record that go into some union funds. But every employee that contributes to the recording who is employed by the record company—most of them are salaried; most of them are not royalty feed.

Mr. SAWYER. It gets down to where a book is copyrighted, but the guy that sets up all the type and did all the printing and everything else—he isn't operating on a royalty basis. He is operating on a salary, presumably.

Mr. GORTIKOV. That's right.

Mr. SAWYER. And I presume it is the same for the average musician in a band. They are represented by a very effective union, I know, and I am sure they get paid pretty well for what they do.

I don't really see the necessity of carrying over into a royalty thing.

Mr. FUENTEALBA. I think it might be best if you approached the problem from the other side of the coin. What is the justification for commercial use of this product without some compensation to the people who made that product?

Mr. SAWYER. Presumably whoever got it, paid for it.

Mr. GORTIKOV. At the radio station?

Mr. SAWYER. Yes.

Mr. FUENTEALBA. No, radio stations get their records free, I believe.

Mr. SAWYER. I presume if they get it free, it is because the record company thinks it's an advantage for them to get it. Otherwise they'd have no way of getting it, other than paying for it.

Mr. GORTIKOV. Perhaps you didn't pick up the essence of what I was saying about that promotional benefit. Yes, there is an advantage on newly released records for public exposure of records over radio stations. But that does not sustain the sales for the life of the record, and there are loads of recordings that don't get on the radio. Most records don't get on the radio.

So what you are missing is the use made of this by the radio station in attracting its audiences and selling its commercial time. Shouldn't some benefit flow to the originators on that basis?

Mr. SAWYER. Apparently you don't even charge them for the record. You are giving them the record because you want to see some self-advantage to that.

Mr. GORTIKOV. I spoke to that.

Mr. SAWYER. But if you don't even charge them for the record, which you are certainly entitled to do now, why should we enact a law making them pay a royalty?

Mr. GORTIKOV. Then you are missing the point of what I said, sir.

Mr. SAWYER. Apparently I am.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Again I will just touch a few points. I am glad, Mr. Gortikov, that you and the gentleman from Michigan did bring up what was the contribution of the recording company, because I submit that most people who have not been in a recording studio have no perception of the quality, the technicality, and the degree of work that goes into the making of a recording. If there is something you did not touch upon there that occurs to you, I wish you would mention it now, because if someone has not been in a recording studio, they simply can't understand what goes on there.

Mr. GORTIKOV. The only addi I would like to make would be to invite Mr. Sawyer and any r. mber of the subcommittee interested into a recording company to actually show and demonstrate the process so there is no doubt in your minds at all on the creative contribution of the recording companies. It is easily demonstrated and there would be no doubt in your mind at all as to that contribution if you were exposed to it directly.

Mr. DANIELSON. I would hope we could take advantage of that offer sometime because some of us have been in recording studios, but the membership of this committee has changed a good deal, and I am sure some would benefit from the experience.

Mr. KASTENMEIER. Would the gentleman from California yield on that point?

Mr. DANIELSON. Surely.

Mr. KASTENMEIER. I gather the offer is seriously made, but recording studios are essentially in California.

Mr. GORTIKOV. New York would probably be the closest.

Mr. KASTENMEIER. But not here in Washington?

Mr. GORTIKOV. There are some studios, but not operated by any recording companies.

Mr. FUENTEALBA. There are studios in every major city in the United States, but not necessarily owned by the recording companies.

Mr. DANIELSON. What I have in mind is a firstline type of recording studio, one that has all of the facilities that go into the making of a fine recording.

We can talk about that later, but I think it would be a very useful thing.

A second point that I want to stress—I can do it through you, I believe, Mr. Gortikov—in this bill we are only trying to reach the commercial use of sound recording; is that correct?

Mr. GORTIKOV. That is correct.

Mr. DANIELSON. And the bulk numerically, the largest number of records, are probably purchased by the individual citizen who buys it for his or her home use; is that not correct?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. I am speaking numerically. But one phonograph record in a radio station can be played innumerable times for one purpose only, to sell the sound. That is the only reason people tune in, is to hear the noise that comes over the airwaves.

And a discotheque likewise. Very few people have the habit of going to discotheques when there is no music, is my understanding. I have not yet found one.

But we are talking only about commercial use, use for profit.

There is an ambiguity in the documents before the subcommittee. Counsel put together a magnificent background memo, and I do commend it, but it refers to gross receipts. We are talking about net receipts from advertising in this bill, which, of course, is a different concept, and I want the record to be clear on it.

A third point which I believe both of you gentlemen have touched upon--I can only think of it as the life that is in a recording. The composer of a tune has created an intellectual property—the Constitution of the United States recognizes that, as do our laws—and he is entitled to an exclusivity which brings him a royalty—the composer.

The publisher, who is the adjunct to the composer, likewise receives a royalty.

But the aggregate of their product is a piece of sheet music. That sheet music could lie on your desk there for 6 months and nobody would ever hear a tune, would they?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. It needs life breathed into it. And that is the function of the musician who converts that symbol on the piece of paper into a sound that can be heard. And it is also the function, if we are talking of sound recordings, of the recording company who has the technique, the skill, the knowhow, the genius, to put that properly onto that piece of vinyl so that it can be reproduced.

These are the intellectual properties we are talking about, are they not? It's the fixed sound which can be reproduced at will by the person who possesses the equipment.

Mr. GORTIKOV. Yes.

Mr. DANIELSON. Is it true, Mr. Gortikov, that sometimes the same tune is recorded by different artists under different labels?

Mr. GORTIKOV. Yes. The same tune may be recorded by literally hundreds of artists on different records, on different labels, at different times.

Mr. DANIELSON. Within the trade is it not true that the different recordings by different artists under different labels of the same tune have varying degrees of popularity?

Mr. GORTIKOV. Yes, and are also each unique.

Mr. DANIELSON. But some are more popular than others?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. And that is the result of the unique talent of the musicians and the unique talents of the recorder, or both, that produce what you call a hit record?

Mr. GORTIKOV. That's correct.

Mr. DANIELSON. Some are just vinyl that you finally punch a hole in and sell on the distress market?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. But the good one is the one which occupies the market, isn't it?

Mr. GORTIKOV. True.

Mr. DANIELSON. So from that can you not infer that the talents, the performance of the musicians, plus the work of the recording company, combine to produce this work of art that has a demand in the public market?

Mr. GORTIKOV. That is correct.

Mr. DANIELSON. That's what I think of as the life of a recording.

You mentioned older records. I want to clarify that, if I may. You say that broadcasting stations and, I presume, discotheques, play the up-to-date music largely—maybe not exclusively, but it's the popular music that is being played to the greatest extent.

Mr. GORTIKOV. No, sir, I said about 53 percent of the music played on radio stations relates to records that no longer have effective sales taking place.

Mr. DANIELSON. That's right; that's correct. You referred to them as "older."

Mr. GORTIKOV. Yes.

Mr. DANIELSON. By older, I don't want there to be an ambiguity. You don't mean so old that they are not now in the public domain and beyond the reach of copyright?

Mr. GORTIKOV. No, I do not.

Mr. DANIELSON. I think I heard about 25 years ago that "Jeannie with the Light Brown Hair" was the only tune that could be so played. It was 100 years old, as I heard it. I had a strep throat and lay in the hospital and heard "Jeannie with the Light Brown Hair" 24 hours a day. When you say older, you are not meaning public domain, are you then?

Mr. GORTIKOV. No, sir, I am not.

Mr. DANIELSON. This technical progress to which you have referred—this never ends, apparently, the progress in the manufacture and utilization of sound recordings. At least it hasn't ended so far; am I right there?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. Most of us have heard a so-called hi-fi set. In fact, I think most of us are blessed with one. But sound recording and reproduction is already very good. Are there still improvements being made on recording and reproduction?

Mr. GORTIKOV. Yes, there are.

Mr. DANIELSON. Would you touch on digital for a moment.

Mr. GORTIKOV. The digital technique is probably the next breakthrough in sound reception that would be available to the consumer. Digital reception and digital recording would create a sound that is absolutely distortion-free, free of the clicks and pops that are implicit——

Mr. DANIELSON. No background hiss?

Mr. GORTIKOV. No background hiss. It is perfect sound of the same quality that would constitute the actual input. Records are being recorded today digitally, but no records are being played back in the consumer's home digitally because the equipment to do that is still in the prototype stage, and it is probably just a few years before it will be coming out.

Mr. DANIELSON. But it is coming, as sure as tomorrow?

Mr. GORTIKOV. Yes.

Mr. FUENTEALBA. And digital recording also requires top musicians to perform, because the technique used would not permit mistakes to be made.

Mr. DANIELSON. That's right, because the mistakes would come back as perfect mistakes.

Mr. FUENTEALBA. That's right, once it's cut.

Mr. DANIELSON. I have seen advertising of devices to record and play back using a laser beam instead of a mechanical needle. Is that coming, as far as you can see?

Mr. GORTIKOV. Yes. One of the two video disc configurations is laser, and I think one of the audio digital techniques that will be coming onstream in a few years is also laser.

Mr. DANIELSON. But they are capable of producing sound?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. And this will be more perfect sound than we have today?

Mr. GORTIKOV. Correct.

Mr. DANIELSON. Satellite broadcasts—you've touched upon that. That could come in either digitally or, well, in any manner that the communicator chooses to use.

What I am getting at is: With more perfect reproduction—also, there is constant progress, is there not, on producing better speakers, better reproducers of the sound? We have big companies putting out fine studio-monitor-type speakers that the public can buy today.

Mr. GORTIKOV. That's correct.

Mr. DANIELSON. With the enhancement of the reproduction of sound, the music buffs who can't stand a little background hiss and so forth are going to be able to use recordings, rather than listen to live music, isn't that true, such as the Marine Band in the White House?

Mr. FUENTEALBA. True.

Mr. DANIELSON. It took a long time to get to the Marine Band, but that's what I was trying to reach.

On the technique of collecting and paying out this royalty, the radio stations—and users; I don't mean just radio—users of sound recordings today already pay, if they are doing them commercially—pay the composers and publishers a royalty, do they not?

Mr. GORTIKOV. Yes, sir.

Mr. DANIELSON. Could not the same, identical techniques be used to keep track of the playings so that the performers could receive their royalties?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. I have visited radio stations. This function is already in place, in operation, daily as I understand it.

Mr. GORTIKOV. Yes.

Mr. DANIELSON. And the same technique can be used for the purpose of this royalty?

Mr. GORTIKOV. Yes.

Mr. DANIELSON. I have no further questions.

Mr. KASTENMEIER. Let me see if I can follow up.

What you are saying, then, is we don't really need to use the Copyright Royalty Tribunal or the Copyright Office for these purposes.

Mr. GORTIKOV. No. Apparently the drafters of the bill felt that the oversight is necessary, but the actual operations of it would be in the hands of the private parties.

Mr. KASTENMEIER. That is not precisely the model used by ASCAP and BMI.

Mr. GORTIKOV. Well, ASCAP and BMI are independent entities that have no relationship with the Copyright Royalty Tribunal in a supervisory position.

Mr. KASTENMEIER. But as I understood the last colloquy, it was to suggest that that model could be followed.

Mr. GORTIKOV. That model can be followed. ASCAP, I think, is under the supervision of a court.

Mr. DANIELSON. Would the gentleman yield for a moment?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. What I have in the back of my mind on this subject is that perhaps we might need to use the Tribunal as a startup, but I am personally convinced from what I have seen and heard and learned that in a short period of time the transition could be made to a private entity such as ASCAP, BMI, SESAC, something of the sort.

Mr. GORTIKOV. It may be even those same entities.

Mr. DANIELSON. Within a short time, and therefore get it off the back of the taxpayers completely.

Mr. KASTENMEIER. The point I was making is they do not employ the Copyright Office or the Copyright Royalty Tribunal for purposes of their normal collection.

Mr. GORTIKOV. Right.

Mr. KASTENMEIER. Thank you.

The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman. That was precisely the point I wanted to pursue because I judged from the questions of the gentleman from California that the machinery is in place for the collection of the royalty for performers and recorders. The distribution technique that we presently have would be altered under this legislation.

My question to you is—and I think I understood, but does this suggestion that we use the Copyright Royalty Tribunal come from your industry, or is that purely a vehicle that the Chairman has thrown out for us to work with?

Mr. KASTENMEIER. It's in the bill.

Mr. BUTLER. Yes, I know, but from whose brain did it spring?

Mr. KASTENMEIER. It obviously——

Mr. DANIELSON. Would the gentleman yield?

Mr. KASTENMEIER. It's Mr. Danielson's bill.

Mr. DANIELSON. Would the gentleman yield?

Mr. KASTENMEIER. Certainly.

Mr. DANIELSON. It springs in part from my brain, but I plead guilty to plagiarizing every thought I could get from everybody who was willing to contribute. It's sort of an aggregate thought.

But what I truly have in mind, if the gentleman will permit, is that you have to have a starting point, but I believe that this can be phased into a purely private operation—I mean a free enterprise type of operation—without any burden to the taxpayers.

Mr. BUTLER. I thank you for that, but aren't we making a lot of decisions that the free enterprise system ought to make for itself at this point. That is, the relationship of one performer to another and the relationship of the performers to the recorder? Those distribution factors are to be written into the legislation. Is that the suggestion of industry?

Mr. GORTIKOV. Yes, sir, and those suggestions generally follow the patterns that prevail worldwide. The split, for example, 50-50 between the record company copyright owner and the performers, is a general worldwide pattern. The procedures for collecting and distributing generally would follow patterns that prevail in the 62 countries where the royalty right is respected.

So there is not too much pioneering here that need be done, even in this country, with ASCAP and BMI creating the basic semblance of methology. It would have to be altered slightly, but it is basically there.

Mr. BUTLER. Assuming we passed legislation which created the performance rights and declined to get involved in the distribution of the largesse, how long would it take the industry to develop a mechanism on its own? In other words, if we deferred the effective date of the legislation, how long would it take until the industry could develop a mechanism on its own to handle the distribution?

Mr. GORTIKOV. The implementing date in the legislation is January 1983. I would say it would take somewhere between 6 to 12 months upon passage for us to develop the workable methodology to implement it.

Mr. BUTLER. And that would include a workable methodology for distributing the royalties?

Mr. GORTIKOV. Yes.

Mr. BUTLER. Do you think that's a fair figure?

Mr. FUENTEALBA. I think that is a fair figure, yes; no longer than that.

Mr. BUTLER. I thank you. I apologize to the witnesses for not being present for your testimony. However, as you know, it's a recording which has been played several times, and I had another hearing. But I did read it again, and each time I read your testimony I am more persuaded, or closer to being persuaded, as to the total validity of your position. Maybe with the passage of time, if we keep playing this song, Mr. Chairman, I will be able to help with its passage.

Thank you.

Mr. KASTENMEIER. I have a couple more questions.

Suppose this bill were enacted and 3 years hence the Congress decided to ask for the elimination of the fee structure with the performance rights created, going to a free market in your ability to go to the affected parties—principally radio broadcasters, jukebox companies and discos, et cetera—and negotiating with them directly in the spirit of free enterprise, free markets, and deregulation.

Mr. FUENTEALBA. That wouldn't help the performers at all, because there is no legal basis for negotiating with them, since they are not the employers of the performers.

Mr. KASTENMEIER. Well, they would have to negotiate with your representative since you control the copyright. They would not be entitled to presumably play these records without negotiating with record companies, or record companies and representatives of performers, by whatever mechanism is created to do that. Presumably that would evolve just as other things would evolve.

Mr. GORTIKOV. I think that could certainly be an acceptable alternative. I think the compulsory license and the specificity of

the royalty are matters of administrative convenience, and also more a benefit to the user in knowing exactly, at the outset anyway, what his costs might be.

It generally follows the same pattern that was used in setting up the other compulsory licenses that Congress has undertaken. But it is not carved in bronze, and it could be readily adapted to a more free marketplace approach. But I would say it could be helpful during the launch phase.

Mr. KASTENMEIER. I say that because just as ASCAP, BMI, and SESAC do not have a statutorily imposed fee structure in terms of their negotiations with radio broadcasters, presumably in the future, using that as a model, neither should you.

Mr. GORTIKOV. I think that is a fair prospect for the future. It is the creation of the right that is the critical element.

Mr. KASTENMEIER. Other than radio broadcasters, entities which could be affected would be jukebox companies, discotheques, nightclubs, cafes and bars at which the principal form of entertaining is dancing to the accompaniment of sound recordings. In other words, that would follow the Performing Right Society's configuration with respect to liability.

Mr. GORTIKOV. Yes, where there is a commercial use.

Mr. KASTENMEIER. If you had a disco which didn't have dancing, but the principal form of entertainment was to listen to the records, presumably they would have no liability.

Mr. GORTIKOV. I don't know the answer to that.

Mr. FUENTEALBA. I think they would come under the other section of the bill. I think there are certain exemptions.

Mr. KASTENMEIER. Are there? I am looking at section 8(d).

Mr. FUENTEALBA. Section 7(c) on page 10 says "other users not otherwise exempted."

Mr. KASTENMEIER. Thank you for that clarification.

We will conclude today, and tomorrow we will return to the cable problem.

I appreciate, Mr. Gortikov, your raising the question of the celestial jukebox, because we are beginning to appreciate that satellites and the new technology involve broadcasting as well as telecasting, and that is essentially music.

I was not aware of the digital case that you used. I wonder, whether an entity responsible for transmissions to the home could also be implicated in the process of enabling home users, that is, cable subscribers, to use their facilities to record. I don't know the answer to that. I know that home recording is in the process of being tested, perhaps not successfully. I wonder whether the agency of transmission could also be implicit in the recording separately for home use. That to me is a separate question, and perhaps we might take a look at that, which you pose as a possibility for the future. I think we must indeed contemplate that, and we should try to anticipate, as we seriously look at this bill, what some of the prospects may be.

One other question:

Mr. Fuentealba was very forthcoming, I thought, in terms of how individual musicians might be compensated in terms of the records being kept.

Is it contemplated that radio stations would keep logs of specific records played each minute of the day?

Mr. DANIELSON. Would the gentleman yield?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. I have observed—maybe it was a unique station, but it's a small station in the Los Angeles area—that they have a system of what I call IBM cards, cards the size of a check with a lot of little holes in them, and every time they play a record this thing somehow or other is logged into a tape. I don't know how they do it, except they have this IBM-type card, and that tells the whole thing, that it's Victor or Capitol Record No. 12345, and so forth.

Mr. KASTENMEIER. I raise that in terms of what it may or may not impose upon broadcasters. I believe the performing rights societies monitor samplings of plays, but they do not insist on a full report, nor do they obtain a full report through the country of the number of times each song is played.

However, if this bill were to become law, I would think one would need more precise information on plays than would be necessary with performing rights societies.

Mr. GORTIKOV. The intent, I would say, would be to get a statistically valid sample, much the same as is done for the publishers and composers. They may miss some, as they do right now, but it is basically a valid sample that is taken.

I think one of the performing rights societies uses logs from stations on a sampled basis. Another one uses actual monitoring on a sampled basis. But in each case they are sampled.

Mr. KASTENMEIER. So my question is—and it is one perhaps the broadcasters may wish to respond to as well: Would this bill, apart from any liability, impose any burdens on broadcasters?

Mr. GORTIKOV. It's the same collecting information for composers and publishers as for musicians and record companies; it's the same sound recording. So from a radio station's view, that part would be the same.

The distribution would require different approaches in a parallel comparable system, but with different beneficiaries, of course.

Mr. FUENTEALBA. In other words, there would be no further recordkeeping required on the part of the broadcasters.

Mr. KASTENMEIER. Than is presently maintained?

Mr. FUENTEALBA. Yes.

Mr. KASTENMEIER. Well, it may well be that as we move along on this and other subjects we may need to return to you or to others who will speak for the bill, in addition to my colleague Mr. Danielson, to respond to questions about other aspects of the bill which may be raised in subsequent hearings.

I would like to compliment both Mr. Fuentealba and Mr. Gortikov for their customary aid, and hope you will be on hand to give help to the subcommittee in the future.

Mr. GORTIKOV. Thank you.

Mr. FUENTEALBA. Thank you.

Mr. KASTENMEIER. Thank you, and that concludes the hearings today, and tomorrow we are going to the copyright on cable and television.

Until 10 o'clock tomorrow morning, we stand adjourned.

[Whereupon, at 11:58 a.m., the hearing was adjourned.]

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THURSDAY, MAY 21, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Frank, Railsback, Sawyer, and Butler.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This is the third day of the committee hearings devoted to copyright questions and the second exclusively to the question of the impact of existing laws on cable systems and on television networks program creators and professional sports, among others.

We are pleased to have this morning a very distinguished panel. They are of course Mr. Monroe Rifkin, Chairman of the board, and Chief Executive Officer of American Television Communications; Thomas Wheeler, who is president of the National Cable Television Association, and Steve Effros, Community Antenna Television Association. All have been witnesses in the past and are well-known to this committee, and we greet you all.

Who would like to proceed? Mr. Wheeler? I recognize the president of the National Cable Television Association.

TESTIMONY OF THOMAS WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION; MONROE RIFKIN, CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER, AMERICAN TELEVISION COMMUNICATIONS, TIME, INC., AND STEPHEN EFFROS, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. WHEELER. Thank you very much, Mr. Chairman. We appreciate the opportunity to be back again in front of you today.

I am Thomas Wheeler, president of the National Cable Television Association. Since my prepared remarks, Mr. Chairman, are rather lengthy, I would like to summarize this morning if I may and ask that they be included in the record as if read.

Mr. KASTENMEIER. Without objection, your entire statement, together with any appendices you may submit, will be accepted and made part of the record, and you may proceed.

Mr. WHEELER. Thank you very much.

The cable television industry is a business in transition. Today over 19 million American households receive cable television service. By 1985 analysts predict that we will double today's number of subscribers. The old standard of 8- to 12-channel capacity for cable systems has been surpassed by new systems, commonly offering 35 to 50 channels. Some new systems exceed even the high range of those figures.

Cable television offers a wide range of alternative programing, from the 24-hour-a-day all-news services you receive in your offices to a 24-hour-a-day all-sports channel; from a specialized children's network to gavel-to-gavel coverage of the proceedings of the House of Representatives; from minority programing to premium entertainment services.

Moreover, cable's potential for two-way interactive capacity is making possible a wide variety of enhanced broad-band services such as shop at home, home energy management, view data, public opinion polling, and home security services.

Those of you who follow the cable industry's progress are familiar with this litany of wondrous developments. Yet it would be a serious error to conclude that the explosion of channel capacity, made-for-cable programing, and enhanced broadband services represent common features of the cable landscape.

Put simply, most of the program and other services I have mentioned are presently available either only to a small proportion of the American population, or available on a test basis. They represent state-of-the-art services which, while technologically feasible, are, like television in the 1930's, available only to a very limited proportion of the population.

The bedrock systems of the cable television industry bear almost no resemblance to the prototypical systems now being tested. Sixty-eight percent of cable systems are located in areas outside the top 100 television markets. [See appendix 1.] A full 70 percent of all systems have a capacity of 12 channels or less. Those figures are significant because it is those systems where cable is often the only way to get decent television service that would be most profoundly affected by changes in the copyright law.

You've heard a great deal of talk about the cable "gold mine." One would expect the other side in this debate to talk like that. But let's see what the financial community has to say.

Sandra Swift, an analyst in the research department of Marine Midland, studied probable rates of return on new franchises using Warner-Amex's franchise in the Dallas area as a typical example. In a report issued last January, she concluded that annual return on investment will average only 9 percent to 12 percent over the 15 years of the franchise, and said that the high end of the range will be met only if profits from two-way services and pay cable are substantial. To quote Ms. Swift's report:

> Unless the venture could raise capital on substantially more favorable terms * * * major new franchises at this point wouldn't provide an annual return in excess of that from an average Standard and Poor's 500 company. [Wall Street Journal, Jan. 26, 1981.] [See appendix 2.]

The bottom line for cable isn't at all the money machine previous witnesses may have portrayed. In fact, just by way of comparison, when we speak of total cable industry revenues and profits, we

are still speaking of numbers less than those applicable to our local supermarket chain, Giant Food.

Let's compare cable to the broadcasting and program supplier industries. The latest available FCC statistics report that the cable industry's 1979 annual revenues were $1.8 million, while the broadcasting industry's revenues were four times greater at $7.8 million. I would like to give you the comparison with the entire motion picture/syndication industries, but the information is not publicly available. However, we do know that seven of the large publicly held movie studios generated 1979 revenues of $3.1 billion.

Mr. Chairman, I will not attempt to review the tortured history of the cable provisions of the Copyright Act of 1976. Suffice it to say that after protracted struggle fought in the courts, the FCC, and both the House and Senate, Congress gave its imprimatur to a formal agreement reached by representatives of the copyright holder and the cable industry.

Mr. Chairman, each of the industries affected by the new law had its own reasons for agreeing to the compromise. But I think we ought to ask the question, which is not often asked, why did Congress agree to it?

My understanding, Mr. Chairman, is that Congress agreed to it for the simple reason that no other system seemed likely to work. Listen to Barbara Ringer, the former Register of Copyrights, who last month referred to "the practical impossibility of each of the cable systems independently in the country sitting down and bargaining in advance with the literally thousands of possible or potential or actual copyright holders of the programming to be retransmitted."

To quote further from Ms. Ringer:

> In any case, because they must carry all or nothing under the law, they do not know what they are going to be retransmitting. There is the intolerable danger of full liability for unlicensed retransmissions. If you abandon the compulsory license, there is just no way they could avoid making unauthorized retransmissions. In that case they would be under very, very severe restraints. The dangers are very, very real.

Ms. Ringer made one other point worth noting here:

"Broadcasting," she said, "will use what weapons it can. Copyright is a form of monopoly, especially when copyrights are pooled in some way. There are broadcasters who would use this to prevent cable systems from operating, or maybe even to drive them out of business."

As you know only too well, Mr. Chairman, these considerations were very much on Congress' mind when this subcommittee adopted the MPAA-NCTA accord. Like Churchill's description of democracy, it may not be the best system around but it's the only one that works. It is the only system that works because the physical burden of 4,350 cable systems negotiating individually for programs is mind-boggling. Consider, for instance, a cable operator with five distant broadcast channels. In the course of a week, each of those channels will carry from 35 to 100 programs, each of which must be negotiated for individually. If 4,350 systems were required to negotiate for 35 to 100 programs per channel, the cable operators would have time to do nothing but attempt to buy programs.

Even Mr. Jack Valenti told this subcommittee in 1975 that a compulsory license was the only sensible solution, and I quote:

> In all honesty, I have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid. Such an administrative difficulty; a compulsory license covering all signals, lessening paperwork, lessening everything.

Perhaps Congressman Danielson made the best case for the compulsory license during floor debate on the 1976 act. He said, quote:

> When we remember that a cable system is passive in its program selection and must intercept and distribute whatever the primary transmitter transmits, then we must recognize that it is impossible and impractical for the cable system to negotiate for a license with the copyright owners in advance of transmitting the program. At the same time, item-by-item negotiating between users and owners of copyright prior to each performance would be so burdensome as to destroy this valuable means of communication and would also effectively deny a valuable market to the copyright owners.

These considerations, plus the incentives some broadcasters have to deny retransmission consent for competitive reasons not related to copyright, persuaded Congress to accept the compulsory license and accompanying statutory schedule of fees embodied in the compromise agreement. Mr. Chairman, no change in circumstances has occurred since 1976 which alters these fundamental reasons why Congress adopted the system now on the statute books.

Lest we get caught up in a discussion of history, let's not forget the reason behind this controversy in the first place—money. Broadcasters and copyright owners contend cable does not pay enough in copyright. The facts suggest that cable's payment is quite substantial.

Since the act took effect in 1978 the revenues it has generated have soared. Initial year payments were projected by common agreement to be $8.7 million, but actual payments exceed the estimate by nearly 50 percent, amounting to $12.7 million. Second year payments rose to $15.1 million, third year payments to $19.5 million, and over the next 5 years the National Association of Broadcasters predicts that these payments will generate $150 million.

Last month David P. Polinger, Chairman of NAB's Ad Hoc Committee on Cable Copyright Royalties, predicted that cable's royalty payments over the next 5 years will be a windfall.

Another development since 1976 about which I know the members of this subcommittee are concerned is the FCC's decision to rescind its distant signal and syndicated exclusivity rules. Why did the Commission take this step? To borrow again from the refreshingly candid Ms. Ringer: "The fundamental reason behind both rules was to protect copyright owners and their broadcaster licensees."

To put it another way, as did the U.S. Court of Appeals for the District of Columbia Circuit (*Geller* v. *FCC,* 610 Federal 2d 973 (1979)), the signal carriage rules were "initially promulgated to facilitate the enactment of new copyright legislation." In other words, that is not to say that a change in the rules mandates a change in the act. But rather, the court said that the 1976 act itself mandated reconsideration of the FCC's rules. Once the new law was enacted, said the court, the rules "lacked a nexus with the public interest . . ."

The court of appeals ordered the Commission take another look at its signal carriage rules and to determine whether, in view of the passage of the Copyright Act, the rules still served a valid purpose. What the Commission found was that contrary to the common wisdom or, as the Commission put it, contrary to the "intuitive mode," cable retransmissions hurt neither broadcasters nor copyright owners. The FCC reported:

"The effect on local station audiences of eliminating the signal carriage rules appears small."

They went on to observe:

"One additional fact of interest is that UHF stations, particularly UHF independents, often receive audience gains from cable television." [12 FCC 79-243, paragraph 116.]

Moreover, and this is very significant, the Commission found that "the television service received by the public would not be impaired and would in some respects be significantly improved by the elimination of these regulatory constraints."

The Commission's findings, of course, have not been greeted with universal approbation. Witnesses last week argued that the FCC reached the wrong conclusion to deregulate cable, and asserted that both the FCC and NAB research showed that cable causes an increasing audience diversion. It is certainly not what the FCC Report and Order concluded, and again I quote:

> The incremental audience losses to local broadcast stations from eliminating the signal carriage rules will be less than 10 percent in the foreseeable future except for the most extreme cases.

Typical of the kind of worst case example with which the broadcasters distort this debate was Mr. Wasilewski's example to this subcommittee last week of Bakersfield, Calif. The FCC study specifically identified Bakersfield as an extreme case with unique circumstances. Public policy should be based on general applicable situations, not extreme and unique circumstances. Insofar as the general case is concerned, I would bring to your attention two additional key observations made by the Commission in its report and order., and I quote:

> There is no evidence in the record that shows our estimates of audience diversion due to cable television in the case studies analysis are incorrect.
>
> There is no evidence in the record disputing our finding that the supply of programing will continue to expand even with the complete deregulation of cable television." [Report, page 197.]

The broadcasters and program producers, in short , were totally incapable in front of the Commission of backing up with hard facts the same arguments that they are making to you. Their testimony last week, while impressive in rhetoric, is equally lacking in hard facts.

Mr. Chairman, the cable industry is ready to stand on the facts. We have yet to see the facts to substantiate the claims of the other side. We urge this subcommittee to undertake its own study, possibly even using subpoena power, to get all the facts in this issue.

And I might parenthetically add here that I think it is particularly interesting that the broadcasters also came up last week and opposed the CRT having subpena authority so that they could get the facts. It is kind of like, "take us at our word, don't go out and find out what realities really are, but trust us."

Now although program suppliers claim that they are harmed by cable growth, they also have yet to come forward with facts to substantiate their claim.

Another FCC report by the noted broadcaster economist Yale Braunstein summarized the situation this way:

"So far copyright holders have been unable to produce a body of data which would clearly show the program revenues are affected."

Further, an examination of the actual prices paid for various syndicated programs in the top television markets reveals that cable is not a major factor in influencing syndicated program prices. This chart [indicating] summarizes data published in Advertising Age, February 18, 1980.

The data reveals that there is no consistent pattern of syndicated program pricing. Clearly there is no discernible relationship between program prices and the number of cable subscribers or cable penetration level in a market.

Let's look at a few examples. The middle column there is 1977.

In 1977 the program "All in the Family" generated the same price per episode, $18,000, in San Francisco, which had a 30-percent cable penetration level, as in Detroit, a similar size market where only 2 percent of the homes in the television ADI have cable. The $24,000 price per episode for "All in the Family" is the same in Philadelphia with its 17-percent cable penetration as in Boston, which is a lower percentage of cable households, 10 percent.

The right-hand column is the Muppet Show, more recent examples. The Muppet Show was sold in syndication in 1979 and 1980. New York and Los Angeles, for instance, to look at those first two columns, first two rows, New York and Los Angeles have the same cable penetration level, 15 percent. Yet in the smaller market, Los Angeles, the station is paying $67,000 per Muppet Show episode while New York pays only $63,000. Similarly, Philadelphia has a higher cable penetration at 20 percent than Boston at 11 percent; at the same time, the Philadelphia station pays almost 20 percent more for the Muppet Show.

The inescapable conclusion of these hard market numbers is that cable is not a factor for affecting syndicated program practices. In my prepared text I list about half a dozen factors which are, including the number of households, the needs of the station, and other examples.

Now we spoke earlier of cable as being a business in transition and of the compulsory license as a flexible mechanism which allows the marketplace to evolve. Another indication of that is the acceptance of superstations by the program supply industry. To avoid widespread cable distribution programs, suppliers can restrict their sales to superstations; that is exactly what happened, as a matter of fact, in WTBS when it emerged as a superstation in 1977. All but one of the major program syndicators refused to sell to WTBS; now, the situation is just the reverse, with only one not selling to WTBS.

Why this reversal of position? It is because they discovered that they can charge superstations more for the programs based on their expanded reach. The beauty of the 1976 act is that it allows for this kind of flexibility and marketplace evolution. Let's look at

some examples of this kind of flexibility and this kind of evolution which is happening under the 1976 act.

WTBS purchased a movie package in 1976, for instance, prior to becoming a superstation, which had 47 films in it and they were charged a total of $70,000. That is roughly $1,500 a film. In post-superstation 1979, a package of 20 similar films was purchased for $130,000, or $6,500 per movie, representing a price increase of over 300 percent.

Likewise, as this chart shows, prices paid for WTBS for renewals of popular series have also increased. A couple of examples.

In September 1972, WTBS purchased The Flintstones under a 6-year contract for $50 per run. In 1978 post-superstation price per run was increased by over 400 percent to $266, and the contract was limited to 31 months.

In 1974, presuperstation, I Love Lucy was purchased for $34 a run; in 1979 the price increased almost 10 times to $330 a run.

You can see down the right-hand column their price increases pre- and post-superstation of up to 823 percent as the marketplace evolves to take care of the changes in cable television distribution.

The existence of superstations has sparked many of the program supply industry's arguments for a change in the compulsory license. However, it is clear the pricing practices are already adjusting to their presence. Furthermore, fears of a proliferation of superstations were proved to be unfounded when one such satellite-delivered signal, KTVU, was taken off the satellite for lack of interest.

But it is argued, it just isn't fair that broadcasters pay 20 to 40 percent of their revenues for programing while cable pays what your witness the other day called a "pittance".

Mr. Chairman, this is one of the most misleading canards currently being tossed about. The fact is that if the amount cable pays for programing is calculated in the same manner as the broadcasting figure is calculated, the amounts are relatively equal. The broadcasters and Hollywood interests have been comparing apples and oranges when they lump their total program purchase costs together and compare them with the cost of only one source of cable programing, distant signals. It is convenient for them and it is a comparison which helps their cause but it is misleading and wholly inaccurate.

Again, let's look at the real world. Let's look right across the river at Arlington, and the ARTEC system. ARTEC is a 35-channel system with roughly 20,000 subscribers. In 1981, 36.4 percent of ARTEC's expense will go to purchase the rights for programs shown on the system. By 1985, programing costs are expected to be 46.4 percent; in comparison all TV broadcast stations in 1979, the latest publicly available data, spent an average 43.3 percent of their expense for programing.

The inescapable fact is that when you compare apples and apples, when you compare total program costs for cable operators to total program costs for broadcasters, they both pay essentially the same percentage level. But before ending this discussion, Mr. Chairman, let's consider the public's interest in this matter.

One of the cable's most important functions is to even out the disparity of television availablity in the United States. Nearly

three-quarters of the TV markets in the United States serving 35 percent of the television population have no nonnetwork TV stations.

Why should Wisconsin Dells, Staunton, Va., and Monmouth, Ill. be second-class television cities? Why should not the people who live in these cities have the same program alternatives as do people in Los Angeles, New York, and Chicago?

Because cable does not use the spectrum, we can avoid the technical problems which created the second-class status. We can bring additional viewing options to areas where few would otherwise exist. This really shouldn't alarm broadcasters.

During the period between 1975 and 1979, the net income before taxes of network-affiliated television stations rose by a healthy 114 percent. And the net income of independent television stations rose an astounding 461 percent.

If cable helps to moderate the disparity of signal availability as between big cities and the rest of the country, is it too much to ask the broadcasters that they trade off just a little of their advantage in return for their deliberately scarce and therefore very valuable license? And what about the program producers? They take advantage of the artificial scarcity of broadcast outlets to demand monopoly rents for their product.

Most syndicated programs start in the networks where, if you multiply prime time hours by number of networks, you will see there are relatively few slots. So the syndicator starts out with a relatively scarce product and then sells it to broadcast stations who own relatively scarce licenses and therefore can command high advertising rates to pay for the high syndication fees demanded by the producers. And holding all of this up is a system which requires that the folks in Wisconsin Dells and Staunton and Monmouth have less choice than some other Americans.

Isn't it reasonable to suggest that the program producers, too, might trade off just a little of the advantage they reap from the system so that the public's interest in universal availablity of diverse programing might be served? For the public's interest ought to be considered. Indeed, it ought to be the first concern in this debate which, instead, seems to have focused itself around dividing up the spoils among competitors.

I hope the subcommittee will consider the evidence and carefully gather some evidence of your own. I hope that in considering the evidence you will ask yourself whether price increases would act as an incentive to increase production and whether significant portions of the public would be denied diverse programing if the compulsory license were eliminated or otherwise constrained?

We think you will find, as we have, that the inevitable result of revision of the Act will be that people pay more and get less. Scarcity will be reinforced. The economic underpinnings of the cable industry, an industry in transition, will be weakened.

Mr. Chairman, members of the committee, thank you for your time and your consideration.

[The complete statement of Mr. Wheeler follows:]

STATEMENT OF THOMAS E. WHEELER,

PRESIDENT,

NATIONAL CABLE TELEVISION ASSOCIATION

Mr. Chairman and members of the subcommittee, my name is Thomas E. Wheeler and I am President of the National Cable Television Association. 1/

NCTA appreciates the opportunity to present its views on the operation of the cable provisions of the Copyright Act, and on proposals to make changes in the Act.

Mr. Chairman, there are several parts to my prepared statement this morning. I would like, first, to give you some background on the status of our industry, its size, rate of growth and, since others have raised the point, its relative position as compared to industries represented by other witnesses who have appeared before this subcommittee.

Second, some observations are appropriate concerning the operation and origin of the compulsory license, the mechanism which is at the heart of the law as it presently stands.

Third, we will look at the effect of the compulsory license on the program supply and distribution marketplace. I am aware that other witnesses before this subcommittee have asserted that the compulsory license has some negative impact on the programming, broadcast and sports industries. Those, claims, after examination, cannot be substantiated.

Fourth, and most important we will consider the impact of this controversy on the major party in interest — directly represented here by you, the members of the subcommittee; I refer to the interest of the television-viewing public.

Cable — An Industry In Transition

The cable television industry is a business in transition. It is difficult to go for a week without reading in the press about cable's expansion into new urban areas and the development of new programming alternatives.

Indeed, cable is growing. At the beginning of 1977, just after Congress passed the Copyright Act, cable served 11.9 million subscribers. Today over 19 million American households receive cable television service. By 1985 analysts predict we will double today's number of subscribers.

The old standard of 8 to 12 channel capacity for cable systems has been surpassed by new systems, commonly offering 35 to 50 channels. Some new systems exceed even the high range of those figures.

Cable television offers a wide range of alternative programming— from the 24-hour a day all news service you receive in your offices to a 24-hour a day all sports channel; from a specialized children's network to gavel to gavel coverage of the proceedings of the House of Representatives; from minority programming to premium entertainment services.

Moreover, cable's potential for two-way interactive capacity is making possible a wide variety of enhanced broadband services such as shop-at-home, home energy management, viewdata, public opinion polling and home security services.

Those of you who follow the cable industry's progress are familiar with

this litany of wonderous developments. Yet it would be a serious error to conclude that the explosion of channel capacity, made-for-cable programming, and enhanced broadband services represent common features of the cable landscape. Put simply, most of the program and other services I have mentioned are presently available either only to a small proportion of the American population, or available on a test basis. They represent state-of-the-art services which while technologically feasible are, like television in the 1930's, available only to a very limited proportion of the population.

The bedrock systems of the cable television industry bear almost no resemblance to the prototypical systems now being tested. Sixty-eight percent of cable systems are located in areas outside the top 100 television markets. (See Appendix 1) A full 70% of all systems — serving 43% of the subscribers — have a capacity of 12 channels or less. It is those systems — where cable is often the only way to get decent television service — that would be most profoundly affected by changes in the copyright law.

Because cable is an industry in transition, it is important that public policy not be based solely on the way things look at a given moment in time. If that was the case we'd be revisiting the issues under disscussion today every two years.

The beauty of the 1976 Copyright Act is that it permits transition to occur in an orderly manner. It does not superimpose a grand design upon the transition, rather it allows for changes as the cable business evolves.

You've heard a great deal of talk about the cable "Gold Mine." One

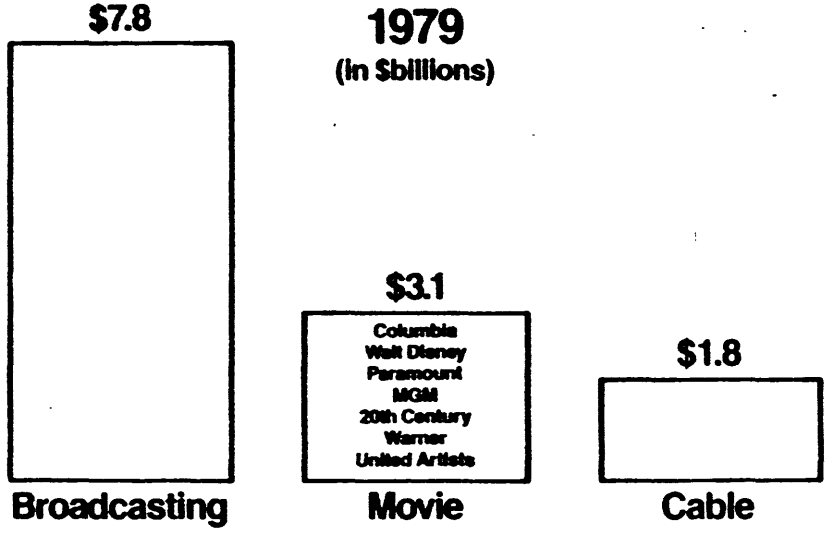
would expect the other side in this debate to talk like that. But let's see what the financial community has to say.

Sandra Swift, an analyst in the research department of Marine Midland studied probable rates of return on new franchises using Warner-Amex's franchise in the Dallas area as a typical example. In a report issued last January she concluded that annual return on investment will average only 9% to 12% over the 15 years of the franchise, and said that the high end of the range will be met only if profits from two-way services and pay cable are substantial. To quote Ms. Swift's report, "Unless the venture could raise capital on substantially more favorable terms ... major new franchises at this point wouldn't provide an annual return in excess of that from an average Standard and Poor's 500 company." (Wall Street Journal, 1/26/81). (See Appendix 2)

The bottom line for cable isn't at all the money machine previous witnesses may have portrayed. In fact, just by way of comparison when we speak of total cable industry revenues and profits, we are still speaking of numbers less than those applicable to our local supermarket chain, Giant Food.

Let's compare cable to the broadcasting and program supplier industries. The latest availabile FCC statistics report that the cable industry's 1979 annual revenues were $1.8 million, while the broadcasting industry's revenues were 4 times greater at $7.8 billion. I would like to give you the comparison with the entire motion picture/syndication industries, but the information is not publically available. However, we do know that 7 of the large publicly held movie studios generated 1979 revenues of $3.1 billion.

INDUSTRY COMPARISON
TOTAL REVENUES
1979
(In $billions)



Sources: Broadcasting data from the FCC Broadcast Financial Report, 1979.

Movie industry data from 'Motion Picture Industry Data', Montgomery Securities, March 5, 1980, and Transamerica's *Annual Report 1979* (United Artists).

Cable TV data from the FCC Cable TV Financial Report, 1979.

Keep in mind that our data excludes 4 of the largest of the 11 MPAA members and all 80 members of the Associaton of Motion Picture and Television Producers. I do not want to neglect the sports industry either, but again the data is hard to come by. We do know that in 1980, broadcast rights for baseball were $95 million, a healthy increase of 74 percent over the 1979 take of $54.5 million. Baseball teams appear to be doing well notwithstanding the growth of cable in the same area. While Mr. Kuhn bemoaned the impact of cable on the Pittsburgh Pirates, the fact remains that in Pittsburgh 1980 baseball attendance rose by 14 percent over the prior year. At the same time cable penetration in the Pittsburgh market increased by 13 percent.

In fact, Mr. Chairman, the admirable record of the broadcast and program producing industries, and even the baseball leagues, is in part attributable to the growth of cable. We improve the clarity of broadcasters' local signals, add "eyeballs" to their rate cards, and help stimulate the interest of people in television generally. Those benefits, of course, apply not only to imported distant signals, but to the signals of all television broadcast stations where cable is present, for FCC rules require that cable — as a condition of existence — carry free of charge the signals of broadcast stations in the local market.

Why the Compulsory License?

Mr. Chairman, I will not attempt here to review the tortured history of the cable provisions of the Copyright Act of 1976. Suffice it to say that after a protracted struggle fought in the courts, the FCC, and both the House and Senate, Congress gave its imprimatur to a formal agreement reached by representatives of the copyright holders and the cable industry.

The 1976 Act provided a statutory fee schedule based on the gross receipts of a cable system and the number of distant signals imported by that system. A Copyright Royalty Tribunal was created to, among other things, periodically adjust the fee schedule to reflect inflation, and to make further adjustments for changes in FCC rules which might allow additional distant signals to be imported, or for changes in the FCC's syndicated exclusivity rules.

Mr. Chairman, each of the industries affected by the new law had its own reasons for agreeing to the compromise. But I think we ought to ask the question, which is not often asked: "Why did Congress agree to it?"

My understanding, Mr. Chairman, is that Congress agreed to it for the simple reason that no other system seemed likely to work. Listen to Barbara Ringer, the former Registrar of Copyrights, who last month referred to "the practical impossibility of each of the cable systems independently in the country sitting down and bargaining, in advance with the literally thousands of possible or potential or actual copyright holders of the programming to be retransmitted."

To quote further from Ms. Ringer: "In many cases [because they must carry all or nothing under the law] they do not know what they are going to be retransmitting...! [There is] the intolerable danger of full liability for unlicensed retransmissions.... If you abandon the compulsory license, there is just no way they could avoid making unauthorized retransmissions. In that case, they would be under very, very severe restraints. The dangers are very, very real."

Ms. Ringer made one other point worth noting here: "Broadcasting," she said, " will use what weapons it can. Copyright is a form of monopoly ..., especially when copyrights are pooled in some way ....[T]here are broadcasters who would use this to prevent cable systems from operating, or maybe even to drive them out of business."2/

Ms. Ringer's point is not without supportive evidence. Between 1968 and 1972, when the FCC experimented with retransmission consent, only 2 consent agreements were obtained by cable in the entire country. While this fact is at least remarkable it, more importantly, is indicative of the broadcast industry's attitude toward cable competition.

Only the Compulsory License Avoids the Practical Difficulties of the Marketplace

As you know Mr. Chairman, these considerations were very much on Congress' mind when this subcommittee adopted the MPAA-NCTA accord. Like Churchill's description of democracy, it may not be the best system around, but it's the only one that works. It is the only system that works because the physical burden of 4350 cable systems negotiating individually for programs is mindboggling. Consider, for instance, a cable operator with 5 distant broadcast channels (2 independent, 2 network and 1 PBS). In the course of a week each of those channels will carry from 35 to over 100 programs, each of which must be negotiated for individually. If 4350 systems were required to negotiate with 1000 suppliers for 35 - 100 programs per channel, the cable operators would have time to do nothing but attempt to buy programs.

Even Mr. Jack Valenti told this subcommittee in 1975 that a compulsory license was the only sensible solution: 3/

> "In all honesty, I have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid... Such an administrative difficulty; a compulsory license covering all signals, lessening paperwork, lessening everything."

Perhaps Congressman Danielson made the best case for the compulsory license during floor debate on the 1976 Act:

> "When we remember that a cable system is passive in its program selection and must intercept and distribute whatever the primary transmitter transmits, then we must recognize that it is impossible and impractical for the cable system to negotiate for a license with the copyright owners in advance of transmitting the program. At the same time, item-by-item negotiating between users and owners of copyright prior to each performance would be so burdensome as to destroy this valuble means of communication and would also effectively deny a valuable market to the copyright owners. 4/

These considerations, plus the incentives some broadcasters have to deny retransmission consent for competitive reasons not related to copyright, persuaded Congress to accept the compulsory license and accompanying

statutory schedule of fees embodied in the compromise agreement. Mr. Chairman, no change in circumstances has occured since 1976 which alters these fundamental reasons why Congress adopted the system now on the statute books.

Satellite Technology has not Altered the Reasons for the Compulsory License

Those who seek to reopen the Act often point to the growth in satellite-delivered services as justification for their actions.

It is true that satellites have made it easier to transport television signals to distant cable systems. This does not alter in any respect, however, the continued validity of the reasons behind the 1976 compromise. In fact the satellite distribution intentions of WTBS (then WTGC) were well known at the time of the MPAA-NCTA accord and were a significant point of discussion in the deliberations. This is why Mr. Valenti insisted on the so called "life net" which allowed the CRT to adjust rates to reflect new circumstances.

Lest we get caught up in a discussion of "life nets" and other extenuating factors, however, let's not forget the reason behind this controversy in the first place — money. Broadcasters and copyright owners contend cable does not pay enough in copyright. The facts suggest that cable's payment is in fact substantial

Since the Act took effect in 1978 the revenues it has generated have soared. Initial year payments were projected by common agreement to be $8.7million, but actual payments exceeded the estimate by nearly 50%,

amounting to $12.7 million. Second year payments rose to $15.1 million, third year payments to $19.5 million. By 1985 these payments are projected to rise to $150 million! Even the broadcasters find cable's payments significant. Last month David P. Polinger, Chairman of NAB's Ad Hoc Committee on Cable Copyright Royalties, reported that cable's royalty payments over the next five years will be a "windfall."[5/]

The Elimination of the FCC Signal Carriage Rules Will Not Alter the Reasons For the Compulsory License

Another development since 1976 about which I know the Members of this subcommittee are concerned is the FCC's decision to rescind its distant signal and syndicated exclusivity rules. This action was not taken by the Commission lightly. After collecting mountains of evidence both independently and from the various industries concerned, the Commission concluded that continuation of the rules served no vaid public purpose.

Why did the Commission take this step? To borrow again from the refreshingly candid Ms. Ringer, "[T]he fundamental reason behind both ... [rules] was to protect copyright owners and their broadcaster licensees." (emphasis added) To put it another way, as did the U. S. Court of Appeals for the District of Columbia Circuit (Geller v. FCC, 610 F.2d 973 (1979), the signal carriage rules were "initially promulgated to facilitate the enactment of new copyright legislation. . . ." Once the new law was enacted, said the court, the rules "lacked a nexus with the public interest . . . ." The Court of Appeals ordered the Commission take another look at its signal carriage rules and to determine whether in view of the passage of the

purpose.

What the Commission found was that contrary to the common wisdom, or as the Commission put it, contrary to the "intuitive model," cable retransmissions hurt neither broadcasters nor copyright owners. The FCC reported:

- "... the effect on local station audiences of eliminating the signal carriage rules appears small. In all but the most extreme cases, the additional audience loss will be less than 10 percent in the forseeable future. Moreover, these losses will take place in a context of offsetting factors. Increases in population and in the level of economic activity result in fairly steady growth in the demand for advertising exposures and in station revenues." (11 FCC 79-241 paragraph 117)
- "One additional fact of interest is that UHF stations, particularly UHF independents, often receive audience gains from cable television." (12 FCC 79-243, paragraph 116)

Moreover, and this is a very important point, the Commission found that "the television service received by the public would not be impaired and would in some respects be significantly improved by the elimination of these regulatory constraints." (Report, page 3.)

The Commission's findings, of course, have not been greeted with universal approbation. Witnesses last week argued that the FCC reached the wrong conclusion to deregulate cable and asserted that both the FCC and NAB research both showed that cable causes an increasing audience diversion. This is certainly not what the FCC Report and Order concluded.

"... the incremental audience losses to local broadcast stations from eliminating the signal carriage rules will be less than 10 percent in the forseeable future except for the most extreme cases. This conclusion was drawn from all of the substantive work on audience diversion that was undertaken for this proceeding — NCTA, MPAA, NAB-WEFA, Park and the case studies — after necessary adjustments were made to the studies. It is important to note that no new study has been submitted which suggests this conclusion is incorrect. (Ibid.,para. 144)"

Typical of the kind of worst case example with which the broadcasters distort this debate was Mr. Wasilewski's example to this subcommittee of Bakersfield, California. The FCC study specifically identified Bakersfield as an extreme case with unique circumstances. NCTA has always maintained that unique situations may require specialized remedies. However, these should be considered on a case by case basis, rather than setting public policy on the basis of extremes. In so far as the general case is concerned I would bring to your attention two key observations made by the Commission in its Report and Order:
Said the Commission,

- "There is no evidence in the record that shows our estimates audience diversion due to cable television in the case studies analysis are incorrect."

- "There is no evidence in the record disputing our finding that the supply of programming will continue to expand even with the complete deregulation of cable television." (Report, p. 197)

The broadcasters and program producers, in short, were totally incapable in front of the commission to back up with hard facts the same arguments they are making to you. Their testimony last week, while impressive in rhetoric, was equally lacking in hard facts.

Mr. Chairman, the cable industry is ready to stand on the facts. We have yet to see the facts to substantiate the claims of the other side. We urge this committee to undertake its own study, possibly even using subpoena power, to get all the facts in this issue.

The Program Marketplace has Evolved to Incorporate the Compulsory License

The facts are that although program suppliers continuously assert that cable somehow harms their business, the syndicated program companies appear to be extremely healthy. A weekly reading of the trade paper Variety has revealed record breaking syndication deals despite increasing cable penetration and the complusory license. The May 6, 1981 Variety reported

"20th-Fox TV is in full flower in all the vital areas of its syndication activities — sales, production and packaging...In the first nine weeks of 1981, Fox has harvested more dollars from the sale of its syndicated properties to stations in the U.S. than during any other full calendar year." (see Appendix 3)

Indeed, it is very difficult to believe claims that the program supply industry is harmed by cable growth. The noted broadcast economist Yale Braunstein summarized the situation in the 1980 FCC report, Recent Trends in Cable Television Related to the Prospects for New Television Networks, "so far copyright holders have been unable to produce a body of data which would clearly show that program revenues are effected in this way."

Further, an examination of the actual prices paid for various syndicated programs in the top television markets reveals that cable is not a major factor in influencing syndicated program prices. The attached chart summarizes data published in Advertising Age, February 18, 1980.

The data reveals no consistent pattern of syndicated program pricing. Clearly, there is no discernable relationship between program prices and the number of cable subscribers or cable penetration level in a market.

In 1977, the program All in the Family generated the same price per episode ($18,000) in San Francisco which had a 30 percent cable penetration level as in Detroit where only 2 percent of the homes in the television ADI have cable. The $24,000 price per episode for All in the Family is the same in Philadelphia with its 17 percent cable penetration as in Boston which has a lower percentage of cable households (10). All in the Family is carried by WTBS into some 2900 cable systems around the country.

The Muppet Show was sold in syndication in 1979-80. New York and Los Angeles have the same cable penetration level (15%) yet, the Los Angeles station is paying $67,000 per Muppet show episode, while New York pays only $63,000. Philadelphia has a higher cable penetration at 20% than Boston (11%). At the same time, the Philadelphia station pays almost 20% more for the Muppet Show.

The inescapable conclusion is that cable is not the factor affecting syndicated program prices. If cable is not a factor, what determines price? In addition to audience size, a number of other factors come into play in the negotiated price of syndicated programs. Although the situation varies with each program and market, the primary factors that consistently influence pricing include 1) size of the market, 2) sales ability of the seller, 3) station utilization of the program, i.e. value of the program to the station, time periods to be filled, regulatory restrictions, 4) number of competitors for the product and stations in the market, 5) the program's track record and/or performance in the market and 6) the value of the station as an outlet

Price per Episode for Syndicated Programs

(Dollars in Thousands)

1981 Rank	ADI TV Market	1977 "All in the Family"	1977 Cable Penetration	1979-80 "Muppet Show"	1979-80 Cable Penetration
1	New York	$40.0	8.0	$63.0	15.0
2	Los Angeles	40.0	10.0	67.0	15.0
3	Chicago	18.0	3.0	—	3.0
4	Philadelphia	24.0	17.0	50.0	20.0
5	San Francisco	18.0	30.0	—	31.0
6	Boston	17.5	10.0	42.0	11.0
7	Detroit	18.0	2.0	—	2.0
8	Washington, D.C.	18.5	8.0	26.0	9.0

Sources: Cable penetration data - Arbitron's *Cable Sourcebook*, 1980.

Pricing data for *All in the Family* from Anthony Hoffman's article, "Golden Oldies' Add Coats of Gold', *Advertising Age*, February 18, 1980. Pricing data for *The Muppet Show* from *Variety*, 'ITC Frog Power Is Big $$ Knockout', July 30, 1980.

for the seller.

It is doubtful that cable would appear on any seller's real-world list of factors considered in the pricing of syndicated products. Even if cable has an impact on the value of the program it is still only one of many factors. Perhaps one of the reasons the program supply industry has been unable or unwilling to quantify the impact of cable on program values is because of its relative insignificance.

Another indication that the marketplace has adjusted to the compulsory license is the acceptance of superstations by the program supply industry. To avoid widespread cable distribution, program suppliers can restrict their sales to superstations. That is exactly what happened to WTBS when it emerged as a superstation in 1977. All but one of the major program syndicators refused to sell to WTBS. Now, however, the situation has changed dramatically as all but one of the major syndicated program companies have sold programs to WTBS. We are happy to report that the last hold-out is currently negotiating with the superstation. Another syndicator, King World, has so much faith in WTBS they recently negotiated unlimited runs of the program Little Rascals on the superstation until the year 2000!

As I said before, the cable industry is a business in transition. The beauty of the 1976 Accord is that it allows the flexibility necessary for an orderly transition. The experience of superstations is a good example of how this has occurred. Program suppliers for instance, have simply raised rates on programs sold to superstation WTBS to reflect the increased cable audience coverage. As an example, WTBS movie package prices have increased

dramatically as a result of superstation status. In 1976, WTBS purchased a film package of 47 movies for $70,000 ($1,500 per film). In 1979 a package of 20 similar films was purchased for $130,000, or $6,500 per movie, representing a price increase of over 300 percent.

Likewise, prices paid by WTBS for renewals of two popular series, The Flintstones and I Love Lucy, have also increased significantly. In September 1972, WTBS purchased The Flintstones under a six-year contract for $50 per run. In 1978 the price-per-run was increased by over 400 percent to $266, and the contract was limited to 31 months. In 1974, I Love Lucy was purchased for $34 per run; in 1979 the price had increased almost ten times to $330 per run.

The existence of superstations has sparked many of the program supply industry's arguments for a change in the compulsory license. However, it is clear that the pricing practices are already adjusting to their presence and that fears of a proliferation of superstations are unfounded. In fact one satellite-delivered signal is no longer being distributed. The demand for a fourth signal just wasn't there.

Compulsory License Fees Are Only A Portion Of Total Cable Payments To Copyright Owners

But, it is argued, it just isn't fair that broadcasters pay 20-40 percent of their revenues for programming while cable pays only a "pittance?"

Increase in WTBS Program Prices

Program	Price per Episode Original	Renewal	Percent Increase
Addams Family	$ 203	$ 500	146%
Andy Griffith	1,000	3,360	236
Beverly Hillbillies	846	2,500	196
Flintstones	400	800	200
Gomer Pyle	600	1,500	150
Hogan's Heroes	900	3,500	288
I Dream of Jeannie	325	3,000	823
Little Rascals	1,002	1,000	0
Lost in Space	400	2,700	575
Our Gang	100	100	0
Three Stooges	100	200	100

Source: Turner Broadcasting System

Mr. Chairman, this is one of the most misleading canards currently being tossed about. The fact is that if the amount cable pays for programming is calculated in the same manner as the broadcasting figure is calculated the amounts are relatively equal. The broadcasters and Hollywood interests have been comparing apples and oranges when they lump their total program purchase costs together and compare them with the cost of only one source of cable programming, distant signals. It's convenient for them and it is a comparison which helps their cause — but it is misleading and wholly inaccurate.

Again, let's look at the real world. Let's look right across the river to Arlington and the ARTEC system. ARTEC is a 35 channel system with 19,780 subscribers. In 1981, 36.4% of ARTEC's expenses will go to purchase the rights for programs shown on the system. By 1985 programming costs are expected to be 46.4%. In comparison, all TV broadcast stations in 1979 (the latest publicly available data) spent an average of 43.3% of their expenses for programming. The inescapable fact is that for total programming broadcasters and cable operators pay at essentially the same level.

Mr. Chairman, at this point let me recapitulate:

- Yes, the cable industry is growing rapidly, both in terms of size and programming.

- Cable, however, is an industry in transition. It would be a grievous error to suppose that the characteristics

of the newest systems are shared by the entire industry.

- The Congress adopted the MPAA-NCTA accord in 1976 for good and solid reasons which have not changed. The fundamental reasons that course was taken remain valid today.

- The FCC's extensive Economic Inquiry proved that cable hurts neither program producers nor broadcasters. And unlike some of my friends on the other side of this question, we have today offered you additional evidence to support this position!

- Finally, we have addressed some of the more persistent myths which have obscured the merits of the issue.

Before ending this discussion, however, we must consider the public's interest in the matter.

The Compulsory License Serves The Public Interest

One of cable's most important functions is to even-out the disparity of signal availability in the United States. Most of this controversy involves retransmission of syndicated programming, which is to say retransmission of non-network broadcast signals.

Nearly three-quarters (74%) of the TV markets in the United States, serving 35 % of the television population, have no non-network TV stations. This is the result of a governmental policy of deliberate scarcity, intended

both to avoid signal interference and provide a safe economic base for television stations. Cable, which has no signal interference problems, and which takes its economic base as it finds it, helps to even up the disparity by bringing signals to places that otherwise would have no non-network programming, or substantially less non-network programming than is available in the big cities.

But why should Wisconsin Dells, Staunton or Monmouth, Illinois be second class television cities? Why should not the people who live in these cities have the same program alternatives as do people in Los Angeles, New York and Chicago? If signal interference problems lend some justification to the FCC's license allocations policy, why not let cable straighten out the resultant disparity of program availability? Because cable does not use spectrum we can bring additional viewing options to areas where few would otherwise exist.

This shouldn't alarm broadcasters. During the period between between 1975 and 1979 the net income before taxes of network affiliated television stations rose by a healthy 114%, and the net income of independent television statons rose an astounding 461%. If cable helps to moderate the disparity of signal availability as between big cities and the rest of the country, is it too much to ask of the broadcasters that they trade-off just a little of their advantage in return for their deliberately scarce, and therefore very valuable licenses?

And what about the program producers? They take advantage of artificial scarcity of broadcast outlets to demand monopoly rents for their product.

Most syndicated programs start on the networks where, if you multiply prime-time hours by the number of networks, you will see that there are relatively few slots. So the syndicator starts out with a relatively scarce product, and then sells it to broadcast stations who own relatively scarce licenses and therefore can command high advertising rates to pay for the high syndication fees demanded by the producers. And holding all of this up is a system which requires that folks in Wisconsin Dells, Staunton and Monmouth have less choice than the people in Los Angeles, New York and Chicago.

Isn't it reasonable to suggest that the program producers, too, might trade-off just a little of the advantage they reap from the system so that the public's interest in universal availability of diverse programming might be served?

For the public's interest ought to be considered, too, and indeed, it ought to be the first concern in this debate which, instead, seems to have focused itself around the dividing of the spoils among various competitors.

I hope this subcommittee will consider the evidence, and carefully gather some evidence of its own. I hope that in considering the evidence you will ask yourself whether price increases would act as an incentive to increase production, and whether significant portions of the public would be denied diverse programming if the compulsory license were eliminated. We think you will find, as we have, that the inevitable result of revision of the Act will be that people pay more and get less. Scarcity will be reinforced, and the economic underpinnings of the cable industry — an industry in transition —

will be weakened.

Thank you for your time and consideration. NCTA will submit in writing detailed comments on specific legislative proposals currently pending before the subcommittee. I hope you will not hesitate to call on us for more detailed explanation of any of the points I have endeavored to make here today, or any other information you may consider relevant to your deliberations.

# # #

FOOTNOTES

1/ NCTA Represents Approximately 1700 Cable Systems Nationwide which serve approximately 70% of all cable television subscribers.

2/ Testimony of Barbara Ringer Before the Committee on the Judiciary, U.S. Senate, April 29, 1981

3/ Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94-1, May 7, pg. 758

4/ Rep. George E. Danielson (D-CA), Congressional Record, September 22, 1976 (Re passage of 1976 Copyright Act)

5/ Broadcasting Magazine, April 20, 1981, p. 34

APPENDIX 1

1/16/81

CABLE SYSTEMS BELOW 100 OR OUTSIDE ALL MARKETS

STATE	Total Systems	SYSTEMS WHOSE MARKET RANK IS: Below 100	% of Total	Outside all Markets	% of Total	% of Total Systems That Are Either Below 100 or Outside All Markets
U.S. TOTALS	4176	1186	28%	1659	40%	68%
ALABAMA	87	33	38%	30	34%	72%
ALASKA	15	3	20	12	80	100
ARIZONA	53	9	17	35	66	83
ARKANSAS	104	34	33	60	58	90
CALIFORNIA	289	61	21	62	21	42
COLORADO	43	11	26	20	46	72
CONNECTICUT	18	0	-	2	11	11
DELAWARE	9	6	67	2	22	89
FLORIDA	133	46	34	36	27	62
GEORGIA	99	22	22	42	42	65
HAWAII	11	8	73	3	27	100
IDAHO	47	8	17	23	49	66
ILLINOIS	104	1	1	36	35	36
INDIANA	92	19	21	32	35	55
IOWA	57	8	14	36	63	77
KANSAS	117	33	28	88	64	88
KENTUCKY	129	48	37	67	52	89
LOUISIANA	50	17	34	22	44	78
MAINE	34	2	6	22	65	71
MARYLAND	32	13	41	11	34	75

STATE	Total Systems	Below 100	% of Total	Outside all Makets	% of Total	% of Total Systems That Are Either Below 100 or Outside All Makets
MASSACHUSETTS	40	7	18	3	7	25
MICHIGAN	94	12	13	36	38	51
MINNESOTA	110	40	36	62	56	93
MISSISSIPPI	76	42	55	25	33	88
MISSOURI	89	30	34	48	54	88
MONTANA	37	18	49	19	51	100
NEBRASKA	51	17	33	26	51	84
NEVADA	13	5	38	8	62	100
NEW HAMPSHIRE	41	26	63	10	24	88
NEW JERSEY	45	7	16	7	16	31
NEW MEXICO	36	7	19	28	78	97
NEW YORK	188	46	24	90	48	72
NORTH CAROLINA	65	10	15	15	23	38
NORTH DAKOTA	36	15	42	17	47	89
OHIO	176	48	27	21	12	39
OKLAHOMA	109	27	25	64	59	83
OREGON	98	28	28	56	57	86
PENNSYLVANIA	317	59	18	97	29	46
RHODE ISLAND	1	0	-	1	100	100
SOUTH CAROLINA	45	13	29	7	16	44
SOUTH DAKOTA	25	10	40	13	52	92
TENNESSEE	86	35	41	34	40	80

STATE	Total Systems	Below 100	% of Total	Outside all Markets	% of Total	% of Total Systems That Are Either Below 100 or Outside All Markets
TEXAS	285	88	31	154	54	85
UTAH	15	0	-	7	47	47
VERMONT	44	23	52	15	34	86
VIRGINIA	85	35	41	19	22	64
WASHINGTON	106	22	21	56	53	74
WEST VIRGINIA	190	96	51	24	13	63
WISCONSIN	83	27	33	37	44	77
WYOMING	30	11	37	19	63	100

Source: TV Factbook, TV Digest, Services Volume, 1980.

APPENDIX 2

Wall Street Journal
January 26, 1981

Heavy Cable-TV Investments Mightn't Yield Above-Average Returns, Some Analysts Say

By CHARLES J. ELIA

Two bidding wars have been under way in the cable-television business. One is the spirited competition among cable companies for new franchises in major cities. The other is the often-feverish rush by investors to buy stocks of the relatively few publicly held cable-TV companies before they're bought out by large companies seeking entry into the business.

There are straws in the wind that suggest some overreaching in both pursuits, analysts say. Achieving above-average rates of return on investment in recently won franchises has become highly dubious. In turn, this threatens to undermine the case for high price earnings multiples.

Cable-TV stocks scored spectacular gains last year. United Cable Television climbed 130%, Adams-Russell 117%, Action Industries 57%, Viacom and Teleprompter 45% each and UA-Columbia Cablevision nearly 40%.

"Prices of cable-TV stocks were much influenced by the idea that the companies were acquisition targets, even if the acquiring companies had to accept a subpar return," says Sandra Swift, analyst in the research department of Marine Midland. Companies would accept this, it was reasoned, "to get credibility in the industry and win franchises."

Heard on the Street

But Mrs. Swift believes there's a catch in this that could cause the stocks to lose much of their speculative appeal.

The problem, as she sees it: "It appears one won't be able to get an above-average return on the franchises one wins, particularly as Warner-Amex Cable is a major competitor. If so, this completely removes the rationale for anyone wanting to pay a high price for cable companies. It seems to me some companies looking at cable already have backed off a bit."

Mrs. Swift comes to her conclusion by analyzing the potential rate of return for Warner-Amex Cable of its new franchise in the Dallas area. Warner-Amex is a joint venture of Warner Communications and American Express. [illegible] estimated that a $100 million investment will be needed to build the Dallas system.

Working with industry data provided by Warner, Mrs. Swift calculates that the return on the investment will average 9% to 12% annually over the 15 years of the franchise. The higher end of the range, she says, will be met only if profits from two-way services and pay-TV offerings are substantial.

"Financing would be in the form of a 15-year installment note at 13% interest," she says. "Incorporating the best information we have on potential profitability, we must conclude that potential earnings per-share growth from winning major new franchises at this point wouldn't provide an annual return in excess of that from an average Standard & Poor's 500 company, unless the venture could raise capital on substantially more favorable terms."

For this and other reasons, Mrs. Swift says she doesn't think the current interest in cable-TV stocks is justified by the fundamentals. "We continue to believe this definitely isn't the time to be holders of cable-television stocks," she says.

David Goldman, analyst at Smith Barney, Harris Upham, has used the term "cablemania" to describe the past year's action in the stocks. "From an investment standpoint, it's more speculative than ever before and there's potentially more risk than at any time since I began following these stocks," he says.

Though he cautions clients that the stocks are risky and volatile, and is advising conservative investors to pass them by, Mr. Goldman still believes a long-term commitment can be rewarding. "The best of these companies will continue to be sought after," he says "but I wouldn't recommend them solely on that basis.

"I'd stick to high-quality companies which aren't sacrificing their financial futures to win a franchise. Last year marked a watershed, with awards based on the promise of expensive new services. In the past, you could recover equipment costs in about four years, but Dallas makes it look more like eight years.

"I'd rather recommend companies with a backlog of subscribers at yesterday's prices, such as Acton, Adam-Russell and Viacom."

HOLLYWOOD REPORTER
November 14, 1980

Cable expert asserts industry profit margins dangerously low

By PETER WARNER

Far from being the highly lucrative business it is assumed to be, cable TV's profit margins are decreasing to a dangerously low point – especially for modern, high channel capacity systems – according to Byron Jarvis, a leading consultant within the cable industry for the past 20 years and currently president of recently launched Jack Barry Cable TV. Furthermore, advertiser-supported cable networks which depend partially on systems' license fees, like the Cable News Network, are compounding this problem, he told a monthly luncheon of the Southern California Cable Club.

"Our business is not lucrative – and the risks it entails are scary," Jarvis asserted. "Our gross margins are not increasing as fast as our asset costs are – costs which have gone right through the roof."

A cable plant (the actual wire and amplifiers, etc.) costs 60% more than it did three years ago, he said, and the more sophisticated convertors necessary for high channel capacity are typically 125% more expensive than their three-year-old counterparts. All told, the average cost of home terminal hardware in modern systems is $225-250, he estimated. Consequently, the asset cost per subscriber in a 50%-penetrated system has zoomed upwards from the $250 range a few years ago to $600 now, he said.

Jarvis also cited a multiplicity of increased operating costs: for skilled labor, bank interest, increased service call overhead due to wasted time spent adjusting consumers' video gadgetry; higher programing staff overhead mandated by franchise promises; higher city and country franchise fees; strong competition from STV operators, and hybrid advertiser-supported, cable system-supported services which are not billed to the consumer incrementally.

"Satellite services (other than pay TV channels) have destroyed my gross margin," Jarvis charged. "I can't bill the consumer directly for CNN or the Entertainment & Sports Programing Network, yet 15% of my expenses are paid as license fees for them."

When combined with other, "non-productive" services which Jarvis said cable operators are being "forced" to offer, the bottom line is that gross margins have slipped from 50 to 35%, he estimated, and pretax profits are now in the 15% range when profits are finally reached after several years of operation. "I'm not sure this is adequate," Jarvis said.

He also said he is "terrified" of the fine-tuned, high-tech, computerized systems now being installed which he suggested are untested and may backfire.

Jarvis is the former president of the predecessor company to Dallas-based Sammons Communications; a former director of the National Cable TV Assn. and of other industry associations, and holds a master of business administration degree from Harvard University.

Jack Barry Cable TV, operating in the 20,000 home Westchester-Playa del Rey franchise area, is 90% owned by TV producer Jack Barry, and is actively seeking other franchises.

MULTICHANNEL NEWS
March 16, 1981

Big Franchises May Drain Money Market, Analyst Says

NEW YORK CITY—Although capital is now readily available for system construction, the cable industry may find itself short of funds if the companies involved with developing major-market franchises hit the money market all at once, according to David Wicks Jr., managing director of Warburg Paribas Becker, Inc.

As part of a panel on economics at New York University's recent law and television conference, Mr. Wicks, who specializes in providing corporate finance services to the cable industry, warned that while banks, insurance and other companies have been adding cable stocks to their portfolios, "a quickly escalating call for capital could outstrip supply."

Focusing on programming trends, Goldman, Sachs & Co.'s media analyst Ellen Sachar suggested that the cable industry regard motion picture and broadcasting companies as partners, rather than rivals, in programming ventures. "It's time that the Davids look at [those industries] as Jonathans rather than Goliaths," she said.

Ms. Sachar added that, with an estimated average sale price of $800 per subscriber (meaning a 60,000 subscriber system carrying a $48 million liquidation value), "cable may no longer really be looked at as David." □

Variety
March 4, 1981

Storer's Profits Nosedive In 1980, Cable Costs Cited

Storer Broadcasting reported sharply depressed earnings for the fourth quarter and full year in 1980 which the company attributed to expansion and start-up costs on cable communications systems.

For the quarter, net income plunged 23% to $8,822,000, versus $11,186,000 for the same period in 1979, as revenues rose 24.3% to $59,319,000 from $47,732,000 the year before. Per share earnings dropped to 62¢ in 1980's fourth quarter, from $1.03 in 1979.

Full-year figures showed a similar discrepancy, with revenues up but income down. Net earnings dropped 18% to $24,827,000, compared with $30,283,000 in 1979, while revenues climbed to $197,068,000 from $170,357,000 — a 16% jump. Earnings per share dipped to $1.98 in 1980, versus 1979's $2.93. Per share figures in 1980 include gain of 25¢ from the sale of two of Storer's radio stations; 1979 figures include 84¢ from the sale of four radio stations.

Broadcast Sector

Revenues from the company's broadcast operations were up just over 4% in the fourth quarter of 1980, to $37,896,000 from $36,345,000. Broadcasting revenues were up nearly 10% to $15,763,000 from $14,390,000, almost overcoming a substantial nine-month deficit. However, broadcasting income was still down slightly for the year (0.3%) $41,914,000 compared with $42,605,000. Revenues also declined slightly for the year: $128,744,000, versus $130,063,000 the year before.

Cable revenues for both the fourth quarter and year reflected major gains, but profits were down significantly as the money was used to cover expansion costs. Cable revenues in 1980's fourth quarter were up 90% to $21,624,000, from $11,407,000 the year before. Fourth quarter cable earnings dropped 64% to $541,000, versus $1,485,000 in 1979.

For the year, revenues from cable operations increased 70% to $68,324,000 from $40,274,000, while profits declined 33% to $5,197,000, compared with $7,727,000 in 1979.

Storer officials said basic cable subscribers increased during 1980 from 347,000 to approximately 580,000 in early January 1981.

APPENDIX 3

'Mash' Pumps Cash For Fox As Syndie Coin Reaches Record; Money Series On Front Burner

20th-Fox TV is in full flower in all the vital areas of its syndication activities — sales, production and packaging.

Robert Morin, senior v.p. in charge of domestic syndication for the tv arm, made the following points in an interview Monday (4):

Robert Morin, senior v.p. in charge of domestic syndication for 20th Century-Fox Television, made the following points in an interview Monday (4):

—"In the first nine weeks of 1981, Fox has harvested more dollars from the sale of its syndicated properties to stations in the U.S. than during any other full calendar year.

— Fox is working on the pilot of a weekly syndicated series on money — how to acquire it, how to spend it, how to invest it and how to hang on to it. Called "The Business of Living," it will be produced with a lot of graphics pizazz and will be hosted by Jane Bryan Quinn, the syndicated columnist.

— A new syndicated movie package is in the works, with titles to be chosen from among "Breaking Away," "Alien," "The Omen" (all three parts), "9 To 5," "The Bible," "Brubaker," "Julia" and "The Turning Point."

"Mash" is the pump that has inflated Fox's tv-syndication grosses to new records. "We're getting from six to 12 times the original dollars in our renewal negotiations with stations," says Morin. Fox is chalking up these unprecedented increases not only because the series has stayed on top of the ratings since it started two years ago as a syndicated strip but also because Fox practically gave the series away when it first sold "Mash" station-by-station back in 1975. (It was in 1978 that Paramount Television made a breakthrough in syndication prices with the sale of "Happy Days.")

In its "Mash" deals so far this year, Fox has sold additional runs of the episodes made during "Mash's" first eight years and initial runs of the half-hours produced in the ninth and tenth years.

Other cash shows that have fed Fox's huge gross figures for the first part of 1981, according to Morin, are ongoing sales of the studio's Century 10 movie package ("The Poseidon Adventure," "The Silver Streak," "Patton," "The French Connection II," etc.) and its Premiere One made-for-tv-movie package. Fox also is successfully re-marketing 120 hours of "Daniel Boone," starring Fess Parker, which ran on NBC-TV from 1964 to 1970; 120 half-hours of the live-action "Batman" series (an ABC camp success from 1966 to 1968); and a mix of the cartoon half-hours "Planet of the Apes" (13 episodes) and "Dr. Dolittle" (also 13).

VARIETY

Wednesday, May 6, 1981

rograming

SYNDIE FILM PRICES HIT THE CEILING

20TH-FOX ASKS 150G PER TITLE IN L.A., 75G IN N.Y.

VARIETY

LOCAL TV-RADIO & SYNDICATION

CBS SHELLS OUT $7-MIL FOR 'MUPPETS'

RECORD RERUN BIDDING HEADS WEST NEXT

VARIETY

NEW UA SYNDIE PIX PACK FOR RECORD $$

30—TITLE OFFER A BUDGET BUSTER

'Three's Company' off to richest start in syndication history

'Surprisingly Good' Syndie $$ For Col TV 'What's Happening' May Boost Limited-Series Sales

By JOHN DEMPSEY

MCA Cashes In On Beatlemania With Syndie Lure Of 'Sgt. Pepper,' WOR-TV Ain't Lonely At $200G

MCA-TV is spinning tv syndication gold out of one of Universal's biggest theatrical boxoffice failures of the last decade, "Sergeant Pepper's Lonely Hearts Club Band."

Don Menchel, president of MCA-TV, says that close to 50 markets have bought two runs of the feature either for cash or for a unique share-the-revenue approach in which MCA pockets 50% of the advertising revenues collected by the station after the station deducts ad agency commissions and tv rep commissions. In the latter arrangement, according to Menchel, the station also agrees to put up a guarantee against MCA's half of the advertising dollars and MCA gets the right to approve the time period in which the movie will be placed.

Top Price

Sources say WOR-TV New York has opted to pay $200,000 for the two runs of "Sgt. Pepper," which is a record price in New York for a one-shot of this kind. KTLA-TV Los Angeles also has bought the picture, which will be available for play in April and which many of the station buyers are likely to play during the May sweeps.

Although none of the Beatles makes an appearance in the picture, the soundtrack of "Sgt. Pepper" reverberates with Beatles songs, which are performed on screen by the likes of Peter Frampton and the Bee Gees. When the murder of John Lennon provoked a new interest in Beatles music, Universal decided that a hastily put-together theatrical re-release of "Sgt. Pepper" would appear "ghoulish," in the words of one company executive.

Because of its failure at the boxoffice, "Sgt. Pepper" hadn't attracted any interest from the three networks. So MCA decided to follow the pattern it established last year when it sold "The Deer Hunter" market by market as a special Election Night one shot, with stations either paying cash or permitting MCA to go halvsies on the advertising revenue. "The Deer Hunter" couldn't land a network primetime sale because of the networks' fear that they'd be swamped with pressure-group protests over the film's graphic violence.

Menchel says he foresees more special handling by MCA of out-of-the-ordinary theatricals as a result of the demonstrated ratings success of "Deer Hunter" and the early sales success of "Sgt. Pepper."

VARIETY

Feb 25, 1981

Mr. KASTENMEIER. Thank you, Mr. Wheeler. I commend you for your presentation.

I think before questioning Mr. Wheeler, though, we will go on to your colleagues.

Mr. Rifkin?

Mr. RIFKIN. Thank you.

Mr. Chairman and members of the subcommittee, my name is Monroe Rifkin, and I am chairman of the board and chief executive officer of American Television & Communications Corp., known throughout the trade as the ATC. We are a wholly owned subsidiary of Time, Inc., and are the largest cable company in the United States, serving over 1.4 million subscribers in 33 States.

I also serve as Chairman of NCTA's Copyright Committee, and it is in that capacity that I appear before you today.

As a multiple system operator, I am anxious to share with you the realities of the cable business—the economics and structure of our industry.

Underlying the workings of the cable business is a premise that the issue of cable copyright liability was settled in 1976. We are now astounded to confront a new uncertainty concerning our copyright agreement, which is being subjected to reconsideration again. This process has created new doubt for operators large and small who have invested and committed extensively based on the certainty promised by the existing law.

I will review with you five key issues which we feel establish the legitimacy and workability of the current law and its method of providing fair compensation to copyright owners.

First, to explode a myth. Mr. Chairman, some of the witnesses who have appeared before you have discussed the cable business as if it were a sort of magic money machine. Nothing could be further from the truth.

Cable is a highly capital-intensive and risk-intensive business, which in the newer markets being built today must rely largely on cable-originated programing to generate the major portion of its revenue base.

Cable is a rate-regulated business and in fact, the Copyright Royalty Tribunal has recently found that industrywide subscriber rate increases did not begin to keep pace with the rate of inflation. Between 1976 and 1980 this subscriber rate increase shortfall amounted to 21 percent, based on a rise in the Consumer Price Index of 34 percent.

Cable is subject to rapid technological change. I know that you are all aware of the impact that the prevailing high cost of money has on any business, but particularly capital-intensive businesses that are in an expansion mode.

Yes, there have been Horatio Alger stories about certain cable television companies. However, I don't mind telling you that, based on 20 years of experience in the field, cable on the average has not produced rates of return which are out of line with the attendant risks. The cable industry faces risks from the development of competing signal delivery methods, from technological obsolescence, from inability to obtain franchise renewals, and from a host of other business uncertainties.

By comparison, industry sources indicated that it costs approximately $3.5 million to build a major market VHF television station. Yet stations like these are selling for prices in excess of $50 million and are maintaining constant or rising market multiples and earnings even through a lengthy period of the economic doldrums in our Nation. Why?

The answer of course is the fact that the Government has given these broadcasters a pathway to the home—the public airwaves. Cable operators, on the other hand, must build a pathway into each home, a pathway which in major markets today can cost us upward of $100 million. Why do we do this?

We do this because we are and have been entrepreneurs who have created an industry which increases consumer options, and one which the consumer has taken a liking to. We are willing to take business risks because we believe in the future, not because we are in possession of a magic money machine.

Copyright royalty fees represent only a small portion of the benefit program producers derive from cable.

Mr. Chairman, representatives of the program producing, broadcast and sports industries have made a variety of complaints to you, many of which center about the notion that cable is getting a free ride. Each of them puts a different gloss on his argument, but a man from Mars, unfamiliar with the real world of cable, might conclude from their remarks that the bulk of cable's programing payments are to be found in copyright royalty fees.

Nothing could be further from the truth. There are at least four different ways program producers derive income from the cable industry.

First, of course, there are royalty fees paid for the compulsory license to retransmit distant signals under the Copyright Act. As has been pointed out, first-year payments of this kind amounted to $12.7 million, a full 50 percent greater than anticipated. Second-year payments rose to $15.1 million; third-year payments to $19.5 million, and this year we project a payment of $27 million. This is what the late Senator Dirksen would have called "real money," and the mere fact that the copyright owners would like to have more doesn't convert it into a pittance, as they have described it.

Mr. KASTENMEIER. If I may interrupt on this point, they presented a chart too indicating copyright fees represent 1.2 percent of total operating expenses and the same percent of gross receipts for basic service which they indicate on their chart, which I believe they have left, is the smallest of all the costs.

Mr. RIFKIN. Yes.

Mr. Chairman, I have indicated that our royalty fees are the first of four elements of consideration to the program producer.

Mr. KASTENMEIER. Yes.

Mr. RIFKIN. Second, there is a phenomenon called "lift" which brings substantial benefit to the producers of syndicated programs. Lift, put simply, is the number of additional subscribers who take basic service solely in order to receive pay cable service options.

For example, our Savannah, Ga., system experienced stagnant penetration at about 28.1 percent for years despite vigorous marketing efforts. The introduction of a pay cable service caused an immediate increase of penetration to 36 percent, all of whom sub-

scribed to basic cable we believe to get options. Similarly, when our Albany, N.Y., system introduced pay service, our basic cable penetration jumped 5 percentage points.

Quite clearly, most of the new subscribers in both places weren't very much interested in basic service by itself; otherwise they would have bought service long before pay was introduced. These examples are typical of others within our company and the industry in general.

How does this benefit the syndicated program producer? It benefits the program producer because the law bases copyright royalty payments on revenues from the total number of basic cable subscribers, not the number of cable viewers of distant signals. The program producer is receiving royalty payments from the subscriber fees of a considerable number of households which may not in fact watch the program being retransmitted. The program producer thus in effect enjoys the position of a theater owner who has a guaranteed ticket sale to a population who may never claim their seats.

The third way copyright owners derive income from cable is that retransmission of distant signals brings additional viewers—"eyeballs" in the jargon of the trade—to producers' programs and broadcasters' audiences. Broadcasters can, and do, reflect in their ratecards the cable subscribers to whom their signals are retransmitted. Program producers can, and do, charge higher prices for their programs to broadcast stations whose signals often are retransmitted by cable, as we have vividly demonstrated here.

Fourth, and finally, pay cable has become a major source of income for the program producers. The large channel capacity of new cable systems has created a demand for movies and cable-originated programing which producers are scrambling to provide, in the construction of new buildings, new cable television systems. More than one-third of total operating expenses commonly go to such programing costs.

In short, it simply is not true that cable is getting a free ride. It simply is not true that royalty fees under the compulsory license make up the bulk of our payments to program producers, or that cable's growth is a result of unfair competition with broadcasters premised on the compulsory license.

I would like to next talk about the impact change the compulsory license would have on the industry. The reason Congress opted for a compulsory license in 1976 was that no one could determine the value of distant signals. Congress realized the necessity of avoiding the disastrous effects of program-by-program negotiations.

Jack Valenti now repudiates the agreement he signed which made the 1976 act possible but, despite his change of heart, nothing has changed since 1976 to make the marketplace a more viable alternative. If cable operators were required to individually negotiate for each program carried on the retransmitted signals, the number of transactions would be staggering.

This point was emphasized by Copyright Royalty Tribunal Commissioner Thomas C. Brennan in June 1979, testifying before the U.S. House of Representatives, when he said:

I do not recall any congressional dissent from the conclusion in Public Law 94-1476 (1976 Copyright Act) that it would be impractical and unduly burdensome to

require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. I am not aware that any viable alternative has emerged to alter the judgment reached by the Congress three years ago.

There are 4,350 cable systems, each carrying an average of 5 distant signals, each with a minimum of 6 to 17 hours of programing per day. Although it would be impossible to estimate the number of transactions that would be necessary, it is clear that the simple multiplication of 4,350 cable systems times 1,000 program suppliers seriously underestimates the probable number. This is an estimate made by our detractors. While most program suppliers offer several programs, the number of contacts required to program 5 channels 17 hours per day, 7 days a week, 365 days a year, would be enormous.

Other witnesses have argued that there are a limited number of multiple system operators, 50 is a number frequently mentioned, who would easily facilitate the number of transactions. In fact there are hundreds of multiple system operators ranging in size from the 125 systems our company operates to smaller MSO's with only 2 systems. In addition, there are hundreds of individually owned and operated cable systems, the moms and pops of industry, who would have to negotiate for programing. Since transaction costs are independent of system size, the burden is even greater for small systems because the per-subscriber transaction costs are greater.

Finally on this subject, I would question the value of creating another system designed to centralize the program decisionmaking. Picture the cable program executive in Denver or New York City dictating which programs the cable viewers in Virginia, Texas, and Illinois will see. That system certainly sounds like network television—the structure that brings viewers programing intended for the lowest common denominator. Cable television can and should be an alternative to network television.

In addition, Mr. Chairman and members, the broadcast and copyright industries would have you believe that the issue of broadcast signal retransmission by cable is one of fair competition. A transparent attempt to capitalize on current deregulatory trends, this argument is a patent misrepresentation.

In reality, the basic objective of their retransmission consent proposal is to eliminate the competition. Restriction, not expansion of competition, is also the objective of the broadcast industry's current policies opposing the introduction of low-power television service, the allocation of new VHF stations, and the development of direct broadcast satellite delivery systems. Like cable, these new television outlets would bring additional services to the public, potentially threatening the broadcasters' oligopoly control of their market. Unlike the broadcast industry, the cable industry has welcomed the introduction of such competition as serving the public's interest in program diversity.

For years the broadcaster and the program supplier as coventurers have enjoyed market power and surplus profits derived from the fact that the public's demand for television service exceeds the supply available, given the limited number of stations assigned to each market. The fact is that no free market exists for the distribution of this product.

There is plenty of incentive for the broadcast and programing industries to deny cable access to syndicated television product. This was vividly demonstrated between 1968 and 1972 when, under the FCC's retransmission consent rules, only two cable systems in the entire Nation were able to receive retransmission authorization. It has been demonstrated in recent years by the refusal of many program suppliers to provide programing to WTBS. It has been demonstrated quite vividly again in the past year by the proposed business practice of Premiere, a joint venture of four program suppliers, who collusively combined to withhold their product from cable distributors in violation of the antitrust laws.

In urging elimination of the compulsory license, these industries are asking you to preserve their cartel-like power. You must decide whether this would serve the public interest.

In this analysis I urge you to ask whether, in the absence of a royalty fee increase or adoption of retransmission consent, these companies will be significantly injured. We think not and the FCC's study has indicated the negative; their increasing rates of return in the presence of cable competition prove the negative as well, and they have proffered you no record evidence to the contrary.

Second, I urge you to consider whether such changes would produce the socially desirable result of increased production. The answer must be no in that the number of broadcast outlets is currently fixed.

Finally, I urge you to consider the impact on the cable industry and the 19 million cable subscribers who now depend on cable for the delivery of diverse television programing. The inevitable result of adoption of these proposals, I believe, would be the denial of such programing.

Mr. Chairman, there is a final point I would like to address this morning. I want to preface that point by referring to the suggestion made last week that cable retransmissions represent the purloining of someone else's product. To purloin means, of course, to steal, and it is a characterization resented by both me and my industry.

We retransmit distant signals under an act of Congress which confers benefits and obligations on both parties. Tom Wheeler has pointed out that the act was the product of a formal agreement between NCTA and the copyright holders, and he has offered some suggestions as to why Congress agreed to it. Let me tell you why I agreed to it.

I agreed to it because my company was prepared to invest large sums of money based on our belief in the future of cable technology, and in fact in the intervening years those investments in the case of our company have amounted to many hundreds of millions of dollars. One of the things necessary to make these kinds of large investments is certainty of circumstances, and one of the functions of a law governing commercial transactions is to provide that certainty.

Among other things, the 1976 law seemed to me to provide certainty. It offered a resolution of the long-festering copyright dispute, and it also seemed to me to weaken the justification for the continued existence of the distant signal and syndicated exclusivity rules.

We did not at that time ask you to freeze them into permanent law. Instead, both parties agreed to a provision in the law allowing for rate adjustments in the event that the distant signal and syndicated exclusivity rules were changed. In effect, the parties agreed to take their chances at the FCC on that score, except that the copyright holders were allowed a hedge should their bet fail.

But the essence of the agreement, I must point out, was the compulsory license and the statutory fee schedule, and Mr Chairman, I think my industry has a right to rely on the precept that once things are settled in the form of a public law, they are likely to remain settled at least for a reasonable period of time. Otherwise, the law isn't providing certainty and investment decisions must therefore take on an entirely different character.

I hope you will take this point seriously, for it is very important to us, and I think it has important policy implications as well.

In conclusion let me say that in the early seventies we had a slogan in our industry that read: "Plant a seed in television's wasteland." Cable has planted that seed, and the Copyright Act has been one of the factors which allowed it to grow into a healthy young tree. We're delivering on our promise, perhaps not as quickly as everyone would like, but there seems to be little disagreement with the proposition that cable is greatly changing and improving the television landscape.

Distant signals are a part of that landscape, and they remain an important part in many areas of the country; they are part of the mix, and if my industry is to ultimately deliver on its promise, we ask you to help us by not changing the ingredients.

Mr. Chairman, I will be happy to respond to any questions you and the members of the subcommittee might have.

Mr. KASTENMEIER. Thank you, Mr. Rifkin. We, too, will defer questions of you.

I want to commend you for your statement. Whatever agreement on various issues or differences I may have, I do want to support your statement insofar as purloining is concerned. You said we transmit distant signals under an act of Congress which confers benefits and obligations on both parties. We can correctly—and even prior to that when you were retransmitting distant signals pursuant to decisions of the Supreme Court or FCC rules, you were not stealing anybody's property. And I think that is a point worth noting.

Mr. RIFKIN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Effros?

Mr. EFFROS. Mr. Chairman, thank you.

Mr. Chairman, members of the subcommittee, I am Steve Effros, executive director of the Community Antenna Television Association, better known as CATA. As you know, CATA represents the numerous smaller, independent cable television operators throughout the United States. As you also know, copyright has never been one of the favorite subjects of the independent operator. Indeed, CATA was started by those operators to specifically oppose the payment of copyright fees.

It should come as no surprise to you today that we oppose any changes in the present law that would result in either higher copyright payments or a new governmentally imposed restriction

on what our subscribers can watch. But this is not new to you. We have all been in our respective seats on this subject before, and I suspect we will be here again. So I propose, with your consent, to keep my prepared statement short in order to get to the far more important dialog that will hopefully follow.

I had not seen the statements of my colleagues this morning, but you are going to see some similar allusions as we go along. Mine are slightly blunter, however.

Rather than go through the litany on copyright and cable television, which you know all too well—as a matter of fact, you probably know all the various versions, the Wheeler edition, the Valenti edition, the Kuhn edition, and yes, even the Effros edition, by heart—I would like to get directly to the arguments that you have been hearing recently that allegedly support the proposition that there needs to be some modification of the present law. CATA disagrees with that analysis.

But where does it come from? It comes from the notion that there is something wrong with the copyright law of 1976, a law that took over a decade to create. It comes from a supposition that the framers of that law simply did not know what they were doing. Surely the concept of compulsory license was fully aired at the time; do we really think that Congress in 1976 did not know the ramifications of the compulsory license?

Has something so catastrophic happened between 1976 and today that all of the deliberation concerning the appropriateness of the compulsory license has changed? Not at all.

In fact, you could read most of Mr. Valenti's speeches from that era and today and not be able to tell the difference, with the one exception that that time even Mr. Valenti agreed that a compulsory license was the only way to effectively assure the distribution of television programing via cable.

Mr. Wheeler just quoted Mr. Valenti's statements at that time to that effect. So what has happened?

Well, there is the claim that the changes in the FCC rules should precipitate this new look at the compulsory license, or that satellite carriage should do it, or that the success of the cable television industry should be the reason. But in fact none of those things has anything whatever to do with copyright, and they were all foreseen at least in outline by the framers of the 1976 law. They have certainly nothing to do with the validity of the concept of a compulsory license.

We are left with rhetoric, and what I would choose to call Valenti mathematics, as practiced not only by the master himself, but also by Mr. Wasilewski, Mr. Kuhn, and others who are left with no substantive arguments, so they are forced to create some rather strange accusations and analogies in order to attract an audience. Let's deal with those right from the start.

Cable has been accused of many things, and the favorite last week was that the cable industry was the only competitor in the telecommunications marketplace that was being subsidized by the Federal Government out of the hides of the program producers through the draconian use of the compulsory license.

Indeed, your own staff, in the memorandum attached to the submission statement for H.R. 3560, seems to have taken a page

out of the Valenti book and characterized cable as the sole communications beneficiary of so-called enclosure laws. The implication, of course, and one made very specific in the testimony last week, was that the cable television industry was the odd-man-out in what would otherwise be a true, open marketplace. And the remedy suggested was simply the elimination of the compulsory license so that that so-called marketplace would be allowed to work naturally.

I would respectfully suggest that both the distinguished witnesses last week and your staff suffer from severe myopia in this regard.

What marketplace? I'm sorry, I couldn't find the Italian equivalent in deference to Mr. Valenti, but the argument against cable that something is unfair because of the compulsory license subsidy is the ultimate in chutzpah coming from the programing industry, which thrived because of the artificially monopolistic broadcast industry which, in turn, has been given its entire distribution system for free by the Federal Government. Is this the competitive marketplace they are talking about?

Let's look a little bit more closely at the slick arguments being made by those who cry that cable is abusing their property rights, and that cable is being unduly aided by the copyright law. These, as I said, are the same people who have become some of the most powerful and wealthy business owners in the Nation through what may be the biggest giveaway of public assets, with the possible exception of defense contractors, that has ever occurred in our history.

The defense contractors give us something in return for the money spent. The broadcasters give us commercials. These are the same people who use the public's scarce spectrum for free, and demand the use of the cable operator's channel space for free, and then complain that we are the ones being subsidized. This is the same group of people who continually protect special tax advantages for the protection of motion pictures and complain that we are not paying our fair share. And, too, these are the same folks who have a special exemption from the antitrust laws for their sports monopolies and then argue that the Government should stay out of the free marketplace when it comes to cable television.

We have reached the theater of the absurd when arguments like these can be taken seriously. But the only way to prove it is to play their game, so let's use some of that Valenti mathematics and see what we come up with. I will not use specific numbers here, I'll just give you the formulas. I think you will get the point.

Mr. Valenti and others continually point out that the cable industry pays, in comparison to the broadcast industry, a very small percentage of its revenue for the purchase of programing. This, they say, proves that cable pays too little in terms of a copyright. CATA respectfully submits to you that it proves nothing other than that even in old age the adage learned in grade school is still true; you can't mix apples and oranges and hope to come out with a logical result.

But back to the math—we are told that cable pays a very small percentage, and broadcasters pay a very large percentage of their

operating revenues for programing. What would happen if we actually equalized the two industries?

Well, there are of course no actual numbers, but if the broadcasters had to pay for the spectrum space they now are given for free, if they had to pay for their distribution system at a highly competitive open market rate the way cable does, then I daresay the percentages would look quite a bit different. Or, to put it another way, it would be safe to say that if we eliminated the cable system's cost of constructing the distribution system, you would find that programing would be one of the largest remaining costs the industry incurs.

But we all know this is nonsense. The entire concept of trying to compare the broadcaster's cost of programing with a cable operator's is unproductive. They are selling to two entirely different markets.

How is any comparison such as the one pushed so strenuously by Mr. Valenti and friends of any use? After all, the broadcaster buys his product with built-in spaces, lots of them, for commercials. When cable gets that programing, it is already packaged, the commercials have been sold, and by law we are not allowed to take them out. It is a different product. Don't be fooled by the Valenti shell game.

Before we get to questions, I will answer one from my perspective, baring the soul, if you will, of at least one person who has been around the cable television industry for quite a few years. And I say this not to simply reiterate what CATA members, at least, have been reading for a long time.

I agree with what Mr. Valenti said last week; in a few years the importation of distant signals, at least in the large urban markets, will be a thing of the past. Programing will be bought directly. Advertising directly on cable systems that can afford to sell it will be successful, and this whole issue will be moot. The marketplace is now moving in that direction. CATA urges you to allow it to move that way naturally. The copyright law of 1976 is working. The transition is taking place in an orderly fashion with no real evidence of anyone being seriously hurt, or there being any severe dislocations. Why not let it evolve?

The programers of the 1976 law did a good job. The FCC, who has finally admitted that it can find no rational basis for the signal carriage rules it adopted in 1972, has created a mechanism to deal with any possible anomaly.

The famed Bakersfield example, often forwarded as one of the only alleged examples of the horror cable will wreak on television broadcasting, would be potentially eligible for special relief from the FCC if it were true that cable importation could be shown as the cause of a diminution of local programing. So far no such thing has been shown. But the point, I hope, has been made.

The mechanisms developed in the copyright law of 1976, combined with the protections created by the Federal Communications Commission when it finally decided to eliminate the unnecessary restrictions on what the American public can watch, are more than sufficient to protect all interests during this transition period.

Mr. Valenti has already told you, and I am sure that you can find many in the cable television industry to support the proposi-

tion that the transition you are seeking, to a marketplace accommodation—that is what all these charts were about before in terms of the cost of syndicated programing to a station such as WTBS—is well underway. To change the rules of the game again would only serve to disrupt that transition, as Mr. Rifkin was just pointing out to you.

It also, I might add, results in an enormous waste of energy and talent, and the valuable time of the Members of Congress, on a subject that need not be addressed. It is on its own way to a solution without additional governmental intervention.

There are a few more subjects I would like to briefly touch upon.

First, as is CATA's wont, I would like to bring everyone back down to reality about the cable television industry. I know this is not appreciated by our adversaries, who like to characterize us as a small group of very large companies well on the way to wiring all of America. It is also not particularly liked by some of the larger members of our own industry who want to maintain the momentum on Wall Street by letting people perceive cable in a slightly rose-colored light, or maybe I should say a green colored, but that is not what cable is today.

We hear a great deal about the top 50 companies, and how simple negotiations with these giants would solve the program distribution issue. What you are not told is that within that so-called top 50 are companies that serve less than a total of 70,000 subscribers—that's the equivalent of a single city cable system serving the suburbs of Washington.

What is not mentioned is that there are literally thousands of other cable television systems not represented in that group that serve a very important part of the American public, the part that does not get the benefit of all this programing we have been hearing about unless it is on cable, the part that the broadcast industry does not really reach.

Let's remember that with one or two exceptions there are no independent television stations outside the top 100 urban areas. The effect of eliminating the compulsory license, or reinstituting the signal carriage restrictions, would be to simply disenfranchise those people from ever having the opportunity to see the same type of television programing that their urban brethren in a scant 100 markets take for granted.

Note that I am not talking here about rural America. I am talking about all of America with the exception of the 100 largest cities in the land. Your proposals, Mr. Chairman, and those of Mr. Frank would have the practical effect of severe restrictions, or the elimination of any possibility for the rest of the country to see what we see here in Washington, D.C. I, my membership and I am sure hundreds of thousands of television viewers are going to want to know why.

Let me clarify another point for you that was raised last week. It is not as simple as you, Mr. Chairman, tried to make it sound, with regard to the problem being only one or two distant signals. That, in fact, may be true in the top 50 markets, the markets that the MPAA is concerned with.

I believe you will find testimony from years gone by that indicates that the top 14 or 18, I do not recall which, markets in the

country account for the vast majority of all the money made in syndication of programing in any event. But in the rest of the country it is not true at all. In many areas where my members serve, all of the signals being brought to the subscribers are distant signals under the law. In many other areas all but one or two are, and the local signals are simply retransmissions of a network feed. So the result of your proposals would be to guarantee a continued and permanent lock on the information resources of the public, the networks would finally get their wish insofar as television programing is concerned.

And remember, it would not matter who owned that system in a smaller market, or how big a conglomerate it was a part of, the result for the viewer would be the same. So to make distinctions based on the owner rather than the viewer:

As an example, the result of the proposal to make a special category for satellite carriers that would create a copyright liability would be that no one outside the top 100 television markets would ever be able to see an independent television programing. The growth of nonurban cable can be directly linked to our ability, finally, via satellite distribution, to bring the viewing public television programing that it could not otherwise receive; the independents: the sports that they would not be able to see any other way, and I can assure you most of the viewers are a lot more than 50 miles from the stadium in question; the news that finally gives the viewers a choice other than watching the three networks; the syndicated programing that Mr. Valenti has already assured you his people would not sell to cable because they would be busily making exclusive deals with television stations in those same top 100 markets. What about the rest of us?

This is not a simple problem. For if you try to design a law that would allow satellite carriage for the nonurban markets to satisfy this need, but try to restrict the major population centers, then the smaller operators, without the support of the urban cable operators, could not afford to pay for the satellite distribution. The system is synergistic, and it is working. No private party is being unduly harmed, nor can any party demonstrate such harm.

For years cable television has been forced by regulations to prove the negative, that it would not harm the broadcaster or the program producer. Now finally we are in a position where the facts indicate we will not do harm. The facts are also in that we provide a service that the viewing public is hungering for diversity of television broadcast programing. And you are sitting here once again hearing the monopolists—the broadcasters with their well-protected free Federal licenses, and the programers who benefit from that artificial monopolistic marketplace—say once again that cable should be stopped because they fear that they will be mugged. Well, it is not my line but it is appropriate: The only thing they have to fear is fear itself.

There have been many studies done, and some of them were even paid for in the hope of finding proof that the present system is not working. They have not been successful. The best they can come up with is theories about potential lost opportunities to see programing by those poor folks in the top 5 or 10 markets in the country. And even then the proof is speculative.

CATA urges you, Mr. Chairman, and members of the subcommittee, to remember that while the elephants are fighting over those few top markets with all the money that is involved there, they are trampling the grass at the same time, and we don't appreciate it one bit. It's time to remember us, the grassroots of this country, and if you are going to design any legislation, which we hope you will not, please note that simply throwing in an exemption for the small operators does not protect much of the cable television industry and, more importantly, a lot of people in this country who are seeking the right to see television programing.

Obviously there is much more that I could say on this subject, but I will stop now in favor of opening a dialog with you.

One last thing, I thought the committee would like to have a sample of the switch that allows a viewer to see both cable television and local television stations on one set. This is the switch that Mr. Valenti told you last week didn't exist. I have them for the committee if you would like them.

Thank you very much for allowing me to appear before you today.

Mr. KASTENMEIER. Before I yield to my colleagues, I have a number of questions.

Mr. Wheeler, I should probably ask how does your association in terms of the characteristics of its members differ from CATA, in terms of makeup of memberships of 1981?

Mr. WHEELER. As you know, CATA was formed in the first place because of the fact that NCTA agreed with MPAA, on the compromise which eventually became section 111 of the Copyright Act. It was a segment of the industry that was generally characterized as the smaller operators who did not want to make that agreement and broke off and formed CATA themselves.

I think it is fair to characterize the difference between the two organizations as being one of—CATA has smaller operators but that is not to preclude NCTA from representing small operators as well. As a matter of fact, if you count them on system, if you determine who we represent, the majority of the people we represent in terms of systems, we represent more smaller operators than larger operators. Obviously, if you count it in terms of subscribers, we represent more larger operators than smaller operators. But I think we have a mix that goes across the board.

I think it fair to characterize Steve's organization as the smaller operators in the industry.

Mr. EFFROS. I would add one word to that, Mr. Chairman; I would say also independent operators. We represent also some multiple system operators, as a matter of fact, many of what you characterize as small operators may own 2 systems, so technically it is a multiple systems operation, those two systems may be 1,000 subscribers, but I can assure you that the members of my association are independent. They have their own views on a lot of subjects and I would say that the major distinction is that we do not represent the major multiple system operators, whereas NCTA does.

Mr. KASTENMEIER. How many systems do you represent?

Mr. EFFROS. About 650.

Mr. KASTENMEIER. How many of those 650 would have subscribers who have more than 5,000 subscribers?

Mr. EFFROS. Less than 10 percent. That is off the top of my head. I would have to check that, but it is going up very rapidly, as you might expect. But the median size system for CATA right now is about 2,500 to 3,500 subscribers. Now we have some 20,000 subscriber systems also, which juggles those averages a lot.

Mr. KASTENMEIER. Is it not the case, Mr. Wheeler, that what we are talking about in terms of the industry is that the industry presently is doing very well under its existing limitations, including imported distant signals? That is to say, as of today without resort to the—since the FCC rules are held in abeyance, the change of last week was held in abeyance, all your present systems operate under those existing constraints?

Mr. WHEELER. I think that is a valid statement, Mr. Chairman. However, that is not to say it is valid public policy or that the present reality is correct public policy.

The situation that we are in right now, for instance, is that the court is reviewing the FCC's deregulation to determine if it was in the public interest. If the court finds that the FCC did act in the public interest, then I kind of wonder why Congress would want to come back in and reverse that decision of a judicial third party saying that this is an action in the public interest.

On the other hand, if the court comes back and says no, remands the decision to the Commission or reverse the decision or whatever, then probably I also question whether the Congress would want to get involved, for at least one of the things we have had described as an impetus for your involvement now would disappear.

Mr. KASTENMEIER. That is one of the issues. The issue is whether the changes in FCC rules, the changes contemplated, are sufficiently drastic to constitute a variation from the understanding of 1976, which resulted in the present law. That is at issue, there is no question about it.

Mr. EFFROS. Mr. Chairman, I would take one slight exception to what Tom was saying, not an exception but an addition.

The problem that you have here in terms of the institution of the signal carriage rules creates more of a problem because, if you talk to the FCC—let's forget the fact that they want to eliminate them altogether—if you talk to the FCC today, they would tell you if they didn't eliminate, they would at least turn them around, they are backward now.

The small market that has only one signal is limited severely in how many more signals, in terms of diversity, the viewers can watch than the larger market which is not as limited. In other words, you can bring in more distant signals to a large market than you can bring to a small market.

Once the Commission determined that it was not necessary to have an economic protection for the broadcaster, which is what these rules were all about, then to reinstitute them in the same form as you are suggesting that the FCC wrote them in the first place denies diversity to the small market. It goes exactly backward from what the Commissioners, I am sure, would say to you today, or some of them certainly who wrote the rules back then would say,

We made a mistake, they were backwards to begin with. You should have allowed more signals in the smaller markets and less signals in the larger markets because in the larger markets the people there were already able to see the independent program and in the smaller markets they don't get any of it.

So a simple reinstitution certainly isn't the answer.

As to your question, the cable industry seems to be doing well now even with the restrictions. What you are saying now is the cable industry is building the larger markets; that is, creating the boom in the television industry, creating the publicity and so on.

Please remember the statistics Tom gave you before, 70 percent of the industry is still 12-channel systems, 60 percent of those people are still outside the top 100 markets. Those systems are not the ones being sold on Wall Street left and right. It is the large market competition you are seeing now with the broadband communications. I think that is great but let's remember the people out there who don't fall into that category. They are the ones that get hurt most by these signal carriage rules.

Mr. KASTENMEIER. One of the questions I have is—what we are really talking about—you made reference, Mr. Wheeler I think, or maybe Mr. Rifkin, to Arlington, the closest cable system we have here across the river in Arlington, which I believe is a 35-channel system with 12 local signals, a large number of retransmission of local signals; only two imported signals, WOR New York and WTBS, and as you, Mr. Rifkin, pointed out, a very attractive panoply of other programs which are copyrighted programs; HBO, special bonus payment programs; CINEMAX, another special bonus payment program, USN network probably has Caliope, CNN, has all the local access, it has one religious broadcaster, CBN.

So we are only really talking about, at least in this one case, two distant signals in a possibility of 35 signals more or less. And I do not understand why the necessity for them to import distant signals is of greater either attraction for possible subscribers or indeed attractive to them as a cable operator, since what they will have presumably in the years to come, Mr. Rifkin, is more and more attractive new programing, for which you or at least the people you contract with already pay copyright and negotiate.

Mr. RIFKIN. I might tend to agree, Mr. Chairman. But I must really enlarge the circumstances in terms of the industry. You are citing Arlington with 2 out of 35 channels. But in 70 percent of the systems in the country, we have a 12-channel limitation currently and there we may be talking 2, 3, 4, or 5 out of 10 or 11 or 12 channels.

Mr. KASTENMEIER. But all those systems, those 12-channel systems will be increasingly including HBO, CINEMAX, and all the other competitors who have new and presumably attractive programing for people, presumably those are even more attractive—you made the point—than bringing some distant signal in with old programing and maybe sports?

We are talking about independents now?

Mr. RIFKIN. Yes.

Mr. KASTENMEIER. Because the duplication in network programing won't really matter that much?

Mr. RIFKIN. Well, the second part of this problem is actually one of franchise obligation and commitment plus our moral commit-

ment to the subscribers whom we have achieved and attracted over the years, predicated on what it is we tell them we can bring.

We find that the most difficult thing we can ever do is take anything away from them. They just don't want to understand that. Many is the franchise agreement of the last 5 or 6 years that specifically said, "You will deliver such and such a channel or program."

Having made our commitments and investment on that basis, we are really not arguing as to how important or how many eyeballs will be on those programs; we think research developments which are coming along will show us that and will compensate the owners back via the broadcast facility and its increased market share.

Mr. KASTENMEIER. Well, my point is nothing is taken away from existing programing except the possibility of importing x number of new distant signals, as opposed to other new programing which obviously is going to be available here.

Mr. WHEELER. Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. WHEELER. I think one thing that is important to look at here is, yes, again standing on the facts, the economic inquiry showed that there is diminishing marginal utility for each additional distant signal that you bring in. Arrayed against this, however, is the fact that we went out to consumers about 2 years ago, I guess, and did a nationwide study by Peter Hart Research, asking them what they wanted in cable television.

We got an amazing answer, they said two things: one, we want new programs, like HBO, CINEMAX, but that was second choice. First choice was, we want time diversity. We want to be able to see our favorite television programs with some time choices. I can't see Star Trek at 10 o'clock in the morning when it is on the local station because I am at work. If I could see it at 9 at night, I sure would like to and I would be willing to pay for it.

That is one of the things the distant signals provide. So they are valuable, even if of decreasing marginal utility, but they are important to consumers.

Mr. KASTENMEIER. My reference was to the draft bill that I have. Obviously if we are looking at other approaches such as terminating compulsory license, other issues are involved.

I would like to yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr Chairman. I want to thank all of the witnesses.

We have a little bit of changed circumstances. That is, when we were considering the 1976 act, as you recall we had Barbara Ringer, the then Register of Copyrights, who was very much for a compulsory license. Now we have the interesting change that the new Register does not favor the compulsory license and has actually called for the elimination of the compulsory license. And in his Senate testimony I think he did so because he pointed out that Congress in its deliberations back in 1975 and 1976 took into account the Supreme Court decision that related—that made a finding that cable did not perform, at least under the terms of the outmoded, as he said, 1909 law.

Then he also said that cable needed some help because he thought that we felt that because of the growth of cable, or the

lack thereof, that we would stifle growth. And then he points out now that cable has enormously grown and he says this is his principle to the copyright law. He says the general principle of the copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. Cable systems perform copyrighted works for profit when they make secondary transmissions of such works. Copyright owners will be more confidently assured of rightful compensation if that compensation is determined by contract and the marketplace rather than by compulsory license. So I wonder what is your reaction to his findings?

Mr. WHEELER. I think, Mr. Railsback, there are several responses to that.

First of all——

Mr. RAILSBACK. Could you pull that closer?

Mr. WHEELER. Yes.

First of all, I think he overlooks some of the specific benefits of the compulsory license. There are three reasons why you have to have a compulsory license. One is the high transaction cost that Barbara Ringer referenced and again referenced over in the Senate.

The second is the difficulty of establishing through—the difficulty of establishing what the value of signals would be.

As Mr. Rifkin explained, the measurement mechanisms are just coming on line, the third is the problem of noncopyright users having the ability to control product, that is, the broadcaster shutting out a cable operator's access to product. But if you go back to the basic question, I guess where I differ the most with Mr. Ladd is in his interpretation of what is the purpose of copyright policy.

If indeed your authority does flow from article 1, section 8 of the Constitution to promote the progress of science and the useful arts, and that has been interpreted by the Supreme Court to mean that there is no constitutional right to copyright, but that the rights may be defined as Congress sees fit in order to protect the public interest, I think that is where we really diverge. The public interest is a different kind of a thing.

Mr. RAILSBACK. Is it to protect the public interest or is it to promote the arts?

Mr. WHEELER. Well, in *Wheaton* v. *Peters,* which was the definitive Supreme Court case, I understand, on point, the Court said that copyright is not a constitutional right, that the rights may be defined by Congress as Congress sees fit in the public interest.

Now the question is, what is the public interest? Is the public interest which Mr. Ladd interprets the public interest as saying pay copyright holders more? I say that that is not the public interest.

The public interest, and the progress of the useful arts which the Constitution talks about incorporates the availability of that product to the public. If the copyright owners are not being harmed and, as we have indicated, there is no way that they can be harmed, and they even can't come forth and show harm, then that kind of difference fuses his arguments. But the public has a right, and there is a public interest, to receive expanded programing and

that is the public interest that the Constitution, to the Congress, as interpreted by the courts, vests in this committee.

Mr. RAILSBACK. You know, it sounds to me like what you are saying is really a good communications policy. I kind of differ with you. I think we have a different responsibility. I think that responsibility is to see that a proprietor or a copyright owner is adequately and fairly compensated under the mandate of the Constitution. So I really think there is a distinction.

Mr. WHEELER. Mr. Railsback, I do not——

Mr. RAILSBACK. Let me ask you this and then you can comment on the other, if you have time.

What do you think about the idea that has been mentioned, and it is also mentioned I see by David Ladd as well as Mr. Valenti, of going to a free market system with the likelihood that there would be middlemen that would emerge that could package and so forth?

Why don't you address the problems as you perceive them, and you have done it a little bit in your statements. But what are the problems as you perceive them?

Mr. WHEELER. I am glad you asked that question.

Mr. RAILSBACK. That is the soft ball. I am saving my hard balls.

Mr. WHEELER. We are grateful for everything, Mr. Railsback. Let's take a look.

Mr. Valenti said last week that there are five answers to the program supply problem, which is the problem that you just raised. Let's look at each one of them and tick them off.

The first solution he said was cable operators can carry local signals and that is how they can get programs. I think, as you all elucidated last week, that is kind of a self-serving comment. That is saying the marketplace is for them, the cable operators, but protect us and make sure they must carry our local signal. So that is not a real solution to the problem.

His second solution was cable operators can offer two or three pay channels. That is kind of self-serving to. Look who benefits from that. It is not the consumer who gets added diversity in watching "Star Trek" when he or she would like to, it is the Hollywood folks who get to sell more movies.

Mr. RAILSBACK. But also the cable systems?

Mr. WHEELER. We share along the way.

Mr. RAILSBACK. In other words, the cable system, middlemen, and the suppliers?

Mr. WHEELER. Let's talk about middlemen.

The third point is what is called HBO model; that is, there would be some entity created that would collect programing and resell to cable operators much like HBO. He says that is the way we want to go. We want to do those kinds of things. I guess we are more inclined to judge the program production community by their actions than by their words.

There was just a case in the second circuit where the Justice Department sued the four major program producers because they tried to shut down HBO, because they decided that they didn't like the prices that they were paying to HBO, they didn't want the middlemen and they wanted to deal directly so they engaged in a product lockout, where they formed a new company that they owned and they said we will not sell product to HBO, we will sell it

only to this new company; so cable operators, if you want to get this product, you come to our company. I think their actions kind of knocked their HBO model into a cocked hat.

His fourth solution was to program your own channel. Well, that is a great solution too. The problem is that it suggests that we should do what the networks can do with a quarter of the homes that the networks have. That is a little heavy burden for us. We would like to do that at some point in time, it is a little heavy today.

His last solution was that we should band together like the theater owners in some kind of arrangement. Well, my studying of the situation in talking with theater owners is, they banded together for their own protection against blind bidding, block booking, and other kinds of anticompetitive practices.

Look at the long list of legislation and litigation that has resulted from the relationship between these banded-together movie operators and the program producers.

In other words, to answer your question, I think the five solutions that were proposed as to how we can get to a marketplace don't work. And they don't work because they look great on paper but when these people go to implement it, it can't be implemented.

Mr. RIFKIN. I would go back to the question, Mr. Railsback, and say that by the actions of the cable industry in 1976, we indicated a willingness to pay for the product. Because of this transactional problem and the methodology problem you have heard, we needed a compromise. We have heard various testimony and references over the years to the fact that nobody seems to have found a workable solution other than payments into the copyright royalty tribunal and the compulsory license.

If that was accurate, then we feel it is very accurate and proper today. That leaves the question of value. What was agreed upon was a rate schedule that the three independent parties agreed to. There were escalation provisions written into the law. They are working.

Mr. RAILSBACK. My understanding is that the broadcasters, as I recall, did not agree; it was the Valenti-Schmidt agreement.

Mr. RIFKIN. I stand corrected.

Mr. WHEELER. Your statement is correct as you said it. The significance, however, is that you didn't see the broadcast community coming out and falling on their sword and falling over you and saying "Don't, don't do this." There may not have been active participation but there certainly was some kind of acquiescence.

Mr. RIFKIN. And the program owners at that time were content with the payment schedule provided for in the escalation provisions and we are right now entering into an era of perhaps decent audience-measurement techniques which will prove out in the next several years as to where the payments are fair and proper. We think the system is working.

Mr. RAILSBACK. I do not think the copyright royalty tribunal has been working very well at all.

I have used my time.

Mr. EFFROS. May I make just one comment to Mr. Railsback?

Getting down to the practical effect of Mr. Valenti's statement, let's just have a middleman, take a program and figure out how it would work.

The public wants to see, let's say "MASH". Everybody except the folks in the top 100 markets can't see it because there are no independent television stations. So the cable operator picks up the television station, an independent, imports it via satellite so they can see that program. Now we change the marketplace structure, a la Mr. Valenti's suggestion, and there are middlemen.

The middleman goes to try to buy "MASH" to put it on the satellite so the people out there in the country can see it. The producer of "MASH" says, "No, I am not going to let you do that because if you put it up on satellite, what I have done already," as Mr. Valenti said they would do, "is sell that program exclusively in the big number markets, and because there are cable systems all around the edge of that market that have satellite-receive dishes as the only way they can get independent programing and they would receive 'MASH', that will interfere with my exclusive market in the top 100 or 10 or 14, whatever, that really make the money. Therefore, we are going to freeze you out of 'MASH' on satellite distribution, Mr. Middleman."

The result is that 67 or 68 percent of the people on cable television can't see it.

Mr. RAILSBACK. I think that is a problem. I did ask him about that, where he gives an exclusive right to a particular broadcaster, broadcast station or whatever, and then he would not sell. He did say he would not sell to the superstation that would be able to transfer via satellite.

Mr. WHEELER. Neither does "MASH", but they will be happy to sell us "My Mother, the Car."

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, gentlemen, for appearing here today, and for your statements. I am a little bit concerned that we are not getting what we need to have as a legislative committee in order to work out a solution to it. I do perceive it as a problem whether you gentlemen do or not. I want to point out a few things that do not impress me and most of them are what I have been hearing this morning.

I am not impressed with ad hominum arguments. In fact, I am turned off by ad hominum arguments. We have a tough problem to solve and calling each other names does not help me solve the problem. I won't hold it against any of you, but I can tell you right now it hasn't persuaded me at all.

I am not at all impressed by an argument that an agreement was entered into in 1976. If there were a contract you could enforce it in the courts as a contract. There is no contract. We are here on the basis of interpreting, modifying, rewriting a law. The 94th Congress cannot bind the 95th Congress. It cannot bind the 96th Congress. And I can assure you it doesn't bind the 97th Congress.

We change the laws all the time. Sometimes we make mistakes and we change the law. Sometimes we are right, and even so we change the law. More often we are human and we have a mix of mistake and correctness, and even so we change the law. But it is

axiomatic that one Congress cannot bind another and, although I was on this committee and I was a member of the group that worked on the copyright law, and I supported it in the 94th Congress, I can promise you this: I am going to arrive at an independent judgment according to my best ability in the 97th Congress, and I am not going to be bound by anything that happened four Congresses ago.

Now I want to point out a couple of more things that bother me here. We are not bound by the FCC. We created the FCC. We are not bound by a court's interpretation of a past law in considering whether we should draw up a new law. Every once in a while we find that courts, including the Supreme Court of the United States, have interpreted a law which is on the books in a manner that brings about a manifest injustice, or may be just as can be, it doesn't please the people of the United States. At that time we change the law.

We are now considering possible changes in the law. I beg of you to provide me with some facts. Personality charges we wear white hats, they wear black hats, don't impress me at all. I want to know something about cents. I want to know something about who is getting what from whom at what price. That will help me come to a very tough decision.

I also have a copy of the Constitution. I read it every now and then. Every time I read it I refresh my recollection. The Constitution says that the Congress has the power to promote the progress of science and the useful arts by, and that is an important word, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Time, judicial decision, statutes have established that there is a copyright in intellectual properties which we are really talking about here today. The Congress has honored them as did common law by constituting them as a form of property. As a form of property, the owner is entitled to just compensation for the use of that property. That is what we are talking about, what is just compensation. If somebody made a bad bargain four Congresses ago, we have the power to correct it because we are the ones who passed it in concrete and we would be remiss if we didn't correct it.

I hope that somebody who appears before this committee will come up with some factual information which will help us find out whether the owners of a property right—and we are in a free enterprise system that respects property rights—whether the owners of those property rights are receiving fair compensation for the use of that property. Maybe they are, I can't say that they are not. Maybe they are not, but I want those facts, and if you can please indulge me with a little bit of factual information instead of an awful lot of rhetoric, I would truly appreciate it.

I have no further questions, Mr. Chairman. I yield back the balance of my time.

Mr. KASTENMEIER. I yield to the gentleman from Michigan.

Mr. SAWYER. Even I am a little intimidated by that.

I appreciate your argument about the expression of programing costs as a percent of total operating costs, as being really pretty farfetched in that obviously the operating costs and so forth of a cable system in total are vastly different than the operating costs

of a broadcaster in total. Perhaps dollar comparisons might have been more meaningful than the comparisons we were given by percentage of cost. I, however, am still somewhat intrigued by the possibility of eliminating the compulsory license.

I was not impressed with the argument of the broadcasters that we ought to eliminate the compulsory license, except as to compelling a local cable to carry the local signal. It seems to me if it is of value to the broadcaster, certainly at some price they could induce the local cable to carry it, much the same as is kind of my view of the reciprocal on the seller's point of view.

But I am a little curious why CATA takes exception to the chairman's proposed draft bill in that it would exempt 90 percent of your members from any impact at all.

Mr. EFFROS. No, it would not exempt us from impact. It would exempt us from payment of a compulsory license—or of copyright fees.

What it would also have the effect of doing is restricting us from being able to use any other broadcast programing, particularly satellite-transmitted programing, because it would reinstitute the signal carriage rules that are presently—that the FCC is trying to eliminate. Those signal carriage rules from our perspective, and I think most people's perspective, are backwards.

We the operators who operate primarily outside the top 100 markets are the ones most severely restricted as to the number of signals we can bring in. The folks who already have a great number of signals are allowed to bring in more. So what we are saying is, we would oppose the reimposition of a set of rules that would continue to restrict the ability for us to have diversity. That is those people outside the top 100 markets.

Mr. SAWYER. You know, I was impressed with the testimony we received from the chairman of the Royalty Tribunal where, at least speaking for himself, he suggested the abolition of his agency because it doesn't work.

You know, that is a very unusual thing for a bureaucrat to do. As I said, Mr. James, impressed me when he said that.

Mr. BUTLER. If the gentleman will yield, it also happens that the Bicentennial Commission was self-destructive, if you are looking for a precedent.

Mr. SAWYER. I wish we could say the same about the Contract War Renegotiation Board. But they haven't up until now; the last I heard they had some $43 million in the kitty. It is probably more now. But they hadn't managed to distribute a penny of it.

Then the only other thing they have done, that I am aware of is proposed a rate increase or payment increase of 21 percent and now that is jammed up by the cable industry appealing that. So it is sort of like a Catch 22 situation as far as that board is concerned.

Mr. WHEELER. I think you raise some valid points. There are a couple of things which need to be taken into consideration.

One indeed now, within the last 10 days, as a matter of fact before the hearing of last week, the Copyright Royalty Tribunal did finally begin the first distribution, distributing approximately half of the 1978 pot that is there., The reason that the distribution was held up was because of the legal claims and legal challenges made by the claimants. It wasn't because the Tribunal didn't do its job,

or because the Tribunal couldn't write the checks; it was because the job they did was being challenged by those who didn't like what they did.

This is the way agencies build up case law. The reason we appealed the inflation adjustment is for that very reason, because in the act the Congress provided that one of the things that could be taken into account in mitigating the inflationary impact, inflationary increase, was what is called regulatory lag, that you put your rate increase in to adjust for inflation and you don't get anything for 6 months. And so we are not getting any increased money so therefore they shouldn't get any increased money.

The CRT just ignored that. We appealed it because we were not looking at just this year, we were looking at a precedent being established, just as the other parties were, precedent being established that it is going to be case law that is going to be binding on down through subsequent years.

We had to say, "Hey, is that right? We don't think that is what the Congress meant. The only way we can call you on it is go to court and ask the court to interpret it."

So I think the problems of CRT are, as a result of case law being established, the mechanisms are finally ironing themselves out. We certainly hope that the CRT will do its job.

I think it is fascinating that those who say the CRT isn't doing its job and therefore should be abolished and there should be a compulsory license don't want to give the CRT the tools to help it do its job. They oppose subpena power, they oppose other kinds of things that would help the CRT do its job better.

There is a bit of a dichotomy there, it seems to me.

Mr. SAWYER. One argument that really hasn't impressed me is the multiple transaction difficulty of negotiating for programing.

The block booking and that sort of thing went down the tubes and was really not necessarily created by booking agents; it was created by in effect, the producers. But the Supreme Court knocked that out in the *Paramount* case many years ago.

Mr. WHEELER. That is right.

Mr. SAWYER. I know the theaters, even little independents, manage their booking through a booking agent. So, you are not stuck with one booking agent.

Mr. WHEELER. There still have been consent decrees signed when they were caught with their hand in the till for violating the *Paramount* decision, and that is one of our very serious concerns.

Then we look at what they did, the same program producers did with Premiere, where here was HBO, set up as the exact model that they want to set up for syndicated programing——

Mr. SAWYER. But the second circuit didn't go for that. The laws are on the books to stop that.

Mr. WHEELER. Thank God for that.

Mr. SAWYER. Those things can be corrected, just like the *Paramount* case corrected the block booking and the categories of first run, second run, third run.

So, I do not see the big argument on the impracticability of operating through booking agents just like the second circuit took care under antitrust law violations that were perceived in connection with HBO, or in forming their own companies. I do not think

we can add, in a consideration, that they are going to be able to violate the general antitrust laws.

Mr. WHEELER. Try as they may.

Mr. SAWYER. While I am sympathetic with some of the arguments, multiple transactions or the inability to handle them, doesn't appeal to me.

Mr. EFFROS. Would you add to the legislation?

If we are talking, taking Mr. Danielson's clue and not attacking them for doing something wrong, but let's look at the practicalities of how it is done, if we are talking about booking through a booking agent—and we have already seen Mr. Valenti has stated to us we have a problem with exclusive contracts to broadcasters preventing booking agents from booking these things for cable television—would you also suggest the prevention of broadcasters from being able to make an exclusive contract? If not, then we are back in the same problem.

Mr. SAWYER. Yes, but theaters, automobile dealers and everything operate within the parameters. There are always other products.

Mr. EFFROS. That is the problem, sir. It is the difference between talking about distributing to cable television and distributing a movie to a movie theater. We are talking practically about distributing via satellite. That is practically the only way that most of America can get some of these programs.

If we are talking about satellite, it is distributed nationwide. Therefore, it is not something where we have a spot theme, where you can only do it in the nontop 100 market urban areas. This is precisely the problem Mr. Valenti brought up. So it is not totally analagous. We have a problem in booking that way, number one.

No. 2, if you were going to book that way, there is a presumption of creating a new network, in essence. It reduces the diversity that we can now provide to the American public by doing both.

Mr. SAWYER. Of course, as you know, television stations have that same problem. They are usually alined with one other network and producers sell exclusively to NBC or ABC an exclusive product.

In many areas of my State, the three channels are not available, and neither is cable. So, you may have one or two of the networks but—many of the markets have all three, but plenty of them do not.

Mr. EFFROS. But in this context we are talking——

Mr. SAWYER. So, they can't get MASH because they are selling it exclusively to the network that you can't get.

For example, the whole upper half of the Lower Peninsula of Michigan has NBC and CBS, but you cannot get an ABC station because it is beyond the range of Grand Rapids station, which is the furthest north that has an ABC channel.

But it seems to me there is enough marketing ingenuity in the United States, and enough entrepreneurs, that they are going to solve, with no problem at all, this negotiating and booking question.

As I say, some of the arguments appeal to me but that one frankly does not.

Mr. WHEELER. One of our concerns in this whole thing is that product will be made available. I am certain of that, but it is not going to be the quality product because we can't bid today with the prices for the MASH's. Like I said before, we will get My Mother the Car, they will be happy to sell that because nobody will buy it. We are not going to get the kind of stuff that people want to see and have come to expect distant signals from cable television to be providing. So let's just dispose with all the other arguments, the problem is also how are we going to be able to get the quality product? Why is it in their interest, their interest to turn around and sell quality product and sell to us, if they can get the top dollar by selling to the locals.

Mr. SAWYER. I suppose then you raise your subscription price, the way everybody else does, to buy something because it costs more.

Mr. WHEELER. It is a difficult thing to do, when you are, one, taking things away from people; two, when you are a rate-regulated industry, and three, when you have contracted with the city and said: "I will provide you these channels," and then later on say "Oops, I am not going to provide them to you any more. By the way, I want you to pay me more, I want you to approve the consumer paying me more."

Mr. SAWYER. The electric utilities and the gas utilities, at least in my State, don't seem to have any problem getting their rates raised when the cost of their product goes up.

Mr. DANIELSON. Thank you. The time of the gentleman has expired.

The gentleman from Massachusetts.

I might state if you gentlemen have added questions, we can have a second round.

Mr. Frank?

Mr. FRANK. Thank you, Mr. Chairman.

I want to say I think we ought to just take your statement that you used your time for and have it printed up and handed out in advance to all witnesses. I think it is a very useful set of instructions for all witnesses.

Mr. Effros, you were talking about the problem if you didn't have compulsory license, if you got your programs over satellite. The suggestion would be that the program would be coming over satellite that you weren't legally entitled to use, is that the problem?

Mr. EFFROS. This is a statement Mr. Valenti made last week that he would not sell——

Mr. FRANK. No. I am talking about—you said one of the problems with the small markets was that you had the overlap, where there was exclusivity and a program would be coming over the satellite that you weren't legally entitled to use. Why is that a problem?

Mr. EFFROS. Again, what I tried to say and apparently didn't do it very well was that Mr. Valenti said he wouldn't even sell it to the satellite distributor because he foresaw that problem of the cable operator.

Mr. FRANK. But if he did sell it, we could control who used it? The satellite doesn't turn on the set?

Mr. EFFROS. No. If he did sell it, then the individual operators could use it or not use it.

Mr. FRANK. Or not use it? You are attributing to Mr. Valenti, and I didn't remember it, the statement that he wouldn't sell it because some people might illegally use it, is that it?

Mr. EFFROS. No. I am saying he would not sell it——

Mr. FRANK. The problem, the point I am trying to focus on, is the difficulty once it is over the satellite, it can't be controlled and somebody who didn't pay for it might use it; is that the problem?

Mr. EFFROS. That was the problem he intimated.

Mr. FRANK. All right.

I do not think it is a serious problem. He didn't say that—I do not think he said that. If he did, I think I blocked it out. I do not think it is a serious problem. I do think we have ways of preventing people from putting programs on the air which they have no legal right to do. I do not think that is a serious one. I do want to thank you for bringing the switch.

By the way, I have an ad for the switch. I heard about it. I want to say, as I see it, the ad appears to be accurate. And it does dispose of one problem with respect to the must-carry that clearly it is no serious problem. I am told newer sets are now built with the capability to have the dual reception. I think that is relevant to the must-carry argument, which I would like to see gotten rid of.

Mr. Wheeler, you were suggesting that the purpose of the copyright was to promote science and the useful arts which phrases we have given clearly a broad definition if that is to be included in the science and the useful arts, as in those arts.

Clearly that is where we are. Frankly, for my suggestion, I am wondering why you think we have to pay some of these people at all, from what you said. It seems to me the logic of your argument is that they are going to produce the programs anyway, they are going to be shown elsewhere, you would see no constitutional problem if Congress said they don't get any compensation at all.

Mr. WHEELER. I think a pretty logical case could be made that even under the current formula they are being paid too much for——

Mr. FRANK. Fine. I will get to that one when I get to that one. But let me ask you this one. Isn't the logic of your argument that they are really not entitled to any payment at all, that is the motive here is to make the useful arts as available as possible to the public and paying them is an irrelevancy.

Mr. WHEELER. I think we bit that bullet in 1976.

Mr. FRANK. I want your logic. Why should we require you to pay them, given your interpretation of the copyright section of the Constitution?

Mr. WHEELER. As Mr. Rifkin indicated in his testimony, the situation the industry was in, after two Supreme Court decisions, was you don't pay twice for the same ticket; two tickets for the same performance I guess was the language——

Mr. DANIELSON. May I interrupt? We are not having an atomic bomb attack; we are in recess.

Mr. FRANK. As long as the interruption is made, you are going back into history. I do not care why that agreement was made in

1976, I wasn't here in 1976. Mr. Danielson made it clear it is not binding.

What I am saying is, the logic of your argument goes much too far. You have not argued against the free market, you have argued against paying them anything whatsoever. That is just necessary—let me put it this way: From your argument, they are going to make the programs anyway, they are going to make movies anyway.

Mr. WHEELER. I think that is an assumption that you are making.

Mr. FRANK. That they are going to make movies anyway?

Mr. WHEELER. What I am saying is, there are several goals of copyright policy. One is the just compensation of the artist.

Mr. FRANK. OK——

Mr. WHEELER. And another is, as established by the courts, as in the cases I cited, serving other public interests which include——

Mr. FRANK. I appreciate that; you have said that.

Mr. WHEELER. That is——

Mr. FRANK. You have answered my questions.

In your dialog with Mr. Railsback, I didn't get just compensation—I didn't get the impression that you thought that was a legitimate purpose, and I think it is.

Now let me go to the next question, since just compensation is one of the purposes. You said one of the reasons we need a compulsory license was the difficulty of establishing the value of the programs; am I correct?

Mr. WHEELER. Yes.

Mr. FRANK. Well, if it is difficult to establish the value of the programs, why in the world are three or five or however many people there are on the Tribunal better able to do it than some free market thing? Why do you give it to three people?

Mr. WHEELER. I admit to you that is a difficult assignment to give to any human being. As I said in my testimony, it is not a perfect system but it is the best one that we can come up with, that anybody can come up with, because the marketplace, quote unquote, does not function. It is disfunctional on this particular aspect and we saw that from 1968 to 1972, when you couldn't get product, when you had to go out and do something without compulsory license.

Mr. FRANK. I want to get to that point next.

I did want to say—and I think it is important to go reason-by-reason with the line Mr. Sawyer was taking—the difficulty in establishing the value, I think you would agree, that is part of the argument you are making now, is really not an argument for giving it to the Copyright Royalty Tribunal. Your argument for giving it to the Copyright Royalty Tribunal, I take it from all you said, because it is too dificult, I think you don't give it to somebody to try to do some pseudo-scientific determination of what it ought to be.

There are two problems we have, it seems to me, if we do away with compulsory license.

Let me say I do want to do away with the distant signal and exclusivity rules. And though the draft bill I have has them in there traditionally, it wouldn't bother me, I may very well be for

doing away with them right away, not even reinstating them temporarily.

I am convinced we should do away with must-carry, which leaves me with the only regulation that I am confronted with, the compulsory license.

In my own State they are not regulated as to what they can charge the consumer any more. They have been deregulated as to that. And it was——

Mr. WHEELER. I am sorry, I didn't understand that.

Mr. FRANK. In Massachusetts there has been substantial deregulation of what they can charge the consumer.

Mr. WHEELER. Within certain guidelines.

Mr. FRANK. Right. I must say that was an attempt to let the market function that the cable operators managed to swallow hard and accept. They didn't find that one to be insuperable. But the question, there are two difficulties, it seems to me, you are posing that may come if we have no compulsory license.

One is that you may have to pay too much for the program. There I am inclined to say that I agree with Mr. Sawyer that that is precisely the function of the market and whether or not people pay too much for the programs. You just agreed we don't know what too much is. It is too hard to put a value.

The other argument that there would not be the availability of the program, that is the one I guess as I see it would be your strongest argument.

I would really like all three of you to tell me what is the evidence for believing that if we did away with compulsory license substantial numbers of people would not be allowed to see certain programs.

Mr. DANIELSON. Let me interrupt because your time has expired and this sounds to me like a long answer because it is a very important answer. I think we ought to let the gentleman from Virginia clear his throat in the meantime and we will get back to you, and this will also give the witnesses a chance to think over their answer to that.

Mr. Butler, please.

Mr. BUTLER. Thank you.

I appreciate your laying the foundation for my next question, which is basically what we have been talking about; it did give us a rather frightening experience when you said MASH wouldn't be available. I guess that is what you are leading up to.

This is my question to the panel: Would legislation which denies to the residents of Monterey, Va., population 1,900, access to MASH, promote or retard the progress of science and the useful arts? I would address that to the panel.

Mr. EFFROS. That is yours.

Mr. WHEELER. Well——

Mr. BUTLER. Yes or no?

Mr. WHEELER. I remember, you know, clearly the people of the town that you cited——

Mr. BUTLER. What I want to tell the gentlemen while you are here is that the other community in my district is not Staunton, it is Stanton.

Mr. WHEELER. Stanton, thank you. I was worried about pronouncing Mr. Railsback's district.

Mr. BUTLER. You kind of blew that one, too.

Mr. RAILSBACK. It is not Manmouth, it is Monmouth. I thought they had a cable system.

Mr. WHEELER. They do. That is the only way they became a first class TV area.

Mr. BUTLER. Enough of that.

Mr. WHEELER. I think you go back to the basic question, not is there an inalienable right to watch MASH? But you go back to the question: "Should Government establish systems that discriminate between various people based upon where they live when there is a system that can ameliorate that problem?"

We have built interstate highways, other communications networks to assist those people to have the right that people in big cities have. There is a structure in the tariff provisions of providing telephone service that provides in essence for a cross subsidy so that those people could have the same kind of quality telephone service that the people in the big cities have.

I think it is the same kind of point that we are looking at here; policies should not discriminate among various people if it doesn't have to discriminate. I think there is a way where it doesn't have to.

Mr. BUTLER. Don't you think that if the product MASH becomes unavailable and the system remains in place, that the system is going to go out and find substitutes for MASH, and that eventually the system is going to generate more interest in program development if we remove the compulsory license and leave it to the marketplace as it were? And, aren't we going to generate more interest in program development, and hopefully elevate the quality of programs available, because the selection would be broader and the dollars out there to purchase it would be greater?

Mr. WHEELER. Mr. Butler, I know you have heard this response but I would like to paraphrase something that somebody said at a meeting the other day. That is that that is kind of like the Sheikh Yamani attitude that we are going to up your prices for oil and cut off your supply to strengthen your reliance on coal and other sources of energy.

I am not sure that is a good goal. We are still looking at a situation where there is a cartel-like organization that has the ability to deny products in order to inflate rates and inflate profits. And that is justified, in some arguments by, well, by doing this we will encourage people to go elsewhere to create other programs. I think there are some real similarities between that and Mr. Yamani's argument.

Mr. RIFKIN. From the operator's viewpoint we have enormous difficulty in separating this issue of compulsory license or not out from the broader subject of the growth of cable. I would offer that it is the foundation that was laid in 1976 and the degree of certainty that has promoted our investment in wiring the Nation which in fact has created additional revenues and additional sources and additional communications highways for the performing arts.

We have five or six cultural changes coming onstream shortly; we have news channels, sports channels, religious channels, ethnic channels.

Mr. BUTLER. How are they related to a compulsory license.

Mr. RIFKIN. It is hard to isolate which came first, but those channels certainly didn't develop prior to the 1976 law, which was a signal to the cable industry that we might perhaps pay for product and have a certain base on which to build our systems. And the ingenuity and the creativity of the arts society has seized on that opportunity, and technological advancement brought us satellite distribution and the program is working.

Mr. BUTLER. Yes, sir.

Mr. EFFROS. In response to your question Mr. Butler, obviously I am not pointing just to MASH——

Mr. BUTLER. No, but that is probably your best shot.

Mr. EFFROS. I know, that is why I am doing it. Your suggestion would be totally acceptable, I think, to the small operators of this country if we were competing for the programing in a marketplace where we were in an equalized position to buy the product.

The problem that we have—and there is another way around this if you would like to do it—but the problem we have is what you are saying to us is, you go build your distribution system and then compete for programing and we are going to give these other guys their distribution system and they are going to be competing with you for programing.

Our problem is that there is no way that we can compete in that format. There is no such thing as a free open marketplace for programing the way you are suggesting it, because one side has been given its distribution system anfd the other side, as Mr. Rifkin pointed out, is so capital-intensive primarily because of its distribution system. So for you to say to us, "Go out in the marketplace and buy your programing just like they do and be sure the price goes up,"—the price goes up because they didn't have to pay for their distribution system.

If you want to realize those markets, another way would be to have legislation to make them pay for the spectrum, that would equalize the market—and certainly we are supportive of it.

Mr. BUTLER. I am familiar with that argument. It is true we have a lot of cable people out there with a substantial investment, and if we pull the rug out from under them we have to deal fairly with them. That I think is the best argument you have for continuing the compulsory license.

My next question would be then, if Congress were hell-bent to repeal the compulsory license for distant signals and let the free market operate as envisioned by some of our witnesses, how long a leadtime would be needed to minimize the horrendous impact on the cable industry? Or is there any period of time which might be helpful?

I would give that to the panel.

Mr. EFFROS. I can start by answering it two ways, very short.

For the small operator in the nonurban area, no leadtime would be sufficient, because he just couldn't do it no matter what happened.

For the larger operators, I think there might be a leadtime and I think I will let Mr. Rifkin go from there.

Mr. RIFKIN. I think we would need a substantial leadtime because the way the question was worded, the workings of a "free market," we don't have a free market, unfortunately, where we are committed to our subscribers, to our city governments, and so on, to deliver a certain product.

When we meet the owner of that product across a potential bargaining table and he knows we are obligated to supply his product, that is not a free market.

Mr. BUTLER. No further questions.

Mr. DANIELSON. The gentleman's time has just expired. Thank you.

Mr. Railsback?

Mr. RAILSBACK. I have one last question.

Do you all agree satellite carriers should have copyright liability? I do not think anyone has addressed that.

Mr. RIFKIN. I would like to go beyond that question and point out——

Mr. RAILSBACK. I would like you to answer that one too.

Mr. RIFKIN. I will try and I will try to be factual. We talked, and in fact in our own testimony we fall prey to some of our own publicity hounds, in quotes, using this word "superstations".

I do not think there are superstations. I think there is a superstation, the first one that stepped up to the plate and made a major commitment. That is WTBS Atlanta.

Mr. RAILSBACK. I am not talking about the so-called superstation, WTBS, or another satellite carrier, the resale carrier, Southern Satellite.

Mr. RIFKIN. OK. But the point is, while the carrier is not the superstation, he is the vehicle for that "superstation" if it is a superstation being widely distributed.

I think there is only one that is really widely distributed, that is WTBS.

Mr. RAILSBACK. Yes, except WGNM, somebody told me they get the Cub games in New York. Now that is not as good as "MASH"——

Mr. BUTLER. That is——

Mr. WHEELER. That is an advantage?

Mr. RAILSBACK. As a long-time Cub fan, I have about given up. But anyway, let's assume hypothetically that there are superstations. Should the resale satellite carrier be subject to copyright liability?

Mr. RIFKIN. Well, I think it is conceivable that if the subcommittee must contemplate or consider some change, that that would be a far more agreeable change to this procedure than taking away the compulsory license that the cable operator has.

Mr. RAILSBACK. I see you nodding your head.

Mr. EFFROS. I would disagree.

Mr. RAILSBACK. You are tough.

Mr. EFFROS. I have a lot of people out there who rely on that sort of programing, the only programing they can get. And if you impose a copyright liability—first of all, you are talking about a very complicated communications question because you are saying

you would impose copyright liability on a satellite carrier but you haven't mentioned microwave carriers, for instance.

We have been transmitting via microwave for years as common carriers picking up signals. If you are going to distinguish satellite carriers, what you are saying is, well, it isn't really a question of copyright, it is a question of can we restrict the amount of distribution.

And the people you are restricting it from are the nonurban areas, because in the urban areas, again, you are going to have those microwave loops and they are less expensive when you only have to go 20 miles than when you have to go 200 miles. So what you do by distinguishing the satellite carrier is again saying to nonurban America, we are going to make it tough for you to get programing but everybody else can watch it.

That is why I have to be tough, because my folks say "Hey, what about us?"

Mr. RAILSBACK. Yes. Maybe not make it tough, but maybe make you pay for it.

Mr. EFFROS. Pay for it? We pay for it already.

Mr. WHEELER. There is another issue.

Mr. RAILSBACK. You do too, is that right?

Mr. WHEELER. The common carriers don't own the product. An analogous situation would be to turn the question around and ask should A.T. & T. long lines pay copyright royalties for the network transmissions that they carry? I do not think so. But that is the analogous situation.

Mr. RAILSBACK. I hate to tell you that that is an issue that may be coming up before the Judiciary Committee or an extension thereof, if they are deregulated, depending on what the Commerce Committee does.

Mr. EFFROS. Mr. Railsback, there is something that in our discussion just now reminds me of a subject that we haven't touched on. That is that throughout this debate we have been talking about the payment of copyright to the program owner. Of course, the television station is in there somewhere. But what we have neglected to look at, if you talk about percentages of any other monetary amount, is that the cable operator in the instance of importing signals has to pay the delivery charge.

So while you might be able to distinguish and cut it down and say all right, Jack Valenti or whoever does their mathematics, they say the cable operator is paying 2 cents per subscriber per month for that program and that is what they say is too low. They say that to the CRT.

What isn't added is, we are also paying 10 cents a month to the satellite systems, which makes it 12 cents per month per subscriber to get that signal from there to here so our subscriber can see it. You have to add that in because the broadcaster doesn't pay that delivery charge, that is part of the amount of money he pays for the program.

If you want to compare how much we are paying, you have to include the delivery charge. What you are suggesting to us is that we would increase the delivery charge.

Mr. DANIELSON. The time of the gentleman has expired.

I am going to toss in one thought responsive to something that just came out. I think you have a difference between microwave transmission and long line A.T. & T. transmission on the one hand, and direct broadcast satellite on the other, in that your common carrier telephone line or microwave is point to point, it is a controlled circuit.

From satellites you have broadcasts. Any person with a proper Earth station could pick it up. It is not a controlled situation. The audience that is able to receive it is much broader. So you have a difference.

Mr. EFFROS. We were talking about satellite to cable system, not to home. We are point to point that way.

Mr. DANIELSON. No, I am talking about the characterization of a satellite as being a common carrier. The common carrier usually delivers something from a point to another point. Your satellite delivers something from the heavens to all Earth below. It is like the quality of mercy, it is everywhere. That is a thought only.

I will yield to the gentleman from Michigan.

Mr. SAWYER. I have nothing further, thank you.

Mr. DANIELSON. I have been trying to stall for our friend from Massachusetts to get back, but I am afraid he won't be able to get back. So I guess we can continue Everyone else has departed.

I did make one misstatement audible to him. I believe you, Mr. Wheeler, said—somebody said that this group of theater owners banded together only for their own protection. I was unwise enough to comment to him that that is the only reason anybody bands together is for their own protection.

Mr. WHEELER. I would be unemployed were it not that way.

Mr. DANIELSON. But I corrected that the Democratic Party stands together for another purpose.

That concludes our hearing for this morning. The next meeting of this subcommittee will be on next Thursday, May 28, to consider the bill H.R. 2007 and related bills dealing with the use of copyrighted works by veterans and fraternal organizations. I trust that includes female as well as male, fraternal.

Thank you.

We now stand adjourned.

[Whereupon, the subcommittee adjourned, to reconvene Thursday, May 28, 1981.]

NONPROFIT USE OF COPYRIGHTED WORKS

THURSDAY, MAY 28, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, and Sawyer.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order. This morning we will hear from proponents and opponents of legislation to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from copyright liability for the public performance of music.

Several bills have been introduced on the subject; namely, H.R. 2007 by Congressman Young of Florida; H.R. 2108 by Congressman Donnelly of Massachusetts, and H.R. 3408 by Congressman Johnston of North Carolina.

It is my understanding that while Congressmen Young and Donnelly are not able to appear in person this morning, they will submit written statements for the record and we will be pleased to include them. [See Appendix Ia and b]

Our first panel this morning consists of representatives from some of our largest veterans and fraternal groups. It is a pleasure for me to greet and welcome Mr. Don Schwab of the Veterans of Foreign Wars; Mr. Phil Riggin of the American Legion; and Mr. Carl Weis of the Loyal Order of Moose.

I would parenthetically observe that when I lived in Watertown, Wis., I was a member of the Moose and have been and still am a member of both Veterans of Foreign Wars and the American Legion.

Mr. Schwab, would you commence on behalf of the panel?

TESTIMONY OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; E. PHILIP RIGGIN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION; AND CARL A. WEIS, SUPREME SECRETARY, LOYAL ORDER OF MOOSE

Mr. SCHWAB. Thank you, Mr. Chairman.

I thank you for the privilege of appearing before this distinguished subcommittee to present the views of the Veterans of Foreign Wars of the United States.

One bill before you, Mr. Chairman, H.R. 2007, was introduced by the Honorable C. W. Bill Young and would amend 17 U.S.C. 110 to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

This bill is fully supported by current VFW Resolution No. 317 entitled, "The Copyright Act of 1976," passed by the voting delegates to our 81st national convention.

Mr. Chairman, the Veterans of Foreign Wars, now in its 82d year, is a nonprofit organization, congressionally chartered by Public Law 630 of the 74th Congress on May 28, 1936, and codified as 36 U.S.C. 111 through 120.

The purpose of the VFW is stated in my testimony. I will not belabor you with reciting that provision.

Mr. Chairman, because of the high and noble purpose of nonprofit veterans' and fraternal organizations, and the time and effort gratuitously and unstintingly given by so many to help others, we have historically been given special consideration by the Congress of the United States as opposed to profitmaking organizations or enterprises established for the sole purpose of the personal financial gain of individuals or groups.

This is true with respect to tax treatment as enunciated for veterans' organizations in 501(c)(19) of the Internal Revenue Code and also with respect to postal rates as enunciated in 39 U.S.C.

The same was true with respect to live performance of music in our VFW post homes until enactment of the Copyright Act of 1976, which became Public Law 94-553.

Under the provisions of Public Law 94-553, both the American Society of Composers, Authors and Publishers [ASCAP] and Broadcast Music, Inc. [BMI] have been actively pursuing the payment of licensing fees by our posts in which paid musicians perform or, if unpaid, an admission fee is charged.

Those who violate the law by copyright infringement subject themselves to Federal court action and a judgment against them for statutory damages.

Under the provision of 17 U.S.C. 504(c), the judgment will ordinarily not be less than $250 for each copyrighted musical composition performed without a license plus court costs and attorneys' fees.

The license fees imposed on our VFW posts by both ASCAP and BMI are identical to those charged commercial enterprises, such as restaurants, taverns, nightclubs, and similar establishments operated solely for the personal financial gain of the owner or owners.

Mr. Chairman, the performance of live music at our VFW post homes is resorted to to enhance their fundraising activities which are not for personal financial gain but, rather, for the good of the order to support our rather extensive youth activities programs and community service programs.

Among these worthwhile endeavors to assist others, but by no means a complete listing, are the following:

First. Our voice of democracy scholarship scriptwriting program.

Second. Boy Scout troops, Cub packs, Explorer units, and Girl Scouts.

Third. VFW teen-er baseball.

Fourth. VFW-NRA junior rifle matches.

Fifth. VFW-sponsored drum and bugle corps.

Sixth. VFW lite-a-bike program.

Seventh. VFW drive to survive programs.

Eighth. VFW drug abuse seminars.

Ninth. The donation by VFW post and auxiliaries of wheelchairs and television sets among other items to Veterans' Administration hospitals.

Obviously not all VFW posts participate in all programs and some in other services, such as transporting senior citizens on shopping tours, to church, and to the polls to vote.

Mr. Chairman, the thrust of current law with respect to performance of live music is to protect the author and his or her heirs and assure them of recompense for the author's work during his or her lifetime and for a period of 50 years thereafter.

Be that as it may, there is little doubt in my mind that if most authors and composers with the heart and mind to produce enduring compositions frequently performed realized that the new law greatly reduced the ability of the VFW posts to support youth and community activities, they would willingly waive this new-found royalty source with respect to nonprofit veterans' and fraternal organizations.

Along this same line there is absolutely no doubt in my mind that it is patently unfair and discriminatory to assess nonprofit veterans' and fraternal organizations licensing fees at the same rate as charged commercial enterprises operated only for personal financial gain.

Before closing, Mr. Chairman, it is incumbent upon me to call to your attention that when hearings were held with respect to similar legislation by the Subcommittee on Improvement in Judicial Machinery of the Senate Judiciary Committee last year, the witness representing Broadcast Music, Inc., gave considerable emphasis to his assertion that the facilities of nonprofit veterans' and fraternal organizations are not restricted to the use of their membership but, rather, open to the public.

In an attempt to substantiate this allegation, appended to his testimony was a 19-page montage compiled by a clipping service consisting of advertisements of functions held in the facilities of various veterans' and fraternal organizations containing the legends "everyone welcome," "public welcome," and "open to the public."

Permit me to make it abundantly clear VFW functions within post homes are restricted to members in good standing in the Veterans of Foreign Wars and its ladies auxiliary and their bona fide guests.

Violation thereof would subject the offending post to suspension or revocation of its charter.

Notwithstanding, it is a common practice among veterans' and fraternal organizations to rent out their function rooms to other organizations and to private parties for such things as wedding receptions, anniversary dinners and dances.

Although the name of the VFW may appear for the purpose of identification of location, it does not necessarily follow that the function is one of the Veterans of Foreign Wars.

In conclusion, Mr. Chairman, we of the VFW thank you for holding this hearing to provide a forum for airing views perhaps neither fully explored nor appreciated when S. 22 was considered, which became Public Law 94-553.

Thank you, Mr. Chairman, and I will be happy to respond to any questions you may have.

[The complete statement of Mr. Schwab follows:]

PREPARED STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Thank you for the privilege of appearing before this most distinguished Subcommittee to present the views of the Veterans of Foreign Wars of the United States with respect to pending legislation to amend the Copyrights Act of 1976.

My name is Donald H. Schwab and it is my privilege to serve the 1.9 million men and women of the Veterans of Foreign Wars as their National Legislative Director.

The bill before you, Mr. Chariman, H.R. 2007, was introduced by the Honorable C. W. (Bill) Young and would amend 17 USC 110 to exempt non-profit veterans organizations and non-profit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders. This bill is fully supported by current V.F.W. Resolution No. 317 entitled, "The Copyrights Act of 1976," passed by the voting delegates to our 81st National Convention.

Mr. Chairman, the Veterans of Foreign Wars, now in its 82nd year, is a non-profit organization, congressionally chartered by Public Law 630 of the 74th Congress on May 28, 1936 and codified as 36 US.C 111 through 120.

Mr. Chairman, because of the high and noble purpose of non-profit veterans' and fraternal organizations, and the time and effort gratuitously and unstintingly given by so many to help others, we have historically been given special consideration by the Congress of the United States as opposed to profit making organizations or enterprises established for the sole purpose of the personal financial gain of individuals or groups. This is true with respect to tax treatment as enunciated for veterans' organizations in 501(c)(19) of the Internal Revenue Code and, also, with respect to postal rates as enunciated in 39 USC. The same was true with respect to live performance of music in our V.F.W. Post homes until enactment of the Copyrights Act of 1976, which became Public Law 94-553.

Under the provisions of Public Law 94-553, both the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have been actively pursuing the payment of licensing fees by our Posts in which paid musicians perform or, if unpaid, an admission fee is charged. Those who violate the law by copyright infringement subject themselves to federal court action and a judgement against them for statutory damages. Under the provisions of 17 USC 504(c) the judgement will ordinarily not be less than $250 for each copyrighted music composition performed without a license plus court costs and attorneys' fees. The license fees imposed on our V.F.W. Posts by both ASCAP and BMI are identical to those charged commercial enterprises, such as restaurants, taverns, nightclubs and similar establishments operated solely for the personal financial gain of the owner or owners.

Mr. Chairman, the performance of live music at our V.F.W. Post homes is resorted to enhance their fund-raising activities which are not for personal financial gain but, rather, for the good of the order to support our rather extensive youth activities programs and community service programs. Among these worthwhile endeavors to assist others, but by no means a complete listing, are the following:

1. Our Voice of Democracy Scholarship Scriptwriting Program.
2. Boy Scout Troops, Cub Packs, Explorer Units and Girl Scout.
3. V.F.W. Teen-er baseball.
4. V.F.W.-NRA Junior Rifle matches.
5. V.F.W. sponsored drum and bugle corps.
6. V.F.W. Lite-A-Bike Program.
7. V.F.W. Drive to Survive Programs.
8. V.F.W. Drug Abuse Seminars.
9. The donation by V.F.W. Posts and Auxiliaries of wheelchairs and television sets among other items, to Veterans Administration hospitals.

Obviously, not all V.F.W. Posts participate in all programs and some in other services, such as transporting senior citizens on shopping tours, to church, and to the polls to vote.

Mr. Chairman, the thrust of current law with respect to performance of live music is to protect the author and his or her heirs and assure them of recompense for the author's work during his or her lifetime and for a period of 50 years thereafter. Be that as it may, there is little doubt in my mind that if most authors and composers with the heart and mind to produce enduring compositions frequently performed realized that the new law greatly reduced the ability of the V.F.W. Posts to support youth and community activities, they would willingly waive this new found royalty source with respect to non-profit veterans' and fraternal organizations. Along this same line, there is absolutely no doubt in my mind that it is patently unfair and discriminatory to assess non-profit veterans' and fraternal organizations licensing fees at the same rate as charged commerical enterprised operated only for personal financial gain.

Before closing, Mr. Chairman, it is incumbent upon me to call to your attention that when hearings were held with respect to similar legislation by the Subcommittee on Improvement in Judicial Machinery of the Senate Judiciary Committee last year, the witness representing Broadcast Music, Inc. gave considerable emphasis to his assertion that the facilities of non-profit veterans' and fraternal organizations are not restricted to the use of their membership but, rather, open to the public. In an attempt to substantiate this allegation, appended to his testimony was a 19-page montage compiled by a clipping service consisting of advertisements of functions held in the facilities of various veterans' and fraternal organizations containing the legends "everyone welcome," "public welcome," and "open to the public."

Permit me to make it abundantly clear V.F.W. functions within Post homes are restricted to members in good standing in the Veterans of Foreign Wars and its Ladies Auxiliary and their bona fide guests. Violation thereof would subject the offending Post to suspension or revocation of its charter. Notwithstanding, it is a common practice among veterans' and fraternal organizations to rent out their function rooms to other organizations and to private parties for such things as wedding receptions, anniversary dinners and dances. Although the name of the V.F.W. may appear for the purpose of identification of location, it does not necessarily follow that the function is one of the Veterans of Foreign Wars.

In conclusion, Mr. Chairman, we of the V.F.W. thank you for holding this hearing to provide a forum for airing views perhaps neither fully explored nor appreciated when S. 22 was considered, which became Public Law 94-553.

Thank you, Mr. Chairman, and I will be happy to respond to any questions you may have.

Resolution No. 317

THE COPYRIGHTS ACT OF 1976

WHEREAS, the Copyrights Act of 1976, Public Law 94-553, which became effective January 1, 1978, as written, permits Broadcast Music, Inc. (BMI) and/or the American Society of Composers, Authors and Publishers (ASCAP) to require our V.F.W. Posts to pay an annual license fee; and

WHEREAS, the penalty for copyright infringment subjects the violator to suit in federal court and, under the law, fines of $250 for each piece of music played during an unlicensed performance may be levied, plus court costs and attorney fees; and

WHEREAS, the Veterans of Foreign Wars of the United States, including all of its Posts, is a Congressionally chartered, non-profit, fraternal and patriotic organization; now, therefore

BE IT RESOLVED, by the 81st National Convention of the Veterans of Foreign Wars of the United States, that we seek the passage of legislation in the Congress of the United States to amend Section 110 of Public Law 94-553, the Copyrights Act of 1976, to specifically exempt any and all musical performances within the Post homes of the Veterans of Foreign Wars of the United States, and all other Congressionally chartered, non-profit, fraternal and patriotic organizations.

Adopted by the 81st National Convention of the Veterans of Foreign Wars of the United States held in Chicago, Illinois, August 15-21, 1980.

Resolution No. 317

GENERAL LICENSE AGREEMENT—RESTAURANTS, TAVERNS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS

529

Agreement between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("SOCIETY"), located at 10400 WEST HIGGINS RD., SUITE 235, ROSEMONT, ILLINOIS 60018 and V.F.W. THEODORE HOFFMAN POST 1769 ("LICENSEE"), located at SOUTH 4th STREET ROAD EFFINGHAM, IL. 62401 as follows:

1. Grant and Term of License

(a) SOCIETY grants and LICENSEE accepts for a term of one year, commencing FEBRUARY 1, 1978, and continuing thereafter for additional terms of one year each unless terminated by either party as hereinafter provided, a license to perform publicly at V.F.W. CLUB POST 1769 SOUTH 4th ST. RD. EFFINGHAM, IL. 62401 ("the premises"), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights.

(b) Either party may, on or before thirty days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given the agreement shall terminate on the last day of such initial or renewal term.

2. Limitations on License

(a) This license is not assignable or transferable by operation of law or otherwise, and is limited to the LICENSEE and to the premises

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY'S repertory to persons outside of the premises

(c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this agreement, shall include, but not be limited to, a musical comedy, oratorio, choral work, opera, play with music, revue, or ballet.

3. License Fee

(a) In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the applicable license fee set forth in the rate schedule printed below and made part hereof, based on "LICENSEE'S Operating Policy" (as hereinafter defined), payable quarterly in advance on January 1, April 1, July 1 and October 1 of each year. The term "LICENSEE'S Operating Policy," as used in this agreement, shall be deemed to mean all of the factors which determine the license fee applicable to the premises under said rate schedule

(b) LICENSEE warrants that the Statement of LICENSEE'S Operating Policy on the reverse side of this agreement is true and correct.

(c) Said license fee is TWO HUNDRED EIGHTY FIVE AND NO/100 Dollars ($ 285.00) annually, based on the facts set forth in said Statement of LICENSEE'S Operating Policy.

4. Changes in Licensee's Operating Policy

(a) LICENSEE agrees to give SOCIETY thirty days prior notice of any change in LICENSEE'S Operating Policy. For purposes of this agreement, a change in LICENSEE'S Operating Policy shall be one in effect for no less than thirty days.

(b) Upon any such change in LICENSEE'S Operating Policy resulting in an increase in the license fee, based on the annexed rate schedule, LICENSEE shall pay said increased license fee, effective as of the initial date of such change, whether or not notice of such change has been given pursuant to paragraph 4(a) of this agreement

(c) Upon any such change in LICENSEE'S Operating Policy resulting in a reduction of the license fee, based on the annexed rate schedule, LICENSEE shall be entitled to such reduction, effective as of the initial date of such change, and to a *pro rata* credit for any unearned license fees paid in advance, provided LICENSEE has given SOCIETY thirty days prior notice of such change. If LICENSEE fails to give such prior notice, any such reduction and credit shall be effective thirty days after LICENSEE gives notice of such change

(d) In the event of any such change in LICENSEE'S Operating Policy, LICENSEE shall furnish a current Statement of LICENSEE'S Operating Policy and shall certify that it is true and correct

(e) If LICENSEE discontinues the performance of music at the premises, LICENSEE or SOCIETY may terminate this agreement upon thirty days prior notice, the termination to be effective at the end of such thirty day period. In the event of such termination, SOCIETY shall refund to LICENSEE a *pro rata* share of any unearned license fees paid in advance. For purposes of this agreement, a discontinuance of music shall be one in effect for no less than thirty days.

5. Breach or Default

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty-day period without further notice from SOCIETY. In the event of such termination, SOCIETY shall refund to LICENSEE any unearned license fees paid in advance

6. Notices

All notices required or permitted hereunder shall be given in writing by certified United States mail sent to either party at the address stated above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this day of , 19

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By _____
PRESIDENT OR AGENT

V.F.W. THEODORE HOFFMAN POST 1769
LICENSEE

By _____

TITLE

(Fill in capacity in which signed: (a) If corporation, give corporate office held. (b) If partnership, write word "partner" under signature of signing partner. (c) If individual owner, write "individual owner" under signature.)

RATE SCHEDULE

This rate schedule applies to Bars, Grills, Taverns, Restaurants, Lounges, Supper Clubs, Night Clubs, Piano Bars, Cabarets, Roadhouses and similar establishments where:

(a) The highest price (when musical entertainment is provided) of a nationally advertised brand of bourbon, rye or scotch is 85¢ or more a drink; or

(b) If the establishment does not sell liquor but sells beer, or if liquor or beer are not sold but the establishment sells set ps, the highest price (when musical entertainment is provided) of a bottle, can, draught, or other serving of a nationally advertised domestic beer, or an individual set-up where beer is not sold, is 50¢ or more.

A rate schedule applicable to establishments charging less than the amounts set forth above will be furnished to such establishments.

ANNUAL RATE

Seating Capacity	No. Nights Per Week	LIVE MUSIC—SINGLE INSTRUMENTALIST					LIVE MUSIC—TWO OR MORE INSTRUMENTALISTS					NO LIVE MUSIC—MECHANICAL MUSIC ONLY		
		Base Rate	NO. OF VARIABLES*			If Mech. Music Used, Add	Base Rate	NO. OF VARIABLES**			If Mech. Music Used, Add	Base Rate	NO. OF VARIABLES***	
			One	Two	Three			One	Two	Three			One	Two
0-75	1	$90	$120	$160	$215	$35	$120	$160	$215	$285	$35	$90	$120	$160
	2-3	125	165	220	295	45	180	240	320	425	45	90	165	220
	4-7	155	205	275	370	55	240	320	425	570	55	90	205	275
76-150	1	120	160	215	285	50	160	215	285	380	50	130	160	215
	2-3	180	240	320	425	65	240	320	425	570	65	130	240	320
	4-7	240	320	425	570	80	320	425	570	760	80	130	320	425
151-225	1	160	215	285	380	65	215	285	380	510	65	170	215	285
	2-3	240	320	425	570	85	325	430	575	765	85	170	320	425
	4-7	320	425	570	760	105	430	575	765	1020	105	170	425	570
226-300	1	200	265	355	475	80	270	360	480	640	80	210	265	355
	2-3	300	400	535	715	105	405	540	720	960	105	210	400	535
	4-7	400	535	710	950	130	540	720	960	1280	130	210	535	710
301-375	1	240	320	425	570	95	325	435	580	770	95	250	320	425
	2-3	360	480	640	855	125	490	650	870	1155	125	250	480	640
	4-7	480	640	855	1135	155	650	865	1155	1540	155	250	640	855
376-450	1	280	375	500	665	110	360	505	675	910	110	290	375	500
	2-3	420	565	745	995	145	570	760	1015	1370	145	290	560	745
	4-7	560	750	995	1325	180	760	1015	1350	1800	180	290	750	995
451-525	1	280	375	500	665	110	435	580	775	1030	125	330	425	575
	2-3	420	565	745	995	145	655	870	1160	1550	165	330	640	865
	4-7	560	750	995	1325	180	870	1160	1545	2060	205	330	850	1150
526-600	1	280	375	500	665	110	490	655	870	1160	140	370	475	650
	2-3	420	565	745	995	145	735	980	1305	1740	185	370	715	975
	4-7	560	750	995	1325	180	980	1305	1740	2320	230	370	950	1300
601-675	1	280	375	500	665	110	545	725	970	1290	155	410	525	725
	2-3	420	565	745	995	145	820	1090	1455	1935	205	410	790	1050
	4-7	560	750	995	1325	180	1090	1455	1935	2582	255	410	1050	1450
676-750	1	280	375	500	665	110	600	800	1065	1420	170	450	575	800
	2-3	420	565	745	995	145	900	1200	1600	2130	225	450	865	1200
	4-7	560	750	995	1325	180	1200	1600	2130	2840	280	450	1150	1600
751 and over	1	280	375	500	665	110	600	800	1065	1420	185	490	625	875
	2-3	420	565	745	995	145	900	1200	1600	2130	245	490	940	1315
	4-7	560	750	995	1325	180	1200	1600	2130	2840	305	490	1250	1750

*VARIABLES (Applicable to single instrumentalist):

—Show or act(s) or vocalist(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

**VARIABLES (Applicable to two or more instrumentalists):

—Show or act(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by a band or an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

***VARIABLES (Applicable to mechanical music only):

—Show or act(s).

—Admission, minimum, cover, entertainment or similar charge.

SEASONAL RATES

For seasonal licensees, the rates for periods up to four months of operation are 1/2 the annual rate; for each additional month the rate is 1/12 the annual rate. The seasonal rate will in no case be more than the annual rate.

COMPUTATION OF RATE FOR MIXED POLICIES

1. Compute rate for the higher policy for the number of nights that the higher policy is in effect. The "higher policy" is the policy which generates the highest rate for any one day.
2. Note total number of nights entertainment is provided.
3. Compute rate for the lower policy using the total number of nights entertainment is provided under both the higher and lower policies.
4. Compute rate for the lower policy using the number of nights the higher policy is in effect.
5. Subtract rate computed in step 4 from rate computed in step 3.
6. Add rate computed in step 1 to rate computed in step 5 for total rate.

STATEMENT OF LICENSEE'S OPERATING POLICY

LICENSEE V.F.W. THEODORE HOFFMAN POST 1769

PREMISES V.F.W. CLUB

FULL ADDRESS SOUTH 4th ST. RD.

EFFINGHAM, ILLINOIS 62401 TELEPHONE NO.

Indicate only applicable factors:

1. Seating capacity 210

2. The highest price (when musical entertainment is provided) of:
   a. Nationally advertised brand liquor $1.00
   b. Individual set-ups . . . . .
   c. Nationally advertised brand beer . . . . .
   d. Average price of dinner . . . . .

3. Description of Entertainment — No. Nights Per Week — Nights Used (Circle)
   a. Single instrumentalist ☐ — Su M Tu W Th F Sa
   b. Two or more instrumentalists ☒ — 1 npw — Su M Tu W Th F Sa

4. Mechanical music not cleared at the source — Nights Used (Circle)
   a. Radio ☐ No. of Speakers — Su M Tu W Th F Sa
   b. Records ☐ — Su M Tu W Th F Sa
   c. Tapes ☐ — Su M Tu W Th F Sa

5. Mechanical music cleared at the source
   a. Records ☐
   b. Tapes ☐ Name and address of supplier:
   c. Wired ☐
   d. Multiplex ☐

6. Show ☐ Act(s) ☐ Vocalist(s) ☐ Check if None ☒

7. Charge made
   Admission ☒ Minimum ☐ Cover ☐ Entertainment ☐ Check if None ☐
   Similar charge (describe): $

8. Alternate or relief music provided by instrumentalist(s) ☐ Check if None ☒

9. Number of rooms with musical entertainment one *
   *If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room.

10. If seasonal operation, indicate seasonal period
    Opening date _____ Closing date _____

Rate based on above policy $285.00
(If more than one room, total rate for premises $_____)

CERTIFICATE

I hereby certify that the foregoing Statement of Operating Policy is true and correct as of this ____ day of _____, 19____.

V.F.W. THEODORE HOFFMAN POST 1769
LICENSEE

sign here (x)
By _____

American Society of Composers, Authors and Publishers
10400 W. HIGGINS RD.
SUITE 235
ROSEMONT, ILL. 60018

AGREEMENT, made at New York, N. Y. on ....., 19....., between BROADCAST MUSIC, INC., a corporation organized under the laws of the State of New York (hereinafter called BMI) with principal office at 10 West 57th Street, New York, N. Y. 10019, and

.....
(Legal Name of Licensee)

Strike Out Inapplicable lines

A corporation organized under the laws of the State of .....

A partnership composed of .....

An individual residing at .....

(hereinafter called LICENSEE) with offices located at .....

City of ..... State of ..... Zip No. .....

1. BMI hereby grants to LICENSEE a non-exclusive license to perform publicly for profit by musicians, singers and other entertainers actually present and performing and by no other means whatsoever at the premises known as .....

located at (street address) .....

in the City of .....in the State of ..... Zip No. ..... all of the musical works, the right to grant public performance licenses of which BMI shall during the term hereof control. Said license shall not include dramatic rights or the right to perform dramatico-musical works in whole or in substantial part; or the right to broadcast, telecast or otherwise transmit the performances licensed hereunder to persons outside of the premises.

2. LICENSEE agrees to pay BMI for each year of the term, the applicable fee listed opposite LICENSEE's bracket of entertainment costs as defined in Schedule "A" hereinafter set forth and made a part hereof.

3. The term shall commence on .....and end on ..... and shall be extended for additional periods of one (1) year unless cancelled by either party by written notice given to the other thirty (30) days prior to the end of the said term or of any subsequent period.

4. LICENSEE agrees to pay BMI for each contract year of the term an estimated fee as an advance on account of the actual fee for such contract year.

The estimated fee for the first contract year of the term shall be determined by LICENSEE projecting entertainment costs over a twelve month period pursuant to Schedule "A" hereof except that if LICENSEE was a music user for a period of twelve (12) months prior to the commencement of the term, the estimated fee shall be an amount equal to what the actual fee would have been pursuant to Schedule "A" for the immediately preceding twelve (12) months.

5. LICENSEE hereby estimates its fee for the first year of the term to be $.....

based on entertainment costs of $.....for the immediately preceding year computed in accordance with Paragraph 4, which is due and payable upon the signing of this agreement and upon each anniversary date during the life of the agreement. At the option of the LICENSEE, payment of the estimated fee may be made in quarterly instalments in advance of each quarter provided that said quarterly instalments are made within ten (10) days after the first day of each quarterly period. If any quarterly payment is not timely made, the option herein granted to LICENSEE to make quarterly payments shall forthwith terminate. Payments are made subject to the following:

(a) Within twenty (20) days after the expiration of each contract year, LICENSEE shall furnish BMI a statement (on forms to be supplied by BMI), certified either by an officer or auditor of LICENSEE, setting forth LICENSEE's total entertainment costs for such contract year.

(i) If the actual fee due BMI is less than the estimated fee already paid to BMI during the contract year, BMI agrees to credit the difference to the account of LICENSEE and, if such difference shall occur during the last year of the term hereof, BMI agrees to return the same promptly.

(ii) If the actual fee due BMI is greater than the estimated fee already paid by the LICENSEE to BMI during the contract year, LICENSEE shall pay BMI the difference between the actual and estimated license fee.

(iii) The estimated fee for each contract year, subsequent to the first contract year of the term hereof shall be the actual fee reported by LICENSEE for the previous contract year.

(b) If LICENSEE shall fail to furnish BMI with the statement described in sub-paragraph (a) hereof on or before the date set forth in such sub-paragraph, BMI may make written demand therefor by ordinary mail. In the event that LICENSEE fails to furnish such statement within twenty (20) days after the mailing of such written demand, then until such time as LICENSEE shall furnish such statement, LICENSEE's entertainment costs and license fee for said contract year shall be the amount listed in the highest bracket of the Schedule "A" hereof.

6. In the event that LICENSEE shall discontinue the use of all music and entertainment at the premises during the term of this agreement, LICENSEE may give written notice thereof to BMI. Within twenty (20) days after the date of receipt by BMI of such notification of discontinuance, an adjustment shall be made for the part of such contract year preceding such discontinuance on the basis of the entertainment costs at the premises for such part of such year, but the amount due shall not be less than the minimum fee set forth in Schedule "A". After such adjustment has been made, LICENSEE shall not be obligated to make future payments to BMI until such time as LICENSEE shall resume the use of music at the premises during the term.

(a) It is agreed that the term "discontinuance" as used herein shall mean the total abandonment of the use of music and entertainment and shall not refer to a seasonal or periodic cessation of the use of music and entertainment.

(b) Notwithstanding such discontinuance, LICENSEE agrees to continue to furnish to BMI statements as provided in sub-paragraph (a) of Paragraph 5 hereof.

[illegible] ments of the same class and category as that of the LICENSEE, be issuing licenses granting rights similar to those [illegible] by this agreement at more favorable rates of payment than are set forth herein, BMI shall, for the balance of the term, tender to LICENSEE an agreement containing such more favorable rates of payment.

8. BMI agrees to indemnify, save harmless and defend LICENSEE, its officers and employees, from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance under this agreement of any or all musical works licensed hereunder at the time of LICENSEE's performance thereof. BMI's Index Department shall at any time upon request, advise LICENSEE whether particular works are available for performance as part of BMI's repertoire. LICENSEE agrees to give BMI immediate notice of any such claim, demand or suit, to deliver to BMI any papers pertaining thereto, and to co-operate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand or suit.

9. Upon any breach or default of any of the terms or conditions herein contained, BMI may, at its sole option, and in addition to any and all other remedies which it may have, cancel this agreement upon [illegible] days notice in writing to LICENSEE, addressed to the premises. No waiver by BMI of full performance of this agreement in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this agreement thereafter or of the right to cancel this agreement.

10. Any controversy or claim arising out of, or relating to, this agreement or the breach thereof shall be settled by arbitration in the City of New York, in accordance with the Rules of the American Arbitration Association, and judgment upon the award of the arbitrator may be entered in any Court having jurisdiction thereof.

11. All notices given by BMI hereunder shall be duly and properly given if mailed to the premises.

12. This agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by the parties. This agreement, its validity, construction and effect, shall be governed by the laws of the State of New York.

IN WITNESS WHEREOF: the parties hereto have duly executed this agreement the day and date hereinbefore set forth.

BROADCAST MUSIC, INC. ....

LICENSEE (Legal Name)

By: .... By: ....

VICE PRESIDENT (Signature)

....

(Print Name of Signer)

....

TITLE OF SIGNER

SCHEDULE "A"—RATE OF ANNUAL FEES

*Bracket of Annual Entertainment Costs	Annual License Fee	*Bracket of Annual Entertainment Costs	Annual License Fee
Less than $ 5,000.00	$ 75.00	$120,000.00 to $139,999.99	$ 700.00
5,000.00 to 7,999.99	90.00	140,000.00 to 159,999.99	800.00
8,000.00 to 9,999.99	100.00	160,000.00 to 179,999.99	900.00
10,000.00 to 14,999.99	120.00	180,000.00 to 199,999.99	1,000.00
15,000.00 to 24,999.99	180.00	200,000.00 to 249,999.99	1,250.00
25,000.00 to 34,999.99	240.00	250,000.00 to 299,999.99	1,300.00
35,000.00 to 49,999.99	300.00	300,000.00 to 349,999.99	1,400.00
50,000.00 to 64,999.99	325.00	350,000.00 to 399,999.99	1,500.00
65,000.00 to 79,999.99	400.00	400,000.00 to 449,999.99	1,600.00
80,000.00 to 99,999.99	500.00	450,000.00 and over	1,700.00
100,000.00 to 119,999.99	600.00		

* "Entertainment Costs" shall mean all expenditures of every kind and nature (whether in money or any other form of consideration) made by LICENSEE, or on LICENSEE's behalf, for the services of musicians and all other entertainers actually present and performing at LICENSEE's premises. The services of LICENSEE as a musician or entertainer shall be included in "Entertainment Costs" at the prevailing rate for such services in the community. Included in "Entertainment Costs" is the agreed value of room and board where LICENSEE is obligated to provide [illegible] as part of the consideration for such entertainment services. The agreed value of room and board shall be deemed to be one-half of the prevailing rate charged to guests for similar accommodations.

Mr. KASTENMEIER. Thank you very much, Mr Schwab, for that brief but illuminating statement. It is certainly right on point.

I think before I ask any questions of you, I will turn to your colleagues.

Mr. Riggin?

Mr. RIGGIN. Thank you, Mr. Chairman.

With your permission, I would summarize our prepared statement with the understanding, or the request that that full statement be entered into the record of this hearing.

Mr. KASTENMEIER. Yes. Without objection, your complete statement will be made part of the record and you may proceed as you wish.

I should identify you as deputy director of the National Legislative Commission of the American Legion.

Mr. RIGGIN. The American Legion appreciates the opportunity to present testimony before this subcommittee on legislation to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement of paying royalty performance fees for certain uses of copyrighted music.

We appear before you today in support of H.R. 2007. We believe that continuing to require local American Legion posts to pay royalty fees through the purchase of licenses will seriously jeopardize our volunteer efforts.

We also believe current law, as implemented, reflects somewhat of an inconsistency with longstanding congressional recognition of veterans' organizations as clearly defined nonprofit groups which have been exempted from such requirements.

It should be stated at the outset, Mr. Chairman, that the American Legion does not dispute the right of any creator of music to protect his creation through the receipt of royalties.

We recognize the need for a copyright mechanism and we do not quarrel with the provision of acquiring compensation from those who would seek financial gain through the use of material created by someone else.

We, however, believe that the use of copyrighted material for the express purpose of promoting charitable activities differs significantly from that principle. It is our opinion that neither Congress nor the creators of copyrighted musical works have ever intended copyright legislation as an impediment to legitimate nonprofit community service activity.

Yet Public Law 94-553 is having precisely that impact. Many American Legion posts facing financial survival on a day-to-day basis are simply not willing to risk the consequences of outright violation of the law and, therefore, have terminated all live musical performances.

Without this source of fundraising, they have been forced to curtail their community service programs.

Mr. Chairman, it is not our intention here to imply that the amounts of money necessary to purchase copyright licenses at current rates are forcing Legion posts into bankruptcy. It is our intention, however, to report a developing fear among Legion posts that the purchase prices of copyright licenses may rise dramatically if we recede from our position and accept the right of copyright organizations to demand payment from the American Legion as

they would from any profitmaking activity which, of course, is the current situation.

If such prices did increase, then the license fees in our opinion would in fact impose financial hardship on local Legion posts.

As stated previously, Congress has consistently recognized the value of voluntarism and community service. With the knowledge that many of the services provided through volunteer activities would otherwise be funded by taxes, Congress has enacted legislation which now offers tax incentives on proceeds generated to fund such nonprofit activities.

Congress determined years ago that the American Legion's programs met the standards to qualify for such tax treatment.

Our organization has enjoyed exemption from Federal income tax since its creation, an exemption which was made more specific in 1972 with the enactment of section 501(c)(19) of the Internal Revenue Code.

Since 1934, our national headquarters in Washington, D.C. has been specifically exempted by act of Congress from District of Columbia property tax, and despite challenges from the Internal Revenue Service on various occasions, Congress has consistently protected certain Legion activites from taxation as unrelated business income.

We therefore were disappointed and remain disappointed over the failure of Public Law 94-553 to continue to exempt our organization and others like us from the royalty payment obligation, especially when considering that Congress, during its deliberations on Public Law 94-553 decided to approve nine separate categories of exemptions under section 110 of that act.

We offer no objection to those exemptions, for educational, religious, or governmental activities, all of which are accompanied by nonprofit stipulations. We can even with some effort accept the rationale for exempting State fairs, but we find it difficult to understand how establishing criteria for these exemptions led Congress to the decision to exclude veterans' organizations.

It appears as though Congress was particularly interested in protecting educational, religious, and charitable enterprises from the royalty payment obligation because of the social benefit derived from their activities; and in view of this perception we would invite the subcommittee's attention to our annual report to Congress which shows that except for normal operating expenses, all proceeds from our organization are for charitable purposes.

Mr. Chairman, we believe our request for this subcommittee's approval for language to specifically exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement of paying royalty fees to copyright holders for the live performance of copyrighted musical works is a legitimate request.

We believe that your approval of such language would not violate the standard by which current exemptions have been granted.

That, in a nutshell, Mr. Chairman, is the basis of our position.

As Mr. Schwab indicated, I would be happy to respond at the appropriate time to any questions you may have.

Mr. KASTENMEIER. Thank you very much for your statement, Mr. Riggin.

[The complete statement of Mr. Riggin follows:]

PREPARED STATEMENT OF E. PHILIP RIGGIN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE COMMISSION

Mr. Chairman and Members of the Subcommittee: The American Legion appreciates the opportunity to present testimony before this Subcommittee on legislation to exempt nonprofit veterans organizations from the requirement of paying performance royalties for certain uses of copyrighted music.

We appear before you today in support of H.R. 2007. We believe that continuing to require local American Legion posts to pay royalty fees through the purchase of licenses will seriously jeopardize our volunteer effort. We also believe the current law, as implemented, reflects an inconsistency with longstanding Congressional recognition of veterans organizations as clearly defined nonprofit groups which have been exempted from such requirements.

It should be stated at the outset that The American Legion does not dispute the right of any creator of music to protect his creation through the receipt of royalties. We recognize the need for a copyright mechanism and we do not quarrel with the principle of requiring compensation from those who seek financial gain through the use of material created by someone else. We, however, believe that the use of copyrighted material for the expressed purpose of promoting charitable activities differs significantly from that principle.

Our demonstrated support for copyright legislation is probably best illustrated by our long and friendly association with licensing organizations. In fact, we offered no resistance to their efforts several years ago when they sought enactment of P.L. 94-553. We believed in the credibility of their argument that the line between some nonprofit activities and commerical ventures was becoming increasingly difficult to draw and that stricter controls were necessary because there were people who actively sought to exploit copyrighted works under the guise of nonprofit status. In addition, we accepted as valid their complaint that a liberal interpretation of the "not for profit" exemption contained in the 1909 statute was hurting authors and was creating a disincentive to write.

Of course, the intervening years have produced P.L. 94-553 and a very strict interpretation of the nonprofit exemption. This interpretation, as reflected in Section 110 paragraph (4) of the Act, allowed copyright organizations to begin planning in 1976 on how they would collect royalties from this new revenue source. The American Legion soon learned that it was at the top of the collection list when agents from the respective licensing organizations began to contact local posts across the country. When it was clear that there would be no early resolution of the payment controversy between these organizations and the legion, our National Convention unanimously adopted a mandate in 1979 seeking exemption legislation—a position which was reiterated at the 1980 Convention.

It is our sincere belief that neither Congress nor the creators of copyrighted musical works have ever intended copyright legislation as an impediment to legitimate nonprofit community service activity. Yet, P.L. 94-553 is having precisely that impact. Many posts facing financial survival on a day-to-day basis, are simply not willing to risk the consequences of outright violation of the law and, therefore, have terminated all live musical performances. Without this source of fund raising they have been forced to curtail their community service programs.

We believe that a brief review of those programs would be appropriate at this point. However, before offering such a review, it is important to note that the average Legion post is a small town operation consisting of 157 members with an annual dues of $11.00 per member. From that amount $4.25 goes to the state organization and $3.50 goes to the national organization. That leaves $3.25 per member, or $510 per post, as dues income. It, therefore, is clear that fund raising is necessary to carry out any energetic program of community service and it has been consistent Legion practice over the years to use music as an integral part of such fund raising.

Conservative estimates of our organization's community service in 1980 reveal that we spent $2 million in sending young people to American Legion Boys State programs; $1.8 million to sponsor drum and bugle corps groups; more than $6 million to sponsor Legion baseball teams; almost $1 million for Scout troops; $800,000 for academic scholarships; $2.5 million in cash assistance to needy children; and almost $4 million for clothing and other essentials for distressed families. In addition to all this our organization also donated $3.6 million to various other social welfare activities, including the United Fund, American Red Cross, cancer research, and mental health groups.

It is also important to note that our organization's ability to raise funds for various worthwhile purposes creates an attitude of community commitment within our membership which is demonstrated by the millions of hours of volunteer work

performed each year. Although such volunteerism does not result directly from fund raising, it is a secondary development and is a legitimate consideration in this entire debate.

Mr. Chairman, it is not our intention here to imply that the amounts of money necessary to purchase copyright licenses at current rates are forcing Legion posts into bankruptcy. It is our intention, however, to advise you that some Legion posts are terminating those fund raising activities in which music was previously used and that such termination has removed a major revenue source which had previously paid for a variety of charitable projects. It is also our intention to report a developing fear among Legion posts that the purchase prices of copyright licenses will rise dramatically if we recede from our position and accept the right of copyright organizations to demand payment from The American Legion as they would from any profit making activity. If such prices did increase then license fees would, in fact, impose financial hardship. These perceptions are coupled with a developing attitude at the local level that the posts are being consumed by a combination of bureaucracies. The royalty payment obligation is perceived by many officers at the post level as another in the never ending series of regulations which require more time than they, as volunteers, are willing to spend on preparing paperwork.

Our members, who willingly give their time and energy to participate in activities which benefit the community, are inclined to view the royalty payment obligation as they would a seemingly needless governmental regulation—both are sources of frustration. Volunteerism is, therefore, discouraged when individuals decide that personal satisfaction is not sufficient to compensate for the inconvenience of contending with such restrictions.

As stated previously, Congress has consistently recognized the value of volunteerism and community service. With the knowledge that many of the services provided through volunteer activities would otherwise be funded by taxes, Congress has enacted legislation which offers tax incentives on proceeds generated to fund such activities.

Congress determined years ago that The American Legion's programs met the standards to qualify for such tax treatment. Our organization has enjoyed exemption from federal income tax since its creation, an exemption which was made more specific in 1972 with the enactment of Section 501(c)(19) of the Internal Revenue Code. Since 1934 our national headquarters in Washington has been specifically exempted, by act of Congress, from District property tax. Despite challenges from the Internal Revenue Service, Congress has consistently protected certain Legion activities from taxation as "unrelated business income".

We, therefore, were disappointed over the failure of P.L. 94-553 to continue to exempt our organization and others like us from the royalty payment obligation. Of course, an exemption from taxes levied by government is not the same as an exemption from the requirement of paying a private citizen for a specific product. However, the difference between these exemptions becomes less clear cut when one reviews the legislative history of copyright law.

The 1909 statute vividly illustrated Congressional intent to exempt nonprofit organizations. Admittedly, the increased frequency of live performances and the changing nature of so-called nonprofit musical presentations demanded tighter controls through more precisely-worded legislation. Yet, Congress remained convinced during its deliberations on P.L. 94-553 that exemptions from royalty payment were in order, by approving nine exemptions under Section 110 of the Act.

We offer no objection to those exemptions for educational, religious, or governmental activities—all of which are accompanied by nonprofit stipulations. We can, with some effort, even accept the rationale for exempting state fairs. But we find it difficult to understand how establishing criteria for these exemptions led Congress to the decision to exclude veterans organizations. It appears as though Congress was particularly interested in protecting educational, religious, and charitable enterprises from the royalty payment obligation because of the social benefit derived from their activities.

Mr. Chairman, in paragraph (4) of Section 110 our exemption as a charitable organization would be assured except for the language which requires that no fee or compensation be paid to performers, promoters, or organizers of a musical performance. The language contained in this paragraph is somewhat disappointing for several reasons. First, it appears as though Congress, in approving such language, was attempting to exclude from exemption those who promote, organize, and perform live concerts under the guise of some nonprofit cause. Certainly, recent history has recorded frequent violations of the copyright principle by those who stage such concerts with the precise intention of making a profit. It is particularly unfortunate, however, that this exclusion also terminated our exemption.

Second, paragraph (4) of Section 110 makes specific reference to "charitable purposes"—the same term which was used for years in Section 501(c)(4) to authorize for our organization an exemption from federal income tax. Our annual report to Congress clearly shows that, except for normal operating expenses, all proceeds are for charitable purposes.

Despite the requirement in paragraph (4) that no fee or compensation be paid to performers, promoters, or organizers of musical performances paragraph (6) of Section 110 seems to impose no such restriction on fee or compensation payment when the performance is associated with an agricultural or horticultural fair. The consistency of standards for which exemptions are granted becomes somewhat vague at this point.

Mr. Chairman, we believe that our request for this Subcommittee's approval of language to specifically exempt nonprofit veterans organizations from the requirement of paying royalty fees to copyright holders for the live performance of copyrighted musical works is legitimate. We believe that your approval of such language would be in conformity with the intent of Congress when it passed the bill which became Public Law 94-553.

Before proceeding to questions, I would call on our last panelist, Mr. Weis. Am I pronouncing your name correctly.

Mr. WEIS. We call it "Wees," but to anybody by the name of Kastenmeier, it has to be "Wise."

Mr. KASTENMEIER. All right.

In any event, we are very pleased to have you. You are the supreme secretary of the Loyal Order of Moose with national headquarters at Mooseheart, Ill?

Mr. WEIS. Correct.

Mr. KASTENMEIER. You have a 14-page statement which is submitted by yourself as supreme secretary and Mr. Ruddy as general counsel.

Mr. WEIS. Mr. Chairman, we will certainly not impose on you for that full 14-page statement. We do have a summary of it which we would appreciate presenting this morning.

Mr. KASTENMEIER. Your statement in its entirety will appear in the record.

Mr. WEIS. Thank you, Mr. Chairman.

The Loyal Order of Moose, organized in 1888, is a nonprofit, private, fraternal order now including more than 2,000 lodges throughout the United States.

Each lodge is separately incorporated, not for profit, and has its own board of officers and its own funds.

The entire order is built on three cornerstones: Mooseheart, Moosehaven, and local community service activities.

As you know, Mr. Chairman, Mooseheart is a home and school for dependent orphaned children located 40 miles west of Chicago.

Moosehaven is a home for dependent, aged members of the order and their wives. Both Mooseheart and Moosehaven are charities maintained by a portion of the dues of members and contributions of members and their families.

Both establishments have always been recognized as tax-exempt contributions to which are deductible from income and estate taxes.

Mooseheart was founded in 1913 and has provided a home and education for more than 7,000 fatherless children, some of them for as long as 18 years each.

Moosehaven was founded in 1922 and is providing a permanent home and security for more than 500 dependent oldtimers as we meet here this morning.

In addition, the individual lodges throughout America support a broad range of purely local, charitable, philanthropic and community service activities tailored to the needs of the individual community.

The continued existence of these charitable and community service activities depends upon the dues and contributions from the members of these lodges. No public solicitations of any kind are ever made by the Moose.

To help carry out the purposes of the order, nearly all Moose lodges provide music as a social activity for their members. For such functions lodges usually hire one or more musicians, frequently members of the lodge, to furnish music for the particular occasion.

On all such occasions, admission is limited to Moose members, their wives and their guests.

Moose lodges use music strictly for nonprofit and noncommercial purposes in which no provision is ever made for a profit for any promoters or organizers, usually not even for the lodge itself.

Lodges are merely interested in furnishing music for their members and their wives on various occasions throughout the year, infrequently making the equivalent of an admission charge to offset part of the cost of the evening, but never to make a profit for any promoters, or organizers, or anybody else, or even the lodge itself.

Many of these affairs actually result in a small loss which the members willingly offset with a portion of their dues payments.

Naturally, increased costs occasioned by copyright fees and licenses result in more frequent losses which are borne by the respective lodges. These losses curtail contributions to charitable institutions of the order as well as local charitable philanthropic and community service activities and reduce the effectiveness of the lodges as well.

On a projected basis, the amount paid for royalties and licenses by Moose lodges alone is more than a half a million dollars annually. That statement has been challenged previously and I would like to repeat it, and emphasize it, and reaffirm it.

On a projected basis the amount paid for royalties and licenses by Moose lodges alone is more than half a million dollars annually.

A word of explanation.

Using ASCAP's own previous testimony that they have collected $140,907.38 from 753 Moose lodges, we have an average charge of $187.12 per lodge. Projecting that average to the 2,087 Moose lodges operating in the United States on April 30, 1980, a total of $390,519 is produced.

BMI's average charge is only $109.57, which projects to $228,672 for the entire Moose fraternity or a grand total of $619,191.

Although this does not take into account the 10 to 15 percent of Moose lodges that have no liability because they do not use music or have discontinued music rather than submit to these demands, neither does it include SESAC charges which have not yet reached a significant volume, but are steadily growing.

This total results from arbitrary charges running as high as $905 per Moose lodge imposed by just one of the three licensing organizations, ASCAP, BMI, and SESAC. The rates they apply to Moose

lodges are identical to the rates they charge public taverns, restaurants, and nightclubs which are operated solely for the financial gain of their owners.

Compounding this already excessive burden, Moose lodges must face the constant danger of precipitous, arbitrary increases without having an adequate remedy available other than protracted and expensive litigation.

This diversion of funds materially reduces the contributions which could be made to Mooseheart, Moosehaven, and local charitable philanthropic and community service activities.

As the subcommittee counsel has acknowledged, many of the newly restrictive provisions applied by the act to nonprofit organizations stemmed from the monster rock concerts which some nonprofit groups sponsored in the past.

However, none of those groups were nonprofit, fraternal, or veterans' organizations; thus, our organizations are being penalized for improper actions which others committed.

The act places an excessive financial burden upon the nonprofit and veterans' organization by its distorted definition of the word "public."

By providing that a performance is made public if it is presented to an audience greater than a family circle or its social acquaintances, the Copyright Act makes a private club public. Fraternal orders, therefore, lose their well recognized character as private groups. This status is already recognized by nearly all concerned branches of Federal and States governments. The Civil Rights Act, as well as the Internal Revenue Code, are illustrations.

So are the State alcoholic beverage licenses held by nearly all Moose lodges which carry a restriction specifically prohibiting accommodation of the general public and limiting the benefits of the license to the members, their families, and their bona fide guests.

In saying that Congress has the right to define the same words differently in various contexts, ASCAP quotes *American Visuals Corporation* v. *Holland.*

But the court in that case does not approve conflicting definitions for the same word. On the contrary, it points out that confusion results.

In a footnote, the court even suggests methods by which confusion could be avoided.

ASCAP should not be like Humpty-Dumpty in Lewis Carroll's "Through the Looking Glass" when he said: "When I use a word it means just what I choose it to mean, neither more nor less. The question is, which is to be the master—that is all."

Additionally although Congress intended and provided for exemption of certain performances, this purpose is virtually defeated for all nonprofit, fraternal organizations by the requirement that there be no compensation paid to the musicians.

This requirement is unrealistic. A performer's services are limited by time and space. In other words, he can perform at only one place and at a given time whereas an author can derive income indefinitely and universally for a single action.

In our society today it is usually unreasonable to expect musicians to perform without compensation even in those cases where they happen to be members of the lodge.

A musician's service represents time that is totally used up. Consequently a composer's creation simply cannot be equated to its live performance.

H.R. 2007 is identical to S. 2082, which was considered in the 96th Congress. Hearings on that bill were held by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery in August and October 1980.

On December 15, 1980, the subcommittee recommended the adoption of the bill, modifying the proposed exemption of nonprofit veterans' organizations and nonprofit fraternal organizations to a performance to which the general public is not invited if the proceeds from such a performance, after deducting reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain.

The subcommittee did not recommend the exemption of all performances of music works by nonprofit veterans or fraternal organizations but limited the exemption to performances to which the general public is not invited, and which are for charitable purposes.

We agree. While this modification is narrower than that requested, the Loyal Order of Moose is nevertheless willing to accept it as a compromise.

Summing up, from 1909 to 1976 America's nonprofit fraternal and veterans' organizations were regarded as exempt from the Copyright Act because they were looked upon as private groups whose musical performances were limited to their members and families.

On behalf of its more than 1.7 million members, the Loyal Order of Moose respectfully urges restoration of the exempt status of these organizations from the requirements of the 1976 Copyright Act.

I thank you very kindly, Mr. Chairman, for your courtesy and consideration.

[The complete statement of Mr. Weis follows:]

PREPARED STATEMENT OF CARL A. WEIS, SUPREME SECRETARY, LOYAL ORDER OF MOOSE; MEMORANDUM ON HOUSE RESOLUTION 2007 CONCERNING THE PERFORMANCE OF COPYRIGHTED MUSICAL COMPOSITIONS BY NONPROFIT VETERAN'S ORGANIZATIONS AND NONPROFIT FRATERNAL ORGANIZATIONS

The Loyal Order of Moose expresses its appreciation to the House Judicairy Subcommittee on Courts, Civil Liberties and the Administration of Justice for the opportunity to submit this memorandum in support of HR 2007 to amend Title 17 of the United States Code to exempt non-profit veterans' organizations and non-profit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders.

The Loyal Order of Moose, which was organized in 1888, is a non-profit private fraternal Order now including more than 2,000 lodges throughout the United States. Each lodge is separately incorporated not-for-profit and has its own board of officers and its own funds. The purposes of the Order as stated in its Constitution are to unite in the bonds of fraternity and charity persons of good character; to educate and improve members and their families; to assist aged members and their wives; to encourage and educate members in patriotism and obedience to laws; to encourage tolerance; to render services to orphaned or dependent children by the operation of the institution called "Mooseheart", situated at Mooseheart, Illinois; and to serve aged members and their wives at the institution called "Moosehaven", which is in Orange Park, Florida. The Supreme Lodge of the World, Loyal Order of Moose, is the administrative representative and agent of the lodges of the Order in all

matters of common and joint interest which may be best administered by one central agency.

Both Mooseheart and Moosehaven are charities maintained by a portion of the dues of members and contributions of members and their families. Both establishments have always been recognized as tax-exempt, contributions to which are deductible from income taxes. Mooseheart was founded in 1913 and has provided a home and education for more than 7,000 fatherless children, some of them for as long as 18 years each. Moosehaven was founded in 1922, and is providing a home and security for more than 500 dependent old-timers as we meet here this morning. In addition, the different lodges support a broad range of purely local, charitable, philanthropic and community service activities. The continued existence of these charitable and community service activities depends upon the dues and contributions from these members. No public solicitations of any kind are ever made.

To help carry out the purposes of the Order nearly all Moose lodges provide music as a social activity for their members. For such functions, lodges usually hire one of more musicians, frequently members of the lodge, to furnish music for the particular occasion. On all such occasions, admission is limited to Moose members, their wives, and their guests. Moose lodges use music strictly for nonprofit and noncommercial purposes, in which no provision is ever made for a profit for any promoters or organizers—usually not even for the lodge itself. Lodges are merely interested in furnishing music for their members and their wives on various occasions throughout the year, infrequently making the equivalent of an admission charge to offset part of the cost of the evening, but never to make a profit for any promoters or organizers or anybody else, or even the lodge itself. Many of these affairs actually result in a small loss which the members willingly offset with a portion of their dues payments.

Naturally, increased costs occasioned by copyright fees and licenses result in more frequent losses which are borne by the respective lodges. Those losses curtail contributions to charitable institutions of the Order as well as local charitable, philanthropic and community service activities, and reduce the effectiveness of the lodges as well. On a projected basis the amount paid for royalties and licenses by Moose lodges alone is more than a half million dollars annually.

Applying this projection to the other three non-profit fraternal organizations we have joined in support of H-2007, produces the total cost to our combined organizations, not including veteran's organizations, of more than three million dollars annually.

This results from arbitrary charges running as high as $905 per Moose lodge, imposed by just one of the three licensing organizations: ASCAP, BMI, and SESAC. The rates they apply to Moose lodges are identical to the rates they charge public taverns, restaurants and nightclubs which are operated solely for the financial gain of their owners. Compounding this already excessive burden, Moose lodges must face the constant danger of precipitous arbitrary increases without having an adequate remedy available other than protracted and expensive litigation. Witness ASCAP'S testimony to the Senate Subcommittee about "maximizing royalties" and looking forward to "once all users are licensed".

This diversion of funds materially reduces the contributions which could otherwise be made to Mooseheart, Moosehaven, and local charitable, philanthropic and community service activities. In fact, in an effort to reduce the effects of the excessive burden of the Act, it has become necessary for many lodges to reduce the frequency of musical entertainment they provide for their members.

As the Subcommittee Counsel has acknowledged, many of the newly restrictive provisions applied by the Act to nonprofit organizations stemmed from the monster "rock" concerts which some nonprofit groups sponsored in the past; however, none of those groups were nonprofit fraternal or veterans' organizations. Thus, these organizations are being penalized for improper actions which others committed.

The 1909 Copyright Act took note of the distinction between public performances for profit and those not-for-profit. Historically, public performances were required to have permission of the copyright owner and hence generally were charged a fee. Nonprofit performances were exempt. The 1976 Act now in effect reverses this. It does so by broadening the definition of the word "public" in such a way as to distort its generally accepted meaning. The word "public" is defined in the dictionary as "of, pertaining to, or affecting the people as a whole, the community, state or nation". The definition in the present Copyright Act is much broader. Section 101 states "to perform or display work 'publicly' means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered . . ."

The Act places an excessive financial burden upon the nonprofit fraternal and veterans' organizations by its severely narrowed definition of a "private" group. An illustration of this severity is the observation that a literal interpretation of the Act would require in many cases a "father of the bride" to obtain a music license for his daughter's wedding reception at their home simply because he is paying one or more musician's and has invited some of the groom's friends who have never been within the circle of his family and his social acquaintances, and, in fact, who are totally unknown to him and his family. The wedding reception thereby becomes a "public performance" under the terms of the Act.

The definition of "public" (or "publicly") in the Copyright Act is in direct conflict with the language of the public accommodations section of the 1964 Civil Rights Act which exempts private clubs and other establishments not in fact open to the public. By providing that a performance is made public if it is presented to an audience greater than a family circle or its social acquaintances, the Copyright Act makes a private club public. The Civil Rights Act does not define the word "public", so it must be given its generally accepted meaning as pertaining to the community as a whole. If the definition in the Copyright Act were accepted, clubs would be in fact public and the distinction as a private group intended to be given by the Civil Rights Act would be lost. Fraternal Orders would, therefore, lose their well recognized character.

This status is already recognized by nearly all concerned branches of Federal and State governments. For example, the State alcoholic beverage licenses held by nearly all Moose lodges carry a restriction specifically prohibiting accommodation of the general public, and limiting the benefits of the license to the members, their families, and their bona fide guests.

Additionally, although Congress intended and provided for exemption of certain performances, this purpose is virtually defeated for all nonprofit fraternal organizations by the requirement that there be no compensation paid to the musician. This requirement is unrealistic. A performer's services are limited by time and space in other words he can perform at only one place at a given time, whereas an author can derive income indefinitely and universally from a single action. In our society today it is usually unreasonable to expect musicians to perform without compensation, even in those cases where they are also members of the lodge. A musician's service represents time that is totally used up; consequently a Composer's creation simply can not be equated to its live performance.

The Loyal Order of Moose does not object to a requirement that all performances truly public should require permission of the copyright owner; or to the concept that all persons engaged in a genuinely public venture for profit should share in the profits. It does object to the requirement that a fee be paid for a performance given by a private nonprofit veterans or fraternal group for its bona fide members and their wives. Such functions are simply not public, except by artificial definition. This requirement of a fee unfairly burdens the lodge officers and members who give of their time and energy in order to help a charity, and diverts to the copyright owner sums which would otherwise be available to that charity. Sums intended by the lodge members to be used for charity are thus siphoned off for the copyright owner.

The power given Congress by the United States Constitution to enact a copyright law was not primarily for the benefit of the author, but primarily for the public. The permissive words of The Constitution granting the power are "To Promote the Progress of Science and Useful Arts". The United States Supreme Court had held that the copyright law makes a reward to the owner a secondary consideration.[1] It has held that rights of access through fair use of the copyright material pertaining to the culural, aesthetic, historical, educational, scientific, technical and religious heritage of the nation come within the scope of the right of free press guaranteed by the Bill of Rights.[2]

The first amendment guarantees freedom of speech, of the press, and assembly, and the Supreme Court has said that these rights are meaningless unless the people have freedom of access to the materials protected. It has, therefore, consistently applied the doctrine of fair use to copyrighted materials. In passing upon particular claims of infringement, courts have unhesitatingly subordinated the copyright holder's interest in a maximum financial return to the greater public interest in the development of arts, science and industry.[3]

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[1] *Mayer v. Stein,* 347 U.S. 201, 74 S.Ct. 460, 471, 89 L.Fd. 630 (1954), 643.

[2] *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-390, 23 L.Ed2d 371, 386-389. *Kleindienst v. Mandel,* 408 US.S 753, 760, 762-65, 33 L.Ed2d 683, 692.

[3] Berlin v. E. C. Publications, 329 F.2d 544.

The Loyal Order of Moose respectfully submits that a performance given by a veterans' group or a fraternal lodge to its members and guests for nonprofit and noncommercial purposes is fair use of the copyrighted material and should not be regarded as a copyright infringement.

HR 2007 is identical to S 2082 which was considered in the 96th Congress. Hearings on that bill were held by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery in August and October, 1980. On December 15, 1980, the Subcommittee recommended the adoption of the bill modifying the proposed exemption of non-profit veteran's organizations and non-profit fraternal organizations to a performance to which the general public is not invited, if the proceeds from such performance, after deducting reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. The Subcommittee did not recommend the exemption of all performances of musical works of non-profit veteran's organizations or non-profit fraternal organizations but limited the exemption to performances to which the general public is not invited, and which are for charitable purposes. We agree. While this modification is narrower than that requested, the Loyal Order of Moose is nevertheless willing to accept this as a compromise.

RESPONSE TO OBJECTIONS

Objectors to the proposed amendments have asked why copyright owners should be compelled to forego royalty for their compositions played at functions sponsored by non-profit veteran's and fraternal organizations when such bodies must pay the performers for their services, the plumber for repairing a leaky faucet and the liquor dealer for beverages. Historically, these last named persons have always had a property right to the items they furnish. Copyright owners are in a different category. Their property rights are strictly limited to those established by statute. They always have had a common law right to works they created but this ceased upon publication. An author or composer had title to his manuscript and could proceed against anyone who published it without permission, but this right was lost if he published it himself.

Rights to published works are obtained only by statute.[4] Authority to adopt a copyright law is conferred by Article I, Section 8 of the United States Constitution. This constitutional provision does not mandate the enactment of a copyright law. It merely gives Congress authority to do so. Copyright is a privilege conferred by statute and not a right guaranteed by the Constitution. Without this authority Congress could not pass a copyright law at all and the author would have no right after he published his song or his book, but Congress does have this authority and has exercised it in a series of copyright acts. Properly, each of these acts has defined the limits of copyright.

Until the 1976 Act was passed the laws provided that no copyright license was required for a performance unless the performance was public. This was a proper concession for the copyright owner to make for a privilege which he had never had before. Until 1976 the privilege granted by copyright had always been subject to limitations contained within the respective acts themselves but the courts imposed further limitations. They have held that copyrights are subject to the fair use doctrine.

The Supreme Court has held that copyright law had not been enacted for the primary benefit of the copyright owner but primarily for the benefit of the public. It has applied the doctrine of fair use to copyrighted material. It has stated that rights of access to fair use of such material pertaining to the cultural, aesthetic, historical, educational, scientific, technical and religious heritage of a nation come with the scope of the right of free press guaranteed by the Bill of Rights. That right may not constitutionally be abridged by Congress.[5]

Use of copyrighted music for dances given to a private group for the benefit of charitable projects is a fitting example of fair use and is a small concession for a composer to make for rights conferred by the copyright law which had not existed before. As we have stated the cost to the lodges of the Loyal Order of Moose alone for one year has been projected to be more than $500,000. Costs for other fraternal units such as the Knights of Columbus, the Elks and the Eagles are undoubtedly as great and for the American Legion and Veterans of Foreign Wars the cost is much greater. On the other hand, testimony introduced by ASCAP at the hearing before the Senate Committee in 1980 showed that its receipts from fraternal orders and veteran's organizations comprise but a minute fraction of its total income of hun-

[4] *Bobbs-Merrill Co. v. Strews,* 210 U.S. 339, 52 L.ed, 1086, 1092.
[5] *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 376, 386-390, 23 L.ed2d 371,390.

dreds of millions of dollars. Thus, the benefits to charity by the passage of the proposed amendment would far exceed the loss of income by copyright owners.

Objection has been made that the proposed amendment would take away property from copyright owners. That is not so. Rather, it will simply restore a right which fraternal orders and veteran's organizations had possessed under the 1909 Act. This right was the exemption from a copyright license fee unless the performance was a public one. This right was taken away by the 1976 Act.

"PUBLIC" DEFINED

We have pointed out that the definition of public in the 1976 Act is distorted. It differs from the generally accepted understanding of the word, and from the definition in the 1964 Civil Rights Act adopted by Congress, as well as the definition in all States providing licenses for private clubs. A claim is made that the same word can have different meanings in different statutes and that a word's definition in the law must be seen in its specific context. Nothing in the 1909 Act indicated that the word "public" was used differently than in its generally accepted sense. "Public" is defined as "pertaining to or affecting the community as a whole, community, state or nation".

An earlier act, passed in 1897 provided copyright liability on the part of any person publicly performing copyrighted material. This act contained no "for profit" limitation but there is nothing in the act to indicate that the word "publicly" was used differently than its generally accepted sense. The 1897 Act, therefore, applied only to those performances which the community as a whole could attend. It did not apply to performances at private clubs because they were not open to the public.

The 1909 Act, which was enforced for 69 years, broadened the exemption by providing that even public performances were not subject to the Act if they were not for profit. The 1976 Act, effective January 1, 1978, changed everything. The Loyal Order of Moose had no actual knowledge of the Act until after its passage. But the effect was to require for the first time royalties for performances produced at gatherings historically considered to be private. This was done by drastically changing the definition of the word "publicly". ASCAP admits that the copyright acts' definition of the word "public" differs from its definition in the Civil Rights Act but says that Congress has the right to define the same words differently in various contexts. In support of this contention it quotes *American Visuals Corp. v. Holland,* 239 Fed. 2d 740. But the court in that case does not approve conflicting definitions for the same word. On the contrary, it points out that confusion results. The exact words of the court are:

"In deciding whether certain acts constitute 'publication', satisfying the requirements of 17 U.S.C. Sec. 10, we are confronted with numerous conflicting cases which, by their holdings, though not in their stated rationale, raise more than a suspicion that the term 'publication' is clouded by semantic confusion where the term is defined for different purposes, and that we have here an illustration of the one-word-one-meaning-only fallacy".

In a footnote the court even suggests methods by which confusion could be avoided. Congress should not be like Humpty Dumpty in Lewis Carroll's "Through the Looking Glass" when he said, "When I use a word it means just what I choose it to mean—neither more nor less. The question is, which is to be master—that's all".[6] Furthermore, the word "public" is not used in a different context in the Copyright Act than it is in the Civil Rights Act. Both Acts refer to private clubs as places which do not furnish accommodation to the public.

FAIR USE DOCTRINE

The statement has been made that the purpose of the Copyright Act is to encourage individual effort by personal gain. In support of this *Mazer v. Stein,* 347 U.S. 201 is cited. "The economic philosphy behind the (Constitutional) clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts'." The same case, however, holds "the copyright law, like the parent statutes, makes regard to the owner a secondary consideration". We must point out that encouragement to authors and publishers must be limited by the fair use doctrine which holds that the copyright law is primarily for the benefit of the public. Furthermore, the *Mazer* case was decided in 1954 during the time the 1909 law was in effect and there was no intimation that

[6] "Through the Looking Glass", chapter 6, by Lewis Carroll.

copyright owners should be allowed to charge a license for performances at gatherings not open to the public.

Opponents of HR 2007 apparently misconceive the reason for exempt treatment historically accorded charities. We have pointed out that the Loyal Order of Moose does not object to the imposition of a license fee for performances which are truly public. We do object to the payment of a fee for performances limited to members and their guests for the benefit of a charity. Fraternal orders and veterans organizations now affected by the copyright law maintain or substantially support orphanages, the poor, homes for dependent elderly persons, and the physically handicapped. These are charities in the strictest sense of the word. They come within the classical definition of charity, which is a gift "to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government".[7]

If the institutions described above did not exist the need would have to be supplied by government and the cost would have to be borne by the tax payers. Opponents of HR 2007 do not deny the worth of private charities but claim that they should not be mandated to support them, but as has been pointed out, copyright owners were given substantial rights upon publication of their material by the Constitution and statute which they never had before and this contribution to charity is but a small concession to make. The 1976 Act, without notice to charities or fraternal orders, has unintentionally discouraged attempts to aid private charities.

Summing up, from 1909 to 1976 America's nonprofit veterans' and fraternal organizations were regarded as exempt from the old Copyright Act because they were looked upon as private groups whose musical performances were generally limited to their members and families. In behalf of its more than 1.7 million members, the Loyal Order of Moose respectfully urges restoration of the exempt status of these organizations from the requirements of the 1976 Copyright Act.

The Supreme Lodge of the World, Loyal Order of Moose, by

CARL A. WEIS,
Supreme Secretary.

CLARENCE J. RUDDY,
General Counsel.

Mr. KASTENMEIER. We appreciate your statement, Mr. Weis. It is very thorough.

Let me say at the outset I don't think one thing is at issue. That is the value and public purpose of both veterans or patriotic organizations and fraternal organizations and the fact too that Congress has, in years past, specifically provided particularly for patriotic organizations in particular ways to foster and encourage these organizations. I would say that that point is not at question. It refers to both patriotic, veteran and fraternal organizations who are not represented before the committee today. Nonetheless, the remarks of the witnesses I am sure reflect their own views as well as those organizations.

Let me first ask you: There are several bills. You may or may not be familiar with all of them.

If you are not, that is understandable. No one is charged with knowing what all the bills are that are introduced on any given subject or similar subjects.

As noted, Mr. Young of Florida has introduced, H.R. 2007. I am not sure whether Mr. Donnelly's and Mr. Johnston's bills are the same or slightly different. They appear to be slightly different, but I am not precisely sure whether it is a matter of form or substance.

[7] 15 Am Jur 2d 10.

Also, Mr. Young has a bill, H.R. 2006, which does have slightly different language and may not apply to fraternal organizations or veterans' organizations. I don't know.

Apart from what Mr. Weis said about the bill that was acted on in the Senate committee last year, what is your disposition toward the several bills that are introduced before us? Are they identical?

Do you support them? I gather you are willing to accept a modified version of these bills.

Mr. RIGGIN. Mr. Chairman, I have in front of me H.R. 3408, which I believe is one of the bills you referred to.

Mr. KASTENMEIER. Yes.

Mr. RIGGIN. My quick reading of the bill would indicate no opposition by the American Legion. It seems conceptually identical to the bill before us.

Mr. KASTENMEIER. That is almost identical, I believe.

I think it differs only from H.R. 2007 in form. If one reads the second page, there are some slight variations in it.

Mr. RIGGIN. Yes, sir. Both bills would add a No. 10, a subparagraph No. 10, I guess, to the list of categorical exemptions from the copyright provisions.

We would have no opposition to that bill. I do not know what H.R. 2108 includes. I do not have that bill with me.

Mr. KASTENMEIER. If at any time subsequent to this hearing, you do examine those bills and have a view about them, we would invite your communicating by letter to us.

The essential question has always been asked, and indeed, Mr. Weis attempted in part to answer it.

Why, if one is willing to pay musicians ought they not be willing to pay composers for music for which there is an admission charged?

Should not these composers be compensated? Why should these composers be asked to involuntarily make a contribution to a fraternal or veterans' organization no matter how worthy that organization is by having his or her music played without recompense? That is a basic question.

I just wondered whether you had any shorthand answers to that?

Mr. WEIS. Mr. Chairman, as you have mentioned, we covered that in our presentation here to the extent of making the distinction between the work of a composer not being related to time or place whereas musicians' services are subject to now—he earns his daily bread and butter now, and once the time that he devotes to the playing of a piece of music is accomplished, that time is gone, gone forever.

That is not true with regard to the work of a composer. The time element involved goes for his lifetime plus 50 years. For that reason the fact that the time and place elements are totally incomparable between the two jobs, so to speak, or between the two recompenses, makes them incomparable with each other for that reason.

They just do not equate with each other for that purpose.

Mr. KASTENMEIER. It is true, they are not the same. I make these arguments, you understand, in terms of a colloquy among us to explore the issues. One can also argue that musicians can play at another time and another place for money as well.

Furthermore, one could ask Joe, Harry, and Jim whether they would play for nothing down at the Moose Lodge Friday night and they could either say yes or no.

It is somewhat harder to ask the composer that. Here we would presume to take his music without even asking him whether he would like to donate the playing of his music for a given night for a worthy cause.

So I think the argument can be made on both sides. They are not the same, but in both cases it is a person's work that is used.

Mr. RIGGIN. Mr. Chairman, it is certainly a very, very basic question, perhaps the basic question on this entire issue.

It is also a question that Congress could perhaps ask itself. It is obvious that Congress, in amending the Copyright Act in 1976, felt that exemptions were in order for nonprofit activity, and it would appear, based upon that action, that Congress did evaluate the social benefit derived from those respective activities.

I think that question has to be considered in a complete fashion during your deliberations and I would submit for your consideration that the standard established by Congress at that time would certainly not be violated in any fashion whatsoever if an exemption was extended to veterans and nonprofit fraternal organizations if in fact social benefit being derived from those services is the standard by which Congress felt that the nine categories of exemptions should be granted.

I have to think that is part of your consideration here.

Mr. KASTENMEIER. You have all obviously done research on the questions to the extent of the State fairs. The fact is that a case in point had been educational institutions' use of mass audiences presumably for profit which appeared to be in abuse; the great rock groups that appear at the great universities for thousands of people and then the question is asked, is that really what the law intended at the outset to exempt that sort of activity?

The committee answered no.

The State fair, I think, is an anomaly of a sort, although some rationalization was offered at the time.

Let me ask you this: The reason I am a little bit up in the air on this one, I was reading the testimony of one of the witnesses to come which indicates that ASCAP will license each Legion post which regularly uses music for only $40 annually.

This is a significant reduction from the fees ASCAP charges commercial establishments which perform music in a similar fashion.

I am not sure whether this is prospective or what, since the cases used indicate—both by the VFW, by Mr. Schwab, and by Mr. Weis, indicate a larger fee.

Mr. Schwab, you offered an agreement indicating what I take it to be an annual fee of $285 for an Effingham, Ill., VFW post.

You, Mr. Weis, referred to fees which average $187 a year.

We are talking, apparently, about one performing rights society. Can you explain the anomalies?

Mr. RIGGIN. I would be happy to explain them, Mr. Chairman.

At the current time the American Legion is being charged just as the VFW and the Moose are being charged in accordance with a set of standards established by the respective copyright agencies.

The $40 figure to which you refer derives from some discussions that the American Legion and ASCAP and BMI, in fact, have involved themselves in over the last 10 months.

It was the position of the American Legion, as we went into these discussions, to, in view of current law, and in view of our requirement to pay as the law is now interpreted. We felt that it would be beneficial to us obviously if we could get a lower rate.

We are not a commercial, profitmaking operation. That discussion was designed simply to create an agreement until a legislative remedy or a legislative resolution of the situation was established.

It was not designed to be a permanent negotiated settlement.

It, in fact, does not indicate a change in our position where we would seek a resolution of the problem through negotiation rather than legislative remedy.

The $40 figure is something that is being discussed at this point. It is not in effect.

Mr. KASTENMEIER. I understand.

Let me ask you then, would a $40 annual license per chapter be excessive?

Mr. RIGGIN. Of course, $40 wouldn't be excessive; no, sir. Our concern is that if we allowed $40 to be established as an annual fee at this particular point and therefore failed to seek legislative remedy on that basis, we are then exposing ourselves again to rate increases in the future which we don't have any control over at all.

I do not believe that the $40 rate would last more than 1 or 2 years in any kind of agreement with either one of the copyright agencies.

Again, that is something that was designed as an interim remedy to the situation as we saw it.

Mr. KASTENMEIER. I notice that the bills include veterans and fraternal organizations. I think the term is "performance of a musical work in the course of the activities of a nonprofit government organization or a nonprofit fraternal organization."

Why are other nonprofit clubs or organizations, groups, not included? Might they not have the same claim? Should the bill be as narrow as it is?

Can you distinguish why it is nonprofit veterans and fraternal, but not other nonprofit organizations?

Mr. RIGGIN. I can't give you a description of what the thought processes were of those people who introduced the bill.

I can say that we talked to a lot of people and asked them to introduce legislation for us.

Perhaps you could give an example of another nonprofit organization that would be included in something like this. I am not quite sure what you are asking about, sir.

Mr. KASTENMEIER. Well, a chapter of the American Red Cross would neither be fraternal nor veteran—they would be nonprofit and they would be charitable—I don't make the argument.

Practically speaking, I understand that veterans' organizations and the fraternal organizations were the ones most directly affected to engage in this activity and perhaps not other groups.

I was just asking for the purpose of fully exploring the impact or nonimpact.

Mr. RIGGIN. I think the difference there, Mr. Chairman, is the fact that nonprofit fraternal and nonprofit veterans' organizations, of course, do this on a continuing basis, use music on a continuing basis, whereas the American Red Cross would be doing it once a year or at a special event.

I would imagine that would be one distinction that could be drawn. Whether, in fact, that was part again of the thought processes of these respective authors as they introduced this legislation, I don't know.

Mr. KASTENMEIER. I ask this question collectively. Have your communications or negotiations over the past several years since the passage of the 1976 Copyright Act been primarily with ASCAP or with BMI and SESAC equally?

Mr. WEIS. In our case, Mr. Chairman; no.

ASCAP has been the most aggressive of the 3 and at the last count that I took they had contacted 700-some lodges. BMI, I believe, is somewhere around 500. SESAC is probably less than 100.

I didn't take a total of that one. In all three instances the impetus, the momentum is increasing in keeping with the theory of maximizing royalties and eventually having all organizations licensed that require it.

Mr. SCHWAB. Mr. Chairman, at the Senate hearing in the last Congress, one of the copyright organizations, in response to a question, said they would be willing to negotiate a lesser royalty for veterans and fraternal organizations, but this would, No. 1, place our State quartermasters in the position of doing the paperwork, the bookwork, the legwork and acting as a collection agency for ASCAP, primarily ASCAP and BMI. This is somewhat distasteful to us.

We would be working for them, as a matter of fact.

Mr. KASTENMEIER. The language reached by the Senate to which the exemption applies, where the general public is not invited, which activities are carried on for charitable purposes, would this be descriptive of nearly all the cases of the use of live music or some of them only in terms of fraternal or veterans' organizational activities?

Mr. WEIS. In our case, Mr. Chairman, it would be descriptive of many of them, but not all of them. That was the reason why I mentioned in the testimony that the action of the Senate subcommittee narrowed our original appeal and our request.

Nevertheless, that is acceptable to us in the terms of a compromise. We are in agreement.

Mr. KASTENMEIER. Then you would be left either with discontinuing other activities or subjecting yourself to liability and licensing, wouldn't you, for the other activities which did not comply fully with the general public not being invited and the purpose of which was being carried out for charitable purposes?

Mr. WEIS. That is correct; yes, sir.

Mr. SCHWAB. That would cover activities—should cover all activities in our V.F.W. posts because inviting the public would subject the post to revocation of their charter. I have said suspension or revocation. It would really be revocation of the charter.

The only problem that might arise would be with renting out the hall to private parties or other organizations. That is another area

that would have to be explored because our posts frequently do rent out their function rooms for private parties and they are not V.F.W. functions per se.

Mr. RIGGIN. Mr. Chairman, we think that the language as adopted by the Senate Judiciary Subcommittee on improvements in judicial machinery is reflected in a bill which has been introduced in the Senate this year, S. 603.

Mr. KASTENMEIER. By whom?

Mr. RIGGIN. By Senator Zorinsky.

By the way, cosponsored by four members of the Senate Judiciary Committee.

We think the bill, as introduced this year, as modified last year by the Senate Judiciary Subcommittee, is worded in such a fashion that it makes it only fair to the authors and composers and to the copyright organization.

It specifically states that the social function or the function has to be organized and promoted by a nonprofit veterans' or fraternal organization and that the proceeds from such a performance after deducting reasonable overhead costs would be used exclusively for charitable purposes. That is only fair.

I have to agree with Mr. Schwab. If we have any operations, any activities that are going on around the country in our local Legion posts which do not conform to those requirements, then those posts are subject to having their charter revoked by the organization.

If the public is invited on a consistent basis, it puts us in competition with commercial enterprises down the street who do have to pay copyright royalties which is, of course, a circumstance that would be unfair.

I know that the copyright organizations are going to make that point when they come up here and testify before you in a few minutes. It is absolutely a legitimate point.

Mr. KASTENMEIER. Of course, we will hear from them, but the option would be not necessarily whether you revoke their charters, and you might want to do that, but that is your own business. But, whether they do then, in fact, become fully liable for licensing.

They then exceed the exemption.

Well, I appreciate that testimony.

Mr. SCHWAB. Mr. Chairman, I have a question.

Knowing little about copyrights, when this issue surfaced I was amazed that the copyright ran for the life of the composer or author and for 50 years after his death. That is down into the third generation. Is this the rule for all copyrights?

Mr. KASTENMEIER. It is the rule for all copyrights which are attributable to individuals as of 1976, pursuant to the 1976 Copyright law.

Prior to that they were for terms of 28 years, renewable for 28 more years, or 56 years, but the life plus 50 was the common term granted in the rest of the world; Western Europe, for example, although there are some variations of that.

We made our law conform to that not only to protect our authors and composers, but to enable us to enter into certain international conventions. It is indeed a long time.

I know there are some people who felt that in terms of the second and third generations it was questionable what public bene-

fit is derived from that, but the term is an expression of concern for protecting the work of authors and composers and is meant to be generous to them.

Mr. SCHWAB. All right. Thank you, sir.

Mr. KASTENMEIER. The term for a motion picture corporation, I think, is 75 years. They have no life, but for individuals it is life plus 50 years.

The gentleman from Illinois?

Mr. RAILSBACK. Thank you, Mr. Chairman.

Has there ever been a legal determination that you are liable?

Mr. RIGGIN. A legal determination that we are liable if an individual post does not pay?

Mr. RAILSBACK. Yes.

Mr. RIGGIN. You are asking whether the legislation, the current law has been tested?

Mr. RAILSBACK. Yes. Exactly.

Mr. RIGGIN. I am not aware of an individual case where that has been tested. I just am not personally aware of it. I am sure that the——

Mr. RAILSBACK. Are any of the other witnesses aware of any?

Mr. SCHWAB. I am unaware of it having been tested in any of the States. This would have to be a State action, by the V.F.W. in the State function.

I will pursue this matter, but I am not aware of any at this time.

Mr. RAILSBACK. What are we talking about in terms of your own experiences? Have many of the locals been paying the copyright? I know some apparently have and some have not.

Mr. SCHWAB. Yes, sir. ASCAP has been the most aggressive; there is no question about it. BMI less so, and really I don't think we have heard from this organization called SESAC. I don't know what that stands for. Apparently a survey that is underway now, ASCAP and BMI have been most active in Indiana, Maryland, Washington and Michigan.

Mr. RAILSBACK. What has been the response to their activities? In other words, what have your various locals been doing?

Mr. SCHWAB. Of course, when the public law was passed, we advised all our posts that they should pay because performing music in their homes without a license would be an infringement and subject the post to a $250 fine for each piece of music performed without a license, plus court costs and attorneys' fees.

I have had a post call me and say, look, they have contacted me; do I have to do this?

I say, absolutely you do. We are trying to have the law amended, but you have to comply.

Mr. RAILSBACK. So really as far as any of you know, there has not been any kind of a formal, judicial determination that you are in fact liable, but that is as you see it yourselves?

In other words, you believe that you are liable?

Mr. SCHWAB. Yes, sir. The public law says so.

Mr. RIGGIN. We have been so advised by the respective agencies, by the respective copyright agencies. Obviously it doesn't make any specific reference, I don't think, to our liability in the law as it stands. It is just that we lose our exemption as a nonprofit veterans organization.

I think it is under subparagraph (4) or something, of section 110. That is the most precise point, we lose our exemption.

We do charge admission and we do pay the performers. We, therefore, lose it.

Mr. RAILSBACK. Most of the performances that we are talking about, however, are not open to the general public?

Mr. SCHWAB. No, sir, they are not.

Mr. RAILSBACK. They are for the members? Even the fundraising affairs?

Mr. SCHWAB. Sir, they are for members of the VFW in good standing, the ladies' auxiliary, and their bona fide guests, not open to the public.

The purpose of most occasions where music is hired is to raise funds for community activities.

Mr. WEIS. Speaking for the Moose, Mr. Railsback, if I may, it has not been tested judicially with the Loyal Order of Moose as a party yet. However, the advice of our counsel is unanimous that there just isn't any question about our liability at the present time, despite the fact that all of our music functions are limited to our members, their wives, and their guests.

Mr. KASTENMEIER. Would you yield?

Mr. RAILSBACK. Sure.

Mr. KASTENMEIER. The common practice in these various communities, chapters, and so forth, is, I take it, members would sell tickets to people, probably people they knew, friends, whatnot. There isn't a sale at the door to one and all type of thing, but tickets are commonly sold, I take it, in the community, to various people who are not members? Those are people you are calling guests, is that correct?

Mr. WEIS. No, sir.

Mr. KASTENMEIER. No?

Mr. WEIS. No, sir. In the Loyal Order of Moose, particularly in our case, tickets are not sold to the public. Tickets are sold to members.

Mr. RAILSBACK. I guess I am thinking the same thing that if you have a fundraiser and some of your members go out and sell tickets to their friends, then isn't that a little bit different than just selling within your own membership?

Mr. WEIS. Mr. Railsback, we have a positive statement in our testimony that the Loyal Order of Moose never goes outside the organization——

Mr. RAILSBACK. I am not talking right now about the Loyal Order of Moose. I was getting back to the veterans groups.

Mr. SCHWAB. Sir, the only way I can answer is that this is not supposed to happen. It is not supposed to happen. It is a violation of our constitution and bylaws.

Mr. RAILSBACK. Oh, is it?

Mr. SCHWAB. Yes, sir. I go to a VFW post where they have never seen me before. I have to show them my card to enter the post. It is that tight normally, yes, sir.

Mr. RAILSBACK. I think that is all I have, Mr. Chairman.

Mr. KASTENMEIER. I was just trying to determine when the liability occurs here.

"Performance of a musical work other than in the transmission to the public without the purpose of direct or indirect commercial advantage and without the payment of any fee or compensation for the performance of any of its performers," and so forth.

"If there is (a) no direct or indirect admission charged."

I was trying to determine whether you had to have both or one or the other.

Mr. SCHWAB. Either/or, I believe, Mr. Chairman.

If you pay the musicians or charge admission.

Mr. KASTENMEIER. If you did not charge at the door, if you paid the musicians——

Mr. SCHWAB. You are still liable.

Mr. KASTENMEIER. I want to thank the three members of this panel. You have been very helpful, and forthcoming in describing the views of your organizations on the several pieces of legislation before us.

I indicated earlier the committee did consider taking the matter up last year, but did not reach this question because of the heavy press of legislative business.

We are pleased to have an opportunity to hear you on this and we will have to take the matter under advisement on the basis of the testimony here this morning from you and our subsequent witnesses.

We are grateful to all three of you.

Mr. SCHWAB. Thank you, Mr. Chairman.

Mr. KASTENMEIER. All three of our next witnesses have been expert witnesses before this subcommittee not only once, but many times in the past.

I would like, of course, to greet Mr. Bernard Korman of the American Society of Composers, Authors and Publishers. He is the general counsel of that organization.

I would also like to greet Edward M. Cramer, president of the Broadcast Music, Inc., and Mr. Albert Ciancimino, special counsel to SESAC, who formerly was general counsel.

Mr. Ciancimino has been before the committee many times in the past as well.

All three of you we greet again.

TESTIMONY OF EDWARD M. CRAMER, PRESIDENT, BROADCAST MUSIC, INC.; BERNARD KORMAN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; AND ALBERT CIANCIMINO, SPECIAL COUNSEL, SESAC, INC.

Mr. KASTENMEIER. Mr. Cramer, would you like to proceed first?

Mr. CRAMER. Thank you, Mr. Chairman.

I have a brief four-page statement which I hope the committee will incorporate in the record. I think I can be briefer than the four-page statement because my position was summarized quite succinctly in some of the questions that you put to the witnesses.

I do have, however, four or five other statements here which I ask be included in the record; one by Irwin Levine and L. Russell Brown. They are the songwriters who, among other things, wrote "Tie a Yellow Ribbon" which became part of the American heritage during the Iranian hostage crisis; and a statement by Pee Wee King who wrote, among other things, "Tennessee Waltz;" Sy

Oliver, one of the great oldtime arrangers for Tommy Dorsey, who is still very active; Jerry Goldsmith, one of the leading composers of motion picture music, who has won Academy Awards and three Emmies; Gunther Schuller, who is head of the Tanglewood Music Festival, head of the New England Conservatory, perhaps better known to the general public because he wrote and arranged most of the music for "The Sting;" and Boudleaux and Felice Bryant who are well-know writers, particularly popular. They are popular today but were very, very popular in the sixties.

I submit these to you as representative of the views of the 40,000 writers that BMI represents and I assure you, despite statements made by the proponents, that our affiliates do oppose this legislation. No question about it.

Mr. KASTENMEIER. Without objection, those several statements will be received in the record, as well as your own statement and indeed that of Mr. Korman and Mr. Ciancimino with any appendices or other materials they may care to submit at this time.

[The complete statement of Mr. Cramer follows:]

PREPARED STATEMENT OF EDWARD M. CRAMER IN OPPOSITION TO BILLS REGARDING VETERANS' AND FRATERNAL ORGANIZATIONS

My name is Edward M. Cramer. I am President and Chief Executive Officer of Broadcast Music, Inc. (BMI), a non-profit organization representing some 60,000 American composers, lyricists and publishers, located in every state. BMI's main task is to collect the royalties for these thousands of affiliates wherever their music is performed around the world.

On behalf of BMI, and on befalf of our 60,000 affiliates whose music America plays and whose songs America sings every hour of the day, I am making this statement in opposition to the bill which would exempt "non-profit veterans organizations and non-profit fraternal organizations from paying royalties" for the performance of music as required by the Copyright Act.

Such bill is more than a piece of narrow special interest legislation. Leaving aside questions about its constitutionality, its enactment would create serious precedents which I'm sure its well-intended sponsors did not have in mind.

Simply stated, the questions it raises are the following:

If the organizations can hold dances and charge admission, but don't have to pay the owners of the music they play, then why can't the owners of the halls be required to furnish their facilities rent free,

Why can't these organizations require motion picture companies to furnish films without charge?

Can they go to the local newsstands and bookstores and demand free magazines and books for their lounges?

Should they be required to pay carpenters or plumbers?

I give you these simple examples and it takes little imagination to expand the list, to illustrate the basic flaw in the proposed legislation.

The composer of music and the writer of songs is a creator. What he creates is his property, just as the machine dreamed up by the inventor is his property. The patent law protects the property rights of the inventor; the Copyright Act protects the property rights of the music creator.

If this subcommittee votes to take away the property of the song writer in order to give fraternal and veterans organizations an exemption from royalties under the Copyright Act, it will be voting for discrimination against those Americans who make their living from the music they create.

This bill does not provide the fraternal and veterans organizations with a broad exemption from paying the musicians who play at their functions, from paying for the other performers and entertainment, from paying for the liquor, soft drinks and other refreshments, from paying for the utilities and the cleanup costs.

Only the property of the song writers is taken away, without compensation.

As a veteran, I believe that the veterans of our wars are deserving of benefits because of their service. However, this legislation has nothing to do with the service of veterans to our country. Certainly hundreds, and probably thousands, of the nation's song writers are themselves veterans, and except for the few stars in music

performance, most song writers eke out a bare living from their music. Should this subcommittee vote to take from one group of veterans and give to another?

Hundreds, perhaps thousands, of the nations song writers belong to fraternal orders. Should this subcommittee vote to take from one and give to the other? No! Of course not!

What is this royalty insofar as these organizations we are discussing? We are talking about a small annual fee—as low as $35 per year—from each user of the copyrighted music. For this small fee, BMI issues a blanket license for the use of all the music of all its 60,000 affiliates.

Congress has already given intensive thought and discussion to the issue raised in this bill. Congress debated the issues from 1965 to 1976, when the Copyright Law was enacted. Congress specifically eliminated the copyright exemption given for "non-profit" performance of music under the original act of 1909.

In considering the new copyright legislation in 1976, Congress found that the line between commercial and "non-profit" organizations had become increasingly difficult to draw, and that there was widespread exploitation of copyrighted music by so-called non-commercial organizations.

Congress found that many of the so-called "non-profit" organizations were actually getting an unearned subsidy by not paying for the music they performed, and that the "non-profit" organizations should pay for music just as they paid for all other property, for all other goods and services they used.

It is important to recognize that the new Copyright Act already provides an exemption for non-profit organizations—including the fraternal orders and veterans posts—from paying royalties on copyrighted music. These organizations can play all the music they wish for free, so long as no admission is charged and so long as no compensation is paid to the musicians, or to the producers, or the promoters of the affair.

However, if the musicians are paid, if the promoters or producers are paid, then, says the Copyright Act, the song writers must also be paid a royalty for their music.

Surely this is fair to all concerned.

Mr. CRAMER. Leaving to the side any questions, legal questions of the constitutionality of this legislation, in my view the enactment of this legislation would create serious and in my view dangerous precedent which I am sure that many of the people who supported it are well intentioned and really didn't think about it or realize.

The chairman said what I was going to say, but I will repeat it. On behalf of our affiliates, we don't question that these organizations are well intentioned, that they provide a service for their members and for the public at large.

We agree. That is not at issue with us.

But, our objection is simple: When these organizations hold functions and they pay for all the goods and services they use, they want an exemption only for one supplier of services, only for those who furnish the rights to play the music.

A distinction was attempted to be made here between, for example, a musician and a composer, but let's take a hall, a physical facility that is not being used.

Would they propose that the organizations, because they have a noble purpose, be permitted to go in the community and say we want to use that hall for our function tonight?

It is not going to detract from you, the landlord, because you are not using it anyway. I see no difference.

The rights that our composers have, the intangible right of public performance—it is intangible but it is as much property to them as the physical building.

Why can't these organizations go to the motion picture companies and say to the movies, we want to take your film and we want to show the film tonight? It is not going to be used up.

I can't believe that we would sanction legislation which would permit them to go ahead and take films to use, but that is what they are asking.

Can they go to the local book store and say, I want the following magazines because we want to put them in our lounge because we have a noble purpose?

What about the local carpenter, the plumber, or any other supplier?

I just give you these simple examples. I am sure we can extend them.

The point is that if our affiliates want to make a contribution to these organizations, they should be free to do so just like they can contribute to any other charitable organization, but they should not be compelled to make that contribution.

Mr. KASTENMEIER. May I interrupt, Mr. Cramer, to ask, is there any way—I assume you mean that more than rhetorically—is there any way that can be accomplished in the present day setting?

Could one of your composers say, look, I happen to be a member of the VFW and if one of the posts wants to use my music any time, I would like to make it available to them?

Mr. CRAMER. Yes.

Mr. KASTENMEIER. Is there any way such a clearance could take place?

Mr. CRAMER. Absolutely. I am sure my colleagues will explain to you—Mr. Korman of ASCAP, it is our procedure if our individual members want to grant a license of that kind, they can grant individual licenses, or they can make a contribution.

I am digressing a bit, but we talk about—perhaps this is as good a point as any to bring it up.

We talked about how much is involved here. We offered, during the hearing before the Senate subcommittee, to negotiate deals on a basis which would give us statewide contracts for $35 a post. We met with representatives of the Moose and we got no response. We went out to their headquarters. That is what we are talking about here. We are not talking about millions of dollars. We are talking about a small amount of money. We are really talking about a principle.

I do want to point out in concluding here that the act does provide an exemption now for nonprofit organizations, including the veterans' organizations and fraternal organizations. They don't have to pay. They can play all the music they want as long as there is no admission charge and they don't pay the musicians.

Our position is that if the musicians are paid, the producers are paid, or the promoters are paid, then the songwriters should be paid.

One last comment: During the hearings before the Senate in response to the comments made, particularly Congressman Railsback's similar observations here, they kept repeating that the public was not invited to these functions.

I produced at that hearing hundreds of ads with the logo from VFW, with the logo from the AF of M, with the Moose on it, public invited, $3, $6, public invited.

Those ads were submitted. They were part of the record. I have some of them here.

Moose Lodge, with the Moose logo, Friday, October 5, pizza and beer; Saturday, October 6 dance, just country. Nothing about limiting this to members.

I have many ads here from the VFW with the VFW logo. Despite the testimony here—this was given to these people last year and I don't believe that any VFW branches were suspended.

Thank you for your time. I will be pleased to answer questions.

Mr. KASTENMEIER. Thank you, Mr. Cramer.

Mr. KASTENMEIER. Mr. Korman.

Mr. KORMAN. Thank you, Mr. Chairman. I understand the ASCAP statement will be made part of the record and I shall not even summarize it in order to make just a few brief points.

I think the issues here are clear to all.

I should perhaps call the chairman's attention to some of the discussion in the appendix. We deal in the appendix with some of the legislative history.

Mr. Chairman, this will be deja vu for you.

Back in 1965, 16 years ago, this issue was being aired as to how to deal with the whole question of performances by charitable organization in the context of whether a veto should be permitted.

The issue was being discussed not by us; it was raised by representatives of the Commerce Department and the people discussing the issue were Congressman Poff, yourself, Mr. Chairman, and Professor Nimmer.

Congressman Hutchinson was also involved.

If you look back at that record which we have summarized, you will find the issues are laid out. Congress decided not overnight, but after very careful consideration, which exemptions belong in the law.

Section 110 was very, very, very carefully thought through. Nothing has changed to suggest that these good people should be exempt.

One of the representatives referred to Humpty-Dumpty this morning, which leads me to suggest that the arguments being made here are really Chicken Little arguments.

The sky is falling; the rates are going to go through the roof; everybody is going to be sued.

What has happened? There hasn't been a single lawsuit brought under this act.

As a matter of fact, we sued the AMVETS under the old act and they were liable.

These people are probably liable in many cases under the old act. Indeed, the American Legion had a policy of cooperating with ASCAP whenever we had a complaint from a licensee that the licensee was suffering from competition from an American Legion post.

We would get in touch with national headquarters of the legion and say post number so and so in such and such a town is furnishing musical entertainment. We have a licensee who is being hurt and complaining. Would you please see to it that they take care of this? And they did.

We had at least 100 American post licenses under the old law. Now we are talking about total payments for ASCAP, BMI, and SESAC of $100 a year.

The fear is expressed that somehow that is going to cause people to stop using the music or the post to become bankrupt. That is nonsense.

ASCAP has been around since 1914. I might say that John Philip Sousa, who had the Marine Band, must be spinning in his grave when he hears these folks thinking they ought not to pay for his works, those that are still protected.

They aren't radically changed. Nobody can cite an instance where ASCAP went to someone who had been paying fees at a given level and suddenly—not suddenly; over a period of time, suggesting that those rates should be radically changed.

I think it is important that the committee recognize that that is the way the world works. There is another thing the committee should recognize about this world. That is, that these organizations are in many communities in this country the center of social life in those communities. They are the local restaurants, the local bars, and the local nightclubs; and the small entrepreneur attempting to compete is at a disadvantage.

We are not talking about any money, as I say. Why should they be under any disadvantage.

We want to put in the record—I don't want to take a lot of time with it now, but I am sure the VFW, the Moose, the American Legion representatives are honestly stating what they understand to be the position with respect to the admission policies of their groups.

The trouble is, those aren't the policies. People do go, the public does go to all of these places.

Here is an ad. This is December. I am sorry, November 27, 1980. Long after the hearing in the Senate last year. Dance, Whiskey River, Friday November 28, from 9 p.m. to 1 a.m. Everyone welcome. VFW club. Everyone welcome.

Does that suggest it is limited to members of the VFW? I don't think so.

Mr. KASTENMEIER. One thing I am not clear about is whether the activities are carried on by the VFW post or by someone else who has rented or has use of the VFW hall?

Mr. KORMAN. I don't know the answer to that in this case.

All I have is the ad, Mr. Chairman. It may be it is leased out, but I don't believe it is.

Mr. KASTENMEIER. I think this might be a necessary time to take a break. We are in the middle of a vote. The second bells have rung. I hate to divide your presentation in two parts, Mr. Korman, but we are going to have to rush off. We will be back in several minutes. We will then continue these hearings.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

When we recessed 10 minutes ago, we were in the middle of hearing from Mr. Korman. We were in a discussion about whether public notices indicating that the public was welcome or inviting the public was, in fact, necessarily attributable to the lodge or the post itself.

Just to pursue that 1 minute further, Mr. Korman, would the situation be any different if the lodge or the post rented their hall for that purpose?

Would there be a copyright liability on the lodge or post if they leased or rented their hall for such a public purpose?

Mr. KORMAN. I think the normal rule, Mr. Chairman, is that the landlord is not liable for infringements that occur except where he has and exercises the power to control what goes on or shares in the proceeds, for example.

The leading case, I think, was Shapiro Bernstein against H. L. Green in the second circuit where the H. L. Green stores had leased out to a record seller a portion of a store.

The record seller was selling infringing recordings, piratically made recordings. The landlord there, the department store, had the power to control and also, I think, had a lease that provided that he would share in the profits of the concessionnaire.

Normally I think in a situation like a post leasing to a promoter for a concert or a dance, the post probably would not be liable.

Mr. KASTENMEIER. In other words, in these cases we would have to find that the post or the lodge itself was promoting or underwriting the event?

Mr. KORMAN. I believe so.

Mr. KASTENMEIER. Well, proceed. You are in the middle of your presentation.

Mr. KORMAN. I was about to say something about the Moose, but in view of your question, Mr. Chairman, let me call attention—I am going to take a few of these and ask permission to submit some for the committee's record here. [Exhibits are available in the Subcommittee on Courts, Civil and Administration of Justice files.]

Here is an ad of November 27, 1980, again long after the Senate hearings. New Year's eve party, legion community center, featuring the Squires, one of the most popular groups in the State, in South Dakota.

Limited number of tickets being sold. $25 per couple, $15 dollars a single.

Lunch, mix, and ice will be furnished. Contact certain people for tickets.

Sponsored by American Legion Post No. 88.

There is no question about that one.

Moose Lodge. This one is November 20, 1980. Friday, November 21, Women of the Moose game night, 7 p.m., public invited.

Saturday, November 22, Legion of the Moose, chili/oyster supper, 5 p.m., legion members and wives free; dance to the music of Country Goodtimes, 9 p.m. to 1:30 a.m., Lodge closes at 2 a.m.

When they say legion members and wives free, that suggests to me that others are going to be charged admission.

In any case, it is clear the entire public is being invited.

Moose Lodge, Friday and Saturday nights, November 28 and 29, Country Squires.

Wedding dance, Saturday November 22. All of these are 1980.

At the Montrose Legion Hall, everyone welcome.

A question raised in one of the statements concerned the father of the bride having to pay because guests at the wedding might not otherwise have been members of the formal family circle.

I am sure that is a misreading of the law.

Here is a wedding dance. It isn't really a wedding dance. It is an occasion to get everybody in the community together. Celebrate a wedding, but it is the public. It has nothing to do with a limited group of people.

Mr. KASTENMEIER. Let me read one. Fish fry. Walleye or cod, every Friday at Chisholm Servicemen's Club, 5 to 8, takeout orders.

What interest do you have in that?

Mr. KORMAN. I have none. Did I submit that?

Mr. CRAMER. That must have been mine.

Mr. KASTENMEIER. That is yours, Mr. Cramer?

Mr. CRAMER. May I answer that?

Mr. KASTENMEIER. Yes.

Mr. CRAMER. Part of that was to show that these organizations in their general functions don't limit their activities solely to members. Not just with music, Mr. Chairman. That the scope of their activities goes far beyond limitations solely to the members, whether it be dances, fish fries, or something else.

Mr. KASTENMEIER. All right.

Mr. KORMAN. Mr. Chairman, we have other ads that indicate that all of these groups invite the general public to occasions where music is being performed.

I shall submit those, if I may, at a later date.

I have only one or two quick points.

First, with respect to the agreement reached with the American Legion, it is an agreement. We have shaken hands on it. The terms are noted. Indeed, the fee will not stay at $40. It will go up. It will be adjusted for consumer price index changes.

I think the first adjustment will be in 1983, but it isn't going to go up very much.

Considering what this fee is, $40 per year, these people charge $25 a couple for a dance. So you are not talking about a lot of money. Agreements along these lines are available to these other groups if they will sit down and talk to us.

Again I stress we have tried to talk to them. We have not brought any lawsuit. We are certainly not acting—our members might complain perhaps, but we are being—they might say we are being dilatory or not properly protecting their rights. There are a lot of infringements going on daily.

The notion that somehow we are imposing a burden on the Veterans of Foreign Wars, when we ask them to keep some records, what records are we asking them to keep? For $40 per post, please tell us which of your posts are covered.

The only records that the State organization would have to keep under the American Legion agreement—and the same would be available to these other groups—would be records of those posts for which fees are to be paid; namely those where music is used.

All they have to do is pay $40 for each of them and list them so we know. I can't believe that is much of a burden.

When you consider that people have been infringing copyrights and this is the price for a license to use all the copyrighted music in the world, if you add BMI and SESAC, that is what you are talking about, I must say it is Chicken Little, Mr. Chairman.

Having said that twice now, I suppose I should stop here unless there are questions.

[The complete statement of Mr. Korman follows:]

PREPARED STATEMENT OF BERNARD KORMAN, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, IN OPPOSITION TO H.R. 2007 AND H.R. 2108, BILLS TO AMEND THE COPYRIGHT ACT

The American Society of Composers, Authors and Publishers (ASCAP) submits this statement in opposition to H.R. 2007 and H.R. 2108.

INTRODUCTION

H.R. 2007 and H.R. 2108 are ill-conceived attempts to deprive creators of the rights to their property, under the guise of assisting charitable organizations. They are unjustified pieces of special-interest legislation, and would do great harm to the Constitutional principle of protection of authors's rights. As we shall show, there is neither a legal nor a practical justification for passage of these bills. To the contrary, there are many sound reasons why they should be defeated.

I. THERE IS NO LEGAL JUSTIFICATION FOR THE PROPOSED EXEMPTION

We have attached, as an Appendix, a detailed statement of the legal issues raised by the proposed legislation. It shows that there is no legal basis for the proposed exemption for uses of music by fraternal and veterans' groups:

The 1976 Copyright Act represents the proper standard of copyright protection; it is not an aberration, as the fraternal and veterans' groups have suggested.

Congress carefully considered both the "for profit" and "public" aspects of the performing right in the 1976 Copyright Act, and concluded that fraternal and veterans' groups should pay for the musical property they use.

Congress has already granted a well-reasoned exemption for performances of music by these groups in 17 U.S.C. § 110(4), and it should not be changed.

The expanded exemption these bills propose would improperly erode copyright.

II. THE FACTS ABOUT ASCAP LICENSING OF FRATERNAL AND VETERANS' ORGANIZATIONS

Some of the statements made by the proponents of these bills and similar ones regarding ASCAP's licensing activities are distortions of the facts. Many of these statements were made at the last year's hearings on S. 2082 before the Senate subcommittee.

A. *Fraternal and veterans' groups pay nominal amounts for the right to perform ASCAP music, and can well afford it.*—Most amazing are the dollar figures quoted in regard to license fees. Senator Zorinsky testified that the Moose pay "over $500,000 a year in fees to copyright owners." [1] and that the American Legion "pays over $1.5 million a year in fees to copyright owners." [2] (The spokesman for the Moose later said this group's figure was "projected." [3]) The Eagles' representative said his organization is now paying about $550,000 annually to copyright licensing organizations.[4] These claims have no basis in fact.

The facts are these: ASCAP has licensed 836 Moose lodges, for a total annual amount of $153,900, not $500,000. Before our recent agreement with the American Legion, described below, we had licensed 509 Legion posts for a total annual amount of $61,400, not $1.5 million. And 427 Eagles aeries have been licensed, for a total annual amount of $66,100, not $550,000. BMI's representative testified that the amounts these organizations say they are paying in license fees are not going to BMI.[5] Whatever the source of these groups' error, their wildly exaggerated claims cannot be accepted as a rationale for support of this legislation.

The fact is that these groups are able to pay reasonable license fees, as shown by the most recent audited financial report of the American Legional National Headquarters, which was filed with the House Judiciary Committee. It shows an excess of income over expenditures of $1,129,221 in 1978 and $964,824 in 1979. These

[1] Tr. Aug. 20, 1980, 5.
[2] Id., 6.
[3] Id., 14.
[4] Id., 27.
[5] Id., 78.

groups are not in any danger of going bankrupt if asked to pay the nominal license fees we suggest.

B. *Fraternal and veterans' organizations frequently compete with commercial establishments. They should not be allowed to gain a free ride by virtue of their charitable status, to the detriment of honest businessmen.*—The fraternal or veterans' organization is frequently the social center of the community. It not only caters to its own members, but may be open to the general public as well. As such, it is in competition with commercial bars, grills, taverns and dance halls, vying with them for patronage.

Both the fraternal or veterans' organization and the commercial establishment have identical expenses for the property—the goods and services—they use. Both pay market prices for fuel to heat their buildings, for the janitors and custodians to take care of them, for the liquor they serve to patrons and for the dance bands which provide entertainment.

But the fraternal and veterans' groups now seek to single out one form of property—the musical performing right—and, because they are ostensibly "charitable", use it without payment. That would give them an edge over their competitors, who do pay for this valuable property. The honest local tavern owner should not be so penalized.

C. *This legislation would be contrary to the very principles espoused by these groups, for it would result in a forced, uncompensated governmental seizure of property.*—In our economic system, every man is entitled to the fruits of his labor. Copyright is no less a form of property because it is intangible. The Constitution provides for its protection, and for the right of creators to realize the economic fruits of their labor.

This legislation would make a mockery of these principles. If enacted, these groups could use another's property without permission or compensation. Supporting such a result is a strange posture for groups which advocate the sanctity of property as a basic tenet of the American system.

We do not take lightly the valuable role fraternal and veterans' organizations play in our nation. ASCAP, of course, supports the many good and charitable works these groups undertake. Our members have shown their support in many ways—both individually and organizationally. ASCAP members have contributed their time, services, and money to these groups—for example, it is well known that Irving Berlin has donated his royalties from "God Bless America" to the Girl Scouts. And ASCAP itself has, over the years, supplied the prizes for musical competitions conducted by the American Legion.

Our position is simple: it is based on the principles of Americanism which these organizations espouse. No man's property should be used, let alone taken from him, without compensation. That is what this legislation would do, and that is why we oppose it.

III. *There is no need for an exemption: ASCAP has reached voluntary agreements with the American Legion and the Shriners, licensing their performances of our music at nominal cost. Other fraternal and veterans' organizations may obtain similar agreements.*—Since the Senate subcommittee considered an exemption for fraternal and veterans' organizations in the last Congress, ASCAP and the American Legion—the bills' principal sponsor—have reached agreement on the terms of a license. The agreement covers all Legion posts which perform our music, at nominal cost. The details are as follows:

ASCAP will license each Legion post which regularly uses music for only $40 annually. This is a significant reduction from the fees ASCAP charges commercial establishments which perform music in similar fashion. It is less than one-third of the comparable commercial fee, which itself would be most reasonable.

The agreement will be made on a state level with the Legion state organizations. Thus, local Legion posts need not be concerned with even the most minor administrative details.

The Legion posts will, in return, be acquiring the valuable right to perform any, some or all of the compositions in the ASCAP repertory—not only the works created by our 26,000 members, but also those created by thousands of foreign creators whose works we license.

ASCAP has also reached agreement with the Shriners. We have licensed both their local Temples' use of music and the substantial use of music at the Shrine Circus, which is a major competitor of the commercial circuses. The annual fee of only $18,000 for all these uses is paid by the national Shrine organization—again, the local Temples are automatically covered.

We would be happy to discuss similar licensing arrangements with any fraternal and veterans' organization. We suggest that the agreements which have already been achieved show that the proposed legislation is unnecessary.

Conclusion

The issue here may seem minor, but it is major. Congress should not do anything to erode the rights of copyright owners, rights it granted only after careful consideration over two decades, prior to passage of the 1976 Copyright Act. The Committee should support the legitimate rights of creators and disapprove H.R. 2007 and H.R. 2108.

Appendix

I. THE 1976 COPYRIGHT ACT REPRESENTS THE APPROPRIATE STANDARD OF COPYRIGHT PROTECTION

The fraternal and veterans organizations have argued that the 1966 Copyright Act is somehow an aberration because it makes them liable for public performances of copyrighted music. They maintain that the old 1909 Act, with its general "for profit" limitation on the non-dramatic performing right in music, is the norm which should be restored for them. Historically, they are in error.

The first performing right in music was granted in 1897.[1] It provided for copyright liability on the part of "[a]ny person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained." There was no "for profit" limitation of any kind.

The 1976 Act restored the law to its 1897 condition. Thus, the "for profit" limitation of the 1909 Act—not the 1976 Act—is the aberration in the history of copyright protection in this country.

II. CONGRESS CAREFULLY CONSIDERED BOTH THE "FOR PROFIT" AND "PUBLIC" ASPECTS OF THE PERFORMING RIGHT IN THE 1976 COPYRIGHT ACT—IT CONCLUDED THAT FRATERNAL AND VETERANS' GROUPS SHOULD PAY FOR THE PROPERTY THEY USE

Some veterans' and fraternal organizations say they were not aware of the details of the 1976 Copyright Act when it was being considered. That may be so—but what is more important is that Congress knew precisely what it was doing.

As the Committee knows very well, the 1976 Act did not spring into life overnight. It was considered for a full generation—21 years—before it was enacted. Its provisions are not hastily-made mistakes—they are the result of long and wise Congressional consideration.

A. *The elimination of a general "for profit" limitation on the performing right was carefully thought out.*—Congress appropriated funds in 1955 for a series of Copyright Office studies of the Copyright Law. The studies, written in the late '50's and published in 1960 and 1961, were to form the basis for legislation to replace the 1909 law.

One study dealt specifically with the "for profit" limitation of the 1909 Act.[2] It noted that Congress could take one of four courses concerning the "for profit" limitation: (1) it could be maintained in its existing form; (2) specific exemptions could be substituted for the general "for profit" limitation; (3) the general limitation could be retained and combined with specific exemptions; or (4) the limitation could be abolished altogether.[3]

Congress opted for the second alternative—substituting specific and limited exemptions. This approach was taken in the first Copyright Revision Bill, introduced in 1964.[4] Congress' position remained unchanged over the next 12 years, when it was considering all aspects of copyright revision. Indeed, the Congressional reports stated that "this approach is more reasonable than the outright exemption of the 1909 statute." [5]

B. *Congress granted a well-thought-out, limited exemption for certain nonprofit uses in 17 U.S.C. § 110(4). That exemption should not be expanded.*—In deciding what the specific exemptions were to be, Congress concluded that no general exemption for fraternal, veterans', or, indeed, for any charitable group, was warranted. Instead, Congress decided generally that if *no* payment of any sort were being made by noncommercial groups, then non-dramatic performances of copyrighted music should also go unpaid. Accordingly, an exemption was granted under the limited

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[1] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

[2] Varmer, Study No. 16, Limitations on Performing Rights, in 2 Studies on Copyright 837 (Copyright Office, Arthur Fisher Mem. Ed., 1963).

[3] Id. at 119.

[4] H.R. 11947, 88th Cong., 2d Sess. (1964); S. 3008, 88th Cong., 2d Sess. (1964).

[5] S. Rep. No. 94-473, 94th Cong., 1st Sess (1975), 59; H. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), 62.

circumstances specified in 17 U.S.C. § 110(4) (no direct or indirect commercial purpose, no payment to performers, promoters, or organizers, and no admission charged except in certain instances). Congress knew this exemption was more limited than the 1909 law's exemption and said so.[6]

The fact that others were being paid was central to Congress' thinking that these performances should not be exempt, even though the purposes were charitable. Thus, the Reports say:

"An important condition for this exemption is that the performance be given 'without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers.' The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers and the like." [7]

A close look at the legislative history—specifically the 1965 hearings before this subcommittee [8]—shows that Congress intended that creators be paid whenever anyone else was. The issue arose in the discussion of the "veto" provision of 17 U.S.C. § 110(4)(B), which allows the copyright owner to object to "noncommercial" performances where admission is charged and the net proceeds go exclusively to charitable purposes.

In discussing appropriate language for the section (then numbered § 109(4)), a spokesman for the Department of Commerce suggested that copyright protection apply to any performance for which an admission fee is charged. The suggestion was then discussed by Congressmen Hutchinson, Poff and Kastenmeier with Professor Melville Nimmer. Significantly, Professor Nimmer initially did not agree with the Department of Commerce's views—he felt that a charitable cause should be exempt from copyright liability even when admission was charged if the net proceeds were used for charitable purposes. However, when Congressmen Hutchinson and Poff explained Commerce's suggestion to him—that the copyright owner should not be compelled to make a charitable contribution under anycircumstances when others were being paid out of the proceeds of the performance and were not also being compelled to contribute—Professor Nimmer changed his mind and agreed with the Department of Commerce's suggestion, as follows:

"Mr. Hutchinson. The Commerce presentation on that point mentioned net proceeds to be applied exclusively. Now there might be a different situation if the gross proceeds were going to go, on the ground that new proceeds means everything left after the expenses are paid.

Mr. Poff. That's true.

Mr. Hutchinson. And gross proceeds would constitute a contribution by everybody to the cause, while net proceeds, you see, would only represent the profit after all expenses are paid, and I think the point probably made by Commerce was that if only net proceeds were going to be contributed, certainly the copyright owner ought not to be forced to make a contribution where everybody else need not.

Mr. Nimmer. I must say, I find that rather persuasive.

Mr. Poff. I certainly agree with what he has said. He has said it much better than I have been able to say it." (pp. 1820-21, emphasis added)

Congressman Poff then continued by raising the point—apparently for the first time although he ascribed it to Commerce's testimony—that the copyright owner should not be forced to contribute to a cause he did not believe in:

"[Mr. Poff] The copyright owner, according to the Department of Commerce witness, should be spared the involuntary act of having his property contributed to a charity of which he might not approve.

I think that is essentially the point involved."

Professional Nimmer and Congressman Kastenmeier then continued, agreeing with Mr. Poff but returning to the main point—that when others were paid out of the proceeds of the performance, the copyright owner should be paid as well:

"Mr. Nimmer. If I may say, sir, I can see that—particularly where, let us say, the actors are being paid, and the stagehands are being paid, but only the author is not being paid, as would be possible, perhaps under this language.

Mr. Kastenmeier. Yes; if the gentleman will yield, of course, the language is the 'proceeds after deducting the reasonable cost of producing the performance,' and why should not the author's royalties be a reasonable cost of producing the performance?

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[6] The exemption "would cover some, though not all, of the same ground as the present 'for profit' limitations". Sen. Rep., 77; H. Rep., 85.

[7] S. Rep., 77, H. Rep. 85.

[8] Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

Mr. NIMMER. I think it should be, but by virtue of this exemption, I don't think it would be so construed."

Finally, Commerce's suggestion was discussed by Congressman Kastenmeier and by the then Register of Copyrights, Abraham Kaminstein, at pages 1870-1871. Congressman Kastenmeier reviewed Commerce's point—that any forced contribution would be unwarranted—and asked Mr. Kaminstein's opinion. Mr. Kaminstein replied that he was impressed by that agrument, and also by Mr. Poff's point about a copyright owner's forced contribution to a cause he did not agree with:

"Mr. Kastenmeier. On a different subject, last week Mr. Giles, testifying for the Department of Commerce, on page 3 of his testimony suggested that we might consider whether section 109(4) be changed, because, he states:

"In our view this exemption from the copyright protection should not apply to any performance where admission is charged even if the net proceeds are to be applied for an educational, religious, or charitable purpose.

"It is our view that if there is an admission charge, the copyright owner should have the right to decide whether this work is to be performed, or royalty is to be required. Otherwise, he goes on to say: the copyright holder is in a sense being compelled to make a donation to a charitable, religious, or educational cause.

"How do you react to that comment?

"Mr. Kaminstein. I was impressed by the agrument, Mr. Chairman, and also by Mr. Poff's pushing at the point that he might thus be contributing—I take it this was the implication—he might be contributing to a cause of which he was not particulary fond. I think this is one of the situations where there has to be a balance, and pretty much it is de minimis in the sense that these exceptions have been developed over the past and have not been objected to too strenuously.

"In theory there is validity in the argument."

Congress Kastenmeier then returned to the main point of the argument—that the copyright owner should not be required to make an involuntary contribution in situtations where admission was charged—and Mr. Kaminstein agreed:

"Mr. Kastenmeier. It could be further argued, could it not, where there is an admission charged and where there are net proceeds, and I think Mr. Hutchinson as well as Mr. Poff referred to this, where, if there are indeed profits, should not the cost of copyright be taken out of those profits before distribution? Why should the copyright holder be required to make an involuntary contribution?

"Mr. Kaminstein. Bear in mind that these are not profits in the ordinary sense. However, I can't argue with that, because I rather agree with the feeling."

The well-thought-out provisions of § 110(4) should not be expanded. Section 110(4) as it presently exists provides all the exemption that fraternal and veterans' groups should have.

C. *The definition of "public performance" was intended to include performances by fraternal and veterans' organizations.*—Congress also intended performances by fraternal and veterans' groups to be "public" in the copyright sense—a sense that differs from any other. It is highly significant that, in explaining its intent, Congress included lodges as example of the types of places where "public"—in the copyright sense—performances occurred:

"One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp.* v. *Wyatt,* 21 C.O. Bull. 203 (D. Md. 1932), performances in 'semi-public' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control."[9]

At the Senate hearings last year, a representative of the Moose claimed that the law's definition would require the "father of the bride to obtain a music license for his daughter's wedding reception."[10] He was in error. A wedding or similar family affair is not public because it is a gathering of "a normal circle of a family and its social acquaintances," in accordance with the law's definition.[11]

D. *"Public" does not have the same meaning for the copyright law as it does for other laws, such as the civil rights act.*—The fraternal and veternans' groups have said that they are unhappy about the Copyright Act's definition of "public" because it differs from the definition in the Civil Rights Act. They see it as "distorted", because they would prefer a meaning which would mean they need not pay.

This criticism is what the courts have referred to—in copyright cases—as the "one-word-one-meaning-only fallacy."[12] In those cases, the courts were discussing the

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[9] S. Rep., 60; H. Rep 64.

[10] Test. of Carl Weiss, Tr. of Aug. 20, 1980, 16.

[11] 17 U.S.C. §101.

[12] E.g., *American Visuals Corp.* v. *Holland,* 239 F. 2d 740, 742 (2d Cir. 1956).

definition of "publication" under the copyright statutes. Their observations hold equally true for the definition of "public". A word's definition in the law must be seen in its specific context. That the word may be used or defined otherwise in another context, for another purpose is both natural and irrelevant as a basis for criticism.

Here we are talking about public performances, in the copyright context, not public accomodations, in the civil rights context.

The provisions of the Civil Rights Act of 1964 do not apply to "a private club or other establishment not in fact open to the public * * *." 42 U.S.C. § 2000a(e). However, Congress clearly intended a different standard to apply in determining what a "public performance" was under the Copyright Act. Thus, the Congressional Reports specifically enumerate private "clubs" as places where "public performances" take place.[13] And the law's definition states "public performances" can occur even at places not open to the general public, if "a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" there. 17 U.S.C. § 101. There is thus no conflict between the Civil Rights Act and Copyright Act. The fraternal organizations need not fear the loss of their exemption from nondiscriminatory treatment under the former because of their copyright liability under the latter.

III. THE PROPOSED EXEMPTION WOULD IMPROPERLY ERODE COPYRIGHT

Much has been said by the proponents about the relatively small amount involved in license fees as a rationalization for enacting this legislation. The real vice of this bill is that it erodes a valuable property right.

Other narrow special interest groups are watching and will be quick to press for exemptions for their activities if this bill is reported favorably. They tried to do so before the Senate last year. So-called "private" clubs—country clubs and golf clubs—asked to be included.[14] Congress explicitly intended these groups to pay reasonable license fees.[15] Profit-making private instructional facilities—dancing schools—seek to overturn Congress' careful work by an exemption for their narrow special interest. Thus, the first section of H.R. 2108 would expand the § 110(1) exemption for face-to-face teaching activities to those by profit-making as well as nonprofit educational institutions.[16] So, too, commercial broadcasters who charge preachers for the use of their broadcasting facilities, last year persuaded Rep. Kelly of Florida to propose an exemption for their broadcasts, as well as for profit-making private schools like dancing schools.[17]

None of this special interest legislation is justified. Indeed, this legislation has been disapproved in principle by the Section of Patent, Trademank and Copyright Law of the American Bar Association, and by the American Patent Law Association.

Mr. KASTENMEIER. Thank you, Mr. Korman.

Mr. Ciancimino.

Mr. CIANCIMINO. Mr. Chairman, I understand that my full statement will appear in the record. I thank you for that.

I was appalled this morning to learn Mr. Schwab was not acquainted with SESAC. I hope he is the only one in this room not acquainted with SESAC or else we haven't been doing our job very well.

I know I have appeared before the chairman almost continuously since 1965, so it is not for lack of trying that Mr. Schwab does not know of SESAC.

Briefly to acquaint him further, I would like to say that we are the second oldest performing arts organization in the United States.

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[13] S. Rep., 60; H. Rep., 64.

[14] Letter of Hebert L. Emanuelson, Jr., president, National Club Association, to Senate subcommittee, Sept. 8, 1980.

[15] The reports speak of performances at "clubs" as properly under copyright control. S. Rep., 60; H. Rep., 64.

[16] See also the bills in the last Congress with similar purposes, H.R. 4264, H.R. 5183, 96th Cong., 1st Sess. (1979)

[17] H.R. 6262, 96th Cong., 2d Sess. (1980).

We were organized in 1931 and this year we celebrate our 50th year. We represent approximately 500 music publisher catalogs and on a direct and indirect basis literally thousands of writers and composers.

Our catalog numbers somewhere between 150,000 and 200,000 copyrighted compositions.

Enough about acquainting Mr. Schwab with SESAC.

I would like to simply, very briefly, summarize my statement.

Of course, I wish to ratify and affirm everything that has been said here by my colleagues, Messrs. Cramer and Korman.

The subject of private performances by nonprofit fraternal lodges was carefully considered by Congress when it enacted the 1976 act.

What was the result of these efforts, under 110(4) Congress allowed an exemption for performances which are truly of a charitable nature. That is to say fraternal orders and veterans' posts can play music without payment of copyright royalties as long as there is no compensation paid to the musicians or producers or promoters of that event.

In order to be sure that its intention was clear, I would like to read a statement that appears in both the Senate and House reports: "One of the principal purposes of the definition was to make it clear that performances in semi-public places such as clubs, lodges, factories, summer camps, and schools are public performances subject to copyright control."

I would hope that that would answer Mr. Railsback's questions concerning the possible nonliability of these organizations under the current act.

One of the primary reasons given for the need of an exemption in this area by the proponents is that copyright royalty payments diminish the amount of money that they as nonprofit groups could raise for charity. May I suggest to this subcommittee that there is no worthier charity than the impoverished American author and composer of music, the overwhelming majority of whom would qualify for the federal low-income credit given by the U.S. Government to taxpayers in need of financial assistance.

The typical creator of music must work at it in his spare time. He must earn his livelihood from a different source while he devotes whatever time he can to his creation of music; therefore, to iterate Mr. Cramer's question: Why punish only the writer and composer of music in this area? Why is music among all the services rendered the only one earmarked for nonpayment? The obvious answer is that there is no justification for this narrow piece of special-interest legislation and we respectfully ask the subcommittee to protect and support the legitimate rights of authors and composers.

Thank you for the opportunity to appear before you.

[The complete statement of Mr. Ciancimino follows:]

PREPARED STATEMENT OF ALBERT F. CIANCIMINO, COUNSEL FOR SESAC INC.

Mr. Chairman, Members of the Subcommittee, my name is Albert F. Ciancimino and I am duly admitted to practice before the Bar of the State of New York. I appear here as counsel for Sesac Inc., an organization which represents the performing rights, among others, in the catalogues of more than five hundred (500) music publishers and in the musical works of thousands of writers and composers.

Sesac is the second oldest music rights organization in the United States, having been organized in the year 1931. Sesac's main headquarters are at 10 Columbus Circle in the Coliseum Tower, New York and we also maintain regional offices in the Sesac Building, 11 Music Circle, Nashville, Tennessee and 9000 Sunset Boulevard, Los Angeles, California.

As a music rights organization representing approximately 150,000 musical compositions, we have a vital interest in any legislation which would affect our right to license performances of the musical compositions which we represent. Sesac therefore is making this statement in opposition to any legislation which would exempt non-profit veterans organizations and non-profit fraternal organizations from paying performance royalties as is now required by the Copyright Act of 1976.

The subject of "private performances" by non-profit fraternal lodges or veterans organizations was carefully considered by Congress when it enacted the 1976 Copyright Act. Under the 1909 Act a performance royalty could only be earned by an author of music if the performance was both public and for profit. In a sweeping reversal of this 1909 concept, Congress, in the 1976 Act, eliminated the for profit limitation on performances, and in its place set forth clearly defined and limited instances in Section 110 when certain performances would be exempt from the payment of copyright royalties. It also indicated its clear intention as to the meaning of "performance" by expressly defining the word "perform" more broadly than those terms had previously been construed by the court and the 1909 Act.

What was the net result of Congress' efforts in this area? It is clear that under Section 110 (4) Congress has allowed an exemption for performances which are truly of a charitable nature, that is to say fraternal orders and veterans posts can play music without payment of copyright royalties as long as there is no compensation paid to the musicians or producers or promoters of the event. In short, if there is a charitable event where admission is charged and there is no commercial advantage either directly or indirectly to anyone but the charity, music may be performed free of charge as long as no objection to the performance has been made by the author of the music. Even if an objection is made by an author, the music may still be used free of charge as long as there is no admission charge.

We therefore can readily see that Congress has taken pains to outline, in detail, rather strict circumstances under which non-profit fraternal and veterans organizations may perform copyrighted music without liability. With reference to the language of Section 110 (4), Congress has defined the term "perform . . . publicly" as meaning: "To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."

This broad definition in the statute goes well beyond the definition of public performance as has been set forth by various courts since the 1909 Act. Further, in order to be sure that its intention was clear and that there would be no mistake with regard to the parameters of liability, Congress stated the following, in both the Senate and House reports concerning the 1976 Copyright Act: "One of the principal purposes of the definition was to make it clear that . . . performances in 'semi public' places, such as clubs, lodges, factories, summer camps and schools, are 'public performances' subject to copyright control."

We therefore submit that the intention of Congress in the 1976 Act was clear in that it committed to copyright liability all non-profit organizations which did not meet the strict exemption requirements for the performance of music set forth in Section 110 (4).

One of the primary reasons given for the need of an exemption in this area is that copyright royalty payments diminish the amount of money that they, as non-profit groups could raise for charity. May I suggest to the Subcommittee that there is no worthier "charity" than the impoverished American author and composer of music, the overwhelming majority of whom would qualify for the Federal Low Income Credit given by the Unied States Government to taxpayers in need of financial assistance.

The record of hearings before Congress on the 1976 Copyright Act is replete with evidence and testimony from author and composer groups of their inability (except for a very small percentage) to earn a living solely from their writings. The typical creator of music must work at it in his spare time while he devotes his primary time to earning a living in another field. Therefore—why punish the writer and composer of music? Of all the services supplied to charitable organizations, why single out music as the one service to be given free of charge. Surely veterans posts and other such organizations pay rent, pay electric and heat, pay for their telephone, pay for their repairs, pay for their periodicals. If the singers or musicians are paid at a function of a fraternal organization, the writers and composiers should also be paid. Why is music, among all the services rendered, the only one ear-

marked for non payment? The obvious answer is that there is no justification for this piece of narrow, special interest legislation, and we respectfully ask the Subcommittee to protect and support the legitimate rights of authors and composers.

Thank you for the opportunity to appear before you.

Mr. KASTENMEIER. Thank you, Mr. Ciancimino.

I will yield to my colleague from Michigan, Mr. Sawyer.

Mr. SAWYER. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. I have just a very few.

Under present law, if a lodge, post or chapter did not charge an admission, had donated musical services, but advertised to the public, would that subject them to liability?.

Mr. KORMAN. No admission charge. No payment to anybody.

Mr. KASTENMEIER. Even if they advertised it publicly?

Mr. KORMAN. I think they would be exempt.

Mr. CRAMER. My view is they would be exempt, Mr. Chairman. That is why I say I think there is an exemption under the present act.

Mr. CIANCIMINO. I agree.

Mr. KASTENMEIER. Mr. Ciancimino, I take it from the preceding witnesses, irrespective of whether they have heard of SESAC or not, that SESAC has been—has not made the contacts that the other two performing arts societies have made in terms of this particular area of possible performance?

Mr. CIANCIMINO. That is true, Mr. Chairman. This is generally true in all areas of relatively new licensing. SESAC is the smallest of the three organizations. It would be kind of inappropriate for us to possibly set precedent which might be damaging to the two larger organizations. Generally what we do is that we wait for precedent to be set by ASCAP and BMI and in light of that, we negotiate our rates.

Mr. KASTENMEIER. It is like the big three in the auto industry?

Mr. CIANCIMINO. Yes. We tried harder. [Laughter.]

Mr. KASTENMEIER. Let me ask you first of all, there are several pieces of legislation before us I have alluded to. I am not asking precisely whether you agree with any of them. I assume you do not, but what is your analysis—is there any distinction to be drawn from H.R. 3408, H.R. 2006, or H.R. 2007, that you are aware of? Is there a distinction between these several pieces of legislation?

Mr. KORMAN. Mr. Chairman, I don't know that I have seen H.R. 2006.

Mr. KASTENMEIER. I think the reason we probably have it before us was that Mr. Young had introduced it. It probably does not pertain to this area of coverage. Had he appeared, we would have asked him about it. I assume that it does not pertain to fraternal and veterans' organizations.

Mr. KORMAN. With respect to H.R. 2108, that appears to go beyond H.R. 2007 in significantly expanding the exemption for nonprofit educational institutions. I take it the moving force behind this bill, one of them, would be that they had some interest in dance studios. Why Arthur Murray and Fred Astaire dance organizations should be exempt, I can't fathom. I think that would be the effect of the first paragraph on page 2.

In addition, I don't understand section 2 at all, what that is intended to do. But I would strongly oppose both of those bills and

assume there may be hearings later on a bill I just saw yesterday, H.R. 3392, also a bill of Congressman Young, which is in my judgment a disastrous bill, something similar to the bill that Congressman Kelly had introduced which would, in effect, permit commercial radio broadcasters who have chosen to specialize in broadcasting programs with religious themes to be able to use copyrighted music of a religious nature free. That is one of the more outrageous notions that has come to my attention recently.

I guess if that bill gets any attention, we will hear about it later on. I just mention it because it is also sponsored by Congressman Young.

Mr. KASTENMEIER. Let me ask you about the bill the Senate subcommittee tentatively agreed to last year which, as I understand it, narrowed the exemption to the point that wherein the general public is not invited to activities carried on for charitable purposes. Do you feel that is a possible area of legislative compromise?

Mr. KORMAN. Not a bit, Mr. Chairman. I opposed that as strenuously as these others. In fact, my recollection of that bill is that it went further and struck out the provisions now in 110(4) referring to the exemption applying only to when the musician is not paid. We would oppose that, although I have not looked at it recently, Mr. Chairman.

Mr. CRAMER. In commenting on the proposal by the Senate subcommittee, I would oppose that just as I do these others, because I think in principle it is wrong. The basic principle I have reiterated and I think others have here, that whether it is open to the public or not, it is really not in my view the major issue here. The major issue is, should one group of suppliers of services or products be singled out and forced to make a contribution where no other supplier of goods or services is asked to make that contribution?

So in the situation posed by a performance where it is closed to the public, again the utility company, no one else is asked to donate their services, just the writers and publishers. On that basis, I would oppose the Senate proposal—the subcommittee's proposal as well as the other pieces of legislation.

Thank you.

Mr. KASTENMEIER. Let me ask you about the possible negotiations with respect to reaching—I suppose for the lodges and posts—less onerous fees. I note Mr. Schwab, speaking for the VFW, has included with his presentation a copy of an agreement with post 1769 in Effingham, Ill., with ASCAP. This is for a period commencing February 1, 1978, for 1 year, $285. Of course, we have heard from Mr. Weis to the effect that many of the lodges were paying—I think he suggested an average of $187 and the total amount they might be ultimately liable for might approach half a million dollars.

I take it in terms of new proposals or negotiations this is being—much more modified sums are being discussed; is that correct?

Mr. KORMAN. Yes, Mr. Chairman. That is correct. By the way, I notice in that document, it is not signed.

Mr. KASTENMEIER. And it is not dated.

Mr. KORMAN. It seems as if it were something tendered by ASCAP for signature.

Mr. KASTENMEIER. Yes.

Mr. KORMAN. The rates you will notice, Mr. Chairman, are on the second page. The rate schedule is part of the agreement so that the user can see how the numbers are arrived at. There is no mystery about that. This would be the rate as the agreement states in the upper right-hand corner. We call it a general license agreement for restaurants, taverns, nightclubs, and similar establishments.

I think we have made it crystal clear both today and in the Senate hearings and in our conversations with these groups that we are proposing these agreements, have proposed them in the past, as an alternative; but we are quite prepared to negotiate something a great deal more cheap as we have done with the Legion and as we have done with the Shrine.

I must comment with respect to the Shrine, Mr. Chairman, that there we had a devil of a time for years with Barnum & Bailey and other circuses who compete with the Shrine. The Shrine Circus is a well-known institution. It isn't a circus, in fact. It is a bunch of local circuses that will be sponsored by the Shrine at various times.

When you have a Shrine Circus in a given city, you cannot have Barnum + Bailey come in until a certain number of months pass. These people really do compete. The Shrine, I must say, the Shriners recognize this that they have to pay. We worked out something that we regarded as something very reasonable.

I think the entire matter here is one of the music licensing people bending over backward. I must say I think our members might not approve entirely of what the board at BMI and ASCAP do.

Mr. KASTENMEIER. I have heard the figures $40, $35, and $100 mentioned. I gather ASCAP proposes for itself $40, I don't know whether BMI does—is it $35?

Mr. CRAMER. We proposed—again this doesn't mean it would be forever, but whatever figure it is, there certainly isn't going to be tremendous fluctuation, but we proposed to the people in this room a deal which would cost them $35 a post or a club provided it was done on some kind of bulk basis, state-by-state basis, so we wouldn't have to be involved in chasing down different posts, et cetera. Very much like the kind of arrangement we have with the Shriners. We do have a deal with the Shriners for $35 a year, under a nondiscriminatory licensing policy. We offered that same deal last year. We offered it—I offer it today. That's all BMI is talking about for its repertory for this time.

Mr. CIANCIMINO. May I add, Mr. Chairman, that on a bulk basis, of course, SESAC would keep the fee of the three organizations if ASCAP were at $40 and BMI at $35 under $100. There would not be any question about that in our mind.

Mr. KASTENMEIER. I am sorry.

Mr. CIANCIMINO. If ASCAP on a bulk basis charges $40 per unit and BMI charges $35; in other words, SESAC has not yet entered negotiations with these groups. We are waiting to see if these agreements are firmed, but once they are firmed up, our agreement, of course, will come in at less than the other two organizations.

Mr. KASTENMEIER. Yes. I assume that is what the $100 figure was suggestive of. It would be somewhere in that area.

I trust you are doing this all nonviolative of the antitrust agreements?

Mr. CIANCIMINO. Absolutely.

Mr. KORMAN. Mr. Chairman, we act independently. I didn't know until Mr. Cramer announced at the Senate hearings that BMI proposed $35. Of course, the users tell us when it is in their interest to do so what someone else has quoted. That is how we find out.

Mr. KASTENMEIER. I am sure there are practical considerations as to what a repertory is worth, one relative to the others in terms of use, in terms of certain activities. That is not too difficult to arrive at.

Well, the hour is late. I appreciate your coming here this morning. I won't pursue any other matters. Mr. Cramer didn't pursue whether or not he, in fact, had constitutional obligations to these bills. We will put that matter aside, but this certainly does update the committee on this question and we are grateful to all our witnesses for appearing this morning. The three of you have been here many times before on other matters. I am sure you will be here again.

Mr. Sawyer?

Mr. SAWYER. Nothing, thank you, Mr. Chairman.

Mr. KASTENMEIER. The committee thanks you for your appearances.

We stand adjourned.

Mr. CIANCIMINO. Thank you, Mr. Chairman.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

HEARING ON H.R. 1805, COMMERCIAL USE OF SOUND RECORDINGS

WEDNESDAY, JUNE 10, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10 a.m. in room 2226, Rayburn House Office Building, Hon Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Frank, Railsback, and Butler.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This is the second morning we are holding hearings on H.R. 1805, a bill to provide for copyright protection in terms of commercial use of sound recordings.

The first morning we heard from the proponents of the measure. This morning we will hear from three witnesses who oppose or have serious reservations about the measure.

I would first like to call forward two witnesses who I think have a common interest from a slightly different perspective, and they are Mr. James Popham, counsel for the National Association of Broadcasters; and Mr. Robert Herpe, chairman of the board of the National Radio Broadcasters Association.

Gentlemen, will you both come forward to constitute the first panel? Which of you would like to proceed? Mr. Popham, you may proceed as you wish. We have your 29-page statement. If you care to summarize it you may or just proceed however you wish.

TESTIMONY OF JAMES POPHAM, COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. POPHAM. Mr. Chairman, I think I will take the liberty of summarizing.

I appreciate the opportunity to be here today. This is not a new concept. If indeed it's a new piece of legislation, the issues before you today are not new. They have been before a number of previous Congresses. They have been before this subcommittee a number of times and I have to say that they have never met with success in terms of enactment and I think it's to the credit of the Congress and to this subcommittee that you have managed to

pierce consistently the veil of superficial appeal which cloaks this legislation.

So today we would urge you again to take a very penetrating look at the reality of establishing a performance right in sound recordings and we would urge you to look again at the decade of evidence which demonstrates that a performance right in sound recordings would be an inefficient and ineffective solution to a non-existent problem.

We would urge you not to be swayed by arguments of fairness and equity which really just obscure the existing equitable balance of interests inherent in the broadcast of recorded music.

NAB's 4,772 member radio stations would be most substantially affected by this legislation and certainly we can't and would not deny that they derive benefit from the use of recorded music. At the same time, the record companies and performers benefit handsomely from the constant, continuous, and extensive exposure of their recordings on radio. We believe this creates a balance of benefits which would be destroyed by requiring stations to pay for the right to promote record sales.

Record company executives repeatedly confirm that the promotional benefit reaped by recording artists and record companies is very staggering and I think it's the reason we have a multi billion-dollar record industry.

Now the quotations we have here—we always seem to come up with a litany of these rather easily—I think they speak for themselves. I would perhaps just note one of them out of the April 30, 1979, edition of U.S. News & World Report where one of the promoters was noted as saying after the Grammy Awards, "Only two winners thanked the record companies and promoters for their success. But if they really understood the business, all of them would have said 'thank you, radio; thank you, promotion.' "

We think it's well known that considerable time, effort, and money are invested in promoting airplay of records. If you look at magazines and periodicals like the Radio and Records magazine you see record company ads touting their latest releases seeking airplay of their records. Magazines like Radio and Records are just one of many that are directed at the program directors of radio stations, which include many advertisements and indeed include a lot of information relating to how records are being used, which records are being used on the radio, and all this is for the benefit of the radio stations and also of the record companies in exposing their product.

Now radio airplay does more than just sell records. I think it keeps recording artists consistently in the public ear and maintains the exposure and their popularity between the release of their records and also promotes and assures large audiences for their live concerts. So we do not see radio as the mere beneficiaries of the creativity of performers and record companies. We see it really as a partner in this creative process because radio does play a vital role in assuring broad exposure of creative works, thereby promoting and stimulating record sales. We question where is the equity and where is the fairness in requiring stations to pay for conferring such an enormous benefit on record companies and performers.

Now beyond the inherent unfairness, we believe there is simply no demonstrable need for these payments by radio stations and we really see it as a rather useless right in terms of the constitutional goal of copyright "to promote science and the useful arts." The alleged need for establishment of a performance right in sound recordings is really just a cleverly crafted illusion. Over the past decade we have submitted quite a bit of evidence on this point which reveals that performers really are well compensated for their work and as a class are not a starving or deprived class.

These findings reflect how unnecessary additional payments to performers and record companies really are and I would also add that, along with the record companies, the performers do share in the great bulk of revenue from the record sales and airplay.

Now the real difficulty that we see being faced by performers is simply a supply of performers which very greatly exceeds the demands for their services, and that is not a problem which we believe will be remedied by this legislation. In effect, establishing a performance right in sound recordings, as would be established by H.R. 1805, would simply reallocate wealth from one industry to another. In effect, broadcasters would be taxed and performers and recording companies would be subsidized primarily at the expense of the industry which is most responsible for promoting the sale of the records.

In terms of the constitutional goals of copyright, we see a performance right in sound recordings as nothing more than a useless appendage to the copyright law.

I would also urge you not to have any illusion about the industry which would pay the bulk of the fees. Radio broadcasting is a strange prey for such Robin Hood-type legislation. Radio is not, by and large, a big business. A typical station in 1979 had a before-tax profit margin of under 6 percent which amounted to less than $20,000. Looking to FCC financial data for 1979, you find that 40 percent of the country's AM stations and AM-FM stations operated at a loss. Nearly half of the independent FM stations operated at a loss. A third of the stations with revenues of $200,000 or over, which are those that would be most affected by this legislation, operated at a loss, too.

Now I would note finally that pretax profits in the industry were down slightly over 25 percent from 1978.

Now I suppose you could say that stations could absorb this new element of expense, but I think this would lead to corresponding cutbacks in other program expenses such as news and public affairs-type programing, and this would be a price that the public pays. It might also be said that stations can simply pass on the additional costs, but I think this too would be a price the public would ultimately pay.

Another dimension of this legislation would be the enlargement of the role of the Federal bureaucracy and the creation of new paperwork burdens for stations. The stations would be filing annual statements and submitting fees on an annual basis. This would add to the cost of the legislation from the stations' point of view and I think it is contrary to the trend of deregulation and elimination of paperwork requirements.

Furthermore, I think I should point out that public disclosure of station revenue, which might well be required, would be revelation of information which is normally confidential and could disadvantage all the stations that have to publish this information by way of a statement.

We are also not as confident as the proponents of this legislation that the cost of distributing the license fees would not be substantial. We speak from some experience here, having been through one round before the Copyright Royalty Tribunal and now going into another one. We were unable, even among the four major groups, to reach any agreement as to the distribution of those royalties and I doubt that unanimity among the affected record companies and performers would be much easier to obtain.

The proponents also assume they can piggyback on existing systems for determining the extent to which individual recordings are played. Maybe they can. Maybe they can't. But if they are wrong, I think they face very substantial costs and indeed could impose very substantial paperwork and recordkeeping burdens on stations in order to make that determination.

Finally, we would like to raise one other problem that we see with this legislation to the extent it deals with providing royalties to performers. It really would be awarding, under the guise of copyright, noncopyright owners with compulsory license fees. Generally, I think almost invariably, the record companies are the copyright owners and the performers are not, and we think it would be out of sync with the legislation to create a special class of noncopyright owners which would share in the royalties from this legislation.

And we are very concerned also that once this door was opened to noncopyright owners there would indeed be long lines of other noncopyright owners who would be seeking copyright benefits.

Mr. KASTENMEIER. Let me only interrupt to make sure I understand your point. Which noncopyright owners are you talking about?

Mr. POPHAM. We're talking about the performers who perform on the recordings. I think there's no question that the record companies are the copyright owners of the record, whereas the performers are not copyright owners in the true sense of the word.

Mr. KASTENMEIER. I see.

Mr. POPHAM. I think this really exposes the performers' royalty aspect of this as something that is, again, nothing more than a tax and a subsidy which is well outside the proper sphere of copyright concern.

So, in sum, let me say again, as I probably need not, that we continue to oppose establishment of a performance right in sound recordings. It is something we see as unwise, unnecessary, and unproductive. Thank you very much.

[The complete statement of Mr. Popham follows:]

PREPARED STATEMENT OF JAMES J. POPHAM, DEPUTY GENERAL COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS, WASHINGTON, D.C.

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] appreciates this opportunity to express its views on H.R. 1805, the last in a long line of bills to establish a performance right in sound recordings. The issues before you hardly are new. Every Congress in recent history has seen similar legislation before it. Every Congress has rejected it.

It is to the credit of Congress and this Subcommittee that you have pierced the veil of superficial appeal which cloaks this legislation.

We urge you again to take a penetrating look at the reality of establishing a performance right in sound recordings. Look, again, at over a decade of evidence which demonstrates that a performance right in sound recordings would be an inefficient and ineffective solution to a non-existent problem. Do not be swayed by arguments of fairness and equity which obscure the existing equitable balance of interests inherent in the broadcast of recorded music.

NAB's 4,772 member radio stations would be most substantially affected by H.R. 1805. Certainly, they do derive some benefit from the use of recorded music. At the same time record companies and performers benefit handsomely from the constant, continuous, and extensive exposure of their recordings on radio. This creates a balance of benefits which would be destroyed by requiring stations to pay for the right to promote record sales.

Record company executives repeatedly confirm that the promotional benefit reaped by recording artists and record companies, is staggering and, perhaps, the reason that record sales is a multibillion dollar industry.

Listen to what they have to say:

"Despite the hard time we're in, new talent continues to break through and radio exposure is an important reason why." Scott Kranzberg, Promotion Vice-President of Board Walk Entertainment Co. in Billboard, August 30, 1980, at 19.

"We obviously need each other . . . Radio and record companies have an age-old relationship where we want to break new acts and they want to get ratings." Rip Pelley, Director of Field Operations, Elektra/Asylum, in Billboard, August 30, 1980 at 19.

"We will continue to make good viable records to support radio, which in turn will help us." Ed Hynes, Vice-President of National Promotion, Columbia Records, in Billboard, August 30, 1980 at 19.

"Thank you, radio, for freely exposing our industry's hit product." Richard Palmese, Vice President of Promotion, Arista Records, in Billboard, August 30, 1980 at 19.

Noted one promoter after the recent Grammy Awards ceremony for recording artists: "Only two winners thanked the record companies and promoters for their success. But if they really understood the business, all of them would have said, 'thank you, radio; thank you promotion.'" U.S. News and World Report, April 30, 1979 at 71.

Considerable time, effort, and money are invested in promoting airplay of records. In the latest issue of Radio and Records magazine, for example, record companies placed ads touting their latest releases. This magazine is one of many directed primarily at radio program directors. A key part of these ads is the listing of stations which have played the record. This is designed to spur readers to follow their colleagues' lead and play the advertised record. A few examples are appended to my statement.

Radio airplay not only sells records, it keeps recording artists in the "public ear". Continuing exposure of their records maintains their popularity between release of their records and assures large audiences for their concerts.

Thus, radio broadcasters hardly are the mere beneficiaries of the creativity of performers and record companies. In reality, they are partners in the creative process. They play a vital role by assuring broad exposure for creative works, thereby promoting and stimulating record sales. Where is the equity, where is the fairness in requiring stations to pay for conferring this enormous benefit on record companies and performers?

The inherent unfairness of a performance right in sound recordings is compounded not only by the lack of demonstrable need for such windfall payments, but also the uselessness of the performance right in terms of the Constitutional goal of

[1] NAB's membership includes 4,727 radio stations, 662 television stations, six radio networks and three television networks.

copyrights, "to promote science and the useful arts." The alleged need for establishment of a performance right in sound recordings is no more than a cleverly crafted illusion. Over the past decade, we have presented evidence to this subcommittee showing that:

Members of the two major performing artists' unions, AFM and AFTRA, have higher median and average incomes than the general population;

Approximately 70 percent of revenues derived from the sale and broadcast of recorded music already goes to record companies and performers;

Performers' compensation on an hourly basis already is high;

Most of the compulsory license fees imposed by this sort of legislation would flow to the minority of recording artists who are popular and whose recordings receive more airplay.

These findings reflect how unnecessary additional payments to performers and record companies really are. Performers are well compensated for their work, and, as a class, are not starving. Along with the record companies they share in the bulk of the revenues from record sales and airplay. Thus, performance right payments would be no more than a needless windfall.

Notably, the real difficulty faced by musicians and performers, namely, a supply of performers which far exceeds the demand for their services, would not be remedied by this legislation.

A performance right in sound recordings would not lead to production of more recorded music or appreciably enhance the creative efforts of those producing and performing sound recordings today. The fees generated by H.R. 1805 would increase record company revenues less one half of one per cent. Once divided among performers, the compulsory license fees probably would provide only a few hundred dollars more per year to each performer. Similarly, this would provide no real impetus to produce new records of any kind, much less the less popular types of recordings with limited buyer interest and sales potential.

Thus, in the case of both record companies and performers, the possibility of enhancing their contribution to the arts would be nil. In terms of the Constitutional goals of copyright, a performance right in sound recordings would be a useless appendage to the copyright law.

In effect, H.R. 1805 simply would reallocate wealth from one industry to another. Broadcasters would be taxed. Performers and record companies would be subsidized primarily at the expense of the industry which is most responsible for promoting sale of their product.

You should have no illusion about the industry which will pay the bulk of the fees. Radio broadcasting appears a strange prey for Robin Hood legislation. According to financial data compiled by NAB, the typical radio station in 1979 had a before tax profit margin of 5.75 percent or less than $20,000. FCC financial data for 1979 shows that:

40 percent of the country's AM stations and AM/FM combinations operated at a loss;

48 percent of the country's FM stations operated at a loss;

33 percent of the country's radio stations with revenues of $200,000 or over (those would pay the highest license fees) operated at a loss;

Pretax profits were down 25.6 percent from 1978.

Maybe stations can absorb a new element of expense, but corresponding cutbacks in other program expenses may be the price the public pays. Maybe stations can pass on the additional cost, but this, too, will be a price the public ultimately pays.

H.R. 1805 also would enlarge the role of the federal bureaucracy and create a new paperwork burden for stations, all of which would be filing statements and submitting fees on an annual basis. This not only would add to the costs of the legislation, but would also run contrary to the present trend away from governmentally imposed paperwork requirements. Furthermore, if it required public disclosure of station revenue, the annual statements would reveal normally confidential information to the disadvantage of all stations.

We are not as confident as the proponents of this legislation that the costs of distributing the license fees will not be substantial. Here we speak from experience. Even the four major parties seeking shares of the cable royalty pool could not agree among themselves. Consequently, the Tribunal had to conduct costly extensive hearings to make a distribution. Now a new proceeding to distribute 1979 royalties is underway. Unanimity among the affected record companies and performers as to the method and criteria for distribution may be impossible to achieve in reality.

The proponents also assume they can piggyback on existing systems for determining the extent to which individual recordings are played. If they are wrong, they face substantial costs—and might attempt to impose additional recordkeeping burdens on stations—to make that determination.

Finally, we see Constitutional and legal problems in the misuse of copyright in awarding noncopyright owners compulsory license fees for use of recordings. Performers do not own the copyrights in the recordings used by broadcasters. The copyright in the sound recording is owned by the record company. Section 106 of the Act provides rights to copyright owners.

To create a special class of noncopyright owner beneficiaries of copyright would be not only out-of-"synch" with the statute, but also particularly unwise and inappropriate. Once that door is opened, rest assured that long lines of non-copyright owners would form seeking copyright benefits.

If anything, the "performers' royalty" aspect of the legislation exposes it for what it is—a tax and subsidy scheme which attempts to deal with difficulties well outside the proper sphere of copyright concern.

In sum, we continue to oppose a performance right in sound recordings as unwise, unnecessary, and unproductive.

II. IN VIEW OF THE VALUE OF AIRPLAY TO RECORDING COMPANIES AND PERFORMERS, ESTABLISHMENT OF A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD IMPOSE AN UNFAIR LEVY ON BROADCAST STATIONS

Broadcasters do not pay performers and record companies for the use of sound recordings. At the same time, record companies and recording artists, generally do not pay broadcasters for the highly beneficial exposure they garner from air play of their records. In reality, each contributes to the other's well being. Broadcasters get program material; the record groups get free promotion. This fair and equal marketplace balance would be drastically upset if royalty fees were levied on broadcasters.

Broadcasters are more than mere beneficiaries of the creativity of the recording artists and record companies. They are partners in the creative process. It is the efforts of radio broadcasters that are primarily responsible for huge record sales and huge audiences at recording artists' concerts. Radio broadcasters, too, serve the creative process. They ensure broad exposure for creative works via air play of records and, thereby, promote and stimulate the sale of original artistry.

In fact, the radio broadcast industry represents the principle promotional device leading to the success and well being of recording artists and companies. Recording industry executives readily acknowledge the essential role radio plays in promoting record sales.

"Airplay is everything," is a frequently heard slogan in Elecktra/Asylum's ultra modern Los Angeles offices. Wall Street Journal (April 21, 1981)

"Air play is essential to sales." Forbes (January 5, 1981)

"I, like every other head of a record company, need and want radio to play our records. Without airplay we'd all be in the door to door aluminum siding business." Bob Sherwood, President of Phonogram/Mercury in Billboard (December 22, 1979).

The benefit of airplay is not limited to established, popular recording artists. This sentiment was expressed by Jack Craigo, then Senior Vice President and General Manager of CBS records:

"Craigo praised [radio] as one of the most important aspects in overall development of new artists, as well as a way to stimulate increased sales by established stars." Variety, March 29, 1978

For more than fifty years broadcasting stations have conferred substantial benefits on recording companies and artists by providing essentially free and valuable exposure for new recordings.

To require broadcasters who contribute so much to the creative process and the success of record companies and performing artists to pay the beneficiaries of our efforts for the right to continue to make this invaluable contribution would be grossly inequitable. In fact, because record companies and recording artists really need no additional stimulus to their creative abilities and because a performance right in sound recordings would provide no real stimulus to creativity in any event, it would be more than inequitable, it would be outrageous.

III. RECORD COMPANIES AND PERFORMERS ALREADY ARE WELL COMPENSATED FOR THEIR CREATIVE EFFORTS AND DO NOT NEED FURTHER COMPENSATION "TO PROMOTE PROGRESS . . . IN THE USEFUL ARTS"

A performance right in sound recordings is not necessary to "promote the progress of science and the useful arts." Copyright traditionally has been justified because it encourages authors and inventors to create by assuring them that they will reap the profits of their labors. The copyright law provides necessary protection for authors against those who may seek to "share" in the author's profits by duplicating or otherwise using the author's work for their own gain. Such protection

is not necessary in the case of those who perform music and produce sound recordings. They already are assured ample rewards for their creative efforts.

During the 93d Congress, NAB retained the late Dr. Frederic Stuart, Professor of Business Statistics at Hofstra University, to estimate the relative extents to which the various parties to record production, distribution and performance were compensated in the absence of a performance right in sound recordings. Dr. Stuart calculated the revenue from two sources—record sales and broadcast performance license fees—and estimated the relative amounts of such revenue flowing to the four parties to the production, distribution and performance of the sound recordings. The four parties are the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record.

With no performance right in sound recordings, only composers and publishers receive payment for broadcast performances. On the other hand, all four parties—composers, publishers, performing artists and record companies—share in the revenues from record sales. Based on revenue estimates generated by a random sample of records, Dr. Stuart found that performing artists and, to an even greater extent, record companies received shares of record sale and performance revenues which exceeded those of composers and publishers. The income distribution figures themselves are startling. Composers received $2,570,000 or 13 percent of the revenues generated by the random sample of records. Publishers received $2,910,000 or 15 percent of the revenues. Performing artists received $2,860,000 or 15 percent of the revenues. Record companies (after variable manufacturing costs) received $10,720,000 or the remaining 56 percent of the revenues.

Dr. Stuart refined these results to reflect two important factors: (1) the cost of unsuccessful records which must be borne by performing artists and record companies thereby reducing the amount of money they receive; and (2) the royalties from broadcast performance received by performing artists who also are the composers and/or publishers of the songs they record. When so refined, the revenue distribution from the same random sample of records was as follows: Composers received $1,530,000 or 9 percent of the revenues. Publishers received $1,200,000 or 7 percent of the revenues. Performing artists received $4,200,000 of 25 percent of the revenues. Record companies received $10,000,000 or 59 percent of the revenues. Dr. Stuart concluded: "The foregoing analysis shows the performing artist to be . . . well ahead of . . . composers and pulishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies, and none of these figures taken into account the substantial revenues generated by live concerts."

The record industry conducted a similar study of its own. Not surprisingly, they were highly critical of Dr. Stuart's study. Not surprisingly, they found performers better compensated than the record companies. What both studies showed quite conclusively, however, and what is most illuminating in the context of the present legislation, was that performers and record companies already garner the lion's share of the revenues from broadcast and sale of records. Whereas, Dr. Stuart found that performing artists and record companies received 68 percent of the revenues, the recording industry's study found their share to range from 66 percent to 72 percent over the same period. In short, the only beneficiaries of this legislation already are the largest beneficiaries of the broadcast and sales of records.

This study squarely rebuts allegations of the need for a performance right in sound recordings. The compensation received by performing artists compares favorably with or exceeds the compensation received by composers and publishers. The compensation received by record companies far exceeds that received by performing artists, composers and publishers. Therefore, the present copyright law provides adequate incentives to the production and distribution of sound recordings.

Additional factual material illuminating the true financial condition of performers, is provided by this study prepared by Professors James Destouza and Steve Wildman of the Department of Economics at Standford University. It indicates that in comparison with incomes of the population in general, performers are doing relatively well. In 1976, the median household income for AFM and AFTRA members surveyed was $16,000 and $18,000 respectively, while for the population as a whole, the median household income stood at $12,686. On an individual basis for all industries the average income was $11,623 while for AFM members it was $12,970 and for AFTRA $13,590.

The conclusion of the study is that at least among AFM members and AFTRA members in 1976 the median incomes were higher than those of the population in general. Hence, it is difficult to understand how they can argue that the incomes of performers demonstrate the need for a performance right in sound recordings.

IV. A PERFORMANCE RIGHT IN SOUND RECORDINGS IS UNJUSTIFIABLE AS A MEANS OF FURTHERING THE CONSTITUTIONAL GOAL OF COPYRIGHT

The proposed legislation hardly will "promote the progress of science and the useful arts" as mandated in the Constitution. Proponents maintain that a performance right in sound recordings is a logical outgrowth of the decision to grant limited copyright protection to sound recordings. This is not so. The Constitution requires the Congress to serve a specified goal in enacting copyright legislation; the present limited copyright in sound recordings—granted primarily to combat record piracy—does not automatically lead to the conclusion that performers or record companies have any right to a copyright payment for performances of sound recordings.

Proponents of the performance copyright law argue the imposition of royalties will stimulate new production and increased employment of musicians. Both contentions are naive and baseless and ignore the economic realities of a profit making business. Record companies will continue to refuse to release records until and unless market conditions justify their release. In this context, market conditions means prospective sales of records. Performance royalties are irrelevant to the normal functioning of the marketplace.

Compulsory royalties will not lead to employment of more musicians. Evidence presented to this Sub-committee over the years has consistently established that the recording industry over and over uses the same musicians and that these musicians make up less than 10 percent of union musicians available for employment. The President of the American Federation of Musicians confirmed this in testimony before the Copyright Office in 1977. He stated that AFM had 335,000 members in 1976, of which approximately 25,000 worked in the recording industry during that year.

Law Professors Robert Bard and Lewis Kurlantzick have conducted an extensive analysis of the impact of a performance right in sound recordings. It was published in the George Washington Law Review, Vol. 43, No. 1, November, 1974, at pages 152 through 238. Regarding the possibility that a performance right in sound recordings would stimulate recordings of unproven songwriters and performers, they pointed out that:

Records of new songs from unproven composers, performed by unproven artists, are risky enterprises and decisions to make such records are based on educated guesses regarding the sales potential and the record companies' need to maintain their flow of new releases.

Public performance revenues in these instances will be very difficult to calculate and only represent a small fraction of revenues obtainable from record sales. The margin of error in these decisions is so large that the small amounts of additional potential revenues from the sale of a public performance right are unlikely to be considered.

In short, a performance right in sound recordings will provide no stimulus to the creative endeavor of unknown and unproven performers.

A performance right in sound recordings would be similarly useless in stimulating production of classical records. Again, Professors Bard and Kurlantzick point out that the "increased income from [the sale of performers rights] is far too small to be considered in estimating the potential revenues from new classical record releases." Looking to legislation proposed in the 93d Congress, they estimated that performers and producers of classical music recordings would gain "no more than $59,000 from public performance fees, and probably less."[2] This amounts to less than two-tenths of one percent of the $32 million dollars generated by classical music sales in 1973. It would be described generously as a drop in the bucket in terms of providing any stimulus to classical record production or enchancing rewards to classical music performers.

Providing additional compensation to unknown performers and classical music performers is a most appealing goal. The illusory and theoretical benefits of a performance right in sound recordings, however, provide no real means of achieving that goal.

V. A PERFORMANCE RIGHT IN SOUND RECORDINGS IS NO REMEDY FOR THE ALLEGED DIFFICULTIES OF PERFORMERS, RECORD COMPANIES, OR CONSUMERS

The facts show performers and record companies to be well compensated already for their efforts, and, thus, there is no sound policy reason to establish a performance right. The revenues that would flow to performers and record companies if a

[2] Bard and Kurlantzick, A Public Performance Right in Sound Recordings: "How To Alter the Copyright System Without Improving It," 43 Geo. Wash. L. Rev. 152, 181 (1974).

performance right were established would, in fact, constitute an unwarranted windfall, offer no hope of public benefit, and fail to solve the alleged difficulties faced by performers.

H.R. 1805 proposes to redress the performing artists' traditional disadvantages in contracts and collective bargaining with the recording industry. There is no place for government intervention in this area, especially under copyright laws. In addition, the record companies are in a better position to fund additional compensation to background musicians and singers than is the radio broadcast industry.

Under present law, performers already obtain two fees—one from record manufacturers for making the initial pressing and another stipulated sum for each record sold. Performers also benefit from radio airplay of their songs which promotes sales of their albums increasing their income with each record sold.

The plight of allegedly under-compensated background singers and musicians often has raised as an agrument for a performance royalty. A performance royalty, proponents argue, would provide additional income to such performances. This argument ignores reality in several respects. First, royalties generated by a performance right very likely would tend to go where they are needed least. The most popular songs from the most popular performers are played more often. Thus, those who are successful will reap additional rewards for their success. Those who fail to achieve popularity will receive little. The rich get richer; the poor stay poor, if very slightly less so. Windfall for the popular; continued short fall for the also rans. A new copyright cannot remedy the difference in economic rewards between those who are highly successful and those who are not. Second, if, as alleged, these supporting performers are poorly compensated for their contributions to the final production, then relief should be forthcoming from those parties that directly benefit from these services, the recording companies and recording artists. This is an intramural industry problem, not a broader problem that compels government intervention under the guise of copyright.

Furthermore, if H.R. 1805 costs the radio industry 26.5 million dollars in royalty payments and if half of these payments went to the record companies leaving 13.25 million dollars for recording artists (and assuming zero costs for distributing royalty payments) each of the 44,000 musicians recording in 1979 would have received an average of only a few hundred dollars each. In fact, according to the Stanford study, it seems very likely that only about one sixth of the performers would receive this much and quite probable that half of the funds would go to artists already in the upper income brackets. We doubt that the Congress believes it necessary to provide even more wealth for the major performing artists than they now so obviously accumulate.

Furthermore, it is doubtful that performers would benefit at all from a performance right in sound recordings. The inordinate share of revenues which flow to the record companies evidence the overwhelming strength of the record companies' bargaining position. If we make the relatively safe assumption that the record companies will seek to maximize their gains, through their leverage in the bargaining process, they will have every reason to reduce performers' compensation to the extent the performers benefit from performance royalties. Thus, their revenues will be augmented by the extraction of at least some portion of the performer's share in the performance right royalties. Establishment of a performance right in sound recordings then would not shift bargaining power from one party to another in a way which would lead to any increase in performers' share of recording industry revenues.

Is it possible, as the legislation attempts to do, to guarantee that performers do in fact receive additonal money? Whatever the legislation may provide in terms of preserving the efficiency of the 50-50 split between performers and record companies, enactment of the performance right would not alter the overall bargaining positions of the two parties. We seriously doubt whether the performer's royalty payments ever could be isolated from the bargaining process. If, indeed, the record companies now have the upper hand, will they not be able to use their superior bargaining position to ultimately extract a bit more than what was intended—at the expense of performers and recording artists?

Of course, the recording industry would be delighted with any new revenue, particularly when it helps to get rid of a need to bargain with recording artists for a more equitable division of profits from record sales. But imposing a copyright burden on an unrelated industry is hardly the answer to resolving the inequities Congress might feel exist in the recording industry.

Furthermore, establishment of a performance right in sound recordings hardly will engender a greater need for performer's services, thus leading to greater employment among performers. Indeed, the Stanford study reveals that while performer's compensation on an hourly or daily basis is high, the real difficulty is an

oversupply of performers relative to the demand for their services. Thus, only a small percentage of them work full time as performers, a condition that this legislation would not address, much less correct.

In 1975 the Register of Copyrights, Barbara Ringer, testified before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee. She stated that sound recordings had damaged the performing artist by taking away his audience and limited the diversity of performers available. Although there may be an element of truth to this contention, a performance right will not rectify the situation. Radio stations never again will see the day they can afford to hire live performers and musicians.

In reality, H.R. 1805 is designed to allow Congress to impose what is, in effect, a tax upon radio broadcasters and television broadcasters for the benefit and subsidization of major record companies and performers. The problems it is designed to solve, however, involve the relationship between record companies and labor unions. Broadcasters should not be brought into it. This issue should not be muddied by so-called "copyright" considerations. We do not think the Constitution intended that Congress thrust itself into commercial enterprise in this manner under the guise of the copyright laws.

Finally, it has been claimed that a performance right would "redress the inequity" of record buyers having to bear the costs of creating sound recordings. This is not true. Record buyers will continue to be the groups actually paying for sound recordings and never will see the alleged benefits of a performance right in sound recordings. Record prices will not drop because of additional royalties paid to record companies and performers, and any claim to the contrary is erroneous and misleading. Performance right fees of ten or fifteen million dollars amount to less than one half of one percent of record industry list price revenues.

VI. A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD IMPOSE A COSTLY BURDEN ON RADIO BROADCASTERS TO THE DETRIMENT OF THEIR ABILITY TO SERVE THE PUBLIC

If a performance right in sound recordings is established, broadcast stations will have to pay additional royalties for use of sound recordings on their stations.[3] The amount of royalties payable by broadcast stations would be substantial. The fee schedule in the latest legislative proposal, for example, would extract millions of dollars from the radio industry's "bottom line."

The total payments required of the radio industry under the fee schedule in H.R. 1805 can be estimated from 1979 FCC Financial Data. 594 stations had revenues between $25,000 and $100,000; these stations would pay $250 each, or a total of $148,500. Similarly 1404 stations had revenues between $100,000 and $200,000; these stations would pay a total of $1,053,000.

Payments for stations with revenues over $200,000 can be estimated as follows. Total revenues for stations with revenues less than $200,000 are estimated by the midpoint of the revenue category and then summing across the categories for revenues less than $200,000. Subtracting these revenues from total net broadcast revenues for all stations produces an estimate of 2.776 billion in revenues for stations with revenues over $200,000. The total royalty payments for these stations would therefore be approximately $25.6 million, and total payments by all stations would be $26.461 million.

Payments of this magnitude would have a substantial impact on the radio industry. Total pre-tax profits were $231.4 million in 1979, so the royalty payments under the proposed bill would have represented about one-eighth (12.5 percent) of industry profits.

For many individual stations, the proposed payments would be particularly burdensome. In 1979, 40 percent of the AM and AM/FM stations lost money, and 48 percent of the independent FM stations lost money. Unfortunately, unprofitable operations were not confined to smaller stations (those with revenues less than $200,000) that would pay a flat fee under H.R. 1805; even among stations with revenues greater than $200,000 only 67 percent reported profitable operations in 1979. It is important to remember in this context that the payment schedule in the proposed legislation is tied to "receipts" not profits, so that a station showing revenues of $400,000 would still pay a royalty fee of $4,000 even though it was a loss operation. Such stations would be hard hit by a substantial increase in costs.

As suggested by many radio industry witnesses in the past, such measures could include cutbacks in news services, public affairs and other program areas that generally are not highly profitable in their return to the broadcaster.

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[3] Broadcast stations already pay approximately 3.5 percent of their revenues to authors and composers for use of their musical works.

The Register, relying on the much denigrated Werner Report, concluded that there "is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programming, and drive marginal stations out of business." [4] However, logic compels the conclusion that the imposition of an additional royalty payment on radio stations (particularly unprofitable or marginal operations) would require that radio broadcasters make certain judgments concerning the implementation of operation adjustments and other cost saving means to offset the additional costs incurred. The real question—not fully addressed by the Register—is whether the risk of a reduction in the quality and value of broadcast service is outweighed by the necessity of imposing upon radio broadcasters the obligation to provide additional compensation to record company employees. We do not think it is.

VII. ADMINISTRATIVE COSTS MAY WELL REDUCE THE SUPPOSED BENEFITS OF THE PERFORMANCE RIGHT IN SOUND RECORDINGS AND CREATE A LARGER ROLE FOR THE GOVERNMENT

There is some doubt about whether even the proposed performance royalty would actually benefit musicians because the costs of administering the system to collect and distribute the royalty payments could be so expensive that little money would be left over for the musicians. The Werner Report [5] looked at three different systems for calculating and distributing the money. Werner's discussion of these three systems leaves some serious questions about the cost of the feasibility of each of these systems. Werner recognized the problem of collecting and distributing the money, but did not offer evidence that the problem could be solved in a way that would leave any substantial amount of money for the intended beneficiaries of the proposed performance royalties. Not only does this leave unanswered the question of whether performers will really benefit from the proposed royalties, it also raises some question about the efficiency of the proposal—in an economic sense—since the "transactional costs" appear to be such a large proportion of the money involved.

Increased administrative costs will arise both in the private and public sectors if a new performing right is introduced. In the private sector some administrative costs which are likely to arise would be the costs of litigation involved in trying to restructure contractual relations among the various parties.

The costs to the government will undoubtedly increase. The necessary government machinery to determine the fee structures is already in place in the form of the Copyright Royalty Tribunal. The introduction of a new performing right will increase the complexity of their deliberations and will likely result in increased time and resources being needed.

VIII. INTERNATIONAL CONSIDERATIONS FAIL TO ESTABLISH ANY REASON FOR THE PERFORMANCE RIGHT IN SOUND RECORDINGS

Proponents of H.R. 1805 note that adoption of the Danielson Bill would bring this nation's copyright law into accord with prevailing international practices. Any evaluation of the foreign experience for purposes of predicting the effects of a performance right in this country must not ignore the tremendous differences between the broadcasting system in this country and those in most foreign countries. Unlike most foreign broadcasting systems, the U.S. system is privately owned. Moreover, it has developed into a ubiquitous, nationwide service which provides an invaluable service to the public without government subsidy. In contrast, most foreign systems are state-owned and operated and provide a far more limited service. In terms of the impact of a performance right in sound recordings, payments made to recording artists and record producers by state-owned broadcast systems really amount to an indirect government subsidy. A portion of the public funds used to operate the broadcasting system is, in effect, reallocated to recording artists and record companies. Furthermore, this subsidization of recording artists and record companies is hardly likely to affect the quality or quantity of service provided by a state-owned broadcast system. The cost of performance right fees is paid by government funds allocated to operation of the broadcast system.

In this country, performance right fees would be paid by broadcasters and would constitute a transfer of funds from one segment of the private sector to another, rather than a governmental subsidy. As was pointed out in previous testimony, this

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[4] Addendum to the Report of the Register of Copyrights on Performance Rights in Sound Recordings, page 10.

[5] Werner, S. M. "An Economic Impact Abalysis of a Proposed Charge in the Coypright Law." Prepared for the Copyright Office, U.S. Library of Congress, 1977.

reallocation of broadcast revenues to recording artists and record companies cannot be justified by any commensurate public benefit. Moreover, in contrast to the foreign experience, payment of performance right fees would tend to reduce the quality of radio broadcast service in this country and might jeopardize the continued operation of some stations. Any comparison between the effects of a performance right in sound recordings in this country and foreign countries must be viewed in light of these critical distinctions.

The legislation's advocates state that Canada has abandoned its performance royalty because United States law provides for no reciprocal performance royalties. This was only one reason for its abandonment. It was found by the Canadian government that introducing the performance right would result in a negative benefit-to-cost ratio. It was found that introducing a performance right in sound recording would be extremely inefficient "since approximately 70 percent (55 percent of foreign companies and 15 percent in administrative expense) of the funds raised would not reach the Canadian producers.[6] The study determined that the money raised would come from royalty payments flowing to composers/publishers and broadcasters. It was determined that broadcasters would not be able to pass the increased royalty costs on in full to advertisers which could result in serious impact on smaller stations "many of whom are presently suffering consistent losses." [7] The Canadian situation is strikingly similar to that of small American stations.

The Keon study advised against implementing the performance royalty because "the rationale for such a right is weak, since record producers are already the prime beneficiaries when their music is played on the air" [8] and "Royalty Fees . . . would result in the majority of the funds going to the holders of copyright in the already successful recordings. As a subsidy scheme this would not be desirable, since the producers who most need the money would not be receiving it." [9] The Canadian experience has shown that a performance right is unnecessary as an incentive to produce records and not beneficial to performs or producers—only to the record companies who need the royalties least.

IX. H.R. 1805 IS CONSTITUTIONALLY BASELESS AND OUT OF PLACE AS A COPYRIGHT MATTER

In view of the lack of need for a performance right in sound recordings and the performance right's inability to stimulate the creative efforts of recording artists, enactment of a performance right in sound recordings would exceed the powers granted Congress in the Constitution. Article I, Section 8, empowers Congress to establish copyrights to "promote progress in science and the useful arts." It does not empower Congress to establish copyrights merely for the purpose of reallocating revenues from one industry to another. Yet, that would be the only real effect of a performance right in sound recordings. Thus, we submit that establishment of a performance right in sound recordings would constitute not only an unsound public policy judgment, but a Constitutionally baseless act as well.

Furthermore, in awarding copyright fees to performers, H.R. 1805 inappropriately and unwisely confers copyright benefits on non-copyright owners. Section 106 of the present act grants rights only to copyright owners. Performers on records usually do not own the copyright in the record. The record company is the copyright owner.

If non-star performers receive inadequate compensation, this is a matter for the recording industry to deal with in the context of traditional employer-employee relationships; it should not be clouded by the injection of so-called "copyright" considerations. Government intervention in such a process here will inevitably lead to requests that Congress "legislate" compensation adjustments to other industries. We do not think the constitution intended that Congress thrust itself into commercial enterprise in this manner under the guise of the copyright laws.

Mr. KASTENMEIER. Thank you, Mr. Popham. We have some questions, but first we would like to call on Mr. Robert Herpe, who is, as I indicated earlier, chairman of the board of the National Radio Broadcasters Association. We are very pleased to have you here this morning.

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[6] Keon, Jim, "A Performing Right For Sound Recordings: An Analysis by the Minister of Supply and Services" Canada (1980) p. 95.
[7] *Id* at 96.
[8] *Id* at 99.
[9] *Id* at 99.

TESTIMONY OF ROBERT HERPE, CHAIRMAN OF THE BOARD, NATIONAL RADIO BROADCASTERS ASSOCIATION

Mr. HERPE. Thank you, Mr. Chairman.

It's a great pleasure to be here today and I want to thank you for the opportunity to speak before this committee. My name is Robert G. Herpe. I am the licensee of AM and FM stations located in New Haven, Conn., and Orlando, Fla. I have been in the broadcasting business for almost 30 years. I also serve as chairman of the board for the National Radio Broadcasters Association, a nonprofit trade association representing approximately 1,500 AM and FM radio broadcast stations located throughout the United States. The NRBA has been and continues to be unalterably opposed to the payment of a performance royalty by radio broadcast stations which broadcast entertainment programing encompassing records and/or tapes produced by record companies in the United States. The NRBA's position is predicated upon the fact that sufficient consideration runs to the record companies, as well as to the performers, by the mere fact that radio stations feature and thus promote the record companies' product on the air, without charge.

Record companies are attempting to foster the concept that radio stations are operations whose profit is unfairly predicated upon the free utilization of record company product—that is, using the product of the record companies without providing fair compensation. I put to you that if the concept is correct, why do record companies hire record promoters and utilize other independent agents to work with program directors and other radio station personnel at radio stations located throughout the United States to secure favorable consideration for play of their product by the radio stations? Why is there a Federal crime known as "payola"? In other words, why are record companies and performers interested to the point of being willing to violate Federal law by providing consideration to radio station employees in order to secure favored treatment of their product? I submit that the answer is a simple one. Record companies live or die based upon the sales of their product, and those sales are directly proportional to the amount of air time accorded that product by local radio stations. Now I could back this with many statements, as my colleague here stated before, but I will give you but one so that we don't bore you.

This one came from Bob Sherwood, president of Phonogram/Mercury Record Co., stated in a commentary which appeared in Billboard magazine in the fall of 1979: "I, like every other head of a record company, need and want radio to play our records. Without airplay, we'd all be in the door-to-door aluminum siding sales business." I repeat, "without airplay," he stated, "we would all be in the door-to-door aluminum siding business."

The record companies and the broadcast stations offer to each other mutual advantages—their relationship is symbiotic. No radio station operator is, by any stretch of the imagination, taking advantage of the record companies. As noted, record companies live or die by securing exposure of their product on radio stations. This is the consideration which radio stations are giving to the record companies—and it is valuable. Otherwise, why, as noted before, would the record companies be willing to pay money for favorable treatment of their product? If a law were to be passed requiring

radio stations to pay a performance royalty for the right to play the product of record companies, there is no question but that this would be introducing a false factor into the relationship between the stations and the companies. What, in effect, would be happening is that the radio stations would be paying 1, or 2, or 5 cents to the record companies in exchange for a right for which the record companies, absent a Federal law, would be willing to pay many times that amount to the radio stations for exposure of their product. This is not logical.

In his statement presented to this subcommittee on May 20, 1981, Stanley M. Gortikov, testifying on behalf of the Recording Industry Association of America, Inc., stated:

> Radio in particular makes extensive use of records at no cost. Sound recordings account for three-quarters of radio's programing. Yet broadcasters—who must pay for all their other types of programing—pay nothing to performers or record companies for this, their basic source of programing material.

This statement is easily and more validly turned around—the record companies are provided air time for promotion of their product by radio stations—time for which other advertisers have to pay the radio stations—yet the record companies receive this time without any expense to them other than the provision of the product. To this, we add, as noted before, air time for which they do not have to pay, although, absent a Federal law, they would be more than willing to do so.

Since the profits of the record companies are predicated upon sales, and sales are predicated upon exposure of their product on radio stations, it is a specious argument to bring up the "poor" musicians and performers who don't profit from the sale of records. Their plight can be ameliorated very easily. The record companies and the musicians can enter into contracts which would fully compensate the musicians for their work. As to providing a fund for those musicians and performers who can't find adequate employment for their skills, we submit that this is a function to which the record companies and the successful performers should address themselves. Why shouldn't the successful performers set aside a portion of their income to help musicians and performers who are out of work, if that is so important to their industry? Why should radio stations which provide the air time which leads to the success of a record and/or a performer be asked to subsidize those members of the record industry who cannot secure adequate compensation from that industry?

On that point, I might just point out that perhaps the record companies would like to subsidize the out-of-work DJ's and there are hundreds of them also. It doesn't make sense.

We might add that a close look at the industry would show that not only is the sale of records important to big-name performers, but, as a result of exposure of their product by radio stations, these performers are able to secure lucrative concert dates. While we are getting a little off the track, this subcommittee should know that when a performer is coming to town, no effort is spared to secure the cooperation of local radio stations to play that performer's records and to promote the concert.

In sum, it is hard to perceive any justification for further governmental intrusion into the relationship among record companies,

performers, and radio stations. The existing payola laws prevent money from flowing from company and artist to the broadcaster in return for the substantial and valuable dedication of program time to recorded music. The proposed performance rights provision would force broadcasters to pay artists in return for providing air time for which the recording company and the performer would be willing to pay. This is illogical. For the reasons stated, the NRBA believes that a law requiring radio stations to pay a performance royalty for the service they provide by featuring record company products should not be passed.

Mr. KASTENMEIER. Thank you, Mr. Herpe.

I know I need not issue a disclaimer, but I think the questions I ask are not necessarily meant to disclose my own personal views but, rather, to attempt to elicit a dialog of the issues.

First of all, is there any difference in interest between the National Radio Broadcasters Association and the National Association of Broadcasters. Particularly on this subject or in terms of representing radio stations, would there be any difference between your two organizations?

Mr. POPHAM. I think we can say we are both unalterably opposed to the legislation and there's no question about that.

Mr. KASTENMEIER. Do you have a common interest in fact?

Mr. HERPE. In this particular situation, definitely.

Mr. KASTENMEIER. In both of your testimonies you suggested that because promotion is a benefit to musicians and to record companies that justifies the free use. When I say free use, I mean use without payment of royalty. I wonder whether that necessarily follows. One could say equitably that would be the case for perhaps certain new records in terms of benefit, if there were some sort of formula. But the testimony I think is that the majority of records are not played for the first time, are relatively old records that have been around for a while, and this provides your programing and there ought to be a quid pro quo. There ought to be some sort of commercial benefit the radio stations derive from access to these huge repetoires without any compensation whatsoever.

Mr. HERPE. I think that is very true, that much of the music that we do play is, as you say, older music. However, that music was not always older music. When that particular product was new, we played and promoted it in the same way as we do any other new air product, and perhaps without us that product wouldn't be around today at all. I think we have paid for that in the past and I think we have paid for the right to continue to use that.

Mr. POPHAM. Let me agree that that music would not have been popular—the recording would not have been popular in the first place without airplay, and alluding to something else too; that there is really a continuing exposure from the performance of the so-called oldie to the performer and to the record company and that it does keep the performer in the public eye. It does help with respect to promoting concerts and personal appearances and also I think just from personal experience walking into a record shop or looking at a record rack in a department store, there are a lot of what might be considered oldie albums on sale, too.

There's still a benefit which is conferred I think long after this initial period of popularity. There are many levels of record sales

which might start in the major record shops but further on you still have record clubs and similar devices to maintain the marketing position of the recording to keep it in the public eye and keep sales going beyond this initial period.

Mr. KASTENMEIER. My question, Mr. Popham, is whether or not promotion, which is very much a voluntary activity on the part of both parties, should be the criterion here. For example, how do you distinguish between a major vocalist or musician and a person who says, "Yes," just as the record company says, "Yes, I need appearances on radio or on television. This will help promote me and advance me." But with the broadcasting industry putting such a person on, does that not mean that person will not be accepted merely because that person benefits from the appearance, whether it's on radio or television? The understanding is that the person is compensated. How does it differ then from use of that person's record in the same relationship, whether it's a question of promotion or not?

Mr. POPHAM. Well, I think here you have to look at a large picture; that it's a situation where there is a balance of equities at this point. There is what in a legal sense might be called consideration of one form or another flowing both ways, and to impose a system of payments on one party now would really throw that out of balance and I think that is our overall concern here.

Mr. KASTENMEIER. Talking about balance, how do you distinguish between paying a composer a royalty and all the attendant regulations and bookwork, not to speak of costs, and of paying these performers and recording companies a royalty? Why should the country expect you to pay in one case and not the other?

Mr. POPHAM. Well, I think it boils down to the question of what is needed in terms of copyright to promote the creative effort. We have already submitted evidence which I think has shown that the record companies and the performers are getting the lion's share of revenue when you look at both airplay and the sale of records together, and indeed the recording industry has grown as the radio industry has grown and promoted their product.

The publishers, on the other hand, at this point have a rather limited benefit from the sale of records. I think some of the statistics submitted by the recording industry before the Tribunal indicated that their mechanical right fees were something like 7.2 percent, which was a rather small amount of record company revenues. So they are rather limited in that respect and, indeed, there might not be the stimulus if they were not paid for the airplay as well. Here we think the stimulus from airplay is there and the stimulus in existing copyright law is sufficient.

Mr. HERPE. If I may add, Mr. Chairman, I think that there is a definite difference in the promotability. It is seldom that the name of the composer is even discussed on the air and promoted. They are not getting the same kind of promotion as the performer or the record company is getting on a regular basis. Therefore, certainly it does make sense.

Mr. KASTENMEIER. Well, that may be, but I wonder really what might have happened if somehow the law had provided earlier for performers' rights. Assume this bill had passed 30 years ago and the composers had not, for one reason or another, gotten a similar

royalty and would today be asking for that royalty. What would your arguments be, whether they would be similar or not? I don't see a great deal of difference between the two. There are some differences, but I'm not sure that these aren't in a sense more or less historic accidents rather than inequities.

Let me ask you one other question. You mentioned—and I think indeed you should make the point—that many stations operate at a loss or they do not make very much money, that many radio stations certainly are not big business by any means. They are small business and some of them, especially I suppose the small FM's, barely make a go of it.

Would it help at all, do you think to have modified the payment schedule to provide a little more relief for the broadcasters at the bottom end of the scale in terms of should this bill pass or move on?

Mr. POPHAM. I think the main focus of our concern at this point would be the stations who are not at the small end of the scale but are at the large end of the scale but not making money. I think they would pay large royalties. This would just be adding to their deficit, so to speak, and I think we would be most concerned about the effect on those stations. Obviously, anything that reduces the burden anywhere I suppose makes it less painless, but certainly not painless overall, and I think would not significantly reduce our concerns.

Mr. HERPE. I think, Mr. Chairman, there are certainly some stations, who could not afford to pay an added royalty fee. If you were to ask me if I could afford it, perhaps I could afford to do so, but I think that's like saying to me to buy a loaf of bread for $2 when it's really only worth $1, which we're already paying. Sure, I could afford the $2, but it doesn't make sense for me to pay it. I think it's a principle we're talking about.

Mr. KASTENMEIER. I'd like to yield to the author of the bill, the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Mr. Popham, following up on the question presented by Chairman Kastenmeier a moment ago, you state—and it appears on page 6 of your written statement—that 40 percent of the country's AM stations and AM-FM combinations operated at a loss in 1979. I presume those are the latest figures you have available?

Mr. POPHAM. Those are the latest available, yes.

Mr. DANIELSON. And 48 percent of the FM stations operated at a loss and 33 percent of the country's radio stations with revenues of $200,000 a year or over—that would be the higher category under this formula—operated at a loss. I'm concerned how do these stations stay in business? I have found, except for the Federal Government, when enterprises operate at a loss they go through bankruptcy. How do they stay in business if they're running at a loss?

Mr. POPHAM. Well, I think the same stations do not necessarily operate at a loss on a year-after-year basis. They might make money one year and lose money the next and make money for a year or two.

Mr. DANIELSON. But it's such an enormous percentage, 40 percent, 48 percent, 33 percent. This sounds like Chrysler.

Mr. POPHAM. It's a very competitive business.

Mr. DANIELSON. Have you had a loan guarantee from the Federal Government to help these stations, like Chrysler is what I'm thinking about?

Mr. POPHAM. Not to that extent, no.

Mr. DANIELSON. Do you know of any radio station, AM, that has gone bankrupt in the last 5 years?

Mr. HERPE. Yes, I do.

Mr. DANIELSON. Designate the station and the year, please.

Mr. HERPE. WNHC AM radio in New Haven, Conn., this past year.

Mr. DANIELSON. Do you know of any other that's gone bankrupt?

Mr. HERPE. Yes, another radio station. I can't recall the call letters, but it was up in Rhode Island.

Mr. DANIELSON. What year? How long ago?

Mr. HERPE. This past year.

Mr. DANIELSON. I did ask FCC for any such information and they were unable to provide it, but do you know in the bankruptcy proceeding if that license and the equipment were picked up at a sale by the trustee?

Mr. HERPE. They were taken over by trustees.

Mr. DANIELSON. The law requires that, but were they sold by the trustees?

Mr. HERPE. At this stage, neither of them, to my knowledge, have been sold. I believe they are trying to sell them.

Mr. DANIELSON. The license is still available to whomever wants to buy it?

Mr. HERPE. Yes, sir.

Mr. DANIELSON. How many radio stations are there in the United States?

Mr. POPHAM. Roughly 8,900 now at this point.

Mr. DANIELSON. I notice, Mr. Popham, that you say you represent 4,772. That would be the NAB?

Mr. POPHAM. That's right.

Mr. DANIELSON. And 662 television stations. How many of them are there?

Mr. POPHAM. There are just over 1,000 television stations at this point.

Mr. DANIELSON. And six radio networks and three television networks.

Mr. Herpe, you state in your statement that your association has approximately 1,500 stations?

Mr. HERPE. Yes, sir.

Mr. DANIELSON. Are the stations represented by each of you exclusive or do you represent the same stations under some circumstances?

Mr. HERPE. No. Some of our members are members of the NAB, but a good percentage of them are not.

Mr. DANIELSON. What is the differentiation between the NAB group and the National Radio Broadcasters?

Mr. HERPE. The National Radio Broadcasters Association is and exclusively radio oriented organization. The NAB is more of an umbrella organization representing all of the broadcast interests, including television.

Mr. DANIELSON. And there are at least some of your group which are members of NAB?

Mr. HERPE. That is correct.

Mr. DANIELSON. Do you agree with that, Mr. Popham?

Mr. POPHAM. Yes, I do. There are members of both organizations.

Mr. DANIELSON. Well, I do hope, if you can provide for us—apparently you obtained this financial data from the National Association of Broadcasters?

Mr. POPHAM. Well, there are two sources, Congressman. There is a report put together by NAB and there is a report put together by the FCC. We would be happy to provide both.

Mr. DANIELSON. I would respectfully request that you do because I would like to have that data and I would certainly like to know where these bankruptcies took place and are still pending. Maybe I can pay up a license and pick it up.

I'm concerned that you're worried about the financial end. The bill provides as presently drawn for a blanket license if you should wish it, no charge for stations with net receipts under $25,000; $250 per year, which is about 70 cents a day, for stations having net receipts between $25,000 and $100,000; and $750 per year, which is $2 a day, for stations between $100,000 and $200,000; and thereafter to consider 1 percent of the net receipts as you get into that much higher level.

What concerns me is I have been in a business. I know you buy drinking water for our health that's in that little jug down the hall you push and button and blub, blub, blub into a cup you know. There's usually coffee in the help's dressing room. You use electricity to run your station. Do you not pay for all of those things?

Mr. POPHAM. We do pay for electricity.

Mr. DANIELSON. And the coffee and so forth and paper towels?

Mr. POPHAM. Yes.

Mr. HERPE. I submit, Congressman, that as I stated before, we are already paying for that product in kind.

Mr. DANIELSON. For electricity?

Mr. HERPE. No, for the use of the records.

Mr. DANIELSON. You buy the record, do you not?

Mr. HERPE. There are different types of payments, sir, and I believe that the kind of services that we are offering which are worth millions of dollars which advertisers would pay for, are being given to the record industry. There is a definite benefit afforded.

Mr. DANIELSON. Did you ever consider charging the record companies for playing their record?

Mr. HERPE. Well, if they would like to pay me 25 cents for every time I play a record I might consider it. I think, however, our payola laws and the public interest would not allow us to do that.

Mr. DANIELSON. I don't think there's anything in the law that says you can't charge for advertising.

Mr. BUTLER. You'd better be careful there.

Mr. POPHAM. Let me respond to that a little bit more. There are, I think, some cases where record companies do actually advertise on stations not having a record played as such but simply normally the 30 or 60 second commercial, promoting a particular record. I think the concern about paying generally is it would amount to an

awful lot of commercial time on radio stations and I think they would be very concerned about their public interest obligations.

Mr. DANIELSON. It is a fact, is it not, that your public interest obligations remain an obligation? That is, in effect, the charge you pay for the radio frequency. Your stations are assigned a given frequency and they are allowed to broadcast on that frequency and one of the considerations is to devote a certain amount of time to public interest broadcasting; is that not a fact?

Mr. HERPE. That is true.

Mr. DANIELSON. Do you not agree, Mr. Popham?

Mr. POPHAM. Well, there's been some deregulation such that the very detailed guidelines that we once had do not apply. But generally speaking, stations obviously have an obligation to be responsive to their communities.

Mr. DANIELSON. It's a mandate, is it not?

Mr. POPHAM. Yes.

Mr. DANIELSON. Thank you. The answer was yes. I know this—radio stations in my community, which is Los Angeles, come to my office at least once a year to query me as to what are the issues of the day they must report on and also to assure me that they are giving public interest broadcasting, and so there must be some compulsion behind that. I guess that's all the questions I have. Thank you very much.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Given the rapidly changing technology and the fact that now apparently Americans are going to be able to tape right off the air radio broadcasts, including musical compositions, the performers have made the argument that the industry itself, by reason of that fact, is going to be in trouble unless they are given some compensation by way of a royalty. I wonder what your perception is of that and how you would address it?

Mr. HERPE. I would say that the technologies that are happening out there do, as Mr. Gortikov said when he testified before this subcommittee—I believe his statement was that it threatens the very existence of the record business. I would put to you that the radio business, on the other hand, is no less threatened by these new technologies. But to my way of looking at it, in a free marketplace, it is not for us to ask the Government to bail us out because of changes in our industry.

I think that the creative entrepreneur and company has to change with the times if he's going to survive.

Mr. RAILSBACK. Do you really mean that, and do you mean that it would also apply to the composer? You distinguished the right of the composer from a performer. What about the composer in such a situation?

Mr. HERPE. The composer, sir, is getting and presently does get paid.

Mr. RAILSBACK. What I'm talking about is we may have the very real situation where these American people, with their taping devices, take right from the air a musical composition from one station and may reproduce it and then play it. In that case, the composer, although there may be a small copyright paid from one

broadcast station—what you're talking about is really tantamount to record piracy.

Mr. POPHAM. I think you have to make a very critical——

Mr. RAILSBACK. I think there's a distinct possibility. What would you do about the composer situation? What can be done about that?

Mr. HERPE. I don't know that I'm in a position to really give an expert comment on it, however, it would seem to me that if these new technologies come about and if there is going to be direct taping off of satellite, that it's going to be for the record companies, composers, et cetera, to negotiate with the satellite companies. I think we're talking about a whole new business. We can't foresee that at this point.

Mr. RAILSBACK. That's really a little bit different. I'm talking about something—as I understand it—that is very new. It involves all kinds of new technological capabilities, but go ahead if you had an answer.

Mr. POPHAM. I would like to draw the distinction between the performance and the making of the record which is what you're concerned with and what is a substitute for the sale of the record which is of great concern to the record companies. The performance right legislation that we're dealing with really doesn't address itself to that issue. It would not really affect that situation. People have been able to tape record music off the air for a number of years. We have had tape recorders for years that have done that. But this seems to me is a problem that deals with a totally different right, the right to make a copy and not the right to perform. If there's a problem there this legislation certainly isn't the solution, but something related to right to make a copy would be the remedy. Of course, with the antipiracy legislation of 1971 you attempted to at least deal with the piracy as a substitute for the sale.

Mr. RAILSBACK. Well, let me ask you both this. When I read your statement—and I think we should try to ask pretty tough questions of the performers that are the proponents—and listened to your testimony, I get the feeling that this concept of a performer's royalty, you think, is almost outlandish because the radio broadcasters are benefiting the performers by exposing and giving them publicity. But how do you explain, or how do we explain, the fact that 62 countries right now have recognized the right of a performer's royalty. Even though you can make the distinction between a state-owned radio station and contrast that with the private firm radio stations, is it so outlandish if 62 countries have already done it? Then I want to ask you, are the American performers losing royalty rights by our failure—this country's decision not to have some kind of a reciprocal right? What would you do about that, if anything?

Mr. HERPE. We are certainly, in most cases, I believe, talking about different systems, different types of broadcasting systems. I don't know of any other country that has the free marketplace concept that we do and allows for this interchange and this partnership that was mentioned here before. So I don't think that you can really make a comparison under those circumstances.

Mr. RAILSBACK. But in either case, whether it's state-run or state-operated——

Mr. HERPE. Even in some of the other countries that do have some commercial radio, there does not exist the same symbiotic relationship. It just does not exist.

Mr. RAILSBACK. Well, what's the difference?

Mr. HERPE. Most records in the world are produced right here in the United States. The radio business in the United States has indeed fostered the record business. If you go back to pre-World War II, we certainly had records, but it was a whole different business before radio started programing in the way that radio programs today. That was when it suddenly happened. The record business just mushroomed, and I think most record company executives will agree with that.

Mr. RAILSBACK. So you're making the distinction that the United States is unique in that we are the No. 1 producer. That's one thing. It still doesn't answer the argument that because radio broadcast stations give certain exposure to the records—because I think that happens in these foreign countries too and I'm just trying to understand. I understand that some of the foreign countries have state-owned systems, and yet I know that they are giving exposure to those private record companies. A lot of our performers are apparently losing reciprocal rights that they might otherwise enjoy. I have no idea how much that would amount to, but I think that's an argument that has to be dealt with. Sixty-two countries do have a performer's royalty.

Mr. POPHAM. I think by way of perspective, there are 100 and some odd countries in the world, so there are quite a few—Canada comes to mind as the most prominent—that does not have a performance right.

Mr. RAILSBACK. Didn't they have it at one time?

Mr. POPHAM. I think they did and they——

Mr. RAILSBACK. Because the United States didn't, they backed down.

Mr. POPHAM. But they have rejected it also for many of the same reasons that this country has rejected it. Also, I think again the larger perspective, the record companies if they did not have the base of record sales in the United States to develop their industry—and this comes again largely through the promotion they get on radio—they would not have records to export to begin with. So I think we are providing a base which enables them to sell their music in other countries, which is highly beneficial and part of this overall benefit that the record companies get from airplay. And finally, I would just point out that I think primarily we are dealing with a domestic question and to let an international point perhaps be compelling may be letting the tail wag the dog which would not be appropriate.

Mr. RAILSBACK. That's all, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. No questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. I'm sorry I had a bit of a delay but I have read the statement and I find myself a little bit

torn here. I'm persuaded in part by your arguments vis-a-vis the record companies not vis-a-vis the performers. I don't know whether it is possible to resolve that.

I want to start with the record companies. You point out it is now illegal for them to pay you to play their records and I understand that, but I wonder—suppose we repealed the restriction against payola and then, of course, it would be legal so we wouldn't call it payola. At the same time, we give them copyright protection and you and they were in the free market. How would the overall balance be? In some cases the record company would pay you and in other cases you would pay them. I'm trying to understand what the basic economic forces would be. What would you think would be the practical situation in a case like that, if you and the record companies were free to buy and sell the right to do that?

Mr. HERPE. I think I could become a very rich man.

Mr. FRANK. You think they would be willing to pay you more than you would have to pay them?

Mr. HERPE. I think so.

Mr. POPHAM. I think at the very least, as we have said, there is a balance of equities at this point.

Mr. FRANK. Why don't we do that then? If we could work it out, is that not the ideal thing? Let's leave out the rights of performers. We're dealing with various corporate entities. The optimum free market would be that you own the station and they own the records and each of you would be allowed to bargain with the other to set whatever price, and leave aside the transaction cost and whether or not that would be practical. Would that not be the ideal free market situation from the standpoint of the public?

Mr. POPHAM. I think the present situation is rather good and I would just parenthetically say——

Mr. FRANK. Why is it good?

Mr. POPHAM. Because the balance is there.

Mr. FRANK. When the present situation says the free market economic forces shall have nothing to do with this; we'll do this all by law. Are there other areas of the economy where you would simply, by law, suspend the free market forces?

Mr. HERPE. I could see some public interest problems in what you're proposing, Congressman.

Mr. FRANK. What would they be?

Mr. HERPE. In that a record company that wanted to pay me off to play more of his records than somebody else's records is exposing more of his product to the public which would keep other products from being exposed to the public, I think that's not in the public interest.

Mr. FRANK. You have antitrust laws and other laws, so it would not be legitimate for him to pay you not to play somebody else's product.

Mr. HERPE. But if he's paying me to play many of his records, I may not have the time to play the other records.

Mr. FRANK. Well, good. Why is that wrong? Why is this not a market-type situation? Why is that not the best? I don't understand where the public interest is being damaged there.

Mr. POPHAM. I think in the true sense of the word, in the legal sense of the word, payola is really something of a fraud on the

public because in a payola situation neither the public nor usually the station management would know.

Mr. FRANK. You would have the truth in advertising. You would have to say—we do this now. I don't think this is a serious problem. I really do think if we're going to talk about this in the commercial context that's where we ought to go, and if you're right, if it's more valuable for them to have you play the record than for you to play them, then it's——

Mr. BUTLER. If you would yield on that point, wouldn't your objectives still be to play what the public wants to hear? Otherwise, it would be reflected in your advertising revenues, would it not?

Mr. HERPE. I think that is probably true. Our ratings would not be all that great if we played only one record company's products.

Mr. FRANK. So the market forces would govern the tendency to abuse?

Mr. HERPE. Yes.

Mr. FRANK. If you believe that, that seems to be a direction in which we ought to go. You ought to have the right to play the music, but it does not seem to be some sort of a sacred subject and you could have a disclaimer that we have taken into account what people want to pay us. I think that's a reasonable thing to do.

Mr. POPHAM. May I just add that if you went to that sort of situation that the performers would really be out of the picture. The record companies are the copyright owners here and they would be the sole beneficiaries.

Mr. FRANK. That's why I set the performers' interests aside. To the extent possible, we ought to let market forces prevail.

Mr. HERPE. What I see in the performers' royalty bill at this point with the emphasis that the record companies are putting on it, can frankly be summed up by the statement that Mr. Gortikov made when he said that up until now the record companies have been able to build in enough profit to pay for their investment and then some. I think all that this thing is really doing is trying to get a subsidy for a business that is changing under economic stress and technology, and I don't see that it makes sense for the Government to try and bail that business out. They didn't bail out the horse and buggy when the automobile came along, and that was new technology. They didn't subsidize the iceman when the refrigerator came into fact. I see this as being no different.

Mr. FRANK. Do you think the record companies are going to be phased out?

Mr. HERPE. Well, Mr. Gortikov says the new technology threatens the very life of the industry.

Mr. FRANK. What are people going to play when there are no records?

Mr. HERPE. They may come up with something else. Call it a musical needle.

Mr. FRANK. I don't see the relevance of that one. Let me go on before I get to the performers. Your position, the one with which I agree, is that the compulsory actions ought to be abolished with regard to cable companies. I think that's right. You've got a copyright and you ought to be able to keep it. Is that philosophy consistent with your position here? You can play somebody's

record. Let's say I'm a singer—to take a very remote hypothetical—and I sing a song and you can put it on the radio whether I like it or not. But if I'm in a movie you have to pay me. But you say you ought to have control over whether a cable——

Mr. HERPE. There is a difference again. We, as I stated before, are paying for it in kind.

Mr. FRANK. Paying for what?

Mr. HERPE. We are paying for the use of those records by the services we render to the record companies.

Mr. FRANK. So is the cable company paying for the service.

Mr. HERPE. We're paying with the promotional efforts that we're giving.

Mr. FRANK. The involuntary servitude is what bothers me. What you are saying is if I sang this song and I don't want you to play it on the radio you can play it and say this is for your own good and, believe me, that's in your own interest. I don't buy that. I'm talking about the performer's standpoint.

Mr. POPHAM. There is a difference between the two situations. In the area of cable television there was a finding by Congress that there was harm occurring because of the cable use of the programing material, whereas here I think we are in a situation where very definitely there is a benefit from the use.

Mr. FRANK. The philosophical principles are not what we're talking about.

Mr. POPHAM. We're talking about reality. We're talking about two different situations.

Mr. FRANK. It seems to me some of the arguments you were making with regard to compulsory license in the cable area really did draw on some questions of principles and rights of ownership and they seemed to be particularly relevant to the performers' rights, and I'm just waiting to hear some distinction.

Mr. POPHAM. Well, I think we have made the distinction. We said there was a harmful and unfair situation with respect to cable television and here we think there's a fair situation and balance.

Mr. FRANK. That's a statement of a conclusion which does not help me to figure it out. That's not a distinction.

Mr. POPHAM. There was a finding of harm in the case of cable television and the need to redress a problem which existed.

Mr. FRANK. What was the harm? The harm was that they weren't getting enough compensation?

Mr. POPHAM. Well, the harm was—yes, part of it was not getting enough compensation.

Mr. FRANK. That was, of course, the private performers.

Mr. POPHAM. And not having control of the product in the marketplace.

Mr. FRANK. Similar things apply here. The harm is inadequate protection.

Mr. POPHAM. There's no countervailing benefit in the cable situation. Again, here's a symbiotic relationship that exists that is beneficial to both parties. In the cable area it was unbalanced. It was a harmful relationship, a one-sided relationship.

Mr. HERPE. Very few radio stations have ever approached a cable operator and tried to pay him to put their radio station on. I think it's an altogether different situation.

Mr. FRANK. Again, I'm talking about the performer. You're talking about the record company now. In the past did the performers also engage in payola?

Mr. HERPE. According to this bill, the record companies are going to get 50 percent of the take.

Mr. FRANK. I understand that. That's what the bill says. We are allowed, in the process of hearings, to decide whether or not there should be a yes or no vote on the bill itself and whether this is the right approach or whether there should be amendments. It seems to me the question is intellectually indistinguishable to the question of performers. The bill could be changed and I still would be interested here with respect to the performers. Let me just ask you a very practical question. How do you differentiate between the performers and the composers? You do agree it's legitimate that we pay the composers?

Mr. HERPE. The composers are being paid.

Mr. FRANK. How do you differentiate?

Mr. POPHAM. On the basis that there is a need here for a copyright stimulus, so to speak, for the creative effort. In the case of composers, they get a very small part of the record sales. It is necessary and appropriate to compensate them for the performance, whereas in the case of the recordings themselves, there is a great flow of revenue already to the performers into the record companies and the compensation has appeared more than adequate to provide for a great amount of record production and distribution.

Mr. FRANK. If you're to stop paying ASCAP fees for records, we would have a strong writing shortage is your general position, and that's the reason you pay song writers and not performers, because if you didn't pay song writers per time a thing was played we would run out of songs, and that's the basic distinction?

Mr. POPHAM. Certainly it would have an effect and, again, the goal is for creative effort.

Mr. FRANK. Does performing seem to you part of the creative effort? Would you classify performing as creative?

Mr. HERPE. The performers are being paid by the record companies.

Mr. FRANK. The question is—I'm a little bit disturbed. It may not be conclusive, but I'm disturbed about the distinction between performers and composers. One is engaged in a creative effort and one isn't. It seems to me both of them are.

Mr. HERPE. Again, as I stated before, I think the performers are being paid as well as the record companies.

Mr. FRANK. That wasn't the question.

Mr. HERPE. We are paying because the composer himself does not get very much of the promotional activities on the radio station.

Mr. FRANK. There goes another one of your arguments. You said, or others have said and I thought I heard you say it, if there's an imbalance between the performers and the record companies that's for them to redress, not through other means, but to the extent there's an imbalance between composers and record companies, it is legitimate for outside intervention. That again seems to me an inconsistency. Why does that argument not apply?

Mr. POPHAM. It's not from the record companies that we're concerned about.

Mr. FRANK. The composer also gets paid. If somebody records your song, don't you have a right to get paid?

Mr. POPHAM. Let me go back to a point I made earlier. Performers here, whatever their creative contribution may be, are not copyrightowners, and we have a difficulty in the piece of copyright——

Mr. FRANK. That's using labels to conclude argument. The question is, they are not copyrightowners. If they were, we wouldn't be here. Are there elements of the transaction that in fact justify them being treated to a certain extent as copyrightowners in this case? That's the question.

Mr. POPHAM. If you pass this legislation, they would still not be copyrightowners.

Mr. HERPE. We could go to the other extent and extend that to the disc jockey on the air who utilizes his personality and in many cases puts the records and sections of records together to create another product that indeed is also a creative process and he isn't getting paid a royalty.

Mr. FRANK. He doesn't get paid a royalty because he's getting a fee. If somebody recorded him and replayed him, there would be some royalty. That analogy seems to fall totally. You say when he's being paid by his direct employer that's analogous.

Mr. HERPE. I'm just looking at the creative side.

Mr. FRANK. The more creative the disc jockey, he or she is, the greater salary they can get from the radio station. The more creative, the more inventive they are, they ought to get more money. So they're getting rewarded for their creativity. I'll stop now.

Mr. KASTENMEIER. I just have two questions. In the last Congress, the Consumer Federation of America reported similar legislation on the theory that the buying public should not have to pay the full cost of supporting the recording industry, presumably the performers; that commercial users such as broadcasters and discos should also share that burden. How do you respond to the Consumer Federation?

Mr. POPHAM. Well, the facts of the matter are that the present legislation would not do as perhaps has been urged that it would, result in a reduction in record prices which would presumably occur if there were somebody else picking up part of the tab; that we are just talking about a very minimal amount of money compared to the billions of dollars that the record companies sell their records for. It's a rather illusory benefit.

Mr. KASTENMEIER. However, to the extent that an organization represents the buying public, of course, they have influence in terms of their position. Last month—and Mr. Frank touched on this—the NAB went on record as favoring full copyright liability on cable. The argument was made that cable is getting its programing almost for free and broadcasters pay large sums of money. How is this argument different in this case? It's almost the same argument.

Mr. POPHAM. Well, the argument may have a similarity to it but the facts are very different. We are dealing with two entirely different situations. Again, there was the finding in the 1976 act

that there was harm to the copyrightowners and that it would affect perhaps their creative abilities, whereas, again, in the recording area, there is this balance that exists as between the promotion of the record and the benefit to the station. Again, we could not deny that stations are benefiting, but we think that the counterbenefit of the promotion to the record is really beneficial and that it's distinguishable from cable where the use was creating a harmful situation.

Mr. HERPE. I think, too, regarding cable, that there certainly is no one on a cable television station that's running a radio show such as a disk jockey does, that is constantly talking about and promoting the record company's product. A cable company does not run outside promotions that promote the record companies and the performers as does a radio station. So I think there is a considerable difference.

Mr. KASTENMEIER. I'm not sure that your response to Mr. Frank's hypothesis really covered adequately the implications of what would happen if we had a free market. The fact is, if there was not public license, the situation would be absolutely chaotic to give a performers right without compulsory license to any and all musicians and any and all record companies whose records you might play on the theory that you could somehow individually or even through some other agency negotiate with them. Isn't that true?

Mr. POPHAM. Again, I think one thing Mr. Frank said is that the Government was indifferent to the recording industry and broadcasters. The Government has not been indifferent to broadcasters. We do have an obligation to operate in the public interest which I think is paramount in the minds of the broadcaster.

Second of all, I would observe that we have a situation now where we have a balance of equities and going to the free open marketplace without a compulsory license I think would simply burden this process with a lot of transaction costs and chaos, as you mentioned, which really would be a net minus overall for all concerned.

Mr. KASTENMEIER. Well, are there any other questions?

Mr. DANIELSON. Yes, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Thank you, Mr. Chairman.

Gentlemen, the gentleman from Massachusetts, Mr. Frank, caused a vagrant thought to cross my mind. When you folks said if he were to make a recording of a song and have it played, of course, he would not be entitled to a royalty as a performer, but I was going to suggest that if he were only on tapes so that an audiovisual of him singing that song were to come out, such as Stardust, you should get a royalty if you were to pick it up from cable because Mr. Frank is really quite a performer.

I want to say one thing in all seriousness. The thrust of your argument, Mr. Popham, as I see it, and which is impressed by the other gentleman here, is that the broadcast industry simply can't afford to pay a royalty for the use of the phonograph record, the sound product which is a large part of its programing. I have trouble with that for two reasons. One, I don't think that's relevant to the issue. As far back as the Bible it said that the worker is

worthy of his hire. The Constitution of the United States forbids the taking of property without just compensation. I think the laws of most States do the same.

A copyright is a property right. It's something that belongs to someone. It can be purchased. It can be sold. It can be exchanged. It can be dealt with in commerce. It's a property right and if someone is going to use someone else's property, my instincts tell me that person should be paid a fair compensation for that use. So I don't consider we can't afford it as being an argument in favor of the broadcast industry, nor can I consider we're losing money, just per se—we're in hard times—on the part of the record industry. Those are not truly relevant.

But since they have been brought up, I think it is relevant for me to respond that I find that in the August 20, 1979 issue of Broadcasting magazine—I'm sure you folks are familiar with that—August of 1979, the same month that you used in the statistics in your figures in your statements—the headline, Broadcasting, volume 97, No. 8, the top of the week story, "Price tags for stations on a skyrocket. It's a seller's market as demand far outpaces supply, especially in the bigger markets where established owners are. Like the prices of everything else, those of broadcasting stations in the contemporary market are going through the roof"—I'm quoting—"if not through the warning lights on top of the high-rising television towers." Exorbitant, outrageous, fantastic are the most common adjectives heard when recent station trading is discussed. Even those words are losing their meaning as the scale of values continues to change.

In all seriousness, Joseph Citrick of the Blackburn & Co. brokerage firm observed last week that stations are moving along as the prices are merely exorbitant just when the seller's appraisal reaches the outrageous stage that they can sit on the market.

So if you've got these two stations in bankruptcies that still aren't able to sell, get in touch with Mr. Citrick after getting in touch with me first because I have some constituents that might be interested.

Now along the same line, there is a magazine called Forbes, January 5, 1981, which talks about the broadcasting industry in glowing terms. One of the more interesting things is that in yardsticks profitability—this appears on page 258 of that issue of Forbes—broadcasting is the second ranked industry in the United States on profitability. It was the first ranked over a 5-year average. In fact—I'm sorry, it's the first ranked, not the second. The highest profitability industry in the United States, according to Forbes magazine January 5, 1981, at page 258, broadcasting is the highest not only for the last 12 months but over a period of 5 years. Those bankrupt stations' licenses shouldn't go begging very long.

Now in the same issue of Forbes magazine commencing at page 260, a headline, "Who's Where in Profitability?", Forbes magazine ranks 1,034 companies by name in the United States. Out of that group No. 40 is Metromedia, a broadcasting company. No. 441 out of 1,034 is American Broadcasting Co.; and No. 152 out of the same group is CBS. Now that to me means that there is some money in broadcasting.

Now again I say that's irrelevant to the issue of whether the owner of a piece of property should be paid a fair price for his property, but along with that, I notice that in the New York Times for Wednesday, June 10, 1981—that's today—the headline on the Business Day page is—this is the converse side of our coin here—"The record industry is in an upheaval." It points out that the record industry which enjoyed increasing profits over a considerable span of years peaked in 1978 sending out 726 million records, tapes, et cetera, has gone down since then and in 1980 sent out 650 million, a decrease of 76 million, and it appears to be on a downhill skid.

Now this is not my information. It's that of the New York Times, a story by Thomas L. Friedman. You can get it at your local newsstand. Now I think that is irrelevant. If the recording industry is losing money, that's their tough problem and they've got to work it out. But it indicates that they may be and if my information from Forbes magazine and from Variety—I have another story from Variety that radio station licenses are on an upswing—if that's false, that's one of the burdens you have to bear because inflation increases the price brackets of all of us.

The last point I have, Mr. Frank, the gentleman from Massachusetts, extracted testimony from you gentlemen with which you felt that the song writer and the lyricist, the word writer, do create but that the performer does not. Let me tell you a true story.

In the late 1930s a young lady wrote some music. I have her name. I don't recall it right now. That's how important the name is. But she got a copyright on her music. In the same year, about 1938, a man wrote the lyrics for that music. He was then unknown. He later won a Pulitzer Prize at a time when Pulitzer Prizes were worth something, before the Washington Post fiasco a while ago. He was proud enough to turn it down because he didn't think it was worth anything. In 1938 the song existed and in 1939, 1940, 1941, and 1942. They had a copyright but they had no money. Nothing came in.

In 1951, a then little known, if not unknown, young lady sang it and made a recording. It became a No. 1 hit ["Come on to My House"]. She made no money on the performance, of course, but the lady who wrote the music in 1938 had a royalty and so did the gentleman who wrote the lyrics in 1938. The lady's name was Rosemary Clooney. You've heard of her. The man who wrote the lyrics was William Saroyan who died 3 weeks ago. He won a Pulitzer Prize. They never got a cent out of their song until it became a hit when Rosemary Clooney was able to breathe some life into it. A song on paper cannot be heard. It's that flower blooming in the desert unseen. Until someone breathed some life, some soul, some heart into that song, it didn't live. That's when it becomes a valuable property and I feel that the artist who can breathe that life into that creative work has created something and they and the musicians who play the background and who do the arranging are entitled to some compensation.

Now that's my feeling on it. Perhaps we disagree, but I'm convinced—and that is a true story. Thank you.

Mr. HERPE. If I just might answer, you made many statements there. I do agree with you, Congressman, that whether radio sta-

tions can or cannot afford such a payment is irrelevant. I also agree with you that the performer should be paid for what he is doing for his artistic creation, but I restate again, we are paying for it presently.

Mr. DANIELSON. I understand your position and I'm sure you hold that as an honest position. I just guess we respectfully disagree.

Mr. HERPE. I would also point out that with Rosemary Clooney, I doubt that Rosemary Clooney would have made that hit were it not for radio.

Mr. DANIELSON. Well, I'll tell you this, radio certainly wouldn't have had any time to sell advertisement because of her voice if she hadn't made that song, and it didn't do any good being on paper for 13 years.

Mr. POPHAM. I'm not so sure the effect of this on the radio industry is so irrelevant. Radio stations do provide a number of valuable services to the public and if indeed, as we are concerned, they might be affected, I think that is a public policy question, not just a question of the economics of the particular industry.

Mr. DANIELSON. Let me ask you there, do not almost all radio stations today have at least a news feature? They may not be news stations, but they've got a ticker and income from the AP and UPI. Do you pay for that service?

Mr. POPHAM. Yes, sir.

Mr. HERPE. Yes.

Mr. DANIELSON. I thought so. Thank you.

Mr. KASTENMEIER. The Chair wishes to thank the witnesses, both Mr. Popham and Mr. Herpe, for their testimony this morning.

The Chair would like to call Mr. Wayne E. Hesch, past president, Amusement and Music Operators Association.

TESTIMONY OF WAYNE E. HESCH, PAST PRESIDENT, AMUSEMENT & MUSIC OPERATORS ASSOCIATION, ACCOMPANIED BY NICHOLAS E. ALLEN, ESQ.

Mr. ALLEN. I'm Nicholas E. Allen, counselor for the Music Operators Association. I would like to introduce those from our association who are here for the record and our spokesman is Mr. Wayne E. Hesch, past president of our association. Also present are Mr. Norman Pink, our national president from Minneapolis, Minn.; and Mr. Ross Todaro, who is president of the Texas Operators Association; and with him is Mr. Doc Ringo, who is the past president of the Texas association. They are all members of our national association.

Mr. KASTENMEIER. Thank you.

Mr. HESCH. Good morning. We'll try to go through without reading the statement and hitting on the high points that we would like to point out.

Mr. KASTENMEIER. Without objection, your 16-page statement will be received for the record and you may proceed as you wish.

Mr. HESCH. First of all, I'd like to point out that beyond being a past president of the association and the former chairman of the Government Relations Committee, and beyond representing the AMOA, I'm also an operator, as the other people are that are in

the room with the association, and I'd like to explain what an operator is.

An operator is a person who buys a jukebox through a distributor who has bought it from a manufacturer. The operator then maintains that jukebox after he places it in a location. The location is a place where, like a bowling alley, a cocktail lounge or a restaurant. After he places it there, he takes care of the programing of the music in that location. He takes care of the maintenance of the machine in that location. It is his responsibility to make sure everything goes right with that jukebox. He pays a commission to the location for the use of the space in the location and the use of the location's users.

I'm here on behalf of the association to oppose H.R. 1805. We do not believe that the performers and the record companies deserve an increase in income by these legislative means. The performers and the record companies both have the same rights as anybody else in the open marketplace. The performers have a union that negotiates wages and benefits for them. The record companies are in the open marketplace with profitability where they can raise their price or they can reduce their expenses. They can do anything any other business can do in the United States. They are competitive, the same as the union is competitive for wages.

These people have people speaking for them. They should be able to arrive at their own level of pay without getting a copyright.

Mr. KASTENMEIER. Mr. Hesch, let me interrupt only to indicate that I have been called to the Rules Committee to make a brief presentation. In the meantime I will ask my colleague, Mr. Danielson, to preside until I return.

Mr. HESCH. OK. I'd liken this also to the comments you made before about whether or not the recording artists were actually original. I think that the recording artists are really interpreting work. Many recording artists try to record a certain record and sometimes more than one are very, very successful, but they do take an original work and they do work it with their own interpretations or styling, but they are not really the creators of that original work.

The thing with the record companies, they are not a creator of an original work. They are marketing. They are looking for talent, but they do not create that original work. I liken that to an inventor, as an example. It might be a bad example, but I think if an inventor gets an idea much like a song writer, he doesn't get any pay until that idea is sold.

The idea has to sell before he gets a royalty. The man makes a new can opener or something altogether different and revolutionary and he receives his income when that can opener is sold. He doesn't receive any income when that can opener is used. It can be used by a housewife or it can be used by a restaurant and he does not receive a royalty each time it's used. The revenues obtained through H.R. 1805 would not accomplish the goals other than to make the rich richer and the not-so-rich about the same.

The legislation, if passed, may open the door to even more claims from the recording industry by people who are not included under the present claims. There are many other people who might come

in and say they deserve a royalty because they also are creators of one part of the sound on this recording.

We think it could open a whole new Pandora's box, and every year we might be back fighting new copyright requests.

Now I'd like to get down to the jukebox industry itself. The jukebox industry already supports the record companies and the performers directly. We purchase the records that we use. We don't get them for nothing. A lot of people think that those are freebies. We purchase every record that we use. We use approximately three records a week on each jukebox. We use approximately 150 a year. Today the price of a record is approximately $1. So each jukebox today is paying to the record companies and the performers through the purchase price $150 a year. This is translated into $45 million a year for our industry that we pay to use the records.

A second benefit that we give the performers and the record companies is we also do some promotion for them. When those records are out there and they are listed on a jukebox, they do promote sales of albums, tapes, and other singles. We give a double benefit to the record company and the performer in both sales and promotion.

Another thing that comes up is we are different from the other opponents of this bill in the fact that we have to buy an individual record to put on each individual jukebox. We cannot use one record to accomplish all of our goals on all of our jukeboxes. That is why we buy so many records every year. Our industry is really no different than other industries. We all have our problems.

The recording companies say they have problems. The performers say they have problems. We also have our problems.

In the last decade, we have lost for a period of time two of the four major manufacturers of jukeboxes in this country. Wurlitzer is still out of business. They went out of business because they weren't selling enough machines to make it profitable. Seeburg went into a reorganization of bankruptcy and they have been purchased and are back in business now under new ownership of Stern Electronics.

Why did the sale of jukeboxes drop so drastically that half of the people were forced out of the business? Probably because there are three factors: One factor we fought for many years, and that's competition. We have competition from background music. We have competition from discos, live entertainment, radio, television. You go into places that have a jukebox and most of those places have other sources of entertainment—sound recordings. We compete with those people. It makes our jukebox used less in that place.

We also have a problem with industry pricing. Everybody has that problem also, but our problem is a little bit different. We have to go out and actually negotiate with our location owners. They have a big stake in how that price is arrived at. They have to understand why we need an increase. It's not an idea of sending out a letter and saying that the price goes up 10 cents tomorrow. We have to raise the price in different ways.

After we negotiate that raise, we also have to go in and spend approximately 2 or 3 hours with each machine to change the price.

It makes it very hard for us to change price to keep up with inflation.

Another problem that we have is that the recordings have gotten longer over the period of time. The records have become 4 minutes from an average of 3 minutes. This has cut down our income potential from each location. We cannot play as many records in an hour as we used to be able to play. We used to play 20 records in an hour if it was played continuously. Today we can only play 15 records in an hour and we are selling time. There are only so many hours when the places are using jukeboxes. So that has hurt our revenue also.

I want to mention that in a survey that was done a few years ago we found that most of the operators in this business, the average operator, has 77 jukeboxes on the street. We're talking about an awful lot of small companies in this business. A majority of companies are small and most of the companies or all of them that I know of operate amusement games also and some of them are in the vending field.

Now in the past 5 years we have been plagued with—in the past year actually—we were plagued with an increasing fee from the $8 copyright fee that we pay to ASCAP and BMI of $8 per year per machine. In 1982, it's proposed that that will be raised to $25. In 1984, it will be raised to $50. In 1987, it will be adjusted for the cost of living. We also pay a mechanical fee when we buy all these records. That mechanical fee today is 5.5 cents a record. As of July 1, that mechanical fee is going to be raised to 8 cents a record. Then after that, every year, it will be raised or lowered depending on the retail price of records.

Our cost today for these combined fees is $16.25 a machine. Our cost in 1984 of these combined royalty payments will be $62. It would be $50 plus $12. It will be $62.

In our survey run based on 1978 figures, it showed that the profit per jukebox to the operator is $88 a year. Now the increased cost that we already have on copyright fees are already in the works for $46. If we take the $46 from the $88 profit, we end up with $42 profit, and if this legislation were to pass it would probably amount to $6 per jukebox by 1984 because it's based on the ASCAP fee. That would knock our profit down to $36 per year per jukebox just on additional fees that we will be paying. These increases will hasten the exit of the jukebox industry.

What effect will that have on the record industry? Well, an immediate loss of sales and an immediate loss of promotion that this industry provides. Our industry is not giving up and I don't want to give that indication. We are here today to present our points. We are also in the Federal courts to argue the point of rising copyright fees from $8 to $25 to $50.

We are also opposing certain regulations in the mechanical fee increases. So we are not going to sit by and just let the things happen.

In conclusion, I believe that this is the time to draw the line on Government intervention on industry matters that industry should solve by itself. You can see that the jukebox industry now supports the performers and the record companies through the purchase and the promotion of records. Our industry cannot survive addi-

tional costs of increasing royalties. Our survival will depend a great deal on governmental bodies and their decisions like you are about to make. We urge you not to impose this new royalty. It is not needed. It will not increase income to the people who are really in need. It will work to the detriment of those for whom it is intended to help—the performers and the record companies—and it will help put out of business the jukebox industry which has been supporting the performers and the record companies over the past years. Thank you.

[The complete statement of Mr. Hesch follows:]

PREPARED STATEMENT OF WAYNE E. HESCH, AMUSEMENT & MUSIC OPERATORS ASSOCIATION, INC.

Mr. Chairman, I am Wayne E. Hesch, past President and former chairman of the Government Relations Committee of Amusement and Music Operators Association, the national organization of operators of jukeboxes and coin-operated amusement games.

I am here in behalf of the Association to oppose H.R. 1805, a bill to amend the Copyright Law which would create copyright performance rights in sound recordings.

We are opposed to this legislation on four basic grounds. First, that recording companies, performing artists and musicians are not entitled to an increase in incomes by this legislative means. Second, that jukebox operators, the largest group of purchasers of 45 rpm singles records, already supply and adequate source of revenue for these same beneficiaries. Third, that jukebox operators have been subjected to heavy new assessments and the proposed new royalty would be an unfair burden upon them. Fourth, our objections in princple.

The recording companies and the performing artists and musicians do not deserve an increase in their incomes by this legislative means.—We do not believe that the recording companies and performing artists and supporting musicians deserve an increase in their incomes through enactment of this legislation for the following reasons:

1. THE SOUND RECORDINGS PERFORMANCE ROYALTY IS UNNECESSARY

Traditionally, performing artists and supporting musicians bargain with recording companies for their compensation and royalties. The artists and the supporting musicians have complete control over their bargaining positions. The musicians also have as their bargaining representative the American Federation of Musicians, one of the strongest unions in the country.

Needless to say the recording companies and their powerful association, the Recording Industry Association of American (RIAA), need no government assistance to secure adequate returns for their recordings. There is no impediment to their setting prices they desire and, through that simple market mechanism, obtaining the revenues needed to compensate the recording companies as well as the performing artists and musicians, full, fairly and adequately.

Government intervention into this traditionally independent segment of the music marketplace is wholly unnecessary and uncalled for.

2. THE SOUND RECORDING PERFORMANCE ROYALTY IS A WINDFALL FOR THE RECORDING COMPANIES

The recording of phonorecords is a big business, a multi-billion dollar-a-year business. Except for a poor year in 1979 when a combination of factors reduced recording companies' overall revenues, this has been a lucratively successful business for many years, and it is reported to be staging a strong comeback with forecasts of even greater profitability. In 1980 total receipts from all records sales amounted to $3.682 billion. Sales of singles records totaled 157 million units and receipts from sales of singles records totaled $250 million. A large portion of the singles records sales is attributable to the jukebox operators' purchases.

If H.R. 1805 is enacted, the recording companies will share 50 percent of the new royalty collections for which they can show no need, in addition to all their other revenues.

If H.R. 1805 is enacted, the other 50 percent of the royalties collected will go to the performing artists and musicians, the very people with whom the recording

companies negotiate royalties and salaries. The new royalties will be a double benefit for the recording companies because it will also relieve them from having to give equivalent increases in royalties and salaries to the performing artists and musicians.

3. SINGER/SONGWRITERS WHO OCCUPY THE DOMINANT POSITION IN THE MUSIC BUSINESS AND WOULD BE MAJOR BENEFICIARIES OF THE BILL ARE AMPLY COMPENSATED AND NEED NO GOVERNMENT ASSISTANCE TO INCREASE THEIR REWARDS

Singer/songwriters, that is the performers who write their own songs, collect the majority of mechanical royalties. Many of them form their own publishing companies and, so, receive the composers' and publishers' shares of all the streams of royalty income generated by copyrighted music (Brief of the RIAA in the United States Court of Appeals for the District of Columbia Circuit, May 1981, pages 47, 48).

If H.R. 1805 is enacted, singer/songwriters who are already earning the greatest share of musical copyright royalties, will be among the principal beneficiaries of the new performance royalty.

It is difficult to comprehend how government intervention to enlarge their present rewards through this proposed legislation can be justified.

4. TECHNOLOGICAL DEVELOPMENTS HAVE NOT PROGRESSED TO THE POINT WHERE THE NEW LEGISLATION IS CALLED FOR

We have heard mention of a "celestial jukebox," but believe us, as working jukebox operators, there is no such thing.

Seriously, there is a world of difference between "talk of new technology" and the arrival of the real thing. Our point is that there is still much that is uncertain, that is speculative, about technological developments that are said to be under way.

We believe that it is ill-advised for this Committee to attempt to legislate new royalties, or a new system for collection and distribution of royalties, before the subject to be regulated comes into being; before it is identified, and before its ramifications are sufficiently understood.

5. WHEN THE USER HAS PAID A ROYALTY FOR THE PRODUCT THERE SHOULD BE NO FURTHER USER CHARGE

When the jukebox operator has purchased the records, he has shared the burden of the mechanical fee in the cost of the records. There can be no serious doubt that the recording company includes the sums paid in mechanical fees in the prices it charges the wholesalers, and that the "one-stop" wholesalers in turn pass on their full costs to the jukebox operators who buy records from them.

The inventor of the can-opener becomes entitled to royalties upon the can-opener he has designed and patented when his can-openers are marketed. Thereafter, he gets no more royalties, no matter how many times the purchasers, for example restaurant owners, may make use of his can-openers.

I realize this objection runs against all performance royalties, including those that are now in the law, as well as the new royalties that are proposed here. We simply do not want to see that kind of royalty enacted again in this new legislation.

6. PROVISIONS FOR EQUITABLE DISTRIBUTION OF THE PROPOSED ROYALTY HAVE NOT BEEN ADEQUATELY EXPLORED OR AGREED TO

Proponents of H.R. 1805 say that various alternative methods are available for distribution of the new royalties to the intended beneficiaries. But selection and approval of an acceptable method is still to be accomplished. And, admittedly, any distribution system will be fraught with difficulties as to criteria for identifying the recipients, and for determining their proper shares, as well as the actual mechanics of distribution.

Admittedly, also, the sums that become distributable to many recipients will be so small, after expenses of administration are deducted, that the benefits will be negligible.

As some critics have observed from the standpoint of cost effectiveness, it is doubtful if this legislation can be justified.

Jukebox operators are the largest group of purchasers of 45 rpm singles records and therefore are the principal source of the recording companies', and performing artists', and the supporting musicians' revenues from recorded music. No additional royalties should be enacted for them from jukebox operators. We contend that no additional royalties should be enacted for recording companies, performing artists and supporting musicians for the following reasons:

1. UNLIKE OTHER USERS, SUCH AS THE RADIO STATIONS WHO CAN ENTERTAIN ALL OF THEIR LISTENERS BY THE PLAY OF ONE RECORD, THE JUKEBOX OPERATORS MUST PLACE THE SAME RECORD IN EACH OF THEIR JUKEBOXES WHERE THAT PARTICULAR MUSIC IS TO BE PLAYED

As a consequence, it is estimated that jukebox operators buy at least 45,000,000 new records a year—at an average rate of 150 records per jukebox, for at least 300,000 jukeboxes that are estimated to be on locations throughout the United States. At the current price to the operators of $1 per record, this amounts to $45,000,000 of gross revenues annually to the recording companies, and their performing artists and musicians. This contribution by the jukebox operators should be enough without the addition of further statutory royalties.

2. JUKEBOX OPERATORS PROVIDE AN ADDITIONAL BENEFIT TO THE RECORDING COMPANIES, PERFORMING ARTISTS AND MUSICIANS, THROUGH THE JUKEBOX PLAY AND PROMOTION OF RECORDS

As evidence of the role of the jukebox in promoting popularity of recordings and in creating demand for new songs, we cite the following:

Cash Box, May 23, 1981 issue: "a Cash Box survey of distributors, one-stops and promotion people who deal with jukeboxes in the South also found that in many cases jukebox play can be instrumental in creating early demand for a record and later on can be used to substantially boost sales of a record with already established radio play." (See annexed Exhibit A).

Testimony of Don Van Brackel, a jukebox operator, before the Copyright Royalty Tribunal, April 22, 1980: "Let me cite an example of how the jukebox does promote music. 'A Long-haired Country Boy' by Charlie Daniel's band was a flop when it first came out. Then, as a result of requests of jukebox operators, it was re-released, and as a result of jukebox play, it has moved up through the charts to No. 19 on RePlay's latest singles pop chart."

Jukebox operators have been subjected to heavy new assessments in the past year and the imposition of a new royalty upon them would be grossly unfair.—Imposition of the new performance royalty upon jukebox operators would be grossly unfair for the following reasons:

1. JUKEBOX OPERATORS HAVE BEEN SUBJECTED TO HEAVY NEW ASSESSMENTS BY THE COPYRIGHT ROYALTY TRIBUNAL

Jukebox operators now bear the economic burdens of two copyright royalty fees, the $8 jukebox royalty fee under Section 116 of the Copyright Act, and the "mechanical" royalty fee under Section 115 which at the present rate of 2¾ cents per song (5½ cents for both sides of a record), and at the operators' average purchasing rate of 150 records per jukebox per year, amounts to $8.25 per jukebox per year. The combined burdens of these two royalties now amount to $16.25 per jukebox per year.

In the past year the Tribunal has decreed increases in the present $8 jukebox royalty fee to $25 in January 1982, to $50 in January 1984, and to an undetermined amount in January 1987 that is to be indexed to changes in the Consumer Price Index from February 1981 to August 1986. The Tribunal also decreed an increase in the mechanical royalty fee effective July 1, 1981 from 2¾ cents (5½ cents per record) to 4 cents (8 cents per record).

H.R. 1805 imposes an additional economic burden upon jukebox operators by increasing the present $8 fee to $9 per jukebox per year for the benefit of record companies and performers. The $1 add-on is to be divided 50-50 between the recording companies and the performers (Sections 7 and 8 of the bill, pages 14 and 18).

If the same 8:1 ratio, as now provided in H.R. 1805 for the $1 add-on to the $8 jukebox royalty fee, is extended and adapted to the increases the Tribunal has decreed in the basic jukebox fee, the add-on for the new performance royalty fee will amount to $3 in 1982, $6 in 1984 and to an even higher amount in 1987. The Tribunal's decree which increases the mechanical royalty fee to 4 cents per song also will raise the burden of that fee upon jukebox operators from $8 to $12 per jukebox per year. The Tribunal's decree will increase the mechanical fee still further beginning January 1982 and annually thereafter, proportionately to changes in record prices.

These increases in royalty fees will be prohibitive for the jukebox operators and certainly will cause elimination of large numbers of the jukeboxes that are still in operation. It is obvious, we believe, that the jukebox industry as we know it today cannot survive such drastic increases.

2. JUKEBOX OPERATORS ARE SMALL BUSINESSMEN AND THE JUKEBOX BUSINESS IS AN ECONOMICALLY MARGINAL ONE—THIS FACT MUST BE UNDERSTOOD TO APPRECIATE THE IMPACT H.R. 1805 WILL HAVE ON THE BUSINESS, AND THE REASON JUKEBOX OPERATORS VIEW THE BILL WITH SUCH APPREHENSION

A recent survey by the nationally known accounting firm of Peat, Marwick, Mitchell & Company of the jukebox operators' business in 1978, shows that the average annual revenue per jukebox was $754.00. The average annual operating cost per jukebox was $673.00 and the average gross profit per jukebox as statistically calculated was $88.00. The average phonorecord expense per jukebox was $94.00. These statistics indicate that many jukeboxes, especially those of small operators, are operated at a loss or at no significant profit and that any increase in the jukebox royalty rate would probably force many small operators out of business.

If H.R. 1805 is enacted it will add one more burden upon the jukebox operators that is certain to make more jukebox locations economically unprofitable. As a result fewer jukeboxes would be registered under the Copyright Act and the jukebox royalty pool would become correspondingly reduced. At the same time, the bill would expand the numbers of royalty beneficiaries, adding recording companies, performing artists and musicians to other copyright owners to share in the reduced royalty pool.

I want to emphasize to the Committee that jukebox operators are small businessmen, and that this industry continues in a depressed conditon. This Committee recognized this fact in its report on the General Revision Bill in 1976 when it said:

"The Committee was impressed by the testimony offered to show that shifting patterns in social activity and public taste, combined with increased manufacturing and servicing costs, have made many jukebox operations unprofitable." Report No. 94-1476, page 113, on S. 22, September 3, 1976.

I would like to remind the Committee that the jukebox business has declined to such an extent that Wurlitzer, one of the four American manufacturers of jukeboxes, stopped producing jukeboxes in 1974. A second manufacturer, Seeburg, went through bankruptcy reorganization in 1979 and 1980 and is just recently becoming active again under new management and under the new name of Stern Electronics. Inc.

While jukebox operators' cost are increasing drastically, they are not able to make changes in prices per play to keep pace with those increases. In some businesses, prices can be increased by merely changing the price tag, and the changes may not be noticed. In the jukebox industry, however, it is a matter of reducing the number of songs a customer can play for 25 cents or 50 cents, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent must be obtained for any price rise. Many location owners object to increasing the price per play because they consider it to be detrimental to their business. We operators must negotiate with the location owners because the jukebox is using their space and their customers.

Another problem of the operators has been the tendency of the recording companies and the performing artists to turn out longer and longer records, that is, records that take longer and longer playing time. Up to about 14 years ago single records were only about three minutes long. Since then the playing time has been increased to as much as 6½ minutes. Even the addition of one minute per song cuts down the number of records that can be played in one hour on a jukebox from 20 to 15, with a corresponding cut-back in receipts. We still have this problem, and it is a serious one for us.

The conflicting and continuing pressures I have described have resulted in a general reduction in the level of operators' income from their operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding coin-operated amusement games and vending machines to their jukebox operations. Coin-operated amusement games and vending machines now constitute by far the greatest part of the operators' business and the jukebox has become a relatively small part of this business.

We wish to emphasize, therefore, the apprehension with which jukebox operators view any proposal that would create a new royalty and thereby increase their royalty burden under the Copyright Act. We believe the marginal condition of this business demonstrates the unfairness of imposing any such added burden upon it.

Our objections in principle.—We object to the bill as a matter of principle for the following reasons:

1. H.R. 1805 IS OBJECTIONABLE IN PRINCIPLE BECAUSE PERFORMERS AND SUPPORTING MUSICIANS AS WELL AS RECORDING COMPANIES ARE NOT CREATORS OF MUSIC AS CONTEMPLATED BY THE CONSTITUTION

The Constitution authorizes Congress to enact legislation:

". . . To promote the progress of science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to the Respective Writings and Discoveries." Constitution, Article I, Section 8, clause 8.

Those who perform and record music are not the authors of the music, songwriters are the recognized authors in the constitutional sense. Performing artists, supporting musicians and recording companies implement the songwriters' creation. Such creativity as they may supply is not a work of authorship, as contempleted by the constitutional grant of authority to enact legislation "to promote the progress of the useful arts."

We insist therefore that there is a basic constitutional infirmity in the concept and reach of this bill.

2. THERE SHOULD BE BUT ONE PERFORMANCE RIGHT FOR THE PLAYING OF A MUSICAL RECORD

If, however, notwithstanding the constitutional infirmity of the bill, multiple performance rights are to be given statutory recognition the most that should be done is to recognize, and so provide, that the playing of a record constitutes only one performance of all the rights that are embodied in the record. Proliferation of claimed rights of creativity in sound recordings would open a Pandora's box for the assertion of many more claims beyond those that are now covered by the definition in this bill of "performers."

In conclusion, I would like to say that Government intervention as provided by H.R. 1805 is unnecessary because the beneficiaries of these new royalties are perfectly capable of securing adequate compensation on their own, and also because the new royalties will be an unjustified windfall for recording companies.

We urge the Committee, therefore, to take no further action on this bill.

Thank you for giving us this opportunity to submit our views to you.

[From Cash Box, May 23, 1981]

SOUTHERN ONE-STOPS, JUKEBOX OPERATORS COMBINE FORCES TO HELP BREAK SINGLES

(By Dave Schulps)

NEW YORK.—Although it is restricted by the same type of repertoire tightening that is taking place in radio, the jukebox remains an overlooked tool for breaking acts in the deep South, especially in country music, R&B and other regionally-based musical styles.

A Cash Box survey of distributors, one-stops and promotion people who deal with jukeboxes in the South also found that in many cases jukebox play can be instrumental in creating early demand for a record and later on can by used to substantially boost sales of a record with already established radio play.

While many jukebox operators are currently limiting their record purchases to established name acts, others will listen for the right sounds that will appeal to their patrons, according to Virgil Lugar, manager of Music Center Distribution, Inc., a Birmingham, Ala. one-stop. "With country music, I can play the records for some of the operators in my store and if it's got the right feel they'll buy it regardless of who's doing it. Then they'll play it in their place a couple of times, using marked quarters, to gauge the reaction."

JUKES BREAK RECORDS

There is general agreement that jukeboxes will often begin playing records much earlier than radio, which tends to wait for chart action before going on new discs. "I can give you 50 or 60 examples of songs that have been jukebox hits before they ever reached the charts during the past five years," said Paul Yoff, vice president of Ops One-Stop in Miami.

" I can usually get a record by a new artist out to a jukebox before radio goes on it," said Betty Bales, who handles jukebox accounts for Tara Distributors in Atlanta. But Bales also noted that many of her best accounts have begun to buy fewer records and are less willing to take chances on unproven acts due to hikes in singles

prices and licensing fee payments. Nevertheless she was able to point to three regional country hits—Ed Bruce's "Girls, Women and Ladies," Wayne Kemp's "Your Wife is Cheating on Us Again" and Mel McDaniel's "Louisiana Saturday Night"—that had broken through jukebox play recently. Bales also mentioned another regional phenomena, the beach music scene that has taken hold along the Carolina coast, as having received much of its exposure through jukebox play. "We're doing tremendously well with beach music on both a jukebox and retail level." she said.

The use of jukeboxes to promote regionally-based music is especially prevalent in the New Orleans area, which has traditionally had a strong self-contained music scene. Dave Shtrick, general manager of Record Sales of New Orleans, a one-stop that deals with many locally produced R&B acts, named four local artists that had broken recently through a combination of jukebox and radio play. Shtrick said that jukeboxes were such strong moneymakers in New Orleans that the recent price hikes had not slowed down his jukebox sales at all. "The jukeboxes are the bread and butter for some of those joints, even if the price of a 45 went up to $1.50 or $2 for the operator, they would continue to buy them."

HELP RECORD SALES

It is agreed that jukebox play sells records. "There's no doubt that jukebox play boosts sales and gives a record additional exposure beyond radio, although it's difficult to know what percentage of total sales it accounts for," said Arnold Thies, general manager of P.A.I.D. Records, a Nashville-based independent label currently enjoying chart success with Randy Barlow's "Love Dies Hard," the #4 new country single on the Cash Box Jukebox Programmer chart last week, Thies said that while he had not had any reports of the record's breaking through jukeboxes prior to receiving airplay, P.A.I.D. had done mailings of the record to key jukebox operators and generally made title strips on their records available to operators, when discs were felt to have good jukebox potential.

Greg Johnson, director of Southeast area promotion for Tar Productions, Inc., an independent R&B promotion firm, said he generally looks at jukeboxes as a way of helping to increase sales on acts getting heavy airplay. "If the record is medium I usually won't pursue it," he stated, "but if you ignore the jukeboxes when the record is being heard on radio regularly, you're hurting both yourself and the artists, I put about 80% of the product I promote onto jukeboxes.

"I try to call major jukebox operators every two weeks," he concluded. "Being an independent I'm looking to offer my clients something extra for their money. If I can put their records on the jukeboxes, I feel I'm giving them service they wouldn't get from their label."

Op One-Stop's Paul Yoff believes that the major labels were mostly ignoring the jukebox market. "It's the easiest means of getting exposure on new singles," he said, "but the majors have never really gone into it because they don't know how. They've left jukebox promotion to the one-stops. They know how to spend millions of dollars on promotions, but they don't know how to use the free publicity jukeboxes provide."

However Dave Benjamin, sales manager of WEA's Miami branch, asserted that he was "definitely aware of the jukeboxes and dealing with them on a regular basis." Benjamin verified Virgil Lugar's contention that John Anderson had received substantial exposure via jukebox play in the south, citing his branch's sale of 1,000 pieces of Anderson's latest single, "I'm Just an Old Chunk of Coal," to jukebox operators alone.

Benjamin also noted that jukeboxes had recently provided the first orders on Manhattan Transfer's new single, "Boy from New York," "Keep and eye on that single," he suggested, "It'll give you an idea of the effect of jukebox play on a record."

Mr. DANIELSON. Thank you, sir. I will yield first to the gentleman from Virgina, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman, and I appreciate the testimony of the witness.

Help me a little bit in your relationship to ASCAP. How do you pay them, or do you pay them?

Mr. HESCH. We pay them through the Register of Copyrights $8 a year. The fee is $8 per year which is divided between ASCAP, BMI,

and other performance societies, and that's $8 per year per machine.

Mr. BUTLER. And that came into law in 1976?

Mr. HESCH. I believe 1978. That was the first year we paid.

Mr. BUTLER. How did you pay them prior to that?

Mr. HESCH. Maybe you'd like to answer that question, Nick, because you understand that part better than I do.

Mr. ALLEN. Mr. Congressman, prior to 1976, the only music copyright royalty that the jukebox operators contributed to was the mechanical fee. The mechanical fee then was 2 cents per song or 4 cents per record. That was in the copyright law from 1909 forward. Up through those years the coin-operated play of music was exempt from performance fees, the kind of fee that is now in section 116.

We really are talking about two kinds of music copyright royalty fees; the mechanical fee under section 115, the old one; and the performance fee, what we call the jukebox royalty fee, under section 116.

Mr. BUTLER. Well, I think I understand what you're saying here. Of course, you're protesting the additional fee which would result from this legislation of $1 a unit?

Mr. HESCH. Yes. Well, this legislation, as I read it today is $1 per unit for every $8 of the ASCAP tax or fee. So as the ASCAP fee increases to $25, this would increase to $3 and as it increases to $50 this would increase to $6. It's tied into the other copyright performance fees that we pay. That's how the formula is made up. It sounds like $1 a jukebox, but in effect it changes as we go along.

Mr. BUTLER. Now I think I've got that. You say you're not giving up. The business is here to stay. How many manufacturers are left in the business of producing jukeboxes?

Mr. HESCH. Three.

Mr. BUTLER. And do you have any figures that indicate the volume that they are doing?

Mr. HESCH. Do you have those figures in your head, Nick?

Mr. BUTLER. Well, you can supply them for the record. I just want to know whether the sales volume is decreasing rapidly, or significantly, or whether they are holding their own.

Mr. HESCH. Well, a period of time back, they did decrease drastically, and for about the last 4 or 5 years they have remained at the low level that they decreased to. This is the general way it went. At one time they were high and it took a drastic drop and then it leveled off and that's where we are today. That's what the trend is. I can't remember. We had those figures last year and I can't remember the range of the figures for all the manufacturers.

Mr. ALLEN. I can give you the figures, Congressman, that we presented in the hearing before the Copyright Royalty Tribunal. I'm speaking now from my memory of handling that evidence. I think up until about 1975 the production of jukeboxes was on the rise and that was a peak year and I think it was something like perhaps 50,000 or more for domestic use. Then it dropped off and it leveled off at about, according to my recollection—the figure I gave you I think was about 75,000 for both the domestic and foreign. Then it dropped off to about 38,000 to 40,000 per year until about 1975 for both domestic and foreign, and about half of that is

domestic. So we think that the production of jukeboxes is around 18,000 to 19,000 a year at least through the last year we had statistics on and I think that was 1979. I do not have figures for this year, but the industry is somewhat in an unstable position with the one manufacturer having gone into bankruptcy, a reorganization in 1979 and just pulling out of it through the new purchase this year.

Mr. BUTLER. And what is the direction of jukeboxes in use? Is that a declining figure?

Mr. HESCH. That figure has been declining. It's hard to pinpoint it. The number of registrations in the Copyright Royalty Tribunal has declined somewhat, but the industry itself I would have to say is declining in the number of jukeboxes today.

Mr. BUTLER. And, of course, that's a reflection of the public taste at the moment, or interest in the things you mentioned. The argument you make is that in a distressed situation such as this, why add to your burdens. I can see the validity of that, but tell me how was the $8 arrived at in the first place? Were you participants in that negotiation?

Mr. HESCH. I would rather leave that to Nick because I was not directly involved in it.

Mr. ALLEN. Mr. Congressman, that was a hard bargained settlement among the interested parties. It occurred in April 1967 when the then copyright revision bill was being debated in the House of Representatives, the bill that had come out of this committee, and the bill ran into hard going. The opposition was pretty great. At any rate, during the debates, the interested parties got together. What we were dealing with was a bill that would have produced a royalty on the average of $20 a jukebox a year. The formula was different but that was the net effect and the parties agreed on an $8 compromise, and I should say the expectation and our understanding among us at the time was that that was to be a final rate. There was a departure from that when it got into the Senate and a periodic review was added to the bill over our objection. At one point in time in later legislative history, the periodic review provision was deleted from the bill as it applied to jukeboxes. That was in 1975, I believe.

Mr. BUTLER. In 1976.

Mr. ALLEN. Then in 1976 it was reinstated and that's the way it came through in the final enactment. I think Congressman Danielson was very close to that sequence of events also.

Mr. BUTLER. Well, he's so much older than I am.

Mr. DANIELSON. I should have my royalties recomputed. [Laughter.]

Mr. BUTLER. Well, I thank you very much. I'm just trying to get my own perception of where you all fit into this overall picture and the history of it, and I appreciate the testimony. I think I will just have to reflect on it and I yield back, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. Butler. While you were developing the history of the $8, I checked with our distinguished counsel, Mr. Bruce Lehman, who knows all of these things in an encyclopedic manner, and he tells me the presentation you made was correct. The figure was really first settled along back in 1967 or 1968,

but it didn't become a part of the law until we passed the law in 1976.

On page 9 of your prepared statement and repeated in your oral statement you mentioned the mechanical royalty of 2¾ cents per record. I believe it's correct, is it not, that that is a royalty paid by the record company to the owners of the copyright on the words and music?

Mr. HESCH. That's correct.

Mr. DANIELSON. It's not charged against the jukebox?

Mr. HESCH. No; but it's one of the royalties that a jukebox pays.

Mr. DANIELSON. Well, I suppose everything that goes into the final production of the record you buy is part of the cost of goods sold, but that is a royalty paid by the recording company?

Mr. HESCH. That's correct.

Mr. DANIELSON. Now you object to the performance royalty on the ground that the performers and record companies do not create the music, but what distinguishes them from the performers and the corporations who are able to claim a share of copyright royalties on video products?

Mr. HESCH. I'm not familiar with video products. I know one thing. We buy the records and we pay the performers and we pay the record companies.

Mr. DANIELSON. You pay for the record?

Mr. HESCH. That's correct.

Mr. DANIELSON. You don't make any separate payment to the performers?

Mr. HESCH. No.

Mr. DANIELSON. What do you sell on a jukebox besides music, if anything?

Mr. HESCH. That's basically all we sell on a jukebox. We sell entertainment which is music.

Mr. DANIELSON. The only entertainment you sell is music, is that not correct?

Mr. HESCH. That's correct.

Mr. DANIELSON. And all of it comes off of records?

Mr. HESCH. That's correct.

Mr. DANIELSON. How many, if you can tell me, jukeboxes exist in the United States today?

Mr. HESCH. From the survey that was done by Peat, Marwick and Mitchell, those figures come out—it's around 300,000.

Mr. DANIELSON. All we're talking about is a ball park figure. That's good enough.

What does a new jukebox sell for, roughly?

Mr. HESCH. A new jukebox today will sell for—there are variations, but it's within the $3,000 range.

Mr. DANIELSON. How long do they last before you have to replace them either through outmoded style or for whatever reason?

Mr. HESCH. The normal number of years that people talk about is 5 to 7 years.

Mr. DANIELSON. And they are then what—sold on some kind of a secondhand market?

Mr. HESCH. Today we would like to be able to sell them on a secondhand market, but there aren't many markets for them.

There's kind of a glut of them on the marketplace and there really is no place to really move them.

Mr. DANIELSON. I think that the gentleman from Virginia made a good point in a question, and that is a change in public taste may have some impact upon your business. I remember my college days that one of the most frequent forms of entertainment in which we indulged was you had a date with some young lady and you went to what was called a "Juke Joint" at that time and you could sit around and put a nickel in the machine and hear music and dance and so forth. That has been pretty largely supplanted by the disco establishment I think in our cities, has it not?

Mr. HESCH. I think it's been supplanted also by the fast food chains that have come in. Where you used to go was a soda fountain and——

Mr. DANIELSON. Where you could get a good soda for 10 cents.

Mr. HESCH. That's not here today. We've got a lot of fast food chains and they don't use jukeboxes.

Mr. DANIELSON. It's just a change in what people do?

Mr. HESCH. Somewhat, yes.

Mr. DANIELSON. The royalty which would be imposed on jukeboxes by this bill as presently drafted would be $1 per year approximately and unless the Copyright Royalty Tribunal took some affirmative action to change that that is what it would remain. Is that not true?

Mr. HESCH. They have already taken the affirmative action and it is already scheduled to go up except for the fact that we're arguing about it in court, but it is supposed to go up to $25 a year.

Mr. DANIELSON. No, no. I'm talking about what's provided for in the proposed law. This is only a bill. This is not the law we have.

Mr. HESCH. Say the question again. I didn't follow it then.

Mr. DANIELSON. The royalty which would be imposed by this bill, $1 per jukebox per year, would remain at that level unless the Copyright Royalty Tribunal were to change it?

Mr. HESCH. Unless the copyright royalty were to be changed. Isn't it written in the bill to say it's $1 for every $8 or every $9?

Mr. DANIELSON. Counsel understands it better than I. Would you state it, Mr. Lehman?

Mr. LEHMAN. I think the way the legislation is written right now there's an additional $1 per year royalty. Now that is based on the fact that the original statutory royalty was $8, but it wouldn't require action by the Copyright Royalty Tribunal to raise that $1 and arrive at a new figure. It wouldn't automatically be a ratio of $8 to $1.

Mr. ALLEN. Mr. Congressman, let me just throw in this thought. The bill says $1 add on. It also uses the fraction one-ninth. I notice when Mr. Gortikov was testifying he talked about this new add on as a one-ninth add on. Now reading that with what the Tribunal already has done of increasing from $8 to $25 and then from $25 to $50 and then to something else in 1987, that one/ninth could apply automatically. And we are looking at the bill believing that in view of the intervening decision of the Copyright Royalty Tribunal since you introduced your bill we would expect in the further consideration that they will revise it.

Mr. DANIELSON. Well, thank you for bringing your point to our attention because we have now been alerted to it and we will be able to consider that during the time of markup.

Someone has informed me that when I told the story of the song that Rosemary Clooney breathed some life into and William Saroyan wrote the words, I failed to mention the song. So I ask unanimous consent that it appear at the end of my remarks on that subject in the record. Is there any objection?

Mr. BUTLER. What's the name?

Mr. DANIELSON. Well, is there any objection?

[No Response.]

Mr. DANIELSON. Hearing none, so ordered. The name of the song was and is "Come On To My House." I think everybody has heard it.

I have no further questions, gentlemen. Do you have anything you feel a strong compulsion to say or add to the record? That's not meant to cut you off if you would like to say something.

Mr. ALLEN. Thank you very much.

Mr. DANIELSON. Thank you very much. And although we were in short quorum here a little bit of the time, your information is clearly in the record and I can assure you we will consider this royalty feature in markup.

That is the end of the hearing on this subject for today. Tomorrow the same subcommittee will meet. We will recess until tomorrow morning at 10 o'clock at which time we will have testimony from the General Accounting Office and by the Copyright Royalty Tribunal. The subcommittee stands adjourned.

[Whereupon, at 12:05 p.m., the hearing was recessed, to be reconvened at 10 a.m., June 11, 1981.]

CABLE/COPYRIGHT LEGISLATION

WEDNESDAY, JUNE 17, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Railsback, Sawyer, and Butler.

Also Present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning the subcommittee is continuing its hearings on H.R. 3528 and H.R. 3560, relating to cable/copyright legislation.

This morning we have two very distinguished witnesses who I think represent different points of view, or at least come with different perspectives.

The first witness is Ms. Kay Peters, representing the Screen Actors Guild, who has appeared before this and other committees before, and Mr. Turner is very well known for his many endeavors, not only in broadcasting.

Ms. Peters, you are listed first. We will call on you.

TESTIMONY OF KAY PETERS, SPEAKING ON BEHALF OF THE SCREEN ACTORS GUILD

Ms. PETERS. Thank you, Mr. Chairman and members of this committee.

I am speaking on behalf of the 48,000 members of the Screen Actors Guild.

We appreciate the opportunity to discuss these copyright issues, even though we in fact have no copyright protection.

Nevertheless, we are greatly affected by these proceedings, because actors must attempt to negotiate an adequate contract with the producers. But when the producers are not paid fair value for their product, it is impossible for actors to negotiate fair value for their performance. Therefore, section 3 of the Copyright Act of 1976 is influencing the actor's ability to negotiate a fair wage.

Before addressing the issues, let me help you understand who the people are that I represent. Most people, when they hear the term "actor" immediately think of the highly visible performers who make lots of money. Actually only 1 percent of our membership earns over $100,000 a year and 80 percent less than $5,000 a year.

Most actors exist at the poverty level. I present this fact so that you fully realize that actors are not financially capable of subsidizing basic cable by allowing them to use our performances at below market value.

It is our contention that networks, independent broadcasters, cable and satellite systems can all coexist profitably, but that the value of these various systems should ultimately be determined through fair competition in the marketplace. Any legislation should encourage and protect new technology only in the early stages of development, but never at the expense of existing systems.

If the Government believes that basic cable systems need extensive protection for the good of the general public, then the Government should subsidize them, not the program suppliers and actors.

So that there is no possible misunderstanding, the Screen Actors Guild would like to be on record as supporting and encouraging the growth of cable systems as well as any other technological developments that provide additional distribution of programing.

It is important to remember that basic cable is a form of distribution. Basic cable does not create its own programing; it simply distributes the programing. As an actor, I have a great deal of trouble with the concept that the distribution of a program is worth 99 percent and the artistic efforts that created that program are worth only 1 percent. And yet, such is the value structure of the compulsory license fee.

David Ladd, Register of Copyrights, made some pertinent statements before the Senate Judiciary Committee. It is my understanding that these statements have been made available to this committee.

I would simply like to underscore the part where he discusses the philosophical objectives of the copyright law, and I quote:

> It (Copyright protection) gives the person the "right" to try and live by the fruit of his or her words, painting, music or cinematic expressions, to succeed or fail principally upon the basis of public acceptance or rejection.
>
> The Copyright Office archives are filled with unread poems, unheard songs, and children's drawings side by side with deposit copies of O'Neill plays, John Huston films, and Beatle songs. So, the Copyright Statute embodies the underlying principles of the Constitution, freedom, risk, and reward for merit as determined by the public's choice, i.e., the consumer's taste expressed by use of his or her money.

Therefore, the Screen Actors Guild asks that the rights of property owners be respected by requiring basic cable systems to have full copyright liability.

We understand that the compulsory license created by the Copyright Act of 1976 was not intended to undermine the rights of property owners. Rather it was created to allow the cable industry a chance to provide its value without being crushed by the existing competitive marketplace.

We understand the point, but we wonder why basic cable was singled out by the Government to receive the benefits of a compulsory license fee while all of the other new technological advancements were left to compete in the marketplace for their programing.

Pay cable subscribers number only slightly over 10 million compared to the 19.7 million basic cable subscribers and yet pay TV has to purchase its programing at marketplace value.

Videocassettes, videodiscs and soon direct broadcast satellite, pay marketplace value for their programing. Why was basic cable the one to need the benefit of Government protection?

We understand that the compulsory license was created to help a burgeoning industry, but still we wonder, how long, how long will the Federal Government permit basic cable systems to take someone else's property, without permission and without adequate payment, and sell it for their own profit?

So the question becomes, does basic cable still need governmental protection?

According to Paul Kagan, basic cable systems have penetrated 25 percent of the total television households. According to the A.C. Nielsen's National Television Index, basic cable penetration is 27 percent. If projections hold true, by 1985 basic cable, with 36 million subscribers, will have 41 percent penetration of the total TV households.

Cable now has revenues of $2.5 billion, with an estimated $8.5 billion expected in 1985. There may be over 4,000 cable systems today, but the 50 top Multi-System Operators control approximately 72 percent of all the basic cable subscribers.

The trend is in the direction of merger and consolidation with the Mom and Pop cable systems gradually evaporating. Donaldson, Lufkin & Jenrette, Wall Street brokers, go on to say in their report, Cable Television 1981, that 11 or nearly half of the top 25 MSO's have either sold out or have mergers pending in the last 5 years.

As an example, Westinghouse is about to purchase Teleprompter for $636 million. We are no longer discussing a basic infant industry; cable has come of age.

I have heard the argument, why should we abolish the compulsory license when no one seems to be able to demonstrate that they have been harmed?

Somehow this statement seems reversed to me when copyright protection is a part of our Constitution and the compulsory license is the exception granted because of an unusual need.

I think that it is up to cable to show that they in fact have a "need." To effectively analyze the need of basic cable we should consider the total cable revenue package.

Currently, cable income is derived from four major sources: one, basic subscriber fees; two, pay subscriber fees—you must remember that cable keeps 60 percent of those fees)—three, advertising dollars from advertiser supported programing on basic cable; four, revenues from ancillary pay services, such as fire alarms, two-way interactive systems, et cetera.

Obviously the cable operator is not going to find his largest profit in the basic cable subscriber fees which average between $8 and $9 a month. But when all of these revenue sources are combined, it would seem that basic cable could financially survive in the competitive marketplace.

I am not an expert on the economics of cable, but I agree with others who have testified and submitted evidence to support this argument.

Can anyone demonstrate harm? Well, even though the FCC has abolished syndicated exclusivity regulations and distant signal limi-

tations, they are still in existence pending the final court decision. That decision came down yesterday, and they are no longer in existence, but that has all just happened. They have been in existence. Therefore, it is extremely difficult to prove harm.

The Rand Report, February 1977, entitled Copyright Liability for Cable Television: Is Compulsory Licensing a Solution? states:

"As cable penetration and distant signal importation increases, the ability of program suppliers to capture the full value of their programs will decline."

According to Jack Valenti, president of the Motion Picture Association of America, "The film industry is currently in the clutch of a depression at the box-office." He cites four major film companies which show a decline in net profit after tax dollars on filmed entertainment in 1980 compared to 1979:

Warner Bros., down 35.2 percent; Universal Studios, down 11.89 percent; Twentieth Century-Fox, down 13.6 percent; United Artists, down 24.4 percent.

But the real harm to programers and actors is that we are prohibited by law from charging fair market value for our product. We have been harmed to the extent of the difference between the marketplace value of our programing and the amount paid by basic cable through the compulsory license fees.

Programers don't have to go bankrupt to show harm. A businessman who has been robbed may show a profit at the end of the year, but that does not negate the fact that he has been harmed.

The ultimate harm is to the consumer. By providing a legislative incentive to basic cable through the compulsory license, you are encouraging basic cable not to create original or diversified programing. When basic cable can use our programing so cheaply, why should they provide anything more than a rehash of what is already available?

A recent report, Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License, by Harry M. Shooshan, Charles L. Jackson, Stanley M. Besen, and Jane Wilson, states:

"The compulsory license for cable has distorted the video marketplace, inhibited fair competition and, most important, hurt consumers by denying to them programing choices which would have otherwise been available."

Is the acquisition of programing possible without compulsory license?

The House Judiciary Committee concluded in 1976 that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."

According to David Ladd, Register of Copyrights, "This conclusion may be valid for small nonaffiliated cable systems, but it is no longer the case for major MSOs."

We have already pointed out that the top 50 MSOs control 72 percent of the basic cable subscribers. So we are really concerned only about the few small nonaffiliated cable systems that are nonaffiliated. These systems now have several options available to them that did not exist in 1976. Middlemen, like Ed Taylor, have satellite program networks that provide program packages to the cable systems.

"Interconnects" are forming where groups of cable systems join together to share the responsibility of purchasing programing. Currently there are approximately 80 such systems representing 1.5 million subscribers and the number is increasing weekly. This whole concept of negotiating directly with the programers is not new.

Since 1948 all of the independent television stations have been operating in this manner, and that is how they get their programing, 24 hours a day.

I think that there is also an underlying fear that if we abolish the compulsory license that the programers will withhold product and destroy basic cable. Why? The programers are in the same position as the actors, there is no love affair with the networks, we welcome the opportunity to do more diverse specialized work on cable.

The prospect of having all of those additional channels available for programing is overwhelming. Why should we try to destroy cable by withholding product if they are willing to pay a fair value for our product?

It doesn't make sense.

The Screen Actors Guild would like to recommend the following:

To abolish the compulsory license for distant TV station programs imported by cable systems;

Retain the compulsory license only for the following:

A. Secondary transmission by cable systems of local broadcast signals which are required to be carried under FCC regulations.

B. Simultaneous importation, by cable, of distant signals containing network programing in locations otherwise unserved by the three national television networks—ABC, CBS, AND NBC.

Specifically state that Satellite resale carriers have full copyright liability.

Provide for a transition period to ease basic cable into the competitive marketplace, perhaps a period of 2 to 3 years.

If any exemptions are to be made for small cable systems, it should apply only to independently owned systems and not those controlled by large MSO's.

Grant the Copyright Royalty Tribunal subpena power.

I would ask that you restore the concept of property rights to the copyright owner by abolishing the compulsory license. Basic cable has come of age and is capable of financially surviving in the competitive marketplace.

Do we really benefit the public by giving a legislative incentive to basic cable not to produce original or diversified programing?

Unless basic cable would be permanently damaged by the removal of the compulsory license, which I have tried to show in my statements is not the case, then I guess my position is best summed up by my 10-year-old daughter when I explained to her why I was going to testify in Washington: "Mommy, why should my Government, the Government of the United States, allow someone to take someone else's property without paying a fair price?" She thought for a while and then she said, "It isn't fair."

Thank you.

Mr. KASTENMEIER. Thank you, Ms. Peters.

We commend you for your statement.

May I ask, your six recommendations, those are the recommendations of the Screen Actors Guild?

Ms. PETERS. Yes.

Mr. KASTENMEIER. Are they also the recommendations of any other organization?

Ms. PETERS. I come before you representing the Screen Actors Guild alone.

Mr. KASTENMEIER. As far as you know, no other organization supports those six recommendations?

Ms. PETERS. No other organization has been asked to support them at this point. They have not been shown to anyone else at this point.

Mr. KASTENMEIER. Do you have any questions?

May I say I am pleased to see that so many members of the subcommittee are here today, notwithstanding other diversions. You may ask Ms. Peters questions now or defer until after we hear from Mr. Turner, as you wish.

Mr. RAILSBACK. All of us are here because we have tired of debating Legal Services and it is kind of a pleasant interlude.

I was interested in what you said for the little fellows that could use middlemen, and I think that is fairly significant, because that has been one of my real problems with doing away with the compulsory license.

You mentioned a fellow by the name of Ed Taylor. Can you expand on that a little bit and tell us about his operation?

Ms. PETERS. I am sure Mr. Turner can explain his operation better than I can, but it is a system. I was trying to point out there are viable options, and people are beginning to band together realizing that this could be a problem. The packaging starts to happen as the industry grows, and that is happening now.

Cable systems are coming together to buy their programs. HBO is an example of a packager. You have someone who provides the program package for the systems.

Mr. RAILSBACK. OK; I will ask Mr. Turner about it.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. FRANK. I was most interested in your suggestion about consumer harm, which I think is an important point first to get into.

You quoted from this cable copyright, consumer welfare report; could you expand on how the compulsory license inhibits the program choice to consumers?

Ms. PETERS. I realize that the compulsory license applies only to those people who do not change the programing and the commercials. That is how they are able to receive the benefit of the compulsory license fee, so that there cannot be, by definition, any original programing or commercials.

Mr. FRANK. Your view is if we didn't have compulsory license, many of the cable systems instead of showing existing programs would start some new ones?

Ms. PETERS. Yes; and they would be able to have their own advertising.

Mr. FRANK. I guess that assumes that they are paying less for the programs they get under compulsory license than they might otherwise pay?

Ms. PETERS. I think that is correct. If the compulsory license was removed, they would have the incentive, since cheap programing would not be available. They could then create new programing and get advertising dollars in and the public would benefit, because they would have no diversified programing.

Mr. FRANK. I am basically sympathetic to your point.

Does that mean if they were going to have to pay more, the consumer would have to pay more?

Ms. PETERS. There are many sources of revenue to the cable systems and, no, I don't think there is any possibility that it would be necessary to pass that on to the consumer.

The profitability of cable can exist without passing the cost on to the subscriber.

Mr. FRANK. It can; but would it? They are not subject to restriction. It would increase their cost?

Ms. PETERS. Not necessarily; if they are able to get the money from advertising, it would not necessarily increase their cost, if you consider their revenue.

Mr. FRANK. If they would do their own programing, they would get advertising for that which they can't do under compulsory license?

Ms. PETERS. Yes.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you.

You posed a question, and I have posed this to people, also: Why would you not want to sell programing without a compulsory obligation to do so?

The answer I get back is because you sell exclusivity and if you take one of those, let's say a satellite station or station operating off of a satellite, there is no way it could block out, that I am aware of, areas where you have sold exclusivity or, I don't say you but exclusivity has been sold.

What is the answer to that?

Ms. PETERS. The exclusivity contracts, syndicated exclusivity contracts, are no longer in existence. You are saying if the compulsory license system is removed; is that correct?

Mr. SAWYER. Well, yes, you posed a question and I posed this, too, because at first I couldn't see any logic to it. You have a product to sell, the movie industry, and obviously they want to sell it and obviously cable would want to buy it. So why the need for compulsory license?

Well, the complicating factor in there is the fact that you sell exclusivity in certain markets, and that this, in allowing one of the superstations that in effect feeds cable to do it, would violate your exclusivity situation and, therefore, you would have a reason not for selling without a compulsory license.

What is the answer to that?

Ms. PETERS. Most exclusivity contracts have a time limitation as well. It is not excluding forever the use of that product in a certain area. An exclusivity contract is in a geographic location for a given period of time, so they may not be able to use it at that moment.

At some other time it would be available to them as well.

Mr. SAWYER. That would in effect be a motive, though, or a reason for not licensing the program in a way that would reach cable? Isn't that correct?

Ms. PETERS. Could someone use it that way, I suppose that is true. The pivotal point is why would they use it forever restricting their use? That wouldn't be the point.

Mr. SAWYER. Then you are in effect relegating cable to second run.

Ms. PETERS. Cable can be first-run if they are paying more than someone else. It becomes a marketplace situation.

If cable is willing to pay more because they want to use it first, they will have it first. The marketplace can determine that.

Mr. SAWYER. Another thing that bothers me is why the compulsory carriage by the local cable network of a local TV program; if we don't have compulsory licensing why should we have compulsory carrying?

Ms. PETERS. Because the FCC regulation exists, we should give them an exemption and allow them to pay the compulsory license fee. Why does the FCC regulation exist, which is what you are asking. It exists because FCC rules were found on the idea that localism was good, that there was a need for the local news, for the local product, the local programs that were being shown. That is the reason why we are saying, yes, "must carry" regulations should be in existence and we should encourage local programing.

Mr. SAWYER. Would you be in agreement with a tradeoff, no compulsory license, no compulsory carriage?

Ms. PETERS. I am speaking now from my opinion, and I would again, as anyone speaking on behalf of other people, have to go back and make sure I spoke and represent the membership. My immediate reaction would be that that would not be too much of a problem.

I think there is a need for local service but there is a greater need, which is to abolish the compulsory license fee.

Mr. SAWYER. There you are in direct conflict with the National Association of Broadcasters' position because they don't want that kind of a tradeoff.

Ms. PETERS. I may find myself in conflict with any number of people as we proceed along. I am speaking for the Screen Actors Guild, and in this situation speaking the opinion of Kay Peters.

Mr. SAWYER. I don't understand the separating into two categories, whether they are owned by big companies or very small. What is the rationale for discrimination against size alone?

Ms. PETERS. I don't know that it is discrimination against size; perhaps more one's ability to pay. I don't think any actor or performer is interested in trying to get a lot of money out of someone who can barely hold the cable system together; those who serve a group of people who might otherwise not have any television service at all. We are willing to allow them to pay only a compulsory license fee as we did, with all of the cable systems at an infant stage needing help.

There is a certain point when cable systems become large enough to pay a fair price. When they are large enough alone, or combined together in whatever way, to become economically sound, then it is time for them to pay a fair value for product.

Mr. SAWYER. I can understand that as a marketing technique or program, but it is kind of hard for me to see how we legally say if you are so big you don't get it.

If you are small you get it with that being the only criteria.

Very infrequently do we do that, and if they were engaging in some kind of abusive exercise of size, that is something different. I just don't see it.

You got Paramount owned by Gulf and Western, for example.

Why do we say we favor Paramount, Gulf and Western, and yet we will discriminate against a cable system that is owned by General Electric?

Ms. PETERS. May I ask you a question in reverse?

Mr. SAWYER. I don't know if that is fair.

Ms. PETERS. It will help me understand in terms of answering the question.

My understanding is basically the copyright law protects property rights and that is the fundamental element of the copyright law.

Now, if that is a given——

Mr. SAWYER. If that is the only question, my answer is yes.

Ms. PETERS. Good. My confusion then is the compulsory license was created to help, in an unusual circumstance, an infant industry, so the law was created not to undermine the copyright law or the principles of property rights but rather to help this little infant to have a chance to grow. Therefore, the size is a factor.

The size is important because you were helping when it was very young. Now if it is of age, if it has grown, and if it is financially able to stand on its own two feet, the law that was established for the infant industry is no longer necessary.

Mr. SAWYER. Thank you.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. It was not because cable was an infant industry. It was because it was proceeding from a nonliability to a liability, and rather than subject cable to full liability and negotiations where none were required before, we subjected them to controlled liability through compulsory license.

That was the major reason at the time.

The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate your taking the time to share your views with us.

Of course, everybody has expressed why they are here today.

I am here today because I recognize the possibility that you may be President of the United States some day.

Ms. PETERS. If I am, I won't cut your budget.

Mr. BUTLER. Let me say a little bit in response to what you exchanged with Mr. Sawyer. We create copyrights because of a constitutional legislative delegation to the Congress to do so in order to promote useful arts.

That is the basis on which this thing of referring in the marketplace, and all of the things that have grown out of that, are a little bit foreign to what I view as the copyright. Hopefully we can get away from that some day.

Likewise, their communication policy is really not a copyright problem, but that is a problem of another aspect, congressional responsibility which is not ours.

My question to you is directed toward what will promote the useful arts. What effect do you think removal of the compulsory license will have on the economic status of your profession?

You mentioned 80 percent earn less than $5,000 a year.

Would you expect that would go up or go down as a result of removing the compulsory license?

Ms. PETERS. Well, I expect, because the contracts we have negotiated, in terms of syndicated reruns are based on the amount that the program is sold for that actors income would increase. Understanding that principle, if programs are sold for more, then actors would share in more of the profits, because our contracts are based on how much someone has paid for the program.

It is linked to the producer. If the producer is making a fair price on his product, then we can negotiate a fair price for our product. This is how it is connected. I would hope that by removing the compulsory license fee that would have additional new programs because it will not be possible for them to simply do a rehash of old programing. It will mean more employment for actors.

Mr. BUTLER. I am not sure more programs are necessarily promoting the useful arts. What effect do you think the removal of the compulsory license might have on the quality of the programing available to the consumer in this country because, after all, I think that is our real basis for why we should create a copyright.

Ms. PETERS. I would like to think that you could legislate quality. I don't think we can. That is going to be determined by individuals and what they stand for and what they believe in. Unfortunately, I don't think that is something, with all of the good intent you might have, that you can legislate.

It will depend on the people of this country and what they want and what they are willing to see.

Mr. BUTLER. You can't hold out any hope?

Ms. PETERS. I wish I could.

Mr. BUTLER. Well, I appreciate your candor and I yield back.

Mr. KASTENMEIER. Thank you, Ms. Peters.

Ms. PETERS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Now the Chair would like to call on Mr. Ted Turner, chairman of the board and president of the Turner Broadcasting System, and also interested in a number of other activities.

We are pleased to greet you, Mr. Turner, and you may proceed.

TESTIMONY OF R. E. "TED" TURNER III, CHAIRMAN OF THE BOARD AND PRESIDENT, TURNER BROADCASTING SYSTEM, INC.

Mr. TURNER. Thank you, Mr. Chairman.

After hearing Mr. Butler's comments or questions to Ms. Peters, and this has been a very illuminating session so far for me as well, I have to say that for programing to be improved, the heads of the networks that are packaging the programing have to make that decision that they are going to consciously and deliberately improve the quality of programing, and I have already done that.

We have been endorsed by the Moral Majority and the National Coalition for Decency, those same groups of people that are concerned about the trash in motion pictures and theaters today, and

if I am allowed to operate, that is what I am dedicating the balance of my life to.

I have said that publicly long before this attack by the enemies of diversity that has forced me to appear before you today, and now I will read my testimony.

The longer statement is about 30 pages, and that takes 25 minutes to read. This is about 12 pages.

Mr. KASTENMEIER. Without objection, your longer statement will be in the record.

Mr. TURNER. Mr. Chairman, members of the subcommittee, my name is Ted Turner, president and chairman of the board of Turner Broadcasting System.

It is a pleasure and an honor to be here today to testify before this committee during these proceedings.

Turner Broadcasting System is the parent of Superstation, Inc., licensee of WTBS, Atlanta, Ga. It appears the major issue emerging before this committee during its hearing has been the carriage of the superstation by cable television systems.

I believe that a review of all the facts will demonstrate that there is no present need to modify or eliminate the compulsory license. I also believe that the facts will show that the ability of cable television systems to transmit broadcast signals under the compulsory license will have a beneficial effect on both the programing industry and the viewing public in the future.

First, there is a demand for the distant signal. WTBS is carried by a satellite resale common carrier to over 3,000 cable systems; as of yesterday it was 3,085. WTBS is currently viewed in over 16 million cable households or 21 percent of all U.S. television households. These figures show that a distant signal such as WTBS is demanded by the consumer.

While other nonbroadcast services may offer some of the same type of programing on a limited basis, no other service offers the wide choice of programing that is televised on the superstation. In the mind of the cable subscriber, there is something unique in receiving a television station from a distant city.

In addition to this uniqueness, the variety of sports, movies, and syndicated programing makes a distant signal extremely attractive to the cable subscriber. As of February of this year, Neilsen began issuing monthly surveys reporting WTBS ratings based on the Nielsen Television Index, a national metered sample of U.S. television households.

The WTBS audience figures I am about to cite come from these reports. WTBS is the only programing organization other than the three national networks to utilize this service.

More than 10 million different homes watch WTBS each week, with the average household viewing between 6½ and 8 hours of superstation programing over the 7-day period. Audience levels of this magnitude mean that over the past 4 months, 9 percent of all viewing taking place in homes served by WTBS goes to our station.

WTBS' showing is all the more impressive because it has only been recently added as a service in many of the homes that it reaches. The fact is that the superstation brings the consumer programing that he or she would not otherwise be able to see.

The superstation also brings programing into areas where there are no independent signals.

Of the over 3,000 cable systems that receive WTBS, almost 2,000 are located in markets where there is no independent signal. A good number of these systems serve over 5,000 subscribers. In some cases these systems are located outside of all television markets.

The data listed in exhibit 1 shows that 80 percent of the systems carrying WTBS are located in those counties which are most distant from major metropolitan centers that are most lacking in television diversity.

Today, 21 States are without even 1 independent television station and only 16 States have a television market with at least 1 independent station.

It is quite clear that if the compulsory license were eliminated, large numbers of the American viewing public that receive service both from small and large cable television systems serving thousands of subscribers would be deprived of access to an independent television station. The progress which has been gained in the last several years in providing television to vast areas of the United States would be totally lost if the compulsory license were eliminated.

As I will discuss, strict copyright liability would destroy our distribution by satellite. This loss of programing would be catastrophic in those areas of the country that only receive independent television stations through satellite transmission.

There are those who would argue that the widespread transmission of the superstation was not a factor when the current act was passed.

However, the present operation of WTBS as a superstation is evidence that the abolition of the compulsory license is unnecessary. Program suppliers are under no obligation to sell their programs to our station. Those program suppliers who do sell to WTBS are aware of the cable homes receiving the station, and they price their product accordingly.

The superstation is providing an additional source of revenue for the syndicator of old shows such as "Leave It to Beaver" and "The Munsters." A program such as "Leave It to Beaver" never could have commanded the prices that we are now paying but for our status as a superstation.

The industry has continued to sell programs to WTBS, of course, at a higher price to account for our increased territory as a superstation. Since achieving that status, it has purchased films from 9 out of the top 10 syndicators. The cost of the programs to WTBS has increased dramatically, several hundred percent in the past 4 years.

For instance, in 1974 we paid $350 per episode for "I Love Lucy" as compared to $2,000 paid in 1978 for the same program, an increase of almost 500 percent. "Father Knows Best" was purchased in 1977 for $300 an episode and in 1981 was renewed for $2,000.

Other series and film packages that are listed in my statement show increases of up to 1,400 percent and demonstrate quite clearly that overall WTBS is paying higher licensing fees directly as a result of its widespread carriage into cable homes.

In the last year, WTBS has committed itself to spend $20 million for the acquisition of new programs, virtually all of which come from the same Hollywood studios that Mr. Jack Valenti represents.

The ability to obtain more accurate surveys through the use of meters in cable households will further enhance the program industry's ability to extract higher prices for their programs.

As WTBS reaches greater numbers of homes, advertisers will pay us more and WTBS in turn will be able to pay greater licensing fees to program suppliers who will demand greater fees based on our audience. I believe that the current marketplace will enable all parties to be fairly rewarded and in the process the end result will be greater programing diversity for the television viewer. It has certainly resulted in that so far.

The distant signal provides diversity. In addition to the higher licensing fees and growing royalties that the program industry will receive, the continuation of the compulsory license holds out the opportunity for a superstation such as WTBS to upgrade its programing and provide diversity to the American television audience.

Independent producers and writers every day are contacting us in order to develop programing that can be televised on the superstation. In the future WTBS can provide an outlet for artists who do not now have access to the three major television networks.

For the small film company or the talented writer or producer, WTBS as a superstation will have the ability to provide an alternative to Los Angeles or New York as centers for television program distribution. Such an alternative is needed and desired by the American viewing public.

Recently WTBS has added to our schedule several new programs which I have outlined in my statement. However, the ability of WTBS to operate as a superstation is predicated on the continuation of the compulsory license. Without the compulsory license cable systems would simply not be able to transmit the entire program schedule of our station or any other distant broadcast signal.

There is nothing to be gained by the superstation transmitting a "Laverne and Shirley" into television markets which already offer that program and, for that reason, we deliberately did not buy it. Therefore, we will necessarily have to evolve as an outlet for different programing if we are to gain acceptance in these areas in the future.

This evolution of our station should be allowed to occur gradually under the compulsory license. At the same time, the marketplace can and is working under the compulsory license as is demonstrated by the programs that program suppliers are currently selling to us.

Strict copyright liability is unworkable. It has been suggested that under a system of strict copyright liability a middleman could bargain on behalf of the cable systems and pay a higher price for the programs. The basic difference between the cable industry and the television industry would doom this approach.

As the Nation's No. 1 superstation, WTBS serves only 16 million homes nationwide. We would literally be competing against virtually all 200 television markets in the country for any particular

program. For this reason, broker cable flagship station, or middlemen, are simply not realistic and is unavailable.

Additionally, I suggest that sports interests would refuse to grant a middleman national rights for their games over basic cable. For instance, major league baseball has always insisted—I should know, I go to the meetings—on territorial exclusivity regardless of the amount of money that would be paid for telecasts under a system of strict copyright liability.

The leagues would never grant national rights in violation of their own internal territorial agreements which grant individual monopolies to each team.

The cable industry would also find that if strict copyright liability were imposed, it would be impossible to transmit WTBS. The deletion of programs on WTBS which did not receive national clearance would completely "chop up" our signal.

The cable operator sells channels and not programs. After several months the end result would be that cable operators would be forced to discontinue carriage of the superstation on their systems due to the disjointed schedule of programing.

Also, according to the program suppliers' proposal, if a cable system wishes to import one syndicated program carried by WTBS, it would be required to bid for the right to that program from the program supplier. If it wished to carry an entire evening's programing, it would have to bid for the right to four or five such programs.

Aside from the costs involved in obtaining the rights to such programs, it would have to compete for that programing against the major market independent station. If a particularly attractive program were available, the television station could cover its costs simply by increasing its advertising rate card. Cable systems obviously can't change their rate for each individual program.

Elimination of the compulsory license gives to one group, the copyright holder, virtual monopolistic control of the marketplace, with the real likelihood that these copyright owners would withhold their works from the viewing public in order to maximize their programs.

The plain fact is that the program supply industry will simply use the absence of the compulsory license to deny its product to the cable television industry and consequently the television viewing public as well. The elimination of the compulsory license will insure that the three national television networks and the major movie-television producers will control virtually all of the program market, and in this position will simply conduct their business in such a way as to maximize profits.

The question before you is whether the program industry under the present compulsory license will be able to earn sufficient revenues in the future to enable it to continue to produce programing for the American public.

If the networks and some of those producers went out of business it would be the best thing that could happen to America. At least there wouldn't be the trash that people are subjected to on the screens of their television sets.

It would be a great thing for this country. We are here to make television better. I had to get that in. The thought just occurred to me.

When the committee considers the widespread carriage of the superstation on cable systems today and in the future, the fact that the copyright holders will have the right to control the use of their programs on the superstation, and the significantly increased revenue which they will realize, a modification or elimination of the compulsory license is unnecessary and would be ill advised.

I further believe that if the compulsory license is eliminated, the distant signal as a source of diverse programing will become extinct on the day that strict copyright liability is adopted.

It is clear that a middleman will not fill the void caused by the elimination of the compulsory license.

I submit that the facts presented to you thus far during these hearings do not support the elimination of the compulsory license and the drastic effect that such a step would have upon the cable television industry and the public.

I therefore urge that the committee retain the compulsory license as it is presently constituted.

Mr. Chairman and members of the committee, I thank you for the opportunity you have given me to testify here today.

I would be happy to answer any questions that the committee may have.

[The complete statement of Mr. Turner follows:]

PREPARED STATEMENT OF R. E. TURNER III, CHAIRMAN OF THE BOARD AND PRESIDENT OF TURNER BROADCASTING SYSTEM, INC.

Mr. Chairman, Members of the Sub-Committee, my name is Ted Turner, President and Chairman of the Board of Turner Broadcasting System. It is a pleasure and an honor to be here today to testify before this Committee during these proceedings.

Turner Broadcasting System is the parent of Superstation, Inc., licensee of WTBS, Atlanta, Georgia, the first superstation to be transmitted over cable television systems across the country. WTBS is vitally interested in this Committee's deliberations and the conclusions that it will reach with regard to cable television's transmission of distant television signals under the compulsory license. Through my appearance here today I hope to accomplish these goals:

To demonstrate the benefit of the distant television signal to the public;

To demonstrate that the compulsory license has worked and will continue to work in the future;

To outline the progress that WTBS has made as a superstation and the evolution of the superstation as a source of diversity for the television viewing public;

To demonstrate the effect that the elimination of the compulsory license would have on the cable television industry; and

To demonstrate why strict Copyright Liability is unworkable.

In 1976 the film and cable industries entered into an agreement which resulted in the right of cable television systems to transmit television signals under a compulsory license. The purpose of these hearings is to evaluate the performance of Section 111 in order to determine whether royalty payments paid by cable television should be increased, whether the compulsory license should be modified, or whether another mechanism should be developed in its place. The mechanism advanced most vigorously by the film and broadcast industries is strict copyright liability for the cable television industry. However, it appears that the real issue before this Committee is not the compulsory license, but rather the carriage of the superstation by cable television systems. I believe that a review of all the facts will demonstrate that there is no present need to modify or eliminate the compulsory license. Furthermore, I believe that the facts will show that the ability of cable television systems to transmit broadcast signals under the compulsory license will have a beneficial effect on both the programming industry and the viewing public in the future.

THERE IS A DEMAND FOR THE DISTANT SIGNAL

WTBS was the first television station to have its signal distributed to cable systems via satellite and currently serves more subscribers than any other cable service. WTBS is carried by Southern Satellite Systems, Inc., an independent domestic resale common carrier, to over 3,000 cable systems. WTBS is currently viewed in over 16,000,000 cable households or 21 percent of all U.S. television households.[1] These figures demonstrate that the public has spoken loudly in favor of the superstation by voting "Yes" in favor of the superstation with its pocketbook. This vote of confidence is all the more important when one analyzes the significant economic difference between cable and over-the-air broadcasting. Cable is a consumer product. It is sold at relatively low prices, and it can be cancelled monthly if it does not serve the customer. The cable industry must be completely responsive to the very specific desires of its subscribers. Cable operators transmit WTBS because millions of households demand the service.

As this Committee is aware , WTBS, as all other superstations, is transmitted by satellite. The cable operator must pay the common carrier for transmission of this signal as well as the copyright royalty. There are today nonbroadcast services that are available free or at nominal costs to the cable opertor as compared to WTBS. Yet subscribers demand the superstation! Aside from providing the only available independent signal in many areas of the country, the superstation provides a wide variety of broadcast programming that is sought after by the television viewer. While other nonbroadcast services may offer some of the same type of programming on a limited basis, no other service offers the wide choice of programming that is televised on the superstation. Furthermore, in the mind of the cable subscriber, there is something unique in receiving a television station from a *distant* city. In addition to this uniqueness, the variety of sports, movies, and syndicated programming make a distant signal extremely attractive to the cable subscriber.

The phenomenal growth of WTBS as a superstation demonstrates that there is a demand for the service which it is providing. The popularity of WTBS programming has been documented by the A. C. Nielsen Co. As of February of this year, Nielsen began issuing monthly surveys reporting WTBS ratings based on the Nielsen Television Index (NTI) national metered sample of U.S. television households. The WTBS audience figures I am about to cite come from these reports.

More than ten million different homes watch WTBS each week, with the average household viewing between 6½ and 8 hours of superstation programming over the seven-day period. Audience levels of this magnitude mean that over the past four months, February through May, 9 percent of all viewing taking place in homes served by WTBS goes to the superstation. At times when WTBS is able to offer strong counter programming to the local network affiliates, our shares of viewing climb substantially. For example, during May, with a mixture of feature films and sports telecast between 8 AM and 6 PM on Sundays, WTBS increased its average share to 18 percent of all viewing in the homes that it serves. A true alternative to the standard fare available to viewers results in a doubling of WTBS' shares over typical levels established on a total day basis. WTBS' showing is all the more impressive because it has only been recently added as a service in many of the homes that it reaches.[2]

While WTBS's widespread carriage has been evidence of its popularity with cable television viewers, it has only been recently that the true popularity of WTBS as a superstation has been capable of measurement through the use of meters in cable households. The result of these ratings demonstrates that the public desires the type of programming that is carried on WTBS. Moreover, the programs on WTBS have a value which is greater than that reflected in any rating for a particular program. The value is representative of the type of wholesome and family oriented programming that is available to the public on WTBS.

In order for a television broadcast station to thrive as a superstation it must counter-program against the three television networks and the cable program networks. The consumer will choose to watch the superstation simply because it wants greater viewing choices. WTBS brings the consumer alternative programming he or she would not otherwise see. Mr. Chairman, I could show you innumerable letters received over the last three years from subscribers and cable operators alike,

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[1] This coverage figure is supplied by A. C. Nielsen, who projects the estimated number of homes able to view WTBS based on its national metered sample. This figure also includes 837,000 households that receive WTBS off-the-air in Atlanta.

[2] WTBS's popularity is demonstrated by a recent independent study conducted by Lieberman Research, Inc., for the ARTEC system in Arlington, Virginia, which found that WTBS was the fourth most watched service behind CBS, HBO, and ABC.

attesting to their satisfaction and desire to view the programming transmitted by WTBS. The fact is that the transmission of distant signals on cable systems, and the superstation in particular, still constitutes the bedrock of the cable television industry.

Of the over 3,000 cable systems that receive WTBS, almost 2,000 are located in markets where there is no independent signal. A good number of these systems, rather than being small operations, serve over 5,000 subscribers.[3] Therefore an exemption from copyright liability for small systems of 5,000 subscribers would effectively cut off large numbers of cable subscribers living in areas which have no access to independent signals. Moreover, in some cases these systems are located outside of all television markets. The data listed in Exhibit I demonstrates that 80 percent of the systems carrying WTBS are located in "C" and "D" counties as defined by A. C. Nielsen, which are those counties most distant from major metropolitan centers, and thus, most lacking in television diversity. Twenty-two states are without even one independent television station and only sixteen states have a television market with at least one independent station.[4] The map which is attached as Exhibit II illustrates the wide areas of this country which do not have access to an independent station. WTBS and other satellite transmitted stations help to fill the program void created by this disparity in the geographical location of television markets offering independent television service to the American public.

Thus, it is quite clear that if the compulsory license was eliminated, large numbers of the American viewing public that receive service both from small and large cable television systems serving thousands of subscribers would be deprived of access to an independent television station. The progress which has been gained in the last three years in providing television to vast areas of the United States would be totally lost if the compulsory license was eliminated.

This Committee has expressed its concern regarding the satellite transmission of stations such as WTBS. However, satellite transmission is a technology which offers the one hope of curing the litany of commercial network television deficiencies and of providing an alternative to the programming decisions of the three major networks. As I will later discuss, strict copyright liability would destroy the superstation's distribution by satellite. Strict copyright liability, of alternatively, retransmission consent for a half or even a quarter of the programs supplied to WTBS by various program suppliers would mean that cable systems would have to block out large portions of the broadcast day from WTBS. This would make the transmission of WTBS and any other distant station impossible and would end signal importation via satellite resulting in the loss of the program alternatives now available to cable subscribers. This loss of programming would be especially serious in those areas of the country that are only able to obtain independent television stations via satellite.

THE COMPULSORY LICENSE IS FUNCTIONING

I submit that the present operation of WTBS as a superstation is evidence that abolition of the compulsory license is unnecessary. Program suppliers are under no obligation to sell their programs to WTBS. Those program suppliers who do sell to WTBS are aware of the cable homes receiving the station, and they price their product accordingly.

Program suppliers have continued to sell programs to WTBS—of course at a higher price to account for WTBS' status as a superstation. Since WTBS became a superstation, it has purchased films from nine out of the top ten syndicators. The cost of programs to WTBS has increased dramatically—several hundred percent in the past four years. The data listed in Exhibit IV strikingly demonstrates that WTBS is purchasing product based on its status as a superstation. For instance, in 1974 WTBS paid $350 per episode for "I Love Lucy" as compared to $2,000 paid in 1978. "Father Knows Best" was purchased in 1977 for $300 an episode and in 1981 was renewed for $2,000. Normally a series' value evidences a decrease in price after a renewal rather than an increase. Although some allowance must be made for inflation, differing contract terms, and a general increase in costs for syndicated product after 1977, the higher prices demonstrate quite clearly that overall WTBS is paying higher licensing fees directly as a result of its widespread carriage into cable homes.

In the last twelve months, WTBS has committed itself to spend twenty million dollars for the acquisition of new programs. The recently acquired ability of WTBS to obtain more accurate surveys through the use of meters in cable households will further enhance the suppliers' ability to extract higher prices for their programs. As

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[3] Specific examples of such systems can be provided to the Committee upon request.
[4] See Exhibit III.

WTBS reaches greater numbers of homes, advertisers will pay WTBS more and WTBS in turn will be able to pay greater licensing fees to program suppliers who will demand greater fees based on WTBS' audience. WTBS believes that the current marketplace will enable all parties to be fairly rewarded and in the process the end result will be greater programming diversity for the television viewer.

The Committee should also be aware that the superstation is providing an additional source of revenue for the syndicator. Programs such as "Leave It to Beaver" and the "Munsters," shows which WTBS previously purchased for $33 and $60 a telecast, have been renewed for $667 and $500 a telecast for broadcast over the superstation. The syndicator has received a "mini-windfall" as a result of the superstation. While copyright holders are receiving royalties through the compulsory license fees paid by cable systems for their programming, the superstation has created another source of revenue for the suppliers of these types of programs. A program such as "Leave It to Beaver" never could have commanded the prices that WTBS is now paying if not for its status as a superstation.

THE DISTANT SIGNAL PROVIDES DIVERSITY

In addition to the higher licensing fees and royalties that syndicators will receive, the continuation of the compulsory license holds out the opportunity for a superstation such as WTBS to upgrade its programming and provide diversity to the American television audience. Independent producers and writers are contacting WTBS with increasing frequency in order to develop programming that can be televised on the superstation. In the future WTBS can provide an outlet for artists who do not now have access to the three major television networks. This Committee should not lose sight of the fact that the MPAA represents only the largest film companies in the industry. For the small film company or the talented writer or producer, WTBS as a superstation will have the ability in the future to provide an alternative to Los Angeles or New York as centers for television program distribution. Such an alternative is sorely needed by the American viewing public.

Recently WTBS has added to its schedule several new programs. WTBS is currently producing a weekly series "The Bill Tush Comedy Hour" with its own stock company of actors, writers, and producers. It's program "Nice People," a one-half hour series of segments produced all over the United States, offers accounts of individuals who are newsworthy based on their accomplishments and positive influence on society. WTBS also broadcasts "Funtime", a children's series. In the future WTBS will be producing "The Achievers," a program designed to recognize those individuals who have attained high levels of achievement. Commencing on July 5th WTBS will bring "variety" back to television by producing an entertainment show entitled "Atlantic City Alive" televised live from Resorts International every Sunday night. In September WTBS will present a weekly Country and Western show from Nashville. Recently WTBS began a plan to produce a series of fifty-one programs on all of the states and U.S. territories. WTBS has purchased the exclusive rights to "Kidnapped," a seven part one hour series which is co-produced by a European company. WTBS is presently searching for other programs produced domestically and internationally and has planned large new studio facilities. However, the ability of WTBS to operate as a superstation is predicated on the continuation of the compulsory license. Without the compulsory license cable systems would simply not be able to transmit the entire program schedule of a superstation or any other distant broadcast signal.

As cable moves into the urban markets the distant signal will have to compete with local market stations. However, cable systems will transmit distant signals in these markets only if subscibers want them. There is nothing to be gained by the superstation transmitting a "Laverne and Shirley" into television markets which already offer that program. Therefore, the superstation will necessarily have to evolve as an outlet for different programming if it is to gain acceptance in these areas in the future. However, the evolution of the superstation should be allowed to occur gradually under the compulsory license. At the same time, the marketplace can and is working under the compulsory license as is demonstrated by the programs that film suppliers are currently selling to WTBS.

STRICT COPYRIGHT LIABILITY IS UNWORKABLE

It has been suggested that under a system of strict copyright liability a middleman could bargain on behalf of the cable systems and pay a higher price for the programs. However, the same basic difference between the cable industry and the television industry would doom this approach WTBS is today a superstation, a status which it would never have attained if strict copyright liability was adopted in

lieu of the compulsory license. Nevertheless, even as the nation's superstation, it serves only 16,000,000 homes nationwide. Today, giving program suppliers the choice between WTBS and its 16,000,000 homes on the one hand, and the tens of millions of homes available through the individual stations in the two hundred individual television markets, it takes little imagination to understand why such an approach would absolutely foreclose quality programming to cable viewers. WTBS would literally be competing against all two hundred television markets in the country for any particular program. For this reason, broker, cable flagship station or superstation reimbursement through higher advertising rates or direct cable payments is simply not realistic and is unavailable.

Moreover, it is clear that sports interests would refuse to grant a middleman national rights for their games over basic cable. For instance, major league baseball has always insisted on territorial exclusivity regardless of the amount of money that would be paid for telecasts under a system of strict copyright liability. The leagues would never grant national rights in violation of their own internal territorial agreements which grant individual monopolies to each team.

Mr. Chairman, elimination of the compulsory license would become the code word for the destruction of the superstation and the distant signal. Even if technically possible, the deletion of programs on WTBS which did not receive national clearance would completely "chop up" the WTBS signal. The cable operator sells channels and not programs. After several months the end result would be that cable operators would be forced to discontinue carriage of the superstation and the distant signal on their systems as a result of the disjointed schedule of programming that would result.

Moreover, no one has suggested that it is technically possible to black out on a selective basis different programs in different markets that have not been cleared for national satellite distribution. Considering that WTBS is delivered to over 3,000 cable systems, it would be an impossible task to continually switch on and off programming transmitted to cable systems around the country. The magnitude of such a technical undertaking is staggering.

Moreover, an independent cable operator with a single system operating in a major market in other than the market city could be expected to have no more than five thousand subscribers. According to the program suppliers' proposal, if the system wishes to import one syndicated program carried by WTBS it would be required to bid for the right to that program from the program supplier. Of course, if it wished to carry an entire evening's programming, it would have to bid for the right to four or five such programs. Aside from the transaction costs involved in obtaining the rights to such programs, it would have to compete for that programming against the major market independent station. One need not be schooled in communications industry economics to figure out which one of these two entities bidding for a particular program would bid the highest. If a particularly attractive program was available, the television station could cover its costs simply by increasing its advertising rate card—a practice developed to a fine point by the networks when they have obtained the rights to such programming as the National Football League's Super Bowl. Even if the cable system's rates were not controlled by the local franchising authority, it could not as a practical matter increase its monthly rates whenever it was necessary to do so to simply cover the cost of imported programming.

Given the limited resources available (the average cable subscriber pays a fee of seven dollars per month and the average cable system has about 4,000 subscribers) and the high investment and fixed costs necessary for system development and operation, very little could be spent on such program purchases. The real world economics of cable and broadcast television would dictate that cable could successfully bid for only a handful of second rate programs. This is evident by the high sums that major market independent stations pay for programming. One major market independent station paid an estimated eight million dollars for less than 140 episodes of "Laverne and Shirley" and as the attached articles in Exhibit V indicate, syndicators are currently attempting to obtain as much as they can from TV sales.

This does not mean that the syndicator is not entitled to its fair share of profits. It does mean that the current state of the syndication industry does not warrant a change in a system that is working.

Clearly the television program marketplace would create an impossible situation for the small independent cable operator serving any community within a top one hundred market outside of the core city. However, the situation would not be different if the cable system operated in the core city, or if all of the small independents in any given market got together and agreed to pool their resources to bid for the rights to one particular program carried by the superstation. The

economics of the two industries are such that, even assuming that the program suppliers were willing to sell strictly on a highest bid procedure, the cable industry could not outbid the broadcast competitors in the market for any program the broadcasters wanted. At best, this would mean that the diversity of programming available through cable would be those programs so poor that none of the local stations were interested in them.

Even assuming that systems in major markets are multimillion dollar businesses, and assuming only that multimillion dollar public corporations could build in major markets, the result is still the same. The wealth of the cable company would be immaterial in this bidding process. In any attempt to cover these increased costs, the cable system would simply price itself out of existence in competition with the broadcast station who could raise its advertising rates to cover the cost of the program.

The present Act gives the copyright holder compensation for use of his or her product under the compulsory license. At the same time it permits the copyright holder to determine the circumstances under which a program is sold to a superstation such at WTBS. It is evident that the recent outcry over distant signal transmission is a direct result of the superstation. While there are those who would argue that the widespread transmission of the superstation was not a factor when § 111 was enacted, the copyright holder and copyright holder alone still has the right to determine whether or not a program is sold to the superstation. Furthermore, the copyright holder, for the most part, has decided that it pays to continue to sell its product to the superstation. The elimination of the distant carriage and syndicated exclusivity rules would still have the right to determine whether it would be in their best self-interest to continue to sell their programs to the superstation in the future.

Witnesses have testified before this Committee that cable systems should be required to compete with over-the-air broadcast stations. The fallacy of this argument lies in the fact that although both cable television and broadcasters are distributors of programming, the operations of these two industries are based upon two entirely different economic principles. For this reason the marketplace bidding that supplies programming to television broadcasters simply cannot be utilized by the cable television industry. Cable television and television broadcasters do not operate in the same marketplace for the primary reason that their source of revenue is disparate.

Broadcast television delivers viewers to advertisers to obtain its revenue, while the cable industry delivers televison signals to its subscribers to obtain its income. By contrast, pay cable and subscription television are in the same marketplace because both their products and their sources of revenue are identical. Such is not the case with cable and broadcast television whose products are dissimilar and whose sources of revenue are totally different.

The simple solution of "the marketplace" rests upon a totally erroneous foundation. Strict copyright liability is irreconcilable with the consumer demand of the viewing public. In many instances the public interest can only be served by a governmentally induced balancing of the rights and equities of all parties involved. Since the parties of interest are cable, broadcasting, the copyright owner, and the public, elimination of the compulsory license would bring the wrong solution to this controversy. Elimination of the compulsory license totally abdicates the responsibility of protecting the public interest and replaces it with the hope that if total, virtually monopolistic control of the marketplace is given to one of the groups—the copyright holder—that group will act in a manner consistent with the public interest out of economic motivation. It is submitted that such an approach is catastrophically unrealistic. Unfortunately, there is a good likelihood that copyright owners would withhold their works from the viewing public in order to maximize their profits. Copyright is designed to stimulate the production of the author, composer, and artist. However, the beneficiary of copyright was never intended to be solely and primarily the creative artist as a class but rather the general public:

"The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks fit. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors." [5]

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[5] H.R. Rep. No. 2222, 60th Cong. 2d Sess., 7, February 22, 1909, accompanying the bill embodying the Copyright Act of 1909.

The plain fact is that the program supply industry will simply use the absence of the compulsory license to deny its product to the cable television industry and consequently the television viewing pubic as well. In contradiction to the claims of the MPAA, the elimination of the compulsory license will thwart the stimulation of artistic production and diversity and would therefore provide no benefit to the public either directly or indirectly. The elimination of the compulsory license will not increase the supply of programs. In fact, the opposite will result. It will insure that the three national television networks and the major movie-television producers will control virtually all of the program market and in this position will simply conduct their business in such a way as to maximize profits.

This Committee should also consider the fact that the elimination of the compulsory license could well result in less conventional television broadcast programming in favor of more pay television programming. Pay cable and subscription television are of course valuable parts of the television industry. However, elimination of the compulsory license would replace the classic service of delivering broadcast signals in the major markets with pay cable. Clearly, such a policy of fostering pay television to the exclusion of conventional cable is contrary to the public interest. In a market situation the program producers and distributors would have absolutely no incentive to license their programs to the cable industry and would have every incentive to force the cable industry through retransmission consent, into pay cable in the major markets. Pay cable is a very important secondary source of income to the big movie-television program producers. Thus, the copyright owner would have the greatest incentive to insure that pay cable rather than conventional cable survives as the service in the major markets. The end result would be that the supply of programming in the smaller markets and in rural areas of the country would simply not be available on the superstation to television viewers.

Cable television in the top one hundred markets would simply become pay cable. Viewers desiring to watch distant broadcast programming would have to pay for each program on a per-program basis. If you can't afford pay cable or pay television and simply want a variety of television programs for a reasonable price, you would be out of luck.

There exists another disturbing potential in the wake of the elimination of the compulsory license. Trade press publications have indicated that producers such as Tandem Productions have purchased cable systems and that others such as MCA, the single largest program producer, are actively interested in buying into the cable industry.[6]

When asked the question of the competitive position of firms having both cable holdings and being involved in programming and syndication, the MPAA president responded simply, "I just really don't want to get into that now. That's another matter."[7] Given virtually total control of the life blood product, program suppliers could drive the value of cable systems down by the simple expedient of refusing to sell the product in the absence of the compulsory license. Under such a "marketplace" who but the program supplier would be a willing buyer for the cable systems in the then decimated cable industry? This of course would in turn afford the program supplier the opportunity to invest in cable at the most favorable prices, thus giving one segment of the "marketplace" control of both the product and the distribution facilities. There is no surer way of diminishing the program diversity available to the American public.

The MPAA argues in effect that a workable marketplace can be created where two different types of delivery systems will compete for a program product. This argument has already been discussed before this Committee and it has been pointed out that while broadcasters obtain a "free ride" through the use of the airwaves, the cable television industry must expend vast sums of capital to construct their cable plant. There is no question but that broadcasters today receive a subsidy from the government in the form of an "uncollected spectrum fee". If this subsidy was ever to be calculated, it would total missions of dollars annually.

A survey by the Roper Organization, Inc. performed in 1979 and distributed by the Television Information Office concluded, "A 4-to-1 majority of the American public views favorably the concept of commercially-sponsored television."[8] Eighty percent of the viewing public surveyed obviously includes a small percentage of people sufficiently wealthy to afford pay cable or pay television if no other medium of diversity was available. However, it also undoubtedly includes a large number of

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[6] See E.G. Paul Kegan Associates, Inc., Cablecast report, June 11, 1979, at p. 3.

[7] Cable Vision, June 4, 1979, at p. 37.

[8] Press Release from the Television Information Office of the National Association of Broadcasters, March 16, 1978.

poor and elderly on fixed incomes, and even many of the great American middle class who simply feel they cannot afford to pay for their television on a per-program basis. To all these viewers the program suppliers would say, sorry, but we feel you should be satisfied with what is available over the air. I respectfully submit that it seems that in balancing the rights of the copyright holder and the public, this attitude is not acceptable. This is especially true since an alternative does exist—the compulsory license. Those program suppliers who determine that it is in their self-interest to sell to WTBS and other stations similarly situated have that option within the framework of the compulsory license and thus have the right to control their own product.

CONCLUSION

I believe that the question this Committee must ask itself is whether it believes the program industry under the present compulsory license will be able to earn sufficient revenues in the future that will enable it to continue to produce programming for the American public. When the Committee considers the widespread carriage of the superstation on cable systems today and in the future, the fact that the copyright holder will have the right to control the use of its programs on the superstation, and the fact that the Copyright Royalty Tribunal currently has the right to increase the royalty rates for those additional signals and programs that will be transmitted as a result of the FCC's deregulatory actions, a modification or elimination of the compulsory license is unnecessary and would be ill-advised.

I further believe that if the compulsory license is eliminated the distant signal, as a source of diverse programming, will become extinct on the day that strict copyright liability is adopted. The inability to obtain distant broadcast signals would create a void in the homes across America that do not have access to independent signals and in those homes that desire an alternative to programming provided by the superstation. Moreover, the superstation should be permitted to continue to develop its programming under the compulsory license in order that it may provide a true alternative to the national networks.

It is clear that the "middleman," the alternative advocated by the opponents of the compulsory license, will not fill the void caused by the elimination of the compulsory license and will not be able to offer the quality and diversity of programming that is now available from the distant broadcast signal.

This Committee has a continuing obligation and the continuing authority to oversee the operation of the Copyright Act. I submit that the facts presented to you thus far during these hearings do not support the elimination of the compulsory license and the drastic effect that such a step would have upon the cable television industry and the public. I therefore urge that the Committee retain the compulsory license as it is presently constituted.

Mr. Chairman and members of the Committee, I thank you for the opportunity you have given me to testify here today.

EXHIBIT I

WTBS Cable Systems/TV Households By
A.C. Nielsen Designated Market Areas and
By A.C. Nielsen County Size Definitions */

I. WTBS Cable Systems/TV Households:

No. Cable Systems	No. of TV Subscribers
2,810	9,941,500

II. WTBS Cable Systems/TV Households in TV Markets Without an Independent TV Station:

No. Cable Systems	No. of TV Subscribers
1,956 = 69.9% of households served	5,829,366 = 58.6% of subscribers served

III. WTBS Cable Sysems/TV Households by County Size:

County Size **/	No. Cable Systems	No. of TV Subscribers
A	271	1,746,442
B	418	2,285,188
A/B Totals:	689 (24.5% of systems served)	5,031,630 (50.6%)
C	664	2,773,191
D	1,457	2,136,679
C/D Totals:	2,121 (75.7% of systems served)	4,909,870 (49.4%)

IV. WTBS Cable Systems/TV Households by County Size in TV Markets Without an Independent TV Station:

County Size	No. Systems	% All WTBS Systems In County Size	No. of TV Subscribers	% All WTBS Systems In County Size
A	1		669	
B	259		2,020,712	
A/B Totals:	260	37.7%	2,021,381	40.2%
C	497		2,095,624	
D	1,199		1,712,361	
C/D Totals:	1,696	80.0%	3,807,985	77.6%

Footnotes

*/ These figures are based on WTBS' subscriber count of 9,941,500 which does not include the number of subscribers receiving WTBS on a part-time basis. It also underestimates the number of homes viewing WTBS in apartment houses which obtain WTBS via MDS programmers and MATV systems which do not report subscriber counts to the FCC. Also, cable television systems reporting to the FCC and Copyright Office report on the basis of subscribers which, in the case of an apartment building, could be listed as one subscriber rather than the actual number of apartment households that take service. Also, the Nielsen estimated figure includes those homes which are taking cable service illegally. If Nielsen's coverage of households was utilized, the percentage of homes receiving WTBS in markets without an independent signal could be expected to remain the same.

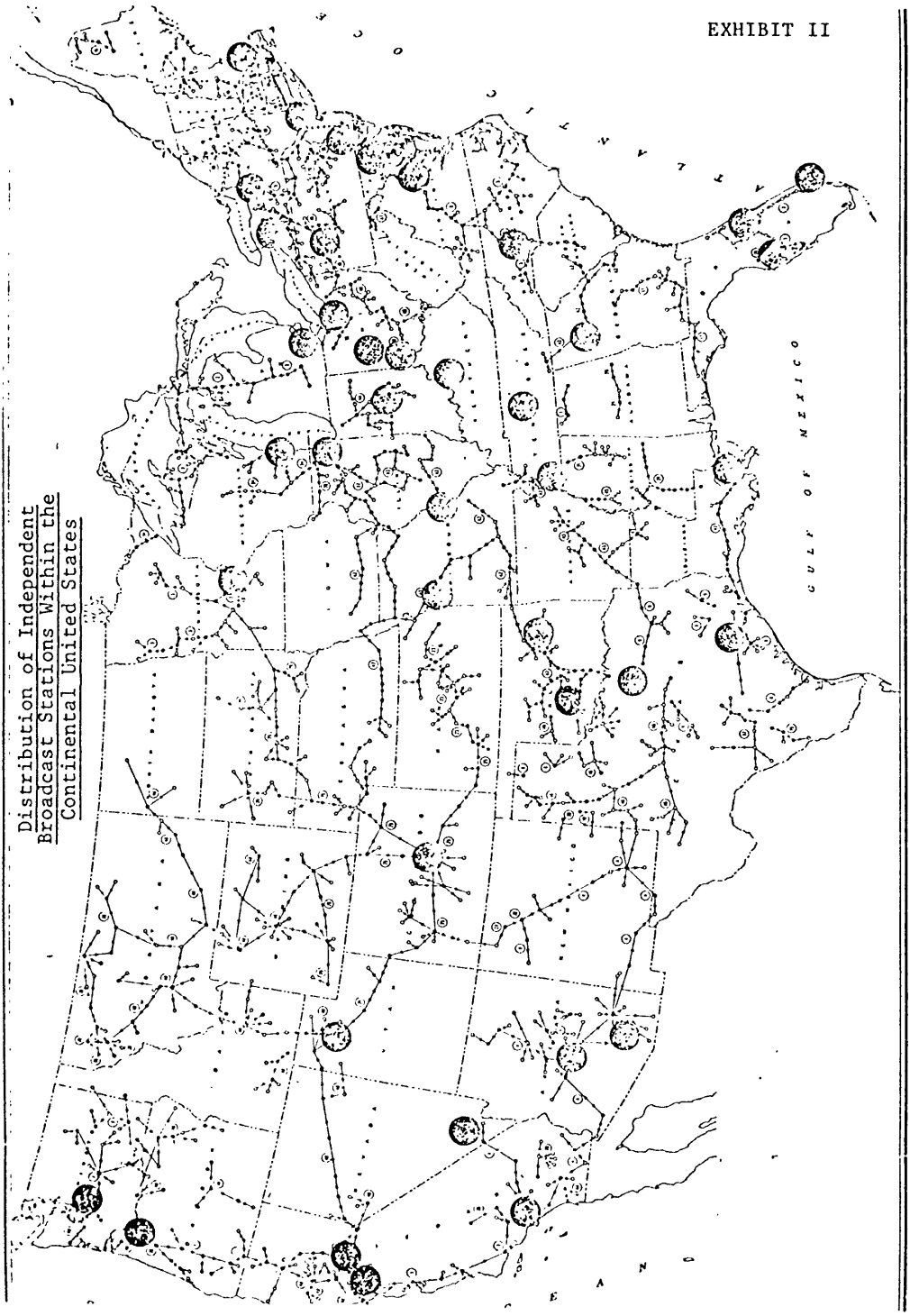
**/ "A" = All counties belonging as of February 23, 1971 to the 25 largest SMSAs according to the 1970 Census of Population.

"B" = All counties not included under A that are either over 150,000 population or in Metropolitan Areas over 150,000 population according to the 1970 Census of Population.

"C" = All counties not included under A or B that are either over 35,000 population or in Metropolitan Areas over 35,000 population according to the 1970 Census of Population.

"D" = All remaining counties.

EXHIBIT II



Distribution of Independent Broadcast Stations Within the Continental United States

EXHIBIT III

I. States (22) In Which There Are NO Independent Television Stations:

Idaho
Montana
Wyoming
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Iowa
Arkansas
Mississippi
Alabama
South Carolina
Virginia
New Jersey
Delaware
Connecticut
Rhode Island
Vermont
New Hampshire
Maine
West Virginia

II. States (16) In Which There Is Only ONE Television Market With Independent Television Stations:

Washington
Oregon
Nevada
Utah
Colorado
Minnesota
Wisconsin
Louisiana
Georgia
North Carolina
Kentucky
Indiana
Michigan
Maryland
Massachusetts
Illinois

Program	Date of Contract	Current Contract $/Episode	Current Contract Episode	Current Contract Duration	Prior Contract	Prior Contract $/Episode	Prior Contract Episode	Prior Contract Duration	% of Increase
*	2/81	12,000	6	4.5 yrs.	10/77	6,000	6	3.5	100
*	3/81	16,500	6	6 yrs.	10/77	8,000	6	6 yrs	106
I Love Lucy	4/78	2,000	6	6	1/74	350	10	7	471
Hogan's Heroes	4/78	3,500	6	6	4/73	900	6	7	288
Beverly Hillbillies	4/78	2,500	6	6	1/73	800	6	7	213
Andy Griffith	4/78	3,357	6	7	6/72	1,000	unl	8	236
Father Knows Best	5/81	2,000	10	8	1/77	300	4	6	567
*	4/81	3,000	unl	8	8/75	325	unl	7	823
*	4/81	2,500	unl	8	12/74	250	unl	7	900
*	4/81	2,000	unl	8	3/78	200	unl	4	900
*	5/81	3,000	unl	8	8/75	200	5	5	1400
The Addams Family	5/81	2,400	unl	8	8/78	500	unl	5	380
The Little Rascals	3/81	700,000pkg	unl	14	6/77 7/78	24,000pkg 80,000pkg	unl unl	3 6	

Newer Movie Packages				Older Movie Packages				
*	11/80	13,000	10	7	Para Port III	10/76	1,178	8	8
*	11/80	15,000	10	7	Gold Key Screame Theatre	5/77	1,161	7	7
*	11/80	7,176	10	7	Action Theatre	10/77	1,161	7	7
*	5/80	20,000	10	10	Warner Bros. Starlite 3	1/76	809	8	8
*	/81	15,429	10	8					
*	/81	9,000	10	8	Warner Bros. Starlite 2	12/76	500	4	3
*	3/81	6,000	7	7					
*	5/81	20,000	10	8	Warner Bros. Starlite 1	12/76	500	4	3

*/ The titles of some syndicated series and film packages have been deleted as a result of commercial considerations. WTBS would be happy to provide this information to the Committee upon request.

VARIETY May 26, 1981

EXHIBIT V

'Mash' Pumps Cash For Fox As Syndie Coin Reaches Record; Money Series On Front Burner

20th-Fox TV is in full flower in all the vital areas of its syndication activities — sales, production and packaging.

Robert Morin, senior v.p. in charge of domestic syndication for the tv arm, made the following points in an interview Monday (4):

Robert Morin, senior v.p. in charge of domestic syndication for 20th Century-Fox Television, made the following points in an interview Monday (4):

— In the first nine weeks of 1981, Fox has harvested more dollars from the sale of its syndicated properties to stations in the U.S. than during any other full calendar year.

— Fox is working on the pilot of a weekly syndicated series on money — how to acquire it, how to spend it, how to invest it and how to hang on to it. Called "The Business of Living," it will be produced with a lot of graphics pizazz and will be hosted by Jane Bryan Quinn, the syndicated columnist.

— A new syndicated movie package is in the works, with titles to be chosen from among "Breaking Away," "Alien," "The Omen" (all three parts), "9 To 5," "The Bible," "Brubaker," "Julia" and "The Turning Point."

"Mash" is the pump that has inflated Fox's tv-syndication grosses to new records. "We're getting from six to 12 times the original dollars in our renewal negotiations with stations," says Morin. Fox is chalking up these unprecedented increases not only because the series has stayed on top of the ratings since it started two years ago as a syndicated strip but also because Fox practically gave the series away when it first sold "Mash" station-by-station back in 1975. (It was in 1976 that Paramount Television made a breakthrough in syndication prices with the sale of "Happy Days.")

In its "Mash" deals so far this year, Fox has sold additional runs of the episodes made during "Mash's" first eight years and initial runs of the half-hours produced in the ninth and tenth years.

Other cash shows that have fed Fox's huge gross figures for the first part of 1981, according to Morin, are ongoing sales of the studio's Century 10 movie package ("The Poseidon Adventure," "The Silver Streak," "Patton," "The French Connection II," etc.) and its Premiere One made-for-tv-movie package. Fox also is successfully re-marketing 120 hours of "Daniel Boone," starring Fess Parker, which ran on NBC-TV from 1964 to 1970; 120 half-hours of the live-action "Batman" series (an ABC camp success from 1966 to 1968); and a mix of the cartoon half-hours "Planet of the Apes" (13 episodes) and "Dr. Dolittle" (also 13).

VARIETY

Wednesday, July 23, 1980

Surprisingly Good' Syndie $$ For Col TV 'What's Happening' May Boost Limited-Series Sales

By JOHN DEMPSEY

The success of "What's Happening" in syndication despite its limited number of episodes has prodded the distributor, Columbia Pictures Television, to search for other series that are branded with the stigma of having run for less than five years in network primetime.

"Maybe ABC should never have cancelled 'What's Happening,'" says Hank Gillespie, president of Columbia Pictures Television Distribution.

Gillespie acknowledges the conventional wisdom in the tv industry, which says that a series with less than 120 episodes (usually accumulated from a run of five years on a network, at 24 episodes a year) is unsaleable in syndication because a station that strips it would be into reruns so soon that the series would be exhausted in the first year.

Columbia's salesmen have chalked up deals in 43 markets for "What's Happening" at "surprisingly good dollars," according to Gillespie, although "Happening" has only 65 half-hours in the hopper (having been scuttled midway through its third season).

(Warner Bros. Television's "Welcome Back, Kotter" also has done well in sales despite only four years' worth of episodes, and the 50-or-so half-hours of Don Taffner's "The Benny Hill Show" from Thames Television of England, with its speeded-up slapstick and frequent focus on near-naked female comedy foils, have rolled up solid numbers in large urban markets.)

Columbia is giving stations the usual six or seven runs of each half-hour of "What's Happening," but Gillespie says the buyer is given a longer period of time to play them off. That stretch-out allows stations to rest the series for long periods in between the runs, or to schedule it for specific periods of the year, like summertime, when audience levels are low, as a replacement for one of the station's bellwether off-network sitcoms.

Pre-Sale Sitcoms

Buoyed by the results of "Happening," Columbia has bought a couple of other limited-episode series, which Gillespie says will be announced next month.

"This product is needed because there are so few off-network sitcoms coming into the marketplace in the next couple of years," he adds.

Only Columbia's "Barney Miller" (available in the fall of 1980), Paramount's "Laverne & Shirley" (fall of 1981) and Don Taffner's "Three's Company" (fall of 1982) have harvested substantial pre-sales among the off-network sitcoms making the station rounds, although TAT Communications' "The Jeffersons" (fall of 1981) and Lorimar's "Eight Is Enough" (fall of 1982) are expected to wind up with strong lineups of stations.

Hour-Long Series Are Rough

The marketing problems of "Eight Is Enough" stem in part from the fact that it's a 60-minute comedy. Hourlong series tend to wear out their welcome fast when they're stripped off-network, and stations are wary of buying them in syndication. For that reason, Gillespie is having a tough time convincing stations to buy "Charlie's Angels" (available in the fall of 1981) even though two other 60-minute series, MCA TV's "Rockford Files" and Columbia's "Starsky & Hutch," have done okay in syndication in the last year or so.

Gillespie says he'll try to use as a selling point for "Charlie's Angels" the fact that it attracts a large proportion of kids despite its 9-p.m. scheduling by ABC. This factor could induce independent stations to buy "Angels" for stripping between 5 and 8 p.m.

New Col TV Package

Columbia is also within a couple of weeks of formally offering for sale a new package of 90-minute made-for-tv movies, encompassing 17 titles in all. Gillespie says the package has already landed a pre-buy from all five CBS-owned stations. Many of the 17 were shot on tape for scheduling, not in in primetime, but during latenight time periods or mid-afternoon slots.

The most noteworthy picture in the bunch is "The Sex Symbol," with Connie Stevens as a manipulated and exploited Marilyn Monroe-type movie star. Co-starring Shelley Winters and Don Murray, "The Sex Symbol" chalked up a 24.2 rating and 37 share when ABC ran it in primetime on Sept. 17, 1974.

Syndicators use off-net series to lure stations

Los Angeles—Columbia will pitch its two network drama series going into syndication for the first time as "new generation" hours loaded with appeal to women, and 20th Century Fox is said to be bidding for domestic syndication rights to "Vega$," another drama series with good female appeal by way of star Robert Urich.

Fox' bid to snare "Vega$" domestic rights is one of several examples of studio syndicators—pressed by diverse first-run programing competition from other syndicators—making sure that they have at least one prize network series to pull traffic at the National Assn of Television Program Executives convention next March 13 to 18 in New York. NATPE is the major U.S. tv program marketplace.

With a hot, new off-network series as the carrot to lure stations, the studio syndicators believe they will be able to pull their "cart" of older series, movies and, most importantly, first run syndication fare to over-all sales success. For that reason, studio syndicators are expected to hold back closing deals for new series until NATPE, except in major markets where station competition creates a seller's market for all kinds of product.

• Columbia's dramas going on the block are "Fantasy Island" and "Police Story," the latter new to syndication although NBC canceled it in August, 1978, after four seasons.

Fox hopes that the new "M*A*S*H*" episodes and "Vega$" if it gets the latter, will carry its heavy slate of first-run syndicated product, including sports. Metromedia currently handles "Vega$" in foreign markets.

MGM-TV, which just reacquired tv rights for its older movies from United Artists (AA, Sept. 15), got around NBC objections to sell its "CHiPs" series for fall, 1983, airing. The revitalized studio, with former Viacom exec Lawrence Gershman heading syndication sales undoubtedly will try to capitalize on the "CHiPs" sizzle by concurrently selling its new first-run syndication, "The Great Mysteries of Hollywood," geared for prime time access.

Lorimar, making its third NATPE appearance, is offering "Eight is Enough" for fall 1982 airing and is expected to market "Dallas," possibly for fall, 1983, availability. Stations after network series probably will get pitches for Lorimar's new first-run syndication weekly, "The Doc Severinsen Show." A source indicated that "Dallas" would be put on the block to get top dollar before any star in the cast-heavy CBS blockbuster walks out over salary issues, a move that might dilute "Dallas" syndication value.

• After sales to WNEW TV, New York, and KTLA TV, Los Angeles, "Taxi" will be offered elsewhere by Paramount for fall, 1983, availability. "Mork & Mindy" is expected to be put on the block, possibly for fall, 1982 airing. "Mork" is just too important for them to leave alone," said Ronald Krueger, vp of syndication consultant TeleCom Associates, which is headed by Herb Jacobs.

MCA-TV will unleash "The Incredible Hulk" for fall 1982 airing, although "Quincy" with more episodes, does not have a firm off network release date.

Warner Bros is expected to offer "Alice" at NATPE, although execs there declined to comment. Warner Bros is selling 61 episodes of "Wonder Woman," highlighting good ratings from KTLA, Los Angeles, summer airing in its station pitches. The same technique was used to launch 62 episodes of "Kung Fu"—which KTLA aired in summer, 1979—into wider syndication.

At TAT Communications syndication, offers for a fourth-quarter "presale" of "One Day At A Time" are being solicited in major markets, said Gary Lieberthal, v.p. domestic syndication. The presale would set the number of runs and years for sales to subsequent markets. The CBS series will be available for fall, 1982.

"That's not to say the last sale will be in New York or Los Angeles," Mr. Lieberthal said. "It could be in Chicago or Detroit but we're just dipping our toe in at this point."

The runs and licensing period—the same in all markets because of residual fees—will be "on a short string" like TAT syndication of "The Jeffersons," which was sold with seven runs over six years starting this fall, Mr. Lieberthal said.

Mr. Lieberthal added that the Gary Coleman vehicle, "Different Strokes," entering its third season on NBC, probably will be available in fall, 1983, but no definite decision has been made yet.

• Although half-hour sitcoms on the strength of good children and female appeal traditionally have worked best in syndication, Columbia is set to sell "Fantasy Island" and "Police Woman" (never before in syndication) as women winners. Hours such as "Marcus Welby" and "Ironsides" fizzled in syndication in the past, but Columbia will eagerly point out that more recently "The Rockford Files" via MCA-TV has performed well on the strength of star James Garner, and Columbia's own "Starsky & Hutch" has been respectable, based on action and children appeal.

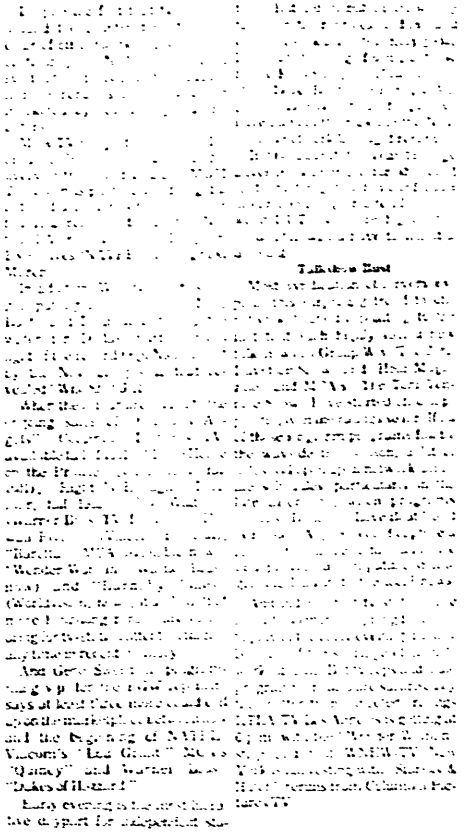
"Fantasy Island" augments its light stories with guest stars, and "Police Woman," with about 90 episodes, features Angie Dickinson, who is hot again following her role in the movie, "Dressed To Kill."

Columbia already has sold "Charlie's Angels" to 80 markets as a women-grabbing glamor vehicle. Set for 1981 start, "Angels" is in all top 30 markets except Atlanta and Cleveland, according to a source.

Columbia also has domestic distribution rights to [illegible] down the road.

Worldvision [illegible] "Little House on the Prairie" for a fall, 1981, start [illegible] "Love Boat," another hour series with strong women appeal in its syndication debut for fall, 1983, availability. Worldvision currently is selling 6-year-old "Little House on the Prairie" for a fall, 1981, start.

Syndic Mkt. Smiles On Off-Net Hours, As Talk Ratings Fail



Mr. KASTENMEIER. Thank you, Mr. Turner.

We will reverse the order of asking questions.

I will call on the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate your testimony, Mr. Turner.

Of course, I guess my question of you is, basically, if Congress was hellbent to abolish the compulsory license and you have a reasonable warning period in anticipation of the event, would you not be able to position yourself to survive in the market in the interim?

Mr. TURNER. Mr. Butler, there are several different problems.

Each of the major groups that has been pushing for the abolition of the compulsory copyright has a different position. We could never negotiate without compulsory licensing, never negotiate to carry the Braves games outside of the immediate area around Atlanta, Ga.

Your viewers in Roanoke, Va., who have been seeing those games would lose. They would immediately lose the baseball games that they have been able to get all these years on basic cable.

Being on the inside of the leagues, I know the plan of most of the owners is to phase off the air as much as possible and make people pay $4 or $5 to see one baseball game at home.

The New York Yankees are headed in that direction and so are the Los Angeles Dodgers.

It will give the viewers who can't afford to pay $3 or $4 per game, cable, give them some alternative in the way of sports.

The motion picture industry has a separate problem. If you do away with the compulsory license for sports, even over a period of time, you are going to have a massive loss of sports service to the cable subscribers, and it will be most felt in the smaller markets that do not have any local television of over-the-air baseball like they do in New York or Los Angeles or Chicago.

Perhaps something could be worked out in the motion picture industry over a long period of time, but at the current time the problem that Mr. Sawyer brought up exists, that all the film company contracts are exclusivity contracts, so if a program is sold in just one or two markets like an older program, a package of movies that might have Bing Crosby or Bob Hope in them, they could not give the rights to me for that, because they have already given them in the other markets. They can't give me the rights to run it while they have been exclusive in the other markets, so Roanoke would lose the ability to see those movies.

I could not act as a manager in there. The whole idea of this compulsory rate reduction, this same group has tried it before at the FCC, has tried to put us out of business, and when that failed, they went to Lionel Van Deerlin's committee 2 years ago, and now they are coming to you after spending hundreds of thousands of dollars on attorneys trying to figure out some kind of way to stop the diversity and the increased choices that are occurring for the American people.

That is a repackage, and there is this third group here on the Hill that they have to see. They keep getting further and further away from the Federal Communications Commission which we are paying, all of us taxpayers, paying them good money to oversee the

thing on a day-to-day basis, and through three different FCC administrations, they have done an excellent job of pushing this, the diversity for the American people and better choices for television viewers across this country than they currently have, which I am sure is the nearest and dearest to our hearts too.

Mr. BUTLER. What are you doing to replace the Braves games?

Mr. TURNER. We are running movies; John Wayne instead of Phil Neikro. At least in the movies, the good guys always win. We have so many wounded players, sir, it was probably a good thing for the Braves, a chance to recuperate a bit.

Mr. BUTLER. That is not the motivation that created the strike, though.

Mr. TURNER. No, sir; I think the strike is awful.

Mr. BUTLER. I withdraw the question.

Do you have any idea what is happening to your viewing market while the Braves games are on?

Mr. TURNER. Our ratings show our movies and baseball games have about the same number of homes watching. We have about 1 percent of the people, a little over that, watching our prime time movies, 800,000 homes watch the baseball games and the same watch the movies, so from a rating standpoint the 2 programs have about the same value, but we run a lot of ball games and movies. The women like the movies more than the men do, and the men like the ball games more. Overall, it is about the same.

Mr. BUTLER. I believe it was yesterday that the second circuit sustained the FCC in the *Malrite* case.

What effect is that going to have on your doing business?

Mr. TURNER. I must say never in my life have I asked an FCC Chairman, I never went to the FCC and asked them to change any rules.

I have never asked them to change any rules nor did I ask them to change this rule.

This rule will help us. This will mean that we can go into the other parts of the country that we were shut out of because of the limitation. Basically, the smaller markets could only bring in one distant independent station and the major markets only two.

This rule which was passed by the Federal Communications Commission and once again held up in court by the broadcasters who use every single solitary step that they can in the courts, in the Congress, in the marketplace, in the streets, I don't know how I am still walking around alive, why they have not had me eliminated, but if something happens to me, check and make sure it wasn't CBS that did it, because we are creating a lot of trouble for them.

This is going to help us a lot. It will help the American people because it means more choices will be available to the American people.

Mr. BUTLER. What effect is it going to have on the broadcasters?

Mr. TURNER. I don't think it will have a significant effect. Cable has been growing dramatically and television profits, even considering the recession, and so forth, for the most part are at all-time levels. Television stations are still trading. You can't buy a television station for less than $20 million and really what is it other than a free license given by the Government?

I feel like all television broadcasters should pay a spectrum fee. When somebody drills on Federal land for oil, you put it out for bids. You ought to recapture all the television stations and put them out for bids, you would be able to pay off the national debt. It would be a good move. We could reduce taxes without having a deficit.

The television industry hasn't been hurt. If the television ratings went down to half what they are it would still be a great business. There are thousands of magazines and hundreds of newspapers, why should there only be three television networks?

Mr. BUTLER. My question should have been directed to its effect on the independent television broadcast stations?

Mr. TURNER. They are making more money than they ever did. I am sorry Herman Land isn't up here. I would rather debate with him than Ms. Peters, because she is an accomplished actress.

If some of these guys turn their licenses back in, there are a lot of minority groups that would love to have the stations. The independent stations are making more money today than they ever did and are worth more. That is true.

Mr. BUTLER. My one question again, is it your perception that now that the courts have taken themselves out of this FCC proceeding that the independent broadcasters will not be hurt by that?

Mr. TURNER. No, sir; I think they will probably be helped because the independents, they don't think they will be helped, but cable has helped every broadcaster because cable carries broadcast signals and gets a better picture. At least people can see the picture on a cable system because it clarifies the signal from a fuzzy UHF system, even at my own home.

It gives everybody good reception on all the channels, and that was why cable started in mountainous areas like Virginia and West Virginia. For both cable and broadcasting, their profits just keep going up, unlike the automobile industry.

The communications industry, television, is good for everybody. It is good for the producers, and good for everyone, including the sports leagues.

Mr. BUTLER. It has given us something to do, too.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I would hate like heck to be trying to sell J&B against Cutty Sark. Bowie Kuhn says that the compulsory licensing is ruining baseball.

Mr. TURNER. Did he say it with a straight face?

Mr. SAWYER. With a glass of Cutty Sark in front of him.

Mr. TURNER. In today's newspaper, the superstation in Chicago is going to buy the Cubs, which are supposedly losing $1.8 million a year for $20.5 million. Bill Wrigley is selling it to a billion dollar company for $20.5 million. The people that own the baseball teams are the richest men in America, and the salaries, they have been able to quadruple the salaries during the last 5 years.

Mr. SAWYER. They give you credit for that because of the free agent position.

Mr. TURNER. My payroll isn't one-third what George Steinbrenner's is. I couldn't even bid for Dave Winfield's shoes if I wanted to. I couldn't afford to get his autograph.

If baseball is being hurt, it is because of the insane salaries and the fact that the players and the owners hate each others' guts. It isn't televising a few games that is hurting it at all. The cable is going to help baseball. Without cable, you will be paying $3 to $50 a game to see a game at home and that is how George Steinbrenner intends to bail himself out.

Mr. SAWYER. Not Ted Turner, having gotten into this free agent market?

Mr. TURNER. When I bought the team, they already had free agency. It is a mess but it is not cable television's fault that baseball has troubles. Nobody has gone out of business yet. When I bought the Braves I only paid $10 million for them and they were only losing $500,000.

Now this team is losing $1.8 million and selling for $20.5 million. If it is so bad, how about giving a little Congressman one of the teams, and let me see what I can do with it.

Mr. SAWYER. With Congress' attitude toward spending money, we can afford to own the whole league.

Mr. TURNER. Bowie Kuhn is really mad at me. He told me I should quit lobbying against baseball because I am messing up his deal up here.

I am in a lot of trouble. He was even talking in a letter about using his best powers to get after me, so I might be back up here asking you to protect me from him instead of you protecting him from me.

Mr. SAWYER. You don't agree, then, as I understand it, that the compulsory license is damaging baseball?

Mr. TURNER. Absolutely not; absolutely not. The Cubs games and the Mets games come into Atlanta now and our attendance this year before the strike was up 40 percent over last year. It doesn't mean anything.

Mr. SAWYER. The Cubs don't hurt anybody very much anyway.

Mr. TURNER. People want to see the home team. They talk about the Los Angeles Dodgers, all the games on cable. Braves games are on cable and the Dodgers are averaging 47,000 people.

Mr. SAWYER. You can't compare the Dodgers with the Cubs.

Mr. TURNER. The Braves aren't doing that good and our attendance was up. They have never been able, in fact, the Court's decision, I got a copy of the *Malrite* decision, we got it this morning, and they address this whole issue and the Court who studied it carefully could see no harm being proven by baseball bringing a few games in and giving people a few more alternatives, causing any damage to professional sports.

Mr. SAWYER. Thank you.

I yield back.

Mr. KASTENMEIER. Mr. Railsback?

Mr. RAILSBACK. Thank you, Mr. Chairman.

I am curious what the effect has been of exclusivity on the operation of your station and if you have any information about that.

In other words, when one of these other areas brings in channel 17, have there been, and I guess this would be relayed to you, it would have to be relayed to you by the other cable systems that

use your channel, have there been any assertions of contractual exclusivity, that they have had a blackout of channel 17?

Mr. TURNER. Most of the stations in America, when I checked it last a year ago, the great majority were not even taking advantage of the blackout.

For instance, WOR and WGN are both brought into Atlanta but my station does not even file for a blackout. We don't think it makes any significant difference at all.

The blackout, according to Neilsen's meters, about 15 percent of the homes that we are in, there are some blackouts. Some stations do avail themselves of the blackout and when they request the cable system to black us out we get blacked out.

The sports leagues do, Bowie Kuhn himself sends around the blackout. If we are playing the Dodgers in Los Angeles and we televise that in Atlanta, that game is blacked out and the sports leagues are doing the blackout. For the program syndicators it hasn't even been a problem because they have not even in most cases even asked for the blackout and that is one reason that the FCC struck this regulation down.

Mr. RAILSBACK. What about the allegations by the people on the other side of the issue that cable has indeed become big and that some of your major multiple system owners are outfits like Teleprompter, Time/Life, and so forth, shouldn't they now be able to compete for programing along with the networks?

Mr. TURNER. They do; each network has only one channel. Each network and each broadcaster has only one channel, and they can concentrate and program that channel and buy the programing. Cable systems, now they have 100 channels, and a cable operator still is just 1 guy. It is impossible for him to program all 100 channels. It is really hard enough to program one.

A cable operator tries to give as much diversity as possible to the American public, whereas what a broadcaster tries to do is to have as little diversity as possible. He wants everybody to watch his programs. The broadcaster takes the position that the American people are stupid and if they are not stupid they are going to put on programs that are more stupid.

From my position, broadcasters are all doing stupid programing. Why don't I do better programing and give people an alternative. I am programing two channels. One is the cable news network and the other is the superstation, and I am programing the superstation for the cable industry.

I had the courage; I used to be a director of the Independent TV Association, and I said I am going on satellite. I went to the Independent Association and my former buddies booed me when I was introduced to say something, so I quit the organization. I dropped out. I barely got into the National Association of Broadcasters because they were against UHF and independent stations for years.

I went in alone and I had the courage to do that. If you program 1 channel, nobody can program 100 channels; it is impossible. If you have 5,000 subscribers, well, they need packagers and we are paying the film companies more money.

If the film companies are unhappy with the national division we have, why do they continue to sell us programing? I can tell you

about private conversations I have had with them. I feel like the motion picture industry stabbed me in the back on this deal.

Mr. RAILSBACK. Are you talking about pay now, pay cable?

Mr. TURNER. Superstation right now, primarily, but pay is just one set of alternatives that cable offers.

One of the channels that cable has is C-SPAN. People across the country can see what you guys are doing. It is very illuminating.

Mr. RAILSBACK. Let me frame a hypothetical.

I am even wearing better ties and everything. Kastenmeier is shaping up, too.

Let me ask you a hypothetical. Suppose that we do not provide any protection for the distant signals. Suppose we go along with what the FCC has done but we do preserve the syndicated exclusivity or the rulings of exclusivity statutorily, and then suppose that we distinguish between the rural areas and a smaller system somehow and the very large multiple service cable systems and allow the free market to operate in that situation.

What is wrong with that? What do you think would be the reaction of the program suppliers who, it seems to me, want to do business with cable, even though they sometimes take a stance that appears to be adverse on the copyright issue.

It is very clear to me that Kay Peters and Jack Valenti know they have a great future with cable. What about making a distinction between the biggest and the little ones?

Mr. TURNER. Who is buying, and who is small and is it 5,000 subscribers, 10,000? The people of America want cable television more than they want anything else.

They want diversity. The majority of the people in this country, over 50 percent of the people, subscribe. If they were happy with the three networks that we have now they wouldn't be knocking the doors down at city hall to get cable installed in their homes because virtually most of the people do get the three networks over the air.

I am not sure I understand exactly; you mean a kind of a phase-in?

Mr. RAILSBACK. I think even under the Kastenmeier bill there is a figure, what is the figure, 5,000 subscribers under the Kastenmeier bill would be a distinction?

Mr. TURNER. What happens to a system operator that gets 5,100 subscribers in Roanoke where they have 25,000 subscribers, and they got the superstation now; they just lose it.

Mr. RAILSBACK. The other side would argue——

Mr. TURNER. I understand.

Mr. RAILSBACK. Presumably, according to some of the people on the other side of the issue, then it would be possible to deal with middlemen that would presumably be able to sell packages, and now getting to the Ed Taylor and Kay Peters statement, tell me how it works?

Mr. TURNER. SPN and Ed Taylor's supposed service is an absolute joke. He sells time to some group from France in prime time, French, and they have programs in French.

Mr. RAILSBACK. That might be pretty good stuff.

Mr. TURNER. If you are taking French it is great, and on Sunday nights it is Italian. He can't get any decent programs. He runs

movies but they are movies that the copyright has already expired on. He wants some silent movies that are in the public domain.

Mr. RAILSBACK. We better invite Mr. Taylor to testify.

Mr. TURNER. He will admit that there is no way that he can build a really viable service.

Mr. RAILSBACK. You disagree with the idea then that if we do try to provide more of a free market atmosphere, you do disagree that middlemen are going to come in and be able to sell good quality packages?

Mr. TURNER. You have no base to operate from. The marketplace is working now because film companies know, there are only three superstations, and all the film companies have to do is open the rating books and they tell you exactly how many homes it is in and they are pricing their programing accordingly.

We have bought programing for the next 8 years, during the last 12 months, and we are been charged 15 times as much for some programs as we paid before, and with Paramount, MCA, Universal; they have even factored in the copyright payments.

We show them the copyright payments, if there is no change in the copyright amount, 1 percent now, and you guys, you gentlemen have the right to change the copyright fees if you want to do that, but I am paying more money. I am getting the advertisers now, too. We have pioneered this whole field. We are about to announce that we are going to televise Jacques Cousteau, which was dropped by the three major networks.

The only place people will be able to see Jacques Cousteau is on the superstation. Without the compulsory copyright we would be hacked to pieces.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Turner, you indicated earlier that if the compulsory license were terminated you wouldn't be able to show the Braves, for example.

But in your own case, I assume you would be able to unless there is a league rule that would prohibit you.

Mr. TURNER. Absolutely. With a league rule saying you can only market your own product in your own market, and the fact is, they have all kinds of rules. That is what they have a Commissioner for.

Oddly enough, in baseball, when you buy a baseball team, you give up rights that the Constitution of the United States gives you. You do not have the right of freedom of speech. If you talk to a player that works for another team they can get you in the clinker.

I didn't read the baseball constitution. It is thicker than the U.S. Constitution. I spent 1 year in jail for talking to a player. When they have hearings they put you under oath. When Bowie Kuhn had me at a hearing he put me under oath.

Mr. KASTENMEIER. In the case of WTBS and the Atlanta Braves, I don't know whether the same thing would be true of the Atlanta Braves. You maintain you were passive with respect to that signal only emanating from a local broadcast signal. Why would you be restrained?

Mr. TURNER. Absolutely; that is the reason that the sports interests are down here lobbying to have compulsory copyright done away with because they want every team to go back into its own territory so they can market on pay television the games, and I

don't want to use the word that would happen to the public as a result of this, but pro sports interests have never had the public's best interests in mind. They have their own best interests in mind.

Name one thing that they have done that has been charitable over the years?

I can't think of anything.

Mr. KASTENMEIER. Well, it would seem to me that you could program your own team within your own territory.

Mr. TURNER. Atlanta, Ga. My own territory is 50 miles from city hall in Atlanta, Ga.

That means in Michigan where the Braves and Hawks games are televised, and in Virginia, and across the country, the people that have had those games, 21 percent of the U.S. homes would lose what they already have, and those people don't realize that those games are in jeopardy.

If push comes to shove I will have to get on the air and tell them and then the constituents will speak up. Only the monopolies have been here so far, and it has been kept a pretty good secret. You all have not, but it hasn't been a big media event or anything.

The people out there don't realize that their viewing options are in jeopardy but they are. I have reached the point where I feel they are in jeopardy. That is why I am here, although I should be back home working. Like you guys, I have other things to do.

Mr. KASTENMEIER. Who is the copyright owner of the original transmission of, say, the Atlanta Braves; you are, are you not?

Mr. TURNER. That is a good question because I didn't get where I am, you know, in a position to where the other three networks are trying to stop me if I wasn't clever, because it is pretty hard to fight such a big city hall as that.

That is why I bought the teams. I knew the leagues would really put pressure on the other owners who may not have been as courageous as I was, because I have stood up to virtually everybody in the entire entertainment field, motion picture industry, three networks, broadcasters and sports interests, the theater owners, are they in here? They are about out of business anyway.

I wonder why they are not here.

Have they taken a position on this?

Mr. KASTENMEIER. Not as far as I know.

Mr. TURNER. Not yet. I ceded myself because I figured I own the copyright to my own team and I sold the rights when I sold the broadcasting rights to channel 17, so the superstation had the copyright but out of fairness, out of fairness and because I was trying to be a nice guy, I let the league have the copyright payment so far.

I don't know why because they take my money and hire Arnold and Porter and hire Bowie Kuhn to lobby against me, but I feel like I own the right and have ceded it to the station. I have been letting the league collect it and distribute it. More copyright fees go to the Braves and the Hawks than any other team. I have been giving it to the league.

Mr. KASTENMEIER. That is to say the compulsory license dividend?

Mr. TURNER. Yes, sir; I have been letting the league have it to split it up with George Steinbrenner but he doesn't give me anything of what he gets.

Mr. KASTENMEIER. If the compulsory license were ended, could you as a broadcaster or as the Braves management control, seek to collect on the copyright?

Mr. TURNER. They would stop those Braves games; those games would be stopped tomorrow. They wanted to stop them before it ever started, if you go back and check with Tim Wirth, he was on Lionel Van Deerlin's committee, but he could tell you if you gave him a call exactly, that they were working on getting it stopped over there, and Charles Ferris could tell you, and who was the FCC Chairman before him?

They have been trying whatever way they could to stop this crossing of territories because they divided up into little pieces, I get Chicago, you get New York, Los Angeles goes to you. Any other business, you would have the Justice Department on them.

Mr. KASTENMEIER. Well, I understand your problem then. Apparently there is a territorial agreement within the league?

Mr. TURNER. Absolutely; I would be willing to furnish you the league's constitution.

Mr. KASTENMEIER. On behalf of the committee we wish to thank both you, Mr. Turner, and you, Ms. Peters, for your contributions this morning. We appreciate them.

Mr. SAWYER. Mr. Chairman, I would like to congratulate Mr. Turner on his modesty and criticize his ambivalence and unwillingness to take a position on this.

Mr. KASTENMEIER. The committee stands adjourned.

[Whereupon, at 11:50 a.m. the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary adjourned.]

COPYRIGHT/CABLE TELEVISION

WEDNESDAY, JUNE 24, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:25 a.m., in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Butler.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Tom Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

We are very pleased to have as our first witnesses this morning a most unusual panel. They constitute the four members of the Copyright Royalty Tribunal in this continuation on hearings on bills related to cable/copyright questions and other related matters.

I should introduce Hon. Thomas Brennan, Hon. Mary Lou Burg, Hon. Douglas C. Coulter, and Hon. Frances Garcia.

The fifth Copyright Royalty Tribunal office is at the moment vacant.

So it is a great pleasure to meet you all. Which of you would like to speak first? Mr. Brennan?

TESTIMONY OF HON. THOMAS BRENNAN, HON. MARY LOU BURG, HON. DOUGLAS C. COULTER, AND HON. FRANCES GARCIA, MEMBERS OF THE COPYRIGHT ROYALTY TRIBUNAL

Commissioner BRENNAN. Thank you, Mr. Chairman.

We have a joint statement which reflects the official view of the agency.

The future of the cable compulsory license is a policy question to be determined by the Congress. The Tribunal has not conducted any specific proceeding or studies concerning the justification for a cable compulsory license. We therefore limit our observations to an assessment of what is found in the extensive record.

It is our view that central to the consideration of this issue is the finding of Congress in 1976 that "it would be impractical and unduly burdensome" to require the operators of cable systems to negotiate with copyright owners whose works are retransmitted by cable systems.

We are not aware of any changes in copyright clearance procedures that presently provide justification for altering the judgment of the Congress that a cable compulsory license is currently necessary. We have had the opportunity to review testimony presented

during the past 2 years before several committees and have not discovered any new and viable alternative.

We have studied the extensive documentation presented by the Register of Copyrights to the Senate Judiciary Committee. The Register concluded that, "It is not easy to predict whether, absent a compulsory license, secondary transmissions of distant nonnetwork programing will continue to be available to cable subscribers."

This subcommittee has had considerable past experience in assessing arguments that an existing or proposed compulsory license is not necesary. One approach that the subcommittee has utilized is to expect copyright owners to make a reasonable showing that through some central clearance mechanism or otherwise, the legitimate needs of a user can be met without disruption of his functions. The subcommittee may seek, in assessing the arguments advanced for the repeal of the cable compulsory license, demonstration from the copyright owners that voluntary licenses at reasonable fees can be obtained by cable systems.

In view of the policy determinations previously reached by the Congress, we do not regard it as adequate to suggest that if the compulsory license is repealed, program supplier middlemen may turn up and it will be possible for cable systems to purchase rights to programing at reasonable fees. Likewise, we do not believe it adequate to suggest that the Congress need not be concerned with the potentially adverse implications of repeal, since it would be possible for the Congress subsequently to yet again amend the cable copyright statute.

The Tribunal at the present time is not recommending that the Congress revisit any of the other compulsory licenses. We believe, however, that it is appropriate on this occasion for us to inform the subcommittee of our judgment concerning the general principles of the compulsory licensing schemes.

In the Tribunal's judgment, to consider restricting or eliminating the compulsory license with respect to cable is inconsistent if the same is not considered for the other three compulsory licenses under the statute—those for phonorecords, jukeboxes, and public broadcasting. Any abridgement of the cable compulsory license, in the Tribunal's opinion, seems illogical and unfair to copyright owners in general as long as all other compulsory licenses remain in place.

The argument for eliminating or restricting the compulsory license with respect to cable is that the license itself is unfair to copyright owners. However, this argument in terms of the other three compulsory licenses, in the Tribunal's judgment, is infinitely more valid. The Tribunal has conducted proceedings in the area of all four compulsory licenses, and it is our view that, by any traditional standard, such as clearance problems or the significance of the user activity to the general public, the justification for the cable compulsory license is substantially greater than any of the other licenses.

The implications of the Federal Communication Commission's cable deregulation is one of the most difficult questions to be confronted by this subcommittee if it undertakes to amend the cable copyright law. The Tribunal is acquainted with the views of members of this subcommittee, as well as the copyright owners,

that the copyright law did not contemplate the total repeal of the Commission's cable rules.

We are also acquainted with the testimony of the representatives of the cable industry that the FCC action is entirely consistent with the Copyright Act and specifically contemplated in the negotiated copyright compromise. We believe that if the Congress, because of the deficiencies of the "marketplace solution," retains the compulsory license for the carriage of signals and programs authorized prior to the Commission deregulation, it would seem that for similar reasons a compulsory license would be necessary for the additional signals and programs.

One of the principal arguments in support of cable compulsory licensing is that it avoids the complexity of licensing programs individually to cable systems. This problem would be no different for any additional distant signals than it is for the signals that are already being carried. It would, therefore, be inconsistent to remove compulsory licensing from one set of distant signals while retaining it for others.

Turning now to cable fees, we believe that the issue of cable fees was put in proper perspective by Congressman George Danielson in his observations during the hearing of May 21. The Congressman said:

> I hope that somebody who appears before this committee will come up with some factual information which will help us find out * * * whether the owners of those property rights are receiving fair compensation for the use of that property. Maybe they are, I can't say that they are not. Maybe they are not, but I want those facts.

The Tribunal has not conducted any proceeding or rendered any determination that permits us to address the subject of whether the fee schedule provides reasonable compensation to copyright owners. Some 18 months ago, in anticipation of a review of section 111 in this Congress, the Tribunal discussed the desirability and feasibility of our conducting a study of the fee schedule. This would have permitted us to respond to the demand for facts which the Congressman quite properly has raised.

We share Congressman Danielson's view that the subcommittee record is heavy on rhetoric and light on facts. During this same period, the Register of Copyrights proposed to the Congress the desirability of the Tribunal conducting a review of the fee schedule and related provisions of section 111. Whatever the merits of these projects, we quickly determined that because of our by now well-known budgetary limitations we were not in a position to pursue such studies.

We believe the absence of any Tribunal jurisdiction to review the basic cable fee schedule and to make such adjustments as may be justified is a very serious defect in the current law and a major cause of dissatisfaction with the cable copyright provisions. If the Congress determines to grant the Tribunal broader cable royalty jurisdiction, the question arises whether, either in the statute or the committee reports, the Congress should establish criteria or policy objectives that should be applied by the Tribunal in its determinations.

The report of the General Accounting Office concludes: "If the Congress were to try to specify new criteria, the result would likely be new problems and controversies."

We believe that the GAO conclusion is reasonable, but the past legislative history of this subject suggests that the Congress may not be prepared to grant the Tribunal the unfettered discretion provided in section 3 of H.R. 3560.

I turn now to a few detailed comments on the chairman's bill.

Mr. KASTENMEIER. Mr. Brennan, at this point I regret to ask you to desist. There is a vote on and I am going to have to recess the committee for a few minutes, and hopefully we will have more members when we resume.

Commissioner BRENNAN. Thank you, sir.

Mr. KASTENMEIER. Accordingly, the committee will stand in recess for about 10 minutes.

[Whereupon, a short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

Commissioner BRENNAN. Mr. Chairman, to expedite our presentation, I request that our entire statement be printed at an appropriate point in the record, and I will highlight the balance of the statement.

Mr. KASTENMEIER. That request is agreed to, and you may proceed as you wish.

[The complete statement of the Copyright Royalty Tribunal follows:]

PREPARED STATEMENT OF THE COPYRIGHT ROYALTY TRIBUNAL, WASHINGTON, D.C.

I am Thomas C. Brennan, Acting Chairman of the the Copyright Royalty Tribunal. I am accompanied by Commissioners Douglas Coulter, Mary Lou Burg and Frances Garcia who participated in the preparation of this testimony and concur in its recommendations. We are appearing to present the agency testimony on (1) the pending cable copyright legislation, and (2) in support of the Tribunal's recommendation that the Congress review our authority and structure.

This subcommittee is well acquainted with the key role of compulsory licensing in the Copyright Act of 1976 and the derivative creation of the Tribunal. Since we are appearing at a late date in the current round of hearings, it is unnecessary to burden the record with a description of the compulsory licenses and the structure and functions of the Tribunal.

CABLE TELEVISION

Compulsory license

The future of the cable compulsory license is a policy question to be determined by the Congress. The Tribunal has not conducted any specific proceeding or studies concerning the justification for a cable compulsory license. We therefore limit our observations to an assessment of what is found in the extensive record.

It is our view that central to the consideration of this issue is the finding of Congress in 1976 that "it would be impractical and unduly burdensome" to require the operators of cable systems to negotiate with copyright owners whose works are retransmitted by cable systems. We are not aware of any changes in copyright clearance procedures that presently provide justification for alterning the judgment of the Congress that a cable compulsory license is currently necessary. We have had the opportunity to review testimony presented during the past two years before serveral committees and have not discovered any new and viable alternative.

We have studied the extensive documentation presented by the Register of Copyrights to the Senate Judiciary Committee. The Register concluded that "It is not easy to predict whether, absent a compulsory license, secondary transmissions of distant nonnetwork programing will continue to be available to cable subscribers."

This committee has had considerable past experience in assessing arguments that an existing or proposed compulsory license is not necessary. One approach that the committee has utilized is to expect copyright owners to make a reasonable showing that through some central clearance mechanism or otherwise, the legitimate needs of a user can be met without disruption of his functions. The committee may seek, in assessing the arguments advanced for the repeal of the cable compulsory license,

demonstration from the copyright owners that voluntary licenses at reasonable fees can be obtained by cable systems.

In view of the policy determinations previously reached by the Congress, we do not regard it as adequate to suggest that if the compulsory license is repealed, program supplied middlemen may turn up and it will be possible for cable systems to purchase rights to programming at reasonable fees. Likewise, we do not believe it adequate to suggest that the Congress need not be concerned with the potentially adverse implications of repeal, since it would be possible for Congress subsequently to yet again amend the cable copyright statute.

The Tribunal at the present time is not recommending that the Congress restrict any of the other compulsory licenses. We believe however that it is appropriate on this occasion for us to inform the subcommittee of our judgment concerning the general principles of the compulsory licensing schemes. In the Tribunal's judgment, to consider restricting or eliminating the compulsory license with respect to cable is inconsistent of the same is not considered for the other three compulsory licenses under the statute; those for phonorecords, jukeboxes, and public broadcasting. Any abridgement of the cable compulsory license, in the Tribunal's opinion, seems illogical and unfair to copyright owners in general as long as all other compulsory licenses remain in place. The argument for eliminating or restricting the compulsory license with respect to cable is that the license itself is unfair to copyright owners, however, this argument in terms of the other three compulsory licenses, in the Tribunal's judgment, is infinitely more valid. The Tribunal has conducted proceedings in the area of all four compulsory licenses and it is our view that, by any traditional standard such as clearance problems or the significance of the user activity to the general public, the justification for the cable compulsory license is substantially greater than any of the other licenses.

Lifting the compulsory license from additional imported distant signals

The implications of the Federal Communication Commission's cable deregulation is one of the most difficult questions to be confronted by this subcommittee if it undertakes to amend the cable copyright law. The Tribunal is acquainted with the views of members of this subcommittee as well as the copyright owners that the copyright law did not contemplate the total repeal of the Commission's cable rules. We are also acquainted with the testimony of the respresentatives of the cable industry that the FCC action is entirely consistent with the Copyright Act and specifically contemplated in the negotiated copyright compromise. We believe that if the Congress, because of the deficiencies of the "marketplace solution," retains the compulsory license for the carriage of signals and programs authorized prior to the Commission deregulation, it would seem that for similar reasons a compulsory license would be necessary for the additional signals and programs.

One of the principal arguments in support of cable compulsory licensing is that it avoids the complexity of licensing programs individually to cable systems. This program would be no different for any additional distant signals than it is for the signals that are already being carried. It would, therefore, be inconsistent to remove compulsory licensing from one set of distant signals while retaining it for others.

Cable fees

We believe that the issue of cable fees was put in proper perspective by Congressman George Danielson in his observations during the hearing of May 21. The Congressman said:

"I hope that somebody who appears before this committee will come up with some factual information which will help us find out . . . whether the owners of those property rights are receiving fair compensation for the use of that property. Maybe they are, I can't say that they are not. Maybe they are not, but I want those facts."

The Tribunal has not conducted any proceeding or rendered any determination that permits us to address the subject of whether the fee schedule provides reasonable compensation to copyright owners. Some 18 months ago, in anticipation of a review of Section 111 in this Congress, the Tribunal discussed the desirability and feasibility of our conducting a study of the fee schedule. This would have permitted us to respond to the demand for facts which the Congressman quite properly has raised. We share Congressman Danielson's view that the subcommittee record is heavy on rhetoric and light on facts. During this same period, the Register of copyrights proposed to the Congress the desirability of the Tribunal conducting a review of the fee schedule and related provisions of section 111. Whatever the merits of these projects, the Tribunal quickly determined that because of our by now well known budgetary limitations, we were not in a position to pursue such studies.

We believe the absence of any Tribunal jurisdiction to review the basic cable fee schedule and to make such adjustments as may be justified is a very serious defect in the current law and a major cause of dissatisfaction with the cable copyright provisions. If the Congress determines to grant the Tribunal broader cable royalty jurisdiction, the question arises whether, either in the statute or the committee reports, the Congress should establish criteria or policy objectives that should be applied by the Tribunal in its determinations. The report of the General Accounting Office concludes: "If the Congress were to try to specify new criteria, the result would likely be new problems and controversies". We believe that the GAO conclusion is reasonable, but the past legislative history of this subject suggests that the Congress may not be prepared to grant the Tribunal the unfettered discretion provided in section 3 of H.R. 3560.

OTHER SPECIFIC COMMENTS ON H.R. 3560

Cable system exemption

The Tribunal is unable to support in its present form the language of Section 1(c) of H.R. 3560 totally exempting cable systems with under 5,000 subscribers from the payment of any copyright royalty fee. The existing fee schedule reflects properly the determination of the Congress that special treatment should be extended to the smaller cable systems. Since the activities of these systems have not been the cause of dissatisfaction with the fee schedule, it is appropriate that such systems not be adversely affected by a revised fee schedule.

We respectfully suggest, however, that in resolving this issue the subcommittee should consider how smaller entities are treated under the other compulsory licenses, such as a local public radio station or Mom and Pop jukebox operations. There are no across the board exemptions for such enterprises. In the absence of compulsory licenses, many small business establishments pay copyright royalties but a cable system, even part of a multi-system operation, would be totally exempt.

Why should a bar that has live entertainment one night a week be required to pay copyright fees, but most cable systems would be exempted from any payment?

Why should a fraternal or veterans group be required to pay for live performances for a copyright license negotiated privately, but most cable systems be totally exempt from any copyright payment?

Distribution of royalty fees for radio programming

The Tribunal opposes Section 5 of H.R. 3560 whereby the Congress would specify that a certain percentage of the cable royalty fees be distributed to copyright owners of radio programming. We are well acquainted with the special problems of radio claimants in ascertaining the carriage of their signals by cable systems. In the 1978 cable distribution proceeding, the Tribunal concluded that the state of our record with regard to the radio claims was so inadequate that we could not make an award to any such claimants, although we made a special effort to distinguish the situation of National Public Radio.

We have now received the written direct cases of the claimants in the 1979 proceeding. We note from the submissions that radio claimants are now making a greater effort to justify their entitlement. Since our final determination in this proceeding will likely precede the passage of any cable legislation, this issue may become moot. But in any event, we could not support legislation which would exempt one category of claimants from having their claims judged by the same criteria that applies to all other claimants.

Judicial stay

Section 7 of H.R. 3560 amends the existing language of 17 USC 809 which controls the effective date of our final determinations of distribution and royalty adjustment proceedings in the event of an appeal. Section 809 has been a major cause of difficulty for the Tribunal and for the parties to our proceedings. The language was added to the revision bill by this subcommittee as a substitute for the legislative veto and limited judicial review provision of the Senate bill. The language is confusing and may not reflect adequate consideration of the impact of the filing of an appeal. Read in one light, it may be viewed as Congress intending to encourage litigation and rewarding those who seek to delay the effective date of our final determinations.

All the proceedings before the Tribunal must be completed within one year. With regard to the 1978 cable distribution proceeding, we have the situation where the Court of Appeals for the D.C. Circuit will have had the case on its docket for a year, and not yet heard oral argument. Furthermore, the Court, despite the public policy reflected in the Copyright Act, has declined to expedite its consideration.

Where the proceeding involves the distribution of royalty fees, Section 809 directs the Tribunal, upon the expiration of 30 days, to "distribute any royalty fees not subject to an appeal". Concerning the 1978 distribution, the broadcaster claimants in their appeal are seeking to set aside the entire proceeding and obtain relief directing a de novo proceeding before the Tribunal. They, with the support of some other claimants, argued to the Tribunal that since major claimants were seeking to set aside the entire proceeding, all royalty fees were "subject to an appeal" and no distribution could be made by the Tribunal. The Tribunal directed distribution of 50 percent of the royalty fees. An effort to stay our distribution was denied by the court, apparently applying the traditional criteria to judge a stay request.

Concerning the application of Section 809 to the effective date of our royalty adjustment determinations, the Tribunal has not rendered any interpretation. Because of a number of pending issues, we do not wish at this time to express a view concerning the application of Section 809. We do, however, support action by this subcommittee to clarify the Congressional intent.

DISTRIBUTION OF CABLE FEES

We are currently conducting the proceeding for the distribution of the 1979 cable fees. In July, copyright owners will file their claims for 1980 performances. After August 1 of this year, in accordance with the statute, if we are not informed of voluntary distribution agreements, it is our intention to promptly commence the proceeding for distribution of the 1980 fees.

We do not recommend any change in our cable or other royalty distribution functions. The Tribunal has adopted criteria to be applied to the distribution of the royalty fees. During the current proceeding the claimants are expected to develop a hearing record that will be useful as well for subsequent distributions.

With this record, as well as guidance from the court on certain contested issues, it may be possible to distribute future fees according to the terms of voluntary agreements.

STRUCTURE OF THE TRIBUNAL

In 1977 the Chairman of this Subcommittee and the Chairman of the Senate Subcommittee having jurisdiction in copyright matters in a joint letter recommended that the Congress, after several years experience with the new Copyright Act, review the administrative structure of both the Tribunal and the Copyright Office.

On January 22, 1979, the Tribunal in a letter to the Register of Copyrights stated that "the Commissioners of the Copyright Royalty Tribunal have been concerned almost from the commencement of their service with deficiencies in certain areas of the Copyright Act relating to the statutory functions of the Tribunal". We noted the congressional interest in reviewing the administrative structure of both agencies and proposed a joint venture to study the subject.

The intervals between Tribunal proceedings and the workload of the Tribunal was explored by this Subcommittee during the legislative oversight hearings on April 9, 1979. At that time Chairman Kastenmeir observed "in the intervening months we have understood that the Tribunal was not—did not need to fully utilize each working day because of the nature of the duties that commanded the attention of the Tribunal". The Chairman noted "that you are going to be busy coming up 1980".

We have remained in both official and informal contact with this Subcommittee. It was understood that during the current Congress we would participate in actively exploring the authority and structure of the Tribunal. Although this task has been complicated by the FCC deregulation and the consideration of bills by this subcommittee that would both expand and contract the Tribunal's functions, we continue to support such efforts at the present time.

Unfortunately a constructive and objective review of the options for restructuring the Tribunal, and a prudent assessment of the optimum time for implementing the restructuring, has been ill served by some bizarre circumstances surrounding the ventilation of this issue earlier this year. We are confident that this subcommittee will not permit any administrative restructuring of the Tribunal to serve as a pretext to promote substantive copyright proposals that have not previously received the approval of the Congress or the Tribunal. We therefore regarded it as highly constructive for the Chairman to request a GAO review of the operations and structure of the Tribunal.

We are gratified by the findings of the Report that "The Tribunal Has Operated According To Its Legislative Mandate", and that "The Tribunal has held all proceedings required by statute on schedule". We welcome the GAO endorsement of legislative and budgetary recommendations previously presented by the Tribunal,

and particularly in the current climate we note the recommendation that the Congress "appropriated additional funds to improve the operations" of the Tribunal. We support the general recommendation of the GAO that "corrective action should be taken" concerning the composition and structure of the Tribunal. This recommendation also had been previously made by the Tribunal.

Specific recommendations of the GAO

1. *Amendment of the Copyright Act to require royalty distribution within 30 days in absence of court injunction*—We support the recommendation of the GAO that the Copyright Act be amended to clarify the authority of the Tribunal to promptly distribute royalty fees.

2. *Access to a general counsel.*—The GAO Report contains a garbled and erroneous account of the views of the Commissioners concerning the creation of the Office of General Counsel. The Report states that "Four of the original five commissioners also support this idea, although when the Tribunal was initially organized, they did not believe a general counsel was needed". The situation is exactly the reverse. At our creation, the majority view was that such an office was a customary component of a government agency. The minority view was that the Tribunal should be guided by the clear directive of this committee that the Commissioners "are expected to perform all professional responsibilities themselves". As the Commissioners became better acquainted with the limitations of legal advice, support for the establishment of such an office declined, and currently is non-existent.

We cannot conceive of any combination of events that would produce an adequate volume of work to justify such a position.

Section 806 of the Copyright Act authorizes the Library of Congress to provide, pursuant to contract with the Tribunal, various administrative support. We recommend that this section be amended to include legal services. The Tribunal could, when useful and necessary, obtain assistance from wherever in the Library an appropriate person may be available.

3. *Subpoena power.*—The GAO report not only supports the grant of subpoena power, but effectively disposes of the argument advanced before this subcommittee that the power is not necessary because the Tribunal hearings are adversarial. As the report correctly notes, "cross-examination is not a sufficient substitute for subpoena power since it is limited to evidence previously submitted."

Another objection advanced is that a copyright owner with a small claim to the cable royalty fund might be subjected to a fishing expedition of his records by the Tribunal. Clearly any such abuse by us would promptly be curtailed by the courts or this subcommittee. However, the principal use of subpoena power would be in our royalty adjustment proceedings. As the GAO concluded, "it is highly unusual for a regulatory or rate setting organization such as the Tribunal to lack subpoena power."

4. *Adequate funding.*—The GAO supports our request for adequate funding to obtain objective expert opinion when needed. While we welcome this finding we are disturbed with the testimony of the GAO witness that our budget problems could have been avoided if we earlier had hired people that we did not need in order to use up the generous appropriations that we inherited. We find it extraordinary that the GAO would describe the fiscal responsibility of this agency as "an error in strategy from the beginning."

We approached the issue of funding for expert consultants exactly as directed by this subcommittee in House Report 94-1476. We did not use or seek funds for such purposes when not necessary. We acted as directed by this subcommittee and trusted that when the need arose for such experts in 1980 our request would enjoy effective support by the members of this subcommittee. Unfortunately, such support was not forthcoming.

We have several specific problems with our funding requests. Some Members of Congress believe that our operations could and should be underwritten by copyright owners. We have tried to explain that the owners would welcome the total repeal of the compulsory licenses. We have also explained that we cannot use royalty fees paid by cable operators for the costs of such items, as the mechanical royalty proceeding.

A second issue that is presented is our presence in the Legislative Branch. While our appropriation is modest, our functions do not directly relate to the operations of the Congress. Those seeking to hold down the size of the Legislative Branch appropriation understandably encourage our transfer.

Finally, there is the view that if the legislative subcommittee would act to repeal all the compulsory licenses, or as an alternative, resume determining these matters by the regular exercise of the legislative process, the funding issue has been resolved. We do not regard this prospect as either likely or constructive.

Qualifications of Commissioners

We believe the conclusions of the GAO Report that only one Commissioner has the proper background for service on the Tribunal reflects a too narrow view of the nature of the Tribunal's work. We regard experience in accounting, commercial broadcasting, and creative writing (previous employment of the other Commissioners) as appropriate to our activities.

GAO restructuring options

While the sections of the GAO Report devoted to a review of the operations of the Tribunal and of current attitudes concerning the compulsory licenses have made a useful contribution, the brief section of the report discussing the restructuring options leaves much to be desired. In our view the document is superficial and totally lacking in the type of analysis that one should reasonably expect.

Among the issues not explored in the report are the following:

1. Is it sound public policy to restructure the Tribunal prior to the determination of its future cable jurisdiction?
2. Is it feasible to convert directly from the current structure to the future permanent structure?
3. If it is possible to do so, what factors must be considered in determining the effective date of the new structure?
4. What is the cost effectiveness of the various options in the short range?
5. What are the implications for stability in Tribunal determinations of changes in the structure of the Tribunal at a time when there are so many pending and unresolved issues?

We urge the subcommittee to carefully weigh the impact of any restructuring on the final resolution of issues which are in various postures before the Tribunal and the courts. With regard to the appeals, it may be useful for us to provide two illustrations of our concerns.

The consolidated appeals of the initial 1978 cable distribution present a number of issues. How these are resolved will directly impact on the 1979 distribution which is currently in progress, and on the 1980 distribution which, in accordance with the statute, it apparently will be necessary to commence this Fall. Because of the range of issues before the court, it would not be surprising if the court directed some additional proceedings. Any such action would have a domino effect on the following distribution proceedings and delay our ultimate objective which is to produce a situation in which the royalty fees are distributed according to the terms of voluntary agreements.

The only appeal that has been argued is the mechanical royalty case. The Tribunal determined in that proceeding that the interests of all parties—composers, music publishers and record companies—could be accommodated by the retention of the traditional flat rate per tune, but indexed to increases in record prices. All parties now accept the concept, but there are differences as to the indexing mechanism adopted by the Tribunal.

The Tribunal's mechanical rate jurisdiction lapsed on December 31, 1980, however, we were concerned that the indexing remain fair and viable for seven years, and provide for possible changes in the record industry. We resolved that the benefits of adequate indexing flexibility should not be abandoned in the absence of a clear judicial prohibition. If the court decides that the particular indexing mechanism is barred by the Copyright Act, it will be necessary to consider appropriate adjustments of our determination. If the indexing mechanism is sustained, it will be necessary to take some action to implement the indexing mechanism.

COMMENTS ON GAO OPTIONS

Reduction of tribunal membership

The Tribunal previously recommended a reduction in the membership from five to three. We noted that this action could be accomplished merely by not filling vacancies, such as has been the practice with the Interstate Commerce Commission. We believe that this option is the most viable short-range solution and best accommodates the situation of the pending appeals, on-going distribution proceedings, and the uncertain congressional resolution of the cable television issue. It would also reduce the operational costs of the Tribunal. We doubt, however, if this option is a satisfactory permanent solution. It may be regarded as a transitional device, which could at an appropriate date be replaced by another option.

Full-time Chairman, part-time Commissioners, General Counsel

As stated above, we see no justification for a full-time general counsel.

It appears that this option is modeled on the restructuring plan adopted by the Congress for the Foreign Claims Settlement Commission. As submitted, in the short range it would not be more economical than the first option. We do not regard it as a satisfactory immediate solution because of the appeals and on-going proceedings. This option more effectively preserves the independence of the Tribunal from the Copyright Office than the other option with part-time Commissioners. It also is responsive to the under-utilization of Commissioners problem.

Transfer to the Department of Commerce

The possible consolidation of all intellectual property activities in the Department of Commerce was described by the GAO as "a policy issue that is beyond the scope of our review". Likewise the Tribunal is not prepared to discuss the broader policy issues of this consolidation.

It is our view that mechanically the Tribunal could be constituted within the Commerce Department even though the Copyright Office remained in the Library of Congress. It would be necessary to transfer the Licensing Division of the Copyright Office and attach it to the Tribunal. This transfer would seem desirable also under other options, since the activities of the Division relate exclusively to the royalty distribution functions of the Tribunal. The transfer apparently is not at issue between the two agencies, for the Register of Copyrights has testified that he has no objection to the transfer, and we believe that the Licensing Division could usefully be attached to the Tribunal.

We believe that such consolidation would produce modest economies and reduction in personnel. According to the official financial statements of the Licensing Division, their operating costs for fiscal year 1980 were over $462,000—a sum greater than the entire operational budget of the Tribunal.

Elimination of the tribunal

We oppose the recommendation previously presented to this subcommittee that the Congress determine by legislation the royalty adjustment and distribution issues.

Ad hoc body convened by the Register

We do not believe that it is desirable to convert to an ad hoc body at the present time. Such an action would bring a number of matters to a grinding halt until the revised Tribunal could be constituted.

The basic concept of this option originated with the Senate Subcommittee on Patents, Trademarks, and Copyrights, and was approved in the copyright revision bills passed by the Senate in 1974 and 1976. This subcommittee determined that public policy and the interests of the parties to the Tribunal proceedings would be better served by a full-time body with a continuity of membership. We have read the transcript of this subcommittee's June 11 hearing and note the continued reservation of some members of this subcommittee to the part-time and ad-hoc options. These concerns are understandable in the current fluid situation, but in our view should not preclude this option from further consideration as a satisfactory ultimate structural solution.

If desired by the subcommittee, the Tribunal later will submit our detailed comments on any restructuring legislation that may be introduced.

We shall now be glad to respond to any questions.

Commissioner BRENNAN. Thank you, Mr. Chairman.

The next section of the testimony is devoted to detailed comments on the chairman's bill.

We support special treatment for the smaller cable systems, but we are unable to endorse in its present form the chairman's rather sweeping exemption for the smaller systems. We set forth our views in our prepared testimony.

Likewise, we oppose section 5 of H.R. 3560, which is a special set-aside in the cable distribution for the copyright owners of radio programing.

We are conscious of the special problems of the radio claimants in identifying which of their signals are carried by cable systems. We suspect that this problem may be resolved prior to any action by the Congress on the cable bill. But in any event, we could not support a provision which would exempt one category of claimants

from having their claims judged by the same criteria which apply to all other categories of claimants.

The next section of our testimony discusses section 7 of the chairman's bill, which would amend section 809 of title 17 of the United States Code concerning the effective date of final determinations. We support action by the Congress to clarify section 809.

We provide some background concerning the structure of the Copyright Royalty Tribunal and our previous recommendations and requests to this subcommittee.

Commencing on page 13, we give our detailed comments on the recommendations made to the Congress by the GAO. Most of these recommendations have our support. In fact, a number of them originated in previous recommendations by the Tribunal.

While the sections of the GAO report devoted to a review of the operations of the Tribunal and of current attitudes concerning the compulsory licenses have made a useful contribution, the brief section of the report discussing the restructuring options leaves much to be desired. In our view the document is superficial and totally lacking in the type of analysis that one should reasonably expect.

Among the issues not explored in the report are the following:

One. Is it sound public policy to restructure the Tribunal prior to the determination of its future cable jurisdiction?

Two. Is it feasible to convert directly from the current structure to the future permanent structure?

Three. If it is possible to do so, what factors must be considered in determining the effective date of the new structure?

Four. What is the cost-effectiveness of the various options in the short range?

Five. What are the implications for stability in Tribunal determinations of changes in the structure of the Tribunal at a time when there are so many pending and unresolved issues?

We urge the subcommittee to carefully weigh the impact of any restructuring on the final resolution of issues which are in various postures before the Tribunal and the courts. With regard to the appeals, we then provide two illustrations of our concerns.

We previously recommended a reduction in the membership from five to three. We noted that this action could be accomplished merely by not filling vacancies, such as has been the practice with the Interstate Commerce Commission. We believe that this option is the most viable short-range solution and best accommodates the situation of the pending appeals, ongoing distribution proceedings, and the uncertain congressional resolution of the cable television issue. It would also reduce the operational costs of the Tribunal. We doubt, however, if this option is a satisfactory permanent solution. It may be regarded as a transitional device, which could at an appropriate date be replaced by another option.

The second option of GAO is for a full-time Chairman, part-time Commissioners, and General Counsel.

As we discussed in our prepared testimony, we cannot envisage any combination of events that would justify establishing a permanent office of General Counsel.

This option in the short range would not appear to be more economical than the first option. We do not regard it as a satisfac-

tory immediate solution because of the appeals and ongoing proceedings. If the subcommittee is concerned about preserving our independence from the Copyright Office, this option would have a certain attraction, as opposed to another option which provides for an ad hoc structure.

A third option is the transfer of the Tribunal to the Department of Commerce.

The possible consolidation of all intellectual property activities in the Department of Commerce was described by the GAO as "a policy issue that is beyond the scope of our review." Likewise we are not prepared to discuss the broader policy issues.

It is our view that mechanically the Tribunal could be constituted within the Commerce Department even though the Copyright Office remained in the Library of Congress. It would be necessary, however, to transfer the Licensing Division of the Copyright Office and attach it to the Tribunal. This transfer would seem desirable also under other options, since the activities of the Division relate exclusively to the royalty distribution functions of the Tribunal. The transfer apparently is not at issue between the two agencies, for the Register of Copyrights has testified that he has no objection to the transfer, and we believe that the Licensing Division could usefully be attached to the Tribunal.

We believe that this consolidation would produce modest economies and reduction in personnel. According to the official financial statements of the Licensing Division, their operating costs for fiscal year 1980 were over $462,000—a sum greater than the entire operational budget of the Tribunal.

Mr. Chairman, I had occasion in my prepared text to offer a possible solution with regard to the Legal Services issue. However, appearing before this subcommittee, I can perhaps venture another suggestion. If the chairman and the subcommittee are successful in your efforts to preserve the Legal Services Corporation, I believe we meet the poverty test that is necessary for the rendering of such services.

The next option that was suggested by the GAO has to do with the Congress returning to the previous practice of once a century acting on these issues through the normal legislative process. We do not regard this as a promising or a constructive recommendation.

The final option presented in the report is the concept of an ad hoc body that would be convened periodically by the Register.

We do not believe that it is desirable to convert to an ad hoc body of any form at the present time. Such an action would bring a number of matters to a grinding halt until the revised tribunal could be constituted.

The basic concept of this option originated with the Senate Subcommittee on Patents, Trademarks, and Copyrights, and was approved in the copyright revision bills passed by the Senate in 1974 and 1976. This subcommittee determined that public policy and the interests of the parties to the tribunal proceedings would be better served by a full-time body with a continuity of membership.

We have read the transcript of this subcommittee's June 11 hearing and we note the continued reservation of some members of this subcommittee to the part-time and ad hoc options. These con-

cerns expressed at that hearing are understandable in the current fluid situation, but in our view should not preclude this option from further consideration as a satisfactory ultimate structural solution.

Mr. Chairman, if desired by the subcommittee, at an appropriate later date we would submit specific comments on any bill that might come before the subcommittee.

With your indulgence, Mr. Chairman, there was one issue which I omitted in my summary, and Commissioner Burg would like to make some observations on that point.

Mr. KASTENMEIER. Pending that, I must announce again there is a vote on and at this time we must recess the committee for 10 minutes.

[Whereupon, a short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

The Chair regrets these recesses. They tend to become attenuated like timeouts in professional football for purposes of television commercials. They last a little longer than expected.

Commissioner Burg.

Commissioner BURG. Thank you, Mr. Chairman. I would like to amplify on one of the statements in our testimony concerning the qualifications of commissioners. I have deep personal reservations about a repeated theme of the GAO report that is found on page 16, the last paragraph, and I express these reservations to you for you to consider and weigh.

The GAO report recommends that in the future commissioners of the tribunal be appointed with demonstrable copyright-related experience.

I can appreciate this is a routine, consistent policy position of the GAO, and I am prepared to accept it as a general rule. In the abstract, the position appears to have undeniable advantages. However, as a practical matter, at least with respect to the tribunal, it raises some important questions.

The GAO suggests—and I quote:

> The Tribunal could be more effective if future appointed commissioners have some familiarity with copyright issues without being intimately involved with any affected industry.

In another section they say:

> Commissioners could be distinguished copyright attorneys, law professors, retired experts in copyright-related areas.

Copyright lawyers have clients, or so I will assume, and by definition these clients will have an interest in copyright matters. This certainly suggests to me the possibility that these clients will either be users or owners.

I simply raise the issue of impartiality and ask how it can be achieved under these guidelines. The central question, it seems to me, is: In the future, can these so-described people approach a rate review without bias? Law professors or retired experts in copyright-related areas would be an obvious resource if the underlying assumption is that the work is fundamentally legal or technical in nature.

In the course of our proceedings to date, pure legal questions have been relatively few in number. Significantly and substantially

more important has been the issue of fairness, and we have to address that on the basis of the evidence presented.

If one believes, as I do, that the central issue is one of fairness and equity, then persons with backgrounds other than law and copyright can and should be appointed. A panel constituted by individuals who have achieved some success in various occupations and who have a modicum of commonsense, in my judgment, would be eminently qualified to render impartial, fair, and balanced decisions.

The legal and technical questions could be addressed by a part-time counsel who could be experienced in copyright law as well as administrative procedures. This approach is not inconsistent with the whole American form of government which stresses not elitism but citizen participation.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Ms. Burg.

That concludes the panel's presentation?

Commissioner BRENNAN. Yes, it does, Mr. Chairman.

Mr. KASTENMEIER. On the last point, I must add, however, that there is one member of the panel who is a lawyer and did have copyright background. Do you not assert that he comes to his work with a bias?

Commissioner BURG. No, sir, I do not, and he has been immensely helpful, and by the statement I do not mean to preclude that one or two could be, but I think the GAO report summarily addressed the entire body, whatever number that might be.

Mr. KASTENMEIER. Let me say that by and large I think the committee was favorably impressed with the GAO report. That does not mean to say that it was perfect or that it was unassailable. And to the extent that you have expressed reservations, criticisms, and other views about some of the conclusions, that is useful. But I would have to say the committee did not have quite as strong a negative view as the tribunal itself.

Commissioner BRENNAN. Mr. Chairman, if I may comment on your observations, I don't think you have correctly reflected the thrust of our testimony, perhaps because of the interruptions and the fact that I did not read most of the testimony.

Commissioner Burg was focusing on perhaps the only area where we do differ with the recommendations in the report. We indicate in our prepared testimony that we are very gratified by the basic conclusion in the report and their assessments of our performance in office. With the exception of reservations about establishing the office of general counsel, we are supportive of their recommendations to the Congress.

I certainly do not believe that it is a fair characterization of our entire testimony to suggest that we are critical of the specific recommendations of the report.

Mr. KASTENMEIER. Could you expand on the view of the Tribunal with respect to the need for a General Counsel. I myself got the impression from the oral presentation that you did not think that such was necessary.

Commissioner BRENNAN. In terms of the workload and as a full-time position, we make the recommendation in our prepared text that the Congress amend section 806 of the Copyright Act whereby

we presently are furnished various administrative services by the Library of Congress. Our proposal is that it be expanded to include legal advice. Therefore, we could, when the occasion arises, request the Library of Congress, pursuant to negotiated contract, to furnish to us an individual who could be useful to the Tribunal at a particular period.

But in terms of the workload and even considering all the open-ended cable issues and how they might fall into place, we do not believe that the workload would justify a full-time Office of General Counsel.

Mr. KASTENMEIER. I take it you conclude that the workload may or may not justify five commissioners but does justify certainly three; is that correct?

Commissioner BRENNAN. We have both a short-range and a long-range position. We believe for various reasons, some of which are set forth in our testimony, that it would not be sound public policy in the immediate future to convert to an ad hoc body, but as a longer range solution the ad hoc options may well be an attractive resolution.

Mr. KASTENMEIER. Let me ask you this about the present composition of the Tribunal. You are missing one member; there is one vacancy. I don't actually recall the law in this regard, and perhaps you can enlighten me. Must you have three members to issue various conclusions and judgments, or may you operate with two or even one?

I am looking forward—let us assume there is one or more additional vacancies. At what time does the Tribunal become inoperative because of lack of commissioners?

Commissioner BRENNAN. A term expires in 1982. Three terms expire in 1984.

On a previous occasion we called the attention of this subcommittee to a potential problem in 1984. It is always difficult to obtain Senate confirmation of nominations during that period, and consequently that issue must be confronted by this subcommittee at some time.

Mr. KASTENMEIER. Is it your view that, quite apart from when the expirations of the terms occur, if any commissioners resign, as did Mr. James and other commissioners, for any reason whatsoever, you may operate with as few as two commissioners?

Commissioner BRENNAN. No, that would not be our interpretation of the act.

Mr. KASTENMEIER. But three would be the minimum?

Commissioner BRENNAN. Yes.

Mr. KASTENMEIER. Do you have any view as to a full-time chairmanship as opposed to the present rotating chairmanship?

Commissioner BRENNAN. The Tribunal has no position on that as an agency. Individual commissioners have different views.

I think it is fair to say that in this body there has been expressed previously a view that a permanent chairman is desirable. But there is no position as such on that by our agency.

Mr. KASTENMEIER. A couple of statements you made I think are very useful. One, obviously, is that should there be any restructuring, we'd have to think very carefully about what effect this has on present pending matters, on litigation, on what form of transitional

arrangements are made, and what effect this has as to the law as it mandates the Tribunal's actions in particular areas in particular years.

And also I think you are correct that from your standpoint the Tribunal might as well be consistent with respect to compulsory licenses.

I take it you have not heard very much in terms of arguments for removal of compulsory license as to phonorecords, and mechanical royalty.

Commissioner BRENNAN. That is correct. And that condition hasn't changed from what it was when the matter was pending before the Congress.

We are not recommending that the subcommittee repeal or modify any of those licenses. We merely presented to the subcommittee a comparative analysis of the justification for the various licenses, taking into account such factors as the clearance problems of the user, the bargaining position of the copyrightowner compared to the user and the impact of the user's activities on the general public. But we are not recommending that the subcommittee at the present time undertake to repeal any of the other licenses.

Mr. KASTENMEIER. You are aware that the Register of Copyrights has made recommendations for substantial changes.

Commissioner BRENNAN. That is right. As I understand his position, though, he would make the effective date of any repeal of the compulsory license at a period 3 to 5 years after enactment.

Mr. KASTENMEIER. Other than the affected industries, I think most of the witnesses who have testified for removal of the compulsory license have suggested a substantial period of phasing in and phasing out.

Commissioner BRENNAN. That is also the approach I think that is reflected in our testimony. We have urged upon the subcommittee that in analyzing the argument concerning retention of the compulsory license, the subcommittee give some thought to whether clearance mechanisms can be established. We think that is an issue which deserves the attention of the subcommittee, particularly in the light of the previous determinations by the Congress on the policy questions.

Mr. KASTENMEIER. You note that the GAO report contained a garbled and erroneous account of the view of the Commission concerning the Office of General Consel. In your view how is it that they got such an account? Do you think they just misunderstood the various commissioners when they interviewed them, or what?

Commissioner BRENNAN. There is no difference of opinion as to support for access to legal services or legal advice. But that must be distinguished from the recommendation for a full-time in-house General Counsel.

My position on that has been consistent. I have supported the clear mandate of this committee that the commissioners perform themselves all their professional responsibilities whenever feasible.

I believe that our recommendation to amend section 806 is a cost-effective resolution of this issue.

Mr. KASTENMEIER. One of the problems that seem to accompany the several years of the Tribunal's existence is—by virtue of the

timing of the mandate for consideration of the various compulsory licenses—that the work of the Tribunal has been uneven in terms of its demand upon the commissioners. This probably accounts for some of the budgetary problems. At times in early 1978–1979, when matters were not then pending of this consequence, the Tribunal did not make very great demands. While the Tribunal made demands for $700,000 or whatever in terms of funding, it did not in fact use or spend that much. That, in turn, begot a lower spending level in subsequent years, and really in a sense pinched if not curtailed the Tribunal's activities.

Is there any way the statutory mandate can be reshuffled or reconstituted to produce, from a time sequence, a more even effect in the demands upon the Tribunal?

Commissioner BRENNAN. I don't believe it is necessary. We should not overreact to a unique condition which arose for a variety of reasons in 1980. When the Congress was completing action on the revision bill in 1976, it was understandable that those interests who saw a possibility of getting an increase in rates by virtue of an adjustment proceeding wanted to have the review mandated at the earliest feasible date. And consequently, with the exception of public broadcasting, all these proceedings were programed into 1980.

On top of that, for a variety of reasons which were described in the GAO report, it was not possible to proceed with the initial cable distribution as early as originally expected, and much of that activity was also pushed into calendar year 1980.

I cannot imagine that that condition will arise in the future, and therefore I do not see any necessity for Congress to alter the existing projected review dates.

Mr. KASTENMEIER. Thank you.

That terminates the questions I have this morning. There are other matters, more technical aspects of distribution and so on, which I will not raise this morning.

There is another vote on.

I do believe, however, that to the extent we will be disposed to act on legislation which will in some form or another affect the Tribunal, we will again confer with you and solicit your opinion, either en banc or otherwise, as the case might be. We do appreciate the appearance of all four of you here this morning, and I personally want to compliment you for what I think has been an excellent job under adverse circumstances in some respects. It was my impression that the GAO report was essentially positive with respect to its evaluation of the Tribunal.

We will stand in recess, pending our last witness, for 10 minutes.

Commissioner BRENNAN. Thank you, sir.

[Whereupon, a short recess was taken.]

Mr. KASTENMEIER. The committee will resume the hearing.

Now it is a very distinct pleasure on my part to be able to greet the next witness who is a new witness before this subcommittee. We knew him, of course, as one of the outstanding House staff members in the past with our sister committee on commerce, but he is here in a new and elevated capacity.

I am very pleased to greet Hon. Bernard Wunder who is Assistant Secretary of Commerce for the National Telecommunications

and Information Agency of the U.S. Department of Commerce. We value not only his past experience and insights in communications but his new perspective in terms of his new capacity, and we are very pleased to have you.

TESTIMONY OF THE HON. BERNARD WUNDER, ASSISTANT SECRETARY OF COMMERCE FOR THE NATIONAL TELECOMMUNICATIONS AND INFORMATION AGENCY

Mr. WUNDER. Thank you, Mr. Chairman. Thank you very much.

Mr. Chairman, I have a 13-page statement which, with your permission, I would ask be inserted in the record, and if I could just summarize it——

Mr. KASTENMEIER. Of course. Without objection, your statement in its entirety will be made part of the record, and you are free to summarize your views as you see fit.

[The complete statement of Mr. Wunder follows:]

PREPARED STATEMENT OF BERNARD J. WUNDER, JR., ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Thank you for this opportunity to discuss NTIA's views regarding appropriate cable television copyright arrangements, and to explain briefly why we think that the special regulatory system created by the 1976 copyright legislation warrants revision. We participated, as you know, in the recent oversight hearings held by the Senate Judiciary Committee in May 1981. Let me reiterate our basic policy position: The current cable copyright system is an anachronism difficult to reconcile with prevailing industry conditions. It is, therefore, appropriate and desirable, in our judgment, for Congress to revisit the 1976 Act, and seek to phase-out its provisions, in favor of a more marketplace-oriented approach.

Philosophically, we believe strongly that the Federal Government should not try to regulate transactions that can be conducted efficiently in the free market. The 1976 Act clearly departs from this fundamental, philosophical preference for free, unregulated, marketplace competition. The law endeavors not only to set prices for the creative output of private entrepreneurs; it also intrudes directly into the division and distribution of the royalty fees collected. We are unaware of any credible evidence that the Federal Government is particularly well-equipped to handle such tasks. Indeed, the weight of the available evidence dictates precisely the opposite. And, regardless of prevailing conditions in the early Seventies, we do not believe that there is any sound basis for continuing to assume that the Government must intervene into the programming marketplace because of "market distortions."

From a factual perspective, the cable television provisions of the 1976 Copyright Act clearly reflect competitive and marketplace assumptions that have been undermined, if not completely overcome, by subsequent events. The cable television business has changed dramatically since 1976, and the important services the industry provides today are quite different. Fifty channel cable systems, multiple "tiering" of pay programs, nationwide distribution of shows via satellite, and an increasing diversity of "auxiliary" services characterize the cable industry today. While twelve-channel systems relying heavily on imported, distant signals still exist, these kinds of operations are fast becoming commercially obsolete.

Since 1976, there have also been substantial changes in the cable television regulatory environment. In the *Home Box Office* decision, for example, the FCC's pay cable television rules were struck down.[1] The FCC in 1976 lifted its restrictions on the use of receive-only satellite earth terminals, thus greatly facilitating satellite relay of programming to cable television systems nationwide. The Supreme Court's *Midwest Video II* ruling eliminated FCC requirements that 12-channel cable systems upgrade to 20-channel capacity by 1981. It also struck down FCC leased, public, educational, and governmental access requirements.[2] Last Fall, of course, the FCC

[1] *Home Box Office, Inc.* v. *FCC*, 567 F. 2d 9 (D.C. Cir. 1977).
[2] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

elimninated its syndicated exclusivity rules, as well as the restrictions on the number of nonlocal or "distant" signals cable systems may import into particular markets. This decision was affirmed last week by the Second Circuit court of appeals.[3]

Contemporaneous with these regulatory changes, and perhaps because of them, there has been a tremendous influx of investment capital into the cable television business. The industry that once was characterized by "mom and pop" operations serving chiefly rural and suburban subscribers, today is dominated by the subsidiaries and affiliates of some of the largest U.S. corporations. The largest cable firm, and dominant pay cable operation, for example, are subsidiaries of Time, Inc., currently 135th on the Fortune 500. The second largest cable firm is a subsidiary of Westinghouse; the third largest cable firm is a joint venture of Warner Communications and American Express. The leading vendor of syndicated programming, Viacom, is also a significant factor in the cable television business. Major national newspaper firms, such as the Los Angeles Times, the New York Times, and Newhouse Publishing, and major multinational corporations, such as General Tire and General Electric, are also major stakeholders in this fast growing business.

These regulatory changes and this influx of substantial new investment capital, have combined to cause very significant, real cable growth. Today, for example, the industry is about twice as large as it was in 1976. Subscribership has roughly doubled and cable industry revenues tripled, to about $3 billion this year. Reliable projections call for the cable industry to double again in size by 1985, bringing total subscribership into the 35 million range—more than a third of the country's TV households—and for revenues to approach $10 billion by the end of this decade.

The compulsory licensing feature that is central to the 1976 Copyright Act was adopted because its proponents had successfully argued two key points. First, they argued—and Congress accepted the argument—that cable's relative weakness in a programming market allegedly dominated by big television networks, big television stations, and big television program producers meant that, forced to bargain, cable television would lose out. In other words, they successfully argued that Government intervention to serve as an "equalizer" was necessary to make the programming market work for cable, and, ultimately, for cable television subscribers.

Second, however, the proponents of the compulsory license scheme succeeded in persuading Congress that the transaction costs associated with other options would be prohibitive. In other words, what with so many cable systems, channels, distant signals, and different programs requiring individual cable entrepreneurs to bargain on a signal-by-signal basis would be tantamount to foreclosing them altogether from the marketplace. I would note here, parenthetically, that these twin arguments—"market necessity" for blanket licensing, and "excessive leverage" on the part of one or more parties—were central to the recent ASCAP litigation.[4]

"Market failure" assumptions such as these buttress virtually every other sort of regulatory system. It is certainly appropriate for Congress to assess the current validity of the premises underlying the 1976 Copyright regulatory scheme, particularly given the very rapid and substantial changes that have occurred and are ocurring in the cable television business.

It is not clear for the available evidence, for example, that the cable television industry today overall lacks sufficient economic "clout" to be able to function effectively in the programming marketplace. Copyright owners, in general, seek the widest possible distribution and the best possible price in marketing their products. Some opponents of full copyright liability argue that an FCC experiment thirteen years ago "proves" that nothing but a statutory, compulsory licensing approach will work. Unless compelled by law to do so, they argue, neither broadcasters nor programmers will license the further distribution and exhibition of their product by cable.

No recent empirical evidence, however, supports this pessimistic view, and, indeed, there is some substantial basis to assume that the marketplace can work here in most regards. Firms such as Time Inc., General Electric, and American Express obviously are not without resources. These companies appear able to buy other production factors needed to provide cable service—equipment, for example—without special Government assistance. A substantial number of cable television systems are also owned by broadcast television interests (though rarely in coterminous markets). It seems far less likely today that might have been true in 1976 that

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[3] *Malrite TV of New York, Inc.* v. *FCC*,— F. 2d —, Civ. No. 80-1420 et al. (2d Cir., June 16, 1981).

[4] See *CBS, Inc.* v. *ASCAP*, 562 F. ed 130, 135, 137 (3d Cir. 1977), *rev'd* 441 U.S. 1 (1979). See also Note, *Antitrust and Nonprofit Entities*, 94 Harv. L. Rev. 802, 817 (1981).

broadcasters and programmers will flatly refuse cable systems the right to retransmit their signals. Some major cable television interests, moreover, such as Warner Communications or Viacom, for example, have corporate interests in a number of ostensibly conflicting business camps, being simultaneously engaged in the production, distribution, and dissemination of programming, using a variety of media, including cable. It seems unlikely to me that the programming arm of Warner Communications, for instance, would deny the cable television divisions retransmission rights.

It is true that relative equality of bargaining position is one prerequisite to achieving a truly competitive marketplace. In the case of some smaller, more rural cable systems, the bargaining inequality premises underlying the 1976 Act may remain quite valid. We think however, that this premise is far less valid in respect of the larger, MSO-affiliated cable systems that are increasingly wiring our major metropolitan centers. In short, while the special "equalizer" purposes of the 1976 Act may still be valid for some segments of the industry, the number of cable systems and interests that require such extraordinary Goverment assistance today is probably limited.

There is also a dearth of credible evidence available to support the so-called "marketplace necessity" argument that proponents of the 1976 legislation employed so successfully. Organizations such as ASCAP, BMI, SESAC, and the Copyright Clearing House, demonstrate that markets can and will evolve workable mechanisms to limit transaction costs. These systems appear to work well for the television and radio, video cassette and disc, music, and print industries. The pay cable television business does not benefit from the compulsory license-statutory fee arrangements established under the 1976 legislation, yet that business clearly is now thriving.

It is not true that a marketplace approach necessarily implicates thousands and thousands of different transactions among many different people. For example, the top 25 multiple system cable operators today serve about 12 million subscribers or some 64 percent of today's cable audience. The top 10 cable companies serve about 40 percent of all subscribers, or about 7.5 million cable homes. Whereas the largest multiple system operator in 1976—Teleprompter—served only 1 million subscribers, the largest such operator today—Time Inc.'s ATC affiliate—serves approximately 1.5 million cable homes. We are aware of no credible evidence clearly demonstrating that Time Inc., for example, is unable to negotiate a suitable licensing arrangement with program producers, especially in light of the obvious success of its other affiliate—Home Box Office—in negotiating, typically, with the same corporations.

Again, for the very small, rural cable television systems, transaction costs may be an important consideration. For the major companies in the cable television business, however, such costs should not be a decisive factor.

Several alternatives to the current compulsory license-statutory fee system have been proposed, as you know. One former member of the Copyright Royalty Tribunal, for example, urged the elimination of the entire arrangement, in favor of full reliance on private marketplace negotiations. Other proposals include continuing the present arrangements for that complement of signals that the FCC allowed, before the recent deregulation action, but requiring all cable systems to negotiate for "new" distant signals. Or, continuing the benefits of the 1976 legislation unaltered for cable television systems of a certain size or located in markets of a certain size. Or, continuing the present cable copyright scheme intact, but substantially increasing the present statutory fees that cable systems pay.

These hearings, as well as those that the Senate Committee has held, serve a useful, indeed an invaluable purpose, since they will produce the current and credible factual basis necessary for any objective net assessment of the pluses and minuses associated with the current—and the variously proposed—cable copyright arrangements. There is today, unfortunately, too little objective evidence available, in our view, to support fully any definitive appraisal of whether the current cable copyright system is working, and to precisely whose benefit or detriment.

Philosophically, NTIA strongly favors relying to the maximum extent possible on competition and marketplace forces. We are, therefore, not favorably inclined toward proposals that call for simply "fine-tuning" the present cable copyright arrangements. On the other hand, however, we are unaware of any clear evidence that the present arrangements are in fact causing severe or irremediable harm. We are fully aware of the fact that significant transitional equities are at issue. In the case of a major market cable television system, the risks to cable subscribers associated with elimination of the compulsory license, for example, appear not especially great. Those metropolitan areas typically benefit from an abundance of over-the-air broadcast service; cable subscribers also tend to enjoy somewhat greater

incomes and to have available a diversity of news, entertainment, and information choices.

The same is less true, however, in rural or less-well-populated suburban areas. There, the local cable television system may in fact be the only reasonably available source of news and entertainment to subscribers who tend to be less well-off and to have fewer diversity options available to them to begin with. The absence of a single signal may be of some inconvenience or annoyance to cable subscribers in Westchester County. The loss of a single signal is likely to be a much more severe development for cable television subscribers in rural southern Delaware, however, where little has been available except "on the cable." When one thus considers the risks of any "flash cut" elimination of the present cable copyright system and associated compulsory license, for urban dwellers these risks are not great. But for rural cable subscribers, the situation may be very much different.

We intend to review the results of the Committee's hearings closely, because cable copyright issues are very important. Most communications experts agree that we are now at a watershed in the development of our electronic media. The cable television industry is growing exponentially both in size and in the diversity of its offerings. At the same time, the number of choices available through video discs and cassettes from conventional over-the-air television, even from possible direct broadcast satellite operations, is likely to continue to expand.

If the American public is to benefit fully from the diversity of news and entertainment choices that both new and familiar technologies can offer, an enormous amount of program product, or "software," will be required. It is thus very important that we insure that our copyright arrangements provide program producers and artists an adequate and sustained incentive to continue to produce.

the prevailing cable copyright arrangements probably do not provide much affirmative incentive to produce, and they thus fall short of the Constitutional admonition—that Congress should "promote the progress of the useful arts." There is also some reason to believe that these regulatory arrangements generate an undesirable propensity on the part of some cable systems to over-consume. Because distant signals cost significantly less than alternative programming, cable operators may have an incentive to rely on them, and not to provide the diversity of new choices that cable television is particularly well-suited to deliver. This is an important consideration, since about 80 percent of cable television systems today have 12 or fewer channel capacity. Since much of this otherwise available channel capability is occupied relaying distant signals—which may now duplicate locally available broadcast programming—the ability of new programmers to emerge may be handicapped unnecessarily.

I want to stress that we have reached no firm or final determinations regarding revision of the 1976 Copyright legislation. Clearly we are tilting in the direction of substantial, marketplace-oriented changes. At present, however, our grasp of the potential upside gains and possible downside losses is not fully complete.

The Subcommittee and its expert Staff are to be commended for undertaking this review of this complicated and traditionally controversial area. NTIA, of course, stands ready to provide you with whatever assistance you may require and to work affirmatively with Congress in developing reform legislation reasonably satisfactory to all of the industries involved and—more importantly—promotive of the public's interests.

Mr. KASTENMEIER. I am very regretful that these votes have delayed proceedings this morning. You have been very patient.

Mr. WUNDER. Mr. Chairman, you don't have to apologize about the House to me. I understand better than most.

Thank you for this opportunity, Mr. Chairman, to discuss NTIA's views regarding appropriate cable television copyright arrangements and to explain briefly why we think the special regulatory system created by the 1976 copyright legislation warrants revision. We participated, as you know, in the recent oversight hearings held by the Senate Judiciary Committee in May 1981.

Let me reiterate our basic policy position: The current cable copyright system is an anachronism difficult to reconcile with prevailing industry conditions. It is, therefore, appropriate and desirable, in our judgment, for Congress to revise the 1976 act and seek

to phase out its provisions in favor of a more marketplace-oriented approach.

Philosophically, we believe strongly that the Federal Government should not try to regulate transactions that can be conducted efficiently in the free market. The 1976 act clearly departs from this fundamental, philosophical preference for free, unregulated, marketplace competition.

From a factual perspective, the cable television provisions of the 1976 Copyright Act clearly reflect competitive and marketplace assumptions that have been undermined, if not completely overcome, by subsequent events. The cable television business has changed dramatically since 1976, and the important services the industry provides today are quite different.

Contemporaneous with these regulatory changes, and perhaps because of them, there has been a tremendous influx of investment capital into the cable television business.

These regulatory changes and the influx of substantial new investment capital have combined to cause very significant, real cable growth. Today, for example, the industry is about twice as large as it was in 1976. Subscribership has roughly doubled and cable industry revenues tripled, to about $3 billion this year.

The "market failure" assumptions prevalent in 1976, in our view, no longer are extant. It is certainly appropriate for Congress to assess the current validity of the premises underlying the 1976 copyright regulatory scheme, particularly given the very rapid and substantial changes that have occurred and are occurring in the cable television business.

It is not clear from the available evidence, for example, that the cable television industry today overall lacks sufficient economic clout to be able to function effectively in the programing marketplace.

No recent empirical evidence supports this pessimistic view and, indeed, there is some substantial basis to assume that the marketplace can work here in most regards. Firms such as Time, Inc., General Electric, and American Express obviously are not without financial resources. These companies appear able to buy other production factors needed to provide cable services—equipment, for example—without special government assistance.

There is also a dearth of credible evidence available to support the so-called "marketplace necessity" argument that proponents of the 1976 legislation employed so successfully. Organizations such as ASCAP, BMI, SESAC, and the Copyright Clearinghouse, demonstrate that markets can and will evolve workable mechanisms to limit transaction costs.

It is not true that a marketplace approach necessarily implicates thousands and thousands of different transactions among many different people. For example, the top 25 multiple-system cable operators today serve about 12 million subscribers or some 64 percent of today's cable audience. The top 10 cable companies serve about 40 percent of all subscribers, or about 7.5 million cable homes.

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panies in the cable television business, however, such costs should not in our view be a decisive factor.

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We intend to review the results of this subcommittee's hearings closely because cable copyright issues are very important. Most communications experts agree that we are now at a watershed in the development of our electronic media. The cable television industry is growing exponentially both in size and in the diversity of its offerings. At the same time, the number of choices available through video discs and cassettes, from conventional over-the-air television, even from possible direct broadcast satellite operations, is likely to continue to expand.

I want to stress that we have reached no firm or final determinations regarding revision of the 1976 copyright legislation. Clearly we are tilting in the direction of substantial, marketplace-oriented changes. At present, however, our grasp of the potential upside gains and possible downside losses is not fully complete.

The subcommittee and its expert staff are to be commended for undertaking this review of this complicated and traditionally controversial area.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Wunder, for your statement.

I believe I understand you, but perhaps I should try to elicit a bit more precisely your position and that of the NTIA. It is that while philosophically you would favor that arrangement which relies on competition and marketplace forces, notwithstanding that, you are not prepared to advocate precisely the changes which might lead in that direction insofar as there is no clear evidence that the present arrangements are causing severe or irremediable harm.

That tends to leave us where we are, more or less, even though a compulsory license insofar as it suggests statutory interference with free market forces is not consistent with the ultimate desirable marketplace philosophical concept.

Is that not correct?

Mr. WUNDER. I would not want to leave you the impression, Mr. Chairman, that we want to leave the situation where we find it, clearly, for several reasons.

First, in terms of the data with respect to harm, I think that the data there, in our view, are inconclusive. However, the significant changes that have taken place—primarily as a result of the repeal of syndicated exclusivity and the distant signal carriage rules—would clearly warrant a revisitation of the 1976 act.

And, second, I would want to express very strongly a clear preference for a solution in which the Government is not involved in determining what value is transferred for the use of property. That is something that we believe can and should take place in the marketplace.

So we intend to make a study to see if we can come up with some more empirical data. Quite frankly, I have some reservations about our ability to do that, and I think it will be inconclusive. But I think that what has happened in the last year, plus especially all the other things that have happened since 1976, the changes in the industry, clearly warrant a change in this mechanism.

Mr. KASTENMEIER. You see, there is always theoretically the question of which way do you go from whence you came. That is, shall cable have any liability? You could have a free marketplace in which it has no liability at all pursuant to the Supreme Court decision which you are aware of 10 years ago or so.

Mr. WUNDER. Yes.

Mr. KASTENMEIER. Or you could subject them to full liability.

I only hypothetically open that choice because it would seem that then there are four choices: no liability, absolute liability, relying on however the marketplace affects matters, or things as they are or adjusting the situation without affecting ultimately the compulsory license, or the sort of limited liability afforded by the compulsory license.

There are those four options, theoretically at least, to look at, although they may not be.

Mr. WUNDER. There should be a movement toward full copyright liability. I believe you have indicated, and other witnesses have favored, some transition mechanism. We would favor that, too. We would not favor a "flash-cut" change in compulsory license arrangements. Plus, there are other things I mentioned in my statement. What possibly needs to be looked at is certain exemptions for smaller systems and rural systems who may not have the equality of bargaining power that the large MSO's some of the large companies that are now involved in the cable industry have.

Mr. KASTENMEIER. One of the difficulties, of course—and I am not arguing this from one position or another, but everyone understands that we are dealing with copyright concepts and communications policy.

Mr. WUNDER. Yes.

Mr. KASTENMEIER. They confront one another in this. And the parties, for example, the cable people, will say, "Well, if you want us to go to a free market, then of course if you want to get rid of this government interference, get rid of the 'must carry' prohibitions and all sorts of other regulatory prohibitions on us that vary from a free market."

Mr. WUNDER. Yes, there is some logic to that.

I would say that just as the changed circumstances with the repeal of syndicated exclusivity and the distant signal carriage rules have, amongst other things, been one of the trigerring factors for you and the Senate to take a fresh look at this, if you were to take action to move toward full copyright liability, I think that that issue of "must carry" would be an appropriate subject for the Telecommunications Subcommittee of the Commerce Committee to take a look at.

I draw a fairly clear distinction between "must carry" and what you are engaged in today. What you are engaged in today are copyright issues, and I think "must carry" is clearly a communications issue.

Mr. KASTENMEIER. I agree. I do not believe this subcommittee would deal with the "must carry" question other than to recognize that it does exist.

Mr. WUNDER. Yes.

Mr. KASTENMEIER. And perhaps the Communications Subcommittee would be importuned to deal with it depending in part on what this committee does.

Mr. WUNDER. I'm sure that's right.

Mr. KASTENMEIER. As I understand your position, while you have indicated a preference for going to the marketplace and ultimately a preference for full copyright liability, it is your position that at the present time there is not the sort of data and evidence to compel immediate action.

Mr. WUNDER. The data that you are searching for and that I believe you are asking me about, is data on harm. As a matter of fact, I don't think that harm necessarily has to be clearly established in order for one to urge, as a result of clear changes in the regulatory environment and other changes in the cable industry and the totally different environment now from 1976—I don't necessarily put those two together, that one has to have that.

I think you can look at this question and deal with it in terms of issues of Government regulation and price control and compensation and the ability for one to sell his product or his service in the marketplace.

Mr. KASTENMEIER. In other words, even though the question of harm is not clearly evident, notwithstanding that, we should feel free to move ahead.

Mr. WUNDER. Yes; that would be my view.

Mr. KASTENMEIER. But also you make some point—and I am not sure for what purpose—that there are distinctions between the rural areas and the urban areas in terms of cable. What the system and the viewer need is quite different in certain rural areas as opposed to others.

How are we to treat that? Are you suggesting that one not be subject to full copyright liability and the other be?

Mr. WUNDER. If you have an unaffiliated, small cable system in a rural area with a small number of subscribers, in that case the transaction costs may be high in a relative sense. I draw a distinction between that and a fairly large cable company in a larger area, or a cable company that is affiliated with a much larger company or a large MSO.

I can see where there may be a burden upon those smaller companies, but I make the point only to illustrate that there may be an inequality of bargaining position in that sense, and we have sort of our classic market failure type of thing.

In other situations I don't see that premise. I see that there is relative equality and ever-increasing equality of bargaining position between those in the cable industry and those that supply the programing.

Mr. KASTENMEIER. Where there is not an equality of bargaining position on the part, let's say, of the small rural system, what do you suggest we do in that case?

Mr. WUNDER. I think you should exempt them out.

Mr. KASTENMEIER. Exempt them out?

Mr. WUNDER. Yes.

Mr. KASTENMEIER. From the marketplace?

Mr. WUNDER. Yes.

Mr. KASTENMEIER. So philosophically we don't really reach them in terms of competition in the free market.

Mr. WUNDER. I don't——

Mr. KASTENMEIER. I say that would be an inconsistency philosophically.

Mr. WUNDER. It's an exception.

Mr. KASTENMEIER. An exception.

Mr. WUNDER. From the total-marketplace approach.

Mr. KASTENMEIER. Would you prefer under that scheme that they be exempted from any payment, or would they make a payment under a compulsory license?

Mr. WUNDER. Under a compulsory license.

Mr. KASTENMEIER. Under a compulsory license?

Mr. WUNDER. Yes; that's the point. They could have the programing, make some payment under the compulsory license, and avoid the transactional costs, and insure that the program was there.

Mr. KASTENMEIER. Mr. Wunder, you are in a position as head of the National Telecommunications and Information Agency to have some vision into the future. At least I'm sure that that is part of your task.

Do you see any technological changes in communications, whether it's with respect to satellites or with respect to programing or other developments, which we might take into consideration in possibly writing legislation for the next decade or so?

Mr. WUNDER. Clearly, I think, Mr. Chairman, what we will see is a continuing use and a greatly enhanced use of the technologies that we know about today. You have mentioned satellite technology and microwave technology. We see that ever increasing.

Hughes is going to come up with a satellite network with additional programing. We see a lot of new entrants using the new technologies. What we see is the use of the new technologies in the future.

Mr. KASTENMEIER. Does counsel have any questions?

If not, I thank you for your initial appearance before this committee. I do hope, Mr. Wunder, that there will be other occasions when you will be back for us to have the benefit of your judgment on public issue matters before us.

Mr. WUNDER. Thank you, Mr. Chairman. I enjoyed it.

Mr. KASTENMEIER. This concludes today's hearings. We will convene at 10 o'clock tomorrow, hopefully not to be interrupted so often, when we will have two witnesses, Ms. Barbara Ringer and Mr. Frank Mankiewicz.

The hearing is adjourned.

[Whereupon, at 12:25 p.m., the hearing was adjourned, to reconvene at 10 a.m., Thursday, June 25, 1981.]

PENDING COPYRIGHT LEGISLATION

THURSDAY, JUNE 25, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:30 a.m., in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, Sawyer, and Butler.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning is another hearing day of a series of hearings on pending copyright legislation. I am very pleased to have as our first witness the president of National Public Radio, Mr. Frank Mankiewicz, who has been a national figure. He was rescheduled for this morning, and we are grateful to him for accepting this second date.

Mr. Mankiewicz, you may proceed as you wish. We have your statement.

TESTIMONY OF FRANK MANKIEWICZ, PRESIDENT, NATIONAL PUBLIC RADIO

Mr. MANKIEWICZ. Thank you, Mr. Chairman. I appreciate the opportunity to appear here on behalf of the more than 250 noncommercial radio stations which are members of National Public Radio.

I believe the committee has my prepared statement, and I would hope that I could dispense with reading it and submit it for the record.

Mr. KASTENMEIER. Without objection, it will be received as part of the record, and you may proceed.

[The complete statement follows:]

PREPARED STATEMENT OF FRANK MANKIEWICZ

My name is Frank Mankiewicz. I am president of National Public Radio (NPR), and I am appearing before this subcommittee on behalf of NPR and its more than 240 member stations. NPR is a private, non-profit organization. Its member stations, predominantly FM, are supported by contributions from listeners, from the Corporation for Public Broadcasting and the National Endowments, and from private foundations and corporations. Each station pays annual dues to NPR to support its activities. In return, the member stations have access to 50 to 60 hours of NPR programming per week. On the average, about 25 percent of a member station's

weekly schedule will consist of NPR material. The local stations produce the rest of their programming themselves.

THE FACTS ABOUT CABLE RADIO

I am here today to discuss the retransmission of radio signals by cable systems. Cable radio service is provided in largely the same manner as cable television. The cable operator builds a large antenna capable either of receiving the entire FM spectrum ("all-band" reception), or of selecting specific radio signals that the operator wishes to retransmit ("select signal" carriage). Just as he can for television, the cable operator also may originate his own radio programming through original productions or satellite connections. The radio signals are sent through the cable to subscribers' homes. Radio service is installed in the home through a drop-wire off the cable. Many subscribers hook up cable radio to their stereo systems to get the best possible sound quality.

Cable radio offers several advantages to the subscriber. Compared to the ordinary off-the-air receiver, cable radio provides better reception and the ability to pick up signals from greater distances. Also, cable systems are beginning to offer original audio services.

This subcommittee may be surprised to discover the extent of cable radio service. NPR recently completed a survey of radio service offered by more than 250 cable systems in 1979. The survey shows that nine out of ten cable systems offer radio service to their subscribers. The survey results are even more striking when only the larger cable systems—those with revenues over $320,000 a year—are considered. All but one of the 65 larger systems in the survey carried radio programming. The survey also showed that 43.6 percent of all cable systems incur the extra expense of retransmitting radio on a select signal basis.

Plainly, radio has become an integral part of the package of services offered by cable systems. A good example is the radio service provided by Complete Channel TV Inc. of Madison Wisconsin. In a 1979 article, the Director of Engineering for that system reported that 1,400 of Complete Channel's subscribers were paying $1.75 a month for FM-radio service, generating over $30,000 a year income for the system. In fact, 23 of Complete Channel's subscribers received only the radio service, declining to pay for television. This official also explained that when he chooses radio signals to retransmit, he tries to offer the greatest possible diversity to subscribers. One of the radio stations carried by Complete Channel was WERN-FM, the NPR station in Madison.

NPR's programming is particularly appealing to cable systems. As the Carnegie Commission reported in 1977, most commercial radio stations—85 percent—offer one of five homogenized formats: "middle-of-the-road," country and western, Top 40, "beautiful music," and religious. Those stations are largely indistinguishable from stations in the cable systems' home communities. But NPR stations offer innovative news programming four hours each day, documentaries, dramas, social and economic analysis, fine arts and classical music shows, as well as programs for specialized audiences such as the handicapped, minorities and women.[1]

The demand for NPR on cable systems derives in part from the fact that only 60 percent of the country has a local NPR station. Moreover, because different NPR stations focus on different audiences and types of programming, a cable system can import several NPR signals without substantially duplicating the service to subscribers. Finally, the high quality of NPR's programs certainly augments its appeal to cable operators and subscribers.

For all of these reasons, as NPR's survey shows, over 63 percent of the cable systems offering radio retransmit NPR signals, while over 53 percent retransmit distant NPR stations. Projecting NPR's survey results over the 4,049 cable systems filing Statements of Account in 1979, about 2,000 of those systems retransmitted distant NPR signals. In addition, 69.2 percent of the larger cable systems carried distant NPR stations. In all, over 78 percent of the retransmissions of NPR signals

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[1] In the words of Newsweek, NPR "is pioneering a wealth of first-rate programming." The excellence of NPR's productions has brought international acclaim. In 1980, NPR was the first American broadcaster to win the Prix Italia for original drama, the most prestigious radio award in the world. When NPR's daily news programs "All Things Considered" and "Morning Edition" won the Alfred I. duPoint-Columbia University Award for 1979-80, the prize stated: "To its exemplary early evening series, 'All Things Considered,' National Public Radio has added 'Morning Edition,' a two-hour program equally imaginative and resourceful in its handling of news and public affairs. This three-and-a-half-hour daily commitment to quality journalism, the most intensive in network broadcasting, has earned National Public Radio its second Alfred I. duPoint-Columbia University Award."

were on a distant basis and half of the larger cable systems retransmit NPR on a select signal basis, investing in expensive equipment to do so.

RADIO CLAIMANTS UNDER THE COPYRIGHT ACT

These market realities, I believe, bear out the judgment of the 94th Congress that radio copyright holders are entitled to some share of the cable royalty fund. Section 111(d)(4)(C) of the Act directs the distribution of cable royalty fees to radio copyright owners as compensation for the distant retransmission of their works by cable systems. But the Copyright Royalty Tribunal ignored that mandate in the first distribution proceeding and denied any compensation to radio claimants. This error was partly due to the practical difficulties that peculiarly confront radio copyright owners in preparing a claim for the Tribunal. These practical problems can be cured by a straightforward revision of the Copyright Act itself.

The threshold problem facing radio claimants is a significant one: the official information that the Copyright Office requires from cable systems does not describe adequately their cable radio service. In Statements of Account filed with the Copyright Office, cable systems identify the television and radio signals that they retransmit. They do not disclose which radio signals are retransmitted on a distant basis, even though they do provide that data for television signals. Frequently, the Statements do not even identify the particular radio signals retransmitted, but report only "all-band" carriage, the retransmission of the entire FM spectrum. As a result, unlike television claimants, radio claimants must conduct expensive annual surveys of cable radio service to support their claims.

In attempting to conduct a survey, however, radio claimants encounter a second obstacle: the ambiguous definition of "distant" radion signals under the Act. The Act incorporates FCC regulations on service area contours to define local and distant signals. But two different such lines appear in the FCC rules for FM radio.[2] In contrast, the relevant FCC regulations for television provide a single, precise delineation of distant and local.[3] Radio claimants must establish their own workable definition of distant signals and the Copyright Royalty Tribunal then must sort out potentially confusing data.

Third, and most significantly, the Copyright Royalty Tribunal has been unable to set criteria for establishing the value to cable systems of distant radio signals, as compared to distant television signals. In last year's proceeding, now on appeal, the Tribunal declined to provide any compensation to radio claimants.

One way to ease these practical difficulties might be to require that cable systems identify on the Statements of Account all radio signals carried on a distant basis. Although this solution might make it easier for NPR to submit a claim, it would only shift to cable systems the administrative burden now borne by radio claimants. That burden could be substantial, since it is not unusual for a cable system to retransmit fifteen or twenty radio signals. This approach would not solve the problem of how to define distant and local FM radio signals, and the Tribunal still would face the task of dividing cable royalties between television and radio.

NPR SUPPORTS H.R. 3560

For these reasons, NPR supports the proposal in H.R. 3560 to earmark for radio a modest share of the royalty fund. This course would eliminate the need for intricate and nonproductive record-keeping by both cable systems and the government. The set-aside would obviate the need to redefine distant and local FM radio signals, a highly technical communications problem with many other ramifications. The result would be a proper recognition of the ownership rights of radio producers, combined with relief from substantial administrative burdens on claimants, cable systems, and the Tribunal.

H.R. 3560 does not now specify the share of the royalty fund that would be designated for radio. NPR proposes that six percent be set aside for radio claimants. In developing this proposal, NPR has considered several factors. As I noted before, the value of radio service to cable systems is clear from the simple fact that so many cable systems go to the expense and trouble of retransmitting distant radio signals. The NPR survey found that when cable systems levy an extra charge for radio service, that price ordinarily exceeds 15 percent of the television service charge. For example, the Madison, Wisconsin cable system I discussed earlier charged $8.00 a month for cable television and $1.75 a month for radio. Commercial syndicators of radio programming sell their product to cable systems for one cent

[2] 47 C.F.R. § 73.311.
[3] 47 C.F.R. §§ 76.57, 73.683.

per subscriber each month, while television syndicators sell theirs for 10 cents per subscriber each month. The six percent figure, as you can see, is on the low side of these yardstick measures. And other radio copyright holders—along with the music performing rights societies—could have claims on this radio share.

H.R. 3560 specifies that the radio portion of the royalty fund would be distributed as compensation for the creation of original programming rather than for the mere distribution of programs or material created by others. This is in accord with the direction of the House Report on the 1976 Act that "copyright royalties should be paid by cable operators to the creators of such programs." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976). By enacting a radio set-aside, Congress can ensure that the traditional protections of the copyright laws are available to the creative talents working in radio today.

APPENDIX

In preparation for the cable royalty distribution proceeding for 1979, NPR surveyed the radio service of 250 cable systems. The raw data came from the Statements of Account filed with the Copyright Office by cable systems. Those Statements record whether a cable system offers "all-band" radio service, which involves the installation of a single large radio antenna that picks up all available signals for retransmission, or "select signal" carriage, which involves the erection of antennae designed to receive only specific frequencies.

The Statements of Account, however, do not reflect whether the retransmitted radio signals are of distant or local origin. Based on the FCC's regulations for defining the "primary service area" for radio stations, NPR defined a distant FM signal as one originating from beyond the one millivolt contour.[1] The following tables report the results of the survey:

TABLE 1.—OVERALL CABLE RADIO CARRIAGE

	Total	Percent
Number of cable systems in sample	257	100.0
Sample systems with radio service	228	88.7
Sample systems carrying radio on "select signal" basis	112	43.6

TABLE 2.—CABLE SYSTEMS RETRANSMITTING NPR SIGNALS

	Total	Percent
Cable systems carrying	228	100.0
Cable systems carrying radio retransmitting NPR signals	148	64.9
Cable systems carrying radio retransmitting distant NPR signals	125	54.8

TABLE 3.—RADIO SERVICE OF LARGER CABLE SYSTEMS [1]

	Total figures	Percent
Larger cable systems sampled	65	100.0
Large cable systems with radio service	64	98.5
Larger cable systems carrying NPR signals	55	84.6

[1]The Copyright Act specifies that "local service area" is the "primary service area" as defined by the FCC. 17 U.S.C. § 111(f). That term is defined by the FCC with respect to AM stations as "the area in which the ground wave is not subject to objectionable interference or objectionable fading." 47 C.F.R. § 73.11(a). Although no such definition directly applies to FM broadcasters, the House Report accompanying the 1976 Copyright Act (H.R. Rep. No. 94-1476, 94th Cong., 1st Sess. at 100) refers to FCC regulation 47 C.F.R. § 73.311 as defining "primary service area" for FM stations. But that rule simply requires that FM licenses specify two field strength contours for their signal: the 70 dBu (3.16 mV/m) and the 60 dBu (1 mV/m, or "one millivolt") contours. The one millivolt contour is most closely analogous to the Grade B Contour for television stations that divides local and distant television service under the Copyright Act. See H.R. Rep. No. 94-1476, supra, at 100; 47 C.F.R. §§ 76.65, 73.683. Consequently, NPR has used the one millivolt contour in analyzing the survey results.

TABLE 3.—RADIO SERVICE OF LARGER CABLE SYSTEMS [1]—Continued

	Total figures	Percent
Larger cable systems carrying distant NPR signals	45	69.2
Larger cable systems with select signal radio service	38	58.5
Larger cable systems with select NPR	31	47.7

[1]The larger systems are those that have to file a "Form 3" with the Copyright Office, and are defined as those systems with annual revenues of over $320,000.

TABLE 4.—RETRANSMISSION OF NPR SIGNALS

	Total	Percent
Instances of retransmission of NPR signals	219	100.0
Instances of distant retransmission of NPR signals	172	78.5

TABLE 5.—*Charges for radio service*

Sample cable systems levying monthly charge for radio service	[1]32
Average monthly charge of those systems for radio service	$1.55
Average monthly charge of those systems for television service	$6.97

Average radio charge ($1.55) divided by average television charge ($6.97) equals 22 percent.

[1]Many cable systems charge for radio service the price specified for a "second-set" for television service. Because those charges are not officially identified as for radio service, they could not be included in this sample.

SUMMARY OF PREPARED STATEMENT: RICHARD N. LYNESS

1. INTRODUCTION

Richard N. Lyness is founder and a principal in Pay/Cable Associated, a management and marketing consulting firm specializing in providing services to companies in the cable and pay television industries.

2. CABLE RADIO SERVICE

Cable radio service is provided in much the same manner as cable television service. The operator erects a large antenna capable of receiving the entire FM spectrum ("all-band" reception) or several antennae directionally oriented to receive specific signals which the cable operator wishes to retransmit ("select signal" carriage). Because of the size and location of these antennae, the cable system is able to receive and retransmit distant signals which may be unavailable to its subscribers through off-air reception. Some cable systems also use microwave systems and/or satellite receivers to overcome long distances or terrestrial barriers to off-air reception.

Just as a cable operator can originate television programming, it may also develop nonbroadcast radio programming, utilizing original productions, purchased packages, and/or satellite connections. In contrast to the large number of basic and pay video program services for cable—such as Entertainment and Sports Program Network, Cable News Network, USA Network, C-SPAN, Home Box Office, showtime, the Movie Channel and numerous others—there are few national sources of audio programming for cable other than broadcast signals. While communities have often required cable systems to provide active local access and production capability for video, few if any systems have been required to develop local audio origination. As a result, virtually all audio programming on cable consists of the retransmission of radio broadcast signals. Although new nonbroadcast sources are being developed, these services will likely remain an extremely small percentage of cable radio for the foreseeable future.

Radio signals are sent through the cable to subscribers' homes. Radio service is installed in the home through a drop-wire off the cable. Many subscribers hook up

cable radio to their stereo systems to receive high quality stereo reception. Generally, radio signals can also be received through the television drop-wire, although cable operators may attempt to prevent this with filters, signal traps, and other devices.

3. CABLE CARRIAGE OF RADIO

Cable retransmission of radio signals is already quite extensive, and cable radio and audio carriage are still growing. At a minimum, most cable systems carry all-band FM or selected signals received at the cable head-end, offering subscribers FM reception which is generally superior to that available to them over-the-air. Among the newer systems offering 35 or more video channels, radio carriage is nearly universal, and the carriage of distant signals obtained via microwave and satellite is becoming common. As is noted in Section 5, Indicia of the Value of Radio, there is ample evidence that the cable industry has invested significant resources to obtain and deliver radio services.

Precise subscriber figures for audio services are impossible to obtain without a major direct research effort. Many systems include radio retransmission in their basic package, and therefore do not keep separate records of audio subscribers. Others do not distinguish in their records between second television set connections and radio connections, labelling both "second outlet" fees. Even in systems which offer a discrete tier for radio services, many households are able to use the service without paying for it, by running a wire from the television cable connection to an FM receiver.

The conclusion that there is widespread cable radio carriage is, however, confirmed and supported by interviews with staff members of the Federal Communications Commission's Cable Bureau, franchising consultants, and managers and executives with many of the country's largest cable Multiple Systems Operators (MSO's). Steven Yelverton is the Chief of the Microwave Branch of the Cable Television Bureau of the FCC, and is responsible for reviewing and approving applications for microwave frequencies and systems used by cable operators to carry video and audio signals from their receiving antennae to head-end distribution points. It is his observation that virtually every cable system offering more than 30 channels carries FM signals.

The principals of two of the leading firms providing consulting services to communities considering or awarding cable franchises—Archer Taylor of Malarkey, Taylor and Associates and Howard Gann of the Cable Television Information Center—both confirm that the provision of distant and local radio signals is now a standard feature of nearly all municipalities' requests for proposals from cable systems.

Interviews with programming or operations executives at many of the largest cable MSO's, including American Television and Communications, Teleprompter, Community Telecommunications, Warner-Amex Cable Communications, Cox Cable, Times-Mirror Cable, Viacom, Storer Cable, Sammons Communications, and UA Columbia Cablevision, demonstrate extensive radio carriage by their systems. These interviews reveal that, while decisions regarding which radio signals are carried are generally made at the local level, the majority of systems owned by these companies offer radio carriage. Few of these companies keep close track of the extent of radio carriage in their systems; none were able to estimate the number of audio subscribers in their systems, or state the revenues derived from audio carriage. All confirmed, however, that radio carriage is a standard feature of virtually all "new build" systems.

Interviews with individual system operators further indicate that quality, diversity, convenience and cost are the primary criteria used by local operators in deciding what radio signals to carry. Generally, systems carry stations on a "select signal" basis from outside the local market if they offer formats that differ from those available locally or are dominant stations from nearby markets.

4. CASE STUDIES

To provide an understanding of the different approaches to radio carriage among cable systems, several systems that carry radio were studied. This study was not intended to be representative of all cable systems. Rather, it was intended to describe a variety of systems that carry radio in different markets.

a. Gill Cable, Inc., San Jose, Calif.

San Jose is a city of more than 200,000 households, located roughly 40 miles south of San Francisco, in the country's fifth largest television market. More than 50 off-air Bay Area radio signals can be received in the community.

Despite the ready availability of these off-air signals, Gill Cable has experienced considerable success with its audio tier. Gill's "Three G Sound Around" service consists of 30 off-air FM signals, and stereo sound for its pay-cable movie channel. Distant NPR station KQED-FM, San Francisco, and distant Pacifica station KPFA, Berkeley, are carried on the service. Gill charged each of the radio stations, except the noncommercial stations, $500 to be carried by the system.

The service is marketed by Gill as a second in-home outlet, with an installation fee of between $24.95 and $39.95, and a monthly fee of $3.75 over the systems $12.35 basic cable fee (in 1979, these figures were $2.50 and $9.35 respectively). Approximately one-fourth of Gill's 80,000 subscribers take the second outlet, and the system estimates that half of these customers do so to receive the FM service. The system's marketing vice president reports that the audio service has been particularly useful in enhancing the system's appeal to subscribers, especially before it added new pay and satellite video services.

b. McPherson CATV, McPherson, Kans.

McPherson is a community of roughly 4,700 households in Central Kansas, 60 miles north of Wichita, the 61st TV market. Cable penetration in McPherson is slightly less than fifty percent. The town is served by one AM Middle-of-the-Road station, and one Beautiful Music FM station. Stations available from surrounding communities include three Top 40 formats, two Beautiful Music, two Centemporary, one Middle-of-the-Road and one Religious station.

McPherson CATV offers an FM audio service consisting of 13 off-air signals, including distant Wichita public radio station KMUW which is carried on a select signal basis. About 15 percent of the system's subscribers pay the $20.00 installation fee necessary to receive the audio service. There is no monthly fee for the service, which is included in the $6.95 basic cable charge. The system manager cites particularly good feedback from these subscribers regarding station KMUW, which is the only source of classical music in the market, and the only station that "focuses on serving a mature audience."

c. Muskegon Cable TV, Muskegon, Mich.

Muskegon is a community of about 42,000 households, located 45 miles north of Grand Rapids, Michigan, the 40th television market. Cable penetration in the community and the surrounding areas served by Muskegon Cable is 60 percent. The community is served by four AM and three FM stations; two Religious, two Country, one Middle-of-the-Road, one Beautiful Music, and one Contemporary. Muskegon has no public radio station.

Muskegon Cable TV offers 22 select audio signals for an installation fee of $10.00 and a monthly charge of $1.25 over the $6.95 to $7.95 basic rate (in 1979, the radio rate was $1.00). Among the stations retransmitted are two distant NPR stations, WMUK, Kalamazoo, and WKAR, East Lansing, Michigan, which is imported via microwave. The system manager commented that he imports WKAR because subscribers have requested it; WKAR is the system's major source of classical music programming. About 500 of Muskegon Cable's 25,000 basic cable subscribers take the audio service.

d. Total Television of Amarillo, Amarillo, Tex.

Amarillo is the 123rd television market, with 144,000 households and a cable penetration of 49 percent. Total Television serves a franchise area of about 53,000 homes in Amarillo and surrounding areas in Potter and Randall counties. Amarillo is served by six AM and five FM stations; four Country, three Top 40, one Contemporary, one Beautiful Music, one Rock, and one Religious. There is no public radio station, no classical station, and no significant news or public affairs coverage on radio.

Total Television offers eight select distant radio signals, including public radio station KERA-FM, Dallas, and classical station WFMT. It also retransmits seven local stations. The service is provided without additional charge above the $6.95 basic cable fee. Approximately 9,700 of the system's 30,000 basic subscribers pay $2.00 per month for a second outlet; a majority of these, the system believes, are used for FM service. The system incurs microwave charges of $70.00 per month for each of the seven distant signals imported from Dallas.

e. Cablecom of Modesto, Inc., Modesto, Calif.

Modesto is on the fringe of the Sacramento/Stockton market, the 22nd largest television market. Nearly 60 percent of the community's 40,000 households subscribe to cable on the local Cablecom system. Modesto is served by five AM and four FM commercial stations, including two Top 40, two Beautiful Music, two Middle-of-

the-Road, two Country, and one Religious/Spanish station. There is no public radio station in Modesto.

Cablecom offers its subscribers an audio tier with 24 FM channels. Included among 10 local signals offered is NPR station KUOP in Stockton. Pacifica station KFPA, Berkeley, is included among the distant signals offered by the systems, as well as the satellite-delivered Chicago classical station, WFMT.

More than 8,000 of Cablecom's 23,000 subscribers now pay a fee of $.50 per month over their $6.95 basic cable fee for the audio service. Although the number of basic cable subscribers has remained relatively stable over the past two years, the number of audio subscribers has increased substantially, from 2,588 out of 22,000 subscribers in 1979.

f. Complete Channel TV, Inc., Madison, Wis.

Madison is the 195th television market in the country, with 191,000 households and a cable penetration of 21 percent. The market is served by four AM and four commercial FM stations: two Top 40, two Beautiful Music, two Middle-of-the-Road, one Country, one Oldies, one Contemporary, and one Progressive. There are four noncommercial radio stations in Madison, including public radio stations WHA-AM, one of the country's first radio stations, and WERN-FM.

Complete Channel offers 35 FM and other audio signals to about 70,000 homes in its franchise area of Madison and surrounding areas in Dade County. These signals include both local public radio stations. In addition, it imports two radio signals via microwave.

In 1979, 1,400 of the system's 27,000 subscribers paid $1.75 per month over their $8.00 basic cable fee for the adio service. The system manager indicates that the number of audio subscribers has now grown to between 2,000 and 3,000. He also indicates that public radio plays a significant role in the appeal of the radio offering, due to the receptiveness of Madison consumers to cultural and classical music programming.

g. Texas Cablevision, San Angelo, Tex.

San Angelo is the 194th television market, with 33,000 households, and 59 percent cable penetration. The community has four AM and four FM commercial stations: three Country, two Top 40, one Middle-of-the-Road, one Beautiful Music, and one Spanish. There is no public radio station in San Angelo.

Texas Cablevision aggressively markets an audio tier which consists of 19 select FM and audio channels, including public radio station KERA-FM, Dallas, and satellite-delivered WFMT. KERA and six other distant Dallas stations are delivered to the system by microwave at a cost of roughly $35.00 per station per month. The audio service, called "Musical Theatre Plus . . ." is provided as part of the basic monthly charge of $8.00. Approximately 40 percent of the system's 20,000 subscribers pay $1.50 a month for second outlets; the system estimates that 30 percent of these subscribers use this outlet for FM reception.

KERA was added to the service in January 1981. Texas Cablevision's office personnel received frequent requests for the service from subscribers who received the KERA-FM program schedule by contributing to KERA-TV, the Dallas public television station. Since the KERA-FM, WFMT, and other services were added to the audio tier, Texas Cablevision has installed new FM outlets at a rate of roughly 50 subscribers per month.

5. INDICIA OF THE VALUE OF RADIO

Evidence of radio's value to cable systems is provided, in part, by the existence of several commercial audio distribution services, although, as noted above, nonbroadcast services are not as common in audio as in video.

a. Classical music station WFMT, Chicago is distributed by United Video via Satcom I, Transponder 4. Cable systems pay 1 cent per month per subscriber for this service. This compares to 10 cent per month for distribution of television station WGN, also carried on Satcom I by United Video. Cable systems which carry WFMT must also invest in approximately $4,700 worth of reception and head-end equipment. In 1979, United Video had 24 affiliates serving 276,000 subscribers; there are not 65 cable systems carrying WFMT, serving more than 500,000 subscribers.

b. Seeburg Radio's Lifestyle Service is a 24-hour, young Middle-of-the-Road instrumental music format, without commercials, sold to systems for use as background music for automated data and information television channels. It is carried by United Video on Satcom I, at a charge of between $40.00 and $100.00 per month, based on a rate of 1 cent per subscriber. The service began in March 1981, and has 10 affiliates with 40,000 subscribers.

c. Cable Radio leases hardware and programming in four formats, Classical, Country, Beautiful Music, and Rock, at a cost of $7,200 per year for all four services.

d. Cable Music Works, a service of Video Data Systems, provides reel-to-reel and cartridge tape playback units with automated program controllers in Easy Listening, Pop, and Country formats for $300 per month and about $10,000 in hardware costs.

The value of radio to cable operators is also reflected in the hardware costs associated with radio retransmission. All-band reception requires an omnidirectional antenna, costing approximately $500, plus amplifiers and filters totalling another $200 to $300. For select signal carriage, a cable system will typically erect one or more directional antennae, costing between $200 and $800, and a fix-tuned receiver with modular components for each signal retransmitted, at a cost of between $200 and $300 per station. Investment in equipment needed to receive signals via microwave and satellite ranges from about $1,200 to $5,000. Microwave transmission fees range between $35 and $200 per month for each station received.

6. INDICIA OF THE VALUE OF PUBLIC RADIO

Discussions with cable operators indicate that public radio is an attractive audio product. Because public radio stations generally offer a distinct alternative to the readily available commercial radio formats, operators may be more inclined to carry them on a "select" signal basis. Public radio stations also differ from and complement one another. Thus, a cable system may choose to import a distant public radio station even where one is already available in the local community.

The public radio station audience is broad, diverse, and loyal. A recent Simmons survey indicates that this audience includes a range of occupational groups, including those engaged in manufacturing, industrial, and trade as well as white collar occupations. A third have incomes of less than $15,000. A significant segment of the public radio audience is upscale and highly educated. The public radio audience, though varied, is attracted largely by NPR's cultural and informational programming. This is the same audience sought by cable operators when they transmit one of the four new video services specifically targeted to "cultural" audiences. These include:

ARTS.—An advertiser-supported basic cable service offering "a wide spectrum of cultural programming from theatrical productions to shows focusing on sculpture and gourment cooking." Launched by ABC and Warner Amex, the service has already gained 700 cable affilitates.

CBS Cable.—An advertiser-supported basic cable service featuring music, dance and drama. The service will be launched in October 1981.

RCTV/The Entertainment Channel.—A service which will combine corporate sponsorship and subscriber fees, and feature BBC product, original American performance productions, and special interest films. The service will be launched by RCA and Rockefeller Center in early 1982.

Bravo!—A pay cable cultural program service offered to cable systems at between $3.15 and $3.95 per subscriber per month. The service includes performance, "behind the scenes" perspectives on events and performers, and calendars of upcoming cultural events. Launched in December 1980, the service gained some 40 affiliates and 100,000 subscribers as of May 1981.

Each of these services is aimed at the well-educated consumers who are also represented in NPR's audience. In addition to the obvious revenue benefits which will accrue to the cable systems if these services are successful, their proponents claim that serving this audience will gain other tangible benefits for the cable operator, benefits which can also be gained by carriage of public radio:

"Subscriber lift".—Audiences for cultural and performance programming are often otherwise "light" TV viewers who find cable's conventional mix of sports, movies and traditional broadcast retransmission of limited appeal. The addition of cultural programming to the cable system's offerings may allow it to gain subscribers among a segment which would otherwise be unreceptive, or marginally receptive, to its marketing approaches.

Good will.—Community leaders often expressly support cultural programming. Such cultural services may have more relative impact and appeal among leaders and opinion-makers. When operators are submitting franchise proposals, or applying for renewal or rate increase, the inclusion of cultural programming in the system's offerings may favorably influence public perceptions.

Subscriber retention.—The inclusion of cultural programming and other services which are available on a limited basis in traditional broadcast channels should increase subscriber satisfaction and enhance subscriber loyalty.

To the extent that public radio attracts the same audience—and the Simmons survey shows that public radio has a diverse audience of "cultural" consumers—public radio clearly offers cable operators a parallel set of benefits. The quality and diversity of programming which have become the trademarks of public radio make public radio a valued service for cable systems.

Mr. MANKIEWICZ. And if I may, Mr. Chairman, just to touch a couple of the major points that are in it, we are—NPR—a broadcaster, perhaps the largest single producer of original radio programing, with more than 250 members stationed in local communities across the country.

We produce more than 2,500 hours of regular programing a year. By "regular programing" I mean our basic core schedule, and to that is added special events as they come along, whether they are congressional hearings or presidential press conferences, or some event that requires coverage all day, or a tragic event such as an assassination attempt, or inauguration of a President, or the return of hostages, and national Democratic and Republican conventions. So we have more than 2,500 hours and we think that marks us as the largest single producer of programing.

Cable radio programing is something you don't hear much about, but over 90 percent of all cable systems have an audio component. It hooks up easily with a wire off the cable, and many of the cable systems require extra payment for it. Many subscribers, to what is basically a cable television system, pay extra for the radio component of that system. Nine out of ten cable systems offer radio, primarily retransmitting broadcast signals, although some transmit originally produced signals.

National Public Radio, we think, offers—and indeed the record seems to show—some of the most attractive radio signals, the ones we produce and broadcast through our member stations for retransmission. In 1979 about 2,000 cable systems retransmitted NPR signals on a distant basis, showing the rapid growth of cable radio.

The percentages are even higher for the larger cable systems, and the reason is because we think our stations carry different kinds of programing. Eighty-five percent of stations offer the same five formats, and often those are the only formats that are available in many communities. The NPR station offers a different format, whether it is serious in-depth news and public affairs or some type of music, whether classical, jazz, or other that is not offered in the local format.

We have a copyright problem. The statute, we believe—and I think the language is pretty clear—gives radio certain rights. The Copyright Royalty Tribunal initially in the 1978 hearings gave us an award and then, under circumstances that remain to be explored by the court of appeals, took it away with no explanation, although there was some reference to a hearing although not one to which we had been invited. So we are contesting that. But in any event the Tribunal did not, although we think in spite of the language of the statute, give it to us.

We think there are a couple of reasons for that. We think it was difficult practically because the definition of distant and local signals is unclear under the statute for radio, although clear for television. And, second, the reporting requirements, the statements of account required, are limited to cable systems with respect to radio.

And we think there are other reasons, too, namely, there was a very difficult choice to be made by the Tribunal, and it simply determined, for whatever reason, not to make that choice, and we hope that Congress will make it instead.

We believe that the law provides that radio copyright holders as well as television copyright holders are covered by the compulsory license language. We think the language is clear. The purpose of that license is to assure broad dissemination. We believe that the evidence shows that cable operators value the radio component highly; their listeners value it. There is money spent to deliver it and money spent to receive it. And we believe we should not be in the position of in effect giving away our programs, for which we do hold a copyright, to cable systems with no compensation.

We are here in behalf of what we believe is a modest amount of money, a 6-percent set-aside for all radio copyright owners. We believe that would eliminate the need for intricate and nonproductive recordkeeping, particularly for our radio stations which are necessarily, by reason of their license, noncommercial, and therefore find it even more difficult to maintain the work force and other requirements that would be necessary to keep these records. These surveys are expensive, in any event.

We think the size of the radio share, as I said, is modest. We have evidence to show that separate charges by cable systems average 15 to 20 percent of the television service charges, and we think our request is substantially under that. Commercial syndicators of radio programing sell their product to cable systems for 1 cent per subscriber each month, while television syndicators sell theirs for 10 cents per subscriber each month. So we are below both of those and we think it's a reasonable figure.

The rest of my testimony, Mr. Chairman, is contained in the statement that I filed. It has the evidence attached to it on which we rely, and I would be happy to answer any questions you may have.

Mr. KASTENMEIER. Thank you very much.

Typically, are the radio signals retransmitted by cable systems those derived within 50 or 60 miles, that is, within a distance in which a local radio receiver could receive more or less the same signals?

Mr. MANKIEWICZ. They are both, Mr. Chairman. Some cable systems merely distribute the local radio signals, those that would be available to a reasonably strong radio receiver in the community served by the cable system. That is the so-called all band reception. And they take all the signals and enhance them, and there is slightly better reception. But many of the systems bring in distant signals that are not otherwise available, and those are, for the most part, NPR signals.

Mr. KASTENMEIER. I take it they are on a regularly scheduled basis.

Mr. MANKIEWICZ. Those are regular stations, yes. National Public Radio stations are on the air at least 18 hours a day.

Mr. KASTENMEIER. And it is typical for a cable—I am not familiar with transmitting the radio signal on cable—it is typical for them to transmit the same band on a regular basis, the same selections, or is it hit-and-miss?

Mr. MANKIEWICZ. No, the signals are the same.

Mr. KASTENMEIER. Each day?

Mr. MANKIEWICZ. Each day. Precise figures, Mr. Chairman, are that over 53 percent of all cable systems retransmit distant National Public Radio signals. That is a high figure. In other words, more than half of the cable systems offer National Public Radio stations that are not available in the community of the service.

Mr. KASTENMEIER. It is, of course, not our purpose to redebate matters that have been previously testified to and that are pending before either the Copyright Royalty Tribunal or one of the courts, but to some extent I gather your questions have been pending either before the Tribunal or a court.

Mr. MANKIEWICZ. We made a case before the Tribunal based on the 1979 figures, received a tentative award from the Tribunal, which then disappeared between the preliminary statement and the final opinion. We have appealed that in the court of appeals.

The problem there in part was a question of evidence, because with the way the law is presently written it is very difficult to determine the extent of distant transmission of radio signals, whereas it is easy to do it with respect to television. And part of that is involved before the Tribunal again this year.

Mr. KASTENMEIER. How did you settle on the figure 6 percent? Is that an arbitrary figure?

Mr. MANKIEWICZ. There are elements of arbitrariness in it, yes, necessarily, although what we have done is to take certain measurements that we think make sense, for example, as I mentioned in my testimony—I'll get the precise figures here.

When cable systems levy an extra charge for radio service, as a great many of them do, that price ordinarily exceeds 15 percent of the television service charge. So that that is one measure, 15 percent.

For example, just at random, the Madison, Wis. cable system charges $8 a month for cable television and $1.75 a month for radio.

Another measure might be that commercial syndicators of radio programing sell their product to cable systems for 1 cent per subscriber per month while television sells it for 10 cents per subscriber per month. That would seem to establish a 10 percent yardstick. Our 6 percent is on the low side of both of those measures. But it is to a certain extent an arbitrary figure. But we have deliberately placed it below what we think are reasonable measurements.

Mr. KASTENMEIER. I take it that since you are a proprietor of programing, and have special evidentiary problems, you feel it is appropriate in this area, given the problems the Tribunal has, as a policy matter to allocate what you call a set-aside for public radio and therefore obviate the difference you have in proving a percentage for entitlement.

Mr. MANKIEWICZ. We think so, Mr. Chairman. We think we solve a lot of problems, including the one to which you refer, which is the extraordinary difficulty of the smaller stations in going through all these transactions and recording them and the difficulties the statute imposes. The statute can be reformed to require the cable systems to list in more detail the transmission of radio programs. It would take the burden off NPR and its stations but

simply place the same burden on the cable operators. We think the proposal we have offered would simplify the administrative procedures and save both sides an extraordinary amount of time and money and other investment.

Mr. KASTENMEIER. My last question is: Since the set-aside would affect all radio, public as well as commercial, how would 6 percent or any other percent be allocated among the stations? In the case of public radio would it go to a fund or foundation, either to CPB or NPR or some other organization?

Mr. MANKIEWICZ. We think there is a reasonable way to make that division. There is very little commercial radio that is retransmitted in terms of a distant signal, the reason being that most commercial radio is the same in terms of format in each community. So we don't think that that would be a difficult matter. We think it would be easy enough to agree from the evidence that is available on that division. It certainly would not all go to National Public Radio—by no means.

Then the division between the national production source and that of our local stations we think could be determined even more easily.

Mr. KASTENMEIER. I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I am wondering, Mr. Mankiewicz, if you have any idea what percentage of the National Public Radio would be carried by distant signal compared to other commercial radio. Do we have any idea at all?

Mr. MANKIEWICZ. I'm sorry. Would you repeat that?

Mr. RAILSBACK. Yes. I am asking what would be the percentage of National Public radio compared to other commercial radio programs carried by cable?

Mr. MANKIEWICZ. In terms of total hours?

Mr. RAILSBACK. Yes, in terms of total hours or any comparable relevant statistics.

Mr. MANKIEWICZ. Well, we have some statistics. I am not sure we have that precise one, but I think we could probably find it. We know that all the large cable systems carry radio. We know that 43 percent of them retransmit radio on a select signal basis.

Getting further down, we know that 63 percent—maybe this is getting close to an answer—of the cable systems which offer radio retransmit NPR signals, and that over 53 percent of them transmit distant NPR stations.

Mr. RAILSBACK. What was the last figure?

Mr. MANKIEWICZ. Fifty-three percent of the cable systems which offer radio, which is almost all of them, retransmit distant NPR signals.

Mr. RAILSBACK. OK.

Mr. MANKIEWICZ. Sixty-nine percent of the larger cable systems carry distant NPR signals.

Mr. RAILSBACK. All right. So I guess what I am wondering is if radio was allocated a 6 percent figure, what percentage of that would likely go to public radio? You may not have the answer.

Mr. MANKIEWICZ. And what percent to commercial?

Mr. RAILSBACK. Yes, exactly.

Mr. MANKIEWICZ. I think the figures suggest that it would be something on the order of two-thirds to one-third.

Mr. RAILSBACK. Public radio over the other?

Mr. MANKIEWICZ. Yes.

Mr. RAILSBACK. And the reason for that is because of your unique format and programming.

Mr. MANKIEWICZ. Exactly, the reason being that as between two markets—not intending to be disrespectful to our commercial colleagues, but there is very little in a radio signal in market 1 that is not available in market 2 in terms of format. And it doesn't make a lot of sense to retransmit a country and western station, let's say, from Denver to Boise.

Mr. RAILSBACK. I see.

Then the other likely groups that would have a claim, as you have indicated in your statement, would be the performing arts groups.

Mr. MANKIEWICZ. That is right.

Mr. RAILSBACK. BMI and ASCAP.

Mr. MANKIEWICZ. That is right.

Mr. RAILSBACK. And they would have a claim on some of your programing——

Mr. MANKIEWICZ. Exactly.

Mr. RAILSBACK [continuing]. As well as some of the commercial.

Mr. MANKIEWICZ. That is correct, sir. I would add that there is another reason for the edge in favor of public radio as to the retransmission, and that is that we do far more original programing than the commercial stations, which for the most part broadcast recorded music. We do live concerts, we do drama, we do an extraordinary amount of news, public affairs, and a lot of different kinds of music.

It is true also that the music copyright holders would share in that, although again the bulk of our music is public domain music.

Mr. RAILSBACK. Does your 6 percent reflect—I am aware that you had to do it with certain available information—but does it reflect the fact that some cable does not retransmit radio? Did you take that into account?

Mr. MANKIEWICZ. It does, sir, although that is a very small amount.

Mr. RAILSBACK. Particularly by the larger ones. The larger cables almost all retransmit radio.

Mr. MANKIEWICZ. Ninety percent of all cable systems, 9 out of 10 cable systems, and all but 1 of the 65 larger systems. But we did take that into account. But it represents a relatively small discount.

Mr. RAILSBACK. Let me ask you this, which may be very naive, and if so, I plead guilty to being naive.

The Copyright Royalty Tribunal, it is my recollection, in the claim of the broadcasters, awarded a fairly small percentage to the broadcasters—I believe one-third. Maybe it did not include radio at all. Did it include radio?

Mr. MANKIEWICZ. No.

Mr. RAILSBACK. And the percentage there was something under 4 percent.

Mr. MANKIEWICZ. I think it was 3 percent. That is my recollection.

Mr. RAILSBACK. I think that's all. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I have just one question. What are the five formats used by stations which you mentioned?

Mr. MANKIEWICZ. Is it not mentioned in the statement?

Here they are: Middle of the road—MOR, as the jargon has it. Again not to disparage elevators or dentists offices, but it is the kind of music you hear there——

Mr. BUTLER. Up and down.

Mr. MANKIEWICZ. Yes. Country and western is the second.

Top 40, which is self-explanatory.

So-called beautiful music—which is a little more lush and toward sort of the middle-brow classic from middle of the road.

And religious.

Then there are other categories, but those are the ones that make up 85 percent of the formats.

There is a variant of the top 40 or rock, which is album-oriented rock, which is one with longer selections and fewer vocal interjections.

But basically those are the formats: Rock music, top 40, religious, country and western, so-called beautiful music which is sort of Montovani and that category, and then middle of the road which is——

Mr. SAWYER. Nitrous oxide.

Mr. MANKIEWICZ. In a manner of speaking.

Mr. KASTENMEIER. These five formats all involve principally music?

Mr. MANKIEWICZ. They all involve music, yes.

Mr. KASTENMEIER. Because it is possible to have religious programing——

Mr. MANKIEWICZ. No, the religious is music. It is gospel or a straight religious music program. Those five combine to make up 85 percent of the commercial radio band.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman. I won't take but a minute and I apologize for being late.

What portion of your funding is public funds?

Mr. MANKIEWICZ. In the public radio system the public funds are slightly less than—about 30 percent. I would say slightly less than a third. And from all appearances, that appears to be a declining rather than increasing figure.

Mr. BUTLER. You are perceptive. [Laughter.]

Mr. MANKIEWICZ. For 1983 and, I assume, for 1984 and beyond, that number—the upper limit is lower than the present figures.

Mr. BUTLER. If you got a 6 percent slice of the royalty fund——

Mr. MANKIEWICZ. That is the proposal; yes.

Mr. BUTLER. Would that replace the public funding?

Mr. MANKIEWICZ. Oh, no. It is not a very large figure. The total amount that is under consideration here I think this year is around $12 million. Six percent of that would be somewhere around $700,000 of which, I assume, commercial radio would take perhaps a third, the copyright music holders would take some more

of that, and public radio might look to some perhaps $300,000, perhaps something in that range, which doesn't begin to replace the reductions in public funds.

We are looking to other and far more varied sources to try to replace those funds, Congressman.

Mr. BUTLER. Yes, I understand that.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. One last question, Mr. Mankiewicz.

You do not analogize radio with television, that is to say, to the extent local signals retransmitted might not be entitled to a copyright return on a "must carry" basis, but the distant signals ought to be. Do you have the same sort of configuration in mind?

Mr. MANKIEWICZ. We are talking about retransmission of distant signals; yes.

Mr. KASTENMEIER. Retransmission of distant signals. And if the cable were just retransmitting local signals, even enhanced as they might be, that would not be of any concern in terms of liability?

Mr. MANKIEWICZ. That is right.

Mr. KASTENMEIER. Thank you very much for your appearance here this morning.

Mr. MANKIEWICZ. Thank you.

Next the chair would like to call an old friend of this committee, a person who has been here many times. Undoubtedly I think it could be said no one in the country is more well informed and has had more responsibility for copyright laws than our next witness, Barbara Ringer, former Register of Copyrights in the Library of Congress.

Welcome back.

TESTIMONY OF HON. BARBARA RINGER, FORMER REGISTER OF COPYRIGHTS

Ms. RINGER. Thank you, Mr. Chairman.

Mr. Chairman, I am Barbara Ringer, former Register of Copyrights in the Library of Congress and currently of counsel to the firm of Spencer & Kaye here in Washington. For many years before my retirement from the Copyright Office in 1980 I was actively involved in the development and drafting of the Copyright Act of 1976. After enactment of the new law in October 1976, I was the official with responsibility for developing regulations and procedures that the Copyright Office was required to provide under the statute. It is an honor for me to be invited to appear here and to answer your questions to the best of my ability.

Of the various copyright issues now being considered by your subcommittee, I simply have no doubt that the most difficult and urgent is that of cable television, and for that reason I have limited my written statement to that subject. But, of course, I will be most happy to answer questions on any other subject that you care to raise.

I am not going to read my entire statement, Mr. Chairman, but I would like to speak from it at some length because I do have a proposal to advance.

It does seem to me that we are at a turning point in the history of mass communications in this country and throughout the world. I don't think that is an exaggeration. I have been following with

great interest and quite closely your hearings this spring and summer, and they do strike me as much more than merely interesting or significant or illuminating in themselves. The copyright legislation that will emerge from these hearings will, like the act of 1976 itself, be a critical factor in determining the future course of telecommunications here and abroad.

With your permission this morning, I should like to comment very briefly on the fundamental issues that have emerged from these hearings, as I perceive them, to analyze the legislative proposals now before you very briefly, and to suggest some alternative proposals for legislative solutions as to what I do perceive as one of the most important public issues of our time.

This is an effort really to try to put this problem in some context, and if you will bear with me I'd like to lay out three basic issues and then go on from it.

Reduced to its simplest terms, what is facing your committee are three basic issues in the cable field as I have identified them.

One, has the situation changed enough since 1976 to warrant legislation at all, new legislation?

Second, if so, should compulsory licensing for cable retransmissions be abandoned or retained—in the simplest terms, leaving aside transitional provisions and things like that?

And, third, if compulsory licensing in some form is retained, how should the present system be modified?

First, as to the changes since 1976, I don't think it is any secret to anybody after your hearings now, Mr. Chairman, that the overall situation with respect to cable television has changed dramatically since 1976, and if I might observe, I think it is partly because of the act of 1976 that it has changed drastically.

Some of these changes were anticipated and dealt with in section 111; others are still evolving rapidly or are not yet out of the planning stages.

However, there is one change—the deregulation of cable by the FCC—this was not fully anticipated in 1976, and that radically alters the copyright situation of cable retransmissions under section 111.

I discuss in my paper five changes and, except for one, the deregulation question, I will not go into them now because you have heard them over and over again. I will just mention them by name. They are:

The growth of cable systems, the enormous increase in subscribers, and channel capacity and so forth.

The introduction of superstations and satellite distribution services, which is a matter of great concern but perhaps may be a little exaggerated. It does change the mix somewhat, however.

Third, the introduction of direct broadcast satellites, which is just on the drawing board but I think will undoubtedly have an impact on this whole subject and has to be taken account of.

Fourth, the pay-TV networks, which have proved a disappointment to the copyright owners, and I think it is one reason they feel disappointed with 111. They are not getting what they expected out of cable TV networks.

And fifth—and I will mention this in a little bit more detail—the deregulation of cable by the FCC. To me this is by far the most important change for your purposes.

And as you well know, Mr. Chairman, the 1976 act rested on two legs:

One was the FCC regulations protecting the copyright owners by limiting the signals and programing cable systems could carry in certain situations. That was one of the absolute fundamental pillars on which 111 rested.

The other was the copyright provisions that would give cable systems a compulsory license to retransmit copyrighted programing without advance permission, but only if the carriage was authorized by the FCC rules.

The assumption was that if the cable system were to retransmit programing that it was not authorized under the FCC rules to carry, then they were subject to full copyright liability, and that was a severe restraint.

Last September, as you know, by a 4 to 3 vote, the FCC agreed to abandon its distant signal and syndicated program exclusivity rules—one of the two legs supporting section 111, and it left it pretty shaky, I believe.

Just last week, as you have heard, this action was upheld by the Court of Appeals for the Second Circuit in the *Malrite* case which ruled that the FCC acted legally in repealing what the court called its copyright surrogates. It terms them "copyright surrogates" several times—the distant signal and syndicated exclusivity rules.

This means, assuming that these are upheld—and I suppose there will be efforts to get rehearing and to seek certiorari—but assuming these rules are upheld, this means that henceforth cable systems will be unlimited in the number of distant signals that they can retransmit, and will be able to carry syndicated programs without regard to objections from copyright owners.

And this is a big change, although how you deal with it I think is a very fundamental question you will have to consider.

In my opinion the FCC's action leaves section 111 crippled and in urgent need of legislative repair. In 1976 it was generally, if not universally, assumed that the FCC might tinker with its rules, and that if it did so the Copyright Royalty Tribunal could restore the proper balance by adjustments in the statutory royalty rates. That was an assumption. Whether it was true or not is something else again.

It was not anticipated that the FCC would completely abandon the protection it offered to copyright owners, and I do believe that this change is too great to be appropriately and effectively redressed in CRT proceedings. I believe that new legislation to deal with this changed situation is warranted.

Turning now to the second basic question: Should the compulsory license be retained or abandoned?

Assuming that new legislation is considered necessary, the next basic question is whether you should simply do away with the compulsory license.

I have in my prepared statement laid out arguments pro and con for the compulsory license. I don't think I need run through them. You have heard them over and over again.

I will mention the one that seems to me the most telling, at least from the cable point of view, and that is in my opinion the real impossibility of one-on-one bargaining in all cases.

I think the witness you just heard is a good illustration of that. Is cable to seek out all of the radio copyright owners? There are literally hundreds of thousands—not just television and not just big program suppliers. And it doesn't seem to me that it is any answer to say, "We will provide," which the copyright owners do. There probably would be middlemen that would arise, but I just can't see them covering every single copyright and every single potential claim in an infringement suit if cable had no form of protection in this situation.

This, it seems to me, is a pretty unanswerable argument, Mr. Chairman, although there are various ways of dealing with the problem, and I am not at all convinced that 111 as it now stands is the best way of dealing with it.

I review these arguments that I lay out in my paper—and you have heard them over and over again—and I have reflected hard on the pros and cons of repealing the compulsory license outright.

Over the years, as you know, I think, I have generally looked on compulsory license as a kind of last-resort compromise. It is not something you automatically go forward with at the outset. You come to it after a long period of discussions and in effect negotiations in the legislative context.

I think compulsory license is an appropriate alternative to providing no protection at all, and in many cases it is the only alternative.

I still feel this way, and if we were back in 1958 or 1960 when this issue first started arising, before any Supreme Court decisions holding that cable was not liable under the old law, before the FCC rules, before your copyright legislation, before what is now becoming the wired Nation, I would probably favor complete exclusivity. I certainly would favor it in principle, understanding that in 1958 complete exclusivity would have altered the course of communications in this country. You would not have cable today like you have it if there had been complete exclusivity in 1958.

But we are not in 1958. We are in 1981, and if there ever was a situation that cried out for some form of compulsory licensing—some form of compulsory licensing—it is secondary transmission of television broadcasts by cable systems as they now exist. I simply see no alternative. To require cable systems to stand and bargain with every known and unknown copyright owner of every copyrighted program carried on every station on every channel retransmitted seems to me not just impractical but impossible.

It is for this reason that I cannot support two of the bills before your subcommittee, Mr. Frank's two bills, H.R. 3528 and H.R. 3844.

In other words, I think you have to have some form of compulsory licensing.

Turning to the third basic question, which is: Assuming that you have some kind of compulsory licensing, how should the present system be modified? I think everyone would agree it is not perfect. I believe there are ways in which, through legislation, you can modify and greatly improve the present compulsory license system of section 111 without abandoning compulsory licensing entirely.

Mr. Chairman, I think your bill and your approach is a viable approach, and at one time it was the approach that I foresaw coming out of this committee, something that would preserve the FCC rules, the second leg that I have spoken of, and that would in effect transfer the FCC rules into the copyright law. But the assumption that I was going on was that the FCC rules would still be in place. And what has changed, in my opinion, is the deregulation. The fact that the FCC rules are no longer in place does seem to me to raise some doubts about this approach of simply importing them from the FCC rules and into the copyright law.

I go into the problems with that approach, which I think probably would have existed before, but they are much more severe with the deregulation. I think what your bill does, as I read it, is to freeze the distant signal rules and to give the Tribunal the authority to kind of adopt the syndicated exclusivity rules. And that is a mare's nest, Mr. Chairman. Once you get into that you find the complexities are just overwhelming and the uncertainties and confusions. You can do it, but I am not sure it is the proper way to go.

As an alternative and as an outgrowth of my consideration of your bill and the hearings and what they have evolved, I have tried to get a feel of what might be an appropriate solution here, Mr. Chairman, and it does seem to me there is one—maybe more than one, maybe various—but there is one I have thought of that I don't think has been put forward before, and that I think might have a lot of attractive features for this subcommittee.

What I am proposing—and I will say the criteria I was trying to look to first and then go into the details of the proposal to some extent with your committee.

It seems to me what you are groping for, and which is becoming clearer and clearer, as a possibility, is legislation that would encourage private negotiations and allow voluntary agreements to supersede statutory or regulatory terms and rates in all cases. In other words, if the parties can be induced to negotiate and if they come up with an agreement, that controls, and you forget about the statute in that situation, or the CRT.

The legislative solution should provide a legislative setting in which the television marketplace would to a large extent determine the terms and rates of cable royalties. Everyone acknowledges—and it is a fundamental defect with 111—that those figures are just made up. I will remind the committee how those figures came to be.

The parties agreed on what the first year's royalties should be, and then they tried to make this formula match what was then envisioned as about $9 million. As it turned out, it was $12 million. But they went through, as you are well aware in this room, this long series of discussions that came out with the distant signal equivalent formula with all these weighted percentages and so forth.

That is, I guess, in a vague sort of sense, a marketplace approach, but it is not a very good one. And I think you can do a lot, lot better than that.

Third, there is a lot of unproductive paperwork involved in the present system, and there is a lot of Government involvement, and

I think that this can be minimized and a lot of the rigidity and complexity of the system as it now operates could be avoided.

Fourth, the system should provide copyright owners with a greater degree of control over the terms and rates of the royalties for the use of their works, but at the same time—and this is, I think, essential, Mr. Chairman—the statutory framework should protect cable systems from unwarranted liability, allowing them to retransmit programing without obtaining negotiated licenses from every copyright owner.

I think if you don't do that, Mr. Chairman, you would change the face of communications in this country.

And, finally, I think that the legislation should free the Copyright Royalty Tribunal from the arbitrary and complicated and increasingly outdated restrictions imposed on it under the 1976 act.

Your bill does that, Mr. Chairman, and I endorse that aspect of it.

Now, I have some very specific suggestions for legislative approach, but I throw them out simply for your consideration and discussion and to get some ideas floating around. I think this may be a slightly different approach from anything you have heard before.

I think what I am suggesting would go a long way to meet all these criteria—the free marketplace negotiation, marketplace approach.

Instead of the artificial rate structure, the cumbersome procedures, and heavy Government involvement required under the present law, what I am proposing would incorporate something that is known in formula laws as a system of agreed licensing. It is not a very felicitous term, but I think it is sometimes called that. It is sometimes referred to as blanket licensing in Europe, but that is something with a different connotation here. "Agreed licensing," I think, is the proper term.

Under this approach, which is somewhat reflected, maybe somewhat more than somewhat reflected in section 118 of your act, the public broadcasting provision, the various parties are strongly induced to negotiate and agree upon the terms and rates of voluntary licenses. And once these voluntary licenses are negotiated successfully, then, of course, they control in their own cases and they are made the legal norm. That is where the agreed licensing comes in. They are made the legal norm through compulsory licenses. The level, the norm, the standard, is established, and then it is made applicable to all others similarly situated.

And this has precedents. And, of course, 118 is one of them, although I go a step further than 118; 118 says you can voluntarily license and the CRT has to take account of the voluntary licenses, but it doesn't have to adopt them. I would go a step further and require the CRT to base its actions on the voluntary licenses rather than giving it the authority to go on and do its own thing after taking them into consideration.

I think that is closer to a marketplace approach. I think it takes the Government out of it perhaps one notch.

As I see it, this is how the proposal would work—and again this is just for your consideration; I am not suggesting this as the ideal solution, but it is one possible solution.

You do have to have transitional provisions and you've got a big problem with the transitional provisions because of the FCC action. What do you do in the meantime before you enact new legislation with respect to these additional distant signals that they are going to be able to bring in? And there are some syndicated exclusivity problems there, too.

What I would propose is that you keep 111(d), the traditional compulsory license in effect for a period, say 2 years, 3 years, maybe less, for the signals that the cable systems were able to carry under the FCC rules before the deregulation, and that during the transitional provision the cable systems have to stand and bargain with respect to the distant signals and other signals that they would not have been able to carry under the deregulated rules, if you are following me.

In other words, there would be a very strong inducement during a relatively short transitional period to work out voluntary agreements. I think that you would not find people just laying back and seeing what would happen. I think they would go and negotiate under that kind of compulsion.

To that extent Mr. Chairman, during this transitional period, what I am proposing would be close to your bill. But that would be only the case for the transitional period.

After the transitional period, the old compulsory license would go away, and you'd no longer have all these statements of account and so forth going to the Copyright Office and so forth. You'd have an entirely different system, say in 1983 or whatever.

First of all, voluntary agreements would control in all cases after the effective date of the copyright amendment. Voluntary agreements would take precedence over any statutory or regulatory terms or royalty rates. And one would hope that during the transitional period the voluntary agreements would be worked out so a great deal of the machinery would be taken care of before this came into effect. Maybe that is optimistic but I'm not sure it is.

Then you would have under this new proposal the Copyright Royalty Tribunal acting procedurally much as it does under 118. And I do think 118 was a success in the CRT context. It wasn't appealed, it worked relatively well, and there was a good deal of harmony in the proceedings.

I think cables are probably different. There are different personalities and a lot more money involved, but nevertheless the context is much more amenable to agreement than the compulsive aspects of 118.

The CRT would publish a notice and, under the statute, cable systems and owners would be urged, admonished, to negotiate in good faith, and as under 118 they would be given antitrust exemptions for this purpose so they can act as groups. If you don't have that, you've got a big problem and nobody has really gone into that field. How are these people going to get together to agree on rates that the cable people pay if they don't have some kind of antitrust protection? Be that as it may.

They'd also be able to file with the CRT proposed licenses showing what they want and the various breakdowns with respect to local, national, and syndicated programing, and so forth.

Within a certain stated time frame, the CRT would be authorized to make a determination and publish schedules of terms and rates for cable retransmissions.

Now, this is a departure from 118. These schedules would reflect, to the greatest extent possible, the voluntary licenses already negotiated. Those would establish the general norm and the CRT would go on from there, would take into account the various factors that go into determining the free market value of cable retransmission of copyrighted works, such as the type of carriage, the type of programing, the size of system, the subscriber rate, and so forth.

The CRT's schedules would be binding on copyright owners and cable systems, but only if there'd been no voluntary negotiations or where there had been negotiations and they failed. If there are voluntary negotiations that are successful, none of this applies. This applies only where there have been no voluntary neotiations because they weren't entered into for one reason or another or because the cable system didn't know who to go to to negotiate with or where there have been some and they failed. And I think that would be realistic to expect, that there would be failure, at least at the outset. Maybe not—I would hope not, but I think it would be unrealistic to think this would all work like clockwork.

But I think what you do have is a much more realistic method of setting the rates under this proposal.

And I do have some further suggestions, which I won't go into here, for dealing with the situation where the cable system just simply doesn't know whom to pay to. In that situation you probably have to set up a procedure under which they pay into a fund in the Treasury, an interest-bearing fund, and then these amounts are distributed or go into the Treasury at a certain time.

But I would say this is a very minor aspect of the problem and it is the only one that would involve any kind of procedural complications.

AN IMPORTANT POINT

As long as they complied with either their voluntary agreements or the terms and rates established by the CRT, cable systems would be free to transmit any secondary transmissions that are permitted under FCC regulations. Assuming that the FCC deregulation remains in effect, there would be no prohibition against carriage of distant signals or syndicated programing, but copyright payments would have to be made.

My point here is that you are not going to do something that kind of scares me under your bill, Mr. Chairman. It is that it could eventuate that under your bill you'd simply be doing away with the FCC deregulation and just go back. In other words, if you had massive refusals to license, you'd be doing what the minority on the FCC wanted, which was to continue the FCC restrictions in effect. And that I am not sure is good policy.

This is the way I finally come out in my own thinking: I think the FCC deregulation should stay in effect but that cable systems should pay. They should be able to carry these distant signals but they should pay for them at free market rates. And that is really what I am proposing.

Mr. Chairman, I recognize that this approach is far from perfect and that the proposal as I have outlined it needs a great deal of working over if you are in any way interested in it. However, it does seem to me to offer advantages over the other alternatives you have been considering, and on the basis of several years of successful experience with section 118 I am convinced it would work in practice.

I hope you will give this some consideration, and I hardly need to add that if I can be of future help to your subcommittee in resolving this important problem I'd be more than happy to do so.

Thank you, Mr. Chairman.

[The complete statement of Ms. Ringer follows:]

PREPARED STATEMENT OF BARBARA RINGER, OF COUNSEL, SPENCER & KAYE

Mr. Chairman, I am Barbara Ringer, former Register of Copyrights in the Library of Congress and currently of counsel to the firm of Spencer & Kaye here in Washington. For many years before my retirement from the Copyright Office in 1980 I was actively involved in the development and drafting of the Copyright Act of 1976. After enactment of the new law in October, 1976, I was the official with responsibility for developing regulations and procedures that the Copyright Office was required to provide under the statute. It is an honor for me to be invited to appear here and to answer your questions to the best of my ability.

Of the various copyright issues now being considered by your Subcommittee, the most difficult and urgent is that of secondary transmissions by cable systems, and I am limiting this written statement to that subject. I will, of course, be happy to comment and answer questions on any other matter that you care to raise.

Mr. Chairman, it does seem to me that we are at a turning point in the history of mass communications in this country and throughout the world. I have been following your hearings this spring and summer, and they strike me as much more than merely significant and illuminating in themselves. The copyright legislation that will emerge from these hearings will, like the Act of 1976 itself, be a critical factor in determining the future course of telecommunications here and abroad. With your permission, I should like to comment very briefly on the fundamental issues that have emerged from these hearings, to analyze the legislative proposals now before you, and to suggest some alternative proposals for legislative solutions to what I perceive as one of the most important public issues of our time.

The basic issues.—Reduced to its simplest terms, the overall problem you are considering raises three basic issues which you must consider and, ultimately, answer:

1. Has the situation changed enough since 1976 to warrant new legislation?
2. If so, should compulsory licensing for cable retransmissions be abandoned or retained?
3. If compulsory licensing is retained, how should the present system be modified?

Changes since 1976.—The overall situation with respect to cable television has changed dramatically since 1976, and your Subcommittee should, of course, consider the impact of these changes on section 111 of the Copyright Act. Some of these changes were anticipated and dealt with in section 111; others are still evolving rapidly or are not yet out of the planning stages. However, there is one change—the deregulation of cable by the FCC—that was not fully anticipated and that radically alters the copyright situation of cable retransmissions under section 111.

The relevant changes in the situation since 1976 can be summarized as follows:

1. *The growth of cable systems.*—The recent growth in the number of cable systems, the totals of their subscribers, and the expansion in the channels and services they offer, can only be described as breathtaking. Cable is becoming a major, and potentially a dominant, force in American communications. Cablecasting and pay-cable channels are already significant media of communications, and advertising on cable systems appears to be imminent. Despite all this growth, however, cable still enjoys enormous advantages over its broadcasting competitors: it does not have to negotiate for its basic services—retransmission of broadcasters' signals—and it pays substantially less than commercial broadcasters for the programing. This has caused a growing chorus of complaints from copyright owners and broadcasters.

2. *The introduction of superstations and satellite distribution services.*—Great concern has been expressed about the disruptive effect of the so-called "superstations" upon the copyright owner's ability to control its traditional television market

within a defined locality. While the potential dangers of this development to copyright owners and broadcasters may have been exaggerated somewhat, there is no doubt that the superstations have changed the communications structure in the United States. It seems particularly unfair that the commercial satellite and microwave distribution services are operating without licensing, claiming to be exempt under a possible loophole in section 111. I believe your Subcommittee should consider legislation clarifying section 111(a) on this point.

3. *The introduction of direct broadcast satellite services.*—It seems clear the DBS services, which are now in the planning stages, could have a revolutionary effect on patterns of communication throughout the world. Any revision of section 111 should take account of all of the copyright implications of this new technology.

4. *Pay-TV networks.*—In 1976 representatives of copyright owners expressed the hope that, with cable systems paying compulsory license fees for their retransmission services and negotiated fees for their pay-TV channels, the latter would grow and flourish. Motion picture producers looked on the "wired nation" as offering the potential for an "electronic box office." However, the results for copyright owners have so far proved disappointing. Because they are not yet receiving what they expected from pay-cable, motion picture producers feel that they were short-changed by the compulsory license provisions of section 111.

5. *Deregulation of cable by the FCC.*—The cable compromise in the 1976 Act rested on two legs:

a. FCC regulations protecting copyright owners by limiting the signals and programming cable systems could carry in certain situations; and

b. Copyright provisions that would give cable systems a compulsory license to retransmit copyrighted programming without advance permission, but only if the carriage was authorized by the FCC rules. If the cable system were to retransmit programming that, under the FCC distant signal or exclusivity rules, it had been forbidden to carry, the cable system would be subject to full copyright liability.

Last September the FCC, by a 4-3 vote, agreed to abandon its distant signal and syndicated program exclusivity rules—one of the two legs suporting section 111. Just last week this action was upheld by the U.S. Court of Appeals for the Second Circuit in *Malrite T.V. of New York* v. *FCC* No. 80-4120 (2d Cir. June 16, 1981), which ruled that the FCC acted legally in repealing what the court called its "copyright surrogates"—the distant signal and syndicated exclusivity rules. This means that henceforth cable systems will be unlimited in the number of distant signals they can retransmit, and will be able to carry syndicated programs without regard to objections from copyright owners.

In my opinion the FCC's action leaves section 111 crippled and in urgent need of legislative repair. In 1976 it was generally, if not universally, assumed that the FCC might tinker with its rules, and that if it did so the Copyright Royalty Tribunal could restore the proper balance by adjustments in the statutory royalty rates. It was not anticipated that the FCC would completely abandon the protection it offered to copyright owners, and I believe that this change is too great to be appropriately and effectively redressed in CRT proceedings. I believe that new legislation to deal with this changed situation is warranted.

SHOULD THE COMPULSORY LICENSE BE RETAINED OR ABANDONED?

Assuming that new legislation is considered necessary, the next basic question involves retention of the compulsory license. Strong arguments for and against compulsory licensing for cable retransmissions have been made during these hearings, and they can be summarized as follows:

1. Arguments for complete repeal of the compulsory license

a. No special treatment justified.—Cable television has become a major industry and no longer needs the special economic treatment inherent in a compulsory license. The Supreme Court decisions exempting cable from liability have no relevance under the 1976 Act, which Congress can amend as it sees fit. Cable should "stand and bargain" just as broadcasters and other commercial users do.

b. Royalty rates too low and procedures to burdensome.—The royalty fees provided in section 111 are unjustifiably low and the compulsory licensing procedures provided in section 111 and the provisions of Chapter 8 concerning the Copyright Royalty Tribunal are cumbersome and unsatisfactory.

c. FCC deregulation.—The FCC action in deregulationg cable removes the reugblatory provisions protecting the exclusive rights of copyright owners (and their broadcaster licensees) and leaves only the unsatisfactory compulsory license of section 111. The proper way to repair this imbalance is to bring exclusivity into the copyright statute by eliminating the compulsory license.

2. Arguments against repeal of compulsory license

a. Impossibility of one-on-one bargaining in all cases.—The compulsory license was not adopted for cable transmissions because cable was an infant industry needing special consideration or because of the relative bargaining strengths of the parties resulting from the Supreme Court decisions. The reason for the compulsory license in 1976 remains the same today: the practical impossibility of each cable system sitting down and bargaining with the literally thousands of possible and actual copyright owners of the programming to be retransmitted, and the intolerable danger of full liability for unlicensed retransmissions. The problem here is not just that of transaction costs, although they would be stupendous. Even more serious is the danger that compete exclusivity would amount to complete refusal to license. Because the competitive threat of cable to the broadcasting industry is so real, the likelihood of refusals to license cable systems at any price is also very real. Copyrights, especially in the aggregate, are a form of monopoly, and could be used deliberately to drive cable systems out of business.

b. CRT can adjust rates.—If the royalty fees in section 111 are too low, the machinery for adjusting them allready exists; in fact, in a recent action now under appeal the Copyrigh Royalty Tribunal raised them some 21 percent. Considering the complexity of section 111 the licensing procedures in the Copyright Office work well on the whole, and the relatively modest cost of the operation is fully paid for out of the fees collected, with no cost to the public. The Copyright Royalty Tribunal's costs are likewise compensated from the royalties collected, and the existence of a body like the Tribunal is essential for the operation of a compulsory license.

c. FCC deregulation will not have drastic adverse impact on copyright owners.—Although the FCC's action in deregulating cable removes some protection of copyright owner's exclusive rights, in practice this protection has become far more theoretical than real. The FCC's extensive studies indicate that the overall revenues of broadcasters and program suppliers would not be hurt by deregulation and more distant signals will mean substantially more royalties to copyright owners under the compulsory license of section 111.

Mr. Chairman, I have reviewed these arguments and have reflected long and hard on pros and cons of repealing the compulsory license outright. Over the years I have generally looked on compulsory licensing as a last-resort compromise—as the only alternative to providing no protection at all. I still feel that way, and if we were all back in 1958, before any Supreme Court decisions or FCC rules or copyright legislation or "wired nation" I would probably favor complete exclusivity, understanding that it would drastically alter the course of communications in this country. But we are now in 1981, and if ever there was a situation that cried out for some form of compulsory licensing it is secondary transmission of television broadcasts by cable systems as they now exist. I simply see no alternative. To require cable systems to stand and bargain with every known and unknown copyright owner of every copyrighted program carried on every station on every channel retransmitted to me not just impractical but impossible. It is for this reason that I cannot support two of the bills before your Subcommittee, H.R. 3528 and H.R. 3844.

IF COMPULSORY LICENSING IS RETAINED, HOW SHOULD THE PRESENT SYSTEM BE MODIFIED?

Turning to the last of the three basic questions confronting your Subcommittee, I believe there are ways in which, through legislation, you can modify and greatly improve the present compulsory license system of section 111, without abandoning compulsory licensing entirely.

Mr. Chairman, I believe that in its present form your bill, H.R. 3560, represents an admirable preliminary approach to a consideration of this problem. In very general terms, it seeks to import from the former FCC rules and distant signal and syndicated exclusivity provisions and to translate them into copyright requirements; in other words, where carriage was forbidden before, it would now be subject to full copyright liability unless licensed. Coupled with this are provisions removing the complex and rigid restrictions on the Copyright Royalty Tribunal's ability to respond to changing situations.

I regard this as a possible approach to the problem, and if the FCC rules were still in effect and likely to remain in force for the foreseeable future, I would probably have favored it. However, I believe that the FCC's action in repealing the rules, now upheld on appeal, changes the situation and makes it imperative to look for new solutions.

There are, first of all, serious problems with freezing the FCC's abandoned distant signal rules in the copyright law. They were based on a combination of copyright and communications factors, were subject to grandfathering to begin with, and were

riddled with exceptions and waivers over the years. Even more serious problems arise with the extraordinarily complex syndicated exclusivity rules; I doubt the wisdom of simply leaving it to the CRT to translate them into copyright terms.

Under the present circumstances, I do not favor the importation of the FCC rules into the copyright statute, either by blanket incorporation by reference or by detailed statutory amendment. Either approach would be extremely confusing and unclear in practice, and would be certain to have profound communications (as distinguished from copyright) repercussions. At its worst, this approach might have the practical result of reinstating the FCC's abandoned regulations in a different and perhaps even more rigorous guise.

As an alternative, I believe that legislation should be sought that will meet the following criteria:

1. It should encourage private negotiations and allow voluntary agreements to supersede statutory or regulatory terms and rates in all cases.

2. It should provide a legislative setting in which the television marketplace would to a large extent determine the terms and rates of cable royalties.

3. It should substantially reduce the unproductive paperwork and government involvement in the procedures for collecting and distributing cable royalties, and should minimize the rigidity and complexity of the present compulsory licensing system.

4. It should provide copyright owners with a greater degree of control over the terms and rates of royalties for the use of their works; at the same time it should protect cable systems from unwarranted liability, allowing them to retransmit programming without obtaining negotiated licenses from every copyright owner, as long as they pay royalties at a standard rate.

5. It should free the Copyright Royalty Tribunal from the arbitrary complicated and increasingly outdated restrictions imposed upon it under the 1976 Act.

The approach I am suggesting should go a long way to meet all of these criteria. Instead of the artificial rate structure, cumbersome procedures, and heavy government involvement required under the present law, it would incorporate a modified free-market system sometimes known as "agreed licensing." Under this approach, which is reflected to some extent in the public broadcasting provisions of the present law (section 118), the various parties are strongly induced to negotiate and agree upon the terms and rates of voluntary licenses. Once these voluntary licenses are agreed upon, they are made the legal norm through compulsory licensing, under which the terms and royalty rates of these voluntarily-negotiated agreements are made binding upon other owners and users.

The following is an outline of this proposal as I envision it:

1. Transitional provisions.—The compulsory licensing provisions of section 111(d) of the present law would remain in effect until a prescribed date. Until that date:

a. Cable systems would file the notices and statements of account and pay the royalties prescribed by section 111(d) or (if upheld on appeal) as adjusted by the Copyright Royalty Tribunal.

b. Cable systems would pay compulsory license fees for all signals they were legally carrying before the effective date of the FCC's deregulation order authorizing the carriage of additional distant signals and repealing the syndicated exclusivity rules.

c. However, during the transitional period, and assuming that the FCC's deregulation order is in effect, cable systems would have to obtain copyright clearance for any signals that they could not have carried before the deregulation. This requirement should provide a strong incentive for both sides to enter into voluntary licensing negotiations before the effective date of the new "agreed licensing" copyright provisions.

2. Voluntary agreements control.—After the effective date of the copyright amendments, voluntary agreements would take precedence over any statutory or regulatory terms or royalty rates.

3. Proceedings of Copyright Royalty Tribunal.—

a. On a date to be stated in the statute, the CRT would publish notice of the opening of cable proceedings. Copyright owners and cable systems would be admonished to negotiate actively and in good faith toward the conclusion of voluntary licensing agreements, and would be given antitrust exemptions for this purpose. They would also be given the right to file proposed lisenses with the CRT.

b. Within a certain stated time-frame the CRT would be authorized to make a determination and publish schedules of terms and rates for cable retransmissions. These schedules would reflect, to the greatest extent possible, the voluntary licenses already negotiated, and would take into account various factors that go into determining the free market value of cable retransmission of copyrighted works (such as type of carriage, type of programming, size of system, subscriber rate, etc.).

c. The CRT's schedules would be binding on copyright owners and cable systems, but only when there have been no voluntary negotiations or when negotiations have failed. In all cases they would be superseded by voluntary licensing agreements.

d. When royalties are to be paid under the CRT's schedules, they would usually be paid directly to the copyright owner without government involvement, under terms that the CRT would prescribe. The CRT would also be authorized to provide for reasonable program logging to provide a basis for copyright royalty claims. Where the copyright owner is unknown, the cable system would pay the royalties due into a special interest-bearing fund. Claims to distribution of royalties from this fund would be handled by the CRT under a separate procedure.

e. As long as they compiled with either their voluntary agreements or the terms and rates established by the CRT, cable systems would be free to transmit any secondary transmissions that are permitted under FCC regulations. Assuming that the FCC deregulation remains in effect, there would be no prohibition against carriage of distant signals or syndicated programming, but copyright payments would have to be made.

Mr. Chairman, I recognize that this approach is far from perfect and that the proposal as I have outlined it needs a great deal of working over. However, it does seem to offer advantages over the other alternatives you have been considering; and on the basis of several years of successful experience with section 118, I am convinced it would work in practice. I am hopeful that you will give it some consideration. I need hardly add that, if I can be of future help to your Subcommittee in resloving this difficult and important problem, I will be more than happy to do so.

Mr. KASTENMEIER. Thank you, Ms. Ringer. I compliment you on offering the proposal. This, of course, is the sort of thing we had hoped might come forward, and it is especially important coming forward from someone who has been thinking about this problem, as this committee has, over a period of time. It doesn't necessarily come from one industry or another but from someone who can approach it somewhat objectively in terms of what needs to be achieved.

We do hear, of course, going into the free market and so on, but this does contemplate, perhaps with refinements, a continued governmental role on the part of the Copyright Royalty Tribunal——

Ms. RINGER. Yes.

Mr. KASTENMEIER [continuing]. Perhaps in terms of the bill itself, in terms of legislative resolution on it.

I am not sure that I understand entirely your proposal, but at least the broad outlines suggest it does have real possibilities.

At the outset you indicated—and this is not very central to it, but I thought I'd like to ask you about it—that as far as pay TV networks were concerned, that negotiated fees for pay TV have been a major disappointment of copyright owners. What leads you to conclude that, since there is a great deal of activity on, for example, the packaging of movies and other programs, whether it is by HBO or now many, many others?

Ms. RINGER. I think the situation has improved, although at the time the initiative you are referring to emerged from the major movie companies and the networks, there was a sense of frustration. The Home Box Office organization did have a kind of dominant position at one time. It may not be that way now. But at the time they did, the movie companies were complaining bitterly all over the place, including to the Justice Department, that HBO was simply saying, "Take it or leave it. We are not going to pay you what you're asking, and we are the only game in town so you have to pay us."

And the movie industry went to the extent, as I'm sure you have heard in detail, of setting up the Premiere Network to combat this

very thing, and that bit the dust immediately. And they turned to copyright. That was the only avenue they saw to deal with this.

Their original strategy was that they'd allow cable to build up their subscribership through the importation of distant signals which they'd get for a cut rate under the compulsory license, but that the big money would come from the pay TV networks. And that didn't turn out that way, at least temporarily. It may eventually; I couldn't tell you. But at least they considered that as one of the changes, that there are increasing pay TV networks and they are not getting what they think they ought to get out of them in view of the relatively small amounts they are getting from compulsory licensing.

Mr. KASTENMEIER. I'm not sure I am correct in this impression, but as one who has been to broadcaster and cable conventions to try to get a feel for what went on in these industries—I am impressed by the competition for new programing and for people who put new things together, some of them rather extraordinary, to try to sell the cable systems in terms of the future. Obviously with the explosion we have seen in the last 2 years of franchising throughout the country, various programers, realizing this of course, or the middlemen who put the programing together, see it as a fantastic market for them.

That tended to suggest to me, although the formats are very uneven, from the small mountain systems that merely retransmit to the large urban systems, in many areas the local cable system dependent on distant signals—that their programing which is being sold, is really copyrighted and negotiated material. Also, that the old movies on WOR are less important and that this probably would continue into the future except perhaps for sports, where the imported signal does differentially offer programing different than anything else available.

And so I sometimes wonder what it is that both cable and the proprietors of the material—whether there is a decreasing concern in terms of the spectrum they are offering, whether it is decreasing relevance rather than increasing relevance.

Ms. RINGER. I have shared your questions, Mr. Chairman. I think I would feel very differently about this whole thing if it had not been for the FCC deregulation with the potential of being able to bring in an unlimited number of distant signals. They are crying out for some of the programing. And obviously they will buy it at a considerable extent. This is one of their selling points.

But I think another very major selling point is being able to offer 20 independent distant signals across the board. And I think if they are able to do that and do it under the compulsory license, it would hurt the market, in my opinion, and I think you'd agree with me, for buying the stuff to go on the pay TV channels. Because, you know, you occupy your 50 channels with whatever brings in the most revenue.

Mr. KASTENMEIER. I guess I'd be inclined to agree that I think, not withstanding the more attractive and sensational programing would not necesarily be a distant signal, they would nonetheless have to bring in the distant signals if they are available, from the west coast and elsewhere.

Yes, I suspect that that is true and that they could offer a range of professional supports to viewers that is not now possible with only 20 signals.

In terms of your plan, in the interim period—let's say you have a Madison cable station—or it could be Roanoke or any other place—and they decided they wanted to bring in New York, WOR, and they presently are bringing in, say, WGN and WTVS, and of course under the new arrangement they have to negotiate for that. With whom do they negotiate for that programing?

Ms. RINGER. Of course, the whole problem—you have heard time and time again, "Of course, there will be people for you to negotiate with." It is hard to predict how this will emerge, but I have tried to think this through, and if a plan like this were adopted, I would be very surprised, if you had an antitrust exemption, if some kind of all-industry committee were not appointed to provide a phalanx to negotiate with—and probably on both sides.

This may be oversimplified and may be overoptimistic, but it is certainly what has happened in music and other areas. And in that situation, given the fact that under what I was proposing they couldn't bring the distant signals in unless they stood and bargained, I assume there would be a big incentive to set up some kind of all-industry committee to establish these norms. And the idea would be you'd have a short transition where you couldn't carry these without the negotiations, but once the negotiations were done you'd have a lot of voluntary agreements in the place by the time the Copyright Royalty Tribunal had to come to consider what to do with it.

This is my basic thing.

Mr. KASTENMEIER. Ultimately you contemplate that the value of the programing would be marketplace value.

Ms. RINGER. Yes.

Mr. KASTENMEIER. Real negotiated value.

Ms. RINGER. Yes.

Mr. KASTENMEIER. In that respect, there is a difference with my bill in which we upgrade the compensation but we fall short of trying to make it the market value, thinking we didn't want to be guilty of the same thing the FCC was and change the rule so drastically that it would have to be opposed.

So we tried to find a middle ground in terms of the criteria for awarding amounts.

Ms. RINGER. I recognize that and I approve. I think that is the way to try to find a middle ground. The middle-of-the-road approach, if you will, is exactly what you need here.

But to repeat what I said, I think the FCC deregulation has changed the picture so dramatically that you need another kind of MOR approach, if you will.

Mr. KASTENMEIER. Well, it is your hope that entities will arise which will provide either the packaging or the negotiating capacity, let's say, for various people in the industry who are affected.

I wonder to what extent would you envision sort of a patchwork type where you'd have some compulsory licenses extant?

Ms. RINGER. Yes.

Mr. KASTENMEIER. And also some negotiated settlements.

Ms. RINGER. Yes.

Mr. KASTENMEIER. This whole period would be sort of a patchwork. Even then you'd have a Copyright Royalty Tribunal determination based on what we consider normal and average rates.

Ms. RINGER. The 111 approach that is now in effect I think is helpful in establishing what market rates are. In other words, there has been a lot of ink spilled and words said over the tribunal consideration of cable. And I think that this has clarified what is true market value.

In other words, I think 111 as it now stands has gotten us further down the road to what is an appropriate situation here.

I do feel that there is merit in the argument that the marketplace can operate up to a point, but I still feel that cable needs a safety net. I just don't see sending them naked in the world because I think there are real dangers in that to communications in this country, which I think is really my main concern.

Mr. KASTENMEIER. Well, I think I will probably have more questions at a later point in time and will want to talk with you again.

I am going to yield, however, to my colleague.

Mr. Railsback.

Mr. RAILSBACK. Thank you.

Your idea is not exactly in the same form, but it has been floated, and there are others that have, as you know, wondered whether we couldn't have some kind of a period of free market negotiating backed up by some kind of a compulsory arbitration. Yours is a little bit different than that.

But let me ask you this: In the case of music, which I am not really that familiar with, and I think you are, didn't they have almost the same type of an apparatus where they negotiated and which they had ASCAP bring up, and BMI bring up? But even in that case, as a backup, apparently the Federal district court—I think New York—got into it. I think New York was involved. And then, if there is a problem with the free market negotiating, that court plays a role.

How does that work?

Ms. RINGER. Well, there are consent decrees as a result of antitrust abuses. In other words, you have the big problem and there is an antitrust action and the court steps in. There are different consent decrees for ASCAP and BMI, and the ASCAP consent decree is much more stringent.

Mr. RAILSBACK. Yes.

Ms. RINGER. And I am not going to sit here and propose that this is an ideal situation. I think since you have now an opportunity to address this problem legislatively, this is a much better way to go.

Mr. RAILSBACK. A better way to do it?

Ms. RINGER. That is right.

Mr. RAILSBACK. But the deficiency that I see in your proposal—and I am the one that favors something like this—I have been asking witnesses, "What about the free market backed up by negotiation?"

The omission I see is you keep saying admonish and encourage the process. What kind of carrot do we hold to encourage them or admonish them?

Ms. RINGER. The same carrot that you wrote into 118, that if you don't agree, then the tribunal provides insulation against full copy-

right liability to the cable operator. The cable operator still has to pay but he is not going to be sued or sent to jail and so forth under the copyright law.

Mr. RAILSBACK. Yes, but I guess what worries me about that is that one of the cable parties may believe it's much better off to let the Copyright Royalty Tribunal be the ratesetter. So I wonder if it doesn't have to be some other carrot to induce both parties to want to negotiate. I'm not sure there is one.

Ms. RINGER. It is not predictable, and I am not going to stand here and argue that it's going to work like clockwork. But it worked in 118. There were incentives on both sides to bargain.

Mr. RAILSBACK. What did 118 do?

Ms. RINGER. For music and graphics in the public broadcasting area, it had a similar effect to this, except there is a difference I am proposing. In 118 the Copyright Royalty Tribunal received information about licenses, and they were induced to bargain, and it did receive proposals for terms and rates of royalties in music and graphic arts. But under 118 the Copyright Royalty Tribunal was not obliged to take account as a norm of any voluntary agreements.

And it seems to me that, first of all, by making the transition requiring negotiated agreements to carry these additional distant signals and, second, requiring the Copyright Royalty Tribunal to take account of voluntary agreements and use those as the basis for binding others, there are pretty strong inducements on both sides.

I'd certainly like to see it tried out in practice.

Mr. RAILSBACK. Let me ask you one other thing that is related but not right on the point, and that is your belief that we should let the actions of the FCC continue into effect, namely, the deregulation of both distant signals and exclusivity rules.

And I will tell you my own bias about that or my own feeling about it. I agree with you relating to deregulating distant signals. I can understand how that could even help the program suppliers if the copyright is fair.

The question of exclusivity bothers me. In other words, does that bother you, the fact that—say you have a network and you have cable television with its pay cable. What does that do to a network that buys a movie, a made-for-TV movie, which is picked up. In other words, the program suppliers cannot assure exclusivity.

Ms. RINGER. Well, of course, this is the fundamental argument of the copyright owners for exclusivity.

Mr. RAILSBACK. I am not saying, in my opinion, that it's a very strong argument.

Ms. RINGER. The FCC rules—I wouldn't argue with you in principle, Mr. Railsback, but the FCC rules were copyright rules. They were an effort, in effect—I don't think this is an overstatement—to reverse the Supreme Court decisions——

Mr. RAILSBACK. Yes, I agree with that.

Ms. RINGER [continuing]. And try to establish exclusivity. I feel that as a mistake. I felt so at the time and said so at the time. I think copyright rules ought to be in copyright law and not in FCC rules.

Mr. RAILSBACK. Yes.

Ms. RINGER. And you certainly have the prerogative—and this is what the Chairman's rule does—of taking those copyright rules out of the FCC and putting them into the copyright law.

But those were a mixture of communications and copyright consents, and they did have a massive effect on the communications in this country. And I'm not sure you want to go into that. You are interfering with the free market there.

Mr. RAILSBACK. Yes, but what I'm saying is we have to worry about effect, too. I am not so worried about the effect at all of going along with the FCC and deregulating distant signals, but then I wonder about the networks—or anyone for that matter—it could be an independent station—buying a program that it pays a lot of money for or maybe a new movie and then, without any protection, somebody picking up that movie and retransmitting it.

Ms. RINGER. Of course, in talking about networks, they can do that now. That wasn't covered by the FCC rules.

Also I should point out—I don't know whether it's been brought out too clearly—the syndicated exclusivity rules have not been used that much except in sports. There have been some, and there was the prerogative for the broadcaster or copyright owner to object. But they really haven't been used that much.

Mr. RAILSBACK. I have one guy from New York, Mr. Pollinger, who indicates they have two full-time people trying to determine notices of blackout.

Ms. RINGER. It's a mess; it's a mess.

Again, I'm not sure that I or you ought to be getting into this kind of communications morass.

Mr. RAILSBACK. Yes. I think I have used up my time, but I just want to make it a little more explicit.

It bothers me that cable and the program suppliers can benefit by entering into an agreement to show a movie, and even a nonaffiliated TV broadcaster who wants to buy a movie, and then that movie is not going to be a very valuable commodity if it can be retransmitted. So it seems what you are doing is going to cause the program suppliers to go right into pay TV where they can make more money.

Ms. RINGER. You are assuming there would not be full compensation. I am assuming that in the free marketplace that movie would earn what it deserved to earn from cable retransmission.

Let me see if I can say this right.

Mr. RAILSBACK. You may be right.

Ms. RINGER. Maybe I ought to stop right there.

Mr. RAILSBACK. Quit while you're ahead. I'd better quit.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I go a long way with the gentleman from Illinois. I had somewhat the same question, that if your Copyright Royalty Tribunal were to set up fares or rates or whatever, and then encourage voluntary agreements, it would seem to me that that would be an impossibility; that those who were better off with the CRT rates would refuse to negotiate and take the CRT rates; those who visualized they could get something better than the CRT rates would negotiate. But it takes two to negotiate, so you could never get a negotiation other than at the CRT rates.

Ms. RINGER. I don't agree and I don't think that is the way it has worked in 118 because the CRT rates are not out of the blue; they are negotiated rates.

Mr. SAWYER. But you are kind of putting the cart before the horse and the horse before the cart.

If CRT comes out first and says, "The rate is going to be x dollars for this particular set of circumstances," the person who thinks they can get x-minus-something dollars is willing to negotiate. The one who can't is not, and they are going to take the x dollars because it takes two to negotiate.

So you might just as well forget the encouraging and the free negotiation and have CRT fix the rates.

Ms. RINGER. I don't agree with that because CRT has to set the rates on the basis of something.

Mr. SAWYER. Well, whatever they set it on the basis of, they end up setting a rate. Now, that is going to be the rate because a party who is not benefited by a different rate is going to take that rate, and it takes two to agree so you are only going to get one to agree unless you go to that rate.

Ms. RINGER. Well, the alternative to this is either complete exclusivity or retaining the present system, it seems to me.

Mr. SAWYER. Or what the gentleman from Illinois was toying with, an arbitration. You don't know what x rate CRT is going to fix. You have to negotiate and take your chances. You negotiate without knowing what rate they are then going to fix. It could be worse, or it could be better. But once you know, it's like knowing what a quick decision is in advance. Why the heck should one party negotiate?

Ms. RINGER. I'm not sure it would work out differently in practice. If you had compulsory arbitration for every negotiation we are talking about, it would cost a great deal more than the royalties would ever be.

Mr. SAWYER. That is what I'm getting to. I think, first of all, if CRT has a fixed rate, you can forget the voluntary negotiation, no matter how much you urge it, because one party is going to be not benefited by not taking that rate. Therefore, you are not going to get any deals. You can encourage it all you want but you are not going to get it.

On the other hand, if it is so complex that there is difficulty in negotiating because of the myriad parties, to superimpose arbitration on top of all that, you've got a worse morass.

This is what bothers me about both aspects of this thing.

I can see the mechanics if we had an arbitrated rate for those who couldn't agree, except you run into the same problem of the ability to agree. In the first place, there are too many people. If you fix the rate in advance, one party is never going to agree to anything different than that rate.

But the one thing I can see is the same thing that has grown up in the construction industries and in the trucking industries, where they have the Central States agreement. The truckers in that area appoint a committee to negotiate with the Teamsters, or whoever it may be, and they come up with the Central States contract, and those are the rates. The construction industry does the same thing.

It may be that you could do the same thing here nationally and hence overcome this.

I just don't see how, if you've got so many people—that is, everybody I've heard testify here has said it's impossible, because there are so many people, to ever negotiate with individual dealers. If that is so, there are too many to arbitrate those who can't negotiate, and if you set the rate to begin with, one party won't agree. That is just axiomatic. If you knew what a jury verdict was in advance and there was no appeal, one party would never agree.

Mr. RAILSBACK. Unless there is a carrot or some inducement.

Mr. SAWYER. Unless there is a carrot. And that is what I have been kind of fishing for—either the Central States-type committee bargaining or some kind of a carrot built into that fixed rate. Otherwise I don't see how it would work.

And I have been spending a lot of time thinking about this, too.

Ms. RINGER. That is obvious, Mr. Sawyer.

Mr. SAWYER. Frankly, I haven't come up with anything that makes a lot of sense to me that will work.

Ms. RINGER. You say it's axiomatic that it won't work, but it worked in 118. It has worked in other systems. This system isn't unknown.

In other countries where they use this system they have something we don't have—state-controlled or regulated clearing societies, performance societies, rights societies, and so forth. Here everything has to be done in the free market.

But I really do think it would work. I have been through the same kind of thinking, too.

Mr. SAWYER. It seems to me that this is axiomatic, that if this committee were the CRT and we said, "The price for this retransmission under these circumstances will be $150, but we encourage you and the other guy, the buyer and the seller, to go negotiate"—well, the one who thinks he may be able to get it under $150, sure, he's willing to negotiate. But why should the other one when he has $150 cold deck?

Ms. RINGER. The CRT doesn't do it first; it does it second, after the negotiation process. So there is a range of figures which the CRT has to deal with.

Mr. SAWYER. But then you're saying arbitration, unless I misunderstood you.

Ms. RINGER. I'm not talking about the structure of the CRT in my statement here. It seems to me that is obviously before your committee.

Mr. SAWYER. You're talking about what Mr. Railsback called, in effect, an arbitration. That I can understand, because both parties are taking a risk that they could get something not as favorable as they could get by negotiation, and they don't know in advance.

But then aren't you overwhelmed by the problem of how many of these there are? How could you do it without that?

Ms. RINGER. You can't have it both ways, Mr. Sawyer.

Mr. SAWYER. I'm just trying to be educated.

Mr. RAILSBACK. Would you yield for a second?

Mr. SAWYER. Surely.

Mr. RAILSBACK. I think what you're saying—and you haven't really had a chance to go into it—if the Copyright Royalty Tribu-

nal had new permissible latitude or, in other words, had more latitude to make a subsequent adjustment based on other criteria than they now have, then maybe they would serve in a fashion as the arbitrator. They would be the arbitrator, and if they weren't cemented in, they could make a decision that might not be foreseeable by either of the bargaining parties. Then, the parties would have to take their risk.

Mr. SAWYER. But then, if I may reclaim this, don't you run into the same argument that there are so many that they can't do this individually without having to have a backstop arbitration. That is what bothers me.

Mr. RAILSBACK. If you will recall, they did it. It took a long time. We underequipped and understaffed them. They made a determination. The public radio people were not happy because they were frozen out of the whole thing.

But these things are always subject to review.

Mr. KASTENMEIER. Does counsel have a question?

Mr. LEHMAN. I think I have a question that would really clarify some of the debate, Ms. Ringer, and it is my understanding your proposal isn't so different in effect from the compulsory arbitration Mr. Sawyer was talking about. And what you envision is that in effect the major parties will be compelled to arbitrate. That is in the case of the major motion picture companies and the major cable systems. The difficulty is since there are so many potentially unknown copyright holders who may not be included among those major parties. Even though they may account for 90 percent of the business, you could never be certain that the results of the compulsory arbitration would be binding on everyone.

So what you are proposing is that in effect the major parties compulsorily arbitrate, and then the Commission adopt that for everybody, even those who are not parties. And that would solve the problem Mr. Sawyer has with the many, many people you don't know about who are out there.

Ms. RINGER. That is exactly right, Mr. Lehman. That is exactly what I had in mind. I hadn't thought of it in terms of arbitration, but it would be that, in effect.

Mr. SAWYER. That would make more sense to me.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Well, all that is is enshrining the marketplace in the rules of the Tribunal.

Ms. RINGER. Yes.

Mr. BUTLER. Why is that necessary? Once we know what the marketplace is, why can't we turn the marketplace loose?

Ms. RINGER. Because of the need for protection of the cable. You do have, I would say, hundreds of thousands of potential copyright claimants. If you did away with the compulsory license, they could come in individually and claim copyright infringement—and they would. And you just can't do that, in my opinion.

This way you have the norm established by negotiations—however you want to call it—arbitration, maybe. And then everyone else is bound by that so the cable people can go ahead and use the stuff without advance permission, but they have to pay.

And there are lots of problems with this. It isn't a perfect solution. But I am not sure there is one, and I do think it's better than what has been suggested so far.

Mr. BUTLER. I just need help. What are all these infringements we are talking about, the millions of infringements? Take one simple cable system stuck back in the hills somewhere, and what potential liability is that system exposed to that could be resolved in bargaining?

Ms. RINGER. Well, if you insulate him, then you don't have free marketplace.

Mr. BUTLER. I want every man for himself.

Ms. RINGER. The liability is very great. It can go up to $100,000 per infringement in the normal case, and when you have repeated and willful, there are add-ons to that and criminal penalties, and so forth.

Mr. BUTLER. You are getting into the sanctions.

Ms. RINGER. That is not what you're asking. You are asking what the effect would be, and I would say the effect would be to cut them off at the pass, that they would not be able to carry this stuff at all. That is what would happen in practice, in my opinion, because they couldn't face that kind of liability and would just have to stop carrying the secondary transmission.

Bear in mind these people are not in privity. The cable system has been built up on the assumption that they are picking something out of the air and sending it on. They don't know what is on that channel. They are flipping the switch. They are not actually performing the music or turning on the film projector. They are picking up signals out of the air.

They obviously have industry information as to what the programs are that they are carrying, but not necessarily in advance, and there are changes.

And, remember, every single talk show participant or interviewee has literary property rights, copyright in what they say. And the stations get clearances. They make them sign before they go on the air. But the cable people have no potentiality of doing anything like that. And you do have to insulate them. And no matter what the movie industry says about, "We'll take care of this; it's not going to be a problem," I cannot get over that as a major problem.

Mr. BUTLER. Let's go back to this little cable station that picks up a channel, a local independent TV station. If it was a free market, then, of course, he'd have to make his arrangements with that local independent; is that so?

Ms. RINGER. The local independent doesn't have any rights, necessarily, with respect to cable transmission. No. Maybe if the industry worked it out that way, maybe it would be sufficient.

But as things now stand, if you took away the compulsory license, the little station would have to go to every copyright owner that every program producer had gone to originally and get clearances. And there is a big package of contractual rights and unclarity as to who owns what in this area. When they had the retransmission consent before, they would go to the broadcaster and the broadcaster would say, "I can't give you rights; I don't know them."

Legislatively this calls for some sort of insulation. This is not trying to benefit the cable industry but trying to benefit the public.

Mr. BUTLER. That is the only reason we have for going forward with it, to benefit the public.

Ms. RINGER. That is right.

Mr. BUTLER. It just disturbs me that we are undertaking to referee the marketplace. It just seems to me if we have any faith in the system, it ought to be able to work itself out. We just haven't given them a shot at it. It would be chaotic and interesting, and a lot of lawyers would get fat, but I feel the system could survive that.

Ms. RINGER. Well, as I said in my prepared statement, Mr. Butler, I would have agreed with you in 1958. I did agree with you in 1964. I was in favor of exclusivity then. But there's a lot of water down the river since then. And I think if you simply did away with the exclusivity license, there would be great difficulties.

Mr. BUTLER. I don't disagree with that, but it would make life interesting.

I yield.

Mr. KASTENMEIER. I just have one more question. This relates to another matter, and that is that recently we have had hearings involving the Copyright Royalty Tribunal—we have had the General Accounting Office, and the commissioners themselves present—with respect to prospective changes that might take place in the charter of the Tribunal.

I think it is fair to assume there will be compulsory licenses of one form or another, notwithstanding however the cable question is resolved—that seems to be the most difficult one. It is even possible to create more compulsory licenses.

Ms. RINGER. That is right.

Mr. KASTENMEIER. My question is: If you are familiar with the thrust of the General Accounting Office report, perhaps the views of the commissioners themselves, we would be very interested in your views about the Tribunal, its changes, whether you concur with the GAO report or to what extent you do not, and what changes structurally or otherwise you think might be considered for the Tribunal.

Ms. RINGER. That is a big question, Mr. Chairman. I have read the GAO report which I basically agree with. It seemed to me a balanced and thoughtful report.

I do regard it—and I find some satisfaction in this—as a vindication of the Tribunal to some extent. They have taken a barrage of criticism from interested parties, and I am not sure all of it was fair.

It does seem to me, as I testified in the Senate in April, that they have been doing a fine job under extraordinarily difficult circumstances. I think they have made mistakes. I have not agreed with everything they have done. But I didn't listen to all those hearings, either, and I think they have done exactly what you asked of them under rather adverse circumstances.

My own feelng is if you did away with the Tribunal you'd have to reinvent it in some other form. And I don't think that would be very profitable. I read Mr. Brennan's testimony of yesterday and I do grasp his point that they do have ongoing appeals and litigation

and proceedings, and there would be a great deal of problem if the Tribunal was transformed without some rather lengthy transition.

But it does seem to me that you can improve some of the drawbacks of the present situation. One of them, I think, is implicit in what I was saying, which is to take away a lot of the artificial restrictions in the cable area that were placed on them in 111 and chapter 8.

I am trying to think of all the points that were made in the GAO report. With respect to the structure of the Commission, I think they do need a permanent chairman. That was one of the suggestions, and it did seem to me that was a good idea.

I am not sure I share the tribunal's feeling that they don't need a general counsel. That seemed to me a good idea. They certainly need access to legal advice. They certainly need access to expert advice on technical matters. And I think part of their problem is they have not had that.

I do think that the size of the Commission isn't all that bad. I don't think that five is too many, but I don't think three would be ineffective if you wanted to go that route.

I would remind you that I think in your bill as you marked it up in 1976 there were three, and the five got in, in the conference, if I am recalling correctly. So that you certainly favored three at one time.

As to the placement in the Government, I think that there are some advantages as you perceived them in 1976 in retaining it in the legislative branch. Perhaps it would keep it a little more out of politics and provide a little more continuity, but I'm not sure that is essential. And if it were perceived as being better located in the Commerce Department or as an independent agency in the executive branch, I certainly would never object to that.

What I was proposing would not involve the Licensing Division of the Copyright Office, but if that activity was retained, it could be easily taken out of the Copyright Office and given to the tribunal.

During my aegis as register, it was made so completely separate from the other activity at the Patent Office that, as I understand it, there would be no procedural or administrative reason to keep it there.

Are there any other questions? I can't remember all the detailed recommendations that were made.

Mr. KASTENMEIER. I think you have touched on the major ones.

There were a number of options suggested, that you might have part-time commissioners or on call of another commissioner, perhaps the chairman, or there have been other suggestions that we rely on other administrative personnel to do the function from time to time and dispose of the tribunal completely.

One of the difficulties is the cyclical demands on its time. The first couple of years there was little demand, and as 1980 approached the peak, the involvement of the Commission rose, and let's assume it drops off again, and whether one can justify a full-time panel of commissioners, presuming them to be full-time involved in their activities.

That is why some of the less attractive alternatives, I think, confront us—and I think they are less attractive. I think the tribunal in some form ought to be retained.

Certainly I do not agree—I thought he missed the point. We gave them the mandate for the very reason that Congress did not want to be engaged in rate-setting. We felt we were not competent to do that, and that to merely resume those functions was not a solution at all.

But your own observations are very much appreciated.

Yes.

Mr. SAWYER. Mr. Chairman, suppose we were just to eliminate from the statute these horrendous summations and provide that damages will be the market price as established by other agreements in force, and either let the people go to court or sit down and agree.

Ms. RINGER. Would you preclude an injunction?

Mr. SAWYER. If you had compulsory licensing, there would be no injunction. You would just say, absent whatever the penalties are that you say would be catastrophic, we'd merely provide that the penalty for not having procured advance authorization for showing will be the market price established by similar agreements in force, or something like that, and then when the people find out who each other are, they have the choice of most other people of either paying their bill or going to court. They probably will pay their bill.

Ms. RINGER. I think what you are suggesting is very close to what I've got, except you don't have to go through the really tremendously expensive and burdensome business of suing every time. In other words, what you are proposing, if I read you, is you'd substitute the court for the tribunal.

Mr. SAWYER. Yes, except as a practical matter, every time you order something from the store and buy it, there is the potential of a lawsuit. If you don't pay the bill, they have no choice but to sue you. You can claim it wasn't what you wanted. And yet, there isn't enough of that—you know, 99 percent or 99.9 percent of the people pay their bills and don't get in a dispute. And you would have to assume that if they knew by reference what the market price was, both parties would have an inducement not to go to court because of expense and delay, and so forth, and would settle.

Mr. BUTLER. Would the gentleman yield?

Mr. SAWYER. Yes.

Mr. BUTLER. I think if I understand you, you are suggesting that the sanctions in the statute be fair market value.

Ms. RINGER. That is exactly what they are.

Mr. BUTLER. You scared me to death here a minute ago.

Ms. RINGER. The point is they cease to be fair market value when there are repeated and willful scofflaw infringements going on. Mr. Sawyer and Mr. Butler, you may be interested in knowing that what you are proposing is very much what went to the floor in 1976 in the cable bill, the ancient times—and it's a solution—to allow the courts to sort this out, making the criterion free market value, with no willful infringement liability, no injunctions, and so forth.

And I have reflected a good deal on this. In fact, you could set up a specialized court to deal with this or give it to one of the specialized courts. This is a possibility.

But I don't think it is the best solution. I think you are tying up the Federal judiciary in ways it shouldn't be tied up, and I think this is one reason the bill bit the dust or the cable provisions were knocked out in 1967.

Mr. BUTLER. In 1967?

Ms. RINGER. 1967.

Mr. BUTLER. That was before I was born. [Laughter.]

Mr. KASTENMEIER. If that concludes the questions, again we are indebted to you for your appearance here. It is a personal pleasure to see you again.

Thank you very much.

Ms. RINGER. Thank you.

Mr. KASTENMEIER. We stand adjourned.

[Whereupon, at 12:18 p.m., the hearing was adjourned.]

RECORD AND FILM PIRACY

WEDNESDAY, JULY 8, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:12 a.m. in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Frank, Sawyer, and Butler.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. This morning the subcommittee convenes further hearings on copyright matters. However, we will take up a new area, criminal penalties for piracy and counterfeiting of films, records and tapes.

During the 96th Congress the full committee reported favorably an overall Criminal Code revision containing changes in criminal penalties similar to those which are proposed in H.R. 3530, the bill before us today.

The Criminal Code revision legislation never reached a vote on the floor and obviously that included this part of it. However, proponents of increased penalties for record and film piracy are now seeking separate action with regard to their concerns.

Since the legislation dealing with the criminal penalties for the violation of the copyright laws is appropriately dealt with in this subcommittee, rather than the Subcommittee on Criminal Justice, which handles the code as a total package, we are considering this.

I am pleased to greet our first witness this morning, Ms. Renee Szybala, representing the Justice Department. She is special assistant to the Associate Attorney General with the U.S. Department of Justice.

TESTIMONY OF RENEE SZYBALA, SPECIAL ASSISTANT TO THE ASSOCIATE ATTORNEY GENERAL

Ms. SZYBALA. Thank you. Mr. Chairman and members of the subcommittee, I am pleased to be here today to give you the views of the Department of Justice on H.R. 3530, the Piracy and Counterfeiting Amendments Act of 1981.

This bill would strengthen the laws against criminal copyright infringement and trafficking in counterfeit labels. Its primary effect would be to increase the penalties for record, tape and film piracy and for label counterfeiting.

Piracy and counterfeiting of copyrighted material is now a major white-collar crime. The huge profits to be made have encouraged the growth of this problem while the current lenient penalties have done little to deter it. It has been estimated that worldwide sales of pirated tape recordings exceeded $1 billion in 1981.

The Department of Justice, therefore, favors the enactment of this legislation. We believe that the enhanced penalties would bring the sanctions for this type of crime more in line with the seriousness of the problem.

Under the bill, felony penalties could be imposed for all counterfeit label offenses and for serious and subsequent offenses involving pirated counterfeit recordings, motion pictures and audiovisual works.

The seriousness of the piracy is gaged by the number of copies produced and the timespan with which they are produced. The Department of Justice supports this scheme.

We believe the scheme recognizes that counterfeiting, which defrauds the consuming public, is a more serious crime and that substantial violators merit harsher treatment. We do have some revisions to suggest and these are addressed in detail in my written statement.

The most serious of them concerns the proposed definition of traffic in the trafficking in counterfeit label section. The definition appears to be narrower than under the current law. We suggest that it be broadened.

In addition, the subcommittee may wish to consider adding a section to the bill which would incorporate the definitions of "reproduce" and "distribute," which are currently in 17 U.S.C. 106.

With the revisions discussed in my statement, the Department of Justice supports this bill. We believe it will provide a more effective tool for combating the growing problems of counterfeiting and piracy. Thank you.

I will be pleased to answer any questions you may have.

[The complete statement of Ms. Szybala follows:]

SUMMARY

PREPARED STATEMENT OF RENEE L. SZYBALA, SPECIAL ASSISTANT TO THE ASSOCIATE ATTORNEY COUNSEL

This bill would amend those provisions of titles 17 and 18 which deal with criminal copyright infringement and trafficking in counterfeit labels. Its primary effect would be to substantially increase the allowable penalties for record, tape and film piracy and label counterfeiting.

The Department supports the proposed increase in penalties for these crimes. Piracy and counterfeiting of copyrighted materials are now major white collar crimes and penalties under current law are too lenient to provide an effective deterrent. The Department also believes that the graduation of penalties by the volume of illegal conduct is a proper way to gauge the severity of the offense.

The Department does have some suggestion to make with respect to individual provisions of the bill. The most serious of these concerns the bill's apparent narrowing of the definition of "traffic." With the revisions noted, however, the Department supports the enactment of this legislation.

Mr. Chairman and members of the subcommittee, I am pleased to be here today to give the views of the Department of Justice on H.R. 3530, the Piracy and Counterfeiting Amendments Act of 1981.[1]

[1]H.R. 3530 is identical to S. 691, except that the section sequence differs, and S. 691, probably through oversight, fails to preserve the forfeiture provisions of current 18 U.S.C. 2318 (b) and (c).

This bill would amend titles 17 and 18 of the United States Code with respect to criminal copyright infringement and trafficking in counterfeit labels. Its primary effect would be to strengthen the laws against record, tape and film piracy and label counterfeiting by increasing the penalties for violations.

Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white collar crime. The dramatic growth of this problem has been encouraged by the huge profits to be made, while the relatively lenient penalties provided for by current law have done little to stem the tide. The Department, therefore, in principle favors the enactment of this legislation. We believe that the enhanced penalties H.R. 3530 would impose would help bring the criminal sanctions for copyright infringement more in line with the seriousness of the problem. Coupled with vigorous prosecution, the increased maximum sentences and fines should act as a deterrent to major violators. We do, however, have some technical suggestions to make with respect to individual provisions.

I will first address the substantive provisions of the bill that would amend title 17.

Section 2 of the bill amends the criminal penalties for willfully infringing a copyright for purposes of commercial advantage or private financial gain (17 U.S.C. 506(a)). The substantive offense remains unchanged. The current penalty for criminal infringement of copyright in works other than sound recordings or motion pictures is a maximum term of one year and/or a fine of $10,000. Where sound recordings or motion pictures are involved, the penalty for a first offense is up to one year and/or a fine of $25,000, increased to up to two years and/or $50,000 for subsequent offenses.

Section 2 provides that the penalties will now be those fixed in 18 U.S.C. 2319, a new section which will be added to title 18 by section 4 of this bill. Under this new section, the penalties will be dependent not only upon the type of copyrighted work infringed, and whether the offense is a first or subsequent violation, but also upon the number of infringing copies and the time frame within which they are made or distributed. Thus, an offense, not involving a sound recording, motion picture or audiovisual work, will be punishable by imprisonment for up to one year and/or a fine of $25,000 (2319(b)(3)); a first offense involving sound recordings will be punishable by up to five years and/or $250,000, if 1,000 or more copies are made or distributed within a 180-day period (2319(b)(1)(A)); up to two years and/or $25,000, if less than 1,000 but more than 100 copies are made or distributed in that period (2319(b)(2)(A)); and by up to one year and/or $25,000, if less than 100 copies are involved or more than 180 days elapse (2319(b)(3)). A subsequent offense involving a sound recording is punishable by up to five years and/or $250,000, regardless of the time frame or number of copies involved (2319(b)(1)(C)).[2]

The penalties proposed for infringement of copyright in motion pictures or audiovisual works are similar, but require fewer infringing copies: The penalty of up to five years and/or $250,000 may be imposed where 65 or more copies are made or distributed within a 180-day period (2319(b)(1)(B)); up to two years and/or $250,000, if less than 65 but more than 7 copies are made or distributed within that period (2319(b)(2)(B)); up to one year and/or (2319(b)(2)(B)); up to one year and/or $25,000, if less than 7 copies are involved or more than 180 days elapse (2319(b)(3)); and up to five years and/or $250,000, if it is a subsequent offense, regardless of time frame or number of copies involved (2319(b)(1)(C)); [3]

Section 3 of the bill would completely redraft 18 U.S.C. 2318, which concerns trafficking in counterfeit phonorecord labels. At present, section 2318(a) provides that the transportation, receipt, sale or offer for sale in interstate or foreign commerce, with fraudulent intent, of articles bearing counterfeit labels, is punishable by imprisonment for up to one year and/or a fine of $10,000, for a first offense, and up to two years and/or $25,000, for a subsequent offense. The amended section 2318 increases the penalty for all offenses, first or subsequent, to a maximum of five years and/or $250,000.[4]

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[2] Section 2319(b)(1)(C), which provides enhanced punishment for subsequent offenses involving sound recordings, motion pictures or audiovisual works, requires clarification. It is not clear whether the first offense must have invovled the same type of work as the second—whether both offenses must involve, for example, a motion picture—or, indeed, whether the first offense had to involve a sound recording, motion picture, or audiovisual work, at all.

[3] See footnote p. 3. In addition, we note that both under current law and the proposed bill, where sound recordings, motion pictures or audiovisual works are not involved, subsequent offenses are not punished more severely than first offenses. The subcommittee might wish to consider whether subsequent offenses involving works other than sound recordings, motion pictures or audiovisual works should be punished more severely than first offenses.

[4] The bill would not provide for consideration of time or quantity criteria in the trafficking in counterfeit labels section, but rather would allow the maximum penalty for counterfeiting without regard to such criteria. We believe that this scheme correctly recognizes that counter-

Continued

In addition, the proposed section 2318 would eliminate the requirement of fraudulent intent; it will be sufficient that the offense of "trafficking" is committed "knowingly."

We see no problem with dropping the fraudulent intent requirement. It is difficult to imagine how one could traffic in articles knowing they bear counterfeit lables without intending that some purchaser, immediate or remote, will be mislead and cheated in his purchase.

The Department supports the enhanced penalties of both the counterfeit label trafficking and criminal copyright sections. We also support, as explained more fully below, the inclusion of time and quantity criteria in the proposed 18 U.S.C. 2319.

As to the enhanced penalties, a word of explanation is in order, since we took a different position in commenting on S. 22 in the 95th Congress. In our report on that bill we recommended that a first offense should be only a misdemeanor. It was believed at that time that, if a misdemeanor were not available, the plea negotiation process would be impaired; it was also thought that some United States Attorneys would consider certain criminal copyright cases to warrant nothing more than misdemeanor treatment.

Experience has shown, however, that the meager penalties under existing law appear to have had little deterrent effect in this area. The World Intellectual Property Organization, an intergovernmental group sponsored by the United Nations, has estimated that worldwide sales in pirated sound recordings totaled $1.1 billion in 1980. In North America alone, the figure is estimated at $560 million. Yet the present criminal sanction for a first offense involving copyright infringement of a sound recording or motion picture is a misdemeanor and carries a fine of not more than $25,000. It is difficult to avoid a comparison between the minimal penalties risked, even for subsequent violations, by those who commit this type of offense, and the increasing substantial industry losses. As compared to other theft and forgery statutes, penalties for copyright piracy and counterfeiting are among the most lenient, while these schemes are among the most lucrative.

Additionally, we have learned that, because of their substantial caseloads, United States Attorneys may be less enthusiastic about prosecuting misdemeanor offenses than felonies. Moreover, the existence of penalties of up to five years affords the prosecutor greater flexibility in the plea negotiation process than do misdemeanor penalties. Rule 11(e) (1) and (2) of the Federal Rules of Criminal Procedure, which permits plea agreements between the government and the defendant as to a specific sentence, subject to court approval, provides an opportunity to minimize exposure to incarceration in appropriate cases. It was for these reasons that the Department was able to support the classification of this offense as a class D (5-year) felony by section 1746 of S. 1722, the Criminal Code Reform Act of 1979, as reported to the Senate by the Judiciary Committee in the 96th Congress.

The graduation of penalties by the volume of illegal conduct, based upon the number of units illegally reproduced or distributed, seems to be an appropriate way to gauge the severity of the offense. Under existing law, there is no differentiation between a person who, at a given time, illegally reproduces five copies of a copyrighted work and one who reproduces five thousand. Moreover, classification of the seriousness of the offense by the volume illegally reproduced or distributed during a six-month period recognizes that the large-scale offender is a major law violator, deserving of severe penalties. Concomitantly it prevents those who may engage in trivial distribution on several occasions from being subject to the same penalties as those who make, obtain and distribute voluminous quantities on one occasion or within a short time-span.

The definition of "traffic" in proposed 2318(b)(2), however, appears to be narrower than that under current law, which reaches not only those who sell in interstate and foreign commerce, but also those who ship and offer for sale. We think this cutback is ill-advised and recommend that the bill be revised to continue to cover those who knowingly transport infringing matter. We would, in addition, recommend that the manufacturer be covered as well, since he plays so essential role in the criminal enterprise. We, therefore, offer as a substitute for proposed 2318(b)(2) the following:

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feiting, which defrauds not only the recording industry, but the consumer as well, is a much more serious crime than traditional piracy. Where counterfeits are involved, the consumer is led to incorrectly believe that he is purchasing a product of the legitimate source identified on the label.

"The term traffic means to make, transport, transfer or otherwise dispose of, to another, as consideration for anything of value or, to obtain control of with intent to so transport, transfer or otherwise dispose.

For like reason, i.e., to continue to cover those who offer for sale in interstate commerce, we suggest that proposed section 2318(c)(2) be amended by including the underscored words so that it will read: "the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense."

The proposed definition of "traffic" will remove from coverage those who knowingly purchase or acquire counterfeit material for personal use, without any motive of financial gain. While not condoning such conduct, we do not object to the decision of the draftsmen of this bill that it does not merit federal prosecution and punishment. We also note with approval that the bill provides for some increase in the jurisdictional base of the existing statute. It adds the special maritime, territorial and aircraft jurisdiction of the United States and the use of the mail to the interstate and foreign commerce base of current law (18 U.S.C. 2318(c)(1)(2)).

With the revisions noted above, the Department believes that this legislation would provide a more effective tool for combatting the growing problem of piracy, counterfeiting and other criminal copyright violations and supports its enactment.

I would be happy to respond to any questions you may have.

Mr. KASTENMEIER. Thank you for that rather brief statement.

Ms. Szybala, you are listed as a special assistant to the Associate Attorney General?

Ms. SZYBALA. Rudolph Giuliani.

Mr. KASTENMEIER. Does he have any special area? Is he an Associate Attorney General for——

Ms. SZYBALA. The Associate Attorney General supervises the entire criminal side of the Department of Justice. So that would include the FBI, the DEA, the Criminal Division, and the U.S. attorneys' offices.

Mr. KASTENMEIER. Your prepared statement indicated that U.S. attorneys, at page 6, may be less than enthusiastic about prosecuting misdemeanor offenses. Couldn't this lack of enthusiasm be dealt with by the Attorney General ordering the matter to have a higher prosecutorial priority without any increase in penalties? Is that the only way we can get their attention?

Ms. SZYBALA. I'm sure that portion of the problem could be corrected through departmental policy, but that would take care of only half of it. The other half is what deterrent effect and what message you are sending out to the violators. Given the number of dollars involved, the current penalty is laughable from the point of view of the violator.

Mr. KASTENMEIER. Given the current increase of violent crime in the United States, do you believe that it is appropriate to direct law enforcement priorities at this time to what is essentially a commercial problem, rather than a violent crime?

Ms. SZYBALA. No; I don't in that broad sense. But this particular area, we have found increasing infiltration by organized crime and that will continue to be a priority of the Department. We would hope that under this bill our primary efforts would be directed toward organized crime offenders.

Mr. KASTENMEIER. I must say there is a paucity of evidence before us that organized crime is involved. I don't say it isn't involved. It may well be. But we don't really have any cases in point. We just hear that somehow organized crime is interested in this area. Can the Justice Department provide us with a little more evidence or indication?

Ms. SZYBALA. I'm certain that we could, if you will permit me to get the material to you afterward?

Mr. KASTENMEIER. Would you? I think it is one thing to say that organized crime is involved, and quite another thing to have it shown to us that that in fact is the case.

At this point, I will yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman. In what manner are counterfeits, audio, sound recordings usually made?

Ms. SZYBALA. I have no knowledge at all of the expertise.

Mr. DANIELSON. Forget the expertise. This is totally a nontechnical question. In what manner—forgetting the expertise—what is a counterfeit recording?

Ms. SZYBALA. OK. A counterfeit both duplicates the sound and the packaging of the authorized original.

Mr. DANIELSON. The sound and the what?

Ms. SZYBALA. Packaging, as opposed to a pirated copy, which is simply the sound reproduced but in a packaging with less flair, with no markings from the legitimate source on it.

Mr. DANIELSON. In other words, someone has duplicated an original which was not a counterfeit? Is that what you are talking about?

Ms. SZYBALA. I'm not sure I understand the question.

Mr. DANIELSON. Little Jack Little makes a recording. You don't remember Little Jack Little, but there are those among us that do. He makes—he plays a piano and he makes a good recording. I wish to counterfeit that. Do I record his selection, play it, and duplicate it, and then sell it? Is that the idea?

Ms. SZYBALA. Yes, sir, that's my impression.

Mr. DANIELSON. Isn't it true that these are usually so inferior that anybody can tell one from the other?

Ms. SZYBALA. That I am told is often the case, but to get to that point where you can tell the difference, you need to open the packaging and play the item. The packaging is such when you are speaking of counterfeits that the consuming public can be defrauded, can be purchasing what is an inferior item believing it is legitimate and paying the price you would pay for the legitimate item and only find out when they get it home that the item bought has lousy sound.

Mr. DANIELSON. Does the Justice Department receive complaints from consumers that they bought a recording of artist A and when they got home, they found it was junk?

Ms. SZYBALA. No; I don't believe complaints of that type come into the Justice Department with any regularity; no.

Mr. DANIELSON. How would you know they were inferior?

Ms. SZYBALA. There have been many investigations of this type of thing through the last 3 years. Most of them have been declined prosecutions for one reason or another. But the evidence is coming in through the FBI and through the U.S. attorneys' offices.

Mr. DANIELSON. Why would they decline the prosecutions?

Ms. SZYBALA. A lot of the people they get a hold of are not the major violators. Our belief is that those prosecutions have not had the effect they could because when you get to the end result, nothing much happens to the violator. But the Department has

been declining minor cases, minor distributors cases, in which there just is no evidence of volume.

Mr. DANIELSON. What is the penalty normally and usually imposed under present-day prosecutions?

Ms. SZYBALA. I don't know what courts have been giving.

Mr. DANIELSON. Then how do you know it is too light?

Ms. SZYBALA. Under the law, the maximum that they could impose for a subsequent offense involving records, tapes, and films in particular would be 2 years.

Mr. DANIELSON. Well, 2 years is a long time, ma'am. How old are you? I will strike that question. But 2 years is truly a long time. We send people to prison for rape for less than 2 years.

Ms. SZYBALA. Well, I disagree that we should be doing that. But that's something else.

The 2-year maximum is not what most of the convicted people have been getting. It doesn't tend to work that way. We need to educate the courts when we have the serious organized crime offenders, educate the courts to the extent of the criminal enterprise.

Mr. DANIELSON. I just came back from spending some time in my district, and I'm sure that everybody in my district agrees with you that we should educate the courts to put people in jail.

But I don't think that our passing a law is going to put any more people in jail. The judges are going to impose whatever they consider to be the appropriate penalty. The jails are overcrowded, for one reason. Anyway, that's a point.

I tell you one thing that bothers me in this bill, and my good friend, Mr. Frank, the author is sitting here. You know, I question the wisdom of having special laws for special types of theft. This is a form of theft, a form of stealing.

I come from California. I don't know if it is still on the books, but we had a special law making it a separate crime to steal an avocado. I don't know why it should be different to steal an avocado than it is to steal a turnip.

Or, to steal from you as an individual, break into your home and steal your TV set. But stealing an avocado is particularly bad. In Hawaii they have laws against stealing pineapples for the same reasons, I'm sure.

Mr. KASTENMEIER. Would the gentleman yield?

Mr. DANIELSON. I will yield.

Mr. KASTENMEIER. We had this interesting dialog last year in consideration of a bill, of a Criminal Code provision generally in which it was proposed and I think included in the bill, a theft of airline tickets was punishable, but not bus tickets, but not train tickets, not passenger liner tickets, but only airline tickets.

The question is raised why just airline tickets. Well, obviously, because the airline people had gotten to the committee and influenced the—suggested to the committee that this would take care of their interests, but not anybody else's.

Mr. DANIELSON. I thank the gentleman. Do you know whether the penalty for counterfeiting U.S. currency, which certainly is an essential of our society, carries with it a fine of $250,000? I think you will find it is $10,000. Do you know?

Ms. SZYBALA. I do not know.

Mr. DANIELSON. It is a worthy thing to check. Here is a thought that I'm going to throw out for whomever wants to pick it up. It is free. To take the profit out of stealing, it might be a good idea to have a provision in our Criminal Code that the thief must pay back, plus pay to the Government as a fine as though he were a trustee, all of the aggregate proceeds he receives from the theft in addition to the penalty, so that if you are going to counterfeit phonograph records and suppose you make $1 million doing it, or even $100,000, you not only have to pay back the $100,000, but on top of that, the penalty. That's how you take the profit out of things. But nobody seems to believe that. The bank robbers not only have to go to jail but there is a judgment against him for the $50,000 he stole. If you want to take the profit out of something, take the profit out of it, and then give them the back of your hand. I have no other questions. I thank the gentleman for his patience. Thank you very much.

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman. I appreciate the testimony of the Department and your presence here today. My question is, generally you are supportive of the legislation with the suggestions that you make. What priority does the Department now assign to this area and if we passed this legislation, would they have any assurance that you would give it a different priority?

Ms. SZYBALA. I don't know that I could say counterfeiting is assigned separately any particular priority. I think it comes out within the Department enforcement more as a matter of organized crime. It is in that way that our efforts would be directed toward it.

Should the penalties be increased, I think the incentive both for prosecutors and investigators, increases as well in terms of these crimes. To that extent, enforcement efforts would be stepped up.

Mr. BUTLER. I'm not sure I understand that. Is there a bloodthirsty group of people looking for more blood? How does the increased penalty make it more attractive?

Ms. SZYBALA. I can't speak across the board. It is the feeling of the Department in terms of this legislation and what has been on the books, that where the feeling was originally—we had, several years ago, supported a bill which we had—our position had been that the penalty should be simply misdemeanors.

The feeling at that time was that this was largely an industry problem, not a crime problem, and that prosecutors would be very hesitant to prosecute people for this type of thing on anything other than a misdemeanor basis.

That experience has been proven wrong. The collective judgment now is that what happened was that the prosecutors, with their very limited resources, decided it was a low priority simply because of the way it was treated in the criminal laws: That is, it was not in title 18, the penalties were very low, whether for first or subsequent violations, at least in relation to other areas of white-collar type crime and therefore, its priority was low. To move it to title XVIII is a signal that the problem is growing in seriousness.

Mr. BUTLER. And I judge that really—not putting words in your mouth, but my own supposition is that it is the relationship to organized crime that gives this greater significance in the view of

the Department of Justice. So, you are going to beef up the record as to that?

Ms. SZYBALA. Yes.

Mr. BUTLER. Let me turn to another area just to be sure I understand. We had other legislation of a similar problem in the interstate transportation of untaxed cigarettes, and transportation of untaxed liquor, and things of that nature.

We have from time to time provided for a confiscation or forfeiture of the vehicle or the equipment involved in those transactions. As I read the existing law, you can destroy the labels and the articles to which the labels have been affixed, but that is the extent of it. Is that a shortcoming of the statute, or is there a problem with that?

Ms. SZYBALA. No one within the Department who deals with these types of offenses has suggested that we need some kind of forfeiture statute to me beyond the forfeiture of the counterfeit or pirated goods involved.

Mr. BUTLER. How is the Department's attention to this structured? Is there somebody specifically who is concerned with this area?

Ms. SZYBALA. No. This is just general policy now for bills. We take the bill and distribute it——

Mr. BUTLER. No. With regard to the enforcement of this particular area of the crime law, is there a particular person who has responsibility for enforcement of this area, or does this fall into general crime?

Ms. SZYBALA. It is general crime. Those entities within the Department which have had the most dealings with it are the FBI and the Criminal Division at Justice, and to a lesser extent the U.S. attorney's offices.

Mr. BUTLER. I have no further questions at this time. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, the author of the bill.

Mr. FRANK. I thank you. I appreciate the support of the Department. I agree with your proposed change with regard to the definition of trafficking. We will try to incorporate that.

One question was raised as to whether or not the passage of this bill might divert the Attorney General from his effort to slow down the rate of violent crime. Is there any reason to think that increasing the potential penalty in cases like this would damage whatever it is we are going to figure out we can do about violent crime, which still seems to be a pending matter?

Ms. SZYBALA. None whatsoever.

Mr. FRANK. Secondly, the question was raised why we single out one area and not others. I think the alternative question might have been put, why we were focusing attention on areas that did not seem to be problems at that time. I am wondering—am I correct in assuming you agree that there has been more of a problem in this area, that in fact what we are talking about is an increase in counterfeiting activity aimed in particular at this area?

Ms. SZYBALA. Yes, definitely. Over the last few years, every agency involved in this including Interpol and world organizations concerned have given increasing estimates of the amount of this activity going on worldwide.

Mr. FRANK. In this particular area?

Ms. SZYBALA. I imagine and I am just supposing, that a lot of the problem is due to the advances made in technology. It is easier to do this.

Mr. FRANK. Is it reaching the point where it might be doing significant harm to the industry?

Ms. SZYBALA. I think the industry would have to speak to that. I know that they feel it is. I would imagine given the volume of it, that it would.

Mr. FRANK. One question was whether it was all right to use criminal sanctions in what is a type of a commercial crime. What is the Justice Department's general opinion?

It obviously has to be established, but if it was the case that an increase in criminal activity were in fact posing a threat to the ability of a legitimate commercial enterprise to operate, would you find it a reasonable use of the Justice Department to protect their right to carry on commercial activities uninhibited by this?

Ms. SZYBALA. Yes. The recording industry deserves as much protection under our laws as any other enterprise. This is the theft of intellectual property. It should not be treated quite as differently as it is now treated from the theft of tangible property.

Mr. FRANK. To the extent that there is discrimination now, we treat this as a less serious crime?

Ms. SZYBALA. Yes, sir.

Mr. FRANK. I thank you. I endorse your statement concerning stiffer criminal penalties concerning rape.

Mr. KASTENMEIER. Mr. Sawyer?

Mr. SAWYER. The Attorney General cracks down on those who proliferate on this. We will be right down the line on violent crime. Thank you.

Mr. KASTENMEIER. If you know, is it the view of the Justice Department that they would rather pursue this individually, or in the context of general revision of the Criminal Code?

Ms. SZYBALA. I don't believe there is a view. We are commenting on this bill because it was sent to us. We have commented on it as part of the Criminal Code, as well.

Mr. KASTENMEIER. You make no comment as to whether this matter ought to be pursued from your standpoint individually and distinct from the revision of the code or the conduct?

Ms. SZYBALA. Yes.

Mr. KASTENMEIER. To the extent that, if you have looked at the matter or researched it, have the States made these thefts and piracies criminal offenses?

Ms. SZYBALA. I really don't know. I would imagine that under our newer Copyright Act, some of those laws may be preempted. The newer act purports to preempt all State laws.

Mr. KASTENMEIER. I don't know if they would preempt the criminal laws.

Ms. SZYBALA. I am not sure.

Mr. KASTENMEIER. My question is designed to determine whether or not States have criminal laws which reach this type of piracy or theft and if they do, then there becomes a question of whether the Federal Government should move preemptively in the area or whether in fact the States ought to be pursuing this. I know the

Justice Department in recent years with respect to theft and bank robberies has urged the States to pursue prosecutions in lieu of Federal prosecutions on the theory that that can be handled by State law enforcement. I am asking that question now.

Ms. SZYBALA. I really haven't done a survey and really don't know. But I do believe the point you raise is a valid one. I would be interested to find out.

Mr. KASTENMEIER. If you review whatever information you have and come across that, please make that available to us.

Ms. SZYBALA. Certainly.

Mr KASTENMEIER. The last question I have is the current record of I think the law was effective January 1, 1978, it has not been effective very long, three and a half years. What record the Justice Department overall has with respect to prosecutions under the existing section 2318 and section 506 of the Copyright Act, whether there have been in fact prosecutions and to what nature and to what end?

Do you have a record of that?

Ms. SZYBALA. I do not have any of that statistical material with me. To the extent that it exists, I will be happy to provide it.

Mr. KASTENMEIER. If there has been a paucity of prosecutions, it is difficut for us to assess why, I might add. We do not know whether it is because, as you have suggested at the outset, prosecutors feel that this can best be handled by the industry itself, or whether it is because we have failed to provide high criminal penalties. Either explanation might indeed be the case.

The gentleman from California?

Mr. DANIELSON. Thank you, Mr. Chairman.

There is one comment I didn't touch on and that was the recommendation that the criminal provisions be put into title 18 of the Criminal Code. I certainly concur with that. In the first place, an orderly way of legislating says you should have crimes all brought together. Secondly, it will carry with it a little bit of additional stigma which hopefully would have some deterrent effect.

I would certainly support moving this to title 18. Secondly, Mr. Chairman, as to whether this should be approached separately, I am sorry to say that my experience is such that I think we better deal with it separately. I doubt if anyone in this room will live long enough to see a revision of the entire Criminal Code. I know your resources are more limited than most people think they are, but to me an interesting adjunct to this bill would be some kind of a tabulation or study as to comparable penalties for comparable crimes.

I just wondered where we have $250,000 fines on any other crime. If you have any data like that available, I would appreciate it if you would supply it. But I don't want you to consume time that you could be spending on violent crime on that endeavor, but it really would be helpful, and also on the magnitude of crime. I can imagine that the aggregate dollar volume for counterfeit and pirated recordings exceeds the dollar volume in the bookmaking industry, which is absolutely throughout the length and breadth of our land.

Our jurisdictional copyrights—our Federal jurisdiction on bookmaking is the bookmaker's task which gives total jurisdiction. I

would assume that the book making aggregate cash is far greater than the cash on these counterfeit recordings.

Mr. SAWYER. If I may interject a comment, and I realize it is tied to the gestating Criminal Code, and that is that throughout the new Criminal Code revision, we have greatly increased fines, particularly on those crimes that are money motivated. So that whereas this may not now have comparability with others, I think if the Criminal Code ever comes forward, it will be very comparable because those kind of fines have been levied wherever the motivation is to make money.

Mr. DANIELSON. I would support him completely. We don't have a difference in philosophy there.

Thank you very much. You have made a very honest, practical and forthright presentation.

Mr. KASTENMEIER. If there are no further questions, the committee thanks you, Ms. Szybala.

Mr. DANIELSON. I hope you can stick around and hear the rest of it.

Ms. SZYBALA. I am afraid I can't.

Mr. KASTENMEIER. The Chair would now like to call James Bouras, the vice president, secretary, and deputy general attorney for the Motion Picture Association of America.

We are pleased to have you here this morning. I understand that your views are also compatible with the Recording Industry of America.

TESTIMONY OF JAMES BOURAS, VICE PRESIDENT, SECRETARY, DEPUTY GENERAL ATTORNEY, MOTION PICTURE ASSOCIATION OF AMERICA, ALSO REPRESENTING THE RECORDING INDUSTRY OF AMERICA

Mr. BOURAS. Yes, Mr. Chairman. As indicated, I am making this brief statement on behalf of the MPAA and the RIAA.

We may have available to us today some of the information you requested of Ms. Szybala and I would be happy to provide it at the end of my testimony. This bill would essentially do the following:

Make the counterfeiting and large-scale pirating of motion pictures and sound recordings felonies for the first offenses. Pirates and counterfeiters earn millions of dollars in illicit profits and yet, if they are apprehended and convicted under current law, face penalties which are miniscule in comparison.

It would move the penalties for criminal copyright infringement to the Criminal Code or title 18, which U.S. attorneys regard as their charter, although the substantive offense itself remains in title 17.

It would increase the criminal penalties for counterfeiting and for most cases of piracy as well, in order to make the penalties commensurate with the crimes. This bill is directed toward large-scale piraters. We filed a joint statement with this committee in support of the bill. I would respectfully request that that statement be made part of the record.

The CHAIRMAN. Without objection, that statement will be received and made part of the record to go with the appendixes.

[The complete statement of Mr. Bouras follows:]

PREPARED STATEMENT OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This statement is submitted by the Motion Picture Association of America, Inc. ("MPAA") and the Recording Industry Association of America, Inc. ("RIAA") in support of H.R. 3530, a bill introduced by Mr. Frank and a bipartisan group of co-sponsors (including Messrs. Railsback, Sawyer and Butler of this Subcommittee) to strengthen the laws against record, tape and film piracy. MPAA represents eleven of the largest producer-distributors of motion pictures and television programs in the United States. RIAA is a trade association of 49 recording companies which create and market more than 90 percent of the records and tapes sold in the United States, and its division, RIAA/Video, consists of 25 companies engaged in the emerging business of videocassettes and videodisks.[1]

SUMMARY

The counterfeiting and piracy of motion pictures, records and tapes is a highly sophisticated business that has grown into a billion dollar a year industry. Lured by the huge profits which can be made in a short period, organized crime has become increasingly involved in large-scale counterfeiting and piracy schemes.

Counterfeit films, records and tapes are virtually indistinguishable from the legitimate products, deceiving consumers into buying low-quality imitations as well as robbing the creators of the authentic works of royalties and revenues.

Existing criminal penalties do not deter counterfeiters and pirates. A first offense is only a misdemeanor, a very small risk in light of the enormous profits to be made.

The misdemeanor penalty is so mild a sanction that it discourages prosecutors from pursuing cases. And even when criminals are convinced, the misdemeanor penalty leads judges to impose light sentences.

H.R. 3530 would make counterfeiting and piracy a felony for a first offense and would codify these crimes into Title 18 of the United States Code, which federal prosecutors regard as their "charter." This would help to deter criminals and catalyze prosecutions.

The penalties in H.R. 3530 are graded according to the quantity of illegal films, records or tapes involved. Judges would have the discretion to impose sentences commensurate with the crime. The $250,000 and 5-year penalties are maximum sentences for major offenders—criminals who, as discussed below, often make millions from their crimes. Small-scale offenders would remain subject to only a misdemeanor charge.

INTRODUCTION

MPAA and RIAA welcome this opportunity to support H.R. 3530 which, for the first time, would (1) codify the offense of film and record piracy as part of the federal criminal code; (2) classify the counterfeiting and piracy of motion pictures, records and tapes as felonies; and (3) increase the penalties for those serious crimes to a meaningful level. Specifically, H.R. 3530 provides for graduated penalties based on the size of the counterfeiting or piracy operation. The bill would increase the penalty for large-scale counterfeiting and piracy—involving the manufacture or distribution of 1,000 or more phonorecords or 65 or more copies of a motion picture—to a fine of up to $250,000, imprisonment for up to five years, or both.

The motion picture and recording industries believe that such legislation is essential to curb the explosive growth of counterfeiting and piracy, and that only through penalties such as those provided in H.R. 3530 can the law deter the sophisticated and organized criminals who now control a more than billion dollar a year "industry" in the illegal reproduction and distribution of motion pictures, records and tapes.

I. FILM AND RECORD PIRACY AND COUNTERFEITING ARE MASSIVE PROBLEMS THAT DEMAND IMMEDIATE ATTENTION

A. The nature of the problem

For a number of years, the legitimate motion picture and recording industries have been victimized by various forms of piracy and counterfeiting. "Piracy" is the term used to describe the unauthorized duplication of records and films on disks, tapes, cassettes, cartridges, videocassettes or videodisks. Audio piracy began its

[1]The membership lists of MPAA, RIAA and RIAA/Video are appended as Attachment A.

rapid growth in the late 1960s when prerecorded tape cartridges were introduced into automobiles and homes; video piracy began in the 1970s with the introduction of videocassette recorders. The pirates quickly discovered that they could reap huge, untaxed profits by copying and selling hit records and tapes on a massive scale. The pirates are able to do this, of course, because they do not make any of the substantial investment in the development of new talent and distribution of the product which must be made by legitimate producers, but rather concentrate on "hit" products for which a sure market has already been established.

The impact of piracy on legitimate industry is enormous. As one Justice Department official described it:

"The effects of piracy are debilitating; the pirate brings no creativity to his entry into this art form; indeed he feeds as a parasite on the creativity, the productivity, and the enterprise of others. He is anticompetitive for, to a substantial degree, he suppresses the creativity and initiative of both artists and producers as he feeds like a vulture upon their creations. He is really a thief of major stature." [2]

"Counterfeiting" goes a substantial step beyond piracy. In a "conventional" pirated film or tape, the recorded performance is a copy of the original commercial version, but the package and graphics used to market the pirated product are usually unrelated in appearance to that of the original. In the case of a counterfeit film, record or tape, however, the package and graphics—including artist photos, color art, company labels, corporate logos and trademarks—are also forgeries or close facsimiles of the authentic product.

It is thus very difficult to distinguish a counterfeit film, record or tape from the authentic product until the counterfeit is played. Indeed, the identification of counterfeits is so difficult that unscrupulous or uncaring distributors and retailers are often able to meld counterfeits into their stock of legitimate products.

Counterfeiting is thus an even more insidious crime than conventional piracy, for counterfeiters deceive the public as well as rob the legitimate artists and producers. Consumers are induced to believe that they are purchasing the product of the legitimate motion picture studio or recording company identified on the counterfeit label. Even honest retailers who would otherwise refuse to distribute pirated products are often defrauded into selling counterfeits. Counterfeiters thus steal not only the intangible property of the copyright owner, but also the business name and good will of the motion picture studio, recording company, artists and actors.

B. The destructive effects of piracy

The victims of counterfeiters and pirates are numerous:

1. *The public.*—The public is victimized by counterfeiting and piracy in a number of ways. The consumer who purchases a counterfeit film or record at full price, believing it to be legitimate, is often cheated by the poor quality of the forgery. Because sophisticated equipment is needed to reproduce feature-length films faithfully, counterfeits are often marred by imperfections. In some versions, entire scenes have been deleted or cropped, making them unintelligible. Records and tapes reproduced on cheap or faulty equipment with inferior materials likewise often fail to provide the true fidelity of the legitimate products.

The consumer, taken in by the counterfeit packaging, does not know he has purchased a cheap, pirated version until he attempts to play it on his stereo or video machine. Some of these dissatisfied customers return the defective counterfeits to the retailers or legitimate manufacturers for credit.

Counterfeiting thus often injures the legitimate manufacturer twice—by the loss of the original sale and by the replacement cost of products sold by the counterfeiter.[3]

The public is also injured by piracy and counterfeiting in another, longer-term respect: By their debilitating effect on the legitimate motion picture and recording industries, counterfeiting and piracy reduce the choice of films, records and tapes available and limit the opportunities for new artists. The public is thus injured as the legitimate motion picture studios and recording companies are forced to cut their losses by committing to fewer releases and concentrating on known artists and material.

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[2] Testimony of John L. Murphy, Chief, Government Regulations Section, Criminal Division, U.S. Department of Justice, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of the House Judiciary Committee on H.R. 13364, 93d Cong., 2d Sess. at 7 (1974).

[3] These replacement costs are often substantial. For example, in February 1980 one recording company discovered that during a short period of time several of its retailers had claimed credits on counterfeit tapes and records worth more than $400,000. The Wall Street Journal, February 1, 1980 at 12.

2. *Recording artists, actors, and actresses.*—Most of these talented performers have only very brief careers because of changes in consumer tastes. Counterfeiters and pirates feed off these artists at the peak of their careers when their screen triumphs and recording hits are selling well. Recording artists lose millions in royalties and fees from the unchecked activities of pirates and counterfeiters. On the other hand, counterfeiters and pirates leave the new or less popular artists to be subsidized by the legitimate entertainment companies. As sales of legitimate products are increasingly displaced by sales of counterfeit and piratical copies, however, the legitimate companies are increasingly less able to support these marginal artists.

3. *Musicians.*—Both the lead recording stars and the multitude of background musicians are directly injured every time a counterfeit or piratical record or tape is sold. The members of the American Federation of Musicians receive supplemental income through a Special Payment Trust Fund based on the number of records sold. In 1980 the recording companies paid nearly $19 million into that fund.

Each time a legitimate record or tape is sold, the recording industry also makes a payment to a Music Performance Trust Fund which is used by the musicians union to finance free concerts by their members at veterans' hospitals and in underprivileged areas. In 1980 the recording companies paid another $19 million into this fund. The current volume of counterfeit and piratical records and tapes deprives these two musicians' funds of millions of dollars each year.

4. *Directors, writers, composers and publishers.*—These creative individuals also have a vested interest in the success of their films, records and tapes. Indeed, in the recording industry, the earnings of composers and publishers are determined by the legitimate sales of records and tapes. Again, whenever a counterfeit or piratical film or record displaces the sale or rental of a legitimate product, these individuals are robbed of the fruits of their labor.

5. *Motion picture studios and recording companies.*—Piracy and counterfeiting have an adverse effect on the legitimate motion picture studios and recording companies which must take the risk and provide the investment in new films and recordings. A studio will often invest $20 million in the production of a single motion picture, and another $10 million in its distribution and advertising, before it returns one penny at the box office. Recording companies likewise invest $250,000 and more to record and advertise a new album before a single copy is sold.

Only a small percentage of films and records make money; most never earn enough to cover basic product, talent and promotional costs. In 1979, 84 percent of the record albums released failed to recover their costs. A motion picture studio or record company is thus dependent on its relatively few hits to cover its costs, develop new talent, subsidize losing projects, and hopefully make a profit. Counterfeiters and pirates, by contrast, copy only the hits, depriving motion picture and recording companies of the revenues they need to survive in a very risky business. Counterfeiters and pirates bear no risks, but substantially increase the risks borne by legitimate producers.

Piracy and counterfeiting are growing so rapidly that it is difficult to estimate with certainty the economic impact on legitimate business. Jules E. Yarnell, Special Counsel, Anti-Piracy for the RIAA, estimates that more than $600 million a year is diverted from legitimate recipients in the recording industry. The impact on the motion picture industry may be as high. Overall, it is reasonable to estimate that pirates and counterfeiters siphon more than a billion dollars a year from the legitimate industries.[4]

In addition, the export of American-made motion pictures and television programs contributes approximately $900 million annually to the U.S. balance of payments. Many of the piratical films and videotapes manufactured in the United States are today being shipped overseas, threatening the continued financial viability of overseas markets for American motion pictures and television programs—and also the positive impact these markets have on the U.S. balance of payments.[5]

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[4]In light of these statistics, it is not an exaggeration to say that the financial straits of the American recording industry are at least partially the result of the explosive growth of counterfeiting and piracy. A number of major recording companies (ABC, Capricorn, Casablanca, GRT, Infinity, London, and Private Stock) have recently been merged or gone out of business because of their severe financial problems.

[5]See, e.g., *United States* v. *David Barnes* (U.S. District Court, Southern District of New York, 78 Cr. 80 WCC) (shipment of pirated films to South Africa); *United States* v. *Ralph E. Smith* (U.S. District Court, Southern District of Texas, Crim. No. H-79-82) (pirated videotapes manufactured in the United States shipped to Ghana, Egypt, Malta and the United Arab Emirates); *United States* v. *Drebin*, 557 F.2d 1316 (9th Cir. 1977), modified, 572 F.2d 215 (9th Cir. 1978), cert. denied, 436 U.S. 904 (1978) (shipment of pirated films to South Africa); *United States* v. *Keith Auston and Mohy Quandour* (U.S. District Court, Central District of California, reported in the Los Angeles Times, July 16, 1979, page 15) (pirated videotapes manufactured in the United States shipped to England, Saudi Arabia, Jordan and the United Arab Emirates).

6. *Employees.*—This drain on the income of the legitimate motion picture and recording companies from counterfeiting and piracy has contributed to widespread lay-offs at every level. No one should think that piracy and counterfeiting harm only a few wealthy film and recording stars; those serious crimes directly injure thousands of both white-collar and blue-collar workers as well.

7. *Retailers and distributors.*—These small businesses are among those most damaged by counterfeiting and piracy. A legitimate retailer selling a videocassette, record or tape simply cannot compete with a dishonest retailer who traffics in pirated or counterfeited versions which cost the retailer less than a third of the genuine product.

8. *The government.*—Last, but by no means least, counterfeiting and piracy harm the government in two important respects. First, pirates and counterfeiters, who deal strictly in cash, do not pay any state or federal taxes on their illicit profits. Tax authorities have been forced to expand and increasing amount of their resources in an attempt to reach this illegal income.

Second, as organized crime expands, its involvement in piracy and counterfeiting, there are obvious costs to government in attempting to untangle the web of illegal operations which support one another. As one of the participants in a recent conference on piracy and counterfeiting conducted by the World Intellectual Property Organization—an arm of the United Nations—stated:

"It should not be thought that record piracy is only carried on by petty traders and small-time criminals. As soon as the large profits possible from record piracy became apparent, big-time criminals began to appear on the scene. Nowadays, record pirates are often the same people who are active in other illegal enterprises, such as the trade in dangerous drugs." [6]

C. Piracy and counterfeiting are growing at an alarming rate

Piracy, and particularly counterfeiting, have plagued the recording industry for some time. And recent changes in the distribution methods of the motion picture industry have increased the opportunity for both piracy and counterfeiting immensely.

Until recently, motion pictures were only licensed, rather than sold, for viewing in a sequence of outlets—theaters first, followed by pay television, network television, local television, and various non-theatrical outlets (*e.g.*, hospitals, ships, and airplanes). In the last few years, however, motion picture studios have also begun to offer films for outright purchase in the form of pre-recorded videocassettes and videodisks some time after their initial theatrical engagements, thus adding another step to the distribution pattern. This market is now growing rapidly as consumers purchase videotape and disk playback devices.

Unfortunately, the growth in the market for pre-recorded videotapes and disks has been accompanied by a tremendous growth in film piracy and counterfeiting. The illegal duplication and sales of videotapes and disks means, just as it has meant for the recording industry, that labels and other identifying marks are now being counterfeited so that illegally duplicated films, tapes and disks can be palmed off on the public as legitimate products.

Moreover, because films are distributed in a sequential pattern, motion picture studios also face a number of piracy problems besides the "pirating" and/or "counterfeiting" of legitimate videocassettes and videodisks. The most serious of these other problems is the illicit film-to-tape transfer of films still in initial theatrical release which have not yet legitimately been issued in the form of videocassettes and videodisks. Indeed, many pirates focus their efforts on just such films because, facing no legal competition, they can charge whatever they market will bear. For example, pirated videocassettes of "Star Wars" are known to have been sold for as much as $500 a copy. The pirating of films which have not yet legitimately been issued in the form of videocassettes and videodisks has a doubly deleterious impact upon the motion picture studios: It not only adversely affects current theatrical attendance but also dilutes the future potential for sales of legitimate cassettes and disks.

Despite the substantial efforts of MPAA, RIAA and federal law enforcement officials, film and record piracy—and particularly counterfeiting—are growing by leaps and bounds.[7] In December 1978, the FBI seized over $150 million worth of

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[6]Statement of John Hall, Director General of the International Federal of Producers of Phonograms and Videograms (March 25, 1981) at 3.

[7]Both the motion picture and recording industries have established special anti-piracy offices. Each industry is spending more than a million dollars a year in that effort. But these industry efforts to curb the growth of the record an film piracy have met with only limited sources. This is because, on their own, copyright owners, such as the members of MPAA and RIAA, can only

equipment and counterfeit recordings in simultaneous raids at 23 locations in five states. These raids and subsequent investigations resulted in the indictment and eventual conviction of Sam Goody, Inc., a major retail chain, for the purchase and sale of over $1 million in counterfeit recordings. In another recent FBI raid in five states, 78 individuals were convicted for operating a massive piracy ring.

Miltimillion-dollar piracy and counterfeiting operations are not at all uncommon. For example, one counterfeiting ring raided in 1977 was alone responsible for producing and disseminating more than 25 million counterfeit records a year, reaping an annual profit of more than $30 million.

The Department of Justice has recognized the epidemic proportions of piracy and counterfeiting. In August 1980, the Attorney General published the results of a survey of FBI field offices throughout the nation which ranked the problem areas in all forms of white collar crime, including corruption, financial crimes, and various frauds. Of the 44 crime areas listed in the survey, the FBI ranked copyright violations—that is, film and record piracy and counterfeiting—as the third most troublesome.[8]

Although the legitimate industries and the Justice Department are concerned by both piracy and countefeiting, counterfeiting presents the more difficult and faster growing problem. This burgeoning growth has been caused by a number of factors:

1. As a result of the increased efforts of industry and law enforcement officials against the manufacturers, distributors and retailers of pirated products, unscrupulous retailers who had previously dealt in pirated products have turned to counterfeits which are virtually impossible to detect. Moreover, even when counterfeits are detected, the retailer or distributor can often evade prosecution by claiming that he too was duped by the counterfeiter.

2. Counterfeit films and records are more readily saleable through legitimate outlets and bring greater profits to the counterfeit manufacturers and distributors because they can be sold for higher prices than piratical products. The consumer, unaware that he is purchasing a counterfeit, will pay the full market value for what is really only an elaborate forgery.

3. Because of the extraordinary profitability of counterfeiting, organized crime is becoming more and more involved in manufacturing and distributing counterfeits. Indeed, organized crime is in a unique position to move into counterfeiting because the crime requires more technology and capital than piracy due to the sophistication necessary to forge faithful graphics, labels and packaging.

The August 1980 Report of the Attorney General concluded that "[t]here is evidence that organized crime is becoming increasingly involved as a major supplier of counterfeit products." [9] As a group of investigative reporters found—

"In the last three years, the Mafia has become one of the biggest producers of records and tapes in this country, turning out millions of copies of the hits on the Top 20 list.

"The mob's first big hit was the music from the soundtrack of the movie, 'Saturday Night Fever' featuring the Bee Gees. RSO records, the company that made the original legal recording, says it sold 23 million copies of the soundtrack from 'Saturday Night Fever.' Federal investigators say mob counterfeiters made and sold at least that many." [10]

These sophisticated criminals are well aware of the huge profits and small risks involved in piracy and counterfeiting. As an FBI agent stated in June 1980—

"We now know . . . that video piracy has moved out of its initial stage as the province of small-time operators and semiprofessionals to where the Mob is involved in a big way. It had to happen, I suppose. The potential profits are enormous and the risks are fairly small." [11]

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file civil infringement actions. Such civil actions have no effect on the sophisticated criminals who engage in pirate and counterfeiting activities. They simply set up new operations in another location and ignore the injunctions issued by the civil courts. A case in point is George Tucker. Although enjoined from piracy in three differenct civil actions dating back to 1971, Tucker's name was prominent in multi-state raids by the FBI in December 1978. (In August 1979, Tucker pled guilty to an indictment stemming from the raids.) Efforts by the industry to develop some technological solution to the problem of piracy and counterfeiting have likewise not been successful. Although both industries have sought out and tested all devices designed to impede piracy and counterfeiting, no satisfactory technological solution has been found.

[8]Report of the Attorney General, "National Priorities for the Investigation and Prosecution of White Collar Crime," Appendix C. Film and record piracy and counterfeiting were viewed to be as troublesome as all forms of housing frauds and labor corruption. (The most troublesome problems were corruption of state and local officials and bank embezzlement.)

[9]Report of the Attorney General, "National Priorities for the Investigation and Prosecution of White Collar Crimes," August 1980, at 28.

[10]Transcript of NBC Nightly News, May 9, 1979, at 1-2.

[11]TV Guide, June 21, 1980, at 3.

The rising tide of piracy and counterfeiting—and particularly the fact that piracy and counterfeiting are increasingly the domain of organized crime—is a subject of concern of law enforcement authorities throughout the world. In 1977, Interpol, the body through which the police forces of member nations coordinate the investigation of crimes with international consequences, unanimously adopted a resolution sponsored by the United States seeking the support of all of its member nations in the fight against counterfeiting and piracy.[12]

These efforts, however, have not been very effective, in large part because of the inadequate penalties in existing legislation for large-scale counterfeiting and piracy operations. This past March, the member nations of the World Intellectual Property Organization met to consider the alarming growth in recording and video counterfeiting and piracy. The WIPO convention reported that piracy and counterfeiting are virtually out of control. The WIPO members adopted another resolution, again supported by the United States, which called on all nations to combat counterfeiting and piracy "by imposing penalties of sufficient severity to act as a deterrent."[13]

As described below, H.R. 3530 is a meaningful response to this call for action. For the first time, the penalties for film and record counterfeiting and piracy would be an appropriate deterrent to the organized criminals who are now responsible for that billion dollar a year underworld "industry."

II. THE EXISTING PENALTIES FOR PIRACY AND COUNTERFEITING ARE INADEQUATE

The existing penalties for film and record piracy and counterfeiting have become inadequate. The lack of appropriate penalties—particularly the fact that a first offense is only a misdemeanor—deters law enforcement officials from prosecuting. Prosecutors frequently decline to prosecute at all; and even when cases are prosecuted and the criminals convicted, judges often give the offenders suspended sentences because they consider the crime to be "a mere misdemeanor."

A. Criminal copyright infringement (Piracy)

At present, Title 18 of the United States Code—the federal criminal code—does not contain any provision prohibiting copyright infringement of a record or motion picture. Rather, the penalty for that crime is found in 17 U.S.C. § 506(a), a portion of the Copyright Act. The act provides for a fine of up to $25,000, one year in prison, or both for a first offense, and a fine of up to $50,000, two years in prison, or both for repeat offenders. A pirate who has not previously been convicted is thus faced with only a misdemeanor penalty no matter how massive his operation may be. Many pirates believe that the misdemeanor penalty—with the likely prospect of a declined prosecution or a suspended sentence—is a small risk well worth taking in order to reap the enormous profits piracy can yield.

Unfortunately, the pirates are correct. United States attorneys, who see their "charter" in terms of enforcing Title 18, are often unaware of, or unfamiliar with, the criminal provisions tucked away in the Copyright Act or believe that the misdemeanor nature of the offense does not justify the time necessary for a prosecution. Judges likewise often hand out suspended sentences on the grounds that copyright infringement is not really a "crime."

Recent cases demonstrate that the inadequacy of the existing misdemeanor penalty undermines effective law enforcement. One individual who was caught with more than 200 completed pirate videocassettes and six video machines capable of making many more each day was given a 30-day suspended sentence. Another who was arrested with more than 600 pirated tapes and 12 recorders was also given probation and a $2,500 fine. In the latter case, the judge even returned the recorders to the pirate.

Given the evidence that organized crime is increasing its control over film and record piracy and reaping large profits from this illegal activity, the misdemeanor penalties in the Copyright Act have become inadequate. H.R. 3530 would make it clear that piracy is a criminal offense punishable under the federal criminal code, and that large-scale piracy is a felony warranting stiffer sentences.

B. Counterfeiting

Since 1962 the interstate shipment of records or films with counterfeit labels has been covered by a separate provision of the criminal code. 18 U.S.C. § 2318. Recognizing that counterfeiting had become "so profitable that ordinary penalties failed to deter prospective offenders," in 1974 Congress increased the maximum fine to

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[12]Interpol Resolution (September 8, 1977) (Attachment B).
[13]WIOP Resolution (March 27, 1981) (Attachment C).

$25,000 for a first offense and to $50,000 for any subsequent offenses. H.R. Rep. No. 93-1389, 93d Cong., 2d Sess. 4 (1974).

When the Copyright Act was revised in 1976, however, the penalties for counterfeiting were reduced to their present level—a $10,000 fine, one year in prison, or both for a first offense, and a $25,000 fine, two years in prison, or both for subsequent offenses. The result is a curious anomaly—the penalty for piracy (which itself is too low) is greater than the penalty for counterfeiting, which is the far more profitable, deceitful and insidious crime.

The present misdemeanor penalties for both piracy and counterfeiting are clearly inadequate. As early as 1974—when the counterfeiting fine was more than twice what it is today—the Chief of the Government Regulations Section of the Criminal Division of the Justice Department reported that the misdemeanor penalty was a "[m]ild sanction [which] necessarily creates a psychological attitude on the part of prosecutors and courts that mitigates the seriousness of the offense and militates against the imposition of sentences compatible with it." [14]

For these reasons, the Justice Department official supported a proposal which would have made the penalty for a first offense a felony.

In 1979, Mr. Ted Gunderson, then Special Agent in Charge of the FBI's Los Angeles Field Office—the office perhaps most directly involved in combating counterfeiting and piracy—acknowledged that United States attorneys are reluctant to prosecute piracy and counterfeiting cases because of the inadequate misdemeanor penalties available:

"Many U.S. attorneys don't want these cases in their courts. I know an instance where a guy made more than one million dollars in counterfeiting, and the judge gave him one-year probation and a $1,000 fine. Nobody seems to care.

"What judge in this city is going to sentence an individual to severe punishment for a misdemeanor? In a raid on the East Coast of a record-album counterfeit operation, there were in excess of 23 search warrants issued, and out of that in excess of 100 indictments are projected. There are going to be 100 people convicted . . . and they probably will plead guilty to one or two counts of copyright infringement. For that they will get a fine, probation, suspended sentence. All the man hours and time that went into that . . . for what? For these guys to go into business again." [15]

Despite these criticisms by law enforcement officials, the situation has not improved. In August 1980, the Attorney General conceded that, despite the growing problem in copyright violations, "sentences for convicted offenders have . . . been light." [16]

During the last session of Congress, both the House and Senate Judiciary Committees, as part of their overall revision of the federal criminal code, recommended the enactment of provisions that would have accomplished the same modifications of law now proposed in H.R. 3530.[17] In recommending these changes, the House Committee emphasized that "increased penalties are necessary" to combat the "explosive growth in record and film piracy in recent years, depriving legitimate recording companies and motion picture studios of very large revenues. Record and film piracy has the effect of reducing the legitimate volume of sales and the payment of royalties to recording artists, actors, and actresses, musicians, producers, directors, writers, composers, publishers, and other participants in the creative process. Reduced profits also deprive Federal, State, and local governments of tax revenue." [18]

Although the omnibus criminal code revision bill was eventually tabled, the increased penalty provisions for piracy and counterfeiting—which were supported by the Justice Department—"were not controversial in subcommittee, nor was any question about them raised during the 18 markups of the criminal code bill that were held by the full Judiciary Committee." [19]

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[14] Testimony of John L. Murphy, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 13364, 93d Cong., 2d Sess. at 5 (1974).

[15] "Counterfeit! LA's Hot Status Crime for the 80's," Los Angeles Magazine (February 1979).

[16] Report of the Attorney General, "National Priorities for the Investigation and Prosecution of White Collar Crimes," August 1980, at 29.

[17] H.R. 6915, 96th Cong., 2d Sess. §§ 2537, 2544; S. 1722, 96th Cong., 2d Sess. §§ 1738, 1746.

[18] "*Report of the Committee on the Judiciary on H.R. 6915,*" 96th Cong., 2d Sess. at 324. See also S. Rep. 96-553, 96th Cong., 2d Sess. at 725-27, 757-58.

[19] 126 Cong. Rec. (daily ed.) E5191 (Dec. 3, 1980).

III. H.R. 3530 WOULD HELP STEM THE TIDE OF PIRACY AND COUNTERFEITING BY PROVIDING APPROPRIATE FELONY SENTENCES

MPAA and RIAA vigorously support H.R. 3530 as a meaningful response to the problems described above. H.R. 3530 would help stem the tide of piracy and counterfeiting by (1) bringing criminal copyright infringement—piracy—into Title 18, the criminal code, and (2) providing that large-scale counterfeiting and piracy would be felonies subject to fines and prison terms which would be a deterrent to the organized criminals who now control such operations.[20]

Like the omnibus criminal code bill, H.R. 3530 provides that the penalty which could be imposed by a court for the large-scale piracy or counterfeiting of more than 1,000 records or 65 copies of a film would be a fine of up to $250,000, imprisonment for up to five years, or both.[21]

We have reviewed other federal criminal statutes concerning counterfeiting, fraud, and theft—all of which are involved in piracy and counterfeiting operations. That list demonstrates that a five-year sentence for such offenses is common:

Title 18, United States Code	Offense	Maximum sentence
Section 478	Counterfeiting foreign securities	5 years.
Section 494	Counterfeiting contractor's bonds, bids, or records	10 years.
Section 495	Counterfeiting contracts or deeds	10 years.
Section 497	Counterfeiting patents	10 years.
Section 501	Counterfeiting postage stamps	5 years.
Section 656	Bank embezzlement of more than $100	5 years.
Section 659	Embezzlement of theft of more than $100 from a common carrier	10 years.
Section 661	Theft of more than $100 of personal property within the territorial jurisdiction of the United States.	5 years.
Section 664	Theft or embezzlement from an employee benefit plan	5 years.
Section 2312-13	Transportation or sale of a stolen vehicle	5 years.
Section 2314-15	Transportation or sale of stolen goods valued at more than $5,000	10 years.
Section 2316-17	Transportation or sale of stolen cattle valued at more than $5,000	5 years.

As this list demonstrates, the maximum sentence for the sale or transportation of stolen or counterfeit goods is typically five to ten years. The counterfeiting of a patent—an offense with the same implications as the counterfeiting of copyrighted work—warrants up to ten years in prison; the transportation of stolen goods valued at more than $5,000 likewise justifies a ten-year sentence. In keeping with these provisions, H.R. 3530 reserves the maximum sentence of five years for large-scale piracy and counterfeiting operations involving trafficking in more than 1,000 records or 65 audiovisual works—amounts which are calculated to approximate the $5,000 amount which triggers the stiffest sentences under these other statutes.[22]

H.R. 3530 is thus narrowly focused on the problem of large-scale, organized piracy and counterfeiting. The less serious offender—who produces less than 100 records or 7 copies of a film—would remain subject to only a misdemeanor charge.[23]

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[20] A companion bill with essentially the same provisions, S. 691, has been introduced in the Senate by Senator Thurmond.

[21] The House version of the omnibus criminal code bill (H.R. 6915) called for fines of up to $250,000 and imprisonment for up to 40 months. The 40-month penalty, however, recognized that convicted criminals traditionally are granted one-third of their sentence off for good behavior—a practice which would have been eliminated by other provisions of the House bill. The 40-month figure was derived by taking two-thirds of the five-year sentence provided in the Senate version of the bill. The five-year maximum sentence in H.R. 3530 is thus identical to the House version of the omnibus criminal code bill.

[22] The qualtity approach, rather than the "value" approach of other theft provisions, is appropriate in the case of criminal copyright infringement and counterfeiting because of the difficulties inherent in assigning a value to illegal reproduction. For example, if the "property" stolen is defined as the copyright which has been infringed, then the value will almost certainly exceed $100,000, since any record or film worth pirating would have a copyright value of at least that much. On the other hand, if the "property" is defined as the illegal reproduction itself, the question arises as to what value (retail value, wholesale value, or thieves' market value) would be the most appropriate measure of each unauthorized copy.

[23] H.R. 3530 also improves the existing counterfeiting statute by eliminating certain possible loopholes. At present, Section 2318 requires that the counterfeit labels be "affixed" to recordings or films when shipped in interstate commerce. To avoid federal jurisdiction, counterfeiters have

H.R. 3530 would be a clear message to the organized criminals now involved in piracy and counterfeiting that Congress will not tolerate their illicit activities which deprive legitimate artists and producers of needed revenues and defraud customers on a massive scale. Those sophisticated and organized criminals would be forced to recognized that their offenses will be punished under a statute which appreciates that such crimes constitute a grave threat to creative activity and a massive fraud on the public. Only in this way can Congress act to stem the growing menace of piracy and counterfeiting.

For these reasons, MPAA and RIAA strongly support H.R. 3530 and urge its prompt enactment.

(ATTACHMENT A)

Members of the Motion Picture Association of America, Inc.

Avco Embassy Pictures Corp.; Columbia Pictures Industries, Inc.; Walt Disney Productions; Filmways Pictures, Inc.; Metro-Goldwyn-Mayer Film Co.; Orion Pictures Company; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Pictures, a division of Universal City Studios, Inc.; Warner Bros. Inc.

Associate Members.—Eastman Kodak Co.; Technicolor, Inc.

Members of the Recording Industry Association of America, Inc.

A & M Records, Inc., Hollywood, California
Alfa Records, Los Angeles, California
Alshire International, Inc., Burbank, California
Ariola Records, New York, New York
Arista Records, New York, New York
Art Attack Records, Inc., Tucson, Arizona
Atlantic Recording Corp., New York, New York
Bee Gee Records, Los Angeles, California
The Boardwalk Entertainment Co., Beverly Hills, California
Bush Country Records, Tampa, Florida
Capitol Records, Inc., Hollywood, California
CBS Records, New York, New York
Charlie's Records, Inc., Brooklyn, New York
Chrysalis Records, Los Angeles, California
The David Geffen Co,. Los Angeles, California
Elektra/Asylum/Nonesuch Records, Los Angeles, California
EMI-America/United Artists Records, Los Angeles, California
Forte Record Company, Kansas City, Missouri
GNP-Crescendo Records, Los Angeles, California
Goldband Recording Corp., Lake Charles, Louisiana
Handshake Records, Inc., New York, New York
Jamie Records, Philadelphia, Pennsylvania
Jerico Records, Orlando, Florida
Kelit-Aurora Record Corp., New York, New York
Kristin Records, New York, New York
Lifesong Records, Inc., New York, New York
MCA Records, Universal City, California
Mirage Records, Inc., Stamford, Connecticut
Monitor Records, New York, New York
The Moss Music Group, Inc., New York, New York
Motown Records, Los Angeles, California
Nashboro Record Company, Nashville, Tennessee
Ovation Records, Glenview, Illinois
Peters International, Inc., New York, New York

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been known to ship across state lines only the unattached counterfeit labels and jackets, leaving the disks, 8-track cartridges or other containers to be shipped separately. The packaged product is then assembled in the state where the dissemination or distribution will take place. Such tactics may preclude proof of a violation of Section 2318. The language of H.R. 3530 would eliminate this loophole by providing that the penalty applies to anyone who knowingly traffics in a counterfeit label "affixed or designed to be affixed" to a record, motion picture or audiovisual work. H.R. 3530 would also cover labels with minor modifications and "simulated" labels which are designed to defraud the public by appearing to be genuine but are not technically "counterfeits" because no genuine lable in fact exists. For example, cases have arisen where a counterfeiter has reproduced, packaged and distributed videotapes of a film that has never been released in that form to the public. H.R. 3530 defines "counterfeit" labels so as to encompass this new and rapidly growing fraud.

Philadelphia International Records, Philadelphia, Pennsylvania
Platinum Records (Music Factory), Miami, Florida
Polygram Classics, New York, New York
Polygram Records, Inc., New York, New York
RCA Records, New York, New York
RMS Triad Productions, Madison Heights, Michigan
RSO Records, Los Angeles, California
Tabu Records, Los Angeles, California
20th Century Fox Record Corp., Los Angeles, California
Thomas J. Valentino, Inc., New York, New York
Vanguard Recording Society, Inc., New York, New York
Vantage Recording Co., Pottstown, Pennsylvania
V. R. Records & Tapes, Southfield, Michigan
Warner Bros. Records, Burbank, California
Word Records, Waco, Texas.

Members of RIAA/Video

ABC Video Enterprises, Inc., New York, New York
American Radio & Television Productions, Inc., New York, New York
CBS Video Enterprises, Inc., New York, New York
Digital Video Systems, Inc., New York, New York
John Goodhue Productions, Westport, Connecticut
Home Theater/VCI, Hollywood, California
Instant Replay Video Cassette Magazine, Coconut Grove, Florida
Karl Video Corporation, Costa Mesa, California
Magnetic Video Corporation, Farmington Hills, Michigan
Mastervision, Inc., New York, New York
MCA Videocassette, Inc., Universal City, California
North American Phillips Corp., New York, New York
The Nostalgia Merchant, Inc., Hollywood, California
Panacea Productions, Utopia Video, New York, New York
Pioneer Artists, Inc., Moonachie, New Jersey
RCA Records, New York, New York
RCA SelectaVision VideoDiscs, New York, New York
The Video Society, Los Angeles, California
Time Life Video, New York, New York
Video Communications, Inc. (VCI), Tulsa, Oklahoma
Video Corp. of America, New York, New York
VHD Programs, Inc., Los Angeles, California
Walt Disney Telecommunications, Burbank, California
Warner Communications Records Group, Burbank, California
Warner Home Video, New York, New York

(ATTACHMENT B)

INTERPOL 46TH GENERAL ASSEMBLY HELD IN STOCKHOLM—RESOLUTION UNANIMOUSLY ADOPTED ON THURSDAY, SEPTEMBER 8, 1977

The full text of the Interpol resolution follows:

"Conscious of the fact that international traffic in stolen and unlawfully duplicated motion pictures and sound recordings has harmful effects on the economies of the countries affected,

"Aware of the loss of revenue legitimately accruing to the Governments of such countries and to persons engaged in the lawful production and dissemination of sound recordings and motion pictures, thus aggravating the problems of unemployment in the industries concerned,

"Noting that, as presently implemented, international agreements have not been fully effective in combatting this illicit traffic,

"Convinced that national enforcement of laws and international police cooperation are absolutely essential for the suppression of the traffic in pirated motion pictures and sound recordings,

"Believing that such police cooperation needs to be supplemented by judicial and diplomatic cooperation which should be expanded and facilitated,

"The ICPO-Interpol General Assembly, meeting in Stockholm from 1st to 8th September 1977 at its 46th session,

"Asks the National Central Bureaus to:

"(1) Cooperate as fully as possible with other NCBS who request assistance in investigating cases of traffic in stolen or unlawfully duplicated motion pictures and sound recordings,

"(2) Ensure that local police forces in their countries are aware of this problem and of the channels of communication to be used whenever such international traffic is suspected,

"(3) Heighten their Governments' awareness of the severe consequences resulting from the traffic in pirated motion pictures and sound recordings,

"(4) Draw their Governments' attention to:

"(A) The advisability of becoming parties to existing multilateral agreements on copyright, where they have not already done so,

"(B) The need to implement effectively the provision of any such agreements which they are already party to, or in concurrence with,

"(C) The desirability of adopting procedures and/or enacting legislation, where these do not already exist, to combat traffic in stolen and unlawfully duplicated motion pictures and sound recordings."

(ATTACHMENT C)

WORLD INTELLECTUAL PROPERTY ORGANIZATION WORLDWIDE FORUM ON THE PIRACY OF SOUND AND AUDIOVISUAL RECORDINGS—GENEVA, MARCH 25 TO 27, 1981

RESOLUTION ADOPTED BY THE PARTICIPANTS ON THE SUGGESTION OF DELEGATIONS AND EXPERTS OF CZECHOSLOVAKIA, GUINEA, HUNGARY, INDIA, MEXICO, SWEDEN, AND THE UNITED KINGDOM—MARCH 27, 1981

The participants in the WIPO Worldwide Forum on the Piracy of Sound and Audiovisual Recordings held at Geneva from March 25 to 27, 1981, express their great appreciation of the initiative taken by WIPO in organizing this Forum to discuss the nature, extent and the effects of commercial piracy and to exchange information and opinions on the matter.

The participants affirm the unanimous view that:

(1) the enormous growth of commercial piracy of sound and audiovisual recordings and of films all over the world is posing dangers to national creativity, to cultural development and to the industry, seriously affecting the economic interests of authors, performers, producers of phonograms, videograms and films, and broadcasting organizations;

(2) commercial piracy stifles efforts undertaken to safeguard and promote national cultures;

(3) commercial piracy constitutes a grave prejudice to the economy and to employment in the countries affected by it;

(4) possible inadequacies of, or inadequate use of, existing legislations do not effectively prevent acts of commerical piracy, which are facilitated by continual technological progress of the means of reproduction and communication.

The participants express the wish that, both in developed and developing countries, steps may be taken as necessary, as a matter of urgency, to combat and eliminate commercial piracy of sound and audiovisual recordings and films and, in particular:

To bring into force appropriate legislation, where such legislation does not already exist, which guarantees the specific rights of those affected by such piracy to prevent the unauthorized fixation and/or reproduction of the products of their creative efforts; and

To ensure the application of such legislation, civil and criminal, by the establishment of speedy and efficient procedures which would put an immediate stop to the production, distribution, import and export of pirate product and by imposing penalties of sufficient severity to act as a deterrent;

An increasing number of countries should adhere to the appropriate intellectual property Conventions.

The participants suggest that WIPO should continue to intensify its activities in the fight against commercial piracy of sound and audiovisual recordings and films by adopting the following measures among others:

To alert Governments and public opinion to the need to fight such piracy;

To give emphasis in all its technical cooperation activities to education and legal advice in this field;

To make available to States and owners of rights information concerning all legislation and jurisprudence on the subject of intellectual property which may be made use of in the fight against such piracy;

To coordinate research and take initiatives for the purpose of improving such legislations as well as their more effective application in collaboration with the intergovernmental and international non-governmental organizations concerned;

To give priority to undertaking an interdisciplinary study of all relevant international Conventions on intellectual property administered by WIPO.

Mr. BOURAS. The purpose of these brief oral remarks is to highlight some of the reasons we support the bill.

It is an inescapable fact that the pirating and counterfeiting of motion pictures and sound recordings has become a massive worldwide problem, a fact which is attested to by the antipiracy resolutions adopted in 1977 by Interpol, the International Criminal Police Organization, and in 1981 by the World Intellectual Property Organization.

They are crimes which adversely affect not only motion picture and sound recording companies, but also the individuals, such as writers, actors and musicians, involved in the creation of films and records.

They are crimes which affect the public, which pays for illicit goods of inferior quality. I have with me today several examples which we would be delighted to make available for inspection by members of the subcommittee, including a rather vivid illustration of the counterfeit and the legitimate film of "The Muppet Movie." A consumer in the Chicago area paid $60 for it, and found that there was no picture on it and returned it so that the manufacturer lost the legitimate sale and then had to refund $60.

They are crimes which adversely affect both Federal and State governments, to whom pirates pay no taxes and which are also deprived of the tax revenues which would flow from sales of legitimate goods.

They are crimes which adversely affect thousands of retailers and other types of businesses all over the United States which serve as outlets for legitimate motion pictures and sound recordings, and who simply cannot compete with illicit merchandise.

Piracy and counterfeiting are also crimes in which, as the Attorney General has recently concluded, "There is evidence that organized crime is becoming increasingly involved . . . Indeed, in one case of which we are specifically aware, a film pirate in Florida was also engaged in sales of machine guns in violation of the Neutrality Act."

The potential "profits" from pirating and counterfeiting are substantial, to put it mildly. Let me cite a few examples:

A sound recording piracy operation uncovered in Pennsylvania a few years ago was found to be turning out 25 million counterfeit records a year. That's units, not dollars.

A nationwide video piracy ring was found to be shipping thousands of pirated videotapes a year from Los Angeles to Florida and other parts of the country.

A pirate who was apprehended shipping illicitly duplicated films out of the country signed customs documents in which he underdeclared their value at $600,000.

An east coast retailer was recently convicted of dealing in more than $1 million worth of counterfeit records during a 5-month period. Pirates and counterfeiters who operate on this scale—and these are only a few examples of many—cannot be deterred or adequately punished under current laws.

In supporting H.R. 3530, MPAA and RIAA are not suggesting that everyone who violates its provisions should necessarily be subjected to its maximum penalties. Prosecutors would still have discretion in bringing charges, as would judges in meting out sentences.

However, MPAA and RIAA believe that cases of piracy and counterfeiting should be carefully evaluated for prosecutive merit and not dismissed out of hand, as is all too frequently the case under current law, on the ground that "it's only a misdemeanor."

Figures compiled by MPAA's film security office, for example, show that since 1975 there have been a total of 166 criminal convictions for motion picture and videotape piracy in the United States, of which, as of June 15 of this year, only 26 resulted in jail sentences. During this same period prosecution has been declined in more than 530 cases.

A few additional considerations merit some emphasis: Both the motion picture and sound recording industries fully recognize their own obligations in this area and are doing everything they can to help themselves.

For example, many cases are never referred to law enforcement at all and are instead pursued civilly. But civil remedies and sanctions have proved ineffective in dealing with large-scale pirates and counterfeiters, and only strong criminal sanctions can serve as a deterrent in these cases.

Piracy and counterfeiting represent, as several people have indicated, the theft of intellectual property, but the current penalties therefor are way out of line with the penalties which existing Federal laws provide for thefts of patents, tangible property and analogous crimes.

For example, the counterfeiting of patents carries a maximum prison sentence of 10 years and theft of more than 100 dollars' worth of personal property within the territorial jurisdiction of the United States carries a maximum prison sentence of 5 years. We have a host of examples on pages 30 and 21 of our joint statement.

The penalties for piracy and counterfeiting provided in H.R. 3530 are thus not a radical departure from the norm; rather, they would bring the penalties for these crimes up to the norm.

Perhaps most significantly, H.R. 3530 would serve to eliminate the current climate in which prosecution of pirates and counterfeiters is all too often automatically declined on the ground that "It's only a misdemeanor."

Instead of discouraging prosecutors, or encouraging judges to mete out sentences which are not even remotely commensurate with the gravity of the offenses, H.R. 3530 would at least induce prosecutors and judges to evaluate more thoughtfully the prosecution of, and sentencing in, such cases.

In conclusion, the respective experiences of MPAA and RIAA show that piracy and counterfeiting of motion pictures and sound recordings is growing by leaps and bounds and that the penalties provided in current law are totally inadequate to deal with these lucrative crimes.

As things stand now, the present penalties for piracy and counterfeiting serve more to deter law enforcement officials from pros-

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ecuting than they do to deter criminals from pirating and counterfeiting.

We therefore sincerely hope that this subcommittee will report favorably on H.R. 3530. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Bouras.

I wanted to compliment you on your statement, your complete statement, which you have offered for the record, as well as the appendices. I think you did a very thorough job.

I have just a couple of questions. Do you agree with the recommendations for change in H.R. 3530 suggested by the Justice Department witness?

Mr. BOURAS. I heard them orally and insofar as I could consider them in the course of the oral presentation, they seemed very reasonable to me.

Mr. KASTENMEIER. It is my understanding during the past year there have been some significant piracy actions by the Justice Department, a significant case involving the executives of the Sam Goody chain, which was so widely advertised, particularly in the New York papers.

In view of these successful efforts, how do you justify the need for greater penalties and even more focus on criminal copyright problems?

Mr. BOURAS. The *Sam Goody* case is one of potentially hundreds or even thousands of piracy and counterfeiting cases in the United States. I am not intimately familiar with all of the charges in that case, but I believe that that was one of those rare or exceptional cases which, beside copyright infringement, involved other offenses as well and that that is one of the reasons why Sam Goody, Inc., was prosecuted and convicted. I cannot respond to the details. Mr. Yarnell of the record industry is here and perhaps he could.

Mr. KASTENMEIER. One of the difficulties with respect to the level of sentence or penalty for violations is whether or not they are excessive or inadequate and what effect they have. Obviously the industry and the committee and presumably other witnesses concluded that the current level of penalties was adequate, at least as of 1976.

As a matter of fact, some people feel that if you increase the penalties too much, you also get or have a tendency to get no prosecutions because of excessive penalties and the tendency to lay off these things because, really, the penalties may not be justifiable.

Then there is the other question, what are the implications if the penalties are increased, and 3 or 4 years down the line we find that prosecutions are still not pursued with the vigor the industry would like?

Does that suggest to us that we ought to go to life sentences and capital punishment? That is figuratively speaking, of course. In fact, will such penalties be effective or justifiable in deterring crime? Those are the questions we might ask if you want to make any comment.

Mr. BOURAS. Yes, I would, if I may.

It is one thing to speak of a bill or a law which contains stiff penalties as currently on the books and to debate the advisability of increasing those penalties. That is the suggestion you made

about what if 5 years from now we enacted this bill and found that it did not increase prosecutions or deter, should we increase them more? We are talking right now about the current law which really amounts to no penalties at all.

We are talking about for the first time really enacting very stiff penalties for criminal copyright infringement and pirating of motion pictures and sound recordings. There can't be any guarantee that passage of this bill will stimulate more prosecutions. However, I think it is a reasonable assumption that it will increase the attention or draw the attention of Federal prosecutors to these offenses.

It has been our experience and the experience of record industry indicates that quite a few cases, large scale cases, are not even considered by U.S. attorneys. They simply say "don't bother us with misdemeanors." I think that will surely change and that is all we can expect, really.

You will at least focus the attention of U.S. attorneys on this as something which Congress has declared to constitute a serious offense. As things stand now, U.S. attorneys say Congress doesn't regard this as very serious.

Mr. KASTENMEIER. I asked the other witness this question and she did not have the answer, but perhaps you do. Do any of the States or a number of the States have criminal penalties for what would amount to piracy or transportation of forged or counterfeit labels, and so forth?

Mr. BOURAS. With respect to motion pictures, and that is the only area in which I can profess some intimate knowledge, it is clearly preempted by the Copyright Act of 1976. I believe there are some recent court decisions, not in the piracy area, which have said clearly that analogous State offenses are preempted by the Copyright Act of 1976.

There is a recent decision out of the southern district of New York quite clearly to that effect. So that as far as motion pictures go, there are no State prosecutions whatsoever barring the novel case where somebody breaks into a warehouse and steals film prints and puts them on a truck and transports them.

That is straight theft. As far as sound recordings go, I believe that most of the state effort itself focuses in the pre-1972 area. Perhaps if you want, Mr. Yarnell can come up and address himself to that. But with respect to motion pictures, there are no State provisions.

The CHAIRMAN. I yield to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Am I correct that the motion picture industry has a whole force of investigators themselves that followup on this kind of thing?

Mr. BOURAS. That is not quite correct. We do have a film security office which is staffed by former FBI agents. But it has various functions. It does do some investigations for the purposes of instituting the civil litigation. It does check out certain matters and if it finds that they are large scale operators, it may turn them over to law enforcement.

It does provide a central clearinghouse to which prosecutors or law enforcement officials can go if, for example, they want the

copyright information on motion pictures or if they need witnesses in a proceeding. They can call our security office and we will provide witnesses. It is simply something that is available for law enforcement if law enforcement initiates a request to use it.

In addition, the security offices also constantly monitor and check security within the industry itself, laboratories, studios, theaters and the like. They also engage in various educational campaigns. But yes, there is some investigation.

Mr. SAWYER. Do they engage in any significant amount of civil litigation?

Mr. BOURAS. We have engaged in a considerable amount of civil litigation with very unsatisfactory results. In cases involving large scale pirates, even to the extent that you secure judgments, you are often unable to collect them. To the extent that you secure injunctions, you often find that these are the kinds of people who injunctions don't mean anything to.

They will ignore them repeatedly. I believe in our statement we cited one example regarding a sound recording pirate who had repeated three times. I think I should make that clear. Whatever the decision of this subcommittee with respect to this bill, there should be no mistaking the fact that in dealing with the types of people that this bill goes after, civil remedies are absolutely useless.

Mr. SAWYER. What would make you think that higher fines would be collectable? I am basically supportive of the bill. I am only asking questions because I am curious.

Mr. BOURAS. They may not be but they may not be in any other area where you have stiff fines. This bill would serve several purposes. One is a deterrent purpose. Second, it would, by making it a felony for the first offense, induce or hopefully stimulate U.S. attorneys to focus more closely on the cases which are presented to them.

Mr. SAWYER. With the big money, at least from what I have been listening to, why are they so unable to collect civil judgments? Is it that they are diverting money somewhere?

Mr. BOURAS. In part. There can be dozens of dummy corporations involved. There can be bank accounts which are located out of the United States. It could be a variety of reasons. It could also be that you may obtain a—find a large scale pirating operation and be awarded statutory damages on a substantial scale without any books and records available to prove how much money the man actually earned, where he secreted it, where his bank accounts are or anythng like that.

Mr. SAWYER. Thank you. I yield back.

Mr. KASTENMEIER. The gentleman from California?

Mr. DANIELSON. Thank you, Mr. Chairman. You have given us some useful information in your statement. I am sorry I did not receive it early enough to have a chance to read it thoroughy. But you have raised a few points which raise some questions.

You mention, for example, that the Government loses because these people deal in cash usually and therefore they do not pay—and they do not pay taxes on their income. That, of course, states a prima facie case of income tax fraud and does invoke the penalty provisions of the Internal Revenue Code. So you do have a felony

involved in the tax violation which invokes a substantial potential imprisonment of I think 5 years, at least 5 years.

I think it could be 10. There is a substantial fine, an open and shut civil tax case, for the amount of unpaid taxes plus 50 percent fraud penalty plus interest. It really is far reaching. You mentioned—so, we do have a strong law that is violated there.

Yet we do still find people violating the income tax laws. You mentioned that some of these people have been found to have been dealing with machineguns. That is a felony already. It involves, upon conviction, a heavy penalty and confiscation of the property, because these things are contraband.

So you do have a heavy penalty there, but apparently that has not been enough. You mention understating customs declarations by $600,000. That happens to be another felony. But apparently the threat of a felony prosecution and conviction, with all that it entails, imprisonment, fine, is not enough.

I read an article, a feature article in yesterday's Los Angeles Times, to the effect that organized bad check writing by people who deliberately, groups of people who deliberately open several checking accounts and then hurriedly write bad checks on them, and move along, come to a matter of several billion dollars a year.

Of course this constitutes a violation of one of our Federal felony laws and it still doesn't seem to stop it.

The point I am trying to make is we do have many criminal situations in which the existence of felony penalties plus heavy fines does not see to bring the problem under control. Sending money to a bank account in Bermuda, that puts it beyond the reach even of the Internal Revenue Service.

There is a gentleman down there named Vesco as I understand it, who has been sitting down there thumbing his nose at all ever since Watergate and we can't seem to reach him. I guess I am trying to say that there are problems in law enforcement that do not lend themselves to an adequate, satisfactory solution.

Would making this—I favor making this crime a felony with a penalty commensurate with other felonies but I think the best way to do it is simply to make the theft of intellectual property the equivalent of the theft of money or any other kind of property rather than a special law just for the purpose of sound recording.

False identification cards are now a big business and with the use of them, these are counterfeit, there is no crime against it, incidentally, but through the use of them all types of fraud are perpetrated.

Now back on pages 30 and 31, I see an interesting item. On page 30, title 18, section 659, counterfeiting a contractor's bond or bid, just a bid even, or record, 10 years. Counterfeiting postage stamps, 5 years. Embezzlement or theft of more than $100 from a common carrier is 10 years. The same kind of a theft within the territorial jurisdiction of the United States is only 5 years.

The transportation and sale of a stolen motor vehicle is 5 years but $100 from a common carrier is 10 years. These are some of the inconsistencies we live with. Here is an example of special crime.

On page 31 is the transportation or sale of stolen cattle valued at more than $5,000, 10 years, but if it is stolen goods, it is 5 years. This is some of the inherent vice in making specific types of theft

more onerous than other types of theft. You tell a rancher that his goods are only worth 5 years, whereas a case of whisky or several cases of whisky is worth 10 years and that rancher is just not going to agree with you.

He thinks his cow or his steer is worth a darn sight more than a few cases of whisky. I don't like the theory of making special laws concerning special crimes. I think if we do anything, we ought to move it to title 18 and declare it to be a felony and let the theft clause apply.

You said that prosecutors are deterred from prosecuting by this law. How are they deterred?

Mr. BOURAS. It has been our experience that in numerous cases that where we had what we thought were very substantial pirating or counterfeiting operations and turned them over to law enforcement, law enforcement just said "Don't bother us. It is only a misdemeanor."

Mr. DANIELSON. It is not deterring them, they are just not doing it.

Mr. BOURAS. Perhaps deterring is the wrong word. The average U.S. attorney focusing on title 18 and on felonies—we have had cases where some U.S. attorneys don't even have copies of title 17.

Mr. DANIELSON. You find one that doesn't have it, tell me and I will see that they get one. I don't believe that. That is ridiculous.

Mr. BOURAS. Their focus is on felony offenses, not on misdemeanor and this is a misdemeanor on first offense.

Mr. DANIELSON. You said that somebody had been enjoined three times and still disregarded it. Did the court ever take them up for contempt?

Mr. BOURAS. I would ask Mr. Yarnell to answer the question.

Mr. KASTENMEIER. Would you come forward, Mr. Yarnell, so that you might respond to any questions, representing the Recording Industry of America?

Mr. YARNELL. Yes, sir. We have had actually many instances where people have been enjoined repeatedly with absolutely no effect.

Mr. DANIELSON. My question was has any effort been made to hold these people for contempt of court?

Mr. YARNELL. Yes, sir. In fact, there were several instances where contempt charges were brought. In one case down in North Carolina, the court sentenced the defendant to jail for 30 days and then let him out of jail—it was on a Friday afternoon, let him out of jail the next morning.

Mr. DANIELSON. Then your complaint is with the court, not with the law?

Mr. YARNELL. Yes, your Honor, but we find—not your Honor, sir. I am sorry. [Laughter.]

I have got a bad cold and I have been taking all sorts of drugs for my cold and I am a little groggy.

We had cases, for example, where a particular pirate has been sentenced to jail even for contempt and there was a situation involving a pirate in Wisconsin.

Mr. DANIELSON. Did he go to jail?

Mr. YARNELL. He was sentenced to nights and weekends in jail for 6 months.

Mr. DANIELSON. That is the fault of the court.

Mr. YARNELL. It may be the fault of the court but it is a fact that we have to face and live with. And during the week while he was in jail nights and weekends, he was engaged still in piracy. It wasn't until he was indicted and convicted in Illinois that his piratical practices were terminated. We have had——

Mr. DANIELSON. How good a sentence did he get there?

Mr. YARNELL. I think he got 6 months, but at least during that period, he served daytimes, too.

Mr. DANIELSON. Sir, your complaint is that the courts do not adequately enforce the law. That is a valid complaint. I am not demeaning it at all. But that isn't—the law isn't here. The power of contempt is the power that courts must used to enforce their judgments under certain types of circumstancs, injunction being the most difficult. If the courts aren't going to apply it, what makes you think they are going to apply it in another situation?

Mr. YARNELL. Sir, you were speaking in terms of civil litigations.

Mr. DANIELSON. It has to be. You just can't get an injunction on a crime.

Mr. YARNELL. I do believe that in crime prosecutions, there have been more severe approaches taken by courts to crimes than through civil contempts. In addition, this very pirate I was talking about from Wisconsin had all of the courts, both State and Federal, tied up for months with interminable appeals, litigations brought against various judicial officials, against prosecutorial officials, against the directors of the FBI, because he had authorized a raid on his premises where he was then engaged while under an injunction in pirating recordings.

And the fact is that you will find civil remedies have had absolutely no deterrent effect.

Mr. DANIELSON. I will stipulate that these people are very resourceful and imaginative. I will yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman. I appreciate the testimony of the witnesses.

One thing that—just sort of an aside here—on page 7 you say the public is victimized because of the poor quality of the forgery from time to time. My question is: Given the resources of the counterfeiters and pirates, why aren't the counterfeits as good as the originals?

Mr. BOURAS. By definition, technologically they have to be because they are using the consumer copy, either the audio cassette or the half-inch video cassettee, as the master to make their pirated copies whereas the legitimate manufacturer would use 1-inch or 2-inch tape as the master and they would give you better quality.

Some pirated or counterfeited copies are not inferior. Most of them are. That copy of "The Muppet Movie" is atrocious.

Mr. BUTLER. Could you describe for me a typical counterfeiting operation, how it is set up and how its distributor network is—I want to know what sort of equipment they have to have and what sort of distribution network they have to have.

Mr. BOURAS. I will defer to Mr. Yarnell on that, except that I will note that there really is no typical operation. Are you talking counterfeiting or pirating?

Mr. BUTLER. We want both.

Mr. BOURAS. Let me address the pirating aspect and then turn to Mr. Yarnell on the counterfeiting. Basically what he needs is—it depends on what he is doing. Certain pirates specialize in obtaining pirated video cassettes of movies which have not yet been legitimately released in the form of discs or cassettes, movies currently playing in theaters, "Superman II," "Raiders of the Lost Ark," or whatever. He could obtain a print by bribing a theater employee or the like. He would need a device called a "film chain" which transfers from film to video tape. He would run through this machine, it only takes the running time of the film to make the copy and he would have a master video tape. He might make submasters. From that he would hook that machine up to what are called "slaves," that is half-inch machines. He would then duplicate the units which are sold to consumers.

That is really the kind of equipment he needs. But he can do it on whatever scale suits his purpose. There are other pirates who do not have this device called a "film chain," which is a very expensive piece of equipment, and instead they go to other pirates and buy masters from them and deal strictly with the half-inch machines. That is a considerably less expensive operation.

So there is no typical situation but basically you need the device to transfer from film to video tape and then further devices to duplicate. If, of course, you are buying and duplicating legitimate video cassettes, all you need is a half-inch machine. You simply hook them up, put electrical boosters on the circuits and you have a factory going.

In terms of our experience, we have found situations where some of these pirates had three or four machines and others where they had several hundred machines going. It really depends on the size of the operation.

Now, once you move a step beyond and get involved in counterfeiting which is the duplication of the packaging as well as the material on it, I will refer that to Mr. Yarnell.

Mr. YARNELL. The main thing to remember in counterfeiting is that counterfeiters almost always, in fact I would say probably always, concentrate on duplicating or simulating the packaging and labeling so that it can escape visual detection. That is the whole purpose of counterfeiting, to defraud the consumer, to make it possible to have the particular product in the stock of a retailer so that a casual inspection by a member of the general public or even by an FBI agent or some other interested person will not disclose that it is a counterfeit.

The problem of trying to simulate as closely the sounds on a sound recording or the motion picture on a video tape or a motion picture counterfeit is, however, impossible from the standpoint of a counterfeiter because each generation of recorded sound or recorded film loses a certain amount of definition. That is just a reality that no amount of ingenuity on the part of a counterfeiter and no amount of sophisticated equipment will wholly overcome. Therefore, there is a loss of definition because of necessity. The copy that they are selling to the public is made several generations later from one that was commercially sold by the legitimate company. Where they will have the visual deceit working obviously they will

not be able to do as well on the recorded sound or the recorded motion picture. Many of them don't really care. Some of them are so peripatetic that they will sell a batch of stuff to one group of distributors or dealers and then change their location and make it more difficult for them to be found.

The use of the actual duplicating of the sound recording or the video tape is simultaneous to the situation in piracy where they merely will attach what they call slaves to a master duplicator and they are hooked up in series so that one revolution of the master duplicator will at the same time produce simultaneous revolutions on all of the slaves. That is how they can get their mass volume. They are more interested in turning out a lot of stuff that will pass physical inspection than they are in quality control. They are not trying to build up good will like a record company is that hopes to stay in business over a long period of time.

Mr. BUTLER. I guess my question comes back to basically how much capital investment is involved in an operation of this sort. How much have you seen?

Mr. YARNELL. We have seen some that have started on a very, very small scale with less than 5,000 dollars' worth of used equipment. To do any volume work in this field, it usually takes anywhere from 25,000 to 100,000 dollars' worth of equipment. We have seen some in fact—I was in one place that was raided in Arkansas that was better equipped from the standpoint of volume of equipment than any legitimate record company whose plant I have been in. They had a tremendously large plant working in an industrial complex and they had the doors sealed, couldn't be opened from the outside, armed guards, et cetera, closed circuit television. But it was the most sophisticated operation I have ever seen and obviously, they must have spent probably close to a billion dollars on equipping that particular plant.

They can do it because they are operating strictly on the basis of cash. Uncle Sam doesn't share in their ill-gotten gains, nor does anybody else who would normally share in the proceeds of sales of legitimate products.

Mr. BOURAS. I would like to add, if you want to enter the pirating business, you can do it on a small scale for very little capital investment. There are the large-scale operators and there are others who are small scale. I mentioned the film chain which transfers from film to video tape as being a very expensive piece of equipment. The latest models cost $250,000. Some of the older discontinued models which are perfectly satisfactory can be bought secondhand or thirdhand for $6,000. It depends. If you want to get in with minimal investment, you can do that.

Mr. BUTLER. Going back to the Arkansas situation, what happened? You had your rate. What happened to the business and the equipment?

Mr. YARNELL. That was in a civil suit because at that time there was no sound recording amendment as yet. There were joint suits brought by music publishers and simultaneously by record companies. The raid was conducted by marshals under the Federal statute permitting seizure on a copyright infringement at that time for underlying musical compositions. What happened was that the people disappeared and the equipment was—the entitlement to the

equipment was being litigated by some straw person, a woman whose name I don't remember, while the main culprits all disappeared. They set up another operation which we ultimately tracked down to some place in Maryland, but they were using false addresses on their packages from Denver, Colo., Wilmington, Del., and some other places.

One place was in the middle of the Harlem River in New York. The problem in most of those cases where we had civil suits and were forced to engage in civil suits, was that there was no way of having these people kept in the jurisdiction. They would be immediately ready to start up in some other area once there was a raid on their plant. They considered it a cost of doing business.

Mr. BUTLER. Touching on one of the areas that I asked the Department of Justice about, are you satisfied that the statutory provisions at present are satisfactory with regard to confiscation or destruction of the equipment?

Mr. BOURAS. Yes.

Mr. YARNELL. I agree.

Mr. BUTLER. So there is no need to consider that. What we are talking about doing with this legislation, as suggested by the gentleman from California, is raising the ante a little bit. What other suggestions would you have if you had an opportunity to write in the legislation in the crime area?

Mr. BOURAS. None occur to me at the moment, Mr. Butler. This bill is such a substantial improvement over current law that our focus is on supporting this bill. I should emphasize what you just said. This bill does not really change the law. It simply increases the penalty. I think it is important to emphasize that.

In terms of what Mr. Danielson said earlier about 5 years and $250,000, these are maximum penalties. It is not necessarily true that every judge is going to give everybody convicted under this bill 5 years in prison and a $250,000 fine. These are maximums.

Mr. BUTLER. I understood that. I also understood you to say that you were giving tentative approval to the comments from the Department of Justice. I hope you would let us know if you have other thoughts about that.

Mr. BOURAS. Certainly.

Mr. BUTLER. I understood you to say that effectively the Federal legislation in this area preempts the State prosecutions?

Mr. BOURAS. For motion pictures.

Mr. BUTLER. How about recordings?

Mr. YARNELL. Sir, the various States, at one point 49 and now 48, because one State transferred it to their general larceny section, but they enacted legislation to cover pre-1972 recordings. The sound recordings protected by the 1972 sound recording amendment only were those released prospectively. So that the entire catalog, Little Jack Little, as Mr. Danielson pointed out, would not——

Mr. DANIELSON. It's hard to find his records these days.

Mr. YARNELL. I think we might be able to dig some up. There are some stores that still deal in——

Mr. DANIELSON. The Smithsonian?

Mr. YARNELL. I think I might even have some at home. In any event, using that as an illustration, sound recordings prior to 1972

were not protected by the Federal statute. The presumption with respect to those will not take place until the year 2017 or something like that, and perhaps at that point I will come back to you and ask for an extension.

Mr. BUTLER. Is there something we should be doing while we are at it to facilitate, or to put the States in the position, where they could prosecute violations themselves?

Mr. YARNELL. The States have been prosecuting violations where it is in their jurisdiction. There are three general types of jurisdictions that the States have been using.

One is an internal antipiracy law which was enacted originally by 49 States dealing internally with sound recordings. There have been prosecutions under that. At the same time, a very large number of those States, probably 30 some-odd, enacted what they claimed was consumer protection statutes which required the name and address of the actual manufacturer to appear on sound recordings.

The third category was bootleg recordings, which for the information of the gentlemen, relate to recordings at live performances in arenas or theaters, which are then duplicated and sold. There have been prosecutions under all three. In some cases, the State statutes are felonies that call for as much as 10 years imprisonment.

It's rather anomalous that somebody who would be dealing in a 1940 recording of Bing Crosby's "White Christmas" album at Christmastime, and that's a standard that comes around every year, will, because it's under the State law, get a 10-year jail sentence where he's only put out 150,000 of them; whereas, under the Federal statues somebody who has put out 25 million will get 1 year in jail, because it dealt with a 1971 to 1974 recording.

Mr. BOURAS. In the case of motion pictures, State remedies are generally not available. I think the 1976 act clearly preempts the field. Second, I think you have to view this—most of these operations are large-scale interstate and some of them foreign operations, and it really requires Federal authority rather than State authority.

I don't think State authorities are capable of coping with a large-scale interstate or foreign operator.

Mr. BUTLER. What do you do about the retailer who knowingly accepts these things for resale and allows himself to get in the position of resale through inattention?

Mr. BOURAS. Through inattention, you would have trouble proving the scienter element. If he knowingly does it——

Mr. BUTLER. I'm thinking about the one on a modest volume, so you are not going to get the attention of the Federal prosecutor.

Mr. BOURAS. Under this bill, he would be subject to the same penalty that he is under current law. If it does not draw the attention of the Federal prosecutors, you would pursue it civilly.

Mr. BUTLER. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. FRANK. One part of the question that the gentleman from Virgina was asking may be answered but I missed it.

To the extent there is a preemption, should we undo it and get the States back in the ballgame? I would like both of you to

address the question which is, to the extent there is a preemption, should we undo that?

Mr. YARNELL. I would say, without having considered it up until this moment, that it would possibly be unconstitutional, because you would be creating an ex post facto law, giving Federal protection retroactively to pre-1972 recordings.

Mr. FRANK. But the crime would be today. If I were to go and do something to something that was built in 1972, it would be a crime. If somebody, after we passed the law, did something to a pre-1972 recording, I don't understand the retroactivity problem.

Mr. YARNELL. That could be done if it were a matter of a criminal act.

Mr. BOURAS. I'm not trying to evade the question. At first blush, your reaction is yes, undo the preemption. The more people you can possibly prosecute in this area, the better.

However, preemption is so central to the 1976 act that I think it requires more thought than we can give it here this morning. And third, you would in essence be in a situation where the State authorities would be enforcing the Federal act. That's another thing that would have to require some consideration. I can't answer the question. As a practical matter, I think it's best handled on a Federal basis, simply because it is an interstate matter. It is not a strictly local matter.

Mr. BUTLER. The problem is the Federal Government is not going to dedicate the resources to this that you anticipate. That was the reason for my question.

Mr. FRANK. I wish you would both address it later on in writing. I think the gentleman is correct. I would say at a minimum, if you are going to be in favor of maintaining the Federal preemption, then that's a factor that's accepted voluntarily. I get nervous when people say it is central to the scheme of 1976. I rarely know what that means.

There are some specific contradictions between something done in 1976 and State prosecutions; if there are, let me know. I appreciate it if you would both consider it in writing. I think the gentleman from Virginia has made a useful suggestion.

The civil suits was one of the problems you are talking about. Are these civil suits that have to be initiated by the victim of the piracy?

Mr. BOURAS. The copyright owner.

Mr. FRANK. What are the legal costs that are generally incurred if I were—was the man who owned the copyright to the Muppets and I wanted to bring a civil suit?

Mr. YARNELL. It depends on the case. We have had cases where the legal costs are $2,000 or $3,000. We have had others where they are $400,000 or $500,000. It really depends on the type of operation you are suing, to what extent he contests the action, the number of copyrights involved, the number of documents, the amount of proof.

Mr. FRANK. So it could be a substantial cost?

Mr. BOURAS. Yes. It is not unheard of for these cases to run $500,000 apiece.

Mr. FRANK. That's one argument against saying that the victims of crime would——

Mr. BOURAS. Generally, it's very expensive.

Mr. FRANK. And getting a contempt citation can cost you a good deal more. Is there any danger that some private citizen who wants to make some money, either out of ignorance or malice, could make a copy and find himself charged with a felony? Is there a problem of putting very severe penalties and scooping up small fish?

Mr. BOURAS. No. You said small-scale and so let's assume it's within the numerical amounts in the bill. He could still be subject to misdemeanor. Even if he came over the numerical amounts where he would be technically subject to felony charges, the U.S. attorney, in evaluating the merits of the case, he could say, I'm going to charge fewer elements or not prosecute at all. The virtue of this bill is that it does grade the offenses and the prosecutor has discretion in what he charges. It is a very intelligently drawn bill.

Mr. FRANK. I think I can agree with that. I can say that with no false modesty. The point has been made obviously increasing the crime penalty will not solve all the problems. That, I concede. Is there anything in the increase of the crime penalty that seems to you likely to hinder our efforts?

Very often there is a tradeoff situation, where you increase it and there is some gain, but you get some loss. I concede this bill will not solve all the problems referred to, but does it make it harder that you can think of?

Mr. BOURAS. No, not that I can see. I can't see any negatives. When Ms. Szybala was here, somebody asked her about spending Department of Justice time, effort and manpower in this area inordinately, in comparison to violent crimes and the like. I don't think even that would be required. These are in our experience relatively easy, easy in the sense that they are brief cases to try when a trial is necessary.

For example, in 1980, there were 60 criminal convictions for film and video tape piracy in the United States, of which only four required trials. Two of the trials lasted a half day each, because it was so open and shut.

In most cases, if the evidence is clearcut, the defendant will plea bargain. Or, he will plead guilty. I don't think there really are any tradeoffs.

Mr. FRANK. From the standpoint of representatives of the industry, this is an increasing problem? Both industries?

Mr. BOURAS. That's the understatement of the year. Tremendously increasing.

Mr. FRANK. Is this increasing in the record industry?

Mr. YARNELL. Yes, sir.

Mr. FRANK. Is it fair to say it's becoming a burden on the ability of the industries to carryout their work? Is the competition serious now between the legitimate and the crooked?

Mr. YARNELL. I can state accurately I believe that every single record company had been forced to cut down very substantially on its employees and curtail their activities, curtail their number of different types of performers whom they contract with, and try to produce recordings for, because their general volume of business has shrunk so drastically. I think that a very, very large share of that is due to the increase in counterfeiting, which deprives them of the income.

Mr. FRANK. To the extent that some of the companies could document that, I understand casualty is difficult to prove, but I think that would be very useful if the companies could provide that. That's all I have.

Mr. KASTENMEIER. I think the implication of the gentleman from Massachusetts is correct, that really the record doesn't have any, either from the Justice Department or from an industry standpoint, very much detail.

I was very much interested in the fact that you suggested that there were 60 convictions last year. That sounds like a fair amount of activity. I wasn't aware of that. That's a fair amount of activity in the field and successful activity. That, standing alone, would suggest that you are doing quite well and that maybe this bill is not necessary.

Mr. BOURAS. I think I have already made the comment that we think the bill is necessary. The sheer number of cases—the 60 are cases which have developed over the course of the years and just happened to come to either the trial or the pleading stage in 1980.

But when you look back over a 6-year span of time the total is 166, so a fairer example of—to divide the 6 into the 166 and come up with an average.

There are some prosecutions and there are some convictions. There is no question about that. But even in those cases where there are convictions, there is probation, small fines, nothing to speak of. It does not act as a deterrent. We have had a certain amount of recidivism in this area simply because of the fact that the penalty the first time around was nonexistent. And even the second time around it was nonexistent.

We have had video pirates in Los Angeles who were given probation on the first offense, probation on the second offense. If you want to count that as a conviction, that's two. But the deterrent impact of those convictions is nonexistent.

Mr. KASTENMEIER. Well, that's a good question. They are obviously—in terms of potential imprisonment, following one or two convictions, there should be a chance. But if 60 convictions last year is inadequate, what quantitatively are you looking for—600 a year?

Mr. BOURAS. It is not the convictions. It might have been 30 convictions but if the sentencing were more adequate, that would have been a bigger help.

We are not looking for quantities of convictions, or quantities of jail time. To us, the main virtue of this bill is that it would send out a clear congressional signal that this is a much more serious matter today than it was in 1976.

It does require more thoughtful evaluation and consideration on a case-by-case basis, both in deciding whether a prosecution should be commenced and in deciding what the sentencing would be. That is really what it's all about. That is what all these laws on page 30 and 31 are about.

Mr. KASTENMEIER. I play the devil's advocate here for this purpose. If indeed what you say—your recitation of the facts is correct, that you have had 60 convictions in 1980 and this may be the result of cumulative efforts, maybe those 60 convictions are sending out a message.

Of course, in 1981 it's too early to tell, but maybe if there were not earlier convictions, one could understand why the pirates would feel free to continue their activities.

But if they took note of the fact that in 1980 there were 60 convictions, all of a sudden an effective—what would appear to be an effective prosecutorial effort in the field, they might—this might in and of itself serve as a deterrent.

Mr. BOURAS. The fact that there were 60 convictions in 1980 was rather widely publicized by us. It appeared in all the publications which are read by people in the video and film business.

Our observation in 1981 is that the problem is increasing.

Mr. KASTENMEIER. Let me ask you one last question, and that is how these cases reach the attention of the various U.S. attorney offices?

Is it the case that in the case of films and tapes as opposed to records and tapes, that your security office and others tend to receive and process complaints of various individuals that activities are going on, and then you turn over the fruits of our investigation to U.S. attorney offices hoping that they will prosecute?

Mr. BOURAS. This is a delicate area because we don't want our film security office to inject itself into the process. Anything we do is done at the specific request of the FBI, or Customs in some cases, or the U.S. attorney's offices.

Basically the function of this office is to serve as the central source through which the motion picture industry makes all of its complaints. We decided the obvious, that if you had every film company, every video producer simultaneously besieging some poor U.S. attorney in, let's say Chicago, he's just going to throw up his hands.

And everybody has agreed that any complaints made to the criminal authorities will be done through this central clearing house.

That is done initially with little or no investigation, other than perhaps checking addresses and making sure the information is correct. Then it's up to the FBI working with the U.S. attorney to decide what they are going to do about the case, to conduct their own investigation.

Anything we do other than a referral of the initial complaint is done at their request. They may call us about copyrights. They may call us about who owns this picture. They may call us with factual questions, for example, "Have copies of this film, say 'Superman II,' been issued legitimately in the form of video disks?"

And we tell them, "No, it has not."

It's a service organization which does many things as well, but mainly makes a referral for the entire industry, and then responds to any specific requests which law enforcment makes.

Mr. KASTENMEIER. Following that up, is it your experience that the larger U.S. attorney offices can devote resources, let's say in the district of New York or the Los Angeles area, or Chicago, as opposed to smaller offices throughout the country?

Is there some unevenness with respect to interest in prosecution?

Mr. BOURAS. If there is any unevenness, it's not with respect to the size of the U.S. attorney office or staff. There is no real pattern. It's simply a question of how the U.S. attorney views criminal

copyright infringement, and all too many of them say "it's a misdemeanor. Don't bother me."

I'm picking numbers out of the air. You could have 20 AUSA's in the southern district of New York, 10 of whom say, "I would like to prosecute even though it's a misdemeanor," and the other 10 of whom would say, "Don't bother me."

We have had prosecutions in a place called Richardson, Tex., where a defendant got 6 months. That's a lot better than New York City. I really can't generalize.

Mr. KASTENMEIER. Do you feel that if asked, U.S. attorneys would answer the question as you have, namely that if it is a misdemeanor that that is a factor in their making the decision with respect to any case?

Mr. BOURAS. Absolutely, yes. We have been told so point blank by several U.S. attorneys.

Mr. KASTENMEIER. Well, the committee thanks you both, particularly you, Mr. Bouras. You have been up here and presented this statement to the record for us; and also you, Mr. Yarnell.

The gentleman from California?

Mr. DANIELSON. One of you gentlemen mentioned that one of the problems in prosecution is that the miscreants set up a corporation to perform an act, and of course, they can set up another and another and another, which is clearly true and pretty standard practice.

When you have had criminal prosecutions, do the prosecutors not indict or bring charges against the individuals who are running the corporations as well as the corporate entity?

Mr. BOURAS. Yes, they do.

Mr. DANIELSON. If the same people set up shop someplace in Wisconsin, I think that was the State that was picked out here as a prime example, you have still got the same people, although they may have a new corporate name.

Does not the repeated prosecution of the same people have an impact upon the court when it considers sentencing? You have got the same John Smith up here three or four times.

Mr. BOURAS. It has not been my experience, which is more limited with recidivism than Mr. Yarnell's, that repeated offenders are treated any more seriously under current law.

Mr. DANIELSON. What kinds of fines are imposed?

Mr. BOURAS. You are talking criminal cases?

Mr. DANIELSON. The only way you can fine people is when you are talking criminal.

Mr. BOURAS. They have been as low as zero and as high as $100,000. The norm is $500 to $1500.

Mr. DANIELSON. What does the present law permit?

Mr. BOURAS. Up to $25,000 on the first offense.

Mr. DANIELSON. Do you mean on the first charge, and a multiple offense indictment?

Mr. BOURAS. Up to $25,000 on the first offense.

Mr. DANIELSON. Per count. So if you have a 15-count indictment you could fine him $300,000—I don't have my computer with me.

Mr. BOURAS. That happened only once.

Mr. DANIELSON. Was there such a fine imposed, in other words, on a multiple?

Mr. BOURAS. I think it was a multiple of $10,000 each.

Mr. DANIELSON. I would assume that by sending 10 fraudulent cassettes, that could be 10 counts on an indictment. If there is a true need to reach the $250,000 level, I would think that if you are dealing in a fraudulent situation in which multiple copies are involved, almost without exception, a counterfeiter is not going to make one copy. He's going to make a lot of copies.

You really have the potential there already, don't you, by just simply bringing in an indictment with say 30 counts and giving him $10,000 on each, $300,000 and that would shake almost anybody to the roots.

Mr. BOURAS. Yes, you do have the potential, but for reasons about which we can only conjecture, that potential has not been realized. I think as currently structured and as currently written, the existing criminal copyright infringement provision sends out certain signals, namely that it's not a serious matter.

Mr. DANIELSON. Well, I think your problem is partly that the Department of Justice for whatever reason doesn't choose to expend a large portion of its resources on this type of crime.

No. 2, when the crimes are brought before the courts and there is a conviction, the judges are not inclined to impose heavy penalties. I don't think either of those are respect—I respectfully submit that neither of those two justifiable complaints are going to be cured by simply increasing the penalty. That's really all this bill does is increase penalties.

I would support, and I will recommend it if we ever discuss it in subcommittee markup, for example, that we make this a felony in the case of a case which would be a felony in other types of crimes, with penalties commensurate with felony penalties in other types of crime.

I really don't see any point in putting out a special law on copyrights. That's like any other kind of stealing. One of the oldest laws in the world is "Thou shalt not steal."

I think we should quit worrying about what is stolen and put the penalties on the stealing.

I have one other thing I don't understand. You used the term film chain or change. How do you spell that second word?

Mr. BOURAS. C-h-a-i-n. It is a device through which you pass film.

Mr. DANIELSON. I understand your description but I didn't understand the word. If a person should make that first tape copy using the film and now using the chain makes a tape, that becomes a first generation master.

If that same master is used for the production of other copies, they all have a comparable quality; do they not?

Mr. BOURAS. They would basically, yes.

Mr. DANIELSON. The generational changes that the other gentleman mentioned is only if you take the first tape and make from it a second tape, and then the second and make a third tape?

Mr. BOURAS. The deterioration occurs in the gauge. If you take a half-inch tape such as this and use this as the master to make other half-inch tapes, you will lose quality. If on the other hand, you take the bigger ¾-inch or 1-inch industrial tape, and use that as the master, you get a good quality copy.

Mr. DANIELSON. You stated that the penalty prescribed here is maximums. I understand that. We almost invariably in the Federal criminal law say that they will be imprisoned for a term not to exceed so much.

You refer to your illustrations in 30 and 31. I have rechecked them and I note you do not cite the fines. You only have the confinement penalty. I am going to check what those are.

I question whether any of them have a fine of $250,000. I have no further questions.

Mr. KASTENMEIER. I might also observe that section 506, and it is in the subsection (a) which relates in part to criminal infringement, including generally infringing; willful infringement of copyrighting is punishable by a fine of not more than $10,000 or imprisonment for not more than 1 year.

That deals with sound recordings and so forth, which is currently not more than 1 year nor more than $25,000. As far as you know, there is no one who is asking that the general willful infringement under copyright be changed from 1 year and $10,000?

Mr. BOURAS. No.

Mr. KASTENMEIER. I say that because it's in the same section and to some extent this would be inconsistent with the other if it is raised.

It will allow the criminal infringement or willful infringement to still remain 1 year and $10,000?

Mr. BOURAS. I think under this bill, it's 1 year and $25,000, under 3530.

Mr. KASTENMEIER. I'm reading, "Copyright willfully"—I'm not talking about sound recordings—"and for purposes of personal financial gain shall be fined not more than $10,000 or imprisoned for not more than 1 year."

I'm talking about general infringement.

Mr. BOURAS. Under this bill, that would be 1 year or $25,000.

Mr. KASTENMEIER. You support to change that as well?

Mr. BOURAS. No. That is in the bill. I have no comment with respect to that. It does increase the financial penalty, but not the possible jail sentence.

Mr. DANIELSON. I guess you gentlemen realize that leaving this at 1 year leaves it a misdemeanor. Generally speaking, under the Federal criminal law, a law which provides for a penalty in excess of 1 year is a felony. Those that are a year or less are misdemeanors, unless you define it by law as being a felony.

Mr. KASTENMEIER. They have done that, though, with respect to the sections they are interested in. Those are upgraded. But what I have referred to as being left—what the witness is referring to as being——

Mr. DANIELSON. This is 1 year.

Mr. BOURAS. Criminal copyright infringement other than of motion picture sound recordings remains a misdemeanor under this bill. That's what I understood the question to be.

Mr. KASTENMEIER. I was suggesting that—I was asking the witnesses if they knew that there is any particular problem with respect to willful copyright infringement other than in the areas we are addressing?

Mr. BOURAS. No, not to my knowledge. This bill addresses the extant problems.

Mr. DANIELSON. If we get into duplication by Xerox, for example?

Mr. KASTENMEIER. That's something else. That's more traditional.

In any event, we thank you for your contribution this morning. The committee stands adjourned.

[Whereupon, at 12:06 p.m., the hearing was adjourned.]

CABLE/COPYRIGHT LEGISLATION

THURSDAY, JULY 9, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, and Sawyer.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member, Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning we continue our hearings on the subject of copyright and in particular on the impact of cable television and satellites in hearings on H.R. 3528, 3560, legislation proposed to change the 1976 Copyright Act with respect to cable television.

I am very pleased this morning to have as our first witness Mr. Roy Bliss, who is executive vice president of United Video Corp., a satellite resale carrier.

Mr. Bliss, we have your statement. You may proceed from it. If you care to summarize your statement you may do that as well.

TESTIMONY OF ROY BLISS, EXECUTIVE VICE PRESIDENT, UNITED VIDEO CORP., A SATELLITE RESALE CARRIER

Mr. BLISS. I will choose to read most of the statement.

Mr. KASTENMEIER. You may proceed.

Mr. BLISS. Good morning, Mr. Chairman, members of the subcommittee.

My name is Roy Bliss. I thank you for the opportunity to discuss with you the changes now under consideration in the cable television copyright laws and to explain why I believe they are unwise.

First I would like to explain that I hope to cover the following four points:

(1) Cable television coupled with satellite technology brings diversity to the one-third underserved American homes;

(2) The present copyright law has created an environment within which all entities involved are prospering;

(3) Resale carriers such as United Video are simply pipelines for the transmission of programing. They do not perform copyrighted works and should not have to pay copyright fees; and

(4) The resale carriers are so small that no fee imposed on them could impact the program supply industry.

As background information, I have spent most of my life in or near the cable television industry. My dad built one of the first cable systems in Wyoming in 1952. I am, therefore, very familiar with the struggle which this industry faces.

It is very important that this committee remember that 27 million households are outside of the top 50 markets, which means 27 million households receive no independent TV stations without the aid of cable.

This vast populous wants and deserves access to distant signals. The proposed changes in the copyright laws now under consideration would decrease that access and would raise other serious problems.

A few short years ago after 11 years of debate and study, Congress adopted new basic legislation in the copyright area which laid down for the communications industry and the public some important ground rules, including the fact that:

(1) Cable television would be able to offer distant television signals under a compulsory licensing system; and

(2) A fee was set for the compulsory license and a mechanism for increases was established.

The industries involved, including cable, including broadcasters, including program suppliers and common carriers like my company, have made their plans, negotiated all manner of contracts and spent millions and millions of dollars in reliance on these basic ground rules.

Congress must take this into account before changing those rules. We are not arguing that all legislation, once passed, should be cast in iron. As Congressman Frank suggested recently, you can change it any time you want, but frequent changes are neither fair nor wise, especially where, as here, all elements of the business community have and are continuing to adjust and, I might add, prosper under those rules.

The changes now under consideration by this committee arise from complaints by the broadcast and program supply industries, who claim they are not getting their fair share. It is difficult to characterize these industries as hurting when we see headlines such as:

"Hollywood To reap $300 million from pay TV in 1981, up 40 percent"—Hollywood Reporter, May 7, 1981.

"ASCAP Logs Another Record Year"—Variety, February 19, 1981.

"Broadcast TV in Sales Boom; 2d Quarter Sales $1.4 Billion, up 16 Percent"—Variety, April 8, 1981.

"TV Revenues To Double in 5 Years."

No segment of the affected industries can seriously argue it is not thriving under the present system. It simply makes no sense to risk the loss of this balance, because two industries, broadcast and program supply, want an even larger slice of the pie, at the expense of others, like United Video, who have invested their future in reliance on the 1976 law. We believe the 1976 law is working.

At various times in this debate about copyright changes, the possibility of imposing restrictions or copyright liability on the satellite distribution of distant signals has been discussed. United

Video would obviously be directly affected by any such changes, and we would like to briefly discuss our opposition to them.

Initially it should be pointed out that the satellite carriers are not performing copyrighted works. Instead they are simply delivering information at the request of and to the cable industry. The carriers do not deal directly with the public but act only as a delivery vehicle, a pipeline, if you will, to cable television systems.

This is analogous to A.T. & T. longline services which presently deliver network programing from the network originating point to each of the local network affiliates.

An analogy outside of the electronics industry might be to that of a trucking company which delivers books to a retailer. These examples merely involved taking product ordered by the customer and delivering it to the designated destination. The fact that microwave carriers, A.T. & T. or trucking companies make a profit off the delivering of these copyrighted works does not and should not subject them to copyright fees or restrictions.

Imposition of a separate copyright fee on the satellite resale carriers is of course an indirect method of taxing the public. If the Congress determines that additional fees should be adopted, it makes no sense to hide a portion of the extra fee by imposing it at a different level of the distribution chain.

Finally, a close examination of the potential revenues from such fees will reveal that despite all of the rhetoric by the program suppliers, satellite resale carriers are very small businesses. United Video, the second largest resale carrier business, last year grossed only $3.1 million from its satellite resale business. Our profit was less than $300,000.

In fact, the fiscal year completed a few weeks ago was the first in which United Video made a profit from any of its common carrier services in more than 10 years. While we expect to make a reasonable profit in the future, the total revenues involved are too small to have any impact on program production. A fee equal to the combined profits of all three satellite common carriers would have absolutely no impact on program supply.

Moreover, the satellite distribution of independent TV stations is not likely to increase in numbers. While at one time there was talk of a substantial number of satellite distributed super-stations and there was an initial rush to get on the satellite, the total number of distributed stations has already peaked at four and declined by one, as one of the competitors dropped out for lack of a market. And it may well be that at least one of the remaining three will disappear for one reason or another.

Another of the restrictions suggested for satellite distribution is to adopt a proposal which would, in effect, force the satellite carriers into the role of a middleman for obtaining of retransmission consent. You have all heard many times the axiom that retransmission consent is simply a code word for retransmission denial. All third party individuals, such as Tom Brennan, Barbara Ringer, and Bernie Wunder have testified that the cable systems could probably not get retransmission consent.

Any such proposal is doomed to failure and the placing of the satellite carriers as middlemen does not obviate the underlying reasons for that failure. Any such proposal would inevitably lead to

the end of satellite distribution because of retransmission denial. This restriction on the use of a valuable new technology is not in the public interest. All of you have thousands of constituents who would be deprived of these valuable services.

The allegation has also been made that the resale carriers are not passive common carriers because they play a role in selecting the television station carried over their facilities. However, our selection role is no different than the decisionmaking routinely exercised by all common carriers, and it is absolutely necessary in a dynamic industry. The same thing occurs when United Airlines decides to serve Bermuda.

Common carriers, like all businesses, examine the marketplace to determine the existence of needs and to find methods to maximize profits.

Thus, as you can see, there is nothing sinister about the selection of WGN. It is a simple case of a common carrier making decisions to satisfy customer requests in the most efficient manner and to maximize the use of its limited facilities. The same process occurs when Bell Telephone begins providing WATS service. A need is perceived and an attempt is made to fill it with the hope that the new initial customers will grow to a level which will support the investment and produce a profit.

A second challenge to the common carrier role of the satellite resale carriers is the claim that their marketing efforts are somehow inconsistent with the common carrier concept. Nothing could be further from the truth. Common carriers, like all businesses, have the right and the obligation to attempt to maximize the use of their facilities.

Once it has been determined that only one television program can be made available over the satellite transponder at a time, United Video owes it to itself and its customers to attempt to increase the number of users of that service. If an airline has only one scheduled route, it sells tickets by advertising where a traveler can go on that route.

Likewise, a communications common carrier with a fixed use for its facilities advertises the programing that is available on those facilities. There is simply nothing wrong with extolling the virtues of the only service available. This practice is common to all types of common carriers.

American Airlines, while advertising the quality of its transportation facility, also extols the desirability of Florida or the other destinations involved. A.T. & T. advertises the benefits of talking to your grandmother or your ex-neighbor. It is accepted standard common carrier practice to market services by stressing the value of the product which can be received by using the pipeline.

In the hearings held on this matter of the past several weeks, members of this subcommittee have expressed a desire for more facts upon which to make a judgment. I would submit that there are already a great number of facts available to the Congress which demonstrate that additional copyright fees or other major changes in the copyright law are unneeded and undesirable at this time.

The largest collection of factual material is of course that which was developed by the Federal Communications Commission in its

study into this matter which covered a span of 4 years and undoubtedly required the expenditure of millions of dollars in resources.

The FCC, whose history is replete with decisions restricting the cable television industry and hindering its growth, cannot be accused of bias toward the cable television industry. It asked the cable industry, the broadcast industry, the program suppliers, and the public to submit whatever factual information could be gathered over a period of several years.

The broadcast and program supply industries expended substantial efforts to put forth their best possible case. Yet the verdict was clear, unambiguous and factually supported that distant signal carriage by cable television systems did not harm local broadcast stations or the program supply industries. This decision was affirmed by the courts just 2 weeks ago.

The FCC's own Broadcast Bureau stated in a separate document that the cable report "is generally well done and its conclusions are justified. . . . The vast majority of television viewers either stand to benefit or will be unaffected if the distant signal carriage rules are relaxed."

The thrust of the FCC's conclusion is that the public can enjoy the benefits of diversity without harm to the business entities involved and indeed that those entities will grow and continue to prosper as never before.

Another "significant" study was recently completed for the Canadian Government by Prof. S. J. Liebowitz. This study, entitled: "Copyright Obligations for Cable Television: Pros and Cons," has been sent to each of you. It concludes that cable is responsible for a 19.6 percent increase in advertising revenues and that imposition of any copyright payments on cable is unjust.

The thrust of the study is that since CATV increases the choice of programs available to the viewers, and since the viewers are willing to pay for CATV, the viewers' valuation of television increases because of cable, due to the fact that they watch more intently. That is to say, viewers in noncable homes might read the paper while watching "Laverne and Shirley."

If, however, they had the opportunity of watching 20 other programs, they might find one that they like very much, such as Carl Sagan's "Cosmos" series. If the viewers were watching something they really enjoyed, they would put the paper down and watch it more intently. If they were watching the show more intently, the commercials would be more effective and therefore more valuable. The study found that they would be 19.6 percent more valuable.

There are only so many viewers in the United States. These viewers can watch only so much product. The fact that cable television mixes the product up, that is, it brings Chicago into Tulsa and St. Louis into Chicago, does not affect the number of viewers. They are still only watching so much product. The copyright owners would like a bigger piece of the pie, never mind that the pie never got any bigger; they just want more.

I would urge that the copyright and distant signal matter has, if anything, been overstudied. All of the facts necessary are now on the table. This is not a new controversy. The affected parties have been gathering and presenting the best available evidence for

many years and the clear consensus among impartial observers is that carriage of distant signals is a public good causing no significant harm to the broadcast and program supply industries.

In closing, I would ask that the committee focus on the facts:

(1) There are 27 million households in underserved America.

(2) There are only 3 satellite common carriers and they are small potatoes.

(3) The three carriers combined have profits of less than $2 million.

(4) United Video only has 36 employees.

(5) Termination of compulsory license for cable will bankrupt United Video.

(6) 60 percent of United Video's customers are small having less than 2500 subscribers.

(7) 87 percent of United Video's customers are owned by small business concerns, not billion dollar companies.

(8) The FCC has spent 4 years and substantial resources investigating this matter, and Congress should not overrule the effect of those decisions.

(9) Studies conducted by our neighbors in Canada have concluded that cable television should pay no copyright fees.

The program supply and broadcast industries are thriving today as never before. A representative of NTIA testified before you a few weeks ago that the present system has not adversely affected the growth of the program supply market.

Moreover, it is clear that the growth of cable television is creating substantially increased revenues for existing programing, as well as developing whole new markets for the production of new programing. Everyone benefits from the present system and no one is really being disadvantaged.

We at United Video would urge that it makes no sense to change a system that is working.

In Oklahoma some people say, "If it's not broke don't fix it."

Thank you for your attention.

[The statement of Mr. Bliss follows:]

STATEMENT OF ROY L. BLISS, EXECUTIVE VICE PRESIDENT OF UNITED VIDEO, INC.

My name is Roy Bliss. I thank you for the opportunity to discuss with you the changes now under consideration in the cable television copyright laws and to explain why I believe they are unwise. I have spent most of my life in or near the cable television industry. My dad built one of the first cable systems in Wyoming in 1952. I am, therefore, very familiar with the struggle which this industry has faced.

United Video was originally formed in 1965 as a common carrier microwave company which would serve the cable television industry by carrying television signals from major metropolitan markets of the underserved TV markets in the hinterlands. People who live in major metropolitan areas sometimes forget that much of America still does not receive a great deal of television. This is principally why cable television has been so popular.

Approximately one third of the households in America live outside the 50 largest markets and, as a rule, receive no independent commercial television off-air. I have attached a map which shows the relatively small portions of this country with access to non-network stations. The map was contained in the 1976 House Staff Report. While the number of stations has increased somewhat since

the 1972 survey on which it is based, the overall picture has not changed much. This vast populous wants and deserves access to distant signals. The proposed changes in the copyright laws now under consideration would decrease that access and would raise other serious problems.

A few short years ago Congress adopted new basic legislation in the copyright area which laid down for the communications industry and the public some important ground rules, including:

1) Cable television would be able to offer distant television signals under a compulsory license system.

2) A fee was set for the compulsory license and a mechanism for increases was established which would lend some degree of certainty to the cost of distant signals.

The industries involved - including cable, broadcasters, program suppliers and common carriers like my company - have made their plans, negotiated all manner of contracts and spent millions of dollars in reliance on the basic ground rules. Congress must take this into account before changing those rules. We are not arguing that all legislation, once passed, should be cast in iron, but frequent changes are neither fair nor wise - especially, where, as here, all elements of the business community have and are continuing to adjust and I might add prosper under those rules:

-- The program supply industry is enjoying record prosperity and further benefits by the rapid growth of new income sources through pay cable and advertiser-supported cable services.

-- Broadcasting continues its phenomenal growth and profitability.

-- The public is turning more and more to the diversity made possible by cable growth.

-- The cable industry is finally moving toward its potential after years of government repression.

-- Businesses like United Video which serve the cable industry are beginning to share in that progress.

The changes now under consideration apparently arise from complaints by the broadcast and program supply industries, although it is difficult to characterize those companies as in need. Some of the typical headlines we've been reading include;

Hollywood to Reap $300 Million from Pay TV in '81, up 40% (Hollywood Reporter, May 7, 1981).

ASCAP Logs Another Record Year (Variety, Feb. 19, 1981).

Broadcast Blurbs in Sales Boom; 2nd Quarter Sales 1.4 Billion - up 16% (Bariety, April 8, 1981).

TV Revenues to Double in 5 Years, NAB Told (Projection by TV Bureau of Advertising, Variety, April 16, 1981).

No segment of the affected industries can seriously argue it is not thriving under the present system as never before. It simply makes no sense to risk the loss of this balance, because two industries (broadcast and program supply) want an even larger slice of the pie, at the expense of others, like United Video, who have invested their future in reliance on the 1976 law.

At various times in the debate about copyright legislative changes, the possibility of imposing restrictions or copyright liability on the satellite distribution of distant signals to cable systems has been discussed. United Video would obviously be directly affected by any such changes and we would like to briefly discuss our opposition to them.

Initially it should be pointed out that the satellite carriers are not performing copyrighted works. Instead they are simply delivering materials at the request of and to the cable industry. The carriers do not deal directly with the public but act only as a delivery vehicle -- a pipeline to cable television systems. This is analogous to the terrestrial carriers who have for over a decade been constructing and operating communications facilities serving the same purpose via microwave. It is also analogous to AT&T longline services which presently deliver network programming from the network originating point to each of the local network affiliates. An analogy outside of the electronics industry might be to that of a trucking company which delivers books to a retailer. All of these examples merely involved taking product ordered by the customer and delivering it to the designated destination. The fact that terrestrial carriers, AT&T or trucking companies make a profit off the delivering of these copyrighted works does not and should not subject them to copyright fees.

It is significant that satellite technology is a great benefit to mankind, allowing a less expensive and more efficient delivery of communications than ever before imagined. Yet Congress is now being urged to take steps to eliminate that efficiency by imposition of what amounts to a tax on this technology. Opponents are urging that satellite distribution is too good and needs to be hampered.

Imposition of a separate copyright fee on the satellite resale carriers is of course an indirect method of raising costs to the public. If the Congress determines that additional fees should be adopted, it makes no sense to hide a portion of the extra fee by imposing it at a different level of the distribution chain.

Finally, a close examination of the potential revenues from such fees will reveal that despite all of the rhetoric by the program suppliers, satellite resale carriers are very small businesses. United Video, the second largest resale carrier business, last year grossed only 3.1 million dollars from its satellite resale business (less than MPAA's 1977 budget). And our profit was less than $300,000. In fact the fiscal year completed a few weeks ago was the first in which United Video made a profit from any of its common carrier services in more than 10 years. While we expect to make a reasonable profit in the future the total revenues involved are too small to have any impact on program production. A fee equal to the combined profits of all three satellite carriers would have no impact on program supply. And by the time any individual program supplier received its share, it would be obvious to all that any reasonable fee from the carriers would not even equal the proverbial drop in the bucket.

Moreover, the satellite distribution of independent TV stations is not likely to increase in numbers. While at one time there was talk of a substantial number of satellite distributed "super-stations" and there was an initial rush to get on the satellite, the total number of distributed stations has already

peaked at four and declined as one of the competitors dropped out for lack of a market. And it may well be that at least one of the remaining three will disappear for one reason or another.

Another of the restrictions suggested for satellite distribution is to adopt a proposal which would, in effect, force the satellite carriers into the role of a middleman for obtaining of retransmission consent. You have all heard many times the axiom that retransmission consent is simply a code word for retransmission denial. Any such proposal is doomed to failure and the placing of the satellite carriers as middlemen does not obviate the underlying reasons for that failure. Any such proposal would, in my judgment, inevitably lead to the end of satellite distribution because of retransmission denial. This restriction on the use of a valuable new technology is not in the public interest.

The allegation has been made that the resale carriers are not passive common carriers because they played a role in selecting the television station available over their facilities. This mischaracterizes what actually occurred and its import. It may be helpful to review the factual setting of the "selection process" to demonstrate that (a) it is no different than the decisionmaking routinely exercised by common carriers and (b) it is absolutely necessary.

Common carriers, like all businesses, examine the marketplace to determine the existence of needs and to find methods to maximize profits on investments, or at least to assure that a pro-

fit will be made. Beginning in 1965 United Video commenced operations as a terrestrial microwave common carrier serving the projected needs of the cable industry. Over the next ten years it constructed 5 separate microwave systems (covering 8,000 miles) carrying 26 different television signals to underserved locations at the request of over 100 cable systems. All of these systems were built at great expense and in anticipation of the growth of cable television. Unfortunately for United Vdieo and for the public, that growth did not occur - in large part because of the Federal Communications Commission's restrictions on the diversity which cable was allowed to offer. It is significant that the microwave systems built by United Video have never made a bottom line profit and have not been a good investment.

When satellite technology arrived its advantages over terrestrial microwave became obvious. United Video believed there was a need for satellite transmission facilities and determined to grow with the technology instead of fighting it. It must be understood that transmission of video services via satellite has had a very negative effect on the terrestrial microwave business.

Because the risk was very high (a commitment of over $1, 000,000), and because United Video is a fairly small company with (book value of approximately $934,000 with only 36 employees) we could only commit for one satellite transponder. Our payments to RCA for satellite transmission facilities are over $1 million a year. We are in the process of investing $700,000 for an earth station uplink facility. With one transponder, we can only provide one video service.

Our principle requests for service came from the systems receiving WGN by microwave who preferred satellite distribution. In all the confusion many overlook the fact that prior to satellite technology, the signal of WGN was delivered by terrestrial microwave to cable systems throughout the Midwest serving 1 million viewers. Most of those customers have now switched to satellite. Thus, in many ways United Video is providing the same service it always has, but using a better pipeline.

For technical and economic reasons someone had to choose between competing requests for services. This is a traditional common carrier role - to act as referee when demand exceeds the availability of facilities. If ten customers request service, seven of whom desire the signal of one station and three of whom desire others, it is entirely proper and necessary for the carrier to choose which service request to fill.

I might add that this is an ongoing process. We are faced constantly with requests for different services during all or parts of the day. As a common carrier we must consider and try to accomodate those requests to the best of our ability. A standard element of FCC tariffs is a provision for changing a previously dedicated use of the transmission facilities when demand for that change reaches a certain level.

Thus, you can see that there is nothing sinister about the "selection" of WGN. It is a simple case of a common carrier making decisions to satisfy customer requests in the most efficient manner and to maximize the use of its limited facilities. The same process occurs when United Airlines decides to start a service to

Bermuda or Bell Telephone begins providing WATS service. A need is perceived and an attempt is made to fill it with the hope that the few initial customers will grow to a level which will support the investment. It is significant that this process also serves to decrease the cost to individual customers. United Video is only now beginning to make a profit. However, as the number of subscribers increases there is little doubt that we will be able to decrease our transmission rates.

To our critics, I would like to turn the question around and ask what they think United Video should have done when faced with multiple service requests, all of which cannot be satisfied. "Selection" of one use of the transponder over another is unavoidable, necessary and proper.

A second challenge to the common carrier role of the satellite resale carriers is the claim that their marketing efforts, are somehow inconsistent with the common carrier concept. Nothing could be further from the truth. Common carriers, like all businesses have the right and the obligation to attempt to maximize the use of their facilities. Once it has been determined that only one television program can be made available over the satellite transponder at a time, United Video owes it to itself and its customers to attempt to increase the number of users of that service. If an airline has only one scheduled route, it sells tickets by advertising where a traveler can go on that route. Likewise, a communications common with a fixed use for its facilities advertises the pro-

gramming that is available on those facilities. There is simply nothing wrong with extolling the virtues of the only service available. This practice is common to all types of common carriers. American Airlines, while advertising the quality of its transportation facility, also extols the desirability of Florida or the other destinations involved. AT&T advertises the benefits of talking to your grandmother or ex-neighbor. It is accepted standard common carrier practice to market services by stressing the value of the product which can be received by using the pipeline. Such advertising in the case of satellite carriers is not the sale of the stations programming. The customers already have the right to carry the station under the compulsory license. The carriers' advertising is merely an attempt to sell more tickets on a vehicle whose destination has already been determined.

This brings up a conceptual problem that should be discussed. In a telephone conversation some would say there is a customer on each end and a carrier in the middle providing the pipeline. The satellite carriers are said to depart from this model because there is only one customer. The analogy does not hold up. When a telephone call is made, it is at the request of only one side, and only one side pays the bill. Indeed, as in the case of telephone solicitations, one side may not want the call made at all. The satellite carriers simply provide a pipeline whereby a customer asks to be connected with the signal of a television station which he has the right, by law,

to receive. This is a traditional common carrier use and should be encouraged rather than attacked.

In the hearings held on this matter over the past several weeks members of this subcommittee have expressed a desire for more facts upon which to make a judgment. I would submit that there are already a great number of facts available to the Congress which demonstrate that additional copyright fees or other major changes in the copyright law are unneeded and undesirable at this time. The largest collection of factual material is of course that which was developed by the Federal Communications Commission in its study into this matter which covered a span of four years and undoubtedly required the expenditure of millions of dollars in resources. The FCC, whose history is replete with decisions restricting the cable television industry and hindering its growth, cannot be accused of bias toward that industry. It asked the cable industry, the broadcast industry, the program suppliers, and the public to submit whatever factual information could be gathered over a period of several years. The broadcast and program supply industries expended substantial efforts to put forth their best possible case. Yet the verdict was clear, unambiguous and factually supported that distant signal carriage by cable television systems did not harm local broadcast stations or the program supply industries. The FCC's Broadcast Bureau stated in a separate document that the Cable Report "is generally well done and its conclusions are justified. . . the vast majority of television viewers either stand to benefit or will be unaffected if the dis-

tant signal carriage rules are relaxed." The thrust of the FCC's conclusion is that the public can enjoy the benefits of diversity without harm to the business entities involved and indeed that those entities will grow and continue to prosper as never before.

Another "significant" study was recently completed for the Canadian Government by Professor S.J. Liebowitz. This study, entitled "Copyright Obligations for Cable Television: Pros and Cons," has been sent to each of you. It concludes that cable is responsible for a 19.6% increase in advertising revenues and that imposition of any copyright payments on cable is unjust. The study uses all types of sophisticated analyses, such as "Hedonic Price Regression of 30-Second, Prime-Time National, Spot Advertising Rates." Another one is entitled "Regression of Change in Viewing Hours on CATV Penetration Change." Another very important element of their research is the Herfindahl Index, which is a measure of market concentration.

The thrust of the study is that since CATV increases the choice of programs available to the viewers, and since the viewers are willing to pay for CATV, the viewers' valuation of television increases because of cable, due to the fact that they watch more intently. That is to say, viewers in non-cable homes might read the paper and watch "Laverne and Shirley." If, however, they had the opportunity of watching 20 other programs, they might find one that they like much better, such as Karl Sagan's "Cosmos" series. If the viewers were watching something they really enjoyed, they would put the paper down and watch it more intently. It they were

watching the show more intently, the commercials would be more effective.

There are only so many viewers in the United States. These viewers can watch only so much software product. The fact that cable television mixes the product up -- that is, it brings Chicago into Tulsa and St. Louis into Chicago -- does not affect the number of viewers. They are still only watching so much product. The copyright owners would like a bigger piece of the pie -- never mind that the pie never got any bigger; they just want more.

I would urge that the copyright and distant signal matter has, if anything, been overstudied. All of the facts necessary are now on the table. This is not a new controversy. The affected parties have been gathering and presenting the best available evidence for many years and the clear consensus among impartial observers is that carriage of distant signals is a public good causing no significant harm to the broadcast and program supply industries.

CONCLUSION

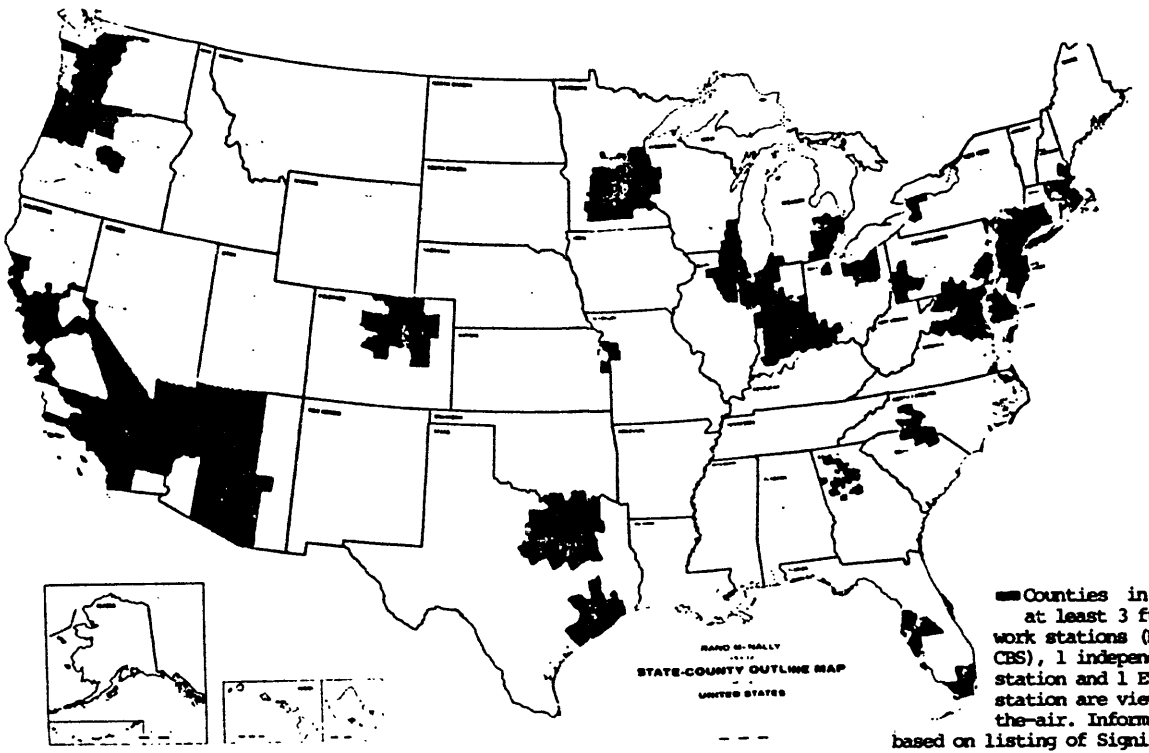
In closing, I would ask the Congress to focus on the goals behind the proposed changes in the Copyright Act. Some have urged that your primary purpose is to increase the revenues of the program suppliers. I would hope that this is not true. It seems to me that the only legitimate goal of Congress in changing a system that works as well for all parties today would

be to cause the availability of more and better product to the public. There is not a shred of evidence that any of the changes under consideration would have that public benefit.

The program supply and broadcast industries are thriving today as never before. A representative of NTIA testified before you a few weeks ago that the present system has not adversely affected the growth of the program supply market. Moreover, it is clear that the growth of cable television is creating substantially increased revenues for existing programming, as well as developing whole new markets for the production of new programming. Everyone benefits from the present system and no one is really being disadvantaged. We at United Video would urge that it makes no sense to dramatically change a system that is working.

Thank you.

Map taken from Cable Television: Promise Versus Regulatory Performance; prepared by the staff for the use of the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives; January 1976.



Counties in which at least 3 full network stations (NBC, ABC, CBS), 1 independent station and 1 ETV station are viewed off-the-air. Information based on listing of Significantly Viewed stations contained in FCC 1972 CATV Report and Order and derived from American Research Bureau Study.

Mr. KASTENMEIER. Thank you, Mr. Bliss.

Without objection, your statement in its entirety will be made a part of the record.

I note there were a number of differences in the presentation and the prepared text.

I think you are the first representative of satellite carriers here before the committee.

I should ask you something about the ABC's of your industry so we have factual common reference points.

Mr. BLISS. Okay.

Mr. KASTENMEIER. There are presently three common carrier organizations which handle programing which is transmitted to cable systems throughout the country; is that correct?

Mr. BLISS. Over the satellite; there are many common carriers that use microwave.

Mr. KASTENMEIER. Yes; I am referring to satellites.

How many satellites are there, physically, the satellite itself? How many of those are there stationed in the upper atmosphere or in space which transmit those programs?

Mr. BLISS. Well, there are many satellites, I am not even sure how many, 24 or something like that, but there are only one or two that you could say are serving the cable television industry. RCA SATCOM 1 has 18 channels that are being used to serve the cable television industry.

RCA, because of the loss of their satellite last year, is using an A.T. & T. satellite which has, I am guessing, I think six channels or something like that being used by the cable television industry, and there are a couple of channels on one of the Western Union satellites that are being used by the cable television industry, so there are three satellites that the cable television industry uses.

Mr. KASTENMEIER. Yes; when we talk about common carriers, we are not talking about RCA, A.T. & T. or Western Union?

Mr. BLISS. No.

Mr. KASTENMEIER. United Video is one. Which are the other two?

Mr. BLISS. Southern Satellite and Eastern Microwave.

Mr. KASTENMEIER. Do you each have access to the same number of channels? There are only some 24 or 26 channels being used. Do the three you presently control have access to all of those channels?

Mr. BLISS. No; we only have between us——

Mr. KASTENMEIER. I shouldn't say channels.

Mr. BLISS. That is close enough. Transponders is the satellite term but they are channels, for all practical purposes.

United Video owns two transponders. One we use for transmission of WGN television from Chicago, and the other one we sublease to Times Mirror. They are using it for a pay TV service. They are not a common carrier.

We leased the second transponder from RCA back when that was still possible, when they still had some available in the spring of 1978, I believe. We did not have enough money to program it at the time. It is now very valuable. Times Mirror has the option to use the transponder for an indefinite period.

Mr. KASTENMEIER. In the commerce of communications, common carriers do what I suppose others do, you go to RCA, A.T. & T. or

Western Union and try to lease channels from them. In turn, you lease spots or allocations on those transponders to others for programing.

Mr. BLISS. That is true. Right now there are no more transponders available.

You could always buy one, but the asking price, I understand, is around $15 million just for the option to have the transponder. You would still have to pay RCA a million dollars a year in lease payments.

Mr. KASTENMEIER. What is your relationship to WGN, for example? They are considered a passive superstation. Do you have any sort of contractual relationship with them?

Mr. BLISS. None whatsoever. We have carried WGN services since the mid-1960's on our microwave system throughout Illinois and into Iowa a little bit and several other stations, some of the network stations out of Chicago to central Illinois.

When we secured a position with RCA for the first transponder we at that time didn't even know exactly what channel we were going to put on the satellite, but we had many requests from our WGN microwave customers in Illinois to switch that to the satellite service because it is much more reliable, higher quality service and WGN is a very, very fine independent TV station.

All of the cable people recognize WGN, and it was a very valuable, salable kind of service. We talked to the WGN people and told them what we would like to do. They took the position they couldn't stop us. They liked it on the one sense that they could be transmitted nationwide.

On the other hand, they were concerned that the program suppliers would charge them more if they were transmitted nationwide.

Mr. KASTENMEIER. Also, did it occur to them that they might charge their advertisers more to the extent that they could translate a broader market into value for advertisers?

Mr. BLISS. I am sure that occurred to them. We did discuss that at great length.

WGN being a division of a huge conglomerate, Tribune Co., has taken a very cautious, slow, wait-and-see approach to this issue.

Mr. KASTENMEIER. Unlike Mr. Turner.

Mr. BLISS. Definitely unlike Mr. Turner. But we have been very cordial, and their sales people ask us all the time, where are we going, how many customers do we have. They are interested in their distribution.

Mr. KASTENMEIER. I take it that the three common carriers do not have all 26 channels tied up?

Mr. BLISS. No; we have only got a few. United Video has two and we had to sublease one because of the lack of finances.

Southern Satellite, they were ahead of us by almost 2 years in this ball game. They have, I believe, I can't remember now, three transponders, but one of them is on Western Union.

One of them is TBS, Turner's station, and I guess they sold one of their others back in the early days when they also needed some money. They sold one to Premier, which is in the midst of trying to sell, so the two of us have two each, but only one each is being used for the transmission of a television type station. Eastern Micro-

wave does not even own a transponder. They are leasing one from Show Time.

Mr. KASTENMEIER. Then that suggests that many of the entities that already have their own programing and are not common carriers, leasing in that sense, have acquired access to those transponders?

Mr. BLISS. Right; most of the people that have the transponder are doing something else; U.S.A. network, et cetera.

Mr. KASTENMEIER. Doesn't that tend to throw a lot of different types of programing into one competitive box? CBN, Trinity may well be able to compete with some of the others, and be in a stronger economic position but, ultimately, if they do not have long contracts with satellite owners, those contracts would come up and whoever is able to pay the $15 million will outbid somebody else?

Mr. BLISS. That is correct. Eventually the contracts, although there are tariffs, go through 1988 at that point in time, who knows what will have occurred. Our only hope is RCA is a common carrier and files tariffs and has some limit to the rate of return they can have.

Mr. KASTENMEIER. Presently they are not limited?

Mr. BLISS. They are theoretically limited but their investment in the early stages of putting up satellites was just horrendous so I really don't know what they are making. I would guess 15 percent return.

Mr. KASTENMEIER. Are they a common carrier?

Mr. BLISS. Yes.

Mr. KASTENMEIER. You have two classes of common carriers here, those who own the satellites and those who lease channels?

Mr. BLISS. Right; I would class it sort of RCA is in the wholesale common carrier business and we are sort of the retailer common carrier. Some of the other companies have expressed a desire to become condominium-type satellites by selling their channels outright. There is a big hassle going on at the FCC right now whether they can do that.

Mr. KASTENMEIER. That is very useful information.

Mr. BLISS. To help clarify, it might be helpful to know that KTVU is an independent TV station in San Francisco, and was being carried by Southern Satellite at one time, on a transponder owned jointly with Holiday Inns. They chose to back out of that business and the transponder is now owned by Warner and they are doing Nickelodeon on it.

Mr. KASTENMEIER. I understand that there were expected to be four superstations. To the extent the satellite is involved, why should we worry about whether there are two or three in a given market since there is not much prospect for it anyway, as you indicated? Unless RCA puts up more satellites there may not be space?

Mr. BLISS. I don't think you should worry about it. There are only three and no prospects of being more than three in the next 4 years probably. Most of the——

Mr. RAILSBACK. Is there going to be direct broadcast satellite? If you don't mind, Mr. Chairman, I was curious.

Mr. BLISS. I think that will definitely occur. Exactly how they will be used and what people will put on them is probably very

questionable. It probably won't occur until the late 1980's, 1986 or 1988, something in that range.

Mr. KASTENMEIER. You might explain that for the record, direct broadcast satellite is a satellite put up for one broadcaster only?

Mr. BLISS. Not quite. I guess the difference is mostly technological. What they are striving to do with direct broadcast satellite is have a lot of power on the satellites so that they can reduce the reception device on the ground to a point where you could have one on every roof. That would be the ultimate goal, sir.

The satellite is very expensive, very large. It would only have a couple of channels under our present technology. That kind of a satellite probably could only have three channels.

Mr. KASTENMEIER. On reception, since your signals are not scrambled, yours and presumably others, anyone is free to receive them who has the technology in the ground for any purpose presumably.

What relationship do you have to cable operators who may or may not contract with you for retransmission of your signals from your two channels?

Mr. BLISS. They sign an agreement with us. If they choose to steal it, the rates we charge are very low. We don't think that many people would steal.

The ramifications of theft are from a copyright standpoint more than, from us, the cable systems could get into a lot of copyright lawsuits which certainly wouldn't be worth the small amount of money they would save by not telling us.

Mr. KASTENMEIER. Obviously, they wouldn't have a compulsory license to retransmit materials for which they have not contracted.

Mr. BLISS. If it is of any size at all, somebody would tell somebody, and even other cable systems tell on their neighbors who aren't paying. There are individuals but there are only a few thousand of them in the whole United States because it is still fairly expensive, several thousand dollars for reception.

Mr. KASTENMEIER. If the year is 1988 and there are several hundred thousand of them, will that make any difference to you or to the local friendly cable operator who does not have his own customer?

Mr. BLISS. I don't think with the present technology that is ever going to be a problem. With direct-to-home satellites, it will be such a shift from the marketplace that probably a lot of other things will have taken place in between.

Mr. KASTENMEIER. I have some other questions but since I have almost used up my 5 minutes I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman. I can understand why you would want to ask a lot of questions because it is a very fascinating area.

If we were to call WGN as a witness, or one of its executive officers, and were to ask them, going back to the 1960's when you first picked up WGN and transmitted it via microwave, how did they feel about that and, over the history, how do they feel about what United Video has done, what would their answer be, in your opinion?

Mr. BLISS. It would probably be different for some of the executives but I think overall they would be happy with it.

It has expanded their market.

Mr. RAILSBACK. Did they, back in the olden days, initially object to United Video picking up and rebroadcasting?

Mr. BLISS. They have never objected.

Mr. RAILSBACK. Is it true that they actually can market their programs and sell their advertising based upon the expanded market that you provide for them?

Mr. BLISS. They used to sell, and I assume still do, the microwave distribution. It was a much smaller environment, and I think they claim that they do not sell the satellite distribution.

Mr. RAILSBACK. Is that so their advertising rates are not geared toward their expanded market, including the east coast?

How many additional units or homes does your satellite transmission mean for their programs?

Mr. BLISS. We double their market, a little more than double their market.

Mr. RAILSBACK. Double in the sense, given their own market, without any other retransmission. In other words, are you the only retransmission of that particular station?

Mr. BLISS. On satellite we are. There are some other microwave companies that carry it into Michigan, Wisconsin, and our company carries it down into central Illinois.

Mr. RAILSBACK. I see.

Now, first of all, let me say I would not have thought that your answer would have been different to my first question. I would have thought that WGN initially would have objected to what you were doing, so that is kind of a surprise when you say that they have never objected.

I guess I also am surprised at your other answer, which is that after you are doubling their market they have not been able to charge, or find more national advertisers.

Mr. BLISS. I didn't say that. They have chosen not to, as a conservative function of their company, they don't, I am really speculating here, because of the fact of the nature of the business, they do not have a contract with us.

They don't want to be out on a limb selling that service and all of a sudden not be there when our contract ends with RCA or something like that, as opposed to Ted Turner who is actively out selling it. They could sell it, there is no question they could sell it and increase their rates.

Mr. RAILSBACK. What is an uplink?

Mr. BLISS. That is the transmitting device that gets the signal to the satellite. It looks just like a receiving device, except it is going the other way.

Mr. RAILSBACK. Then I am confused again

Did I remember in your testimony you indicated you were going to buy an uplink?

Mr. BLISS. We are building an uplink. Presently that is basically an economic consideration. We are presently leasing uplink service from RCA at almost $20,000 a month out of Lake Geneva.

We are building our own uplink in Frankfort, Ill., about 20 miles south of Chicago.

Mr. RAILSBACK. Can you explain again why there are only three of you in this business. Is it because of the lack of transponders?

Mr. BLISS. Two things: That is one and, second, I believe there is only a market for about three independents in the cable industry.

Mr. RAILSBACK. Could you expand on that a little bit.

Mr. BLISS. The cable industry receives diminishing returns from more and more independents. They carry much of the same syndicated material. The sports might be different but if each cable system were importing one distant signal by microwave and all three by satellites, that would be four independent signals, and the fifth one would not add much to their potential.

Mr. RAILSBACK. Where does the cable news network fit in the picture, by providing a certain service?

Mr. BLISS. It is a different kind of service.

Mr. RAILSBACK. Is it like the sports network?

Mr. BLISS. Most of the companies who have satellite time have chosen to go into narrow independent services, all news, all sports or all women's programing as opposed to the kind of service WGN has which we carry, which is broad-based family entertainment.

Mr. RAILSBACK. When you talk about a diminishing return, are you talking about a diminishing return in that particular type of program area?

Mr. BLISS. Correct.

Mr. RAILSBACK. What would happen if the FCC were to deregulate so you would no longer have the exempt status of a common carrier? What would that mean to your company?

Mr. BLISS. As the copyright law is written, our exemption is tied to the fact that we are a common carrier, so if we were no longer a common carrier, we would no longer have copyright liability exemption which means we would have to negotiate for copyright and that means we would go out of business.

Mr. RAILSBACK. Isn't the FCC considering that?

Mr. BLISS. I don't think so. There is some rulemaking to deregulate the carriers, but it is more paperwork deregulation, as much of the Government regulatory agencies are doing now, sir.

Mr. RAILSBACK. How long term are your contracts with your people systems?

Mr. BLISS. Three years.

Mr. RAILSBACK. The other thing is what is your response to the statements by both the current Register of Copyrights, as well as the past Register of Copyrights that you should be subject to a copyright liability, and that you should not be exempt?

Mr. BLISS. Well, I think they are wrong.

Mr. RAILSBACK. You are aware of that?

Mr. BLISS. I am fundamentally aware. I think they have also said that they saw no way around compulsory licensing. It is a complicated issue.

Mr. RAILSBACK. They both think you should be liable.

Mr. BLISS. If we were liable then our service would go away because there is no way for us to grapple with copyrights. WGN does not even own the copyright so we would have to go back to each individual copyright owner and they would not give us the copyright.

Mr. RAILSBACK. If you did have a compulsory license, and if there was a continued deregulation of the distant imported signal as well as syndicated exclusivity, then you would be liable for the copyright royalty. But, you would still be in business, would you not?

Mr. BLISS. I am not sure I understand.

Mr. RAILSBACK. Well, in other words, the FCC deregulated the distant signal requirement and exclusivity. Now the courts have upheld the FCC deregulation, so what I am saying is, I don't quite understand why, if that does not create a problem and if you were held to be liable as many other experts have testified you should be, even though you had to pay a copyright royalty fee, I am not sure why you would be any different than, in other words, your broadcast of WGN's programs.

By the way, I do think it is different than your telephone analogy because in the case of a telephone call here, calling the callee, the callee can hang up. In your case, WGN does not have much recourse.

Mr. KASTENMEIER. Would you yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIER. What if you were made subject to copyright but had the same form of compulsory licensing, which you would pay the copyright but you would not have to negotiate?

Mr. BLISS. We could still be in business that way.

Mr. RAILSBACK. That is what I am talking about.

Mr. BLISS. We could not negotiate for the rights.

Mr. KASTENMEIER. Mr. Bliss, if you can remain, Mr. Railsback and I would like to finish our questioning.

We will recess for perhaps 8 or 10 minutes.

The committee stands recessed.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will resume sitting and will come to order.

When we recessed the gentleman from Illinois was asking Mr. Bliss some questions.

Mr. RAILSBACK. Mr. Bliss, I asked you if WGN had ever objected to your retransmission and your answer was no. Maybe you didn't understand exactly what I was asking, but I meant it to be rather inconclusive, and now I understand that WGN has filed some kind of a suit against United Video.

I think apparently it has to do with WGN, who has some kind of a news summary that they provide to one of those flashing scripts. They are alleging that United Video has blocked out their script and is using its own script; is that correct?

So they are objecting. They have objected to the point where they have filed suit.

Mr. BLISS. Not to our distribution. This is a data service they insert into the video vertical interval which is an unused space of the spectrum. They want that service in Albuquerque, N.M. They want us to get it there for them.

Mr. RAILSBACK. Why would they want you to get it there?

Mr. BLISS. They want the distribution of this data service on our satellite system. The suit is over whether or not we can take it off and put on, we are putting on a Dow Jones data service which Dow Jones pays us for.

Mr. RAILSBACK. They are alleging that you really are changing the content?

Mr. BLISS. We are alleging that it is a technological change. The content of the programing that we carry is the video and the

associated audio. This is another service. We are putting several radio stations on there and other things.

Mr. RAILSBACK. Can I ask what news summary you use, or do you originate it, or is it some other news that you are picking up and substituting?

Mr. BLISS. Another news, Dow Jones Business Cable News that they pay us $2,500 a month for, and they send it to us from New York and we put it in this empty space.

Mr. RAILSBACK. Who pays you for the use of the Dow Jones New Summary?.

Mr. BLISS. Dow Jones does.

Mr. RAILSBACK. Why would Dow Jones pay you to provide their news summary to other areas?

Mr. BLISS. It is a nationwide news summary they are trying to distribute to the cable television industry and they would then charge the cable system for the summary.

Mr. RAILSBACK. If you distribute it, then presumably they are going to contract with the cable system and receive money, and are you going to carry it for them?

Mr. BLISS. Right; we are operating in a carrier role.

Mr. RAILSBACK. Yet you do not pay?

Mr. BLISS. That is correct. I should clear up one other thing. You asked if WGN had ever objected to their carriage or to their carriage by us, and they have objected at the FCC back in the beginning, but our relationship has been very positive. They have never sued us or anything like that.

Mr. RAILSBACK. Did they formally object?

Mr. BLISS. They objected; I think it is more like their passive role.

Mr. RAILSBACK. Did they file a written document objecting?

Mr. BLISS. They did in a proceeding; I think it was a proceeding brought by MPAA or NAB, they filed a written one.

Mr. RAILSBACK. Is that objection still pending, or what was the resolution?

Mr. BLISS. The FCC threw it out, I guess. It was way back or about the time we started carrying them on the satellite.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. Mr. Sawyer?

Mr. SAWYER. I can understand why WGN wouldn't object. You are just expanding their coverage, and at some point in time, they could charge more for expanded coverage.

What is the position of program sellers like the seller of MASH? What is their position?

Mr. BLISS. We have been carrying WGN for over 2 years and the program suppliers keep going in and selling all of the product, knowing they are being distributed nationwide.

Mr. SAWYER. As I understand it——

Mr. BLISS. They try to charge WGN more for that carriage.

Mr. SAWYER. They sell exclusivity in various other markets, and they may not be at the same time for one market as they are in the other. I notice that back in my district. I will see programs a week later than I have seen them here in Washington, although they have been regular programs and apparently just sold at different sequences.

It would seem to me that this would play havoc with their ability to sell. For example, if they sell Channel 7 or 9 here in Washing-

ton, D.C., MASH, for example, and sell Channel 8 in Grand Rapids, Mich., they are running a week behind that. The Washington station, if they were picked up by satellite and beamed into the cable system in Grand Rapids, are really usurping the market they have sold to a station in Grand Rapids.

Don't you get into some problems with that?

Mr. BLISS. It is a problem area. The answer is, there are only three superstations, and the coverage of those three stations is very well known and the program suppliers continue to sell or not to sell to those three superstations. If they really don't want it carried on the satellite, they wouldn't sell to them.

Mr. SAWYER. Do they charge WGN more to sell to them; do you know?

Mr. BLISS. They try to. Part of WGN's reluctance to publicly embrace this satellite delivery is that they don't want to have to pay more for the project. They are trying to straddle the fence.

Mr. SAWYER. Let's make a couple of assumptions that are not necessarily correct, but will be illustrative of what I am talking about.

Suppose Channel 13 in Grand Rapids, an ABC affiliate, WZZM, to be specific, contracts to run MASH, and pays whatever they paid to get that program, and suppose WGN off your satellite comes into our area, because we do have cable also. Let's assume they are either a week or a day ahead and the MASH program is being run on WZZM, it seems to me that has got to create a real problem.

Mr. BLISS. The Grand Rapids television station should go back to the program supplier that sold him MASH and say, why did you sell it to them? You knew they were here. WGN has been in Grand Rapids for 15 years.

Mr. SAWYER. You are not having any problem?

Mr. BLISS. The program supplier is supplying it.

Mr. SAWYER. They are not complaining to you about it?

Mr. BLISS. No.

Mr. KASTENMEIER. You indicated the bill before us would cause real problems, including some alteration for copyright liability for common carriers. Are you sure the bills contain that fact?

The first bill, H.R. 3560, does not contain any provision requiring a separate fee from common carriers?

Mr. BLISS. That is true. There have been some discussions, I believe, by some of the panelists who have discussed that. That is what I was referring to.

Mr. KASTENMEIER. It would affect you, and that is why I think we want to distinguish between those two bills.

Mr. BLISS. I would like to add, if the common carriers were liable to a few but still had a compulsory license, first of all, as I mentioned in my written testimony, the three satellite carriers combined don't make enough money to make a dent in what the program suppliers would really like to see.

Second, to stay in business, we would basically have to pass that fee on to the cable system who would pass it on to your constituents, so it really just would almost be a hidden fee that would be placed upstream into the marketplace.

Mr. KASTENMEIER. Of course, that is true of the present compulsory license fees, those are passed on.

Mr. BLISS. Right.

Mr. KASTENMEIER. I am not sure that militates against that.

What would harm organizations such as yours if indeed we change the copyright liability for cable system but not for common carriers? Certainly you wouldn't be directly affected, would you?

Mr. BLISS. If you change in what manner, increase the rate?

Mr. KASTENMEIER. There are two bills. Assume for the purpose of argument that either bill became law. In the case of one bill, it more or less limits the number of distant signals that can be afforded to more or less a preexisting station before the FCC deregulated, provided for syndicated exclusivity.

The other gets rid of the compulsory license, forcing the cable system to negotiate in one way or another directly for programs in terms of being liable. Assuming that neither makes any provision for common carriers to change the existing law with respect thereto, why would you be concerned about either bill?

Mr. BLISS. The latter bill making cable television systems liable for negotiating fees, the cable system could not do that. They couldn't go out and negotiate for all of the channels that they might be carrying. Therefore, they would drop our service.

It would ruin our business, undoubtedly ruin it. The first bill you discussed would, I guess, just limit our growth. Our future growth is in the cable systems being able to carry more independents. We would basically stop where we are now.

Mr. KASTENMEIER. Certainly, the metropolitan systems are cleared for copyright. That is to say, negotiating for copyright already—E-Span, USA Network, HBO, on and on—so the signals are there for which there is no negotiation covered by compulsory license.

I am talking about the one in Arlington, across the river, WOR and WTBS.

Mr. BLISS. Right.

Mr. KASTENMEIER. The real problem would be negotiation for——

Mr. BLISS. The Arlington system.

Mr. KASTENMEIER. And some sort of clearance that those two superstations would probably have to have.

In other areas there are ground microwave relay systems on the satellite. There are really only two or three options, as you point out, that have this condition of possible copyright to be cleared, if you didn't have a compulsory license?

Mr. BLISS. That is right. The cable system really couldn't get them cleared. Over a period of time, it may not happen instantly, the common carriers like us would quit offering their service and try to do something else with their transponder, because the cable system could not and would not try to negotiate for that service.

Mr. KASTENMEIER. Well, that may be true, and you may not be the best witness since you obviously can't speak for all cable systems. But, there are two major cable operator systems, and let's assume that prospectively there is a majority in the Congress that would vote for a change.

Then one of those organizations, or some other marketing organization representing cable system would, with respect to existing superstations, go out and try to clear the rights of MASH or something else, one by one, and I suspect that would be impossible to do.

Mr. BLISS. In any individual market it might be possible to do. Our contact in Arlington might be able to clear for Arlington, but every single thing would have to be negotiated because of the

exclusivity of the rules that MASH was sold under to every single market, so each cable system would have to clear each market system separately.

It would be a nightmare.

Mr. RAILSBACK. That legally is what is required now. Then you have exclusivity such as in Moline, Ill., where they contracted with United Video to bring in WGN. If WGN carried a program where there was another station in the Moline market that wanted to black out, is that required until regulation went into effect?

Mr. BLISS. Those are the exclusivity rules. The local station says you can't carry that because I have the rights to it, and so they black it out or put the other station on.

Mr. RAILSBACK. So, aside from retransmission consents, which I understand, I remember your argument against that in your statement. If the Congress was to impose a liability on you and if we were to take the Kastenmeier bill approach, and for a limited period of time reimpose the limitation on imported signals and exclusivity, you could live with that, or you had to live with that up until now, although you wouldn't desire it.

In other words, you would rather have a free market so you wouldn't have the problems of exclusivity. On the exclusivity show, the way that works, although it does impact on you indirectly, the people that have to have a certain exclusivity are the local people within the local markets that ask for the blackout; is that correct?

Mr. BLISS. Correct; exclusivity would not bother us. We would just be back where we were, and it is a complication for the cable system.

Mr. KASTENMEIER. Of course, your special problem is that you happen to lease one channel, a passive superstation, and there are only three in the country presently. As far as subleasing, Times Mirror, that is no problem, unless you as a common carrier would be exposed to some other liability not presently provided by law.

Mr. BLISS. Right. Times Mirror is essentially responsible for that. They are buying pay TV basically on that channel.

Mr. KASTENMEIER. The committee thanks you for being so informative with respect to industry practices and information that is presently going on.

Mr. BLISS. Thank you for asking me. I hope I have been helpful.

Mr. KASTENMEIER. Now the committee would like to call Mr. Herman Land. We are very pleased he could come today, as he was scheduled at an earlier time. We had problems in scheduling.

It is my pleasure to greet Mr. Herman Land, president, Association of Independent Television Stations which include, among others, WGN.

TESTIMONY OF HERMAN LAND, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS

Mr. LAND. The President of WGN is chairman of my organization, so it has been fascinating for me to hear all of this. In view of the time, what I would like to do, with your permission, is not read the entire statement, but incorporate it in the record.

Mr. KASTENMEIER. Without objection, your 14-page statement, together with the appendix, will be received in the record, and you may proceed as you wish.

[The complete statement of Mr. Land follows:]

STATEMENT OF HERMAN W. LAND
PRESIDENT, ASSOCIATION OF INDEPENDENT
TELEVISION STATIONS, INC.
BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
July 9, 1981

Mr. Chairman. My name is Herman W. Land. I am President of the Association of Independent Television Stations (INTV). INTV is an organization of 68 stations not affiliated with any of the national networks located in 52 different television markets, ranging from the three largest markets to some of the smallest. INTV's membership includes all but one of the so-called "superstations," as well as many marginal UHF independents which are struggling to attain a foothold in their markets against established, network-affiliated stations.

Our members are pleased that you are undertaking this effort to review the copyright liability of cable television systems under the Copyright Revision Act of 1976. We applaud your decision to revisit the issue, in light of the rapid changes in the broadcast and cable television industries since 1976 that you have already noted.

With all the current talk about the explosive impact of satellite, cable, home video and DBS, important changes taking place within the broadcast television industry are sometimes overlooked. One of the most important of these changes is the rise of the independent stations. Once just a handful of

scattered individual operations, today the independent stations represent a significant communications force reaching close to two-thirds of the American population. Greater national coverage by independents, which will make additional networking possible, can be stymied only by developments which make it harder for new stations to go on the air and limit the opportunities of the independents to rise from marginal existence.

Independents exemplify the diversity and change in the broadcast industry. These stations are the upstarts, standing apart from the national networks and striving to make their way in the face of the heavy network domination of the broadcast system. Such ambitious program undertakings as Operation Prime Time, the night-time productions of the Program Development Group, two satellite-fed news services, and the specials of independent station groups, have shown that independent operation can be successful given imagination and hard work.

I'd like to briefly describe the somewhat curious position of independent stations in the present media marketplace. We find ourselves caught in the middle. On one side, we have the networks and their affiliated stations, with whom we compete daily in our local markets. If you are a network affiliate, the bulk of your programming is supplied by the network and it pays you to carry that programming. But, if you are an independent, you pay for practically all of your programming, from

sign-on to sign-off every day. You have to go into the marketplace for that programming -- there is no other way. It doesn't matter whether you're making or losing money. You must either generate programming yourself, go out and buy it from someone, or contract for someone to produce it. Unfortunately, as a result, many independent stations are losing money. In 1979, the most recent year for which FCC financial data is available, 22.2% of independent VHF stations and 50.7% of independent UHF stations were unprofitable.

On the other side we find the cable television operators, who, under the present copyright law, are outside the program distribution process so far as distant signal importation is concerned. Cable operators neither compete against broadcasters for the right to exhibit broadcast programming, nor bargain with program suppliers in the marketplace, as we do, for time and territorial exclusivity. What all this adds up to is that, in all of cable and broadcast television, only the independent station has to negotiate and pay for an individual performance rights license for nearly every program it carries. And it adds up to plenty. INTV's member stations pay out between 25% and 40% of their revenues to buy programming. A fairly typical example is Metromedia, the owner of seven television stations and INTV's largest member, which last year spent nearly 35% of its revenues on programming.

We are in an even more curious position in relation to the so-called "superstations" which are now being imported from distant markets by cable systems. Ironically, we are both the local stations that must compete with these imported distant signals, and we are the distant signals. As the comic strip character Pogo once said, "We have met the enemy and he is us." In essence, the cable carriage of independent signals, our signals, is what all the discussion and controversy before this subcommittee is about. Yet, in 1976 we were not a party to the agreement that led to the adoption of the cable provisions of the Copyright Act. In fact, we were not even consulted. We are, therefore, glad that this subcommittee has invited us to make our views known.

With respect to distant signal carriage, I want to emphasize that whatever the value of the service an independent may render to distant communities, it is INTV's position that the local station's first obligation is to its own community of license, and its first priority is to maintain the integrity of the local market. That's where we live, and that's where and for whom we operate.

Some representatives of the cable industry say that the carriage of distant television signals is becoming less important to cable operators and that the number of superstations will become smaller and eventually disappear. We disagree. Under the present compulsory license scheme, distant signals

are an inexpensive source of programming for cable operators. In the past, the FCC distant signal restrictions and the scarcity of satellite transponders limited the availability of distant signals. With the elimination of the FCC rules, the quadrupling of transponder space that has been predicted over the next 5 years, and the advent of the 50, 60, 70, 80 and 100-plus channel cable systems that have been promised in major urban markets, cable operators can be expected to seek additional distant signals, because under the present law they are a bargain addition to a system's signal complement and a cheap vehicle for avoiding dead channel time.

The bills which are under consideration by this subcommittee reflect a recognition that the copyright scheme for cable television systems instituted by the 1976 Copyright Act is obsolete, and that unintended consequences are flowing from the Act and from recent actions of the FCC. For local independent stations, the most damaging consequence is that because of the compulsory license scheme we are losing the key feature that allows the independent to distinguish itself from network affiliates and all other program outlets -- the feature that gives the local independent the unique identity that it needs to survive.

I am talking about program exclusivity, the right to be the exclusive exhibitor of a particular program in a local market. This is what we bargain for in the marketplace when we

contract for a performance rights license under the copyright law. All we ask is the benefit of our bargain. But because the copyright law exempts cable systems from the obligation to compete for these licenses, and because the FCC has abolished its distant signal and syndicated program exclusivity rules, we are being denied the benefit of our bargain in the marketplace. There is something very wrong here, when we can't rely on our bargain in the marketplace and make it stick. Under the present scheme, in contrast to virtually all of our competitors in the entertainment media -- cable television, pay cable, subscription TV, home video, the emerging direct broadcast satellite service, and even movie theatres and stage productions -- only the broadcast television station does not enjoy the right to exclusivity.

This is INTV's overriding concern, and I think that it bears an inseparable relationship to your primary concern -- assuring that copyright owners receive the full benefit of their bargains. The independent station is, after all, on the other end of that bargain. We are a primary source of program purchases. Program suppliers tell us that we represent a disproportionate share, perhaps 35-40%, of their total market. Thus, independent stations, while few in number, are an important ingredient in the market. Both the program supplier and the independent station, as a program purchaser, simply want to ensure that their agreements will be enforceable, so

that an exclusive license is, in fact as well as in theory, exclusive.

As you know perhaps better than anyone else, the idea of exclusivity is inherent in the concept of copyright. In 1976, you struck what you called a "delicate balance" between copyright policy and communications policy in creating the present compulsory copyright license structure for cable systems. You specifically relied upon the existence of the FCC's distant signal and syndicated program exclusivity rules to maintain this balance. Now, the FCC has eliminated these rules and its authority to take such an action has been upheld by a federal court. It now appears that only Congress can restore this balance. In the absence of the rules, the cable copyright scheme established by the 1976 Act can never approximate the marketplace, because cable operators pay far less than the "going rate" for programming and they'll be able to import unlimited, duplicative programming into local markets without bargaining for the exclusive right to show such programming, as the local station must.

As INTV sees it, Congress can act to preserve this essential principle of program exclusivity in either of two ways. One way would be to repeal the cable compulsory license scheme as it relates to carriage of distant signals on cable systems, as Congressman Frank's bill, H.R.3844, proposes. Full copyright liability for cable carriage of distant signals would

ensure that the cable operator engage in fair competition and that he go into the marketplace to obtain his programming, just as the independents do. Since program copyright owners grant an exclusive license to exhibit a program in a local market, putting cable operators into the program purchasing marketplace will ensure that the same program will not be carried by more than one channel, local or distant, in the same market. At the same time, cable carriage of local signals could be afforded a free compulsory license, in the interest of providing local television programming to all local viewers. Carriage of local signals raises none of the problems of unfairness or competitive harm that are posed by importation of duplicative programs.

This approach has the virtue of being truly "deregulatory" in nature. It would remove an artificial exemption from the copyright laws, and would put cable on an equal footing with broadcasters in the program distribution marketplace. It would also end the Congressional "subsidy" of an industry that is thriving and expanding as perhaps no other in the nation.

To nobody's surprise, the cable operators oppose the lifting of their exemption from copyright liability. Their plea, which was accepted by the Congress in 1976, remains that it would be too much of a burden for them to go out into the marketplace and obtain a license for every program they want to import. All we can say to that argument is that the independent

stations find it burdensome to obtain these licenses too -- but we do it, for practically all of our programming, every day, because the copyright laws require that we do. And we survive. The cable operators also say that the program owners wouldn't deal with them. I think that the cable systems' recent success in buying rights to sports and other non-broadcast programming lays this argument to rest. In truth, most of the program offerings now available to cable systems are not subject to the compulsory license, and the cable operators are buying that programming. Our review of the services available to cable systems via satellite indicates that, of 28 available offerings, only 3 are subject to the compulsory license. In any event, although I am not an economist, I do know that decisions in the program marketplace, like any marketplace, are based on the most effective means of distribution of the product. If cable is not always the most cost-efficient means of distributing a program, the marketplace will act to insure that the public receives the program through another, more cost-efficient medium. I don't see why cable should call upon Congress to step in to upset marketplace forces.

The other way that Congress could preserve the principle of program exclusivity is to mandate syndicated program exclusivity protection, either by legislatively restoring the distant signal and exclusivity rules formerly contained in Subparts D and E of the FCC's cable rules, or by directing the Copyright Royalty Tribunal to adopt and enforce syndicated

exclusivity rules. Chairman Kastenmeier's bill, H.R.3560, points in this direction. However, we would suggest that it direct the Tribunal to adopt exclusivity rules, instead of only empowering it to issue such rules. To accomplish this in the bill, we would suggest that the new section 801(b)(3) of the copyright law read something like this:

> "(3) within 180 days after the enactment of this Bill, to establish rules which would prohibit any cable system from carrying a syndicated program while a television station licensed by the Federal Communications Commission has the exclusive exhibition rights to the program in the community in which the cable system is located."

Now, let me describe briefly what exclusivity, as accomplished by either full copyright liability or syndicated exclusivity protection, would do. The cable industry says that it would hinder diversity in programming. On the contrary, it is very evident that exclusivity has and would continue to foster program diversity, by obliging cable operators to import or produce programming different from that which is already aired locally. To me, diversity means increasing the number of voices in the market, not simply the number of times the same voice is heard. Exclusivity would allow additional non-duplicative signals into the market while providing protection for the local station's copyrighted programming.

Although I am not certain whether this subcommittee has the jurisdiction or the inclination to report legislation on the subject, I feel constrained to urge that the Congress also

require that cable television operators carry all local television signals on their systems. I am aware that some of you have problems with such a provision, but nevertheless, I'd like to stress that, from our point of view, mandatory signal carriage and program exclusivity protection go hand in hand if the vitality of local television service is to be preserved. If a cable operator is permitted to exclude the signal of a local television station from his system, the practical effect will be that the local station will be cut off from all of the system's subscribers in the very community that it is licensed to serve.

I have heard cable interests attempt to downplay the impact upon cable households of deleting a local signal, saying that a viewer could simply "flick a switch" to receive a local station over-the-air. The fact is that practically no cable operator offers such a switch to subscribers. He certainly won't be inclined to offer such a device, since it would allow the customer to "switch off" his entire cable package. In fact, cable operators have been known to encourage their subscribers to disconnect and dismantle their outdoor TV antennas. So, in truth, the deletion of a local signal from a cable system would deny the local station access to every cable subscriber in its community of license.

Before I conclude, I would like to comment on a couple of other points raised by the bills before us. H.R.3560

would raise the ceiling for the cable "small system" exemption from copyright liability from 1,000 subscribers to 5,000 subscribers, and H.R.3844 would raise the ceiling to 2,500 subscribers. INTV believes that this would be an unwarranted change, especially since our figures on cable indicate that over 80% of all cable systems have less than 5,000 subscribers. In fact, our research reveals that over 60% of the cable systems have fewer than 2,500 subscribers. Over 76% of the systems in the top fifty television markets and 79% of the systems in the top 100 markets have fewer than 5,000 subscribers. Our data has been summarized in an Appendix attached to my written remarks.

In light of these statistics, we don't see how you can redefine the lion's share of cable systems, particularly in the major urban markets, as "small." A high ceiling would give an overwhelming majority of cable operators a free ride in the copyright area, which I think is just what these bills are trying to prevent in the first place. H.R.3560's provision would even give many cable systems operated by the largest multiple system operators a haven from copyright liability. We think that no "small system" exemption should be adopted, because no commercial user of copyright programs should be totally exempt from copyright liability. At the very least, all systems affiliated with a multiple system operator, such as Teleprompter or Warner, should be subject to such liability, and we

support that provision of H.R.3844 that would ensure that these MSO's are not exempted. If the subcommittee feels that some exemption must be allowed, INTV believes that the 1,000-subscriber exemption now contained in the FCC's cable rules would be more than adequate to protect the small, unaffiliated cable systems.

Turning to another problem of great concern to INTV, we are heartened to see that H.R.3844 would exclude the so-called satellite "resale common carriers" from the "passive" carrier exemption in Section 111(a) of the Copyright Act. The problem, of course, is that most of the "superstations" which are retransmitted to cable systems nationwide by these resale entities, all of which are independents and most of which are INTV members, have nothing to say about whether they are to go up on the satellite or not.

Instead, it is solely the resale common carrier who determines what programming will be saleable to cable systems. In effect, he acts as a program distributor. He chooses the program service, gets paid by the cable company, which is charging the consumer an overall fee, and the carrier is getting paid for use of its transponder. The local station that's being carried gets nothing and has no choice in the matter.

Perhaps most inequitable of all, nothing is being paid to the copyright holder, and his efforts to build a rational distribution pattern for his show are frustrated. It's obvious that these "resale carriers" aren't common carriers at all. They specifically select the signals they carry to cable systems, and they aggressively market their product. They most certainly aren't "passive" common carriers under Section 111(a). Congressman Frank's bill recognizes that reality, and we applaud the provision of his bill that would exclude these entities from Section 111(a)'s exemption from copyright liability. As for the concerns of some that such a provision would result in a net loss of service to cable households, I think there can be no question that program packagers stand ready to fill any gap left by the departure of resale entities, and in fact would provide more diverse programming to a greatly increased number of program outlets, by the most cost-efficient means available in the marketplace.

The rapid expansion and strengthening of the cable industry and the revolution in video programming brought about by the emergence of the satellite present both a challenge and an opportunity for the local independent television stations of our country. We're not afraid of competition. We've been holding our own against the giants for a long time. We think we have a bright future. All we need is fair competition.

APPENDIX

Table I--Distribution of Small Cable Systems Nationally

System Size:	Under 1,000	Under 2,500	Under 3,500	Under 5,000
% Systems:	43.9	66.4	73.9	81.2
% Subscribers:	5.3	15.3	21.2	29.3

Table II--Distribution of Small Cable Systems in Top 100 Markets

System Size:	Under 1,000	Under 2,500	Under 3,500	Under 5,000
% Systems:	39.1	62.5	70.5	79.0
% Subscribers	4.1	13.2	18.8	27.1

Table III--Distribution of Small Cable Systems in Top 50 Markets

System Size:	Under 1,000	Under 2,500	Under 3,500	Under 5,000
% Systems:	35.8	58.9	67.7	76.6
%Subscribers:	3.3	11.5	17.1	24.8

Source: bi Associates, Inc. from U.S. Copyright Office, Cable Television Statements of Account, March, 1981.

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., 1200 EIGHTEENTH ST., N.W. • WASHINGTON, D.C 20036 • [202] 887-1970

MEMBERSHIP ROSTER

ACTIVE MEMBERS [63]

KBHK	San Francisco	WAWS	Jacksonville
KBMA	Kansas City	WCIX	Miami
KCOP	Los Angeles	WDCA	Washington, D.C.
KCPQ	Seattle-Tacoma	WDRB	Louisville
KDNL	St. Louis	WFFT	Ft. Wayne
KFTY	Santa Rosa	WFLD	Chicago
KGMC	Oklahoma City	WGN	Chicago
KHJ	Los Angeles	WGNO	New Orleans
KHTV	Houston	WKBD	Detroit
KICU	San Jose	WKBS	Philadelphia
KLKK	Albuquerque	WKFT	Fayetteville
KMPH	Fresno	WLRE	Green Bay
KMSP	Minneapolis	WLVI	Boston
KOKH	Oklahoma City	WNEW	New York
KOKI	Tulsa	WOR	New York
KPHO	Phoenix	WPGH	Pittsburgh
KPLR	St. Louis	WPHL	Philadelphia
KPTV	Portland	WPIX	New York
KRBK	Sacramento	WPTY	Memphis
KRIV	Houston	WTAF	Philadelphia
KSTU	Salt Lake City	WTOG	St. Petersburg-Tampa
KSTW	Seattle-Tacoma	WTTG	Washington, D.C.
KTLA	Los Angeles	WTTV	Indianapolis
KTRV	Nampa-Boise	WTVZ	Norfolk
KTTV	Los Angeles	WUAB	Cleveland
KTVT	Ft. Worth-Dallas	WUHF	Rochester
KTVU	San Francisco-Oakland	WUTV	Buffalo
KTXA	Ft. Worth-Dallas	WVTV	Milwaukee
KTXL	Sacramento-Stockton	WXIX	Cincinnati
KVVU	Las Vegas	WZTV	Nashville
KWGN	Denver	XETV	San Diego
KZAZ	Tucson		

INTERIM MEMBERS [6]

KGSW-TV Albuquerque, New Mexico
May Broadcasting Company, Omaha, Nebraska
Wardean, Inc., Opelika, Alabama
WHRT-TV Ann Arbor, Michigan
WPMI-TV Pensacola, Florida
WWAC-TV Atlantic City, New Jersey

ASSOCIATE MEMBERS

National Sales Representatives [9]

Blair Television	PGW Television
Independent Television Sales	Seltel, Inc.
Metro TV Sales	TeleRep, Inc.
MMT Sales, Inc.	Adam Young, Inc.
Petry Television, Inc.	

ASSOCIATE MEMBERS

Program Distributors [42]

Avco Embassy Pictures Corporation
CB Distribution Pictures Corporation
Colbert Television Sales
Columbia Pictures Television Distribution
DFS Program Exchange
Filmways Enterprises, Inc.
Gaylord Production Company
G.G. Communications, Inc.
Gold Key Entertainment
The Samuel Goldwyn Company
Group W Productions, Inc.
ITC Entertainment, Inc.
Janus Television Corporation
JWT Syndication
Lexington Broadcast Services
Lorimar Television Distribution
Madison Square Garden Television
MCA TV
McManus & Co. Int'l Representatives, Ltd.
Media Investment Service
Metromedia Producers Corporation
MGM Television
Multimedia Program Productions, Inc.
National Telefilm Associates, Inc.
Paramount Television Distribution
PolyGram Television
Program Syndication Services, Inc.
SFM Media Service Corporation
Syndicast Services, Inc.
TAT/Tandem/PITS
Telepictures Corporation
Time-Life Television
Trident Television Associates, Inc.
TVS Television Network
Twentieth Century-Fox Television
United Artists Television, Inc.
Viacom Enterprises
Vitt Media International
Warner Bros. Television Distribution, Inc.
Weiss Global Enterprises
Robert Wold Company, Inc.
Worldvision Enterprises, Inc.

Related Companies/Organizations [2]

Kelly, Scott & Madison, Inc.
Western Union Broadcasting Services

International [1]

Swan Television & Radio Broadcasters Limited, Perth, Western Australia

July, 1981

Mr. LAND. I should like to read some of it, put in some other things, and summarize.

I should like to quote something in the middle—it is so pertinent at the outset—where we quote Pogo, who says he has met the enemy and he is us. We are in the middle of all of this, and we face ourselves coming and going.

Since I last appeared before you we have grown. We had about 50 stations then. Now we are up to 69, in about a year and a half. We have approximately 57 stations in the top 50 markets, 10 stations in the second 50 markets, 2 in the third 50. I was reminded of that, because of the previous statement of Mr. Bliss concerning underserved households. We will grow still further in the next couple of years.

We are in 52 different television markets at the present time. All but one of the superstations are members, and that one was a member originally, as you will recall. We have many marginal UHF independents which are struggling to maintain themselves.

I am very pleased to be here and have a chance to present our thoughts on this.

With all of the talk about the explosion in technology, it is sometimes easy to overlook things that happen within the broadcast industry which add to diversity and change. We are in the forefront of that change as independent stations. I hope that as you have studied this, you have become aware of some of the things we are doing. I won't go into the record.

It is a growing, vital group of stations that is adding something significant, and it is really what this whole discussion is all about. Regardless of what side one is on, we find he is talking about independent stations. That is the service that Mr. Bliss is performing.

The essence of our position is that we are caught right in the middle. Look at it this way. If you are an affiliate you have one sort of a life. If you are an independent, you have another. The affiliate has its programing handed to it for the most part through the day by a network, which pays the station dollars to carry it. The station also has its own local shows, usually the news plus syndicated programs.

The independent lives almost entirely on its own resources. There is no network backbone. This is fundamental to its life. Everything that it programs it must get somehow, create it, produce it, buy it, license it. That is its life from sign-on to sign-off. It makes the independent a very vulnerable operation, unlike the affiliate, which has a more stable economic basis.

Still we are growing and we are developing. But we are not all fat cats. The only figures we have that we can rely on, are 1979 figures issued by the FCC. They show that in that year, 22.2 percent of the VHF independents lost money and 50.7, or more than half, of the independent UHF stations, so we are not necessarily the most wealthy segment of the industry.

Nevertheless, these people do believe in what they are doing and are providing an important service. The long-range prospects are reasonably good so long as things don't come into the way to interfere artificially.

On the other side, you find the cable operators who are outside the program distribution process, so far as distant signal importation is concerned, as Mr. Kastenmeier earlier pointed out.

What all of that adds up to—and it is a strange thing—is that in all of the systems of cable and broadcast television, only the independent station has to negotiate and pay for an individual performance license for nearly every program it carries. Nothing is handed to the stations—and it adds up to a lot.

Our member stations pay between 25 and 40 percent of their revenues to buy programing, and the costs are going up, not down. We have a fairly typical example, Metro Media, with a station here in Washington, owns seven stations. Last year they spent nearly 35 percent of their revenues on programing.

I should like to comment briefly on the superstation.

We are in an ironic situation, because we are the superstation, and we are the station that has to compete locally with the superstation. In our own membership we have all the contradictions that you can find. As I said earlier, we find ourselves coming and going sometimes, and cable carriage of our signals is what is the central piece of this whole discussion.

Unfortunately, in 1976 we weren't a party to these deliberations that led to the Copyright Act provisions, and nobody consulted us, so we are very happy that we do have this opportunity.

I should like to get to something that has been raised in the discussion which is very pertinent to an understanding of the independent's position, and that is, that fundamentally, we are licensed locally. In 1976 we had a discussion about who we were and what we were doing, and what our cable attitude should be. Many stations up to that time had been happy with the cable coverage that they were getting but others were beginning to complain about inroads of distant stations into their own markets.

We came to these conclusions: one, that we are licensed locally; that is our fundamental character; and, two, we would like to get as much coverage as possible. We are fundamentally a local broadcast institution. If you think about that you will see how it underlies our positions and allows the stations to resolve their own conflicts.

In other words, we are local stations, and our first obligation is to maintain the integrity of the local market. That is where we live and where and for whom we operate.

The question has been raised about the future number of distant signals, whether they are going to decline, remain the same, or increase.

What bothers us is that we are moving into a period of expanded transponder space or opportunities, not fewer, and into a period which we will see 50-, 60-, 70-, 104-channel systems being built. So long, therefore, as the present system is maintained, there will continue to be an attraction for a low-cost, really inexpensive source for major programing, I think, therefore, that there is just as much reason to anticipate an increase in distant signal carriage as decrease or a status quo situation.

When you have 104 channels, you have to determine how you are going to fill them. If you can find a rather popular cheap form of programing, that is going to be attractive. Remember, we are not just talking about satellite distribution, but about all the ways of getting the signals.

Now, the bills which are under consideration by this subcommittee reflect a recognition that the copyright scheme for cable embodied in the 1976 act is somewhat obsolete and that unintended consequences are flowing from the act because of the recent actions of the FCC.

That combination is very basic. Now, there is one point I hope I can register with you: For the local stations, the most damaging consequence of all of this is that, because of the compulsory license scheme and the recent FCC steps, we are losing the key feature that allows the independent to distinguish itself from network affiliates and all other program outlets, program exclusivity, the right to be the exclusive exhibitor of a particular program in the local market.

That is what we contract for when we negotiate for a performance license, and all we ask is the right to enjoy the benefit of that bargain; but because of the exemption built into the law and because of the abolishment of the rules, we are being denied that benefit. From our point of view, something is wrong here. We can't rely on the bargain we make. We can't make it stick. In the system, only the broadcast television station does not enjoy the right to exclusivity. The network station is protected by the nonnetwork duplication laws.

The cable systems have exclusivity on the number of broadcast channels. Everybody gets it and everybody wants it. Our stations thought we were getting exclusivity when they signed the contracts, so that is their overriding concern.

I suggest that all this bears an inseparable relationship to your primary concern, which is to assure that the copyright owners receive the full benefits of their bargains.

Now, I don't know whether you are aware of it, we are probably the primary source today, as a market, for all of those programers in syndication. The program suppliers, of which we have 42 or so members listed there, tell us that we represent a disproportionate share of their business, somewhere around 35 to 40 percent of the total market in many instances, so that while we are few in number we are a very important ingredient in the market, and what happens in that mixture is significant.

All that is really involved at bottom is that the program supplier and the independent station ought to be able to insure that they will have enforceable agreements, and that an exclusive license is exclusive.

Let me give you some examples of what that can mean. I have been trying to get some information that might be useful to you.

I talked to one of the managers who is particularly worried about what is happening with the lifting of the rules. He said the station is asking exclusivity from 11 systems in the market—their subscribers add up to 241,700 households—from WGN and WTBS and even WOR, which is on the other coast.

They have listed about 13 popular programs in syndication, many of which you have heard: "All in the Family," "The Muppets," "Odd Couple," and so on, for which they are asking exclusivity.

What happens is that when this goes, all of those programs will now be on the market duplicating their own programs. I asked the manager, what does this mean to you? His answer: "This is going to call for a re-examination of the pricing structure. "Second, it is going to bear some weight on scheduling."

I have been thinking about that and talking to other people. I also have some material from WPIX which represents their exclusivity requests. The program list is long, it is a very important thing that we are going to be losing here.

The thing that comes through in discussions with program people is that they are beginning to find that the customers, the stations—they mean both independents and affiliates—are starting to use cable penetration as what they call a bargaining ploy in negotiations.

Now, when you ask, well, does it work, of course, no salesman will admit he can't get it the price but the point is, this is happening and it is beginning to happen more and more as we are discovering.

Here is an example, just picked up, as a matter of fact, this week from a major program supplier. They have sold some packages, one a series to one station and a combination of a series of features to independent stations in two markets.

There are verbal understandings. The stations are now in fear of the future of cable penetration, and want a provision in the contract which calls for a reduction in price if cable comes in with the program or the right to cancel the series.

The head of the company said, you can't do business that way; you can't enter into such an agreement.

The problem is that if you get a reduction in price, as the creator or distributor of the program, it is going to be very difficult to get it back from the cable system. I have an example of how it might work if you have a different system in which you have all parties competing.

In the South, there are two stations, with overlapping signals. Our member tells us that he has an arrangement that he has made known to the syndicators. He will pay a certain amount of money for exclusive rights, but if the syndicator wants to sell to the other station, which covers a little portion of his territory, he will have to accept a price minus that a specified amount and get the rest from the other station. In the current cable situation, he can't make up the difference with the compulsory license. That seems to me to be an example that could set a pattern.

Now, there are two ways Congress could act to preserve this essential principle of exclusivity. I want to emphasize one thing. For us it is probably more important than for anybody else in the television industry. It is the only way that we can distinguish our channel number from the rest, if we have our own program. Talk to our people and ask, what would you rather have over and above everything else, and they will say, the right to have our own program, and we will compete with anybody.

We want to have that right to have our own distinction, our own identity—and that is what this is all about.

You can go two ways, one through Congress Frank's bill—that would take care of a lot. It is probably the ideal way to go. Of course, the cable operators oppose this.

Their main argument seems to be as Ms. Ringer maintains, that it still would be too much of a burden for them to go out into the marketplace and obtain a license. This committee has been discussing that subject with every witness. We are in that business. We find it burdensome to do it, but we do it for every program. We do it for all the programing because the law requires that we do, and we survive. It works.

The cable operators say that the program owners wouldn't deal with them. It seems to me that the recent successes of the cable systems in dealing with all the program services that Mr. Kastenmeier mentioned before puts that argument to rest. It is interesting—we took a look at what was available through satellite and counted 28 services, and only 3 of them seem to be subject to the compulsory license. The pattern has already been set. The marketplace will take care of it in that instance, because program suppliers are buying the transponders. There is enough future in that alone.

The other thing that I think has to be kept in mind is that there is something happening now which is fascinating in the cable business, and that is the growth of interconnections. We had the executive vice president of the Gill Cable Co. in the bay area, Robert Hosfelt come to speak to us at our recent convention. He said there are some 22 major markets in which the connection is being developed. It is simply a way of tying systems together. There is your packaging potential. Hosfelt decided that interconnecting cable systems had two kinds of profit potential, one from pay TV and one from advertising.

He has 500,000 homes on the local sports channel, and a number which he expects will rise to 750,000 in 2 years. The details of his operation are quite fascinating. He interconnected three channels in the bay area: a classic movie channel, a cable news network channel, a local sports channel, and that gives us a lot of inventory for promotion to reach the same people you want to reach.

"Now, can you sell all of this? We can compare our net weekly circulation with that of some network affiliates and find that it is comparable. We sell our interconnect by preparing our cum cost-per-thousand homes delivered over a schedule rather than individual quarter hours."

He has the equivalent of a broadcast station in operation right now. It is growing. He is going from 30 to 46 channels soon, and so on. There are 22 areas which are already involved, he reports.

New York City, I am told, has a franchise bid rule, which says that city will be interconnected. That means all of the five boroughs will be interconnected. Thus there will be the opportunity to provide an economic base for the programing.

Now, all of this goes to the point, I think, that it is possible. It is practical to program the cable channels in the absence of a compulsory license, which is what the question is. That seems to be a bedrock question, and the way you answer that question will lead you to the other answers.

There is one other way to achieve exclusivity if we don't have full copyright. Mr. Kastenmeier's bill points in that direction, but we suggest you go all the way—write it in. It empowers the Tribunal to set exclusivity rules, but does not mandate that it do so. We have written language which we submit for your consideration as the kind of thing that you might consider.

I am not going to go on with the rest of the discussion of exclusivity. The point has been made. Although I am aware that some of the members of this committee have problems with the question of mandatory local carriage, and that there are jurisdictional questions, I feel constrained to just say why we think it is important.

We think we have to have access to the audience, especially as cable grows, and we are a little bit skeptical of an ability of an "A" and "B" switch to make the difference. I know of cases in Manhattan where the master antenna is deteriorating, and where a new apartment house did not even build a master antenna system because of cable. It is unlikely that the TV operator would want to give you the opportunity to turn him off.

We took a look at where the cable systems are for whom exemptions are being requested—the 5,000 figure and the 2,500 figure. Far more appeared within the top 50 or 100 markets than most people would imagine, so it is a fairly important decision to make.

Concerning the resale common carrier, our position, obviously, would be that liability should reside somewhere. If it is not going to reside directly in the cable system, then the resale common carrier seems a logical place to put it, but we would prefer the former. So we would approve that part of Mr. Frank's bill. All we really are asking, finally, is a chance to compete fairly.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Land. How do you answer the proposition raised by those who cite the FCC study indicating that harm of cable deregulation to independent broadcasters would in fact be minimal? That was a conclusion. The court must have also bought that argument.

Do you have any specific evidence of harm to independent broadcasters?

Mr. LAND. We presented our case to the Commission about 2 years ago when we had done our own studies, which we would be happy to supply you with, and we came to different conclusions that the FCC chose not to accept.

We think we will be harmed. But in most of our markets, penetration has not arrived at that point at which significant impact can be measured. We were in the position of having to project, based on whatever pieces we could find. You have to take into

account the number of stations coming into the market. There is no telling what will happen in the future, not only in terms of the number of distant signals, but in terms of the number of channels that become active and attractive and the number of individual stations that come into the market and compete.

So it is a rather complex outlook, but what we see from the little measurement we can do have is that audiences begin to decline. The independents are hit first, that is natural, because the bulk of the audience still gathers around the network systems. We disagree with the FCC.

Mr. KASTENMEIER. I am not clear myself on this. Did the FCC in its study draw the conclusion which might be beneficial to you, that if there were to be harm, irreparable harm, that the independents would be more likely harmed than the networks?

Mr. LAND. As I recall, there were a couple of reports of the FCC, and I think the second report did make that point. [To his colleagues.] Is that correct, do you recall that? I don't recall the specifics.

Mr. KASTENMEIER. I am trying to ascertain whether or not the FCC did distinguish in their study between independents and network affiliates.

Mr. LAND. My impressions are—but I would like this to be subject to further research—at the beginning, they might not have, but in subsequent evaluations, based on new submissions, they did observe that point. May I comment?

They overlooked something in that report. When they talked about harm, they were talking about harm of the kind that would affect the ability to serve the public interest. It was never really defined. You could lose money but they said, as I recall, well, OK, you lost money, but you can still operate. From the communications standpoint, they conclude, well, nothing lost, and from our standpoint, it was another matter, but that distinction has to be kept in mind.

Mr. KASTENMEIER. Let me ask you this. Is there any possibility that you might be disadvantaged by removal of compulsory licenses to this extent?

Let us assume that compulsory licenses were phased out and that cable carriers, cable operators would, perhaps through national marketing organizations of their own, find it necessary to go and acquire "MASH," "Hogan's Heroes," and all the programs that might be syndicated, copyrighted 3- or 5-years hence, and in fact you find that you won't be able to get your exclusive licenses for those programs because the cable operators will have found it necessary to outbid you for them and the exclusive contracts you won't have. Is that possible?

Mr. LAND. Yes, it is a possibility and people do discuss that.

Mr. KASTENMEIER. The networks wouldn't be very much affected, but you would?

Mr. LAND. Yes, that is one of the questions that we are discussing, and I hope we can come up with the right answer to it. I don't know of anybody who has the right answer now. There is a possibility, too, that consortia of stations can get in there and compete. We are talking about a free—sort of an open—system and we may be able to get our heads together. I don't know.

Mr. KASTENMEIER. It occurred to me that that is one possibility, and I am pleased you are openminded enough to concede that that is a possibility.

I yield to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you.

What would happen if we started at the end of this thing and prohibited exclusivity?

Mr. LAND. I am not sure.

Mr. SAWYER. We do in most other areas. The antitrust laws prohibit territorial exclusivity.

Mr. LAND. It would be very, very difficult for us, if I follow the drift of your question, because under those conditions, you would have—your example in Michigan—you might have four or five MASH's coming in, and that would wreak havoc with the local stations' ability to schedule intelligently and profitably. It would be a serious problem.

Mr. SAWYER. We let bookstores all over sell the same books at the same time. They are all copyrighted.

That would get rid of a lot of this compulsory licensing problem. Why not go back and take a look at it from that direction, because it is a kind of exceptional thing that we permit under the antitrust laws, this territorial product division sort of thing?

Mr. LAND. It just seems to me to be a very difficult prospect for, if I am programing a station and if I can't single myself out of the mob—we can expect 100 of them in the future in those communities—then I have got a very difficult time building a business and therefore, it seems to me, from that standpoint, it makes sense for us to have the opportunity to bid for and bargain for in negotiating an exclusivity contract, and presumably it is good for the copyright owner, too.

Mr. SAWYER. Assuming we did knock out exclusivity, what would be the result? What would happen?

Mr. LAND. Well, take the television marketplace, I suspect that it would be a hell of a free-for-all, and if the supplier couldn't control the distribution of his product, anybody could pick it up. It would diminish the value of that product, drive prices down.

Mr. SAWYER. Wouldn't that be generally healthy?

Mr. LAND. It would not be healthy for the supplier obviously, and interestingly, it would not be healthy for the individual station. Nothing is gained.

Mr. SAWYER. Wouldn't it be healthy for the public to drive the prices down?

Mr. LAND. Program prices?

Mr. SAWYER. Presumably, in other competitive areas, people don't sell at low cost for very long. So, presumably, they would survive.

Mr. LAND. I am not saying that the pricing of the program, if it goes down, is necessarily good for the station in its attempt to build and survive and compete with others. Remember, still, the independent station does not have the resources of the networks, but it has some, and therefore, built into its very essence is the need to distinguish itself. It won't unless it has its own program, otherwise there is no particular reason you would turn into it. Since you are

selling advertising in order to survive and grow, you are going to suffer.

Mr. SAWYER. I am not so sold that if we just put exclusivity under the general antitrust laws and say you could sell it to anybody that wants to buy it, but you can't give them an exclusive right that it would bring prices down. But, why is that bad? Isn't that the whole thrust of competition?

Mr. LAND. I am no copyright expert. It seems to me it is to the benefit of the copyright owner to get the best deal he thinks he can get.

Mr. SAWYER. Let's assume you protect his copyright. On the other hand, he does not have the right to say to you that no one else can buy it in your area. Most producers don't have that right under antitrust laws. They can't territorially sell exclusively. On the other hand, they have a right to sell the product. If it is patented, somebody can't duplicate it.

This exclusivity is kind of a peculiarity to program producers. Suppose we just get rid of it?

Mr. LAND. Again, as I try to follow where you lead, I wind up on the other side.

Mr. SAWYER. I don't know that I am on any side. I am trying to take a look at the various approaches. Suppose you used that one? Suppose it drives prices down?

Mr. LAND. It would add to confusion and get in the way of a reasonable, rational broadcast—cable scheduling. It would just confuse the issue, which is happening right now on a small scale. That is what this whole dispute is about, as to whether there is some value which should be preserved.

If you have the opportunity to run MASH on 20 channels in your system, then you would be washing out its value very, very substantially.

Mr. SAWYER. We saw an ad here, which somebody exhibited from a Los Angeles paper, that showed there were some 450 baseball games going to be shown through the use of the satellites on these superstations, and either Bowie Kuhn, or somebody, pointed this out as a horrible thing.

If we weaned everybody in this exclusivity and let the people watch the 20 or 30 best games that they feel like watching and let the others go fish, which is what we do in other products——

Mr. LAND. I think I remember the argument on that. It is one thing, I suspect, to talk about exclusivity in terms of a specific game. If one of the baseball games is carried on 10 different channels, that is one. If I understand you correctly, with respect to exclusivity, baseball——

Mr. SAWYER. I just picked this out as an example. I am talking about MASH.

Mr. LAND. You say, situations, that is one thing.

We are talking about a lot of sports, not to duplicate each other—different games.

Mr. SAWYER. Maybe the same games.

Suppose we just let exclusivity be, just as prohibited as exclusivity is in selling lawnmowers or bookstores being able to sell that particular copyrighted book in an area. Suppose we said anybody

can buy anything that they want to buy, except they can't say you are protected in this State of Michigan on selling these products?

Mr. LAND. If every station in Michigan, or station in the market there, would be able to buy the same program, you would wash out the differences between the stations sooner or later. Your identity would be lost.

Insofar as the network stations are concerned, they could survive probably, because they have a network which is unduplicated, but the independents would be in a hell of a fix.

Mr. SAWYER. I yield back, Mr. Chairman.

Mr. KASTENMEIER. That concludes this morning's hearings, and we wish to thank Mr. Land for his contribution.

The Chair should announce that on next Wednesday at 10 o'clock, the hearing will feature the Register of Copyrights, Mr. Ladd, and the former Chairman of the FCC, Mr. Charles Ferris.

[Whereupon, at 12:35 p.m., the subcommittee was adjourned.]

PENDING COPYRIGHT LEGISLATION

WEDNESDAY, JULY 15, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Railsback, and Butler.

Staff present: Bruce A. Lehman, counsel, Timothy A. Boggs, professional staff member, Thomas E. Mooney and Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning's hearing is a continuation of hearings devoted to the subject of the copyright legislation, notably that affecting cable television.

We are pleased to have two prominent witnesses, one who formerly served in a major capacity in our Government, and one who last year assumed the responsibility as Register of Copyrights.

The Chair will say, since the House is in session, we may be interrupted once or twice. We will accordingly have to recess for about 10 minutes in that event, and we ask witnesses and others present to bear with us.

It is a pleasure for the Chair to greet an old friend who served in both the Senate of the United States and the House of Representatives and then went on to become the Chairman of the Federal Communications Commission. He served a very notable period of time and brought many changes about.

He has left the Commission and now assumes a new role as advocate in the private sphere. We are very pleased to greet the former Chairman of the Federal Communications Commission, Charles Ferris.

TESTIMONY OF CHARLES FERRIS, FORMER CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; COUNSEL, FIRM OF MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, ON BEHALF OF THE NATIONAL CABLE TELEVISION ASSOCIATION

Mr. FERRIS. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee:

My name is Charles Ferris, and I am the past Chairman of the Federal Communications Commission. I am now a member of the law firm of Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo.

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I have been retained as counsel to the National Cable Television Association on matters pertaining to copyright. I appreciate the opportunity to present my views on this important issue.

Mr. Chairman, I would like to begin by commending you and the other members of the subcommittee for the patience and fairness you have shown through 16 days of hearings on the Copyright Act of 1976.

Everyone and every side has had an opportunity to speak and be heard. I also believe you deserve credit for your willingness to reexamine this complex issue. Even those who believe the present law is adequate must admire your efforts. No law—even one that is ultimately left unchanged—should ever be immune from scrutiny.

After these 16 days of hearings, I believe that you will conclude as I have, that the present law is adequate, and that it really needs no change at all.

I must tell you that I believe your scrutiny will reveal recycled solutions seeking, but again failing to find, problems.

I do not believe that the circumstances of 1981, any more than the circumstances of 1976, justify the imposition of a system requiring thousands of often futile negotiations prior to the importation of distant signals by cable systems.

Nor do I believe that the efforts of the FCC to free cable from baseless regulatory restraints should be undone by legislative reimposition of those same limits.

In short, I do not believe that any of the legislative alternatives currently before this subcommittee would serve the public better than the current system you have in place.

By way of background, it is important to remember that the cable industry employs at least four different types of programing, and that the compulsory licensing mechanism applies to only one of them.

First, cable systems retransmit local and distant broadcast television signals and that is the facet of cable television to which the compulsory mechanism applies. None of the other types of cable programing operates under a compulsory license.

Second, cable systems purchase and transmit so-called pay programing including movies, news, sports, cultural, and other entertainment programing.

Third, they transmit access and local origination programing.

Fourth, they transmit nonvideo services such as teletext, alarm, and commercial data services.

These other aspects of cable go out into the free market and compete with every other seeker of movies or other programing, whether it be broadcasters, exhibitors, video disc or video cassettes. They compete in the marketplace. It is a free market mechanism, and they have no compulsory license mechanism to protect them at all.

The retransmission character of cable is really the object of the concern expressed by what are really competing modes of information and entertainment delivery. They complain about cable by raising the specter of cable having an unfair advantage, getting something for nothing, not paying their fair share.

In focusing on this retransmission character of cable exclusively, these competitors ignore the actual economics of the cable producer

relationship. I must say that retransmission of broadcast signals is becoming a smaller part of cable operation. One need only examine the amount of revenue being generated by the pay services, where it is a free market and cable operators and program producers negotiate an appropriate royalty amount freely.

In 1975, there were probably 265,000 pay subscribers to cable, and in 1980, there are about 9.1 million subscribers of pay cable services. Pay services, operating—legitimately so—without benefit of a compulsory license, are becoming a very significant part, if not the most significant part, of the cable industry's economic structure. I would stress to the committee that a compulsory license is not available in this segment of the business. The entire copyright debate here is concerned only with retransmission aspect of cable.

By way of background, Mr. Chairman, it must be remembered that what cable operators do when they retransmit television signals is extend the broadcaster's market into areas that the over-the-air broadcaster could not reach. It really started in the rural areas of our country when none of the broadcasters were able to reach in with the signal and it provided a signal for the first time to new viewers. Thus not only did cable provide rural America with their first contact with a significantly growing electronic communication mechanism, but, in doing so, it was the best friend broadcasters ever had by adding audience at no cost.

It brought more eyes and ears to broadcasters for those broadcasters to communicate the message of society and the entertainment that other people bring them.

The FCC, where the same issue of the competition between cable and over-the-air broadcasters were studied probably more thoroughly than ever anywhere else before, found that cable actually helped the survivability of the weakness of the broadcast stations, the independent UHF stations.

They gave new viewers the opportunity to be reached for the first time—and at no cost to the broadcaster. And in those days before the click tuner where one almost had to be a safecracker to be able to tune in a UHF signal that new audience proved critically important.

I raise this example, Mr. Chariman, because I know that the broadcasters traditionally have offered the "struggling" UHF as the example of what will happen if any proposed change in communication policy takes place. Our studies actually showed, however, that rather than being viewed as the weakest link, it was actually propped up by cable.

Cable can enhance the profitability of not only UHF broadcasters, but all broadcasters. It extends their markets and brings an audience where no audience was before. Broadcasters are able then to go to the program suppliers and say, this is our reach, this is what we can reach, because cable is providing us with a comparable signal and a larger marketplace that we can sell. They buy their programs based upon the number of viewers they now have and advertisers can be charged based upon the number of viewers that are actually viewing that particular signal. The program producers receive their just share of that based upon the percentage that the compulsory license system includes.

The point I am focusing on here, Mr. Chairman, because I believe it is often lost in the debate, is that the controversy involves only this one small aspect, the retransmission aspect of cable, that it is just one of four types of software used by cable, and in that one aspect, it is the friend of broadcasters. It is providing access to programing, furthering one of the goals of the copyright law which is to permit a creator to extend the reach and dissemination of the artistic product more widely as well as provide compensation back to the program producers.

I think the system actually provides that, and the system that this committee recommended in 1976 was a very wise decision, because it recognized the very character of the cycle of economics in broadcasting, cable and program production.

The structure created in the 1976 act addressed this retransmission character of the cable market and said: "Yes, we recognize that broadcasters have their market extended by cable, and broadcasters get increased compensation by that extended market. But we also recognize that some broadcasters may not actually be able to market those added viewers, because the types of advertisers that have been coming to their station traditionally, do not have their market in those extended areas. As a result, those broadcasters might lose some of the revenue that would come to them if the market had much more of a geographic sense. The compulsory license royalty fee will make up for that."

Certainly, the system provides an opportunity to change the advertising mix, so there would be fewer used car salesmen, and more soap sales. Well, I think the system you set up, the compulsory license with the copyright royalty tribunal is a system that is going to permit and is permitting the best solution to the issue of employing a free market approach in this whole area of the dissemination of programing. I think it was the best solution because I think the 1976 act stands for the principle that the heretofore absolute right of a program producer to determine who will see and benefit from that creative work was balanced against the rights of the public for the widest dissemination of programing, the type of diversity of programing which in the long run is both sound and valid communication copyright policy.

The 1976 act squarely faced the principles of sound communication policy of providing the widest dissemination of programing over the public airwaves and the absolute right to restrict this programing, unless you met terms and conditions. That is usually the traditional power under absolute copyright.

The copyright holder still has the option of selling programing to broadcasters, but when you do more dissemination over the broadcast airwaves, the public airwaves of this country that belong to the people, you have to accept the conditions of use of the public airwaves, one of which has evolved over the decades to be the widest dissemination of communications to all the people. As a result when a producer uses the public airwaves to sell its product, he or she has to accept less than absolute control over your copyrighted product.

In 1976, this committee accepted a compulsory license system because sound communication policy demands the widest dissemi-

nation of products, providing the opportunity to viewers to have options to listen and hear programing when they wish.

Those were the competing forces that you balanced in 1976 to adopt that compulsory license mechanism and I think your solution works, because I think that any shortfall a broadcaster suffers in advertising revenue lost from an inability to fully capture the value of all its distant markets is compensated for by the fees paid to the copyright royalty tribunal and distributed by them to producers. Certainly the gross revenues of cable operators has grown significantly and perhaps even beyond the anticipation of this committee where I think you anticipated the first year revenue to be contributed to the copyright royalty tribunal in 1976, and 1977 would be $8.7 million, and the first year fees were $12.7 million. In 1980, fees paid by the cable industry to the CRT were $18.9 million or that order of magnitude, so the base of the gross revenues on which the royalty fee is calculated is significantly increasing.

I believe that royalty fees are not designed to compensate producers for full value but rather this fund is really set up to be able to compensate for these incremental losses of advertising revenue to the broadcaster which in turn means a marginal loss to producers in terms of their ability to charge the broadcasters full value for the now larger markets. I believe that between adjustments in advertising and the fees that system works.

If one looks at the prices paid by one of the superstations for advertising rates, for example, channel 17 in Atlanta, Ga. I believe the rate for a 30-second spot has grown from $30 back in 1970 now to something like $1,550, because it reaches not the small share of the Atlanta regional market traditionally reached over the years but now 600,000 people all over the country.

The program producers and syndicators after it went on the satellite had a blackout of channel 17 and sold no programing to it. Now, several years later, about half are selling to them, and they are getting significantly increased prices from channel 17.

For example, in the case of "Happy Days" and "All in the Family," which is in my prepared testimony, one can calculate that there is a 60- to 65-percent differential between what much larger markets paid for those syndicated programs and what channel 17 pays, because the program producers are extracting a higher price because of the extended market and channel 17 is extracting higher advertising rates to compensate for those prices that are being paid to the program producers. Any failure to market there, the contribution that systems carrying channel 17 make to the copyright royalty tribunal adds to that fund and the program producers that deal with channel 17 are made whole by those payments. The program producers in fact, actually get a forecast computation as to what the distribution will be from the copyright royalty tribunal in future years if they sell to channel 17, and they are actually looking to the fund as a new source of considerable revenue, so that they can make their calculation as to whether it is wise to sell this product to them at this time.

I see that I have gone beyond what I thought I was going to extemporize, Mr. Chairman.

I can stop at any time and answer questions that you want but I can get into more detail.

Mr. KASTENMEIER. Your prepared statement will be received and introduced into the record.

Have you concluded?

Mr. FERRIS. I just stopped, really.

I didn't get into answering at all some of the charges that are made against the present copyright law.

I don't think anything has changed since 1976 other than cable has grown significantly, but, of course, the contribution that it makes to the Copyright Royalty Tribunal has significantly increased as well. Where the great growth of cable has come is not really in the retransmission programing but in the other classes of cable programing, the pay programs where they negotiate licenses on comparability to every other program purchaser.

People talk about the introduction of superstations and satellite program distribution as being such a dramatic change, but I went back to look at the testimony prior to the 1976 act, and members of the committee who are still here on the committee anticipated and talked about superstations. So it's no great surprise to the members of this committee at least.

All a superstation is is a more efficient mechanism of bringing a distant system to a cable system. Cable systems are in business to bring programing to areas that don't have that programing now, and the very fact that a superstation provides a more efficient mechanism for delivery of that programing, I don't think at all changes the wisdom of the compulsory license mechanism that was chosen in 1976.

The last thing that is usually talked about is the elimination of the distant signal and syndicated exclusivity rules of the FCC.

The study we undertook at the FCC demonstrated with the best evidence available what the real damage would be to broadcasters by the elimination of those rules. With regard to the unlimited distant signal importation, under the best evidence available with all the econometric studies, as well as testing those studies against the grandfathered systems which provided some actual historical data as to what the diversion would be, the maximum loss of audience because of unlimited importation of distant signals was 10 percent, and that was the maximum amount of diversion.

The maximum 10 percent in those areas where we were able to compare historical data should be measured against the profitability of broadcast stations during the period of time and the growth of markets in those particular areas, both of which more than compensated for the loss by the importation of the distant signals. So I think the distant signal loss was insignificant.

As to the other set of rules which we eliminated, the syndicated exclusivity rules, they were imposed back in 1971 and really were a surrogate copyright system being imposed by a communications commission which has no business playing with copyright. Everyone should keep in their own jurisdiction in these matters.

Given their recognized complexity, they showed how ineffective they were in attempting to create some form of copyright-like protection when the maximum protection afforded turned out to be 4 percent of the broadcaster's time. How insignificant they were when they were in full swing is shown by the fact that only 26 percent of all broadcasters even bothered to exercise their option

under those rules to demand the blackouts provided to them by this rule.

Some 74 percent didn't even bother to go through the process of notifying cable systems about covered programing, and asking for a blackout. The notion of reimposing those rules now, rules which had no effect at all, does not seem at all justified to me at this time.

I would like to provide the committee, Mr. Chairman, with some evidence with respect to cable penetration and how it has affected local broadcaster's willingness to pay for syndicated programing. This data is particularly illuminating regarding the relationship between cable penetration and what the over-the-air broadcasters, pay syndicators, or producers.

Look at "MASH," which is a very popular syndicated series. The amount of money paid in San Francisco and in Boston is the same, $5,500 per episode.

Cable penetration in San Francisco is 30 percent, in Boston it is 12 percent.

San Francisco is the fifth largest market; Boston, the sixth.

The difference in actual viewers is 50,000, on a base of about 2 million. So, in markets of approximately equal size, despite a 250-percent differential in cable penetration, the money the local broadcasters pay for "MASH" is identical.

If cable penetration has had such significance, why is it not reflected in the amount that is being paid for programing because of the diversion of viewers to other programing on that cable?

Look at "Laverne and Shirley," another popular program. In both the Los Angeles and in New York markets, which have the same cable penetration, they pay 13 percent higher in Los Angeles than they do in New York. The Los Angeles broadcaster is charged more money even though New York actually has 2.3 million more viewers.

It seems that the marketing prices for these syndicated programs is not being affected too much by factors of cable penetration and diversion on systems.

Probably the most significant example is the very popular series "Happy Days." In Philadelphia, they pay $25,500 for one episode of "Happy Days." Philadelphia has 20-percent cable penetration. It is the fourth largest market in the country with 2.3 million households.

In Chicago, which does not have 20 percent, but only 3 percent cable penetration and with 2.8 million households, is a larger market than Philadelphia, they pay $15,500, so they pay $10,000 more per episode for "Happy Days" in Philadelphia which has a smaller market with 20 percent cable penetration, and only $15,500 in Chicago with a 3 percent cable penetration.

Cable penetration is having no effect on what program syndicators are paying, and, therefore, a pool of revenue is available for program producers. The correlation between the cable penetration and the mechanism of purchasing these syndicated programs has no effect.

It seems to have a reverse effect.

I could go on, Mr. Chairman, and give other examples, but I think the net effect would simply be to confirm what I have al-

ready said: the present law that you put in place in 1976 is a good law. It is working and going to more closely approximate the type of free market mechanism by avoiding all the transactional costs that full copyright liability and retransmission consent would create.

Whenever these policies have been proposed before, the effect has always been retransmission denial and it matters not whether you phase it in, or delay it. It always turns out to be denial, and sound communication policy of this country, certainly one that I believe our policies at the FCC reflected, was to give the widest dissemination of programing, the greatest availability of program and to give more discretion in the individual citizen to choose when he or she will see and hear programing rather than to have those decisions determined for them by intermediates. That is what cable provides, sound communication policy, sound national policy and sound social policy, and I think that it would be a very heavy burden to undo that sound communication policy by providing the opportunity to deny that type of wide dissemination, time diversity and availability of programing to the American public.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you for your presentation, although I must say you are altogether too modest to suggest nothing has changed in 5 years. The Commission itself did produce some changes and, indeed, you testified to the extent of the change, in your statement when you state in 1975, pay programing constituted 265,000; 1980, 9.1 million; 1985, experts predict 17 million, so we clearly are in a period of dynamic change with respect to communications.

Mr. FERRIS. On that I agree fully, Mr. Chairman. I think, however, that is all in the pay programing area where cable systems pay top dollar, compete with broadcasters, video disks, without any compulsory license, full copyright liability. That is where the great growth in cable is coming, not in the retransmission character of cable. The retransmission character by the statistics you cite, Mr. Chairman, is becoming less and less a part of the economics of cable. I grant you, cable as an industry, is growing, booming. But on this point, I don't think the rationale of this committee and the Congress in 1976 was to elect the compulsory license system because cable could not afford to pay what it should pay.

It was a mechanism, as I view it, to provide the widest dissemination of programing, and to assure that as the market adjusts for the wider advertising market of the broadcaster in the interim transmission period, there would be a contribution by cable system to pick up the incremental shortfall that the program producers get.

Mr. KASTENMEIER. It may not be the case that the committee determined that was a significant economic advantage to cable to have compulsory license in 1976, but you give eloquent testimony to the fact that the cable industry is of lesser importance as an industry whether or not it has retransmission consent or compulsory license or goes into the open market. Relatively speaking, that part of the program, the distant signals are of several characters. The distant signals are less and less important to what is selling cable, and why cable is exploding in terms of its reach in America.

Therefore, it becomes less important to cable if indeed certain changes are made.

Going back to the Commission and your role so that we might understand it, or the Commission's conclusions, I would like to draw a distinction between harm to the public at large and possible harm to elements in the program production industries.

The FCC order which repealed syndicated exclusivity and distant signal rule concluded, and I quote, "The focus of our attention throughout this proceeding has been the effect of distant signal carriage on the television service to the public."

I don't quarrel with that. That is a very particular revision of your responsibility.

The thrust of the findings is that abolition of the rules would not result in a reduction of supply of programing to the public.

As the agency responsible for Federal broadcast policy, this is perfectly reasonable, but the issue before us is copyright policy.

How seriously did the FCC consider the dislocation within the copyright-based industries which might arise from deregulation? That is a different question than that which motivated the majority of the Commission to its conclusion.

Mr. FERRIS. I think the studies that I alluded to in my testimony, Mr. Chairman, talked about the methodology we went through to determine just how significant lifting the rules against distant signal importation and the surrogate copyright protection for the local broadcaster would be. It turned out to be very insignificant and the anecdotal information I gave you demonstrates it has no effect on the forces that——

Mr. KASTENMEIER. It demonstrates that that particular part of the economy is very erratic.

Mr. FERRIS. It probably does.

What it does, that is the type of evidence, I assume, that from a copyright standpoint that you would be looking at because the question I imagine you are looking at is who is being harmed by the continuation of the 1976 act.

Is there harm to someone, is there? Is there harm to broadcasters that is detectable? We found none in our studies.

Mr. KASTENMEIER. The final order was by a 4-to-3 decision, and one of the minority, Commissioner Washburn, said in his dissent and I quote him, "Contrary to the language of the Opinion and Order, the studies upon which today's action relies are not conclusive."

He went on to say, "There is little evidence to support this contention in situations where cable penetration is 40 to 50 percent of TV households in a community."

This echoes the concerns of the representatives of the motion picture industry and independent broadcasters to the effect it is impossible to predict accurately future harm. You may have based it on 4, 6 percent penetration and next year you will have 40 or 50 percent penetration.

Mr. FERRIS. The studies predicted 48 percent penetration nationally as the maximum penetration of our econometric models that we attempted to predict what the impact would be, 48 percent penetration.

Mr. KASTENMEIER. You predicted no harm.

Mr. FERRIS. The maximum theoretical harm was up to 10 percent, and in the areas where we had historical data, because they were grandfathered before the 1972 rules, it tracks the econometric models. The 10 percent is not insignificant, but what had happened in those markets where we had historical data was that the markets had grown, the households had grown, the advertising had grown and the profitability of the broadcasters had grown so we never found a net reduction in TV service.

Our charter was not to freeze in place the margin of profits of any participant in broadcasting but only if the profit margins dropped so much that service, whether it be news or other services, would be terminated by a change in the economics.

We found no effect, there would be no change in the TV service to justify not completely eliminating these rules because it would not diminish the service that would be provided under the license responsibilities of broadcasters before the FCC.

The 4-to-3 vote that you recite, it was at least a 7-to-3 vote because three members of the court of appeals unanimously upheld completely that decision so there was a unanimous decision by the court of appeals.

Mr. KASTENMEIER. I will not argue the court of appeals decision, except to say I think once a Commission has reached a conclusion, that it is likely to be upheld.

We had a witness last week, Mr. Land, who represented independent television stations. He argued that independent stations are licensed to serve local markets, and that the local focus is in the public interest as against your argument that they can become lucky and become superstations or somehow willingly or otherwise be expanded to larger markets in terms of their own signals.

What is your response to the argument that FCC deregulation discourages this?

Mr. FERRIS. I think every station has the responsibility to serve the communities that they are licensed to serve.

I don't think the fact that a station has a network affiliation changes at all their responsibilities to serve that community.

Independent stations that Mr. Land represents in his association are those that don't have a network affiliation and, therefore, have a much more difficult time finding the programing to put on their stations.

They don't produce a great deal on their own site, but purchase it from syndicators and other independent entities, so I think that in many cases they do concentrate a little more on looking at the local community and servicing the local community.

I think that is going to be their natural incentive, and that is good and positive.

I think that someone who lives in a particular community does want to know what is going on in their community, not in a distant community, so that is an argument why you would want to watch your local station.

Mr. KASTENMEIER. I have some other questions, but I will yield to Mr. Frank, coauthor of the bill.

Mr. FRANK. Thank you. You cited figures about how little cable penetration affects the price people pay for syndicated programs, but that was during the regime of the syndicated exclusivity rule.

You are saying that rule makes no difference, but I would think you would expect with the exclusivity rules in effect, that would have some effect on the ratio of penetration?

Mr. FERRIS. I don't think the exclusivity rules provided more than a miniscule effect. I think 4 percent is the maximum type of protection, and the fact that only 26 percent of broadcasters bothered to exercise that option confirms that.

Mr. FRANK. Are you saying specifically with regard to the Chicago, Philadelphia thing, well, I am not surprised Los Angeles pays more.

With regard to Chicago and Philadelphia, are you sure syndicated exclusivity was not relevant to the prices or to the absence of cable penetration affecting the prices?

Mr. FERRIS. No, I don't think so.

Mr. FRANK. With regard to the superstations, you said the superstation, at first syndicators wouldn't sell to the superstations, now half are.

Mr. FERRIS. Yes.

Mr. FRANK. The market has been able to work there without compulsory license because to the extent the superstation offers a market that will pay people, they have been known to buy programs without a whole lot of problems?

Mr. FERRIS. They have been able to buy programs and actually get back through the extended market.

Mr. FRANK. Without compulsory license, the market is working?

Mr. FERRIS. There is compulsory licensing, but the cable system that views that has to make a contribution.

Mr. FRANK. You started out—let me go back. One specific question I want to ask you. I am talking about the need for—I assume you are in favor of the continuation of must carry if you are for broad dissemination of programs?

Mr. FERRIS. I am in favor of no change in the copyright laws at all.

The must-carry rules, I appreciate fully the symmetry of your bill if you have full copyright liability. It is symmetrical to say the must carry must go, and I am sure probably any signals that are picked up, maybe cable systems should be able to black out commercials.

Mr. FRANK. You are in favor of compulsory license because of your view that we ought to have the broadest possible dissemination of programing.

I would assume you are also in favor of continuation of must carry.

Mr. FERRIS. For the sake of you developing your question, I will say yes.

Mr. FRANK. Answer it for what you believe. Don't do me a favor. Tell me what you think, and I understand there are different jurisdictions but I am trying to understand the basis of the argument, and if the basis is the broadest possible dissemination of programing, I am assuming you are for must-carry; and if not, tell me why not?

Mr. FERRIS. The must carry-rule probably makes sense while the present sets don't all have a switch to go from over-the-air to cable,

but I think if you live in an area, you can pick up an over-the-air picture signal, must-carry isn't needed.

Mr. FRANK. The cable industry has a right to put forward its viewpoint as to what is going to maximize the cable market. I would think if you came here and said, "Look, I am for a communications policy which maximizes what we have got, then you really ought to be more enthusiastic about must-carry and say we are not talking about the public's right to watch, but about who is going to make more money than whom. You ought to be on the table about it.

Mr. FERRIS. I think, Mr. Frank, at the present time, the must-carry rule should stay.

Mr. FRANK. Let me ask you one other question.

You said in the nonretransmission field, cable is fully able to compete with over-the-air, paid TV, et cetera, et cetera. Apparently the multiplicity of cable operators and producers in that area, the market has been able to accommodate.

What is peculiar about copyright that makes it impossible for a free market to work? Why would the transaction costs be so much more difficult, and unbearable?

Mr. FERRIS. I think you take the 4,000 or so or more cable systems and the number of broadcasters, and the idea of knowing when a particular program is coming on for each cable system to get in touch with the distant television station, and determine its program producers and then negotiate as to what the tribute will be or what consideration will be paid, they won't bother doing it.

Mr. FRANK. Well, if there is a profit to be made, a market to be served——

Mr. FERRIS. There is not much notice really on what is going to be appearing on a particular station, and for every cable system to be able to have to get in touch with a distant signal and negotiate a fee, all within a very short time, I just think the transaction costs are too great.

Mr. FRANK. In every area they are performing, certainly the generation of video disks and other kinds of programing is fairly diverse. It works there.

Why did they bother to do that? They read what the video disk catalog is, and it seems to be quite similar?

Mr. FERRIS. I think every cable system would have to approach every broadcaster that was being brought in and determine on a program-by-program basis what fee they were going to pay, pay the copyright holder.

Mr. FRANK. We got to go vote.

Mr. KASTENMEIER. The chair will announce there is a vote pending.

The committee will be in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. Ten minutes having expired, the subcommittee will resume sitting, and did the gentleman from Massachusetts conclude?

Mr. FRANK. Thank you. We were talking about relative degrees of harm. What harm would you think would be done if we were to do away with compulsory license?

I am not talking about—I agree we should not be trying to reimpose syndicated exclusivity or distant signal but with regard to compulsory license, what harm would be done?

Mr. FERRIS. I think all of the transaction costs would inhibit significantly the carriage of distant signals. If there was the economic incentive to carry these distant signals, I think with the number of small cable companies, they might very well be an incentive for concentration in the cable industry so that one could minimize the impact of all of these costs, and big system operators could deal more efficiently.

I don't think that is a positive contribution to communication policies.

I think what would happen if you reimpose that, you would minimize the carriage of distant signals, and historically, any form of retransmission consent has turned into retransmission denial. That does go contrary to diversity.

Mr. FRANK. Cable is a much more important and economically significant operation and reaches more people.

If I am a copyright holder, what is my incentive to refuse to let somebody pay me to show my program?

Mr. FERRIS. I don't think there is—I don't think there is any incentive to refuse.

The thing is, what is the incentive from the cable operator going through the hurdles that are set up to attempt to negotiate to determine——

Mr. FRANK. The denial suggested to me that someone refuses to sell. You said retransmission consent becomes retransmission denial.

You are not saying the copyright holders would refuse permission?

Mr. FERRIS. Unless he delegated to the over-the-air broadcaster the rights of doing negotiations.

Mr. FRANK. I would not be giving someone who had a competitive interest contrary to mine, my interest as a copyright holder is to maximize my income.

You mean the transaction costs would be so difficult?

Mr. FERRIS. Yes.

Mr. FRANK. I am rethinking one of the points you stress. You used those comparisons between Chicago and Philadelphia particularly. You don't know for sure whether or not syndicated exclusivity were being applied to the particular program.

Mr. FERRIS. Of the statistics I gave you, the ones where I use San Francisco as a market, San Francisco was a grandfathered market where there was no syndicated exclusivity imposed. In those cases you can look at the comparison and have a data base with respect to——

Mr. FRANK. Send it later, with regard to those where—because I believe we agree, if it had been invoked, then the comparison would be invalidated.

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Ferris. I appreciate your contribution, too.

I was interested to hear that the price of "Happy Days" is greater in Philadelphia. I am too much of a gentleman to ask what "Happy Days" costs in Cleveland.

I am concerned about several of the areas that we have touched on today, but my first question is that I am not sure which hat you are wearing today.

A deregulating Chairman of the FCC ought to be consistent to want to get rid of the compulsory license. That is a deregulatory direction, and that is not what you are saying today.

Has that been your view even before you accepted employment with the National Cable Association?

Mr. FERRIS. Yes, Congressman, even though the elimination of the compulsory license seems to be removing an impediment and letting the free market flow, it does not have that effect.

Historically, as I look at the record for the past decade and a half, this committee looking at the transaction costs, that is why they concluded that compulsory license made sense.

Barbara Ringer said a legislative grant of a compulsory license is always the last resort. She has a great respect for the legitimacy of full copyright liability, but in this case, even she believes compulsory license is justified.

If you don't have the compulsory license, you won't have the flow of programing to the systems that provide the alternative viewing to subscribers that they have now.

I think it will provide less programing to cable viewers than they get with the compulsory license mechanism. Now, that is communication policy from the standpoint of diversity of options, of programing for viewers to make the choice. That is communication policy, and I think it is going to be significantly affected by your copyright policy. I think that same judgment was made in 1976 for compulsory license, and that nothing has changed with respect to who is being harmed.

I would still like to review the data. We found broadcasters certainly were not being harmed, and we found no evidence in our hearings at the FCC that copyright holders were being harmed.

Mr. BUTLER. The response we get, and the argument we keep running into, is your data was way out of date. That is what the programers keep telling us, and if you went back and looked at it nowadays, you might have a different view?

Mr. FERRIS. For 3 years, Congressman, from 1977 when we started that inquiry, to 1980, we not only collected every bit of data that was available from program producers, broadcasters, we begged them to bring us evidence. We asked them to bring us what evidence you have. No evidence was presented in our hearing that at all undermined the conclusions that we ultimately came to.

We got all forms of rhetoric, but we had no hard data at all, and to this day, I have seen no data that demonstrates the harm that is being done to either program producers or to broadcasters that would at all affect the wisdom of the choice of eliminating distant signal and exclusivity rules.

Mr. BUTLER. The data about L.A. and New York, what year was that?

Mr. FERRIS. "Laverne and Shirley," I believe that was 1978–79. I will confirm that for the record if I can.

Mr. BUTLER. Certainly. Quite frankly, I am pleased to hear you say that. I would like to have the record cleared.

Turning now to the question, and so if you want to amplify the record, that would suit me fine if that is all right with the Chairman. Tell me about the transaction costs again. It seems to me that the transaction costs are a relative matter based on what the flow of money is and what the profit may be.

What do you view as the transaction costs?

Mr. FERRIS. It is the fact that each cable system would have to, wherever they may be located, would have to go and negotiate with whomever had the coyright rights, whether it was given to the broadcaster or the program producer, to be able to make a determination whether they could carry that program and what type of contract they were going to negotiate, and payment they were going to make for that particular—for that series, for that episode. I just think as each one——

Mr. BUTLER. That is a cost to the program purchaser?

Mr. FERRIS. Correct.

Mr. BUTLER. In the absence of a mechanism for buying by group or cooperative arrangement, that transaction cost, you think it would be prohibitive?

Mr. FERRIS. I think it would inhibit to the point where it would cut down significantly the use of these distant signals.

Mr. BUTLER. If we are only talking about the modest area, the retransmission area that you referred to, we are denying "Laverne and Shirley" to folks, and really is that the sort of thing that ought to disturb us too much?

Mr. FERRIS. I don't want to be in the position of saying "Laverne and Shirley" enhances anyone in any way but I think from the standpoint of communication policy, I think the options of the individual to be able to make a determination that they do want to watch Laverne and Shirley or something else rather than having it not available is sound communication policy.

Now, from the standpoint of just more programing being available and the individual is making the judgment as to what he or she will see and hear, I think that is better than intermediaries making those judgments.

That is what diversity of programing is all about, giving much more right, much more responsibility, many more options to the individual to make judgments rather than having someone else make the judgment as to what viewers will hear and see.

That is good communication policy, I think.

Mr. BUTLER. That is the thing that concerns me. You have made several comments about surrogate copyright policy.

Mr. FERRIS. The syndicated exclusivity rules were surrogate.

Mr. BUTLER. Isn't the compulsory license a surrogate communications policy? Is it really the function of the copyright law to make this kind of a determination? That is a communication policy and the purpose of the copyright law is to encourage the useful arts, and that is the only reason, so, I have real problems myself.

But I don't think we ought to stay on that road, because it really is using the copyright law to——

Mr. KASTENMEIER. There is a vote on. We will again recess.

Mr. BUTLER. This is my last question.

Mr. KASTENMEIER. Fine, if Mr. Ferris desires to be excused, he may. In any event, we will return in 10 or 15 minutes and Mr. Ladd will be our next witness.

Mr. BUTLER. Does the witness want to respond to my question if we have a minute left?

Mr. FERRIS. Yes, the question that you asked with respect to communication and copyright policy, I think the distinction that comes about is that the compulsory license mechanism furthers the aim of what is probably very wise copyright law, to afford a mechanism for the widest dissemination of the creator's product.

The compulsory license mechanism over the broadcast medium furthers the dissemination of that product and the Copyright Royalty Tribunal provides a mechanism whereby this compensation can flow back to the producer of that programing, so I think if the policy were to prevent programing from being disseminated, and I think the retransmission consent proposal and absolute copyright liability would do that, it would frustrate good communication policy and the compulsory license mechanism is good copyright law, good copyright policy which furthers a good communication policy, the wider dissemination and diversity of programing available to the public.

[The complete statement of Mr. Ferris follows:]

TESTIMONY OF CHARLES D. FERRIS

Mr. Chairman, Members of the Subcommittee: My name is Charles Ferris, and I am the past Chairman of the Federal Communications Commission. I am now a member of the law firm of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo. I have been retained as counsel to the National Cable Television Association on Matters pertaining to copyright. I appreciate the opportunity to present my views on this important issue.

Mr. Chairman, I would like to begin by commending you and the other members of the subcommittee for the patience and fairness you have shown through 16 days of hearings on the Copyright Act of 1976. Everyone and every side has had an opportunity to speak and be heard. I also believe you deserve credit for your willingness to reexamine this complex issue. Even those who believe the present law is adequate must admire your efforts. No law—even one that is ultimately left unchanged—should ever be immune from scrutiny.

I must tell you that I believe your scrutiny will reveal recycled solutions seeking but again failing to find problems. I do not believe that the circumstances of 1981, any more than the circumstances of 1976, justify the imposition of a system requiring thousands of often futile negotiations prior to the importation of distant signals by cable systems. Nor do I believe that the efforts of the FCC to free cable from baseless regulatory restraints should be undone by legislative reimposition of those same limits. In short, I do not believe that any of the legislative alternatives currently before this subcommittee would serve the public better than the current system you have in place.

By way of background, it is important to remember that the cable industry employs at least four different types of programming, and that the compulsory licensing mechanism applies to only one of them. First, cable systems retransmit local and distant broadcast television signals. Second, they purchase and transmit so-called "pay programming" including movies, news, sports, cultural and other entertainment programming. Third, they transmit access and local origination programming. Fourth, they transmit non-video services such as teletext, alarm and commercial data services.

Copyright licenses must be obtained for at least the first two classes of programming with compulsory licenses applying only to the first. The cable industry, either directly or by means of programming packagers or brokers, is required to obtain licenses for all pay service offerings. In this area, therefore, cable competes in the program market in exactly the same way as exhibitors, broadcasters, videodisc or videotape manufacturers.

In 1975, the last full year before the copyright amendments were adopted, pay programming, where cable possesses no compulsory license rights, constituted only 265,000 subscribers, or 3 percent of cable's then total market of 8.8 million. In 1980, 9.1 million pay service subscribers generated an increasingly critical revenue flow. By 1985, some experts predict that 17 million subscribers will be paying for similar pay services. In fact, these numbers are understated as more and more cable operators add "premium" channels to their basic service packages. Last year, for example, 36.4 percent of one local cable system's expenses were for program purchasing costs. This figure is expected to increase to 46.4 percent in 1985—almost 3 percent greater than the latest reported average figure for all TV broadcasters.

What this means, I believe, is that the compulsory license mechanism, regardless of one's position on its merits, is applicable to only one of four general programming sources and that this source is decreasing in relative size and importance.

Today, cable is generating revenue for producers far in excess of what copyright holders received or anticipated in 1976. With the growth of multiple "tiers" of premium services, and the consensus that such programming represents the key to cable's growth over the next decade, cable systems will become one of the most important revenue sources for any producer. Moreover, the number of producers able to be supported in an area of one hundred channel systems will be far in excess of those creating programming today. It is also clearly the case and has been the marketing experience of large cable systems that people often subscribe to basic service only so they can receive the pay programming offered by the system. In these cases, cable operators are paying fees to the CRT for subscribers who may not ever watch a distant signal or even know that they are there. Their interest is only in that programming for which cable has paid a full copyright price.

In addition to providing its own independent market for pay cable programming, cable expands the broadcast station's market, when it carries broadcast television signals. Indeed, the FCC's three-year study of this field concluded that cable added more viewers to those stations generally in the weakest financial condition by expanding their immediate service areas than it removed from those stations by importing distant signals. The early history of cable, in fact, was the result of mostly rural people's desire to get basic television service when they lived outside the reach of most television signals.

In 1976, Congress decided that the compulsory license mechanism was necessary to allow cable's function of expanding television markets to continue. This decision, I believe, was entirely consistent with the dual, and intimately related, purposes of our system of copyright. The logic of the copyright system is that, by assuring a compensatory economic return to the creator of an idea or an artistic product, we give that person an incentive to distribute the creation as wildely as possible among the public and also to continue creating such products in the future.

In order to fulfill the ultimate purposes of this constitutionally created system the 1976 Copyright Act properly struck a balance between the absolute right of a copyright holder to control his or her creation and the rights and needs of the public to diverse programming, when a copyright holder voluntarily agrees to have his or her creation displayed over the public airwaves. As the 1976 House Report stated:

"The Committee believes that cable systems are commercial enterprises, whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to ghe creators of such programs. The Committee recognizes, however, that *it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work is retransmitted by a cable system.*" (emphasis supplied)[1]

Congress determined that the costs of obtaining individual program licenses exceeded the benefits to cable operators in recognition of the literally thousands of programs broadcast by television stations—programs whose identity, and therefore whose copyright holder, would be unknown to the cable system until virtually the eve of broadcast. Moreover, Congress recognized that even if a cable operator could determine the owner of the copyright for any particular program sufficiently far in advance, the resulting negotiations for a license would be distorted by the disporportionate bargaining position of the parties.

These facts, upon which Congress acted in 1976, have not changed, Mr. Chairman. These hearings will be replete with references to the dynamic and growing cable industry. Those references will be correct. But they will not support a conclusion that a cable operator in Wisconsin will know what a television station in Atlanta

[1]H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

intends to broadcast in time to negotiate copyright licenses with each holder of those rights. Nor will these statements support a conclusion that the bargaining position of cable operators disiring to retransmit broadcast signals has improved. On the contrary, Mr. Chairman, I believe the references you will hear to the growth and vitality of cable attest to the fact that the 1976 Amendments were wise and are successfully accomplishing the purposes Congress desired.

It appears, however, that those whose position was not accepted the last time this issue was debated in Congress are again attempting to persuade you that compulsory licensing is not working. At a minimum, they would have you believe that the FCC made a terrible mistake in deregulating cable to free it from arbitrary limitations on the number of distant signals cable could bring into a local market, and the requirements that cable systems black out programs on these signals for which local stations had procured exclusive broadcast rights.

As I under stand the arguments that have been made before you, there are at least three reasons why critics of your 1976 action believe that the compulsory licensing system you enacted after more than a decade of long and careful study must be eliminated or modified: (1) the growth and increasing affluence of the cable industry; (2) the introduction of superstations and satellite program distribution services; and (3) the FCC's action eliminating the distant signal and syndicated exclusivity rules.

I would like to take the time to examine briefly each of these reasons, because I do not believe they offer any basis for changing a structure that has been working effectively.

1. THE GROWTH OF CABLE TELEVISION

Proponents of change argue that the financial conditions of the cable industry have changed dramatically since 1976. Cable today, these individuals note, is a booming and mature industry. Its revenues have skyrocketed as more people have subscribed and as more services have been offered and accepted.

It is argued that the cable industry that needed a compulsory license in 1976 in order to receive its programming can now afford to compete for that programming in the open market. Cable, they say, is no longer unable to pay its own way.

No one can deny that the growth of the cable industry in the past few years has been dramatic. More importantly, no one can deny that this growth has been beneficial to the public.

As you know, the system of payment by cable established by the Copyright Act takes into account this growth. Section 111(d)(2) keys the payment of royalties under the Act to the gross revenues of the larger cable systems. Because these systems have grown since 1976, their contributions to the copyright fund have also increased. In 1976, Congress recognized—indeed desired—that the cable industry would grow as a result of its adoption of the Copyright Act.

What Congress apparently did not expect, however, is the magnitude of the payment to be made by the cable industry. Congress estimated first year receipts of $8,700,000 under the fee schedule in the Act.[2] In 1980, the copyright office received $18.9 million in license fees paid by the cable industry.[3] Congress created a system whereby the growth of the cable industry would increase and has increased proportionately the revenues being received by the program producers.

Mr. Chairman, it is important to remember that the goal of greater cable penetration and the resultant benefits to the public, were precisely the reasons compulsory licenses were supported by the cable industry and by this subcommittee. The Congress wished to bring the benefits of television programs to more people, so that more members of the public could exercise expanded choices over what to view. This was—and still is—sound communications policy—to insure diversity of choice to the American viewer and increase the chances for program producers to have more programs seen by more people.

What has been surprising about cable's growth is not that it occurred or that it has occurred so rapidly, but that it took so long. Indeed, as you will recall, it was a frustration with the slowness of cable's growth, due in no small measure to the severe restrictions that formerly had been placed by the FCC on distant signal importation, that led the cable industry to compromise in the 1971 Consensus Agreement and to support the Copyright Act of 1976.

Neither the cable television industry, nor the American public who would benefit from a wider variety of programs, needed compulsory licenses because cable was too

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[2] 1976 House Report at 91. (Actually, the first year receipts were 12.7 million).

[3] Statement of David Ladd before the Committee on the Judiciary, U.S. Senate, April 29, 1981 at 18.

poor to pay its way. Compulsory licenses were adopted because cable operators were in a different bargaining position—indeed they were in a different business—than broadcasters. And in 1976 the marketplace did not recognize the difference and did not account for it. The fact that cable has grown in size has not altered the simple fact that it is still a different industry than broadcasting and has not in any way altered the broadcast industry's relative bargaining strength.

Under a scheme of full copyright liability, broadcasters and cable operators would enter into the program marketplace with a different set of incentives. Broadcasters are willing to pay substantial sums for their syndicated programming because they will capture large number of viewers in their local market. Indeed, the price they pay for that programming is directly related to the size of the audience, because the audience size also determines the advertising revenue they will collect from the airing of that series.

A cable operator, on the other hand, often has as many as fifty or more channels to program. No one channel is worth as much to the cable operator and does not bring as much revenue to the system as the broadcaster's single station. Indeed, the cable operator does not receive any revenues from the commercials on that distant channel since he is forbidden to delete them for his own. The signal does bring revenue to him, however, as part of the package that the system offers its customers. It is of little or no significance if one subscriber watches a particular signal as long as enough subscribers find that signal in relation to all others valuable enough to justify their subscription to cable.

In short, Mr. Chairman, the cable operator receives much less revenue from a distant signal's syndicated programming that a local broadcast station does. Even without compulsory licensing, a cable operator would be expected in a program marketplace to pay a different and probably lesser amount for programming than would a broadcaster. Therefore, when the relative amounts that cable pays for syndicated programming through the CRT versus what broadcasters pay are compared, it should be remembered that this direct comparison is not what the copyright system is trying to measure. The two industries are paying for different things. A broadcaster is paying for programs to attract large audiences and the advertising revenues that are directly derived therefrom. A cable operator is paying for programming to fill one of many channels in the belief that at least some of its subscribers, even if only a few, will find that channel attractive. Broadcasters, thereby, can justify and are willing to pay far more for programming than are cable operators.

Finally, Mr. Chairman, the entire issue of the size of the cable industry and its financial strength compared to broadcasting is simply a diversion. It assumes that the basis of the Copyright Act of 1976 was, and the standard by which we should evaluate its performance is, some abstract notion of "fairness" between various communications entities. In fact, such questions of comparison of communications mode are, from a copyright standpoint, absolutely irrelevant. The purpose of any copyright system, after all, is to permit the creators of a program to capture the value of their work so that it will be economically sensible for them to continue to produce.

The standard of the 1976 Act and the standard by which its operation should now be evaluated is monetary loss to program producers. The issue is whether the Copyright Royalty Tribunal can compensate under the current structure copyright holders for the monetary loss that they actually experience due to the carriage by cable operators of distant syndicated programs.

Article I, Section 8 of the Constitution gives Congress the power "To promote the Progress of Science and the useful Arts by securing . . . to Authors . . . the exclusive Right to their respective Writings. . . ." The Founding Fathers were concerned with putting the creator of a work in a position to continue his creativity so that the public might benefit from his product. In establishing our system of copyright, they were not concerned with the method by which the creation was moved from the artist to the public.

In the context of electronic communications, one significant method of distributing creative programs is broadcasters, who sign contracts for the exclusive use over the airwaves of certain programming within a limited area for a definite period. The price paid for this contractual right is determined by the broadcaster's evaluation of the audience the programming will attract and the value that advertisers seeking to reach that audience will pay.

There are two possible outcomes that may change this economic system if cable carriage of television programming is initiated. One may occur where the broadcaster's own market is wired, and it loses viewers of the syndicated shows to programming carried by cable. In this case the broadcaster's revenue would be expected to decline as advertisers pay less, because they are reaching fewer potential customers

for their products. Then, in turn, the broadcaster would pay less to the syndicator because it is receiving less revenue. Finally, as a result of receiving less from the broadcaster, the syndicator would reduce its payment to the original producer.

This scenario is predicated entirely on the assumption that broadcast audiences will forego watching the local broadcaster's syndicated programming in such numbers as to reduce the advertising revenue received by the station. The critical point, Mr. Chairman, is that there is no evidence that this has happened either in the record of the FCC's exhaustive Economic Inquiry or in the hearing records before this Committee or your counterpart in the Senate. It has simply not happened.

The second outcome whereby copyright holders may lose revenue is where a broadcaster does not, or cannot, charge advertisers for all viewers watching a particular show—whether it be over the air and/or on cable. As I discuss below, some television broadcasters are clearly receiving additional revenues as a result of the higher viewing level made possible by cable. But for those stations that do not capture the value of such cable audiences in higher advertising rates, the copyright holders are compensated by receiving their fair share of the royalty fees distributed by the Copyright Royalty Tribunal. The creation of this mechanism, designed to recoup any incremental audience outside of the local area that the broadcasters marketing scheme did not fully account for in their advertising rates, is the basis for the license fee system established in the Act.

Under circumstances where creators are receiving fair returns on their creations, the growth and financial strength of the cable industry is wholly irrelevant, because the continuation of market incentives for the production of television programming, not some vague notion of fairness between competing delivery modes, is the standard by which these important copyright issues should be resolved.

2. THE INTRODUCTION OF SUPERSTATIONS AND SATELLITE DISTRIBUTION SYSTEMS

Critics of the 1976 Act also point to the introduction of satellite delivery of so-called "superstations," distant television stations that are transmitted from their local service area by satellite to cable systems throughout the country. The development has taken place only within the last several years since the Copyright Act was adopted, and, therefore, according to this argument, was not accounted for in the Act. Indeed, these critics believe that the development of satellite delivery systems comes as a total surprise to policy makers, who even five years ago did not predict this eventuality. The advent of superstations, they say, renders the Act obsolete.

First, Mr. Chairman, it is the sine qua non of cable to deliver programming to locations not otherwise served by that programming. Thus, the role of satellites as the means for accomplishing this central purpose is only a question of substituting a more efficient facility for a less efficient one. Moreover, the growth of satellite delivery systems was, despite what some have said, fully anticipated in 1976, not only by the Congress but by persons testifying before this Committee. Indeed, the history of the Copyright Act of 1976 is filled with examples of experts and members of this subcommittee discussing the future of cable and satellite communications.

But, Mr. Chairman, the question of whether or not superstations or satellite transmission was anticipated is again a diversion. The issue is not whether Congress anticipated this development, but whether the introduction of these satellite delivered services in any way changes the effectiveness of the mechanism for compensating the producers of programming in this country. I submit that it clearly does not.

In fact I believe the growth of audiences for satellite delivered stations demonstrates to a great extent the validity of the Congress' conclusion that only the present compulsory license structure can approximate a true marketplace approach. When we conducted the Economic Inquiry at the FCC, we speculated that superstations and other distant signals might begin to charge advertisers on a regional or national basis for the extra viewers they reach by satellite distribution. When broadcasters receive additional revenues for additional viewers, program producers can extract greater payments from those broadcasters for the rights to syndicated programs.

As the market evolves in this way, program producers are in fact receiving higher revenues than they otherwise would. This is so, because it has been shown that there is no adverse effect from distant signal importation on a local station's payments to producers, yet the producers are receiving higher payments from the superstations carried on cable.

For example, there has been no evidence that cable penetration has reduced local broadcasters' willingness to pay for syndicated programming in their markets. If cable's impact on the syndicated market is as severe as some claim, one would expect to see differences between the prices paid for such programming in markets

where cable penetration is relatively low and those where penetration is high. In fact, no such differences can be found.

The prices paid for M*A*S*H, and Laverne and Shirley provide an example. The price paid for M*A*S*H is $5,500 per episode in the San Francisco market, with 30 percent penetration and the Boston market, with 12 percent cable penetration. San Francisco is the fifth television market, while Boston is sixth, yet there was no difference in price despite a 250 percent difference in cable penetration between Boston and San Francisco. Laverne and Shirley gets a 13 percent higher price per episode in the Los Angeles market than in the New York market, even though both markets have the same cable penetration levels.

The comparisons can continue. For instance, the price per episode for the syndicated series All in the Family is the same in the San Francisco market, where 30 percent of the homes have cable, as it is in the Detroit market with two percent cable penetration and the Chicago market with three percent. The figures are even more compelling for the series Happy Days, which receives $25,500 per episode in the Philadelphia market where the cable level has reached 20 percent, yet is priced at only $15,000 in the Chicago market, which has only a three percent penetration level.

Why is it, Mr. Chairman, that cable penetration rates seem to have absolutely no impact on the prices paid for syndicated programs. I believe the only logical conclusion is that to which the FCC came in its decision to deregulate cable. Cable does not harm broadcasters and it does not harm program producers.

Indeed, Mr. Chairman, not only is there evidence suggesting that local stations' payments are unaffected by cable penetration in their service area, but also that superstations' payments to producers are increasing. For instance, in comments filed with the FCC during the Cable Economic Inquiry, one superstation claimed that it was then paying programmers for its increased circulation, while another claimed that its superstation status was bringing it increased revenue.

To be even more precise, let me give some specific data from WTBS, the Atlanta superstation. Shortly after WTBS became a superstation, almost all brokers of syndicated programming refused to sell it programming. Currently WTBS has negotiated new contracts with approximately one-half of the syndicators with whom they seek to do business. Two factors have proven critical in these successful negotiations. First, WTBS is required to pay higher than average prices for these programs. Second, the copyright holders are provided a calculation of their share of the license fees distributed by the CRT. The fees are significant now and are likely to become even more so as the cable industry continues to grow.

Further evidence of the adjustment of the syndicated marketplace to the new presence of "superstations" can clearly been seen by comparing the normal syndicated prices for Happy Days and the syndicated price paid by WTBS for All in the Family. In general, All in the Family is a less popular show than Happy Days, and as a result commands a lower price in the syndicated market. For example, in other large markets in 1978 the syndicated prices for All in the Family were 20 to 25 percent lower than that paid for Happy Days the previous year. When WTBS negotiated for All in the Family, however, the price reached was 40 percent higher than that normally paid for Happy Days by nonsuperstation broadcasters, a complete reversal of the relative price trend in other markets. If one were to assume that the price relationship between these two programs remained constant, WTBS paid a 60 to 65 percent premium—because of its status as a superstation.

The $16,000 WTBS paid for All in the Family is more than that paid for the same program in the larger markets of Houston, Miami, St. Louis and Minneapolis. This same price differential was experienced by WTBS in other syndicated program series as well.

Of course, in order to continue to compensate producers at these higher rates, the advertising revenues of superstations must also increase as a result of the additional cable system viewers. Again, in the case of WTBS, this has proven true. In 1972, WTBS charged $30 for a thirty second spot while in 1980 its rate was $1,500. A recently refined Nielsen survey of cable viewers has been completed and potential advertisers now know that the quarter hour average for viewers of WTBS is not the 250,000 figure previously reported but 600,000 viewers. Apparently in reliance on these new figures, General Foods has recently committed to a $40 million advertising expenditure on WTBS.

Thus, Mr. Chairman, it seems that the marketplace is adjusting to the success of these new participants. It is adjusting to assure that each party in the distribution of programming, whether it be producers, broadcaster, cable system, common carrier or viewer pays enough—and receives enough—so that each finds it valuable to continue its role.

These trends of higher prices paid by and paid to superstations are likely to continue as the marketplace evolves and as techniques for measuring the audience of a superstation in a distant market are perfected. Indeed, if such an evolution takes place, as I believe it will, several years from now the fees extracted for compulsory licenses may be too high because the program producer will be compensated twice. At that time a truly free market may require eliminating fees while maintaining the compulsory license.

This market is in the early stages of adjusting to superstations, because the superstations themselves are a relatively new phenomenon. For the market to adjust completely, it was first necessary for the FCC to eliminate its rules which were artificially preventing the rationalization of the market. After so much work, having our decision affirmed by the Court of Appeals and having come so close to achieving this result, I believe it would be unfortunate if the Congress unnecessarily disrupted this evolution to an efficient marketplace for entertainment programming shown on television by eliminating the compulsory fee or by essentially reinstituting the FCC's archaic rules.

Therefore, Mr. Chairman, I do not believe it is fair to say that the introduction of superstations was an unanticipated event which now requires a change in the copyright system. In fact, this development was fully anticipated and, indeed, is the product of the successful system that was adopted by the Congress in 1976.

3. THE DEREGULATION OF CABLE BY THE FCC

As you know, the Commission's distant signal rules limited the number of signals that a cable system could import into their local area. The syndicated exclusivity rules were an incredibly complex set of regulations that, in essence, required a cable system to delete, upon request of a local broadcaster, syndicated programs shown on a distant signal, if the local broadcaster had contracts giving exclusive rights to that program.

Both of these rules were adopted by the FCC in 1972 as a result of the now infamous Consensus Agreement of 1971. That Agreement, as you recall was a White House orchestrated compromise between the various commercial interests whereby the cable industry agreed to support copyright legislation in return for some loosening of the extremely restrictive rules that had been imposed on cable. Until we began our intensive review of the rules in 1976, Mr. Chairman, these rules had never been subjected to analysis or review by the FCC, the courts or the Congress. They were adopted without notice and comment or the submission of any evidence that they were justified or effective.

Beginning in 1976, the Commission committed the rules to the kind of review any rule should have before it is adopted. The study we undertook was the most thorough and intensive analysis of a Commission regulation that was conducted while I was at the Commission. It was, in my view, a model of responsible and responsive deregulation, an instructive example of how agencies can examine and remove rules that impose unnecessary burdens on business and the public without corresponding benefits.

Nevertheless, Mr. Chairman, some have also argued that the Commission's action in removing the distant signal and syndicated exclusivity rules changed the framework within which the 1976 Copyright Act operated and so dramatically altered the situation that the Congress must now scrap compulsory licenses. That strikes me as being the equivalent of saying that because the expert agency, after three years of intensive study, found that there would be no problem created by the elimination of the rules, that finding itself is now the problem. Frankly, I have never understood that argument. Those who make the argument failed to persuade a majority of the FCC after three years of study, and they failed to convince a court that we had erred. I am hopeful that they will also fail to convince the Congress.

Let me, nonetheless, try to put our actions at the FCC in context, to explain why our conclusion to deregulate was based on facts that also disprove the need for Congress to take any action.

As I noted, Mr. Chairman, the FCC studied the impact of its distant signal and syndicated exclusivity rules for over three years. During that time we received input from the widest possible range of interests, and we went even further by hiring consultants to conduct studies independent of any economic or political interest.

Our analysis began by determining the amount of audience that is diverted from local stations by the importation of distant signals—how many people, in other words, stop watching the local station or watch it less because they are watching the distant station instead. While this was a necessary step to determine the impact of distant signals, it was also essential to assess the degree to which the syndicated

exclusivity rules protected local stations. In study after study, including actual case studies of cable markets, the Commission found that the percentage of the audience that is diverted from the local station even with unlimited importation will be less than ten percent in the forseeable future.

The next step was to determine how much of this relatively small audience diversion is prevented by the full operation of the syndicated exclusivity rules, which required cable operators to delete programs on distant signals for which a local station had an exclusive contract. Interestingly, Mr. Chairman, the first and most startling conclusion we reached was that, even if every broadcaster who was entitled to its protection had fully exercised his or her rights under the syndicated rules, only 4.4 percent of all United States households would have been affected. And within this small amount, it turns out that very few broadcasters, only 26 percent, actually requested protection under the rules. Thus it turns out the exclusivity rules were such a insignificant copyright force that even broadcasters themselves didn't bother to invoke them.

Nonetheless, the Commission subjected these rules to a study by Dr. Rolla Park from Rand to estimate the percentage of time that distant signals on cable could be blocked out under the exclusivity rules. These percentages were then applied to the estimates of audience diversion likely to result from distant signal deregulation to determine the amount of protection afforded to local stations by the operation of syndicated rules.

The Commission found, Mr. Chairman, that, even if broadcasters fully exercised their rights, the rules would protect no more than one percent of the audience for any local station. In the long term the maximum possible protection provided by the rules would not exceed nine percent of a local station's audience, a percentage we considered to be considerably overstated. We were confident in concluding that the actual long-term diversion would be considerably less than nine percent.

These conclusions were more than confirmed by actual case studies of markets that were grandfathered when the syndicated rules were adopted in 1972. Our grandfathered market analysis showed that in San Francisco, the major market experiencing the greatest audience diversion from cable (a figure between four and seven percent), the VHF independent stations could protect no more than two to four percent of this audience if the syndicated rules applied. Similarly, if syndicated protection were available to the Palm Springs market stations, which we found to be experiencing the largest diversion among small markets, the amount of audience protected would be no more than one to two percent. Our case studies show that the potential impact of eliminating our rules will rarely be as large as four percent for any station in the foreseeable future.

Mr. Chairman, the conclusion the Commission drew from all these figures, figures based on the best possible evidence, was that there would be little or no noticable impact on either broadcasters or program suppliers from the elimination of the syndicated rules or the distant signal limits. And, if I may suggest a conclusion that this subcommittee can draw from these same figures, it is this: The number of persons who view an imported signal on a cable system is relatively small. The number of viewers who are drawn away from a local station is even smaller. Therefore, the amount of money that a cable system should pay for that signal—even in a system where "fairness" is the standard for allocating revenue—is much less than what a local broadcaster should pay. Indeed, it is just a fraction of that amount.

If a particular cable distant signal captures five percent of the local station's audience (which of course is an even smaller percentage of the total local market), why would we expect the cable operator to pay a price that would even approximate what the broadcaster pays for 20 times the audience? The frequently heard charges concerning the cable industry's levels of fee payments ignore this point. At the same time, they ignore substantial programming costs incurred by cable for the programs it purchases directly from program suppliers wholly outside the compulsory license system and threaten to divert attention from the fee's purposes of appropriately compensating producers not broadcasters.

Indeed, by expanding the markets of both, and by providing new options to viewers, cable television holds the promise of new opportunities for producers to both create and sell.

Given this factual background, Mr. Chairman, I approach the various bills that have been introduced with some skepticism. Your bill, Mr. Chairman, H.R. 3560, essentially reimposes the cable regulatory system which the FCC only last year found to restrict unnecessarily viewer's options without serving any beneficial purpose. Moreover, it would give the Copyright Royalty Tribunal rate regulatory powers heretofore used only in cases of utility-type industries.

I believe I have indicated why I believe the interests of copyright holders are being protected by the current compulsory license system. Therefore, I do not believe there is copyright problem that requires a legislative solution at this time.

If H.R. 3560 were ultimately enacted into law, the Congress would be engaged in reversing the expert agency's most recent communications policy consensus for unnecessary copyright purposes. The compulsory license system has allowed the market to adjust. Program producers are being compensated adequately now and are likely to receive excess compensation in some cases. Thus, adoption of this legislation would leave copyright interests unaffected at best and perhaps slightly worse off while creating a seriously flawed communications regulatory system without any evidence to support it.

I obviously also strongly disagree with the proposals forwarded by Congressman Frank in his bills, H.R. 3528 and H.R. 3844, which would eliminate the compulsory license system of Section 111 and in its place institute a system of full copyright liability or retransmission consent.

As you well know every time such an approach has been examined by a policy-making body, it has been rejected. In 1976 it was rejected by Congress after thorough review because of the high transaction costs such a system would impose on cable systems. It was rejected by the FCC in 1976 and again in 1980 in part for this same reason.

The need to obtain consent for the carriage of large numbers of syndicated programs would require an awesome amount of time, manpower, paper and money. Perhaps, as has been suggested recently, some more efficient mechanism would eventually evolve to reduce this burden, but in the interim the transaction costs would most likely mean that distant signals would be dropped from cable systems.

Moreover, Mr. Chairman, I am concerned that the imposition of such schemes may have the undesirable effect of fostering concentration of ownership in this currently competitive industry. Because the number of transactions, each of which imposes some costs on the parties thereto, is related to the number of cable systems negotiating for rights, actual cost savings may be achieved by combinations of firms negotiating as one. It may be that certain independent bodies, analogous to ASCAP or BMI in the music industry, may be formed. But if such an organization is not created, or until it is, I fear that system owners may have an incentive to merge with other systems. While the costs of doing business would thereby be reduced, the concentration of this new media market may be substantially increased. I do not believe the arguments in favor of full copyright liability warrant such a result.

Even if a cost minimizing mechanism evolved, it is less than certain that consent for the carriage of programs would be granted at a free market price or would, for that matter, be granted at all. As the FCC discovered when it implemented such a scheme in the 1960's, retransmission consent may ultimately become retransmission denial.

I find this to be a very troubling possibility. The premise of my three and a half years at the Commission was that diversity is a public benefit as well as having true economic value. It is clearly viewed as such by the public who seek the ability to watch programs at times more convenient to them through cable television or through video tape recorders and video discs. It is also clearly viewed as an important component of the marketing effort for this industry by cable operators and, perhaps more importantly, by investors.

If through adoption of full copyright liability, distant signals become too expensive or unavailable, Congress will have risked frustrating the growth of this promising industry. If the distant signals which are important to the industry's growth disappear, an industry which is only now maturing may be crippled. Its potential to provide new sources of entertainment and informational programming, even its very real potential to compete in the dawning Information Age against formidable computer and communications industry competitors, may never be recovered. The elimination of any potential competitor from a market of this importance is a decision of the gravest import and should only be taken for the most well-founded reasons. In this case, though claims of economic harm are oftern heard, little damage can be detected.

It is true that much has changed in the past five years since the 1976 Act was passed. But nothing has changed in the underlying reasons for that Act. Certainly the recent growth of cable television and of superstations does not change the basis of the system you wisely selected in 1976.

To summarize, Mr. Chairman, what cable's growth is doing will not undermine the economic structure of television or the production of programming eventually broadcast on television. In fact, it is increasing the opportunities for these program producers to profit. Moreover, because cable does not operate under a compulsory

license scheme for its use of programming not carried on television, entertainment program production generally is being compensated at free market levels now.

What cable's growth is doing is the equivalent of adding scores of new channels to every home in the nation. These new channels require programming. That programming will generate new revenue for current producers and the first chance for countless talented creators now closed out of the entertainment business.

Therefore, Mr. Chairman, I believe that all the evidence indicates that developments in this industry promise a time when the public may be given an opportunity to have our cake and eat it too. We can have vibrant television, cable and program production industries. Such a situation does not require legislation. It requires only that creative talents be developed and allowed to function so that the promises of membership in a new information age now being made to the average American citizen may be fulfilled.

Mr. BUTLER. Thank you. I think the chairman wanted to tell you goodbye.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

In view of the late hour, we will conclude very shortly with our witness. Mr. Ladd, the Register of Copyrights, scheduled second, will not testify this morning but will be scheduled first on the agenda next week. I think that will enable more members of the committee to hear Mr. Ladd and to ask him questions.

I apologize to him and to others who may have been expecting his testimony this morning, but I think in view of accommodating both the committee and Mr. Ladd, that would be the better arrangement.

Hopefully, we will not be interrupted at our hearing next Wednesday at 10 a.m.

I have just a question or two for Mr. Ferris. In terms of the FCC, you discussed one point in rejecting the petition of the National Telecommunications Agency, the Commission establishing retransmission consent. The order concludes, and I quote, "Finally, it seems clear that what we are being asked to do here is to overrule the judgment of Congress, because the present copyright scheme is patently inadequate. Since this agency is itself a creature of the Congress, we do not see how we can take it upon ourselves to correct the judgments as made, and accordingly, believe that this proposal to be beyond our authority."

Now, assuming the judgment of the Commission under your chairmanship is correct, isn't the FCC order an open invitation for Congress to do that which the Commission couldn't do, reconsider the copyright side of the cable broadcasting controversy and isn't it the case that it is self-proclaimed not to constitute a basis for decisions about increased copyright liability for cable systems?

Mr. FERRIS. I would conclude on the statement of jurisdiction and deferral to the Congress that I believe the NTIA had proposed a notion to us of retransmission consent that was contrary to the 1976 Copyright Act where Congress explicitly rejected that and the copyright license mechanism was imposed.

We didn't feel we could do it on those jurisdictional grounds, but we did go on to say on the merits, if we did have the authority, we would have rejected retransmission consent, because it invalidates a sound communication policy of diverse programing availability to the general public. I think we made the finding on both grounds, one on jurisdiction and one on the merits contingent, and I think that it had validity on both matters.

Mr. KASTENMEIER. You also conclude, by implication, that since syndicated exclusivity and distant signal regulation impact copyright, in addition to being the communication policy, that impact in and of itself might have justified the Congress in concluding that certainly we have to reconsider the effect of what we have done in 1976?

Mr. FERRIS. Oh, I agree completely, Mr. Chairman.

I think the reconsideration is part of really the effective use of the committee's power to oversee what the situation is.

I believe, and the evidence we had assembled before us and the evidence that is available today that would lead this committee to the same conclusion that we arrived at, that there is no harm being done by the removal of these distant signal rules and the removal of syndicated exclusivity, so you will come to the conclusion that no one is being harmed, the producers, copyright holders or broadcasters to the extent of interfering with their public service obligation.

The investigation, as I said in the beginning, absolutely is justified and I am sure you will arrive at the same conclusion.

Mr. KASTENMEIER. Let me, in terms of discussing harm, discuss one other aspect: professional sports.

Take baseball, the fears, we will say, of the Boston Red Sox, with which you are familiar.

Would you conclude that they have no right to fear the possibility—and particularly the Red Sox may not have a good year, they are playing at home, Toronto, and imported signals constitute, among others, the New York Yankees versus the Orioles, et cetera—that they are not harmed by that?

Would you conclude that they are not harmed by that, particularly if we assume the cable penetration of the Boston market increases significantly. Also, that the compensation remains more or less the same, professional sports getting about the $18 million pie, 5 or 6 percent. That is 1 year's salary for Mr. Winfield, and that is all that, I guess, professional sports gets.

So that being the case under compulsory license, wouldn't you conclude the Boston Red Sox have every right to worry about penetration, and think of even more compelling analogs than that perhaps, in worrying about cable penetration of competitive professional sports, really baseball?

Mr. FERRIS. I really don't know what the finances are of baseball in general, I think the Ball Players Association is very interested in getting that similar data and it is not being shared with them in their present situation, like them, I don't know what the real basis of their fears should be. I don't think, certainly from a communication policy standpoint, Mr. Chairman, that the people in Boston who should be prevented from enjoying a Yankee-Oriole game, and I don't think legislatively or by Government policy we should impose upon the people of Boston their allegiance to the Boston Red Sox. They should either play good baseball and provide their own momentum for people to have an allegiance to them rather than to prevent the people of Boston who might be so misdirected to want to be a Yankee fan, to be able to be a Yankee fan, and Government should not have a policy that will prevent the people of Boston from being that misguided.

Mr. KASTENMEIER. We are looking at equities.

Mr. FERRIS. I think there are probably a lot of reasons.

Mr. KASTENMEIER. Boston did at one time support two major league teams.

Mr. FERRIS. Yes; and I think to some degree, it was probably more the desire for increased profits that stimulated the moves than it was of the team losing. I suppose that is the profit motive, and that is good and that shouldn't be discouraged, but I don't think necessarily the profit motive should be subsidized by having people in a particular area of private franchising having their option to watch the diversity of programing in sports prevented by Government policy.

I do think the present rules of the FCC prevent the importation of the distant telecast of the home game, so the attendance at the ball park, if the Red Sox were playing the Yankees and the Yankee New York station was televising that game and being carried on cable in Boston, the rules do prevent showing that distant signal back in Boston, so those who do like the Red Sox will have the incentive to go to watch it live in Boston. I don't see why the Bostonians shouldn't at that time, even though there is a game in Boston, have the option to watch the Milwaukee Braves.

Mr. KASTENMEIER. How about the Milwaukee Brewers?

Mr. FERRIS. That is right.

Mr. KASTENMEIER. It seems that it is somewhat imperfect, because there is already some form of protection. It is a question of equitability—what ought to be anticipated and in the same context protected against—and whether the compulsory license, and with free importation of distant signals wouldn't constitute real problems?

Mr. FERRIS. I think probably you are going to see in the years ahead, Mr. Chairman, the cable system, as they go into the urban areas, getting the contracts to originate the games. I am sure the teams are going to be very excited by that prospect, and I don't know if the decision should be made then, that that should be prevented, and the medium of over-the-air broadcasting should be favored and legislated so that that method of delivery of that programing to the American consumer will be protected.

That is what it comes down to, what medium should you favor, if one should be favored with respect to how programing will reach the ultimate consumer?

Mr. KASTENMEIER. I won't press the point further. I understand you do have a time constraint.

Mr. RAILSBACK. I am sorry that we have been interrupted.

Mr. FERRIS. I understand that.

Mr. RAILSBACK. Can I call your attention to page 3 of your statement?

Mr. FERRIS. Yes, sir.

Mr. RAILSBACK. What goes in at the top of the page to program purchasing costs, and the reason I ask is that those figures strike me as being a little bit high, and a little bit different than some of the cable opponents would lead us to believe.

Are they analogous to the program costs generally referred to by the broadcasters, and what elements go into that particular figure

at the top of page 3, 36.4 percent of one local cable system's expenses were for program purchasing costs?

Mr. FERRIS. They were on the pay tier of going out and purchasing movies or any other entertainment under full copyright liability terms, not under a compulsory licensing mechanism.

Mr. RAILSBACK. What cable system is that?

Mr. FERRIS. ARTEC.

Mr. RAILSBACK. Are we talking about some of the other kinds of programs that would include pay cable? In other words, is that included in the 36 percent?

Mr. FERRIS. Yes, that is where the figure comes from. The amount that they actually go out and pay to compete with broadcasters, video disks and video cassettes, under full copyright terms to buy a program and then people pay.

Mr. RAILSBACK. I understand, and I took a look at your report when you were Chairman of the FCC, and in all fairness to you, if perhaps I had been a member of that Commission. I would have been very interested in the very criteria that you used in making a determination, I think, about the impact of deregulating syndicated exclusivity as well as the distant signal, and I have to tell you that.

Our job, as I think you understand, is a little bit different. In your next paragraph on page 2, you mention that what we are talking about here are those programs that are subject to a compulsory license are increasingly making up a reduced percentage of the programs shown on, or services provided by, a cable system. I agree with that. I think you are correct, but the big difference is, when you talk about your second, third, and fourth different activities of the cable system, the first being that which comes under the compulsory license, you are talking about a marketplace negotiation and purchase, am I right?

Mr. FERRIS. Yes; absolutely.

Mr. RAILSBACK. The issue that confronts us relates to that first activity which is diminishing and, in other words, pay cable is growing?

Mr. FERRIS. Yes.

Mr. RAILSBACK. The issue that we have, and I think it is very different than the one that you had when you were Chairman of the FCC, is what exactly should we be doing with the issue of copyright, and whether we should be affording more incentives for the originators, the program providers or suppliers? It is significant, in my opinion, that that was not one of the criteria used by the FCC, nor should it have been. You were concerned with consumers and communications policy.

We are concerned with paying a reasonable amount to somebody that is a creator.

Mr. FERRIS. I agree with that completely.

Mr. RAILSBACK. The issue becomes a question of under your own four categories, are we really being fair to the broadcasters and to the program suppliers with the establishment of a Copyright Royalty Tribunal which perhaps, partly through our own fault, has been plagued with a great deal of difficulty? Then the question that confronts us becomes, should we take a different approach?

Are the program suppliers and broadcasters being fairly compensated? Here is where you and I differ.

I don't think it is enough. As you said on page 16, and as many cable people have said, they have argued that your econometric studies show that they are really not being harmed.

Our job is to evaluate more than that. We must evaluate whether they are being fairly compensated for a work product used by a cable system. Could you please respond to that?

Mr. FERRIS. I think that the studies that you are undertaking will lead, I feel confident, to the same conclusion I have come to, that the mechanism you chose in 1976 was the most efficient mechanism to fulfill good communication policy and satisfy good copyright policy. I believe this because I think the compulsory license provides the mechanism by which the creator of that work product will in effect reach the widest audience and get economic returns for that widest possible audience.

The compulsory license mechanism is going to achieve more closely the marketplace mechanism that I think communication policy dictates with respect to the number of viewers in a market, the number of advertisers that have paid to reach those viewers, the amounts that will go to the syndicator, and the program producer.

It is the idea of getting your marketing mechanism to be able to reach all of the viewers hooked up to that particular program, in a combination of over-the-air and satellite system.

When the marketing mechanisms of the broadcasters are adjusted, you will have the greatest return and in the interim the Copyright Royalty Tribunal is going to pick up that incremental difference.

Mr. RAILSBACK. Let me repeat what is a concern of mine. Here in your own four categories that you have spelled out which are acceptable as far as I am concerned and fairly represent what the activities are of the cable system, it is very significant to me that in three of the four categories you are paying, in effect, marketplace, but, what about the other one?

Mr. FERRIS. Absolutely.

Mr. RAILSBACK. The other one you are not paying marketplace, but you are paying an arbitrary fee If you pick up a distant signal that happens to be broadcast, and somebody has made marketplace prices for, just as cable has for the other three out of the four and then cable is able to pick that up, I think it is detrimental to that particular program supplier?

Mr. FERRIS. Who is being harmed? I am saying that only because——

Mr. RAILSBACK. Forgetting the deregulation of distant signals, I would think that if somebody was paying a lot of money for "Happy Days," we deregulated exclusivity, as has been done, and that particular local station has paid a substantial marketplace price for a particular program and then it is brought in on another channel, I think that would have some impact.

One side is arguing very strongly, but it does have an impact. Your studies were conducted while there were regulations?

Mr. FERRIS. There were grandfathered systems, San Francisco being one, they were grandfathered before the 1972 act. All the econometric models we had and in comparison with the historical

data we had, they correlated every conclusion we had. San Francisco was one of those grandfathered areas.

Mr. RAILSBACK. I have exceeded my 5 minutes, but let me ask you this: In your opinion, and we have heard diverse views and are soon going to hear the current Register of Copyrights, and others that have argued very strongly, who are experts, that just as you deregulated exclusivity and any kind of copyright protection, why not go all the way?

Why not let the marketplace control in the other situation? They argue that a middleman would likely arise that could program and sell packages to the rural cable systems and so forth.

I have questions about that. What is your feeling about that?

Mr. FERRIS. Well, that is the notion that an ASCAP or BMI will emerge, and if it did, the Copyright Royalty Tribunal would have no basis at all.

I think what is going to happen is that as these systems develop, particularly with the substantial capacity that all these new systems have, that the distant signals are going to have a far less significant impact upon the whole mix of cable.

There actually is some data now that actually contributes to why copyright holders are getting too much money, because some people have to buy the basics to get the premium package.

Exclusivity we found had no impact at all.

Only 26 percent of the broadcasters exercised the option to notify cable systems in their areas to black-out which demonstrates——

Mr. RAILSBACK. You know what their reason is for that figure. Even under exclusivity, it is extremely costly. For instance, one broadcaster told me that the New York City market exercises exclusivity, and have two people assigned to dealing with the assertions of exclusivity.

In other words their station, in order to assert exclusivity, has two people assigned to that, and I think that was David Pollinger.

Mr. FERRIS. I would think that some advice on mass mailing would be very, very useful to that broadcaster, because it is just sending out a notice to the cable operator. He is the one that has the difficulty when he gets this.

The cable system, I could see how they would have two people.

Mr. RAILSBACK. They have trouble too, but, on the other hand, they don't own the product.

Mr. FERRIS. All they are doing is, they are wearing their retransmission. Cable in this capacity is the biggest booster, and contributor to the survivability of broadcasters. All they are doing is extending the broadcaster's market. The broadcaster is going to get more advertising revenue and, therefore, be in a position to pay a greater amount to the program producer.

Mr. RAILSBACK. I don't mean to interrupt. I have exceeded my 5 minutes.

I have real reservations. Where I really quarrel with you is, I wonder what is going to happen to the program content of programs in the future to be purchased, broadcast, or televised, by local stations, where there is no guarantee of exclusivity.

I see pay cable providing a very rewarding means for the program suppliers.

I see it being very beneficial to cable which gets a certain percentage of pay cable, but I have trouble seeing the broadcasters, without exclusivity, wanting to invest a substantial sum of money to buy a program that may be picked up and shown right in that local area.

Mr. FERRIS. I think our studies showed that any diversion from programing was not and did not undermine the economic viability of the broadcasters at all. The communications policy notion of leaving the option to the individual to see what they wanted to see when they wanted to see it benefits the viewer without harming the broadcaster.

Mr. RAILSBACK. It is communications policy, but is it good copyright policy? That is what we are concerned about, copyright.

Mr. FERRIS. I think the compulsory license mechanism is the best mechanism to assure the widest dissemination of that product.

Mr. RAILSBACK. I thank you.

Mr. KASTENMEIER. On behalf of the committee, we thank you and are sorry to have kept you so long.

Mr. FERRIS. Thank you.

Mr. KASTENMEIER. We appreciate your testimony. It has been very helpful. We indeed may want to get in touch with you further to develop some of the points and arguments made here publicly today. We appreciate your testimony.

Mr. FERRIS. Thank you, I appreciate being here.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

PENDING COPYRIGHT LEGISLATION

WEDNESDAY, JULY 22, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, Sawyer, and Butler.

Staff present: Bruce A. Lehman, counsel; Thomas E. Mooney, associate counsel; Timothy A. Boggs, professional staff member; and Andrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning the first part of the hearing will be a conclusion of copyright matters. I am pleased to have as our concluding witnesses the Register of Copyrights, Hon. David Ladd, whose comments we have been awaiting and who I must apologize to for not affording him an opportunity to appear before. The last time he was to have appeared the plethora of votes delayed reaching Mr. Ladd until it was too late. In any event we have made up for that now and we are pleased to greet the Register this morning.

TESTIMONY OF HON. DAVID LADD, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL; HARRIET L. OLER, SENIOR ATTORNEY-ADVISER; PATRICE LYONS, SENIOR ATTORNEY-ADVISER; AND DAVID E. LEIBOWITZ, SENIOR ATTORNEY-ADVISER

Mr. LADD. Mr. Chairman and members of the subcommittee, I might say no apology is required. As a matter of fact, Mr. Chairman, I thank you for postponing, at my request, my appearance which was initially scheduled for June 29. At that time, as I told you, Ms. Schrader who is with me, and I had just returned from a trip to China and had not fully thrown off the effect of jetlag, and you were very kind to accede to my request to postpone my appearance from that time.

We are honored to have the opportunity to express our views on several legislative proposals which are before the subcommittee at this time. These include proposed amendments to the cable television sections of the copyright statute; the proposal to introduce performance rights, for sound recordings into our law; the proposal to increase the criminal penalties for copyright infringement; and

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proposals relating to exemption of performances by nonprofit veterans and fraternal organizations.

Before I go further, I would like to introduce the people who are accompanying me here today. On my right is Dorothy Schrader, General Counsel of the Copyright Office and Associate Register of Copyrights. To my extreme left is Harriet Oler; to my extreme right is Patrice Lyons; and to my immediate left is David Leibowitz, all of whom are senior attorney advisers in the Copyright Office and all have participated in the preparation of the office's statement.

If it meets with your approval, Mr. Chairman, rather than reading my written statement, I propose that we submit it for the record and that I give you a summary of our views.

Mr. KASTENMEIER. Without objection the statement with appendixes will be accepted in the record.

Mr. LADD. I want to turn first to, and will spend most of my time discussing, the proposals for amending section 111 and the related cable provisions of the copyright statute. Shortly after I came to this position last year, it became clear that some action on the cable sections of the copyright law would probably become necessary in light of the then imminent prospect of removal by the FCC of the limitations on importation of distant signals and the FCC syndicated program exclusivity rules. In the middle of last year I began to canvass opinion and consider how the Copyright Office might best serve the Congress in preparing information for its use on the cable issue.

As we say in the prepared statement, the Copyright Office does not profess to be expert on economics or the industrial organization of telecommunications industries. Therefore, we thought we might be of most service by marshaling evidence on some of the questions before the subcommittee and changes occurring in the cable and program supplies industries. That is what we have done in considerable length in the prepared statement.

The issues before this subcommittee are cast in terms of copyright. But, as was established in the exchange between members of the subcommittee and Mr. Ferris last week, it is clear that there is a close intertwining of copyright and communications issues. Copyright is only one of the several areas of law in which national telecommunications policy has been expressed. An important one but not the only one.

Just how closely the copyright and communications policy issues are interleaved is highlighted in the *Malrite* decision, which was discussed at the hearing last week. In that decision, the FCC regulations were referred to as copyright proxies. If I may, I will read one sentence from that opinion:

> The FCC rules restricting cable operators' ability to carry distant signals and syndicated programs serve, in effect, as proxies for the copyright liability the courts had refused to impose by restricting cable systems and their use of copyrighted works.

How that interleaving occurs is detailed in our prepared statement and is very familiar to this subcommittee, and therefore, I need not elaborate on that here.

When I began to examine what possible changes might be made in the cable provisions of the copyright statute, I came to the

question with very few preconceptions but with enthusiasm for cable. I had seen what cable had done to the quality of entertainment available in my hometown, the Appalachian town of Portsmouth, Ohio, which had built one of the earliest cable systems and is what is sometimes called a classic cable market. During the period from 1970 to 1977 I was personally involved as a legal adviser and entrepreneur in cable. So cable's industrial, legislative, and regulatory climate during that period of time directly affected my interest and were of great interest to me. I also brought to the examination of these questions a disinclination to use compulsory licenses wherever they can be avoided and to use, instead, free market mechanisms.

On the basis of our collection and examination of the evidence, the Copyright Office has come to the conclusion that the technological, industrial, and regulatory changes which have intervened between 1976 and the present day afford the opportunity to discontinue the compulsory license and to use a market solution for the distribution of program materials in the cable industry.

The assertion has been made in these hearings, and in the Senate hearings, that nothing has changed since 1976. What I surmise the speakers usually mean when they declare that is that nothing has happened which was not foreseen, not that no change has occurred. As a matter of fact, when Mr. Ferris was here last week and made the statement that nothing has changed, he immediately said he based that on his review of the record of the legislative history during the period of enactment of the copyright law.

On the contrary, as you observed last week, Mr. Chairman, cable has been since 1976 in a period of dynamic change and that continues to the present day. I will not extend the time of this testimony here to recount indepth what we have presented in elaborate detail in the statement. Those changes can, however, be summarized as follows: First, the remarkable growth of cable, both in terms of the number of subscribers and its revenue. Second, the change of industrial organization within the industry. By that I mean the tendency toward concentration and acquisitions, the merging of the MSO's with large companies such as the combination of Teleprompter with Westinghouse, and the entrance of Times Mirror and other large companies into the cable business. This phenomenon will bear upon our later discussion of the issues.

The third major change is the continually increasing proportion of cable programing which is distributed by satellite, as distinguished from microwave or direct wire interconnection.

The fourth, which is most important and will be emphasized later in my presentation, is the appearance of numerous and diverse program origination services to serve the cable industry. These include not only those services, such as HBO and Showtime, supplied on a pay basis to be, in turn, sold to the consumer for pay, but also the numerous cable advertiser-supported originator services which often supply their feed to cable systems for free, and in some cases, are beginning to pay the cable systems to carry their programing.

The fifth important change is the appearance of new competing technologies including multiple point distribution service, which I

happen to have in my apartment house in Arlington—I wish very much I had cable—DBS, video disks, and the like.

Now, I want to sharpen my testimony here by addressing the arguments which have been advanced before you about why the compulsory license should not be modified. I think I can do that because, in truth, the arguments have been fully canvassed in the hearings before this subcommittee. The first argument is that the compulsory license is absolutely essential because transactions costs make it impossible for cable operators to negotiate on a one-on-one basis with every owner of every copyright work which is contained in every program which is supplied to feed every channel on every cable system.

This consideration lay at the root of the Congress action in 1976 because the House report states, and I quote, "The committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."

Underlying this argument was the assumption that cable retransmission of programing on imported distant signals was essential in order to provide program diversity and to support the economic viability of cable systems. It was my impression at that time, that this assumption was indeed true for a very specific reason. In the early days of cable, when it was wiring communities which otherwise had no satisfactory television signals, like my hometown in Portsmouth, Ohio, cable was extending the market of the broadcasters and providing programing which would not otherwise be available. In other words, that is what cable had to sell.

As cable began to move into the larger markets, however, many of the potential consumers were able to receive satisfactory television signals in their communities without cable. Therefore, what cable needed to be viable in these markets was the additional and diverse programing available only by importing signals from outside that market.

Mr. KASTENMEIER. Were the signals distant signals or were they local?

Mr. LADD. In every case imported.

At that time the importation of distant signals was indispensable to the survival of cable.

Mr. KASTENMEIER. May I interrupt to raise a question? One of the difficulties in speaking of cable, as you well know is, whether we are still talking about some of the small systems which do import distant signals and have not yet caught up with the new technology, the HBOs and all the rest that make cable so diversified and so attractive. If we were dealing with one form of cable, it would be a different question, but it is hard to conceptualize how all of them can be equally treated and expect equal impact out of them in terms of change in viability.

Mr. LADD. I would suggest that you check with people who know the industry. My impression is that the technology for receiving

satellite transmissions distributing both imported television signals and cable origination networks is now at a level of cost where it is available even to the smallest systems. The dishes for the downlinks are really not that expensive and I doubt that there are very many systems of any size in the United States now that cannot participate in this kind of program distribution. I would suggest that if there is any question about that you check it with people who know the industry better.

Mr. Leibowitz has a point on this subject.

Mr. LEIBOWITZ. You will note on chart 5 of our prepared statement that approximately 47 percent of all cable subscribers received pay cable programing in 1980. That is the programing distributed by HBO and Show Time, among others. That 47 percent figure does not include subscriber's receiving the advertising-supported program origination networks, such as ESPN, Cable News Network, and the USA Network. Almost all of these program services are available to cable systems only via satellite.

Furthermore, projections by industry analysts indicate that subscriber penetration of pay cable will increase to roughly 76 percent in 1985, and one estimate says that in 1989, it will reach 100 percent, although this estimate may be overstated.

Mr. BUTLER. Mr. Chairman, just for clarification, referring to chart 5, we have basic cable and pay cable. Now, then you refer to advertiser-supported network cable. Which one of those columns does that come under?

Mr. LEIBOWITZ. Advertiser-supported cable networks generally would be reflected in some of the basic cable totals. The pay cable column refers solely to those program services that require a fee over and above the basic service fee, traditionally the motion picture channels. The advertiser-supported networks are generally offered as part of basic service but may not be totally inclusive for all basic cable subscribers.

Mr. BUTLER. So you don't have a breakout for that?

Mr. LEIBOWITZ. Not on chart 5 for the originated advertiser-supported programing, no. But since 7 million subscribers are able to receive pay cable, which is traditionally distributed via satellite, the number of subscribers receiving advertiser-supported programing would presumably be at least that much, if not more. This is because the variable cost in receiving that programing is much less than pay cable programing.

Mr. BUTLER. Thank you.

Mr. KASTENMEIER. Continue.

Mr. LADD. I might say that while I declared at the opening of this statement that I have a philosophical disinclination to use compulsory licenses in the copyright system, I am not totally opposed to them. In fact, at the time the cable compulsory license was adopted, I was in favor of it. When the *Teleprompter* and the *Fortnightly* cases were decided, I thought they were questionable as a matter of copyright law. But I also thought that they were the absolutely right decisions as a way of allowing cable to survive and to grow. In that sense and at that time, I really had no objection to it.

Let me return to the question of whether or not it is necessary to have elaborate bargaining by individual cable systems with every

copyright owner. That idea has been asserted here earlier by Mr. Rifkin. The idea that over 4,000 cable systems would have to negotiate with every copyright owner was also raised by Mr. Ferris, and has been raised by other witnesses as well. It is useful in approaching this question to ask how it is that broadcasting has managed to survive under full copyright liability? The answer is that the same marketing methods for programing that have been available and used in broadcasting are now available to cable systems.

The question has been raised in these hearings: How will middlemen work? The middlemen are already in place in the broadcasting industry and have been for a long time. A middleman merely is a purveyor who supplies a program with all of the rights and clearances bundled in and makes it available to an exhibitor to market to consumers. The networks do this. They either produce the programs themselves or they buy the programs from program suppliers and supply it to their stations. That is how their transactions are handled. In some cases syndicators of television programs market their syndicated series directly to stations. But the point is that those middlemen are already in place.

Now, it is useful to recall that, as Mr. Ferris and others pointed out, imported distant signals comprise a very small part of total cable program transmissions. The ratio of cable distant retransmissions to the programing now emanating from the cable origination networks, pay and otherwise, is much larger, and that ratio is shifting.

Let me now go back and recite the basic elements of the proposal which the Copyright Office has laid before you, and then examine how this proposal would actually affect the transactions costs and the acquisition of programing and the operation of cable systems.

We have recommended that the Congress eliminate the section 111 compulsory license for secondary transmissions by cable systems; exempt from copyright liability the simultaneous secondary transmission by cable systems of signals containing network programing only to the extent necessary to assure a full complement of network signals in markets that lack one or more of the three national television networks; exempt from copyright liability the simultaneous secondary transmission of local signals by cable systems; clarify the present section 111(a)(3) exemption to make clear that the activities of satellite resale carriers are subject to full copyright liability; and provide for a transition period during which the present section 111 of the Copyright Act would remain in effect.

Now I want to go through the kinds of programing which are now available and will be available, and I ask you to keep in your mind in each case: will bargaining transactions be necessary and how much will it cost?

First, under this proposal, all cable systems of whatever size and location will have a full complement of network programing—free, with no bargaining. Second, all cable systems of whatever size and location will have, in addition, all local signals including, in some cases, local independent stations—free, with no bargaining. Third, all cable systems of whatever size and location will have the numerous non-fee cable origination network programs services which

are proliferating and the list of those is supplied in our statement. Many of them free with no bargaining.

By the way, I might point out that, in some cases, these cable origination networks are paying for the cable carriage of their programing and there is no reason to believe that this phenomenon will not continue to develop.

Mr. KASTENMEIER. I understand you said that they will receive a full complement of network telecast free whether or not they are distant signal.

Mr. LADD. Yes.

Mr. KASTENMEIER. What about the signal, the distant signal from a network affiliate that locally originated with that particular distant signal?

Mr. LADD. The objective and the limitation would be to provide a full complement of network programing. And if it is available on a local network outlet, obviously it would not be imported on a distant signal. Again, I emphasize only network programing.

Mr. KASTENMEIER. Should it be necessary to import a distant signal? Is the cable system required to black out that programing on that station which is not of network origination?

Mr. LADD. Yes. That is our proposal.

Fourth, if a small system exemption of the type suggested in Mr. Frank's bill, and in your bill, is incorporated into new legislation, all of those exempted systems may have all of the program sources I have already mentioned plus all imported signals without limit—free, with no bargaining.

Now all of those program sources, in summary, do not require bargaining. In many cases cable won't even have to pay and, in some cases, the cable systems will be paid to carry the programing.

There is the problem, however, of how to treat public broadcasting which, in some ways, is like the commercial networks, and in some ways is not. If the Public Broadcasting Service moves in the direction of advertising and indeed product advertising, which some of the principals of PBS have publicly discussed, then the treatment of PBS could be assimilated to the treatment we are proposing here for the commercial networks.

Everything I have mentioned is not all. All systems, of whatever size and location, will have access to the pay services, like HBO and Show Time, and the advertiser-supported services that presently require a fee like the Cable News Network, USA Network and ESPN. Now do cable systems have to stand one on one and bargain for these programs for these pay and advertiser-supported services? The answer is no. What they do is to pay, as for example in the HBO case, the established market rate. The transaction costs are minor. The bargaining is simply coming to a deal on the basis of established market rates, so even in the pay complement the transaction costs argument really is not serious.

Let's turn our attention now to that relatively narrow band, in relation to the other program sources, represented by the programing on imported distant signals. One of the reasons why a transition period is important is because much of that programing, especially the syndicated programing, is under contracts which run for some time in the future. The transition period would allow those contracts to expire and when they do "I Love Lucy," "Mash," and

all the other series which are so valuable and so popular with the American public will then become available for replacement according to the market either on pay cable, or on a cable advertiser-supported network or other origination service or, perhaps, through broadcasting.

There is one final point I want to make. There is a wide diversity of programing which will continue to be available under the proposal that we have put in front of you, without bargaining and without very high transaction costs. Cable is now moving into the very large markets. The status of present bids for franchises and the identification of those recently awarded are given in the appendices to our statement.

The point is that the future cable systems are going to be built into those markets which already have local independent signals available.

Now let me return to the argument that every cable system will have to bargain with every program supplier, indeed with every copyright owner of the copyrighted works which are included in those programs. It is going to be increasingly the case that cable systems are going to be owned by MSO's large enough to compete and service franchises, even in the major markets, and large enough to fend for themselves in the acquisition of programing.

I want to go off on a tangent at this point and observe that a large number of new program supply companies are now coming into the field. Increasingly, it is not going to be the motion picture studios which will control, or even dominate, the provision of program materials for cable and for broadcasting. Within the last 6 weeks the Turner Enterprises of Atlanta, Oak Industries, Merv Griffin Productions, and others have announced their intention to enter this burgeoning field. So in the future it is very unlikely that the motion picture companies and studios will have as large a role in program supply as they have had in the past.

Finally, on the point of transaction costs, I want to point out that the compulsory license is not without transaction costs. I do not talk here about the cost of administering the compulsory license, either in the Copyright Office or Copyright Royalty Tribunal, although these expenses are considerable. I talk rather about the burden that falls upon the private sector in responding to the requirements for filings in our own Office and for proceedings before the CRT.

Brief mention also should be made of the international effects of compulsory licensing. The United States is a major, if not the major, copyright nation. That is measured by the value of the export of our copyrighted products. The question of regulating cable television is now arising in Europe and they are beginning to face many of the same problems that we are. The revenues which this country enjoys from the marketing of copyrighted properties abroad is an extremely important element in our balance of payments and likely to become more so. If we retain a compulsory licensing scheme in the United States, it will be very difficult to object to similar schemes abroad. The likely effect of these compulsory licenses will be a reduction of revenues below what they would otherwise be.

In closing, I want to turn to another cost of cable regulation. That is the delay of the introduction of new technologies. We are, in a way, continuing to undo, in the work commenced by the FCC itself, the damage which has been done by regulation of cable in the past. It can fairly be said that the FCC, in its efforts to balance between the protection of the broadcast industry and the viability of cable, probably delayed the introduction of that technology commercially in the United States by many years. We now have new technologies on the horizon.

Let's talk only, for example, about DBS transmissions, which may prove to be broadcasting's and cable's most formidable competitor in the future. My suggestion is that we allow the market to operate so the public can choose not only what programs they want to see but what medium and modality they want to see it. Cable should not be the only technology which is allowed to stand outside full copyright liability in that competition for the consumer's favor.

That completes my statement, Mr. Chairman. I will be glad to answer questions.

[The complete statement of Mr. Ladd follows:]

STATEMENT OF DAVID LADD
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES

Before the Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
House of Representatives
97th Congress, First Session
July 15, 1981

Mr. Chairman, Congressman Railsback, and members of the Subcommittee, I am David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services. I thank you and the Subcommittee staff for giving me the opportunity to appear here today.

My purpose is to discuss the four copyright issues -- secondary transmissions by cable systems, performance rights in sound recordings, criminal penalties for copyright infringement, and performances by nonprofit veteran's and fraternal organizations -- that have been the subject of recent hearings before your Subcommittee and to comment on the several bills which have been introduced relating to these issues.

I. SECONDARY TRANSMISSIONS OF COPYRIGHTED WORKS BY CABLE SYSTEMS

Section 111 of the copyright statute concerns the complex question of cable retransmissions, and their place in national telecommunications and copyright policy.

The Congress is here dealing with important questions which do and will govern the industrial organization of our crucial telecommunications industries. The central questions here and now are framed in terms of copyright; but they touch the whole arch of national communications policy. These questions have concerned, at one time or another, every branch of Government: the Federal Communications Commission (FCC), the National Telecommunications and Information Administration (NTIA) and its predecessor, the Office of Telecommunications Policy (OTP), the courts, and the Congress. Copyright is involved because it is an important, but not the only, instrument, by which national policy in this area has been expressed.

We are not appearing as experts on the present and future state of the art of communications technologies. Nor are we experts on the economics of the cable, broadcasting and program production industries. We can, however, canvass some of the same evidence that you will have to assess and present that evidence in the context of the American copyright system as a whole and the cable provisions of the statute in particular.

This section of the statement is divided into eleven parts:

(1) Summary of the Copyright Office position on the cable television compulsory license;

(2) Philosophical objectives of copyright and the challenge to those objectives posed by new technologies;

(3) History and contents of the cable television provisions of the Copyright Act of 1976;

(4) Review of the experience of the Copyright Office and the Copyright Royalty Tribunal (CRT) under that law;

(5) Summary of changes in the FCC's rules affecting cable television and the prospects for further deregulatory measures by the FCC;

(6) Review of how satellite distribution of programming has provided cable television systems with greater diversity;

(7) Review of growth and acquisitions within the cable television industry;

(8) Transaction cost implications of the cable television compulsory license;

(9) Impact of the cable television compulsory license on competing technologies;

(10) International implications of the cable television compulsory license; and

(11) Conclusions and recommendations for possible amendment of the copyright statute and comments on H.R. 3528, H.R. 3844, H.R. 3560, and the proposal for agreed licensing.

1. Summary of the Copyright Office Position

a. Background of the Cable Issue.

Section 111 of the statute, enacted in 1976, represented Congress' resolution then of the competing demands of an established broadcast industry, an emerging cable industry, and television program creators and producers. Congressional deliberations took place against a background of unremitting conflict: two landmark Supreme Court decisions dealing with copyright liability of cable systems for retransmission of broadcast signals under the 1909 copyright law; a long history of regulatory actions in the FCC, which, by frequent change and shifts of direction, sought to strike a balance between the survival and growth of cable and the commercial health of broadcast stations. All this took place during the long period of work (1955 -1976) on the revision of the copyright law. (This history is discussed in Section 3.)

The question of whether cable should be liable under the copyright law for its retransmissions of copyrighted broadcast programming, and if so under what terms, was one of the last major obstacles to enactment of the entire copyright revision bill. The Congress' decision is embodied in section 111 of the statute. That section represents the political solution to the conflicts between the cable and program supply industries. Section 111 is based on a bifurcation of communications and copyright functions. Under its scheme, the FCC, through regulation, governs signal allocation and the importation of broadcast signals by cable systems, as a matter of national communications policy. The Copyright Act, taking FCC regulation into account, establishes a compulsory licensing mechanism under which cable systems are required to pay royalties to copyright owners for use of programs contained in signals which the FCC permitted them to carry.

The Copyright Office is only part of this licensing system: we collect the royalties. The Copyright Royalty Tribunal (which is not a part of the Copyright Office) is authorized to direct the proper distribution of those royalties to

copyright owners. The initial copyright royalty rates are set in the statute itself. The Copyright Royalty Tribunal is authorized, within statutory constraints, periodically to revise the rates.

The basic premises of the section 111 "settlement" were that cable needed imported signals to survive and the public was entitled to at least a minimum level of available programming which many did not then have. Cable, it was thought, lacked both bargaining position and alternative sources of program supply to permit acquisition of programming rights by contract in the marketplace. Hence, the compulsory license for imported signals (that is, those permitted by FCC regulations and only those) was necessary.

b. Copyright Office Position.

The Copyright Office now recommends that Congress amend section 111 of the Copyright Act to:

- eliminate the section 111 compulsory license for secondary transmissions by cable systems;
- exempt from copyright liability the simultaneous secondary transmission by cable systems of signals containing network programming only to the extent necessary to assure a full complement of network signals in markets that lack one or more of the three national television networks;
- exempt from copyright liability the simultaneous secondary transmission of local signals by cable systems;
- clarify the present section 111(a)(3) exemption to make clear that the activities of satellite resale carriers are subject to full copyright liability; and
- provide for a transition period during which the present section 111 of the Copyright Act would remain in effect.

c. Reasons for this Position.

The Copyright Office places these recommendations before you because we believe that copyright owners should fully enjoy all their property rights; that compulsory licensing systems -- which permit some one other than the copyright owner to decide how the owner's property shall be used and what its value is -- should be employed sparingly and only where necessary; and that changes in technology, industrial organization, and the demonstrable prospects for growth within the cable industry, coupled with changes in FCC regulations, make this compulsory license no longer necessary or appropriate.

Although only five years have passed since enactment of the revision, the changes in the communications industries have been enormous. For example, in 1976 the common expectation was that the section 111 compromise would continue to sustain the practice of territorial distribution, keyed to particular broadcast markets, somewhat modified by signal importations permitted to cable by FCC regulations and somewhat supported by certain program exclusivity regulations. Today that whole design has been shattered. Satellite transmission, transcending territory, has become the basic method for cable distribution of its most valuable programming.

In 1976, cable was comprised of relatively small enterprises, interspersed with several larger ones, that had wearily survived the uncertainties of long litigation over copyright liability, changing FCC regulations, and difficult financing. It was weak; it lacked bargaining power vis-a-vis broadcasters and program suppliers; and its revenues were obtained primarily through basic retransmission services. Today, cable penetration is growing phenomenally. With that growth have come growing revenues. Mergers and acquisitions have led to growing concentration with strong multiple system operators (MSO's). Many cable enterprises are linked to huge companies,

providing access to capital, management, talent, enhanced bargaining power, and, thereby, varied sources of programming. Increasingly the basic service revenues (to which the compulsory license royalty is keyed) are merely the vehicle by which the lucrative pay and other origination services are marketed. New program sources are appearing. Cable is prospering. The directions of its growth point to the goal of cable networking. And, the FCC has now removed the restraints on the importation of distant broadcast signals and on retransmission of syndicated programming. Finally, technology has made possible new program delivery systems, including direct broadcast satellite, multi-point distribution service (MDS), subscription television (STV), low-power television, videodisc and video cassettes. Of all the program delivery systems, only cable stands outside of the marketplace for a portion of its programming. Competition is consequently skewed in favor of cable to the detriment of the other distribution services and the public. In short, the basic premises of the 1976 cable regulation construct have vanished.

2. Philosophical Objectives of Copyright and the New Technologies

In approaching copyright questions, it is useful to examine the basis of copyright and its rationale, and to weigh specific provisions of the law and proposals to change that law against copyright's constitutional and social purpose.

What is copyright? Basically, it is a legal monopoly, of limited scope and duration, under whose terms authors are permitted to control the exploitation of their creations. A compulsory license strikes to the core of this right because it deprives authors and copyright owners of the power to control the use of their creations.

Copyright is not the only way of promoting the creative arts. They can be -- as they were in the past and are today -- promoted in other ways, such

as allocating money and honors to creative persons through government and private largesse. In former times, this largesse was mere patronage; in modern times, it can be seen in national prizes, government grants through the National Endowment for the Arts, in corporate funds given to sustain libraries, orchestras, opera companies, and broadcasting. But note that all of this depends, to one degree or another, upon the taste and judgment of some elite. The Constitution, however, has provided a more powerful and splendid engine for promoting the arts and sciences: direct reward to authors and entrepreneurs through the copyright law.

This limited copyright monopoly has its basis in our fundamental law, the Constitution of the U.S.. Article I, §8 empowers Congress:

> To Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. 1/

The constitutional provision does not, however, guarantee reward or success to any artist, or entrepreneur who brings an artistic creation before the public. It gives the person the "right" to try to live by the fruit of his or her words, painting, music or cinematic expressions, to succeed or fail principally upon the basis of public acceptance or rejection.

Around this right, resources -- talent, investment, marketing, and risk -- are mobilized; and from this flows the whole array of copyrighted works -- music, from opera to rock; television programs, from sitcoms to documentaries; dance by Jerome Robbins, Michael Fokine, and George Balanchine; and motion pictures, from today's endless stream of horror films to Citizen Kane. The Copyright Office archives are filled with unread poems, unheard songs, and children's drawings, side-by-side with deposit copies of Eugene O'Neill plays, John Huston films, and Beatles' songs.

1/ U.S. Constitution, Art. I, §8.

O'Neill, Huston, and the Beatles -- and those who have produced their works and presented them to the public -- have been at once recognized, sustained, and moved to further work by copyright and the financial rewards it brings from the public which registers its approval by paying for the performance, the recording, or the copy. With copyright, authors are able to seek the richest reward the public will accord with its dollars. The key to this exercise of copyright is contractual freedom, for both the author and the public.

So, the copyright statute embodies the underlying principles of the Constitution -- freedom, risk, and reward for merit as determined by the public's choice, i.e., the consumer's taste expressed by use of his or her money.

This is what has been called:

> ... the harsh but free system of enterprise that grew up in England and America. Under this system authors are free to write and live by writing if they can manage to command the attention of a large enough segment of the populace to make the dissemination of their works even marginally profitable. 1/

But, because freedom of creative expression is central in our society, the economic component of that freedom -- copyright -- was and is a creature of the 18th and 19th centuries. Because copyright arose in connection with print, the live stage or concert hall, some special problems have emerged in preserving these principles in a new technological environment.

This century has put great stresses upon the integrity and completeness of performance rights in copyrighted works. The adaptation of copyright rules to technology began with piano rolls and jukeboxes, then motion pictures, broadcasting, sound recordings, and television. Cable television is simply the next in line.

1/ Ringer, B. Two hundred years of American Copyright Law 130. [reprinted in] Two hundred years of English & American Patent, Trademark & Copyright Law. 1977. American Bar Center.

In the main, technology has benefitted creators and consumers: entertainment and instruction that was once experienced outside the home has been brought into that setting. But, there's a practical problem: while it is easy to get a movie out of the theatre and into a living room, it is hard to get the box office in as well; and the box office has got to be there in some way for the creative incentive to operate.

For many years, the copyright system adapted well to technological issues: should broadcasters be liable for performances sent to houses in the same way as a concert promoter is liable? Do grants of motion picture rights include television? The phonograph took the concert out of the hall and put it into the home; but one still had to buy records, after all. Then radio broadcasting seemed as if it would erode the new market for records. However, the courts took account of changes in marketing and expanded the 19th century concept of performance as a live presentation to include broadcasting. They adjusted statutory rights in accordance with the aims of the statute to protect composers, lyricists and music publishers. But adaptation of the law, particularly an old law, has its price when courts do the adaptation. Cardozo said that rules of law tend to expand to the limits of their logic. Between 1920 and 1976, the limits of the 1909 law had been reached and passed in many areas.

And so, after 20 years of careful and sometimes controversial work, the Congress adopted a new copyright law in 1976. In several important areas the statute intervened in the normal market mechanism for distributing copyrighted works, by establishing compulsory licenses. The question today is whether the changes since 1976 offer the possibility of removing that intervention of the cable television compulsory license -- and the regulatory apparatus it involves -- and permit substitution of a marketplace determination where the consumer would sort out and determine how he or she wishes to regulate what will be seen by signifying approval or disapproval. We think the possibility exists.

Cable television and broadcasting are not the only technologies which will compete for programming. Direct broadcast satellites, low-power television, multi-point distribution service, subscription television, videodiscs and cassettes will all be searching for their own niche in the telecommunications marketplace. The copyright system, when permitted to function as intended by the Constitution, should facilitate fair competition in the distribution of program services.

In short, the consumer, by how he or she spends money, will tell us what programs -- i.e., what copyrighted works -- he or she wants to see. More, because of his or her choice among the new technologies, the consumer will also tell us how he or she wants to see them.

3. History and Analysis of the Cable Provisions of the Copyright Act of 1976

In its 1971 Report on Cable Communications, the Sloan Commission likened the ultimate significance of cable to that of the printing press and the telephone.[1/] The cable television industry is now fulfilling part of its predicted potential and is entering new frontiers in the delivery of telecommunications services. However, the fact that it has taken more than one quarter of a century for this "new" technology to become a viable national telecommunications service deserves further attention.

A critical examination of government regulation in the area of cable television finds a labyrinth of various forces with the FCC, the OTP, the courts, and Congress, often moving in opposite directions in their attempts to reconcile the potential benefits of cable development with somewhat parochial interests in over-the-air television broadcasting. An important component in this legal patchwork has been the issue of cable television's copyright liability for its retransmission of television programming.

1/ On the Cable, Report of the Sloan Commission on Cable Communications at 3 (1971) [hereinafter cited as Sloan Report].

The period before 1976 was marked by great uncertainty as to how best to fit cable television into existing communications policies and law and the copyright marketplace. It is fair to say that this uncertainty, reflected in early FCC efforts to balance communications policy interests, had the perhaps unintended effect of delaying cable development and almost stopping it dead in its tracks.

The history of this period provides a vivid example of regulation gone wrong. It is too intricate to recount in detail here, but may be summarized:

- Until 1972, FCC regulations significantly impeded the growth of the cable television industry. It was generally believed by the FCC that the continued expansion of cable television would seriously interfere with the advertising revenue base of over-the-air television broadcast stations, particularly those transmitted via ultra-high frequency wavelengths (UHF stations). In 1972, the FCC reconsidered and relaxed its protective regulations to allow greater cable carriage of distant television signals. Such carriage was, however, subject to FCC rules providing exclusivity protection for certain network and non-network programming.

- Since 1972, a cable system's selection of television signals to retransmit has been dependent, in part, on its geographic location, its size, the size of its local market and previously authorized or permitted (grandfathered) rights. Generally, a cable system chooses its signal carriage complement from network, independent and noncommercial educational stations. Commission rules in effect until June 29, 1981, required cable carriage of all local and "significantly viewed" television stations upon the insistence of the individual stations concerned. Depending upon the market size of its community, a cable system was permitted to carry, at its option, a specified number of additional "distant" stations. [More liberal signal carriage regulations have been adopted by the Commission. These regulations will be discussed later in this statement.]

The legal relationship between copyright and cable television secondary transmission activity essentially derives from two cases decided by the Supreme Court in 1968 and 1974. In these cases, the Supreme Court was called upon to determine the applicability of the 1909 copyright law to interception and simultaneous retransmission of copyrighted programs without the consent of the copyright owner. In the first of these cases, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), the Supreme Court held that, under the 1909 copyright law, cable retransmission of local broadcasts was not a "performance" of the copyrighted work carried on the signal and thus was not an infringement of copyright. In Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974), the Supreme Court extended this holding to cable retransmission of distant signals not otherwise in the community of the cable system. The Court also concluded that a cable system's freedom from copyright liability for the retransmission of television broadcast signals was unaffected by such other activities of the cable system as program origination, advertising, and reception of distant television broadcast signals by microwave interconnection.

In both decisions, the Supreme Court was at pains to note the inability of the 1909 copyright law to accommodate modern technological developments in the creation and dissemination of intellectual property. The Court, however, urged Congress to resolve the issue of copyright liability for retransmissions by cable systems in the Copyright Revision Bills pending before Congress. Justice Stewart, speaking for a 6-1 majority (Justice Fortas dissenting) in the Fortnightly decision, said:

> We have been invited by the Solicitor General in an amicus curiae brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. 1/

In Teleprompter, Justice Stewart, speaking for a 6-3 majority (Justice Blackmun dissenting in part and Justices Douglas and Burger dissenting), repeated his admonition to Congress:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than a half century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulations of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress. 2/

1/ Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401-402 (1968).

2/ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 414 (1974).

> The continuing legislative deadlock over cable retransmission remained unresolved until April 13, 1976, when the "two industries most directly affected by the establishment of copyright royalties for cable television systems", 1/ the National Cable Television Association and the Motion Picture Association of America, signed an agreement recommending compromise legislation. The cable provisions of the copyright law are based directly on this agreement. The centerpiece of the cable provisions is the section 111 compulsory license.

Under the federal copyright statute, authors generally enjoy certain exclusive rights to control, market, and reap the financial rewards from their creations. Compulsory licenses are in derogation of this principle. In special circumstances, the copyright law has created compulsory licenses, giving certain users guaranteed access (provided certain procedures are observed) in exchange for assuring the author some remuneration for the use. 2/ The author relinquishes control over the work, as well as the right to have the market decide its value, in return for guaranteed payment each time the work is exploited in a manner permitted by the statutory license.

In the case of cable retransmissions, the Congress determined that compulsory licensing was warranted, stating:

> In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program

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1/ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976) [hereinafter cited as 1976 House Report].

2/ The 1976 Copyright Act creates compulsory licenses in four cases: for the performance of recorded nondramatic music on jukeboxes (17 U.S.C. §116); for the production of phonorecords of previously published and recorded nondramatic music (17 U.S.C. §115); for the cable retransmission of broadcast radio and television programs (17 U.S.C. §111); and, for the use by public broadcasters of published nondramatic music and published pictorial, graphic, and sculptural works (17 U.S.C. §118).

> material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the F.C.C. 1/

In order for a cable system to be eligible to claim the benefit of the license, it must comply with certain requirements set forth in section 111:

1. With some exceptions for cable systems located outside of the continental United States, retransmissions under the license must be simultaneous;

2. Cable systems are prohibited from intentionally altering the content of a retransmitted program, except in specific limited situations pertaining to television commercial advertising research. Nor may they delete or alter commercial advertising or station announcements;

3. Cable systems may retransmit only those signals which they are authorized to carry under the signal carriage and program exclusivity rules of the Federal Communications Commission;

4. Cable systems are prohibited from importing foreign television and radio signals pursuant to the compulsory licenses, with the exception of Canadian and Mexican signals receivable within limited zones along our borders, and "grandfathered" U.S. cable systems;

5. Cable systems must file and keep current Notices of Identity and Signal Carriage Complement and Statements of Account with, and pay their statutory royalty fees to, the U.S. Copyright Office.

Failure to comply with any of the above conditions could invalidate the compulsory license and render a cable system's retransmission activity subject to full copyright liability.

1/ 1976 House Report at 89 (1976).

Thus, under the compulsory license, cable systems do not negotiate for retransmission rights and do not pay royalties directly to any copyright owners. Instead, statutory royalties are paid to the Copyright Office. The requirements for filing Notices of Identity, Statements of Account, and royalty fees are not intended to serve as the basis for federal enforcement of the licensing scheme: they are a data base, of sorts, for copyright owners to use in assessing the liabilities and compliance of cable systems. After the Copyright Office deducts its administrative expenses under section 111, the collected royalty fees are then deposited with the United States Treasury for investment.

Under section 111(d)(5), copyright owners claiming royalties from secondary transmissions by cable systems are required to file annual claims with the CRT, created under Chapter 8 of the Copyright Act. The Tribunal then determines whether "there exists a controversy concerning the distribution of royalty fees." If none exists, the Tribunal distributes the available fees among the claimants. If, however, a controversy does exist, the Tribunal initiates proceedings "to determine the distribution of royalty fees." Under section 804, these proceedings must be concluded within one year.

While the Copyright Act does specify who is entitled to share in the collected moneys (generally, those copyright owners whose works have been included in cable retransmissions of distant nonnetwork television or radio programming), it does not establish clear ways of determining how much of the royalty pool any particular claimant should receive. The 1976 House Report notes that "it would not be appropriate to specify particular, limiting standards for distribution. Rather ... the Copyright Royalty [Tribunal] should consider all pertinent data and considerations presented by the claimants." 1/

1/ 1976 House Report at 97.

4. Experience of the Copyright Office and the Copyright Royalty Tribunal Under the New Law

In the months following January 1, 1978, the effective date of the compulsory licensing provisions of the Copyright Act, the Copyright Office issued final regulations governing procedures for submission by cable systems of notices of identity and signal carriage complement and Statements of Account. In addition, the Office issued Statement of Account forms to assist cable system operators in submitting the required information and calculating their royalty fee payments. A Licensing Division was created within the Copyright Office to review, among other things, the notices, statements, and royalty fees submitted by cable systems.

We have now been through six semi-annual accounting periods since the new law became effective. The following table summarizes our experience through June 1, 1981:

Accounting Period	Total Statements of Account Recorded	Royalties Deposited	Total Royalties Available for Distribution 1/
January to June 1978	3,861	$6,164,789	7,970,000 (distributed on May 8, 1981)
July to December 1978	3,864	$6,699,442	8,463,368 (available as of September 3, 1981)
January to June 1979	3,928	$7,522,250	$18,615,482 (as of June 30, 1981)
July to December 1979	4,070	$8,257,135	
January to June 1980	4,168	$9,519,619	$20,371,861 (approximate as of August 31, 1981)
July to December 1980	4,312	$9,544,888	

1/ These figures represent both semiannual accounting periods in given year and take account of (1) interest income paid, or to be paid, as of date indicated; (2) deduction of operation costs; (3) refunds for overpayments; (4) face value of securities purchased; and (5) balance on hand.

In addition to its royalty distribution responsibilities, the CRT has authority to adjust the cable royalty rates in three situations:

(a) A periodic five-year review proceeding: Section 801 provides for a periodic rate review, beginning in 1980 and occurring every fifth year thereafter. Any adjustments in the royalty rates resulting from such review must be based only upon monetary changes from inflation or deflation, or changes in the average rate charged by cable systems for basic retransmission services and are subject to other constraints.

(b) Increase by FCC of the number of distant signals permitted: If the FCC changes its rules to permit the importation of more distant signals than those allowed on April 15, 1976, any party can petition the Copyright Royalty Tribunal to request a rate adjustment proceeding and, subject to certain constraints, the Tribunal can adjust the rates applicable to those additional signals.

(c) Change in FCC exclusivity rules. If the FCC changes its rules on syndicated or sports program exclusivity after April 15, 1976, a rate adjustment proceeding can be instituted. The statute provides that "any such adjustment shall apply only to the affected broadcast signals carried on those systems affected by the change." 1/

1/ 17 U.S.C. §801(b)(2)(C).

These figures indicate substantial compliance with filing requirements by the cable industry: in fact, more royalty fees are being generated than were originally estimated.[1/] For the last three calendar years, the Licensing Division determined its administrative costs to be $215,311 (1978), $273,218 (1979) and $323,950 (1980). These sums have been deducted from the royalty pots as provided by section 111(d)(3) of the Act.

Section 801(b)(3) of the Act directs the CRT to distribute to copyright owners those royalty fees deposited with the Copyright Office under section 111. During 1980 the Tribunal conducted proceedings in connection with those royalty fees deposited by cable systems for secondary transmissions occurring in 1978. On July 30, 1980, the Tribunal announced the following allocation of cable royalties to specific groups of claimants:

> "1. Motion Picture Association of American, Christian Broadcasting Network, and other program syndicators — 75%.
>
> 2. Joint Sports Claimants and N.C.A.A. — 12%.
>
> 3. Public Broadcasting Service [for all purposes] —5%.
>
> 4. Music Performing Rights Societies — 4.5%.
>
> 5. U.S. and Canadian Television Broadcasters — 3.25%.
>
> 6. National Public Radio — .25%." [2/]

This allocation was based upon the following primary factors:

> "1. The harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems.
>
> 2. The benefit derived by cable systems from secondary transmission of certain copyrighted works, and
>
> 3. The marketplace value of the works transmitted." [3/]

Other considerations included the

> "quality of copyrighted program material, and time-related considerations." [4/]

1/ Based on figures provided at the time the law was enacted, Congress estimated annual receipts of $8,700,000. See 1976 House Report at 91.
2/ 45 Fed. Reg. 50621 (1980).
3/ Id.
4/ Id.

In reaching its decision, the CRT determined that:

1. Royalty fees shall not be allocated to broadcaster claimants for the secondary transmission of the broadcast day as a compilation;

2. Royalty fees shall not be allocated to copyright owners of cartoon characters;

3. Royalty fees shall not be allocated to broadcaster claimants who have acquired rights to syndicated programming in a market, which rights are exclusive against other broadcasters in that market, when the syndicated programming is included in distant broadcasts which are retransmitted into the broadcasters market;

4. Royalty fees awarded by the Tribunal for the secondary transmission of certain sporting events shall be distributed to the sports claimants except when contractual arrangements specifically provide that such royalties shall be distributed to broadcaster claimants;

5. The Public Broadcasting Service is not a network for purposes of 17 U.S.C. §111; and

6. The record made in the proceeding provides no basis for an allocation of royalty fees to commercial radio. 1/

On September 23, 1980, the CRT issued its final determination reflecting its decisions announced on July 30, 1980. The final determination did, however, include one modification: The award of .25% to National Public Radio was withdrawn and the allocation to the Public Broadcasting Service was increased to 5.25%. 2/ The CRT also announced its administrative costs to be $35,000, leaving approximately $14.74 million available for distribution.

The 1978 royalty distribution decision by the CRT has been appealed to the United States Court of Appeals by the National Association of Broadcasters, (NAB), the Commissioner of Baseball, the National Basketball Association, the National Hockey League, the North American Soccer League, the Canadian Broadcasting Corporation, National Public Radio, and ASCAP. On October 29, 1980, pursuant to a

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1/ Id.
2/ 45 Fed Reg. 63042 (1980).

motion by the NAB, the CRT stayed distribution of all cable royalty fees collected for 1978.[1/] This order was rescinded on November 25, 1980. After receiving proposals from the claimants concerning the scope and terms of a final order providing for partial distribution of the 1978 cable royalties, the Tribunal ordered a 50% partial distribution effective April 16, 1981.[2/] However, on April 13, 1981, the NAB asked the CRT to delay even the partial distribution of fees, so as to permit NAB to appeal in court. This request was granted by the CRT, with the proviso that, if a court-ordered stay in NAB's behalf had not been granted by April 30, 1981, the partial distribution of royalties would proceed as ordered. The Court of Appeals denied the NAB stay request and the CRT proceeded with the 50% partial distribution on May 8, 1981.

On July 7, 1981, the Tribunal began its proceedings to distribute royalty fees deposited by cable systems for secondary transmissions occuring in 1979.

During the past year, the Tribunal also conducted its first cable rate adjustment proceedings to reflect monetary changes from inflation or deflation, or changes in average rates charged by cable systems.

On December 17, 1980, the CRT announced that, "commencing with the first semiannual accounting period of 1981 and for each semiannual accounting period thereafter, the royalty rates established by 17 U.S.C. §111(d)(2)(B) shall be as follows:

1. .817 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service areas of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (a)(2) through (4);

2. .817 of 1 per centum of such gross receipts for the first distant signal equivalent;

3. .514 of 1 per centum of such gross receipts for each of the second, third and fourth distant signal equivalents; and

4. .242 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter." [3/]

1/ 45 Fed. Reg. 71641 (1980).
2/ 46 Fed. Reg. 21637 (1981).
3/ 46 Fed. Reg. 897 (1980).

The CRT also increased the gross receipts limitations established in sections 111(d)(2)(C) and (D) of the Act from $80,000 and $160,000 to $107,000 and $214,000, respectively.[1/]

The Tribunal's decision in this proceeding has been appealed by representatives of both the cable and program supply industries.

5. FCC Rule Changes Affecting Cable Television and Prospects for Further Deregulatory Measures

a. FCC Rulemaking on Distant Signal Limitations and Syndicated Program Exclusivity Rules.

In 1976 the FCC initiated a formal inquiry to review the purpose, effect, and desirability of the syndicated program exclusivity rules. This was followed by a similar proceeding to review the distant signal carriage rules. These proceedings, now complete, suggest that while elimination of the FCC's distant signal rules would not have any significant impact on television service, it would provide opportunities for greater program diversity and competition. Similarly, the Commission's study found little evidence that elimination of its syndicated program exclusivity rules would threaten the supply of television programming.

As stated earlier, the 1972 cable rules adopted by the FCC were intended to operate in conjunction with the cable television provisions of the copyright legislation then under consideration by Congress. Under this bifurcation of responsibilities, it was understood that the Commission would control signal distribution by cable systems as part of a national allocations policy and would protect some contractual "exclusive rights" while the copyright law would prescribe the degree and nature of cable operators' liability for the use of copyrighted programming. The Register of Copyrights testified before the House

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1/ 46 Fed. Reg. 897 (1980).

Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice in 1979, that in enacting the compulsory license provisions, Congress

> ... recognized the need for flexibility in FCC regulation of cable, but they did not anticipate that the Commission would eliminate entirely either the distant signal or the syndicated exclusivity rules. Piecemeal revision of the regulations, rather than outright repeal, was clearly what Congress had in mind.
>
> Congress entrusted to the Copyright Royalty Tribunal the task of adjusting royalty rates if the FCC rules were changed, but it did not expect the CRT to have to cope with the rates in a completely deregulated situation. On this assumption, it placed certain constraints on the authority of the Tribunal to adjust rates to meet a changed regulatory environment. Had Congress anticipated complete deregulation, it is doubtful whether those constraints would have been imposed. 1/

Nonetheless, on July 22, 1980, the FCC adopted final regulations which eliminated both the distant signal and syndicated program exclusivity rules. 2/ On June 16, 1981, the Commission's decision was upheld by the U.S. Court of Appeals for the Second Circuit in Malrite T.V. of New York Inc. v. F.C.C. 3/ The fallout generated by the Commission's decision continues into these hearings.

b. Further Changes in FCC Rules Anticipated

The elimination by the Commission of its distant signal limitations and syndicated program exclusivity rules is intended to provide an opportunity for greater diversity and competition both in the economic marketplace and in the marketplace of ideas. We may find that the recent FCC action represents the tip of the iceberg.

Over the last several years, the Commission has conducted an extensive inquiry into whether the major commercial television networks have engaged in

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1/ Copyright Issues: Cable Television and Performance Rights Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess. 22 (1979) [hereinafter cited as 1979 Hearings].

2/ Report and Order in Docket Nos. 20988 and 21284, F.C.C. 2d 45 Fed. Reg. 60185 (1980).

3/ Malrite T.V. of New York, Inc. v. F.C.C. (2nd Cir., Docket No. 80-41200.)

practices that are anti-competitive, hamper the judgement of affiliated stations, or otherwise frustrate the purposes of the Communications Act ("Network Inquiry"). A critical part of this inquiry has been the review of FCC policies that may affect the prospects for entry by additional networks. As a result of this inquiry, the FCC staff recommended to the Commission that it actively seek to remove existing regulatory barriers to entry by additional networks:

> If these regulatory barriers are eliminated, we are confident that competition among networks can provide effective solutions to problems that heretofore have been addressed unsuccessfully through the regulation of network behavior. This competition cannot be achieved, however, without sensible regulation that denies firms undue advantages and prevents monopolization. 1/

Included among the specific recommendations made by the Network Inquiry Special Staff to the Commission were the following:

1. Repeal of the rule prohibiting network ownership of cable systems, 47 C.F.R. §76.501(a)(1); 2/

2. Adopt proposals to increase the amount of spectrum space allocated to MDS to make possible between 8 to 11 MDS channels per market (rather than the present limit of 1 channel per market; 3/

3. Authorize experimental direct-to-home broadcasting satellite systems and place no limits on the number of systems that will be authorized nor any restriction on the services to be offered or the methods of finance to be employed; 4/

4. Subject equally-situated networks to equal regulatory restrictions; 5/ and

5. Proceed expeditiously to adopt the proposals for VHF drop-ins and the licensing of low power television stations. 6/

1/ Recommendations of the Network Inquiry Special Staff, Federal Communications Commission, 14-15 (1980).

2/ Id. at 6.

3/ Id. at 4-5. MDS--an acronym for "multi-point distribution service"-- is a closed circuit common carrier microwave system transmitting a signal addressed to multiple fixed receiving points. At present, the financial mainstay of the MDS industry is pay television marketers who lease MDS time to provide motion picture and other programming.

4/ Id. at 5. On April 21, 1981, the Federal Communications Commission accepted for expedited consideration a plan by Comsat to begin direct-to-home broadcast satellite service. For an account, see New York Times, April 22, 1981 at D1.

5/ Id. at 15.

6/ Id. at 3.

These recommendations have already resulted in several significant developments: first, CBS has asked the Commission for a waiver to permit it to own and operate cable systems which, nationwide, would serve no more than 90,000 subscribers. CBS' request has been supported by NBC. Second, ABC filed a petition with the Commission seeking an outright elimination of the FCC's cross-ownership rules prohibiting network ownership of cable systems. Third, the Turner Broadcasting System (TBS) has asked the Commission to remove its "must carry" requirements. These "must carry" requirements, interwoven into the fabric of the copyright compulsory license, require cable systems to carry the signals of all television broadcast stations within the local service area of the cable system.

It is not for the Copyright Office to address these fundamental issues of communications policy. We can, however, suggest that deregulation in the communications arena, without accompanying deregulation in the program acquisition marketplace, cannot achieve the Network Inquiry Special Staff's goals.

With respect to the TBS request, the supportive comment filed on behalf of 68 cable systems (including UA-Columbia Cablevision Inc. and Daniels & Associates Inc, representing approximately one-half million subscribers) is of interest. A significant portion of this group's arguments rests on free-market principles:

> ...to the extent that cable systems decide not to carry local stations or that subscribers choose not to view those stations, these are consumer choices made in a free marketplace context. 1/

* * *

1/ Joint Comments filed on behalf of 68 cable systems In the Matter Of: Petition for Rulemaking to Delete the Cable "Must Carry" Rules, File No. RM-3786, 2 (Dec. 24, 1980).

> The formerly protectionist attitude of the Commission toward broadcast stations has no foundation in contemporary reality -- the reality of proliferation by cable. As that reality takes hold, the Commission has a duty to ease its restrictions accordingly, and to let marketplace forces control where they did not previously exist. 1/
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> * * *
>
> It is clear that, in mandating carriage of certain broadcast stations, the Commission deprives cable operators of the right to use those channels in the open marketplace for more desirable and more lucrative services. 2/
>
> * * *
>
> ...the Commission's "must carry" rules, which mandate use of certain cable channels for carriage of particular stations (upon demand of the stations) impair significantly and directly, the value of Respondent's business. These rules defy marketplace factors and consumer preferences, violate the First and Fifth Amendments of the Constitution, and are contrary to the public interest. 3/

With specific reference to the Fifth Amendment, the group of 68 cable systems added:

> The mandated carriage of television signals -- the governmentally imposed use of cable TV channels -- is a taking without [just] compensation. 4/

This group thus recognizes not only the economic value of property rights but also the efficiency and equity of decision-making through marketplace forces, without government intervention. Protectionist arguments to support the compulsory license have no foundation in contemporary reality -- in what the quoted statement characterizes as "the reality of proliferation by cable" and in continued deregulation by the FCC.

6. Growth of Satellite Distribution Has Led to Greater Program Diversity

Cable television's attraction has been its ability to offer to subscribers a greater variety of motion pictures, sports and syndicated shows than

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1/ Id. at 4.
2/ Id. at 14.
3/ Id. at 15.
4/ Id. at 10.

is generally available over-the-air within the system's local community. Until recently, this diversity was principally achieved by increasing the number of televised broadcast signals either through over-the-air reception by means of a large central antenna or by microwave relay of distant signals. Natural limitations in over-the-air reception and the high transmission costs of microwave relays meant that distant signal carriage was often limited to stations in relatively close proximity to the cable system. The constraints of technology and cost practically precluded national distribution.

At the same time, distribution of motion pictures and other programming through pay cable origination was in its infancy. Home Box Office, then and now the major pay programmer, initially distributed its motion pictures through what now look like "stone age" methods: bicycling tapes from system to system or microwave relays. And the simplicity of distribution reflected the relatively small size of the market being served: As Chart 1 indicates, 832,470 cable subscribers, representing less than 8% of all cable subscribers, received pay cable as of September 1976.

In creating the compulsory license, Congress recognized cable's demand for retransmitted television signals in order to offer its subscribers a wider array of programming. It was expected that the compulsory license would encourage cable growth and benefit the viewing public through program diversity.

Unlike microwave relay and over-the air reception, satellite technology provides an economical means for nationwide distribution of high-quality signals. Recent technological developments -- coupled with FCC rule changes: (1) allowing the use of smaller, much less expensive earth stations;[1/] (2) authorizing resale common carriers to utilize satellites for the delivery of distant television signals to cable systems;[2/] and (3) eliminating the FCC pay television anti-siphoning rule[3/] -- have fostered an array of cable satellite distribution networks. These

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1/ 62 FCC 2d 901 (1976).
2/ 62 FCC 2d 153 (1976).
3/ Home Box Office Inc. v. FCC, 567 F. 2d 6 (2d Cir. 1977).

networks are changing the character of cable television from a passive retransmission service to a direct alternative to traditional broadcast distribution. The following description of the new Cincinnati cable system constructed by Warner-Amex Cable Communication provides a vivid example of this transformation:

> The Cincinnati system will use 46 of its 60 channels at the start, an indication of how rapidly the cable industry has grown. When Qube [Warner-Amex's two way interactive cable system prototype] was started in Columbus in 1977, it did not carry a single satellite-delivered national program. The Cincinnati system will offer more than a dozen at the start, including services devoted exclusively to news, children's programs, movies and the performing arts.
>
> It will also offer four separate movie-oriented pay services - Home Box Office, Showtime, the Movie Channel and Front Row. According to a company official, new subscribers are taking an average of two pay services in addition to the basic service. In addition, individual first-run movies will be offered over four channels at a one-time charge, usually about $3. With that range of choices, it will be significant to see what mixture of services subscribers buy, and how much they are willing to spend for entertainment. 1/

Two general types of program services are presently available via satellite: (a) retransmitted over-the-air broadcast stations; and (b) cable origination networks.

a. Retransmitted Over-the-air Broadcast Stations.

(1) The Superstation Phenomena. Because a cable system's satellite transmission expenses are the same whether the signal originates from a nearby distant community or from across the nation, an economic incentive exists for the growth of what are commonly termed "superstations". As you will note from Chart 2, the signals of three independent television stations, WTBS - Atlanta, WGN - Chicago, and WOR - New York, and one radio station, WFMT FM - Chicago, presently are distributed nationally to cable systems via satellite. According to Chart 3, the three television superstations reach approximately 56%, 26% and 16% of

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1/ N.Y. Times, May 7, 1981 at C18.

all cable homes respectively. The program schedule of these superstations generally is comprised of movies, sporting events and syndicated shows. The stations are particularly attractive to cable system subscribers and have caused a partial centralization of distant signal carriage.

While some stations clearly program their broadcasts with cable in mind, other stations claim to be unwilling participants. Cable systems have argued that the originating station's permission for this national distribution is not needed for cable carriage because of the availability of the compulsory license. These unwilling superstations (a misnomer in this situation: they are not superstations; only cable makes them so) contend that they may soon be unable to compete for the shows they desire since they may have to pay higher rates to their suppliers, attributable to the increased viewership by distant cable subscribers, without income derived from such retransmissions. The alternative is unacceptable: such stations, because of factors unrelated to marketplace values, may be forced to acquire what they and their viewers may consider inferior programming.

Other superstations, such as WTBS - Atlanta, welcome and exploit their new status. They have sought advertising revenue on a nationwide basis in response to their expanded audience. To this date, however, the efforts of WTBS in acquiring nationwide advertising have met with less than a total success.

During hearings before your Subcommittee in June, the issue of market domination by broadcasters in the acquisition of programming was addressed by two representatives of the National Cable Television Association (NCTA). Monroe M. Rifkin, Chief Executive Officer of American Television and Communications Corp. (ATC), a subsidiary of Time, Inc., and Chairman of the NCTA Committee on Copyright noted:

> There is plenty of incentive for the broadcast and program industries to deny cable access to syndicated television product ... It has been demonstrated in recent years by the refusal

of many program suppliers to provide programming to WTBS. 1/ Whether or not this was true in the past is open to argument. The fact that market domination by broadcasters to prevent licensing of programming to WTBS is not a serious problem today, however, was underscored by Thomas E. Wheeler, president of the NCTA:

> Another indication that the marketplace has adjusted to the compulsory license is the acceptance of superstations by the program supply industry. To avoid widespread cable distribution, program suppliers can restrict their sales to superstations. That is exactly what happened to WTBS when it emerged as a superstation in 1977. All but one of the major program syndicators refused to sell to WTBS. Now, however, the situation has changed dramatically as all but one of the major syndicated program companies have sold programs to WTBS. We are happy to report that the last hold-out is currently negotiating with the superstation. 2/

(The ability of cable satellite networks to acquire programming, which is described in detail later in this section of the statement, provides another example of how the program supply and cable industries have been able to negotiate in the marketplace for programming.)

Mr. Wheeler went on to note that program suppliers "have simply raised rates on programs sold to superstation WTBS to reflect the increased cable audience coverage." 3/ It has been suggested that these increased payments should offset any harm due to cable superstation carriage. If these higher payments corresponded to freely negotiated rates which would permit WTBS to authorize cable retransmissions, a compulsory license for its carriage by cable systems would be both unnecessary and unfair. On the other hand, if these new rates do not fully compensate at marketplace values for added cable coverage, the program suppliers may still incur financial losses through the cable importation. In any case, why should an unwilling superstation, unlike WTBS, be forced to pay higher program rates for added cable coverage it may not desire to reach?

1/ Statement of Monroe M. Rifkin before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 10-11 (May 21, 1981).
2/ Statement of Thomas E. Wheeler before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 16 (May 21, 1981).
3/ Id.

(2) The FCC's "Intuitive" Conclusion. Earlier in my statement I said that in the 1960's, the FCC had "intuitively" concluded that cable distant signal importation harms independent television stations located within the market served by the cable system. This intuitive assumption has been discounted by some over the last few years, most notably during the proceeding in which the Commission eliminated distant signal and syndicated program exclusivity rules. Now, new evidence indicates that this discounting may have been premature.

Late last year, the A. C. Nielsen Company released its first Home Video Index report on television viewing in basic cable (excluding pay) and non-cable homes. The report indicated that local independent and public television stations are viewed less frequently in basic cable homes than by non-cable families. Summarizing its findings, Nielsen reported that "the availability via cable of distant station signals, including 'superstations', may have the greatest impact on viewing patterns."[1/] Obviously, it is premature to draw any hard conclusions. Nielsen's findings do at least suggest that viewing of local independent stations may decrease in areas served by cable and that the FCC's first impressions should be examined further. A decrease in local station audience ratings is not necessarily detrimental to public welfare when it is dictated by viewer preferences. It is unfair, however, when it results from a governmentally imposed skewing of competition in favor of one distribution system over another.

(3) The Copyright Status of Satellite Relays. An integral part of the controversy surrounding superstation carriage is the possible exemption from copyright liability for the resale carriers that distribute television signals via satellite. Section 111(a)(3) of the copyright statute exempts from copyright liability secondary transmissions "by any carrier who has no direct or indirect control over the content or selection of the primary transmission or

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1/ Broadcasting, November 24, 1980, at 46.

over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cable, or other communications channels for the use of others..."

During her testimony before the House Judiciary Subcommittee in 1979, the then Register of Copyrights noted that Congress, in enacting section 111(a)(3)

> ...did not consider the then unanticipated activities of superstations and satellite relay services when it exempted traditional common carriers from copyright liability. In fact, the underlying policy reasons for compulsory licensing may well be inapplicable here, since the carrier may be in the position to act as a central agent in obtaining retransmission rights in the relayed programming. For this reason, your Subcommittee may wish to consider an amendment limiting the scope of section 111(a)(3) to exclude transmissions made to, by means of, or from a communications satellite system. 1/

In January of this year, the FCC proposed to deregulate domestic common carriers and resale carriers. 2/ This step was urged by copyright owners and broadcasters who believed that this change would support their argument that resale carriers are not exempt from copyright liability. In this context, I will note only that the carrier exemption of section 111(a)(3) stands on its own and does not necessarily cover the same entities defined as "common carriers" by the Communications Act of 1934.

The legal status of satellite resale carriers under the section 111(a)(3) carrier exemption may be clarified in lawsuits being heard in Syracuse, New York and Chicago, Illinois. Eastern Microwave Inc., which distributes via satellite the signal of WOR - New York, has asked the U.S. District Court in Syracuse for a declaratory ruling that delivery of the New York Mets baseball games broadcast on WOR does not constitute copyright infringement. In the second suit, WGN - Chicago has challenged the unauthorized distribution of its signal via satellite

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1/ 1979 Hearings at 23.

2/ In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, FCC Docket No. 79-252 (January 16, 1981).

by United Video.

In any event, I agree with the views of my predecessor and later in my statement suggest a possible approach to this question.

b. Cable Origination Networks.

Satellite distribution is producing a proliferation of cable origination networks not available at the time the copyright statute was enacted. Carriage of these origination networks by cable systems is not covered by the compulsory license; cable television systems negotiate and pay for the use of this programming in the marketplace.

Many knowledgable observers of the cable scene have noted that these new networks are the infrastructure for cable's expansion and deep penetration into the top 100 markets now served by over-the-air television service. As Monroe M. Rifkin told your Subcommittee,

> Cable is a highly capital and risk intensive business, which in the newer markets being built today must rely largely on cable originated programming to generate the major portion of its revenue base. 1/

That cable-originated programming, rather than secondary transmissions, is the driving force in the expansion of existing cable systems was also underscored by Mr. Rifkin:

> For example, our Savannah, Georgia system experienced stagnant penetration at about 28.1% for years despite our vigorous marketing efforts. The introduction of pay cable service caused an immediate increase of penetration to 35% — all of whom subscribed to basic cable to get pay. Similarly, when our Albany, New York system introduced pay service, our basic cable penetration jumped 5 percentage points. Quite clearly, most of the new subscribers in both places weren't very much interested in basic service by itself; otherwise they would have taken basic service long before pay was introduced. These examples are typical of the industry experience. 2/

1/ Statement of Monroe M. Rifkin before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 2 (May 21, 1981).

2/ Id. at 6.

Cable origination networks are excellent models for assessing how cable can develop under full copyright liability. Generally, cable origination networks are organized by "retail packagers" who negotiate for cable distribution rights to particular programs. Transaction costs are minimized by consolidating purchasing arrangements: rather than negotiating with individual copyright owners, the cable operator merely has to negotiate with the "retail packager" whose origination network the operator desires to carry.

There are several different types of cable origination networks presently distributed via satellite: (1) pay cable; (2) advertiser-supported origination networks; (3) non-commercial public affairs networks; and (4) religious networks.

(1) Pay Cable. Pay cable offers current motion pictures and other specialized programming to cable subscribers generally for a payment over and above the monthly basic service charge. Payment commonly is computed on a monthly basis for the pay network's entire monthly schedule. Some systems, however, charge on a "per program" basis. In addition, many cable systems now offer several different pay packages on a multi-tiered basis. For example, Alexandria Cablevision offers either HBO or Showtime for $18.95 per month (including basic service) or both pay services for $24.95 per month (including basic service). As you will note from Chart 3, the three largest pay cable networks are Home Box Office (HBO), Showtime and the Movie Channel. These program services are already in approximately 31%, 8% and 4% of all cable homes respectively.

Vertical integration of cable system and pay cable ownership is noteworthy. (See Chart 4.) The parent firm of HBO is Time, Inc., which also owns ATC, the nation's largest cable television multi-system operator (MSO) serving over 1,424,000 subscribers. Of these, 1,007,000 subscribers also purchase pay cable service. Showtime, the second largest pay service, is

jointly owned by Viacom (whose cable systems have 494,710 basic and 247,610 pay cable subscribers) and Teleprompter, the nation's second largest MSO with 1.3 million basic and 444,813 pay cable subscribers. Warner-Amex Cable Communications, jointly owned by Warner Communications and American Express Co., is the nation's fifth largest cable operator, serving 760,000 basic and 334,000 pay cable subscribers. Warner-Amex also owns the Movie Channel. Similarly, Spotlight is owned by Times Mirror, which also owns Times Mirror Cablevision, the seventh largest MSO serving 606,346 basic and 361,000 pay cable subscribers. Also noteworthy is the Rainbow Pay Service, jointly owned by three large MSO's: Daniels and Associates, Cox Cable, and Cablevision Systems. As of April 1, 1981, these three systems together served 1,261,518 basic and 845,685 pay cable subscribers.

Two pay cable services expected to commence operation later this year will concentrate on cultural programming. They are the Public Subscription Network (PSN), organized by the Public Broadcasting Service, and the Entertainment Channel, owned in part by RCA.

Chart 1 illustrates the headlong growth of pay cable over the last several years. Where pay cable captured the dollars of a mere 8% of all cable subscribers in 1976, it now garners income from an estimated 45%-47%. (See Chart 5). Furthermore, the estimates in Chart 5 project that pay cable, in the latter part of this decade, will be available to a substantial majority of all cable subscribers, which by then will equal an estimated 30% of all television homes.

(2) Advertiser-Supported Origination Networks

(i) Reasons for their Development. Advertising drives commercial television. Commercial broadcast stations charge advertising rates according to the popularity of, or viewer attraction to, all or part of a commercial station's programming. In the pungent slang of the trade, "broad-

casters sell eyeballs." Because of this, commercial broadcast stations and advertisers both have a vested interest in accurate audience viewing measurement services; and they pay handsomely for them.

In the past, the number of homes served by cable television has been too small to warrant special attention by advertisers. Cable television's recent dramatic growth and projections for its future growth have, however, led advertisers to reconsider.

In fact, there are several ways for advertisers and broadcasters to derive benefit from the burgeoning cable market. Some "willing" superstations have attempted to profit from the added audience by increasing advertising rates. Other entrepreneurs have created advertiser-supported satellite program origination networks geared directly to the cable market.

In the not-too-distant future, nationwide cable audience measurement will provide advertisers with accurate data to compare cable rate cards to those of commercial television and other media. This development should boost the prospects for advertiser-supported cable networks. Cable television, with its specialized programming, offers advertisers the opportunity to direct their messages to selected viewers, much like special interest magazines do today.

Many large advertisers, including Bristol-Myers, Anheuser-Busch, Sears, Roebuck and Company, General Electric, Pepsi-Cola, and Kellogg have already purchased commercial time on cable origination networks.

Robert Alter, president of the Cable Television Advertising Bureau, senses a "revolution" in the cable advertising industry. Mr. Alter endorses predictions like those recently made by analyst Paul Kagan, who estimates that total cable advertising revenue will rise from $45 million last year to $2.2

billion by the end of the decade.[1/] As a step toward fulfilling this prophecy, the advertising firm of Young and Rubicam recently announced that it will place more than $12 million worth of billings on cable for its clients. Indicating that this commitment merely represents a "start," Ira Tumpowsky, Vice-President and Group Supervisor for cable at Young and Rubicam, said that placement of the advertising "underscores" the agency's belief that 1981 will be "the year when cable television matured to the point where it could be considered along with any other media."[2/]

There are several types of advertiser-supported networks (see Chart 9): some offer their programming entirely free to cable systems; others are "hybrids," charging only a minimal payment to offset expenses presently not compensated for through advertising revenue; and one network has begun to pay cable systems for its carriage.

(ii) Advertiser-Supported Sports Networks; the Unique Problem of Televised Sports. Very early on, sports programming became an important factor in selling cable television subscriptions. Until recently, carriage of sports programming on cable was generally limited to retransmissions of local and distant television signals.

Unlike motion pictures and syndicated shows, sports programming is basically ephemeral: once a sporting event has taken place, it has little residual value for repeated uses. As with yesterday's newspaper, nothing is so old as a game whose final score is known. Thus the sports entrepreneur has only one shot with his or her sporting event.

Sports leagues argue that cable importation of currently "strong" teams on distant signals may undercut the home gate, the value of broadcast

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1/ New York Times, Feb. 24, 1981 at D21.

2/ Daily Variety, May 20, 1981, at 1.

rights, and fan loyalty for a team located in the same area as the cable system. Those effects could undermine the overall health of professional sports leagues.

Congress and the FCC have long acknowledged the special status of sports programming. They have done so by providing statutory and administrative protection in the form of antitrust exemptions[1/] and sports exclusivity rules.[2/] The FCC's sports exclusivity rules attempt to protect the interests of sports rights holders. The notification requirements of the rules are burdensome, however, and the rules themselves can produce anomalies. Consider the following examples:

> The FCC rules permit the cable importation of a local sporting event only if the event is also available on a local TV station. Other program distribution services within the area of the sporting event, (i.e., STV, MDS, and other local TV stations) are not permitted similar unauthorized use. However, assuming a local sporting event is available on a local TV station, the cable system is not required to retransmit the game solely from the local station but can rather import the same game from a distant station with different announcers, commercials, etc., thereby violating the exclusivity bargained for by the local TV station and the sports proprietor. As an example, assume that the New York Mets are playing the Atlanta Braves in Shea Stadium and the game is being televised in New York on WOR. A cable system located in New York is permitted, under the FCC rules and the copyright compulsory license, to retransmit the signal of WTBS, Atlanta, which is also carrying the game. The ability of the New York Mets and WOR to market the game in the New York area may be hampered by the dilution of their audience due to the cable carriage and consequent viewership by cable subscribers of the Atlanta station.

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1/ Pub. L. 87-331 (as amended) 15 U.S.C. § 1291-1293 (1975).

2/ 47 C.F.R. §76.67 (1975).

> A sports promoter of a prize fight to be held in the Houston Astrodome may desire to license the fight for over-the-air broadcast throughout the country excepting Houston (in order to protect the live attendance gate). The fight promoter, who is risking his or her own capital on the promotion, should be entitled to make this determination. Nevertheless, this decision may be frustrated by cable importation within Houston of a distant television signal broadcasting the fight. Although this event may be protected under the Commission's rules, a Houston cable system may conceivably carry the event through an "innocent" mistake in violation of the FCC rules without incurring any copyright liability beyond the compulsory license payment. The prospect of impairing the "live" gate for the fight may induce the promoter to transmit the fight either on pay cable, an "advertiser-supported" cable sports network, or into theaters located outside the Houston market. This decision could be detrimental not only to the television stations located outside Houston that are in competition with other program distribution services, but also to the audiences of these stations that may be deprived of viewing the event.

Allegations of FCC rule violations are not uncommon. Recently, the San Francisco Giants filed a petition with the Commission asking that several cable systems in the San Francisco area owned by Telecommunications Inc., Viacom and Castro Valley TV, be fined for carrying eight Giants' home baseball games with the Atlanta Braves via retransmissions of WTBS, Atlanta. Despite the Giants' contention that the cable systems were properly notified of the Giants' exercise of their sports exclusivity rights, these cable systems apparently retransmitted the games. 1/

(iii) Sports Availability on Cable Originations. Cable television operators have historically feared that copyright owners would be unwilling to grant licenses for cable transmission, thus necessitating cable retransmission. Whether or not this was true in the past is debatable. Today, however, cable television's success in direct marketplace negotiations with sports rights holders disproves the unwilling-to-license contention.

1/ For an account of this petition, see Broadcasting, February 23, 1981 at 70 and Cablevision, February 23, 1981 at 12.

As Chart 3 illustrates, two of the most popular advertiser-supported origination networks are ESPN and the USA Network. Each of these are "hybrid" type networks with revenues coming both from advertising and cable system payments. 1/ ESPN transmits sports programming 24 hours-a-day; the USA Network includes sports as a major segment of its schedule. Both ESPN and the USA Network have bargained with sports rights holders for the cable transmission rights to many sporting events — the NCAA, North American Soccer League, National Basketball Association, National Hockey League, Major League Baseball and professional tennis. The last column of Chart 3 indicates that USA and ESPN program services are already available to approximately 43% and 36% of all cable subscribers respectively. Furthermore, the "Percent Change" column demonstrates a phenomenal rise in subscribership during the period of June 1980 through February 1981.

In addition to the sports diversity provided by ESPN and the USA Network, many individual baseball teams, including the New York Yankees, New York Mets, Los Angeles Dodgers, Philadelphia Phillies, Pittsburgh Pirates and Chicago White Sox, have negotiated agreements with cable television and STV systems for the carriage of many of their games.

Cable is aggressively moving to satisfy the insatiable American appetite for sports. Its widening success belies generally the need for a compulsory license to supply sports programs.

(iv) Additional Advertiser Supported Networks. Cable advertiser-supported networks also offer other types of diverse programming. Three such services, Cable News Network (CNN), Satellite Program Network (SPN), and Spanish International Network (SIN), each have distinctive characteristics.

1/ Chet Simmons, Chief Executive Officer and President of ESPN recently said in Cablevision (May 11, 1981 at 40) that he doesn't think ESPN will need a dual revenue stream and expects advertising to take over for system tithing of about 4 cents per home.

The Cable News Network, like WTBS - Atlanta, is part of the Turner Broadcasting System. It provides what has been lauded in the industry as an "innovative" 24 hour-a-day news service which now reaches approximately 25% of all cable homes. As you will note in Chart 3, the number of homes receiving CNN has more than doubled between June 1980 and February 1981. CNN is a "hybrid" type network; in addition to receiving advertising revenue, CNN charges cable systems a fee ranging between 15 to 20 cents per subscriber per month.

The Satellite Program Network (SPN) offers programming of particular interest to women. Unlike the "hybrid" advertiser supported networks, SPN provides its signal to cable systems free of charge. Two other networks offering their program service for free are the Modern Satellite Network and ARTS. ARTS, which is part owned by ABC, Inc., is the first of several program services geared specifically to cable and owned by commercial television networks to begin transmission. In addition, three new networks, CBS Cable, Cinemerica, and Beta, all plan to offer their program services to cable systems without any payment.

One cable network that parallels the relationship between commercial television networks and their affiliated stations is the Spanish International Network (SIN). Commercial stations pay their affiliates for the added audience levels made available through affiliate carriage. Similarly, SIN, which transmits Spanish language programming, pays cable systems for its carriage at the rate of ten cents per month for each Spanish surnamed subscriber. The proposed UTV Cable Network, aimed at women and being developed jointly by UTV and Charter Publishing (publisher of the Ladies Home Journal and Redbook) also will pay cable systems for its carriage (See Appendix 1).

(3) Noncommercial Public Affairs Network. Two additional services, C-SPAN and the Appalachian Community Service Network, provide public affairs information to cable subscribers. Unlike CNN, which also provides public affairs information, these services operate on a non-commercial basis. C-SPAN

is of particular interest to Congress since it transmits live the proceedings of the House of Representatives. C-SPAN is presently available to roughly 36% of total cable homes.

(4) Religious Networks. There are presently four religion-oriented satellite services available to cable systems free of charge. The Christian Broadcasting Network (CBN) is the largest, being transmitted to more than 9 million cable homes.

c. Origination Services Have Altered Cable System Marketing Strategies.

When the copyright statute was enacted, cable systems generally transmitted all of their secondary transmissions to their subscribers for a single monthly "basic service" charge. The sliding-scale royalty schedule for the compulsory license, applicable to cable systems whose annual "basic service" gross receipts exceed $320,000, is keyed to this marketing technique.

The traditional marketing of secondary transmissions as "basic service," however, has been altered in two ways because of technological advances and the greater programming alternatives that are available via satellite distribution.

First, computer micronization has led to the development of "addressable" channel converters. These converters enable cable systems to offer their subscribers a wider range of program selection through different "tiers" of service, with each tier consisting of a specified number of channels, purchasable by subscribers at various increments of cost. For example, a cable system may include in its "basic service" all local and "near" distant signals, and offer a "satellite cluster" tier of programming for an added charge. Problems can arise when this cluster tier includes secondary transmissions (i.e., WTBS, WOR, WGN) as well as advertiser-supported origination networks (i.e., CNN, ESPN, USA Network). (Pay motion picture programming usually is included in yet another tier or multi-tiers of service.) This marketing

strategy, now established in several systems, may have the unintended effect of artificially reducing the "basic service" gross receipts base and the accompanying level of royalty payments made under the compulsory license.

Second, the profit potential of tiering and multi-pay services available via satellite distribution further strains the compulsory license mechanism. Cable systems are no longer being built or acquired for their present "basic service" revenues. Pay and other services are now the driving force. If you will refer to Chart 6, you will note that many MSO's are actively seeking franchises for new cable television systems to serve the major markets. The intense bidding for these franchises has caused many franchise applicants to offer "basic service" at a below-cost price or for free; this enhances their prospects of being awarded the franchise and they believe that "basic service" losses can be easily recouped through the tiering of other services.[1/]

Offering low-cost or free basic service causes an inappropriate devaluation of the "basic service" gross receipts base and the accompanying level of royalty payments made under the compulsory license. Although the Copyright Royalty Tribunal has authority under section 801(b)(2)(A) to deal periodically with the free or below-cost basic service, it is unclear whether the Tribunal or Copyright Office has authority to solve the range of problems that may be encountered through tiering. Furthermore, it seems likely that continual changes in cable marketing strategies would make any solutions determined by either the Tribunal or the Copyright Office obsolete before their practical application.

1/ For example, both applicants for the Boston, Mass. franchise are offering low-cost basic service. Warner-Amex has proposed to offer a basic service tier of 36 channels for $5.95 and has also promised a free 11-channel service to the elderly. Cablevision, Warner-Amex's competitor for the Boston franchise, has offered a basic cable tier of 52 channels for $2.00 per month. For a further account of below-cost and free basic service, see Technology + Economics, Inc., The Emergence of Pay Cable Television, Volume IV: The Urban Franchising Context, at 25 (1980) [hereinafter cited as Pay Cable Report].

d. Originated Services Lessen the Commercial Significance of Secondary Transmissions.

The growth of satellite origination networks also raises a fundamental question of whether a compulsory license covering all signals permitted under FCC rules is still warranted. As I have noted earlier, the trend towards origination programming appears crucial to the prospects for cable television growth in the major markets. The question of where unlimited secondary transmissions fit into the overall scheme of cable development has been raised by several prominent members of the cable industry:

Thomas E. Wheeler, president of the NCTA:

> ... FCC studies and cable industry experience have demonstrated that while distant signals are important to cable's consumer acceptance there is, nonetheless, a decreasing marginal value to each additional signal. One reason this occurs is because of the duplicated programming which makes independent stations look alike. 1/

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Stephen Effros, executive director of CATA:

> Cable's opportunities are limited only by the energies of the people who are operating the systems. Distant signal is not the name of the game anymore. It's a lot of other things. 2/

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Gustave Hauser, chairman of WarnerAmex Cable Communications, Inc.:

> The importance of distant signals has diminished because cable is acquiring a product of its own which is separate and specifically geared toward cable. 3/

1/ 1979 Hearings at 159 (statement of Thomas Wheeler).
2/ TVC, December 15, 1979 at 53.
3/ Cablevision, August 4, 1980 at 36.

Although at one time distant signal retransmissions may have been indispensable elements of cable television, the success of cable origination networks indicates that this is less and less so. As more cable origination networks commence operation, the value of distant retransmissions will further diminish. The most telling evidence on this point is found in the A.C. Nielson Company Report on Television 1981 [1/] which measures prime time viewing by cable subscribers where pay cable and advertiser supported cable programming is available. During each of the last three measurement periods, July 1980, November 1980, and February 1981, estimated viewing by these subscribers of pay cable and advertiser supported cable programming exceeded estimated viewing of all independent television stations (both local and distant) by margins of 3.2%, 1.7%, and 3% respectively. [2/]

Furthermore, the fact that these alternative sources of programming are acquired in the normal marketplace manner demonstrates the ability of copyright proprietors and cable television operators to do business, either individually or through middlemen packagers.

In light of these developments and assuming a compulsory license is to be retained in some form, your Subcommittee may wish to consider whether it is essential or appropriate to permit unlimited cable importation of distant television signals under the compulsory license.

7. Growth and Acquisitions Within the Cable Television Industry

a. "Mom and Pop" Cable System Ownership on the Decline.

The composition of the cable television industry has changed dramatically since passage of the copyright statute.

Since 1976, the number of basic cable subscribers has risen by an estimated 83% to roughly 19.7 million subscribers. (See Chart 5.) This number is expected to swell to approximately 45 million by the end of this decade, with a

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1/ Report on Television 1981, A.C. Nielsen Company (1981).

2/ Id. at 12. When calculated as a percentage of actual viewing, the figures rise to 5.3%, 2.2%, and 3.9% respectively.

substantial portion of growth coming in the major television markets. Between 1976-1979, pre-tax net income of the cable television industry has more than doubled from $57.7 million to $199.3 million (See Chart 8).

Until recently, the cable industry was an agglomeration of small "mom and pop" systems and larger multi-system operators. Although there are many still in existence, the inevitable demise of "mom and pop" systems has been recognized by many followers of the cable industry including Westinghouse Chief Operating Officer Daniel L. Ritchie:

> Cable is far enough along that we're not in the ma-and-pa syndrome, and yet, it's not so far along that it's mature. 1/

This natural evolution within the cable industry has been caused by several factors. Many of the small systems were built with only a 12-channel capacity. This limited channel capacity cannot accommodate the wide array of programming now available and many small systems do not have the cash resources necessary for rebuilding to accommodate "state-of-the-art" channel capacity. Furthermore, as franchises in the larger markets are awarded, franchise-hungry companies will seek to increase their subscribership through acquisition of existing cable systems. As a result, the value of existing cable systems has escalated so greatly over the past few years that many smaller operators find it difficult not to sell out.

b. Competition for Franchises in the Larger Television Markets.

Let us first examine the intense competition underway for franchises in the larger television markets. As you will note from Chart 6, major franchises were awarded in 1980 in 12 major communities including Dallas, Pittsburgh, Dearborn, Cincinnati and New Orleans. In addition, franchise awards have been made, or are expected shortly, in Santa Ana, Fairfield and the Chicago suburbs. Finally, bids have been or are expected to be submitted in the near future in 17 cities including

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1/ Cablevision, February 23, 1981 at 41.

New York, Los Angeles, Boston, Denver, Miami, Baltimore and the District of Cloumbia.

Particularly noteworthy is the continuing prominence of the major MSO's, principally Warner Amex, Cox Cable, Storer, ACT (Time, Inc.), Canadian Cable Systems and Teleprompter, in the bidding for new franchises. (See Chart 6.) This phenomenon is attributable in large part to the considerable capital expenditures necessary to wire these markets. Even in cases where awards are made to small local firms, quick acquisitions often result. A report on the pay cable industry by Technology + Economics, Inc., provides the following account of the awards of Houston cable franchises:

> Within a few months after receiving their awards, three of the four local firms, instead of building, moved to sell a majority interest in their firms under arrangements that would bring their principals immense capital gains. Warner-Amex bought an 80% interest in Houston Cable Television. Storer bought 80% of Houston Community Television, the black firm, and gave its principals the option of buying into its local subsidiary. In October 1979, Gulf Coast Cable Television announced plans to sell a 76.5% interest to Warner, but the move was forestalled by a suit filed against Gulf Coast and the Houston City Council by the losing contender, the Goldberg group. 1/

c. Acquisitions of Existing Cable Systems.

Acquisition of existing cable systems has also been gaining momentum. Robert Hughes, former official of the NCTA and former Chief Operating Officer of Communications Properties, Inc. before its acquisition by Times Mirror, sees the process of consolidation within the cable industry as "inevitable." 2/ If you will refer to Chart 7, you will see that since March 1976, 11 of the 25 largest MSO's either have been acquired by or merged with, or are in the process of being acquired by or merged with, some of the largest multi-faceted businesses in the United States including Westinghouse, American Express, Times Mirror, and Cox Broadcasting. The purchase price for the pending merger of Teleprompter with

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1/ Pay Cable Report at 41. For a detailed account of the Houston franchising awards, see John Bloom, "The Invasion of the Cable Snatchers," Texas Monthly, March 1980.

2/ Cablevision, December 17, 1979 at 128.

Westinghouse is estimated at $646 million dollars.

Other major corporations, not now heavily involved in cable television, have expressed interest in acquiring cable systems. These include Hearst Corporation, Taft Broadcasting, Scripps-Howard, Dow Jones & Company, and Knight Ridder Newspapers.

In April 1981, the twenty-five largest MSO's comprised a total of 11,698,684 subscribers, representing approximately 57% of all basic cable subscribers. (See Chart 4.) When the second 25 largest MSO's are added, the percentage of total cable subscribers increases to approximately 69%. As the present major MSO's further penetrate major television markets and smaller cable systems are consolidated with major MSO's, industry concentration will continue to rise.

8. Transaction cost implications of the cable television compulsory license.

a. Compulsory license intended to minimize transaction costs.

As I pointed out earlier, your parent Committee concluded in 1976 that:

> ... it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to ... establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC. 1/

In his testimony before your Subcommittee last month, Monroe M. Rifkin reiterated the burdens that he believes would be incurred under full liability:

> There are 4,350 cable systems, each carrying an average of five distant signals, (2 networks, 2 independents and 1 educational) each with a minimum of 6 - 17 hours of programming per day. Although it would be impossible to estimate the number of transactions that would be necessary, it is clear that the simple multiplications of 4,350 cable systems times 1,000 program suppliers seriously underestimates the probable number. While most program suppliers offer several programs, the number of contacts required to program five channels, 17 hours per day, 365 days a year would be enormous. 2/

1/ 1976 House Report at 89.

2/ Statement of Monroe M. Rifkin before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 8-9 (May 21, 1981).

Experience under the cable television compulsory license demonstrates, however, that the license shifts costs into other areas, rather than minimizing them. Furthermore, the Copyright Office would suggest that the transaction burdens alluded to above are speculative and represent a hypothetical "worst-case scenario." It is also possible that transaction costs can be reduced through various alternatives under full copyright liability.

b. Costs under the compulsory license.

Most, if not all, government regulation of industry results in costs to the interested parties and to the public; regulation under the cable television compulsory license is no different. As you will note on page 18, the 1980 Licensing Division costs for administering the compulsory license totaled $323,950. This sum does not include the costs incurred for staff time in the Office of the Register and the Office of the General Counsel devoted to cable television issues. Furthermore, a substantial amount of moneys are expended by the Copyright Royalty Tribunal in conducting cable royalty distribution and rate adjustment proceedings and in preparing for judicial appeals of its cable television determinations.

Costs are also incurred by cable television operators under the compulsory license with respect to the following activities:

1) The filing with the Copyright Office of initial Notices of Identity and Signal Carriage Complement;
2) The updating of Initial Notices as changes in cable system ownership or signal carriage complement occur;
3) The semi-annual submission to the Copyright Office of Statements of Account containing an extensive amount of detailed information.[1/]

1/ On July 28 of this year, the Copyright Office is conducting a public hearing to determine what information presently required in the Statement of Account forms may be deleted within the statutory constraints of section 111(d)(2)(A).

4) Representation before the Copyright Office during public hearings and rulemaking proceedings concerning the administration of the cable television compulsory license; and

5) Representation before the Copyright Royalty Tribunal (and the Court of Appeals should a CRT determination be appealed) during cable television royalty rate adjustment proceedings.

Furthermore, costs are incurred by the copyright owners of programming under the compulsory license with respect to the following activities:

1) Examination of Licensing Division files in preparation for cable television royalty distribution;

2) Representation before the Copyright Office during public hearings and rulemaking proceedings concerning the administration of the cable television compulsory license;

3) Representation before the Copyright Royalty Tribunal (and the Court of Appeals should a CRT determination be appealed) during cable television royalty distribution proceedings (in cases where the copyright owners are unable to agree among themselves as to a proper distribution); and

4) Representation before the Copyright Royalty Tribunal (and the Court of Appeals should a CRT determination be appealed) during cable television royalty rate adjustment proceedings.

All told, the costs incurred by the interested parties and the public under the compulsory license certainly run into millions of dollars. There are alternatives to compulsory licensing of cable secondary transmissions that can minimize transaction costs and, at the very least, eliminate public revenues being used for government regulation.

c. Methods of minimizing transaction costs under full liability.

During hearings in May before the House Energy and Commerce Subcommittee on Telecommunications, Consumer Protection, and Finance relating to Competition and Deregulation, Stanley M. Besen, Senior Economist of the Rand Corporation and former Co-Director of the Network Inquiry Special Staff to the FCC, commented on the effectiveness of the cable television copyright compulsory license:

> The manner in which the copyright question was "resolved" for cable virtually guaranteed that the resolution would be short lived. Instead of adopting an arrangement in which program producers would retain exclusive rights to the use of their products — full copyright liability — a compulsory license was adopted. The defects of the compulsory license were obvious. The initial fee schedule was too low. The mechanism for adjusting the schedule in the face of changing conditions was inadequate. And the procedure for distributing fees was non-existent.
>
> Predictably, the outcome has been a disaster that the recent FCC action deregulating cable only highlights. Virtually every action taken by the Copyright Royalty Tribunal has consumed an inordinate amount of resources and has been the subject of judicial appeal. With the FCC no longer in the picture, it is reasonable to expect the parties to focus even more of their resources at the Tribunal. This is sad because it is so unnecessary. The adoption of full copyright liability would contribute to economic efficiency, and, at least as important, would eliminate one source of continued governmental involvement in the cable industry. 1/ (underscoring added.)

It is not easy to predict whether, absent a compulsory license, secondary transmissions of distant nonnetwork programming will continue to be available to cable subscribers; that will ultimately depend on consumers. If so desired, this form of programming still may be available through various alternative means that would not, as suggested by the cable industry, necessitate one-on-one bargaining by every cable system operator for every program carried on every channel.

1/ Statement of Stanley M. Besen before the House Energy and Commerce Subcommittee on Telecommunications, Consumer Protection, and Finance at 6 (May 20, 1981).

(1) Negotiations conducted with multi-system operators. As noted in the preceding section of this statement, the twenty-five largest MSO's represent approximately 57% of all basic cable subscribers; when the second 25 largest MSO's are added, the percentage increases to approximately 69%. This percentage will continue to rise as the present major MSO's further penetrate major television markets and smaller cable systems are consolidated with major MSO's. These MSO's may be in a position to acquire secondary transmission rights for all of their cable systems thereby reducing individual transaction costs. Furthermore, separate MSO's can possibly band together to reduce transaction costs in the acquisition of programming. We have already seen this occur in the formation of the Rainbow Pay Service discussed earlier.

Although the ability of small non-affiliated cable systems to negotiate secondary transmission rights individually still may be impaired, the various cable television copyright bills presently before your Subcommittee do provide exemptions from copyright liability for small cable system secor ' ry transmission activity.

(2) Willing superstations. Another possibility is that willing superstations may acquire rights from their program suppliers to authorize cable carriage of their television broadcast stations. (A transition period before the imposition of full liability, during which time existing broadcasting agreements will expire, may enable such stations to include cable transmission rights in new contracts.)

(3) Program retailers. Although the programming would not necessarily emanate from television broadcast stations, program retailers may appear to package the same types of programming available on independent stations (motion pictures, sports, and syndicated shows) for cable origination networks. The cable origination network model discussed on pages 32 - 40 demonstrates how program retailers can thereby minimize transaction costs.

(4) Collective rights organizations. Section 1(e) of the 1909 copyright law and section 106(4) of the present law provide copyright protection for the public performance of nondramatic musical works. Theoretically, the imposition

of this protection could have necessitated individual negotiations between music copyright owners and users of each musical work. However, performing rights societies, principally ASCAP, BMI, and SESAC, emerged in the marketplace to administer the collection and distribution of royalties to copyright owners on a collective basis. Perhaps a similar type of organization would appear in the private sector under full copyright liability to administer the rights governing cable retransmissions.

9. Impact of the Cable Compulsory License on Competing Technologies.

The size, nature and dominance of the large MSO's in the cable television industry leads us to examine the impact that the cable compulsory license may have on competing telecommunications industries.

Technological advances have thrust telecommunications industries into a period of transition and reorganization. What was once a scarcity of programming, limited by virtue of available electromagnetic spectrum space, may, through the advent of direct broadcast satellites (DBS), low-power television, subscription television, MDS service, video discs and cassettes and cable television, now be characterized as the television of abundance. Each of these technologies will compete for the viewer's dollar. It is not clear which, if any, will survive or thrive in their competition with traditional over-the-air broadcasting and with one another. Whether or not they survive, however, is best determined in the marketplace; the government should not block one technology in order to protect the economic benefits of a user of another technology.

Thomas E. Wheeler, President of the NCTA echoed this philosophy with specific attention to DBS:

> No one is frankly overjoyed by the new challenges to our market, but we firmly believe that those challenges should be met in the marketplace. Government should not preclude new services from giving cable a full and fair run for its money. 1/

1/ Washington Post, February 22, 1981 at K8.

Stephen Effros, Executive Director of the CATA, expresed similar views with respect to DBS before your Subcommittee in 1979:

> Now, Comsat has proposed [DBS], and they say they could get it going if they got all their authorizations immediately, possible 1983. They are talking about six channels. Would it be competition to cable? Yes; sure it would be competition to cable. Would we invite or enjoy that competition, no problem at all. 1/

As these quotations illustrate, the cable television industry appears ready to accept competition, without government intervention, with the new telecommunications technologies. It is reasonable to ask, however, how "full and fair" that competition can be when, among all the program distribution services, cable television is the only one that stands outside the marketplace for a portion of its product.

Both the Carter and Reagan Administrations have affirmed the marketplace as the preferred mode for organizing the telecommunications industry. Richard M. Neustadt, Assistant Director of the Domestic Policy Staff at the White House, declared in 1980 in a speech entitled Communications Policy In The Carter Administration:

> In the last decade, technology opened up wide opportunities to increase communications channels. Policy responded haltingly at first, but the milestones led to competition: Bell was told to accept competitors' telephone attachments; TV sets were changed to help UHF reception; the skies were opened to competing satellites; the restrictions on pay cable were knocked down.
>
> These and other decisions are giving the U.S. the most diverse communications systems in the world. This Administration did not start that trend, but we do support it. Wider choices mean people get more of what they want. Competition spurs innovation and efficiency. Where the marketplace works, it does a better, faster job than any regulator. 2/

Likewise, in April of this year, Malcolm Baldridge, Secretary of Commerce, and William F. Baxter, Assistant Attorney General, Antitrust Division, Department

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1/ 1979 Hearing at 212 (statement of Stephen Effros).

2/ R. Neustadt, U.S. Dept. of Commerce, Communications Policy in the Carter Administration, 3-4 (1980).

of Justice, speaking for the Reagan Administration, addressed the role of the marketplace with respect to direct broadcast satellites:

> The Commission has been a leader in promoting free market competition and deregulation in telecommunications over the past decade. The Administration strongly supports these goals. 1/

* * *

> The United States Department of Justice ... supports the adoption of a scheme that minimizes regulation of DBS and instead places maximum reliance on the marketplace. Such a scheme will assure that competitive forces rather than Commission regulation will determine the ultimate direction of DBS. 2/

Why should the government intervene on the side of the powerful enterprises that are more and more directing cable's growth? Such governmental intervention imposed by the cable compulsory license skews the marketplace for copyrighted programming in favor of cable television and may improperly threaten the financial viability of competing telecommunications services to the detriment of the public.

10. International Implications of the Cable Television Compulsory License

What the U.S. does in the area of cable will be noted abroad and have important implications for our interests there. These implications deserve close attention. The industries we are concerned with here make significant contributions to the U.S. balance of trade. There is every reason to believe that the size and importance of these contributions will increase. In the telecommunications field -- particularly program production -- the United States is already the single most important copyright exporting state.

1/ Letter from Malcolm Baldridge, Secretary of Commerce to Robert E. Lee, Acting Chairman of FCC (April 7, 1981).

2/ Comments of the United States Department of Justice In the matter of Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Gen. Docket No. 80-603, 2 (April 30, 1981).

Copyright treatment of cable television retransmissions is keenly debated throughout the world and especially in Western Europe. The legal scene in Europe today is as unsettled as was ours in the 1970's. From one state to another, there are conflicting court decisions and legislative proposals to deal with cable's copyright liabilities -- all reflecting the interests of government broadcasting authorities, viewing publics and commercial concerns. By the simple commercial importance of our programming, how our law treats that cable programming will have an impact upon what appears reasonable to European lawmakers.

Copyright treatment of cable television in Europe is influenced principally by three treaties: the treaty of Rome establishing the European Economic Community (EEC)[1/], the European Agreement on the Protection of Television Broadcasts, and the Berne Convention for the Protection of Literary and Artistic Works. It is, however, the Berne Convention which has been the principal copyright forum for European discussion of legal regulation of cable. Its provisions governing the minimum exclusive rights of copyright owners with respect to rediffusion by wire generally have the effect of assimilating cable retransmissions to broadcasting. What has divided Europe, however, is precisely the issue we are facing here: what is the role of private, voluntary licensing, and when is it appropriate to supplant the market by a system of compulsory legal licensing.

States such as France, the Federal Republic of Germany and Belgium have already voiced support for distribution through the market, though often favoring blanket licensing systems over completely individual negotiations on a per-program basis. Whether regarded as predicated upon a commitment to the

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1/ The Copyright Office is not expert in the law of the EEC, but that treaty is significant in establishing common principles governing the free movement of goods and services within the EEC, including broadcast signals. Development of the law of the EEC as it affects transnational television signals and cable retransmissions can be as important as copyright legislation and treaties in shaping the European cable market.

rights of the copyright owner or to market economy principles, these nations have resisted compulsory licensing of copyrighted programs for cable. It is important to remember how small Europe is in telecommunications terms in comparison to the U.S. Transnational broadcasting is a natural phenomenon which Western Europe has partly regulated. When a U.S. motion picture is licensed for German broadcast, it can be received in parts of Austria. Austrian cable law is therefore of significance to both the Austrian and German markets.

We are the principal motion picture, television and music exporter in the world today: Foreign buyers are not going to give our sellers a much better deal than they or our sellers can command here at home. When the copyright law of the largest exporting nation of motion pictures and television programming contains a compulsory license for cable retransmissions of that very programming, it is hard to persuade importing states of the workability and fairness of voluntary licensing arrangements. They are, after all, business men and women seeking the most desirable programming at the lowest price.

Cable is relatively new and small in Western Europe. The impact of compulsory licensing on U.S. foreign distribution practices and revenues has not yet become large. But states which import our programming, or receive foreign signals carrying our programs from neighboring countries, do see in the U.S. compulsory license a powerful precedent for their own local action, to the detriment of American income from our foreign trade in copyrighted works. In fact, Austria recently amended its copyright law to establish a compulsory retransmission license for cable systems, keying remuneration to the value of the right in the country of origin.

Ruben Mettler, the Chairman and Chief Executive Officer of TRW, Inc., noted recently:

> Few changes in the domestic American economy in the postwar period appear to me to be as significant and as inadequately recognized, particularly by national

> policy makers, as those changes -- heavily influenced by technology -- which increasingly bind the domestic economy to the rest of the world, and make it a more dependent subelement of a larger and more powerful economic system.
>
> These binding forces exert a discipline on national policy makers by creating significant conflicts between politics and policies which are popular domestically but incompatible with international reality. They force on business executives the recognition that many of their markets are worldwide in scope and that they must compete worldwide to survive in those markets. 1/

This insight, according to Mr. Mettler, is particularly relevant in two areas of our economy, one of which is communications and information processing. Both the communications and information processing industries are heavily freighted with intellectual property rights -- patents, trademarks, and copyrights. As the world markets for these U.S. products and services grow, so does our stake in foreign and international law regulating these kinds of property.

Telecommunications, theatrical motion pictures -- with music and sound recordings -- are all part of the service sector of our economy which has shown dramatic gains in our international export trade. The United States enjoys a market competitive advantage, in a period of waning American advantages elsewhere, in the organization of our copyright industries, the level and depth of their talent, and their prestige from decades of admired success.

This has been recognized by the new Administration. On April 20, 1981, U.S. Trade Representative William Brock announced the U.S. Government Work Program on Trade in Services. In making his announcement, Mr. Brock pointed out that:

> Services trade is the frontier for expansion of export sales.

1/ R. Mettler, "Technology: A Powerful Aspect for Change," in M. Feldstein, The American Economy in Transition (National Bureau of Economic Research: 1980) 598.

> Aggressive cultivation with foreign markets by U.S. service industries is as critical to our economic recovery as is increased export of goods. 1/

In that announcement, Mr. Brock specifically identified movies, advertising, and communications among the "services" constituting our "frontier". In a draft of a study on trade in motion pictures, the U.S. Trade Representative elaborates:

> Inadequate copyright protection - of filmed entertainment arises as cable and satellite systems become more widespread abroad. These new transmission systems possess the capability of picking up and retransmitting broadcast signals for which they have not paid, or not paid a "reasonable," copyright fee to the copyright owner.
>
> Retransmission of broadcast signals without appropriate authorization also infringes on the exclusivity rights for which the broadcaster paid in negotiating his fee for renting the film. Efforts to apply copyright law on a crossborder basis in Western Europe have in turn raised questions as to whether copyright enforcement would not interfere with the free flow of services as provided for in Article 59 of the Treaty of Rome. The uncertainty surrounding copyright protection is in itself an impediment to trade since the copyright owner may be unwilling to authorize broadcast of his materials without being assured that the agreed geographical scope of the broadcast will be respected.
>
> Most industrialized nations are signatories to the Berne Convention which calls for respecting copyright law for the life of the author plus 50 years. The applicability of the Berne Convention to the problem of importing crossborder signals without paying royalty fees remains to be worked out, however. In the industrializing nations there is often no copyright protection at all. 2/

If the U.S. Government Work Program on Trade in Services fulfills its potential, it may be possible for the Congress to assess this and other copyright

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1/ Office of the United States Trade Representative, Press Release at 1 (April 20, 1981).

2/ Draft study by the United States Trade Representative: Trade Issues in the Motion Picture Industry 14-15 (1981). (Quotation used with permission.)

questions the Congress will face soon — like it or not — on a factual basis and in the longer term view. Statistics on trade in services are inadequate and the Work Program will address that problem. Copyright treatment of cable television in the U.S.A., it can be argued, comes within that part of the Administration's program which will review domestic legislative provisions relating to the achievement of reciprocity for U.S. services exports.

Certainly, copyright here or abroad is not the central issue in promoting the domestic and international health of certain service sector industries. But it is a factor of acute importance to the television, motion picture and music industries, whose international copyright concerns include videocassette piracy, growing claims to exemptions from copyright liability for non-commercial uses, international archival exchanges of films, mandatory deposit requirements in foreign law, and quotas restricting U.S. access to foreign theatrical and TV markets.

II. Conclusions, Recommendations, and Comments on Proposed Legislation.

a. Position and Recommendations of the Copyright Office.

(1) The Cable Compulsory License Should Be Eliminated

Based upon a review of the operation of section 111 of the Copyright Act, of technological and industry developments since 1976, and of the fundamental premises upon which the cable compulsory license rests, the Copyright Office has concluded that, subject to two exemptions that I will discuss shortly, the compulsory license of section 111 should be eliminated, or, at least, significantly modified.

Cable television systems perform copyrighted works for profit when they retransmit broadcast programming to their paying subscribers. As a matter of principle, the government should not impose a compulsory license mechanism

on copyright owners that deprives them of fair compensation for retransmission of their works. This was the conclusion reached originally by the Copyright Office when it assisted in the preparation of the 1964 and 1965 revision bills, the first legislation considered in the modern effort that led to the Copyright Act of 1976. In its Supplementary Report on Copyright Law Revision, the Office reviewed the arguments of the copyright owners and cable systems for and against liability and concluded:

> On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill. 1/

In the course of legislative consideration of the various copyright revision bills from 1965-1976, Congress decided to impose a compulsory license, rather than full liability, for secondary transmissions by cable. This decision was largely influenced by two considerations: first, the Supreme Court had already ruled that cable systems did not "perform" copyrighted works within the meaning of the outdated Copyright Act of 1909, and, hence, did not infringe copyright when they retransmitted programs; second, Congress was unwilling to risk the possibility that full copyright liability would stifle the growth of cable, even driving most systems out of business because of high transaction costs, or the refusal of program owners and broadcasters to grant licenses to cable systems.

The general principle of the copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works,

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1/ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, (House Comm print, 1965) at 42.

especially in the case of performances for profit. Cable systems perform copyrighted works for profit when they make secondary transmissions of such works. Copyright owners will be more confidently assured of rightful compensation if that compensation is determined by contract and the market rather than by compulsory license.

In the last five years, the cable industry has progressed from an infant industry to a vigorous, economically stable industry. Cable no longer needs the protective support of the compulsory license.

A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do.

The compulsory license should be eliminated. The Copyright Office recommends retention of the present exemptions of section 111(a), retention of section 111(b) to qualify said exemptions, and two new exemptions.

(2) Arguments for Retention of the Cable Television Compulsory License.

During his testimony before your Subcommittee on June 11, 1981, Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division of the U.S. General Accounting Office, succinctly summarized the arguments put forward by representatives of the cable television industry for retention of the present cable television compulsory license provisions. I would like to address address each of these arguments in turn:

(i) Compulsory license is less of a subsidy to cable operators than the Federal license broadcasters have to distribute their products over the airwaves.[1/] It is true that broadcasters are able to utilize broadcast spectrum space at no cost. Whatever subsidy that may be incurred from this use, however, is borne by the general public and Congress has considered recently the imposition

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1/ Statement of Wilbur D. Campbell before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 39 (June 11, 1981) [hereinafter cited as GAO Statement].

of a spectrum fee to be paid by broadcasters for their use of the airwaves.[1] The subsidy afforded cable television systems under the copyright compulsory license is not taken from the general public but rather from a limited segment of the public: the copyright owners of the very programming which is the life blood of cable television.

(ii) Cable operators could not practicably negotiate with every copyright owner whose work was retransmitted by a cable system.[2] Although it may be true that individual cable television systems may not be in the position to negotiate for all of their programming, the largest cable systems constituting over 69% of all cable subscribers may be able to do so. Furthermore, as the satellite origination network model described in section 6(b) of the statement and the various methods of minimizing transaction costs considered in section 8(b) of the statement demonstrate, alternative licensing mechanisms governing secondary transmissions in a full copyright liability context may be available.

(iii) Cable operators could not compete in the marketplace with major independent broadcasters for the exclusive use of quality programming.[3] The acquisition of quality programming by more than twenty cable origination networks and the expansion of broadcaster activities in cable ownership and programming suggest that this concern is unfounded. The entrance into the cable program production market of companies such as CBS, Oak Industries, T.A.T. Communications, and its sister company, Tandem, further belies this contention. Norman Lear, founder of T.A.T. and Tandem has said:

> Like in the beginning days of television, there's an explosion in the need for material to fill expanding cable and subscription markets. [4]

It is anticipated that this "explosive" demand for programming by cable will continue to be met by a greater number of program suppliers in the marketplace.

1/ See e.g., H. R. 3333, 96th Cong., 1st Sess. §414 (1979).
2/ GAO Statement at 39.
3/ Id.
4/ Washington Star, June 28, 1981 at C1.

(iv) Since the importation of independent distant signals is of decreasing importance and will be of little importance to large urban cable systems in a few years, the marketplace should be allowed to work its course and largely eliminate the use of cable compulsory licenses without legislative change.[1/] Even if we assume that distant independent, network, or noncommercial broadcasting signals are not carried, section 111(d)(2) of the Act still requires a copyright compulsory license payment and accompanying Statements of Account, regulation by the Copyright Office and possible royalty distribution by the Copyright Royalty Tribunal for "the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter." The illogic of this situation is evident: while the compulsory license may no longer be needed, government intervention and expense in administering the license mechanism will remain.

(3) New Exemptions for Local and Network Signals

The Copyright Office recommends that a new exemption be granted for the secondary transmission by cable systems of local broadcast signals. The Office also recommends that, in those cases where the cable system is located in a television market that is not served by the three national television networks (ABC, CBS, and NBC), a further exemption should be granted to permit the simultaneous importation of distant signals containing network programming to the extent necessary to provide a full complement of network service to that market.

The exemptions for retransmission of local and network signals should be subjected to the same prohibition now contained in section 111(c)(3) against program alteration and substitution of commercials.

These exemptions from exclusive rights seem justified by the finding of Congress in 1976 that retransmission of local signals and network programming does not injure copyright owners.[2/] Indeed, if the FCC continues its "must carry"

1/ GAO Statement at 39.
2/ 1976 House Report at 90.

rules, cable systems must have an exemption for those signals that the government obligates them to carry. Also, since the contracts between copyright owners and the networks assume national penetration of all television markets served by the network, importation of network programming into those few markets not adequately served, would not seem harmful to the copyright owner.

(4) Transition Period

If you decide to eliminate the compulsory license of section 111, the Office recommends adoption of a transition period during which time the compulsory license would remain in effect. Such a transition period would ease the change from a compulsory license system to an exclusivity system and should facilitate the development of middlemen to clear rights for cable systems, or the formation of a nongovernmental society to administer cable transmissions rights on a collective basis. It may also facilitate the further development of alternative sources of programming. It is also likely that, with the expiration of existing contractual agreements between program suppliers and broadcasters, cable systems and/or middlemen could compete for the rights to program materials.

(5) Full Liability for Satellite Resale Carriers

Finally, the Copyright Office recommends amendment of section 111(a)(3) to make clear that the activities of satellite resale carriers are not within this exemption. Section 111(a)(3) exempts from copyright liability secondary transmissions "by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others ..." We would support this clarification whether the compulsory license is retained or eliminated. However, clarification of section 111(a)(3) is more significant if the compulsory license is retained.

b. Carriage of public broadcasting stations.

Your Subcommittee may wish to encourage carriage by cable television of noncommercial educational stations either through an exemption (in cases where no local public broadcasting station otherwise exempt is available) or alternative means.

We offer this proposal tentatively because of the character of both the Public Broadcasting Service (PBS) and National Public Radio (NPR). In some ways, like providing coast-to-coast distribution of programs to member stations, PBS and NPR act like networks. In others PBS and NPR are different: Their funds come not from advertising, but from grants, a Federal contribution, and donations from the public; their methods of acquiring programming are different; and the control over what station will carry what programs lies primarily with the stations themselves. Because PBS and NPR are not treated as networks in CRT proceedings, the producers of its programming may file claims to participate in the distribution of compulsory license royalties.

We believe that the public, in all markets, should have access to PBS and NPR programming. To the extent that PBS moves in the direction of advertising, and even product advertising support -- as has been publicly discussed by management leaders of the PBS system -- its treatment can be assimilated to the exemption treatment proposed here for commercial network programming.

If, as has also been proposed, PBS or NPR develop also a pay cable service, that programming would, of course, even under the present compulsory license, be subject to full copyright liability. The problem now, however, would be to devise a statutory mechanism, exemption or otherwise, to reflect the special PBS and NPR situations now and accommodate possible future changes.

c. Assuring access to sports league programming.

During his testimony before your Subcommittee, R. E. Turner, Jr., President of Turner Broadcasting System, Inc. (superstation WTBS - Atlanta and the Cable News Network) and owner of the Atlanta Braves baseball club and Atlanta Hawks basketball club, suggested that the various sports league agreements and member league clubs would prevent WTBS from acquiring in the marketplace the necessary rights for cable carriage of a sports team's programming beyond its exclusive local territory:

> For instance, major league baseball has always insisted on territorial exclusivity regardless of the amount of money that would be paid for telecasts under a system of strict copyright liability. The leagues would never grant national rights in violation of their own internal territorial agreements which grant individual monopolies to each team. 1/

As described in section 6(b)(ii) of our statement, cable importation of league sporting events broadcast on distant signals may undercut the home gate, the value of broadcast rights, and fan loyalty of another member club located in the same area as the cable system. The Office has concluded that adequate protection should be afforded to sports leagues to minimize this potential damage.

The sports leagues have already begun to market sports programming to cable networks, such as USA and ESPN. And there is no reason in principle why, outside traditionally protected club territories, leagues cannot be expected to market their games to cable systems or superstations.

Should the projected difficulties in acquiring sports programming referred to in Mr. Turner's statement actually occur, Congress may wish to follow the policy

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1/ Statement of R.E. Turner, Jr. before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 14 (June 17, 1981).

expressed in the antitrust provisions of Title 15, U.S.C. §1292[1/] in order to balance the interests of the sports league with the desires of stations and cable networks.

d. Comments on H.R. 3528 and H.R. 3844.

The Copyright Office supports, in substantial part, the two bills, H.R. 3528 and H.R. 3844, introduced by Congressman Frank. Both of these bills conform to the Office's principal recommendations:

1) The imposition, after a transition period, of full copyright liability for cable secondary transmissions;

2) An exemption from copyright liability for cable carriage of local signals;

3) An exemption from copyright liability for cable carriage of necessary distant network programming; and

4) An affirmative clarification of the copyright liability of satellite resale carriers.

Both bills contain provisions that warrant specific attention:

(1) Length of the transition period. Both bills provide for the abolition of the compulsory license and the imposition of full copyright liability for cable secondary transmissions as of January 1, 1983. Thus, the bills provide approximately a one and one-half year period of transition. In our testimony in April before the Senate Committee on the Judiciary, the Office recommended a transition period of between three to five years. Although a one and one-half year period may permit an orderly conversion to a full liability model, you may wish to consider lengthening the period to better meet the objectives set forth in section 11(a)(4) of our statement.

1/ Pub. L. 89-800, §6(b)(1), Nov. 8, 1966, 80 Stat. 1515:
[The antitrust exemption in 15 U.S.C. §1291] ...shall not apply to any joint agreement ... [with respect to the pooling of telecast rights] which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

(2) Exemption for secondary transmissions made by "small" cable systems. H.R. 3528 and H.R. 3844 exempt from copyright liability secondary transmissions made by cable systems serving fewer than twenty-five hundred subscribers that are not affiliated with any MSO. The Copyright Office has not suggested an exemption for small systems. However, the Office is mindful of the political pressures surrounding this issue of the §111 compulsory license. The Office also recognizes that certain compromises may be necessary to achieve practical solutions that will serve the public by allowing the market to operate and will make the legislation acceptable to Congress as a whole. A small system exemption along the lines of Representative Frank's proposal may achieve these results.

Should your Subcommittee seek modifications in the proposed small system exemption, you may wish to adjust the numerical subscriber level (to 5000 subscribers for example), or key the exemption to cable systems located outside of the 100 largest television markets.

(3) Preemption of retransmission requirements or restrictions. In addition to dealing with copyright issues, H.R. 3844 also proposes an amendment to the Communications Act of 1934. Section 5 of H.R. 3844 would preempt the FCC and state and local authorities from imposing any requirements or restrictions governing cable carriage of broadcast stations. This provision would effectively eliminate the Commission's sports program exclusivity rules, network non-duplication rules, and "must-carry" rules.

Imposition of full copyright liability should negate the need for all but the last of these rules. The recission of the "must-carry" rules, however, is another matter. As stated in the beginning of this statement, the Copyright Office is not appearing as telecommunications experts. However, in our non-expert opinion, it seems appropriate for Congress to consider further deregulation of the cable television industry, along with competing program distribution services, upon their

assumption of full copyright liability for their carriage of programming.

e. Comments on H.R. 3560.

H.R. 3560, introduced by Representative Kastenmeier, represents a middle ground solution which addresses several of the program suppliers' concerns, while, at the same time, assures continued cable access to broadcast signals through compulsory licensing. Taken in this light, the bill does cure some of the apparent deficiencies of the present compulsory licensing mechanism. However, the Copyright Office respectfully suggests that the proposal's emphasis is misplaced. We have tried compulsory licensing with its attendant government regulation. Rather than attempt to revise the compulsory license, we should seize the opportunity to use the marketplace.

Nevertheless, should Congress determine that the cable television copyright compulsory license should be retained, several aspects of H.R. 3560 deserve consideration:

(1) Distant signal limitations. The bill would make the compulsory license available for a limited number of distant signals; specifically, those permitted by the FCC to be carried on July 1, 1980. As noted earlier in our statement, the development of originated services, both pay and advertiser supported, has lessened the commercial significance of secondary transmissions. Because of the diversity of programming available through these services, the Copyright Office believes that it is neither essential nor appropriate to permit unlimited cable importation of distant television signals under the compulsory license.

(2) Syndicated program exclusivity rules. The problem of carriage of syndicated programming is addressed in the bill in two ways. First, H.R. 3560 retains the Commission's syndicated program exclusivity rules in effect on July 1, 1980. Second, it authorizes the CRT to establish additional rules.

Retention of the Commission's syndicated program exclusivity rules would

provide some limited protection to the suppliers of that programming. On the other hand, the rules are so complex, confusing and difficult to enforce that their actual effectiveness is reduced. Permitting the Tribunal to impose additional syndicated program exclusivity rules could provide additional protection. However, it is the judgment of the Copyright Office that the expense involved in rulemaking, implementation and oversight, accompanied by the possibility of judicial appeal, would outweigh any benefits accruing from the regulation.

(3) Just and reasonable rates. Section 3 of H.R. 3560 would authorize the Tribunal to set the cable royalty schedule at "just and reasonable rates" subject to review every three years. As the then Register of Copyrights testified before your Subcommittee in 1979, "[n]o one can argue that the fee structure of section 111 was based on any scientific analysis of market value, comparable rates or potential damage. It was the result of a series of compromises and nothing more."[1/]

No government organization, no matter how competent or well intentioned, can supplant the marketplace in the setting of fair royalty rates. This amendment, however, would at least allow the CRT to use its best collective judgment as to what rate would closely approximate the free market. In this regard, it may be useful to provide the Tribunal with more specific criteria with which to set the rates, possibly along the lines of the objectives set forth in section 801(b)(1) concerning rate adjustments under the mechanical and jukebox compulsory licenses. Enabling the Tribunal to review the cable rates every three years, rather than every five years as under the present statute, may achieve a better correlation to marketplace rates. However, you should consider whether the added government regulation and industry uncertainty resulting from such frequent reviews outweighs these benefits.

1/ 1979 Hearings at 23.

(4) Protection for sports programming. Section 2 of the proposed legislation would grant sport teams full copyright protection with respect to cable distant retransmission of games within a radius of 50 miles of the stadium. The provision recognizes the unique ephemeral nature of sports programming and specifically addresses the impact of cable importation on live gate attendance. It does not, however, deal with the problem of market dilution and loss of fan loyalty which may occur through the uncontrolled importation of games between two different teams affiliated with the same league.

(5) Royalty distribution for radio carriage. During its distribution of 1978 cable royalties, the CRT found,

> ... that the record of this proceeding provides no basis for any award of cable royalty fees for the distant carriage of radio signals. The record is inadequate to establish the extent of cable carriage of radio programming. Moreover, the record fails to show the value of such programming as would justify the award of royalties to commercial radio claimants, or support a finding that the carriage of commercial radio signals is harmful to radio stations. 1/

The bill attempts to assure benefits to radio program producers by mandating distribution of a portion of the royalty pool to them. Section 111(d)(4) of the statute provides that the cable royalty fees shall,

> ... be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:
>
> * * *
>
> (C) any such owner whose work was included in nonnetwork programming consisting exclusively 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.

It would appear that the proposed amendment is unnecessary since the afore-

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1/ 45 Fed Reg. 63040 (September 23, 1980).

mentioned provision of the statute already calls for distribution of royalties to copyright owners of works included in nonnetwork programming upon an evidential showing.

(6) Small system exemption. Section 1(c) of the bill would provide a free compulsory license governing secondary transmissions made by cable systems serving less than 5,000 subscribers. As discussed earlier in this statement, there may be practical and political reasons for creating a small system exemption. You may wish to consider, however, whether it is appropriate to exempt "small systems" affiliated with large MSO's. Furthermore, although this bill would require no royalty payments from roughly 80% of the total cable system universe, it would still require the submission by them of Notices and Statements of Account with their attendant government regulatory apparatus.

(7) Subpoena power. Section 6 of the bill would give the CRT subpoena powers in both its royalty distribution and rate adjustment proceedings. Assuming that Congress determines that the Tribunal should continue these activities with respect to the four compulsory licenses, the grant of subpoena powers would be a modest but important tool in effectively administering the provisions of the statute.

(8) Judicial stay. Section 7 of the bill strikes out the first sentence of section 809 of the statute and substitutes the following in its place:

> Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication.

When the bill was introduced, Representative Kastenmeier said that this amendment was intended to "eliminate a provision of present law which appears to require an automatic stay in distribution of royalties upon judicial appeal."[1/] It is unclear whether the amendment accomplishes this result since the final sentence

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1/ 127 Cong. Rec. H2151 (daily ed. May 21, 1981) (remarks of Rep. Kastenmeier).

of section 809, which would remain in effect even after the amendment, states:

> Where the proceeding involves the distribution of royalty fees under section 111 or 116, the Tribunal shall, upon expiration of such thirty-day period, distribute any royalty fees not subject to an appeal filed pursuant to section 810. (underscoring added.)

f. Comments on the agreed licensing proposal.

Last month, my predecessor as Register of Copyrights, Barbara Ringer, testified before this Subcommittee on the cable-copyright controversy. The former Register noted that the FCC's cable deregulation has left section 111 "crippled and in urgent need of legislative repair,"[1/] and then opined that the Commission's changes are "too great to be appropriately and effectively redressed in CRT proceedings"[2/] and that "new legislation to deal with this changed situation is warranted."[3/] As a possible solution, Ms. Ringer offered for consideration a proposal based on the concept of "agreed licensing."

In essence, this proposal traces in operation the compulsory license mechanism provided in section 118 of the law for the use of nondramatic musical works and pictorial, graphic, and sculptural works by public broadcasting entities. Agreed licensing is intended to encourage the parties to reach voluntary licensing agreements for the secondary transmission by cable systems of copyrighted television and radio programming. An exemption from the antitrust laws would be provided to facilitate these negotiations. In the event that the parties are unable to agree, the Copyright Royalty Tribunal would step in as a last resort to set terms and rates which would be, unless superseded by voluntary accords, binding on all parties.

1/ Statement of Barbara Ringer before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 6 (June 25, 1981).

2/ Id.

3/ Id.

Royalty payments made under the agreed license would ordinarily be paid by cable systems directly to copyright owners. However, in cases where the identity of the copyright owner is unknown, the cable system would pay the royalties into a special interest-bearing fund to be distributed to claimants by the CRT. In order to assure appropriate payments to copyright owners, cable system operators would be required to log the carriage of their secondarily transmitted programming.

The Copyright Office shares the expressed concerns on the urgent need for legislative change and the inability of the Tribunal to rectify the damage brought upon the compulsory licensing system by the FCC's actions. However, the Office believes that agreed licensing, while possibly an acceptable alternative to compulsory licensing in 1976, is neither necessary nor desirable under present and projected future circumstances.

The agreed licensing proposal presented rests on an assumption which may have been applicable in 1976 but no longer is today: that it would be impossible "to require cable systems to stand and bargain with every known and unknown copyright owner of every copyrighted program carried on every station on every channel retransmitted."[1/]

Such one-on-one bargaining is not now necessary in cable, and would not be under the principles of the Copyright Office proposal, or of the two bills introduced by Representative Frank presently before the Subcommittee.

What are we talking about? Simply, and only, the nonnetwork program fare on imported distant signals. We are not talking about programs to exempted systems, from must carry signals, or from the proliferating cable network feeds, whether advertising supported or for free. As to that nonnetwork programming on imported distant signals — primarily movies, syndicated shows, and sports — will those programs disappear from cable viewers' screens? Definitely not. In the

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1/ Id. at 11

transition period, the compulsory license will continue to provide such programming unabated. In the same transition period, many of those programs -- old movies and syndicated shows -- will emerge from present exclusivity contracts and come on the market for placement with new exhibitors.

In light of all this, the "stand and bargain" prospect is not forbidding. It is not a serious problem. Every cable system now has diverse programming available, and will have, willy nilly.

What, however, if in addition to all this, cable systems desire to acquire more programming? First, most cable viewers -- and the overwhelming majority of those who will not be linked to an exempted small system -- will get their cable services from MSO systems which are quite able to fend for themselves.

Moreover, middlemen are in place now -- the cable networks. And more are on the way. What do we mean by a middleman? Simply a program purveyor who supplies the program ready for performance or display with all the rights and clearances bundled in. That is what broadcast networks and television program syndicators have done for decades; and cable networks and the same program syndicators are doing it for cable, and will continue to do so.

Finally, there is the contention that program suppliers won't sell to cable -- a curious contention, supported in these hearings only by assertion. Program suppliers are selling -- both motion picture producers and sports clubs -- to broadcasters, cable networks, and pay services. And more producers are entering, including very recently Tandem - T.A.T., Oak Industries, CBS, and Turner.

In sum, middlemen are in place, and will continue to grow in numbers, to distribute the product. And the transaction costs are no greater than those to which the communications industry is accustomed to in broadcasting. In addition, the appearance of wholesalers with catalogs of programs and program packages, and

of ASCAP and BMI - like clearance systems, is altogether possible.

There is no dearth of middlemen to obviate one-on-one bargaining. There is no need for compulsory licensing. Nor for agreed licensing.

Notwithstanding the incorrectness of this "transactions impossibility" assumption, the concept of agreed licensing in its application to cable secondary transmissions may prove as objectionable as the present system, if not more so.

The proposal is intended to encourage copyright proprietors and cable system operators to enter into voluntary agreements. It is unclear, however, how this would be accomplished since either side may find it advantageous to allow the CRT to determine terms and rates.

The proposal is also intended to reduce government interference and minimize costs. Yet, costs may be incurred by cable television operators under agreed licensing with respect to the following activities:

1) The logging of programming included in secondary transmissions;
2) The individual payment of royalty fees to known copyright owners;
3) The cumulative payment of royalty fees to unknown copyright owners via a special interest-bearing fund;
4) Negotiations aimed at reaching voluntary accords; and
5) Representation before the Copyright Royalty Tribunal during cable television royalty rate setting proceedings (in cases where the cable television operators and copyright owners are unable to negotiate marketplace terms and rates).

Costs also may be incurred by copyright owners of programming under agreed licensing with respect to the following activities:

1) Examination of programming logs in order to assure proper royalty payments and distribution;

2) Negotiations aimed at reaching voluntary accords;

3) Representation before the Copyright Royalty Tribunal during cable television royalty distribution proceedings for royalty fees paid into a special interest-bearing fund for unknown copyright owners (in cases where the copyright owners are unable to agree among themselves as to proper distribution); and

4) Representation before the Copyright Royalty Tribunal during cable television royalty rate setting proceedings (in cases where the cable television operators and copyright owners are unable to negotiate marketplace rates).

The potential government interference noted above is evident.

In short, the transaction costs of compulsory licensing or agreed licensing are likely to be higher than in a market solution, and probably much more so. And the Tribunal can only approximate, in a cumbersome manner, what the market itself can tell you directly.

Finally, the proposal fails to provide broadcasters with the same rights afforded to all other competing program distribution services: the ability to acquire and distribute programming on an exclusive basis.

g. Final remarks on the cable issue.

In closing, the Copyright Office sees cable television on the verge of becoming a major telecommunications force in its own right. Promises of the late 1960's and early 1970's of cable's potential are now becoming a reality. Cable television is no longer the step-child of television broadcasting, nor should it be treated as such.

In suggesting that the principle of full copyright liability, presently applicable to cable originations, be extended to govern cable retransmission of

distant nonnetwork programming, the Copyright Office does not expect that the cable television industry will be deprived of needed programming, nor deflected from its present remarkable course of growth.

Your Subcommittee has heard from numerous witnesses representing the cable television industry that cable subscribers will be deprived of diverse programming if cable systems are unable to make secondary transmissions of distant broadcast signals under a compulsory license. This contention simply is not true under the principles of the Copyright Office proposal or of the two bills introduced by Representative Frank presently before the Subcommittee.

There is now, and will continue to be, diversity in cable programming:

First, all cable systems, of whatever size and location, will have a full complement on network programming. Free.

Second, all cable systems, whatever size and location, will have in addition, all local signals, including, in some cases, local independent stations. Free.

Third, all cable systems, of whatever size and location, can have numerous non-fee cable origination network program services which are proliferating. (See chart 9.) Free.

Fourth, if a small system exemption is incorporated in any new legislation, all those exempted systems may have all of the program sources already described, plus all imported signals, without limit. Free.

All those program sources spell DIVERSITY. And for those programs, cable systems need not bargain. They won't even have to pay. Furthermore, all cable systems, of whatever size and location, might be encouraged, through exemption or otherwise, to carry programming emanating from noncommercial educational stations.

Nor is that all. All systems, of whatever size and location, will have access to the pay services, like HBO and Showtime, and the advertiser supported services that presently require a fee, like Cable News Network, USA Network and ESPN (although, as discussed earlier, these types of services may ultimately be offered for free relying solely on advertising revenue as the source of income).

Do cable systems have to stand and bargain for these pay and advertiser supported services? Not on a per program basis, one-on-one, but on a package basis with a middleman. Do they have to pay? Yes: established market rates.

The imposition of full copyright protection will also provide a certain and secure basis for all forms of program delivery systems, including traditional over-the-air broadcasting, cable television, direct broadcast satellite, subscription television, pay MDS services, low-power television, videodisc and videocassettes, to compete in the marketplace and develop as consumer preferences direct.

It is not easy to predict whether, absent a compulsory license, secondary transmissions of distant nonnetwork programming will continue to be available to cable subscribers; that will ultimately depend on consumers. If so desired, this form of programming still may be available through various alternative means. First, willing superstations may acquire rights from their program suppliers to authorize cable carriage of their television broadcast stations. (A transition period of between three to five years before imposition of full liability, during which time existing broadcasting agreements will expire, may enable such stations to include cable transmission rights in new contracts.) Other possibilities are that retailers may appear to package the same types of programming available on independent stations (motion pictures, sports, and syndicated shows) for cable

origination networks or a private organization will be formed to administer the rights on a collective basis.

During his testimony in June, Thomas Wheeler cautioned your Subcommittee that the elimination of the compulsory license would inevitably result in price increases to cable subscribers:

> We think you will find, as we have, that the inevitable result of revision of the Act will be that people pay more and get less. 1/

The offering of low-cost and free "basic service" in many new franchise proposals suggests that increased subscriber charges may not be "inevitable."

Although the Report of the Sloan Commission on Cable Communications was written in 1971, before the practical application of satellite technology to cable services and the lessening of regulatory constraints by the FCC, it has served as a fairly accurate guide to cable development. In its Report, the Sloan Commission describes the changing programming market under full copyright liability:

> In the early years, cable systems will probably have to pay stations. Later, when cable systems are larger, the negotiated price might be zero, or even payment by the foreign station for the additional viewers to whom the cable system provides access. 1/

The elimination of the "must carry" rules in H.R. 3844 may hasten this occurrence. Also, as discussed earlier, several satellite cable origination networks offer their programming to cable systems <u>free of charge</u>, with more in the offing.

1/ Statement of Thomas E. Wheeler before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice at 21 (May 21, 1981).
2/ Sloan Report at 57.

Furthermore, the Spanish International Network, already pays affiliated cable systems for its carriage and UTV will soon be doing the same. In a recent presentation before Wall Street entertainment analysts, Dan Aaron, President of Comcast Corporation's Cable Division, one of the top twenty-five MSO's, and former Chairman of the NCTA, observed that this trend will continue in the future:

> The next phase of the industry, Aaron said, will be one in which there will be a shift from basic to advertiser-supported cable programming and where "the cable operator will be paid for his channel," something he claimed the new program services, particularly those from the networks, already realize they will eventually have to do. 1/

Field Communications, owner of five UHF television stations in San Francisco, Boston, Chicago, Detroit and Philadelphia, may be readying itself for this transition in its appointment of Michael Martin Klasey as cable relations manager for its stations. In discussing his appointment with Broadcasting magazine, Mr. Klasey noted "that cable is essential to broadcasters, especially to [UHF stations]" because carriage on cable systems extends a broadcaster's reach. 2/

As you wrestle with the difficult interrelated issues of copyright and telecommunications policies inherent in the cable television controversy now before you, it would be helpful to recall the words of the Sloan Commission a decade ago:

> In the end, cable must grow as conventional television has grown: on the basis of its own accomplishments. As it takes on an identity of its own, the current debate over distant signals and the passion it arouses, as well as the disputes concerning the rights over local broadcast signals, will come to appear insignificant stages in the growth of a total television system. 3/

1/ Broadcasting, February 23, 1981 at 85.
2/ Id.
3/ Sloan Report at 62.

II. PERFORMANCE RIGHT FOR SOUND RECORDINGS

1. Position of the Copyright Office

H.R. 1805, introduced by Representative Danielson, places before the Congress again the proposal to adopt a performance right for sound recordings. A performance right would compensate the creators of copyrighted sound recordings for the broadcast or other public performance of their works. The Copyright Office has testified before this Subcommittee many times in favor of performance rights legislation. We continue to support a performance right for sound recordings.

Efforts to enact a performance right for sound recordings date back to the early part of this century.[1/] When the bill for general revision of the copyright law was enacted, Congress included the anti-piracy protection for sound recordings that had been part of the Copyright Act since 1972, but deferred action on the difficult and controversial issue of performance rights pending a study and attendant legislative recommendations by the Copyright Office. On the basis of its extensive review of the issues, the Copyright Office study[2/] concluded that no valid reason existed, either in law or in policy, for denying creators of copyrighted sound recordings the public performance protection accorded under section 106 of the copyright law to creators of all other copyrighted works.

Broadcasters and other commercial users have performed sound recordings for many years without permission or payment. Recordings undeniably offer a

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1/ See, discussion of legislative history at 28, et seq. "Performance Rights in Sound Recordings," Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) (Comm. Print. No. 15).

2/ Id.

major commercial benefit to these users. Users maintain that airplay and other public performances benefit creators by increasing record sales and popularizing artists and that, therefore, they should not be required to pay for these uses. Such promotion can, of course, benefit selected recordings and lead artists. But it does not, in our view, justify denying compensation for public performance of recordings from which the user enjoys financial gain.

The underlying purpose of copyright is to reward creativity and encourage individual effort through economic incentive. In all other areas, the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. In our view, the potential economic burden on the users of sound recordings resulting from performance rights legislation is outweighed by the commercial benefits they derive from the use and by the damage suffered by performers when recordings are used without compensation as a substitute for live performances.

Record producers, too, are increasingly threatened by the absence of performance rights legislation. As technology makes possible the unsupervised, easy, and often unpoliceable copying of their works, it becomes correspondingly more important to the industry that it be compensated for commercial uses in public performance. Other countries recognized this need long ago.

At present, sixty-two nations legally recognize a performance right for sound recordings. The United States, a major exporter of recordings, is one of the very few industrialized countries which fails to afford any protection for commercial performances of recordings. Since many of the countries which grant a performance right will pay royalties only to performers and producers of countries having reciprocal rights,[1/] enacting performance rights legislation would pave the way

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1/ The United Kingdom, the Federal Republic of Germany, Austria and Denmark are among the countries which extensively use United States recordings but require reciprocity.

for United States artists to benefit financially from the extensive public performance of their sound recordings abroad.

Sound recordings have been legislatively and judicially recognized as constitutional "writings." The 1971 sound recording amendment to the copyright law, which was upheld by the courts, [1/] was a legislative declaration of this principle; and that legal principle is reaffirmed in section 114 of the 1976 Copyright Act. If sound recordings are the "writings of an author" for the purpose of protection against unauthorized duplication, consistently those writings should, like the underlying musical, literary or dramatic work, be protected against unauthorized public performance.

Comments on H.R. 1805

We have some comments on the specific provisions of the bill before you, H.R. 1805. This bill closely follows the 1978 Copyright Office draft recommendation and the bills introduced by Representative Danielson since that time. Those earlier legislative proposals have been thoroughly considered by your Subcommittee and you have already heard numerous witnesses on these proposals as well as H.R. 1805.

H.R. 1805 would add a limited performance right for copyrighted sound recordings fixed on or after February 15, 1972. The right would be limited by a compulsory license for public performances. The license would automatically permit the licensee to perform an authorized and publicly distributed sound recording upon filing timely notices of intention, annual statements of account, and annual royalty fees with the Copyright Office. The royalty fees are to be distributed, in a manner later discussed, to the performers and copyright owner (usually the record producer).

1/ Goldstein v. California, 412 U.S. 546 (1973); Shaab v. Kleindienst, 345 F. Supp. 589 (D.D.C. 1972).

Under the bill, royalty fees may be computed on either a prorated or a blanket basis, at the user's option. For a blanket license, large radio stations will pay 1% of net annual advertising receipts each year. Television stations netting between $1 and $4 million annually from advertising receipts will pay $750 per year, and those netting in excess of $4 million will pay $1500. Other transmitters, including background music services, will pay an annual blanket fee of 2% of annual gross subscriber receipts. The blanket rate for commercial establishments including discotheques and nightclubs, where a principal form of entertainment is dancing to the accompaniment of sound recordings, is set at $100 per location per year. The Copyright Royalty Tribunal would fix the blanket rate for other users not otherwise exempted.

Statutory exemptions are prescribed for small radio and television stations and background music services. Educational users exempted under the present copyright law retain that exemption for performances of sound recordings.

The bill provides guidelines based upon use of recordings for the Tribunal to apply in computing prorated license fees for users who choose not to employ the blanket license rates.

The CRT will supervise the distribution of performance royalties annually. Royalties are to be split, with one-half paid to copyright owners and the other half shared equally among the performers, without regard to the value or length of their contribution to a particular recording and without regard to their legal status as "employees for hire" of a record company. The bill directs the CRT to retain the services of one or more private non-governmental entities to monitor performances and to distribute royalty funds.

Differences between this bill and the bill reviewed by your Subcommittee during the last session, H.R. 997, 96th Cong., 1st Sess. (1979), are few and can be summarized briefly. H.R. 1805 makes the following changes:

(1) Subsections (c)(8)(A) and (B) and subsections (d)(1) and (2) base the blanket royalty rate calculations and the statutory exemptions for radio and television stations on the station's net receipts from advertising sponsors, rather than on gross receipts, thereby making the compulsory license applicable to fewer stations than contemplated under H.R. 997;

(2) Subsection (c)(8)(D) provides a blanket royalty rate for commercial establishments at which a principal form of entertainment is dancing to recorded music, rather than for establishments where that is the principal form of entertainment, thereby expanding the scope of that subsection with respect to discotheques, nightclubs, and bars which use recorded music other than music performed on jukeboxes;

(3) Subsection (c)(8)(E) authorizes the CRT to fix blanket rates for other users not otherwise exempted, rather than providing a fixed statutory rate as included in H.R. 997.

We should like to make several minor observations with respect to H.R. 1805. First, although the bill is entitled the "Commercial Use of Sound Recordings Amendment," its scope may be broader than the title implies since

the bill literally covers all public performances not otherwise exempt, whether or not they are "commercial" in nature. Although the bill specifically exempts transmitters whose receipts are less than the statutory minima, all other users not otherwise exempted would be required to make a payment, under either a blanket or the prorated basis determined by the CRT. Presumably, the Tribunal would not have the authority to exempt from payment noncommercial "other users" who publicly perform sound recordings, and some payment would therefore be required from such users.

Second, subsection (c)(13) gives the CRT "discretion to proceed to distribute any [royalty payments] that are not in controversy." Since the same paragraph authorizes the Tribunal to determine the amount in controversy, the Copyright Office suggests amending this paragraph to direct the Tribunal to distribute any funds not in controversy by striking the words "have discretion to proceed to" in the penultimate line of (13).

Third, subsection (e)(4) defines "net receipts from advertising sponsors" solely in terms of gross receipts from advertising sponsors less any commissions paid by radio stations to advertising agencies, although the definition presumably should cover similar commissions made by television stations to advertising agencies.

Finally, the statutory reference in SEC. 13 (page 21, line 1 of the printed bill) should be amended to read "secton 114(c)(8)(E)."

2. Observations on the Compulsory License

The Copyright Office has expressed its opposition in principle to compulsory licensing systems for the exploitation of copyrighted works. We believe that compulsory licenses, which permit someone other than the copyright

owner to decide how the owner's property shall be used and what its value is, should be employed sparingly and only where necessary.

Performance rights for copyrighted sound recordings may be one of the exceptional areas where a statutory compulsory license is necessary, at least until the right is established and the parties have a chance to form voluntary licensing organizations to assume collection and distribution functions.

Under the proposed statutory scheme of H.R. 1805, the compulsory license offers the benefit of assuring broadcasters and other users, who have heretofore performed copyrighted sound recordings without payment, continued access to those works upon payment of modest statutory rates. It permits users to assess the cost of their uses in advance and to plan for these new payments as part of their business expenses. It includes an express direction to the CRT to retain the services of at least one non-governmental organization to monitor and value performances and to distribute royalties to recipients. The bill also includes an antitrust exemption to permit claimants to agree among themselves as to the appropriate division of funds among them. Finally, H.R. 1805 does not preclude voluntary licensing for parties who are able to bargain and who choose not to use the statutory license.

The Office would prefer to employ voluntary mechanisms and procedures for the collection and distribution of royalties, with minimal government and bureaucratic intervention in that function. Here, however, we acquiesce to such intervention because it is acceptable to the beneficiaries, because it would require time to establish a voluntary collection system and because we would not wish to delay enactment of the performance right, already long delayed, nor complicate the legislative process at this point. If the Subcommittee wishes, the bill may include a provision

for review after a period of years during which the copyright owners could develop a voluntary collecting system.

In short, the Copyright Office believes that establishment of a performance right is long overdue, and that the proposed legislation before you is a satisfactory vehicle for initially establishing that right.

III. PIRACY AND COUNTERFEITING AMENDMENTS ACT OF 1981

The Copyright Office supports H.R. 3530: the Piracy and Counterfeiting Amendments Act of 1981, which would amend titles 17 and 18 of the United States Code to strengthen the laws against record, tape, and film piracy and counterfeiting. By increasing the criminal penalties for anyone who willfully infringes a copyright for profit, the bill would help to deter the unauthorized reproduction and distribution of phonorecords or copies of copyrighted sound recordings and audiovisual works. It would also raise the fines and increase the prison terms for knowingly trafficking in counterfeit labels for phonorecords or copies of motion pictures or other audiovisual works.

The need for criminal penalties commensurate with the extent and scope of the offenses being committed in this area has become particularly acute. In recent years there has been rapid growth in the unauthorized reproduction and distribution of copyrighted sound recordings and audiovisual works fixed in copies or phonorecords. This burgeoning piracy of works protected by copyright has been accompanied by an increase in counterfeiting labels affixed (or designed to be affixed) to phonorecords or copies of protected works. The development of this illegal activity is such that it poses a threat not only to the motion picture and recording industries, but to the public in general. The danger to the public is at least twofold: in the case of inferior pirate copies or phonorecords, consumers are deprived of the quality of the original works; and, by injuring the market for authorized and authentic works, the piracy and counterfeiting may cause irreparable harm to the industries concerned and lead to a diminution in the production of new works.

Film and record piracy has become epidemic around the world. The situation is serious. I say this not merely on the declarations of the film and record industries, but also upon a thorough and urgent review of the problem at a Worldwide Forum on the Piracy of Sound and Audiovisual Recordings held at Geneva in March 1981 under the auspices of the World Intellectual Property Organization, which I attended. Participants in the Forum from many nations, including Third World countries, unanimously endorsed the view that: "the enormous growth of commercial piracy of sound and audiovisual recordings and of films all over the world is posing dangers to national creativity, to cultural development and to the industry, seriously affecting the economic interests of authors, performers, producers of phonograms, videograms and broadcasting organizations."[1/]

The Copyright Office is particularly concerned about the detrimental impact of this illegal activity on the production of new works in the United States. Although the Copyright Act of 1976 attempted to deal with the problems of piracy and counterfeiting, experience since that time, coupled with the recent developments in technology, indicates that the criminal sanctions, especially the length of the prison terms, should be increased. There is a real need for a substantial deterrent to the widespread piracy of copyrighted sound recordings and audiovisual works. The changes proposed in this bill, it can be hoped, will serve to restrain those who illegally interfere with the legitimate market for sound recordings, motion pictures, and other protected works.

Although the Copyright Office generally supports the amendments proposed in H.R. 3530, it has reservations about the proposal to transfer the penalties for criminal copyright infringement from §506(a) of title 17 U.S.C. to new §2319 of title 18. The Copyright Office is aware of the need to facilitate the work

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1/ Resolution adopted by the participants, WIPO Worldwide Forum on the Piracy of Sound and Audiovisual Recordings, PF/1/21 (March 27, 1981).

of the U.S. Attorneys in prosecuting cases for criminal infringement of copyright. The Department of Justice has moved energetically to control piracy and counterfeiting in the United States. It may, however, be more effective to retain the substantive provisions as well as the penalties in the copyright law. If it is decided that the penalty provisions should be moved to the Criminal Code, the Copyright Office would urge that reference be made in §2319 of title 18 U.S.C., to the provisions on the forfeiture and destruction of infringing copies or phonorecords in title 17.

Section 506(a) of the Copyright Act of 1976 provides that a person who willfully infringes a copyright for profit may be fined not more than $10,000 or imprisoned for not more than one year, or both; and, in the case of sound recordings or motion pictures, a criminal infringer may be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first offense and fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.[1/] In addition to criminal penalties, §506 provides for the forfeiture and destruction or other disposition of infringing copies or phonorecords, as well as the implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.[2/] The Copyright Act of 1976 also contains a detailed section dealing with the seizure and forfeiture of copies and phonorecords "manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a)."[3/] Section 4 of H.R. 3530, amending title 18 by adding a new §2319 on criminal infringement of a copyright, makes no reference to either §506(b) or §509 of title 17. In fact, the use in

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1/ See 17 U.S.C. §506(a) (Supp. III 1979).
2/ Id. §506(b).
3/ 17 U.S.C. §509 (Supp. III 1979).

§2319(a) of the phrase "shall be punished as provided in subsection (b) of this section," might suggest that the remedies in §2319 are exclusive.

Section 3 of H.R. 3530 would revise the bases of federal jurisdiction under §2318 to include circumstances where (1) the offense is committed within the special maritime, territorial, or aircraft jurisdiction of the United States; (2) "the mail or a facility of interstate or foreign commerce is used in the commission of the offense;" (3) "the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copyrighted audiovisual work or motion picture, or a phonorecord of a copyrighted sound recording."[1/] As presently drafted, the jurisdictional base of §2318 of title 18 is limited to cases of "interstate or foreign commerce."[2/]

Finally, two technical points. First, the Senate version of this bill S. 691, refers in its section 3 to the definitions of "reproduce" and "distribute" in section 106 of title 17.[3/] It would appear useful to include a similar reference in H.R. 3530.

Second, throughout the bill, motion pictures and audiovisual works are treated as if they were entirely different works. For example, amended §2318(a) refers to "a copy of a motion picture, or an audiovisual work." Since motion pictures are defined in §101 of title 17 U.S.C. as a type of audiovisual work, reference should be made to a copy of a motion picture "or other audiovisual work."

In summary, we believe that, technical matters aside, this legislation is needed, and urgent, and should be enacted.

1/ See Amended §2318(c), H.R. 3530, 97th Cong., 1st Sess., §3, at 3 (1981).
2/ 18 U.S.C. §2318 (Supp. III 1979).
3/ See New §2319(c)(2), S. 691, 97th Cong., 1st Sess., §3, at 5 (1981).

IV. PERFORMANCE OF MUSIC BY VETERANS' AND FRATERNAL ORGANIZATIONS

H.R. 2007, introduced by Representative Young, and H.R. 3408, introduced by Representative Johnston, would amend Section 110 of the Copyright Act by adding a tenth exemption to that section, which would have the effect of exempting "performance of a musical work in the course of the activities of a nonprofit veterans' organization or a nonprofit fraternal organization."

The Copyright Office opposes H.R. 2007 and H.R. 3408 on the ground that the present exemption for nonprofit organizations in Section 110(4) of the Copyright Act represents an equitable balance between the right of creators to be compensated for performances of copyrighted music and the reasonable needs of nonprofit users for royalty-free access to copyrighted music.

Section 106 of the Copyright Act gives copyright owners the exclusive right to perform music in public. That suggestion thus continues a property right that has been part of the copyright statutes since 1897. [Act of January 6, 1897 (29 Stat. 481)]. This exclusive right is, however, subject to exceptions and exemptions. The most significant of these appear in Section 110 of the Act.

The Copyright Office submits that Congress adequately provided for the reasonable needs of nonprofit organizations for royalty-free performance of copyrighted nondramatic music in Clause (4) of Section 110. This general exemption, while narrower than the exemption of the statute in effect before 1978, in its essentials exempts performances of nondramatic music by nonprofit organizations provided the performers, promoters, and organizers are not paid and provided proceeds from admission charges, if any, are used for educational, religious,

or charitable purposes. (However, the copyright owner may object to the performance where an admission charge is made, by an appropriate advance notice in writing.)

If a nonprofit organization performs nondramatic music by mechanical means such as records, tapes, cassettes, etc., the performance is potentially royalty-free under Section 110(4).

If a nonprofit organization performs nondramatic music and the performers, promoters, and organizers are unpaid, the performance is potentially royalty-free under Section 110(4).

In passing the current Copyright Act, Congress drew this new line separating for-profit and not-for-profit performances. It decided that if a nonprofit organization has the money to pay the singer or musician who performs copyrighted music, it is only fair and reasonable that the same nonprofit organization budget enough funds to pay copyright performance royalties to the author-copyright owners of the music performed.

Since copyright is an intangible property interest, it is sometimes easy to forget that it is property. Creators of copyrightable works and copyright owners derive income by licensing various uses of the works. Any significant unauthorized use intereferes with the legitimate expectation of creators and copyright owners that they will be compensated for uses of their property. The public performance of music is one of the most significant sources of royalty income for composers and lyricists.

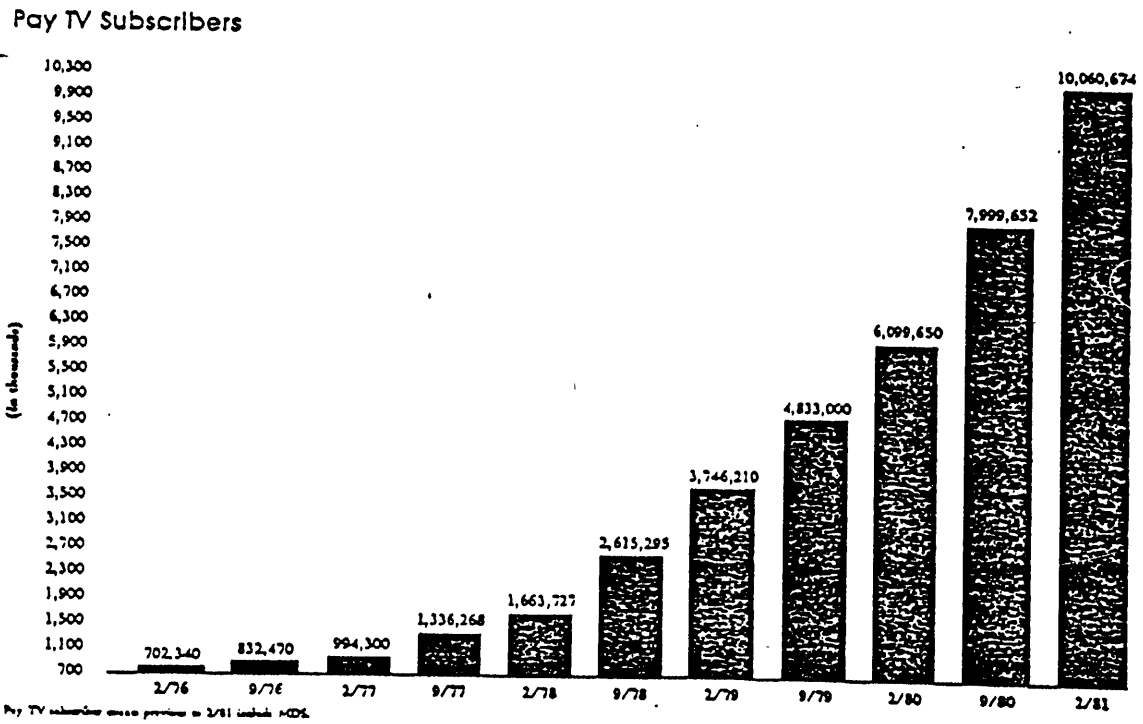
Copyright is of course a statutorily created property right, and Congress both defines the scope of the right and sets limitations on its exercise. However, any such limitations should be consistent with the fundamental purpose of the copyright system, as established by the Copyright Clause of the Constitution. This purpose was expressed by the Supreme Court in Mazer v. Stein, 347 U.S. 201 (1954) in this way:

> The economic philosophy behind the [constitutional] clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and Useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. [347 U.S. at 219]

We are all enriched by the creative spirit that animates composers and authors. We encourage authors to utilize this creative spirit to its maximum potential by assuring them of adequate control over, and compensation for, uses of their creative output. The interests of nonprofit organizations in royalty-free performances of copyrighted music have been accommodated in the current Copyright Act. This accommodation, which Congress legislated only recently, should not be disturbed.

I want to thank you for this opportunity to appear before you and will be pleased to answer any inquiries you may have now or in the future.

CHART I



Reprinted with permission from 6 Cablevision 20 (February 23, 1981).

CHART 2

CABLE PROGRAM SERVICES AVAILABLE BY SATELLITE

PREMIUM MOTION PICTURES

Cinemax [Time, Inc.]

Galavision [Spanish Intl. Network]

Home Box Office (HBO) [Time, Inc.]

Home Theater Network [Westinghouse]

Rainbow: Bravo and Escapade [Daniels/Cox/Cablevision]

Showtime [Viacom/Teleprompter]

The Movie Channel [Warner Comm.]

Private Screenings

Spotlight [Times Mirror]

SPORTS [ADVERTISER SUPPORTED]

Entertainment and Sports Network (ESPN) [Getty]

USA Network [UA Columbia]

OTHER ADVERTISER SUPPORTED SERVICES

Black Entertainment Network (BET)

Satellite Program Network (SPN)

Modern Satellite Network (MSN)

Spanish International Network (SIN)

Alpha Repertory Television Service (ARTS) [ABC/Warner/Hearst]

CHILDRENS PROGRAMMING

Calliope [UA Columbia]

Nickelodeon [Warner Comm.]

RELIGIOUS PROGRAMMING

People That Love (PTL)

Christian Broadcasting Network (CBN)

Trinity Broadcasting Network

National Christian Network

National Jewish Television

NEWS AND PUBLIC AFFAIRS

Cable Satellite Public Affairs Network (C-SPAN)

Appalachian Community Service Network

UPI Newswire

Cable News Network (CNN) [TBS] (Advertiser Supported)

RETRANSMITTED BROADCAST STATIONS

WGN - Chicago

WOR - New York

WTBS - Atlanta

WFMT FM - Chicago

ADDITIONAL PROGRAM SERVICES TO BE ADDED TO SATELLITE

The Entertainment Channel (Pay Service: Cultural) [RCA/RCTV]

CBS Cable (Advertiser Supported: Cultural) [CBS]

Public Subscription Network (Pay Service: Cultural) [PBS]

UTV Cable Network (Advertiser Supported: Women's Programming) [UTV/Charter Publishing]

BETA [ABC/Hearst] (Advertiser Supported: Women's Programming)

PET Network (Adult) [Telemine/Penthouse]

Cinemerica (Advertiser Supported: General Interest to 45+ Years Old)

All-Music Video [Warner Comm.]

The Health Channel

CHART 3

CABLE SATELLITE PROGRAM SERVICES: SUBSCRIBER COUNTS

Network	Subscribers as of 6/21/80	Subscribers as of 2/27/81	Percentage Change 6/21/80-2/27/81	Cable Penetration as of 2/81 *****
* WTBS (Atlanta)	8,929,278	10,970,220	+22.8%	55.6%
Christian Broadcasting Network (CBN)	7,500,000	9,184,000	+22.4%	46.6%
C-SPAN	5,750,000	7,100,000	+23.4%	36.0%
Home Box Office (HBO)	5,000,000	6,000,000	+20.0%	30.5%
USA Network	4,779,826	7,000,000	+46.4%	35.5%
Entertainment and Sports Programming Network (ESPN)	4,035,859	8,502,690	+110.6%	43.2%
* WGN (Chicago)	3,864,644	5,163,069	+33.5%	26.2%
Black Entertainment Network (BET)	3,710,000	6,181,767	+66.6%	31.4%
Trinity Broadcasting Network	3,500,000	3,750,000	+7.1%	19.0%
People That Love (PTL)	3,000,000	3,800,000	+26.6%	19.3%
** Satellite Program Network (SPN)	2,839,639	2,005,518	-29.4%	10.2%
* WOR (New York)	2,753,000	3,180,000	+15.5%	16.2%
Nickelodeon	2,518,360	3,650,000	+44.9%	18.6%
Cable News Network (CNN)	2,314,000	4,856,088	+109.8%	24.7%
Modern Satellite Network	2,300,000	3,400,000	+47.8%	17.3%
Showtime	1,100,000	1,600,000	+45.4%	8.1%
UPI Newstime	700,000	866,000	+23.7%	4.4%
The Movie Channel	407,000	750,000	+84.2%	3.8%
Appalachian Community Service Network	251,000	500,000	+99.2%	2.5%
*** Spanish International Network (SIN)	N.A.	2,644,100	N.A.	13.4%
Home Theater Network	82,000	140,000	+70.7%	.7%
Galavision	13,500	60,000	+344.4%	.3%
Cinemax	N.A.	200,000	N.A.	1.0%
**** Private Screenings	N.A.	78,000	N.A.	.4%
Rainbow	N.A.	63,000	N.A.	.3%

* Retransmitted Superstation
** SPN's loss of homes is due in part to change in satellite.
*** Estimated Spanish-speaking households, affiliates include cable systems broadcast stations and translators.
**** Include STV households
***** Penetration based on estimated total number of cable subscribers at 19,700,000 in February 1981.

Source: Cablevision Magazine: January 12, 1981, p. 28 and March 16, 1981, p. 17.

CHART 4

RANKING OF TOP 50 MULTI-SYSTEM OPERATORS: STATUS AS OF APRIL 1, 1981

FIRST 25 Rank	System Operator	Number of Subscribers	Pay-Cable Subscribers
1.	American TV & Comm. Corp.	1,424,000	1,007,000
2.	Teleprompter Corp. a/	1,337,515	444,813
3.	Tele-Communications Inc.	1,277,301	563,191
4.	Cox Cable Comm. Inc.	958,518 b/	616,185
5.	Warner Amex Cable Comm. Inc.	760,000	334,000
6.	Storer Cable Communications	628,100	441,200
7.	Times Mirror Cable TV	606,346	361,006
8.	Viacom Communications c/	494,720	247,610
9.	UA-Columbia Cablevision Inc.	429,000	318,000
10.	Sammons Communications Inc.	417,630	179,676
11.	United Cable TV Corp.	379,000	231,000
12.	Continental Cablevision, Inc.	368,000	271,000
13.	Gen'l Elec. Cablevision Corp.	276.000	175,000
14.	Cablecom-General Inc.	255,333	112,650
15.	TeleCable Corp.	246,000	117,000
16.	Midwest Video Corp.	231,911	47,074
17.	NewChannels Corp.	214,200	98,300
18.	Service Electric Cable TV Inc.	210,200	30,000
19.	Liberty Communications Inc.	194,600	60,800
20.	Heritage Communications Inc.	192,000	112,000
21.	Cablevision Systems Dev. Co.	173,000	169,000
22.	Comcast Corp.	166,410	82,288
23.	Texas Community Antennas Group	154,400	24,000
24.	Vision Cable Communications Inc.	153,000	80,000
25.	Tele-Media Corp.	151,500	37,400
	Total--Top 25	11,698,684	6,110,193
SECOND 25			
26.	Wometco Communications Inc.	150,500	91,250
27.	Century Communications Corp.	145,602	66,850
28.	Western Communications	145,000	40,000
29.	Rollins Inc.	137,051	59,611
30.	MetroVision Inc.	137,000	72,000
31.	Communications Services Inc.	131,000 d/	40,500
32.	Daniels & Associates Inc.	130,000	60,500
33.	Colony Communications Inc.	125,000	105,500
34.	Prime Cable Corp.	120,000	75,000
35.	Harron Cable TV	113,422	36,413
36.	Suburban Cablevision	103,000	95,000
37.	Jones Intercable Inc.	99,942	40,485
38.	Centel Communications Co.	95,100 d/	37,100
39.	Harris Cable Corp.	93,961	62,723
40.	Multimedia Cablevision Inc.	83,300	75,500
41.	Gill Cable Inc.	83,000	30,000
42.	Cablevision Industries Inc.	80,237	30,895
43.	Tribune Cable Co.	80,000	36,875
44.	Westinghouse Bcstg. Co. Inc.	78,787	20,766
45.	Plains TV Corp.	78,590	22,483
46.	McDonald Group	72,393	29,830
47.	Toledo Blade Co.	71,300	29,670
48.	Multi-Channel TV Cable Co.	70,619	18,091
49.	Palmer Communications Inc.	68,388	13,015
50.	King Videocable Co.	63,500	22,000
	Total--2nd 25	2,556,692	1,212,057
	GRAND TOTAL--Top 50	14,255,376	7,322,250

a/ As of October 1, 1980.
b/ Includes 35,000 Danish subscribers.
c/ As of February 28, 1981.
d/ Includes pending acquisitions.

CHART 5

CABLE TELEVISION BASIC AND PAY SUBSCRIBER AND PENETRATION GROWTH

		Cable Systems	Basic Cable Subscribers	Pay Cable Subscribers	Percent Pay Penetration	Television Households	Basic Cable Penetration	Pay Cable Penetration
9/3/76	[A]	3,450	10.8 million	----	---	---	---	---
1/1/77	[B]	3,832	11.9 million	997,000	8%	71.2 million	17%	1%
1980*	[C]	----	18.5 million	8.7 million	47%	77.6 million	24%	11%
	[D]	----	19.3 million	8.7 million	45%	---	---	---
	[E]	----	----	----	---	---	22%	7%
2/81*	[F]	----	19.7 million	----	---	---	25%	---
1985*	[C]	----	35.3 million	25.4 million	72%	85.8 million	41%	30%
	[D]	----	35.9 million	27.3 million	76%	---	---	---
	[E]	----	----	----	---	---	35%	15%
1989*	[C]	----	45.6 million	----	---	92.9 million	49%	---
	[D]	----	46.1 million	46.1 million	100%	---	---	---
1990*	[C]	----	48.0 million	----	---	94.8 million	50%	---
	[E]	----	----	----	---	---	50%	30%

* Estimated

Sources

[A] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 88 (1976).
[B] Television Factbook, 1980 Edition / No. 49; Pay TV Newsletter.
[C] Donaldson, Lufkin and Jenrette Securities Corp., Cable Television 1981 (1981).
[D] Paul Kagan Associates, Inc., Cablecast (September 3, 1980).
[E] J. Walter Thompson Co., reprinted in Multichannel News (December 1, 1980, page 14).
[F] A. C. Nielsen, Nielsen Station Index, reprinted in Broadcasting (April 6, 1981, page 176).

CHART 6

MAJOR FRANCHISES AWARDED IN 1980 AND AWARDS DUE IN 1981

(A) Major Awards in 1980 (of 45,000 homes or more)

City	Warner/Amex	Cox Cable	Storer	ATC(Time)	Can. Cable Systems	Sammons	Telepromoter
Dallas	400,000						
New Orleans		220,000					
Pittsburgh	171,000						
Cincinnati	161,000						
Portland					120,000		
Omaha		105,000					
St. Louis Suburbs	70,000						
Little Rock			70,000				
Boone County, Ky.			64,000				
Dallas Suburbs	57,000						
Minneapolis Suburbs					56,000		
Erie, Pa.				46,000			
Indianapolis				140,000			
Fort Worth, Texas						160,000	
Dearborn, Mich.							356,000
TOTALS	859,000	325,000	134,000	186,000	176,000	160,000	356,000

(B) Awards Expected Shortly

City	Homes	Date Expected	List Confined to Public Company Bidders
Fairfield Cty., Conn.	120,000	Feb.-Mar.	Storer, UA Columbia
N. W. Municipal Conf. (Chicago suburbs)	200,000	Feb.	Warner, Amex
Santa Ana, Calif.	65,000	Mar.	Teleprompter, ATC, Can. Cable, United Storer

(C) Bids Already Submitted

City	Homes	Bidders
St. Paul, Minn.	112,000	Warner/Amex, ATC/Heritage, Can. Cable, Teleprompter, Cap. Cities
Tampa	117,000	Storer, Cox, Knight Ridder
E. San Fernando Valley, Cal.	160,000	Telepromoter, Storer, United, ATC, Harte Hanks
Boston	240,000	Warner/ Amex, ATC, Times Mirror
Springfield, Mass.	60,000	Storer, Warner/Amex, Cox, ATC, Telepromoter, TCI, Comcast, Acton
New York: Queens	720,000	Warner/Amex, ATC, Teleprompter
Brooklyn	885,000	Warner/Amex, Teleprompter
Staten Island	106,000	Warner/Amex, Cox
Bronx	490,000	----------
Los Angeles-South Central	210,000	ATC,TCI
Philadelphia	649,000	Storer, ATC, Teleprompter, Comcast, Times Mirror

(D) Cities Expected to Issue RFP or Accept Bids in 1981

City	Households
Denver	250,000
Miami	147,000
Sacramento	250,000
Tucson	125,000
Milwaukee	120,000
DC-Montgomery Cty., Md.	200,000
DC-Fairfax, Va.	200,000
DC-Prince Geo., Md.	200,000
Chicago	1,200,000
Baltimore	300,000

Source: Cable Television 1981, page 18.

CHART 7

Cable Acquisitions of the Top 25 MSO's of March 1976

Rank at 3/1/76	MSO	BUYER
1	Teleprompter	Westinghouse (a)
3	Warner Cable	American Express (b)
4	Amer. Telev. & Comm.	Time, Inc.
5	Cox Cable	Cox Broadcasting
8	Communications Properties	Times Mirror
11	Cablecom General	Capital Cities Comm. (a)
15	Midwest Video	Time, Inc.
19	Athena Communications	Tele-Communications (b)
21	Daniels Properties	Newhouse/Metrovision (b)
22	Vikoa	Acton
25	Horizon Comm.	Tele-Communications (b)

(a) Pending (b) Partial Interest Purchased

1980-81 Mergers Among Top 50 MSO's

Buyer	Rank	Seller	Rank (at the time)	Subs.	As of	Price ($ millions)	Status
Newhouse/Metrovision	NR	Daniels & Assoc. a/	16	115,000	2/80	$100E	Completed
The New York Times	NR	Audubon Elect/Cable Systems	48	73,000	2/81	123.2 b/	Completed
Capital Cities Comm.	NR	Cablecom General	14	241,329	10/80	139.2	Pending
Westinghouse Elec.	40	Teleprompter	1	1,337,515	10/80	646	Pending
Tele-Communications	3	Horizon Comm.	29	125,600	10/80	76 c/	Completed
Time Inc. (Am. Tel.)	2	Midwest Video a/ (17) LBJ Co.	NR	90,000	10/80	55E	Pending
Prime Cable	NR	International Cable	36	87,000	10/80	70E	Pending
Newhouse	NR	Vision Cable	23	145,400	10/80	120E	Completed
Rogers Cablesystems	NR	UA-Columbia Cablevision	9	429,000	4/81	217.2 d/	Pending

a/ Does not represent total CATV system holdings.
b/ $32.7 million to be paid over 7 years. Additional $36.5 million for construction in progress or development. Totals contingent upon cash flow June to December 1982.
c/ For 83% interest.
d/ For 51% interest.

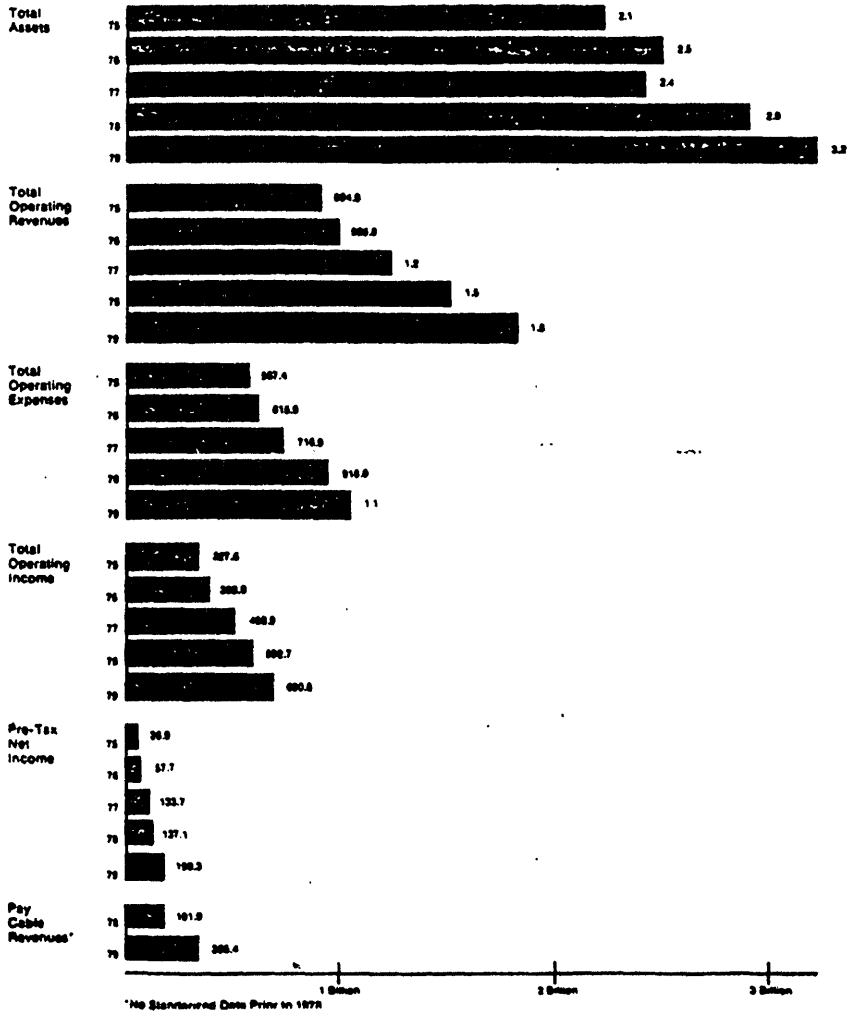
Other Major Corporations Interested in Cable Acquisitions

Hearst Corporation
Taft Broadcasting
Scripps-Howard
Dow Jones & Company
Knight Ridder Newspapers

Source Cable Television 1981, pages 62-63 (1981)

CHART 8

Cable Television Industry
Financial Highlights 1975 thru 1979
(in millions of dollars)



Reprinted from FCC Annual Financial Report of the Cable Television Industry, Table 1 (December 29, 1980).

CHART 9

ADVERTISER-SUPPORTED CABLE NETWORKS

	Est. 1980 Ad Revenues ($ million)	Subscriber Charge/ Monthly	No. of Subscribers Feb. 1981	Format
Entertainment & Sports Network (ESPN)	$7.0	4 cents	8,502,690	Sports
Cable News Network (CNN)	4.0	15 cents with WTBS 20 cents without WTBS	4,856,088	News
USA Network	2.0	11 cents	7,000,000	Sports
Satellite Program Network (SPN)	---	free	2,005,518	Women's programs
Modern Satellite Network (MSN)	---	free	3,400,000	Information
Black Entertainment Network (BET)	---	1 cent	6,181,767	Ethnic
Alpha Repertory Television Service (ARTS) [ABC/Warner/Hearst]	---	free	----	Cultural
Spanish International Network (SIN)	---	Pays cable systems 10 cents for each Spanish surnamed subscriber	2,644,100*	Hispanic
	Start Date	Proposed		
CBS Cable	6/81	free	----	Cultural
Cinemerica	5/81	free	----	General interest to 45+ years old
Beta (ABC/Hearst)	1981	free	----	Women's programming

Source: Multichannel News, Donaldson, Lufkin and Jenrette estimates.
(Updated by U. S. Copyright Office as of April 24, 1981).

* Estimated Spanish-speaking households, affiliates include cable systems, broadcast stations and translators.

APPENDIX 1

Next time a cable network wants to charge you for programming, tell them you don't buy it.

Why pay for programming when UTV pays you?

It's the most innovative concept yet in profits for the cable operator. And the time to cash in is now.

WHEN WE PUT YOU IN UTV...

YOU get free programming. Just put us on your basic service and we pay you.

YOU share in our national advertising revenues. We fill all advertising time and give you a percentage of the revenues — on an ongoing basis.

YOU save time and money. Since we deliver a full programming plus advertising package, you don't have to worry about selling local avails. We don't have to tell you what that can save you in terms of staff, time and capital expense.

YOU get a generous co-op advertising allowance. Plus complete marketing support materials to help you sell your cable service quickly and economically.

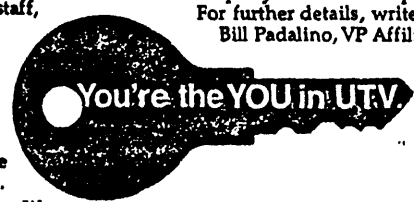
YOU get tiering flexibility. We can handle your special requirements.

You get an increased subscriber base. Our unique programming concept will attract subscribers as never before. The "you" in UTV is your subscriber, who will actively participate in — and impact on — the programming. There'll be viewer participation shows of all types — from game shows and sports to shopping and instructional programs. It's the hottest thing going for unprecedented subscriber lift and retention.

OUR BUILT-IN APPEAL FOR ADVERTISERS MEANS BUILT-IN PROFITS FOR YOU.

UTV is the ultimate profit-maker for you. Our viewer-participation format offers advertisers something no other cable network offers: a built-in device for measuring response. By delivering the most advertising documentation of advertising effectiveness, we'll get the most advertising dollars. And so will you!

Let us put you in UTV. It pays.
For further details, write or call
Bill Padalino, VP Affiliate Sales.



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Mr. KASTENMEIER. I want to compliment you, Mr. Ladd, for your oral prepared statements. I think you have looked very realistically, with great objectivity into the question. As you know there are more issues than just the cable question. If you were today counseling cable interests and were not Register of Copyrights, would you advise them that they might as well forget trying to persist in maintaining a compulsory license but should go to a scheme such as you present here this morning?

Mr. LADD. Yes.

Mr. KASTENMEIER. That is an interesting answer, because I don't know whether they are getting that same advice or not.

Mr. LADD. I don't think they are.

Mr. BUTLER. If you want to see an old man cry, that is the advice you give him.

Mr. KASTENMEIER. In the same sense of changing events, were you trying to be supportive of the FCC disposing of the syndicated exclusivity rule and the distant signal rule the same as part of the deregulation of free markets?

Mr. LADD. Yes. I think that was wise. That is a lay opinion. I am not a communications expert.

Mr. KASTENMEIER. So you are consistent in the sense that you would like to see more or less a return to the free market and fewer rules as evolved in copyright, because those rules did not have copyright implications. How about must carry rules? Should or should not cable systems be part of a copyright scheme as well as communications policy?

Mr. LADD. Let me make a brief preface. There had been a humorous strain running through the hearings in the Senate about whether copyright experts should address communications policies and vice versa. And I would say that I would use the proper circumspection in approaching a question of communications policy. But my lay answer is that I would have no objection to the elimination of the must carry rules. It is certainly worth consideration, and I was interested in the exchange last week between Mr. Frank and Mr. Ferris on this point.

Mr. KASTENMEIER. I think most people would agree but it is of mutual interest to both cable and local telecasting that the cable carry——

Mr. LADD. I think it would be likely that the market, in most cases, will dictate that cable systems carry local signals. I believe that the demand from subscribers would be such that the cable operators would want to carry most local signals. But in principle, as a layman, I would have no objection to the elimination of the must carry rules.

Mr. KASTENMEIER. As I indicated earlier, I think some of us have the concern that not all cable systems are similarly situated. That is to say that notwithstanding chart 5, some systems which are dependent on distant signals and whose hopeful expansion may be more in the distant signal area than in the more sophisticated programing, HBO, et cetera. One would have to wonder whether they would be externally adversely affected. I think at the same time it is true that the large systems are less and less dependent on the distant signal as an attraction for viewership, that it be-

comes less and less important a spectrum of services they offer which are largely not subject to compulsory license.

Mr. LADD. I am very concerned about what happens to the programing supplied to towns like my hometown, Portsmouth, Ohio. Bear in mind, however, that under the proposal we have made, all markets will be allowed to carry all local signals and import enough distant signals to have a full complement of network programing.

You mentioned that some of the smaller systems may not be able to avail themselves of HBO. HBO is a pay service. What is increasingly coming on line are cable origination networks which supply their programing without charge. That complement is growing and I suspect it will continue to. And, in some cases, even with a payment to the cable system for carrying it. Those trends have already been established.

Mr. KASTENMEIER. Assume that a small cable system is in a mountain area and imports three distant signals each involving a network. It probably has public access and several distant signals—we will say Atlanta or New York or Chicago. That is about what they presently have. I think this may describe a fair number of small systems. They are now in a position where they must negotiate for WOR and WTBS. Let's look at how they negotiate. What would be the scenario under your plan?

Mr. LADD. You mean a local cable system negotiating with the superstations that you have mentioned?

Mr. KASTENMEIER. Yes, or the programing that the superstation carries. I suppose they can't clear it through the station. They have to clear it through the owners of the programing.

Mr. LADD. Under our proposal the superstations are going to have to operate under a full copyright liability as well. If the question is, and I may not understand you correctly, how are cable systems going to negotiate with program suppliers? They will have to negotiate as they do with ESPN and HBO and the other cable origination networks; they simply agree to take the programing at established rates.

Mr. KASTENMEIER. We know that. We are only talking about where the compulsory license exists. What sort of system will there be for clearances or negotiations?

Mr. LADD. Whoever the supplier is, whether he supplies by way of a radio signal or satellite transmission, he is the one who is going to have to obtain the clearances. Normally he is going to get the clearances when he buys the program from the program suppliers, just the way it is done in broadcasting today. The program suppliers—wholesalers, if you want to call them that—will have the rights bundled in. The cable system operator will negotiate with the program retailer for the service, not for the individual programing.

Mr. KASTENMEIER. He will negotiate with a wholesaler in the field?

Mr. LADD. No. The cable system will negotiate with whoever is supplying the service; the network service, the superstation service, whatever it is. Just as television stations today do not negotiate for individual copyrighted programs in most cases except where the syndicated series are involved. For example, local network affili-

ates pick up the network feed. They obtain transmission rights to the programs through the network service and the cable origination networks will operate in an analogous manner. They will provide the program stream made up of programs bought from program suppliers with the rights bundled in. I do not see that cable system operators are going to be required to negotiate very frequently.

Mr. KASTENMEIER. I yield to the gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman. I, too, welcome the witness. I offer no apology for giving you a last shot at it. I am glad you came back today, and I am glad you recovered from your trip to China and you came back to find the *Malrite* case is now history. What is the situation right now in view of the *Malrite* case? I believe it has been resolved, so we are in the situation where the rules are now no longer the rules. Is there some great traumatic situation in the industry at the moment or what is going on?

Mr. LADD. I think you can find people to answer the question better than I, but I will make a stab at it. These additional imported signals now available are being retransmitted. United Video, Inc., in Tulsa, is advertising in Multi-Channel News as follows:

Celebrate with WGN! Now that cable systems across America are free to add more distant independent TV signals—they are adding WGN! What does this mean to you, Cable Operator? (1) You can offer unlimited independent TV programming! Cash in on popular viewing trends with constantly changing entertainment found on WGN, the distant independent that leads all others with innovative variety programming. (2) Featuring WGN, the nation's #1 TV independent, means growth! Systems adding WGN in the past 12 months have increased subscriber count by an average of 35% compared with a national average of only 17% for all systems. (3) But it's important that you sign for WGN today! The Supreme Court may later rule against deregulation, but allow "grandfathering" for systems that added more independents.

That phenomenon has already started.

Mr. BUTLER. Let's assume the Supreme Court does not get into the grandfathering. Let's assume that that will stay. Then we go forward with the proposal to eliminate compulsory license in this area. What sort of legislative transition is indicated, if any?

Mr. LADD. A substantial period. In our presentation to the Senate we recommended a period from 3 to 5 years. I would think that a period of not less than 3 years would be indicated. The reason is that there are television programing contracts extending into the future. One of the purposes of a transition period is to allow those contracts, entered into based on rules as defined in the past, to expire naturally so that the properties which are the subject of those contracts can become available for replacement within the market.

Mr. BUTLER. How scientific was your records selection at this time?

Mr. LADD. Not at all.

Mr. BUTLER. Why? Was this just intuitive?

Mr. LADD. That word "intuitive" has been bandied around before. Yes, it was intuitive.

Mr. BUTLER. I asked the representative of the cable industry the same question. They gulped a little but I couldn't get any "time"

suggestion as to what sort of a transition period was necessary. So that is why I want to know.

Mr. LADD. Let me backtrack. It was not totally intuitive because we have had some conversations with distributors and broadcasters who have told us about the length of their contract periods and how far they extend into the future. We know that a number of them extend more than 3 years and the longest that I was told about was a period of 6 years; so, yes, it was intuition but it was not totally not based upon——

Mr. BUTLER. It is based on distribution contracts and things of that nature. What about the financing arrangements of the cable people themselves? Is that a factor in your suggestion of 3 to 5 years?

Mr. LADD. Yes.

Mr. BUTLER. I guess we don't know what their comments are, however, they are down the road.

Mr. LADD. No, and that would be useful information for the subcommittee to have.

Mr. BUTLER. I am increasingly impressed by the free market approach argument, but I am also impressed by the suggestion these people keep giving us—we are relying on this compulsory license and that our financial situation would be substantially in jeopardy if this thing is pulled away at this time. Based on their long-term commitments.

Mr. LADD. I believe that there are adequate data available now to suggest that is not true. One of the things you can look at is simply the revenues and profitability of the systems and the degree to which the large franchise bids are offering an extremely low monthly fee for the basic service. That is simply regarded as a "loss leader"; a means of getting the wire into the house. Cable profit are going to be accrued from the pay and supplemental services. I believe that there is enough evidence now that you can see that.

Mr. BUTLER. You mentioned that philosophy; you supported the elimination of the must carry rule. You are not suggesting that we do that legislatively?

Mr. LADD. No, I am not.

Mr. BUTLER. Nor is it any business of the Copyright Office?

Mr. LADD. I have not reflected on this before. But it occurs to me that there might well be some relationship between the abandonment of the must carry rules and the transition period for the elimination of the compulsory license. That should be examined.

Mr. BUTLER. As I understand, just from your testimony, the continuation of the must carry rule is sort of a premise to the protection of those exempt cable systems.

Mr. LADD. In the near term I think that is so.

Mr. BUTLER. I thank you. Mr. Chairman, I have a number of questions. Would it be possible to keep this witness around until we get back?

Mr. KASTENMEIER. Mr. Ladd, are you willing to remain?

Mr. LADD. Mr. Kastenmeier, we are at your disposal at all times. Yes, of course.

Mr. KASTENMEIER. We will adjourn for the vote and come back in 10 minutes. Until that time we stand in recess.

[Recess.]

Mr. KASTENMEIER. The committee will come to order. The Chair will observe that there is a very large attendance here this morning. I don't know whether it is because of cable copyright or because of patent restoration.

We are taking up two subjects in a sense and I suppose that has doubled our audience. In any event, we are pleased to have you attend.

When we recessed, Mr. Butler was in the process of asking questions so you may continue.

Mr. BUTLER. Thank you, Mr. Chairman.

Turning to two other questions: The record is before us on the performance right problem. They argue that the performance right is needed to protect them against rapidly developing technology which makes it increasingly easier for individuals to tape records directly off the air from broadcasts.

Unless they begin to receive broadcast royalties, they will end up facing financial disaster in a few years when record sales fall off because of taping technology.

Would you comment on that?

Mr. LADD. Yes, sir; Mr. Butler.

The Copyright Office has endorsed and continues to endorse and recommend the enactment of the legislation creating a performance right in our sound recordings. We believe that the need for this legislation is growing year by year.

Mr. BUTLER. The validity of that argument is a portion of your reasoning?

Mr. LADD. That is correct.

Mr. BUTLER. We have before us legislation (18 U.S.C. 2318) providing for the "forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed."

In your opinion, are these forfeitures and destruction provisions adequate to effectively deal with the various counterfeiting cases?

Mr. LADD. I think they are necessary and useful parts of the law but I do not think they preclude the desirability of increased criminal penalties.

Mr. BUTLER. You are in support of the piracy legislation, of course?

Mr. LADD. Yes.

Mr. BUTLER. Mr. Chairman, I have no further questions.

Mr. KASTENMEIER. On the last question of the gentleman from Virginia, did you suggest that you supported H.R. 3530 which raises the penalties?

Mr. LADD. Yes, we do, Mr. Chairman.

Mr. KASTENMEIER. Now, while customarily what is suggested is that these infringements commonly involve records and motion pictures and that is what we have heard testimony to. As I understand it, the bill is much broader in that it does not relate, to just records and motion pictures.

Is that your understanding?

Mr. LADD. As I understand, the penalty for all works other than recordings and motion pictures protected under copyright would be a fine of not more than $25,000 or imprisonment for 1 year or both.

Thus, I think the distinction between the penalties for motion pictures and recordings and for other copyrighted works is maintained.

Mr. KASTENMEIER. You are saying then your reading of the bill is that it does not raise criminal penalties?

Mr. LADD. I would have to go back in to the details of this.

Ms. SCHRADER. It does raise the fine for all works.

Mr. KASTENMEIER. In that respect does your office have any evidence that such drastic penalties in areas other than records and films are necessary?

Mr. LADD. I would have to say no.

Mr. KASTENMEIER. My question was not very clear. I am talking about what a cable company would have to do to obtain rights for the retransmission of distant signals which are covered presently by compulsory license.

Was your answer that, let's say in the case of Atlanta, that each cable system or some combination thereof would have to negotiate with precisely the same entity, wholesalers, packagers, of programs that WTBS presently deals with exactly?

Mr. LADD. Or if not, with whom would that deal?

Mr. LEIBOWITZ. First of all, both your bill and Congressman Frank's bills contain a small system exemption. For those small systems there would be no negotiation.

In our statement we say that you really can't tell whether distant nonnetwork programing available presently on independent stations will continue to be available to the remaining nonexempt cable system; that will depend on whether the subscribers want that programing available.

If the market dictates that this type of programing should be available, there are various ways in the marketplace to make it available. One way would be for WTBS, which is a superstation and I believe the only true willing superstation, that is, they desire the broader reach of their signal and its commercial advertising, to acquire the rights to grant further transmissions of the programing contained on that signal.

Mr. KASTENMEIER. Let me use then WGN. My question is with whom do they negotiate? It doesn't negotiate with WGN?

Mr. LEIBOWITZ. If WGN desired to be a willing superstation, cable systems would negotiate with WGN who, in turn, would have acquired the rights from the program suppliers for further transmissions.

Mr. KASTENMEIER. I used the wrong example. In terms of distant signals there is only one willing superstation.

Mr. LEIBOWITZ. Right now, that is correct.

Mr. KASTENMEIER. So let's deal with the more common case of the passive superstation or other television stations whose signals are imported and which television station is an independent and not network.

Mr. LEIBOWITZ. If the originating station does not desire to have a further transmission, and the carriage is not exempt, either because the signal is distant or because the system is not an exempted small system, the station probably would not be available in the distant community of the cable system.

That is not to say that the programing presently broadcast on that station would not be available through alternative means. What it does say is that the broadcaster of that signal would be assured the same rights that all other programing distribution services have, and that is to acquire exclusive rights to a product.

The origination services on cable, for example, HBO in the pay model, and ESPN and USA in the advertiser supported model, all have the ability of acquiring their programing on an exclusive basis.

A TV station or cable system cannot use that programing without permission and a passive super station who is not willing to negotiate and does not want added cable coverage would be in the same situation of denying carriage. But that is not to say the programing will not be available to the cable system through alternative means.

Mr. KASTENMEIER. In the case of a passive distant station the station would be in a position of vetoing carriage of the retransmission of their system.

Mr. LEIBOWITZ. Yes, sir; just as HBO can veto the carriage of its signal without permission.

Mr. KASTENMEIER. So cable would have to clear with WGN and also clear with the programers?

Mr. LEIBOWITZ. Under the scenario you describe there would be no clearance because that particular signal, at the decision of WGN and with the consent of the program suppliers of that signal, would not be extended to distant cable communities.

So in your particular scenario that would not apply. Other stations might want to have the broader reach available through cable carriage and would acquire the rights to grant further transmissions. Then the station would, in essence, be serving as a middleman. A transition period would facilitate such a system to operate if desired in the marketplace.

I would like to make several points in response to Congressman Butler's earlier question concerning the relative importance of cable origination programing and independent signals. First, Monroe Rifkin testified before your subcommittee several weeks ago and offered his view of the importance of the distant signals in comparison to the originated programing:

> Cable is a highly capital and risk-intensive business which in the newer markets being built today must rely largely on cable originated programing to generate the major portion of its revenue base.

He then cited statistics relating to Savannah, Ga, and Albany, N.Y., where subscriber levels rose dramatically when advertiser-supported and pay programing became available.

Second, the Neilsen Co. has recently conducted a study comparing, on the one hand the viewership by cable subscribers of all independent television stations, emanating from both local and distant communities, with the viewership of pay cable and advertiser-supported cable programing where all of these forms of programing were available.

As you will note on page 44 of our prepared statement, that study measured cable subscriber viewing during July 1980; November 1980 and February 1981. During all three periods, viewing by subscribers of pay cable and advertiser-supported programing ex-

ceeded the viewing of all independent stations both local and distant, by margins of 3.2 percent, 1.7 percent, and 3 percent respectively.

Mr. KASTENMEIER. I appreciate that but that was not my question.

Mr. LEIBOWITZ. I partly was responding to Congressman Butler's earlier question as well.

Mr. KASTENMEIER. What I am trying to find out is what the scenario is in terms of the compulsory license, if you get rid of the compulsory license what the cable systems will have to do, with whom will they negotiate?

I picked the wrong example in Atlanta but in all the other systems presumably they are either passive or negative in terms of whether they want their signals carried. But what are the rights of the stations, what are the rights of the original programer or his agent, the wholesaler, in terms of these negotiations?

What I was trying to look at for the committee was with whom do these cable systems have to negotiate?

Mr. LADD. Mr. Chairman, the answer may be that the program suppliers will negotiate with the television stations to allow the retransmission by cable systems of their broadcast programing. But if that does not happen by contract—I think it is extremely unlikely there will be any secondary transmission of distant nonnetwork television programing.

Mr. KASTENMEIER. Thank you. That is helpful.

Mr. LEIBOWITZ. May I add to that, Mr Chairman? There is also a possibility that a private collective rights organization, similar to ASCAP, BMI, and SESAC, might be formed during the transition period to faciliate the administration of cable retransmission rights.

Again, this is speculative but a somewhat analogous situation took place with respect to the performance of nondramatic musical works, which are subject to full liability. There performing rights organizations were created to reduce transaction costs.

Mr. KASTENMEIER. Of course I raised this question with Mr. Rand who represents independent television stations whether they would be as fully protected by ending the compulsory license as they might think. A distinct possibility would be that the contract exclusivity might run from the programs to a collective cable industry association rather than to the independent television stations. Cable, if it is able to operate somewhat collectively, could probably outbid the independents for the same programs and the exclusivity would go the other way. It would run eventually to cable and not to the independents. So what forms some of these things might take in the wake of, say, eliminating compulsory license one can only guess but we are required to try to do some guessing.

I just have one or two questions. One, I gather, you don't really have very much regard for Ms. Ringer's plan. Barbara Ringer, your predecessor, had a plan which she presented before the committee less than 2 weeks ago, I believe, and you have had a chance to look at it. I don't know that you have.

Mr. LADD. I have and I would not accept the characterization that I don't have any regard for it. I do, however, believe that its basic premise is faulty; that is, the transactions cost argument. I do

not believe that agreed licensing is necessary nor desirable to govern cable carriage of programing. Agreed licensing works only when the parties are able to reach an agreement; and even then, cable access to broadcast programing is compelled and controlled by statute, rather than by the wishes of the copyright owners. In essence, agreed licensing has a compulsory license lurking in the background. While the compulsory license may have been historically useful, the opportunity now exists to abandon artificial market mechanisms and we should take it while we still can before further cable entrenchment in the major population centers of our country takes place.

Mr. KASTENMEIER. One last question goes to an entirely different subject. That is the manufacturing clause. The Congress in 1976 phased out the manufacturing clause I think with the support of virtually the entire copyright community but, of course, it could adversely impact on book manufacturers and printers.

As a result, in the phaseout we at the last moment added a provision calling for a study on the impact of the phaseout presumably on printing and book manufacturing industry most particularly, and I do understand that a report is either issued or about to be issued.

Do you have any comment?

Mr. LADD. It is in distribution today.

Mr. KASTENMEIER. Being released today?

Mr. LADD. Yes.

Our conclusion is that the manufacturing clause should be allowed to expire in accordance with its terms.

Mr. KASTENMEIER. Was the committee's view in 1976 that if it were the intention of Congress to inhibit importation of materials it could do so under the trade laws of the United States and not through the copyright?

Mr. LADD. That is our view; our strong view, I might add.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I apologize for being late and I have not had a chance to read your statement but I did read the Senate statement which I guess, generally speaking, you followed in this statement.

I am concerned that if we let the FCC decision stand on deregulating exclusivity and if we further let the deregulation decision relating to the distant signals stand, and then if we abolish the compulsory license, I have a feeling that your larger cable systems would likely be able to enter the competitive marketplace for programs.

I understand that. I think that many of us that represent a relatively rural area where we have smaller cable systems some of them may not be connected with any major cable companies, and we wonder exactly what is likely to happen to the quality of those programs because they would not have presumably the bargaining power and the leverage to obtain the same high quality that maybe one of your larger cable companies would be able to exercise.

What is your feeling about that?

Mr. LADD. I think that if the proposal that the Copyright Office has made here for the abolition of the compulsory license were acted upon, the overall quality of programing on the small systems will, over time, continue to improve.

I base this opinion on several factors. First, the proposal we have laid before the subcommittee provides that all markets will have access to network programing whether that requires distant signals or not.

Mr. RAILSBACK. That is going to be my next question. I am worried about that, too.

Mr. LADD. It also provides that all the present must carry signals would be carried by cable, including, in many of the markets, independent signals.

But I don't believe that secondary transmissions is the name of the game anymore, nor do I believe that the people in the cable industry think that is the name of the game. The program services which are increasingly commanding viewership are the cable origination networks. There are data on this. Some of that is provided in our statement.

I want to emphasize that much of that programing is coming not on a fee basis. It is coming on an advertiser-supported basis and those services are, and will continue to be in greater numbers, available to small systems as well as large systems.

Mr. RAILSBACK. Is that statistical information in your statement? Maybe you can refer me exactly to that.

Mr. LADD. The gesture of your spectacles was right, it is in the direction of David Leibowitz.

Mr. LEIBOWITZ. Some of the data is found in charts 2, 3, and 9 of our statement.

Mr. RAILSBACK. You mentioned the availability of the rural systems being assured of getting, say, network programing. So again assume hypothetically that we let stand the deregulation of both exclusivity as well as the distant signals. Then you have this tremendous emergence of pay television which I agree with you there it is clearly on the rise. I wonder what happens to the broadcasters that are then in competition with either pay cable in trying to buy programs. I wonder what happens to them if they no longer have any assurance of exclusivity.

This really troubles me. Why would a broadcaster want to pay a lot of money—this is their argument—for a program that can be picked up by a cable system with really no interference, if my hypothetical is used, and then isn't the long range result of that the broadcasters who are clearly—not only are they not in a situation where they receive compensation for that program that they purchased in September through advertising but there, again, they are going to argue their advertising benefits may be diminished and you could argue both sides of that one?

But isn't the likely result going to be that eventually your broadcasters without exclusivity are not going to want to pay a lot of money for a program if everybody can pick it up and show it?

Mr. LADD. We are not proposing that cable be allowed to do that except for necessary exempted smaller market systems.

Mr. RAILSBACK. You are at least making that exemption.

Mr. LADD. For the sake of your argument, yes. We have not proposed that. It is, as I have mentioned, in both of Mr. Frank's bills and also in Mr. Kastenmeier's bill.

Mr. RAILSBACK. But there is no exclusivity. You are not for continuing exclusivity, are you?

Mr. LADD. No. Not through the FCC.

Mr. LEIBOWITZ. May I respond? Full copyright liability would permit granting exclusivity except for those small systems that might be exempt under either of the bills, for local programs that are carried in the cable system's local area where the copyright owner has been compensated already for the local distribution, and for network programing where the copyright owner has already been compensated on the basis of nationwide distribution.

Aside from those specific and limited situations, full copyright liability would provide program suppliers with the ability of granting exclusive rights if desired.

Mr. RAILSBACK. The full copyright liability is something that right now is being paid by the broadcasters. They have full copyright liability. In other words, they are paying the marketplace—the cable systems are clearly not paying the marketplace figure and, furthermore, we are even going to abolish—hypothetically we are even going to knock out the distant signal regulation as well as the exclusivity regulation and how they are protected.

Mr. LEIBOWITZ. That is one of the major cruxes of the problem which we are trying to resolve.

Mr. RAILSBACK. How?

Mr. LEIBOWITZ. What you are describing is the present situation. Cable systems are presently operating under a compulsory license which guarantees them access to the programs for cable retransmission.

Mr. RAILSBACK. They do not have that protection with full liability.

Mr. LEIBOWITZ. No.

Mr. RAILSBACK. Right now maybe we are not on the same wavelength. Right now we permit cable to pick up a limited number of distant signals. We also have a law relating to exclusivity which is designed to protect the copyright owner or the broadcaster from whom the program is picked up.

We are talking about eliminating that protection. We are talking about letting—maybe I misunderstand—we are talking, I would think, about letting the distant signals be picked up but you are saying the cable system would then be charged the full—they would have to negotiate for that.

Mr. LEIBOWITZ. The cable systems would be put in the same position as all other program distribution services with respect to their acquisition of programing. They would not have a compulsory license guaranteeing them access. Rather, they would have to negotiate in the marketplace for the programing through various alternative means.

You referred a few moments ago to the distant signal and syndicated program exclusivity rules. These have been effectively eliminated by the Federal Communcations Commission—so what you are describing——

Mr. RAILSBACK. They would be restored by some legislation that maybe would be enacted too. That is one thing for consideration.

Mr. LEIBOWITZ. Yes. Congressman Kastenmeier's bill restores that amount of protection. Congressman Frank's first bill, H.R. 3528, also restores these rules but only for a limited and short transition period before the imposition of full cppyright liability.

Mr. RAILSBACK. Let me ask you about this aspect of performance royalty. Is it true that because this country does not have any kind of a performance royalty and a lot of other countries do that for that reason the American performers that do perform are not given any kind of reciprocal rights when their performances are carried in those countries that may provide a performance royalty?

Can you expand on that?

Mr. LADD. The answer is yes, and I will ask Harriet Olèr to respond to that.

Mr. RAILSBACK. Does anybody have any idea what we are talking about there in loss of revenues to the performers in this country?

Ms. OLER. We don't have any estimates on that but the United States is definitely a net exporter of sound recordings. A large percentage of Western European countries radio programing is American music for which the performers get nothing because as you said, those countries require reciprocity before making any payments to our performers.

Mr. RAILSBACK. Wouldn't it be a fairly persuasive argument to expand on that and for somebody to have some kind of idea about what we are talking about in terms of lost benefits to American performers, that the performers in other countries that do have some kind of performance royalty received—that is one thing, aside from the arguments generally that about the desirability of having a performer's royalty, I think that one of the strongest arguments that the performers have is that there are 50-some countries that right now do provide for performers' royalty and they protect their performance.

Our performers do not receive what should be reciprocal benefit.

Ms. OLER. That is absolutely true.

Mr. RAILSBACK. I think I used my 5 minutes.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. No questions.

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. BUTLER. I have concluded.

Mr. KASTENMEIER. I have only one other question which I think is desirable to ask for those who may not have analyzed your proposal in detail. That is how does it differ—it appears to be the same in the Frank bill that calls for an end to the compulsory license, in what respect does it differ from the Frank bill?

Mr. LADD. The details of the Frank bill do not immediately come to mind. One detail that I do recall is the transition period.

Mr. KASTENMEIER. The Frank bill does not have it.

Mr. LADD. It does have a transition period. But, it is limited to a year and a half.

Mr. LEIBOWITZ. There are several other differences. As we said before, both your bill and Mr. Frank's bill, contain small system exemptions to varying degrees. We have not suggested that small exemptions be included in legislation, though we understand the practical reasons for them.

Mr. KASTENMEIER. Your exemptions go to the type of network or other——

Mr. LEIBOWITZ. Our proposed exemptions are based on traditional copyright principles where the copyright owner has already been

compensated for that coverage. The proposed small system exemptions do not reflect those types of principles.

Another difference is contained only in the second bill, H.R. 3844, introduced by Congressman Frank. This bill proposes an amendment to the Communications Act pre-empting FCC, State and local regulation of retransmissions. This amendment would effectively eliminate the exclusivity rules that are still in existence with respect to sports, the newwork non-duplication rules and the must-carry rules.

I believe Mr. Ladd has commented on those before.

Mr. KASTENMEIER. Does the gentleman from Illinois have another question?

Mr. RAILSBACK. One last question.

I am concerned primarily about the less affluent cable systems and about quality of programing, and I wonder if based on your experience it is your belief, as I think you maybe testified to this in the Senate, that if we knock out the compulsory license that what would likely happen is that there would emerge middlemen that could then be negotiated for and sold to, for instance, rural systems, rural cable systems.

What is your feeling about that?

Mr. LADD. Before you came in, Mr. Railsback, I talked about that in some length. There is a section in the statement which also addresses this point. Let me explain briefly. Our contention is that the middlemen exist now. They are the same middlemen who have supplied the broadcast industry in the past and they are also the cable origination networks who are supplying, in increasing numbers programing to all systems, including advertiser-supported networks some of which are beginning to pay the cable systems for carrying their programing. So, we are not looking to middlemen in the future; they are here now.

Mr. RAILSBACK. Then I don't think we should belabor it and I certainly thank you for your testimony.

Mr. KASTENMEIER. On behalf of the committee, I wish to thank you, Mr. Ladd, and your staff for your excellent presentation here this morning and indeed we think the statement in its entirety is a definitive work on the subject.

In any event, we will undoubtedly need to consult with you at various times in the future on this and other matters and we are deeply appreciative of your appearance this morning.

Mr. LADD. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We now stand adjourned

(Where upon at 1 p.m. the subcommittee adjourned.)

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