Mr. SWINDALL. In the event the FCC is successful in drafting a must-carry provision that is constitutional, would you still be insisting on the abolition of the cable industry's compulsory license?

Mr. PADDEN. Well, again, our position is that we support the Frank bill. And it does—the only thing it abolishes is their compulsory license for distant signals. And it is our position, without regard to the must-carry issue, that cable has long since outgrown the need for compulsory license for distant signals.

In 1976, they were trying to get something to offer the consumers, some distant signals to supplement the local signals. Now there are 40 or more national cable program services available to them to allow them to supplement the local signals. And as the number of independent stations has grown around the country, it is increasingly a problem for our stations, when the programming that our members has paid for in the marketplace, comes crashing back into the market under a compulsory license for a distant signal. So, we separate the two. We think that they have outgrown the need for the compulsory license for distant signals.

Mr. SWINDALL. Could you respond to or retort Mr. Effros' statement to me, what I asked him earlier about the 22-cent issue? Would you respond to his answer?

Mr. PADDEN. Yes; in my written testimony we use an example of the cable system in New York City, which pays 1.4 percent of its revenues for programming, and a local station in New York City which pays 30 percent of its revenues for programming.

Mr. SWINDALL. I am talking about the cost analysis that he made in terms of what is not included in that.

Mr. PADDEN. Well, I think what he was saying is that it costs his members money to lay their cables. And we certainly recognize that. It costs our industry money to buy transmitters and run transmission line up to the top of the World Trade Center and to staff news departments and a lot of other things that cable operators don't have to do. And motion picture houses have to pay rent for their theaters, but they don't go around asking anybody for compulsory license for their movies.

It seems to me that there is no reason to have any discrimination between the two industries as far as programming costs go.

Mr. SWINDALL. That's all I have for this witness. I would like to ask just one last question of Mr. Effros.

You stated that compulsory license and must-carry are not related. Well, as a practical matter, isn't it true that in any legislation that is drafted in a complex area like this, all of the various factors are related? If one of the substantive factors changes as dramatically as this substantive factor has changed in the wake of the recent circuit decision?

Mr. EFFROS. No, sir.

Mr. SWINDALL. Why?

Mr. EFFROS. Because the mere fact that one group hangs its hat and yells and screams for many, many years about the relationship between one thing and another doesn't in fact make it a relationship.

Mr. SWINDALL. Well, don't you think the Congress in fact hung its hat somewhat on that relationship?

Mr. EFFROS. No, sir, I do not. That's what I said in my testimony. If you look back in 1976 and prior to that in court decisions, there was never any issue about payment of money for local signals or the fact that a cable system could carry local signals, because if you did—I mean, take the logic in reverse. If you did, then you would have to say to the Radio Shack store that you must pay a percentage of the money you make on your antenna to Mr. Padden's organization so that he can distribute it to the local signals that that antenna is carrying.

Nobody ever suggested any of these things. They don't relate. The fact that we had to carry these signals as opposed to the fact that we did not have to carry those signals had nothing whatever to do with the copyrights of the producers of programming that were distributing them over the air in a local market.

Mr. SWINDALL. But the must-carry rule was very much intact at that time.

Mr. EFFROS. It absolutely existed.

Mr. SWINDALL. And I don't think there's any question that, as quickly evolving as this issue is, that it's impossible or it was impossible for Congress at that time to speculate as to what would change.

Mr. EFFROS. It need not speculate, because the issue of copyright did not relate to local signals.

That's the point. I mean, there was no relationship between copyright and local signals. So, the fact that there was a must-carry rule or not a must-carry rule on local signals did not relate to our payment of copyrights for distant signals.

The only thing that must-carry did was give us a definition.

Mr. SWINDALL. So, you're telling this committee that basically this entire hearing would probably be taking place even if these changes had not occurred? I mean, as a practical matter, aren't these so interrelated that you have to look at them simultaneously?

Mr. EFFROS. I am more than willing to concede that it is obvious from the political front that we are going to talk about them at the same time. I am saying from a legal and a copyright point of view there is no relationship between the two of them.

I mean, sure, we are sitting here today in a hearing that was initiated prior to—or, the purpose for these hearings was initiated prior to the elimination of the must-carry rules. It had to do with the CRT and the quality of members of the CRT and the problems that were related to the CRT. And it is now transformed into a dicussion of must-carry. That does not necessarily mean that must-carry is related to copyright. It merely means that must-carry is a very potent political issue.

Mr. SWINDALL. I yield back. Thank you.

Mr. KASTENMEIER. Thank you. That was an interesting exchange.

Mr. Padden, you described the Frank bill as abolishing the compulsory license for distant signals, by implication suggesting that the relationship of broadcasters in the local area would not change, except as to distant signals.

In other words, there would be no liability of a cable operator to a local television station.

Mr. PADDEN. Under the Frank bill?

Mr. KASTENMEIER. Under the Frank bill.

Mr. PADDEN. Under the Frank bill, as I understand it, if the cable operator was willing to carry all of the stations in his market, he would get an absolutely free compulsory license to carry them. He wouldn't have to pay anybody. He wouldn't have to ask the broadcasters for permission.

Mr. KASTENMEIER. In other words, if he failed to carry all of them, he would have to negotiate with those he did carry?

Mr. PADDEN. That's right. Now, I know you asked the question of the witnesses on the 18th what the world would look like without any must-carry or compulsory license, and if the cable operator under the Frank bill wished to discriminate in his carriage of local signals, then that's where we'd be: no must-carry and no compulsory license.

There's a lawyer in town named Victor Farrell who about a year ago wrote a one-act play entitled "There Is No Must-Carry, So This Must Be the Marketplace." The play was set in the office of a cable operator. Out in the cable operator's waiting room, there were three broadcasters. The first was the big, strong affiliate VHF station. He goes in to see the cable operator. The cable operator says, well, I guess we have to talk about how much I'm going to charge you to be carried. The big, strong affiliate V says: no, no, we are here to talk about how much you're going to pay me for me to let you carry me. And the cable guy says: why in the world would I ever pay you? And the big, strong affiliate V says: well, I got the 6 o'clock news and the 10 o'clock news, and I've got the greatest anchor in the city. And you really need to have my station on your cable system, or your subscribers are going to want to know why it's not there. And the cable guy says: gee, I never thought about that. I guess we'll have to talk later.

So, he leaves without any resolution of the matter. The second broadcaster to come into the office is the new independent UHF station, a guy like John Bailie. The cable operator says: boy, I know I got you over the barrel. You're just starting up, and you got to be on this cable system, and I am going to charge you an arm and a leg. And the guy says: I can't carry it. And the cable operator says: I don't care, you're going to have to pay.

Then the last broadcaster to come in the market is a strong VHF independent, a station like channel 5 here in Washington. The cable guy looks at him and says: you know, I'm not sure which one of us is going to pay the other, for you, you're kind of in the middle there. And the big, strong V says: oh, no, no, I don't want to talk about payment for carrying me; I want to find out how much I got to pay you to not carry that guy that just went out the door.

It was a humorous play, but I think it vividly illustrated some of the complexities that would take place in the marketplace.

Mr. KASTENMEIER. Well, that doesn't make the marketplace look that attractive, does it?

Mr. SWINDALL. Is that the way the play ended? [Laughter.]

Mr. PADDEN. That's the way the play ended.

Mr. KASTENMEIER. Let me explore the Frank bill. The Frank bill is not a pure bill then. As described, it is an elimination of the cable compulsory license and the reinstitution of a limited or modi-

fied must carry, because it provides incentives and disincentives for carrying all local signals.

Mr. PADDEN. That's right.

Mr. KASTENMEIER. And therefore is not conceptually pure. It isn't just like——

Mr. PADDEN. It's not really a must carry. It provides—well, we believe would be a strong incentive to the cable operator to carry all the local signals, but it doesn't require him to do so.

Mr. KASTENMEIER. On the other hand, it exempts, you said, small people.

Mr. PADDEN. It exempts two classes of systems. One, it exempts all 12-channel systems. And it exempts systems with 2,500 or fewer subscribers, no matter how many channels they have.

Mr. KASTENMEIER. That would mean that, with those two exemptions in effect, it would permit the cable operator to exercise the same tyranny you complain about in your bill.

Mr. PADDEN. That's right.

And I would respond to that by saying, you know, it is Mr. Frank's bill, if we had our way, we would like our members to have carriage on all of the cable systems.

Mr. KASTENMEIER. Do you have any comment on the Frank bill in that connection, Mr. Effros, as I have talked with Mr. Padden?

Mr. EFFROS. Well, sir, the Frank bill is a fascinating amalgam of copyright law and communications law, or attempt at both. There is an obvious effort there, as Mr. Padden has just said. There would be an extreme incentive for the cable operator to carry, according to the Frank bill, every signal within 50 miles of him, which, of course, is a broader carriage right than even the FCC was seeking in its must-carry rules.

I suspect that the granting of a right at risk would be subject to the same constitutional problems that the must-carry rules are subject to. I think that would take a little bit of research to figure out. But what in effect is going on here is the recreation of a new must-carry rule through the mechanism of copyright. It starts out by creating a new copyright, that is, the elimination of the compulsory license.

In order, so far as—again I refer back to Professor Lange because it's the only guide post we have on what are the burdens, how do you create a new copyright? According to Professor Lange, he says it is reasonable to require the proponent of a new interest—and this would be a new interest—to bear the burden of showing why any intrusion into the public domain ought to be allowed.

Now, I don't think the broadcasters can do that. I have not even heard that the copyright owners are attempting to do that. This is really a mechanism to create a new must-carry status. As such, we will very actively oppose it.

Mr. KASTENMEIER. I understand.

A question was raised somewhat parenthetically but nonetheless in partial response to the situation broadcasters, primarily independent television broadcasters, find themselves in. Neither of you may prefer this result, but would it be appropriate or jurisdictionally possible to, say, amend section 111 to prohibit cable operators from charging for the retransmission of programming, for carriage?

Mr. PADDEN. Are you directing that to me?

Mr. KASTENMEIER. Yes.

Mr. PADDEN. I think it's our view that payment for carriage is bad, and it is the antithesis of the compulsory license. But we believe it is the symptom rather than the problem. Payment for carriage is bad. Refusal to carry the local station at any price is, it seems to us, worse. We would prefer to see some remedy directed to this discriminatory option that the cable operator has to carry the stations that he feels he, the cable operator has to have to sell his service but then be able to exclude those who he doesn't want to carry or who he feels pose a competitive threat to other parts of the service.

Mr. KASTENMEIER. I take it, Mr. Effros, you would reject that out of hand?

Mr. EFFROS. No, sir, I would not.

The cable industry is very aware of the difficulty presented by the question that you raised last time regarding the payment or the requirement of payment for carriage of the signal. It is not as simple as saying, all right, let's design a rule within section 111 that will prohibit such a payment, because the cable operator does have editorial discretion now, according to law. And there are going to be some signals that, based on his editorial discretion, he is not going to want to carry. Some of those signals have no problem. I believe Mr. Bailie's own signal is advertised in his area as being so strong on your simple UHF loop that you can pick it up on your dentures. I think that was a quote from one of his engineers.

There is another way of getting into the homes for some broadcasters. Therefore, that would not be a problem.

Similarly, cable only reaches about 53 percent of the subscribers, or less in many communities. So, it's not like we are a monopoly. The broadcaster is reaching the other one-half of the audience directly anyway; he's the only one that does, as a matter of fact. Everybody else is foreclosed from reaching that other half of the audience.

But we are sensitive to this payment problem. The difficulty with an outright statement would be that there are some broadcasters who we would not carry who should have the right to avail themselves of the leased channels, which are a part of a Government mandate upon us.

So, if you wrote an absolute statement that said the cable operator may not accept payment from a local broadcaster, you would create the local broadcaster who is not carried, you would put him in a special category apart from any other programmer in that he could not buy his way onto the system. He could not lease a channel, whereas every other producer of programming who is competing with him could. We don't think that's fair either.

We recognize your concern. I can say point blank that the leadership of the cable industry at this point is making every effort, as Mr. Padden noted, to say to our membership: this is not the wise course, this is not a wise course to take. We are seeing vagaries in the marketplace. We are finding broadcasters who are coming to us and insisting. They are saying: I want to pay because I want a contract. I don't care what happens up in Congress, and I don't care

what happens with the appeal at the Supreme Court. I would feel better if we reached our own deal.

Indeed, that whole concept was built into the old FCC rules, we could reach a private deal with the broadcaster. So, there are some broadcasters who are doing that today. And there are some cable operators who are saying, yes, I want to be paid for all of the reception equipment that I have had to pay for to carry your signal. And that's going to happen. And I think we have to wait to see how it all falls out.

I don't think there is going to be a great deal of it on either side.

Mr. PADDEN. Mr. Chairman——

Mr. KASTENMEIER. Looking into the future, Mr. Padden, on that same theme, is it possible in 1995 or thereabouts that we will see an explosion of new technology? Assuming there is a cable operator who has more or less a monopoly in a community, but that the community, other than the network affiliates and a large number of independent televisions, may not all be members of your growing association. Maybe one is devoted strictly to rock video. And maybe the others devote themselves to very limited segments. They are not quite the same character as is currently most of your membership. What should we contemplate 10 years hence with respect to the cable operator's discretion to carry or not carry those particular new format television stations, whether they be low power or whatever new technology may be implicated? Do you not conceive that, quite apart from the reasons for the decision on the first amendment and must-carry, there may be difficulties in insisting as a matter of policy that all nonaffiliate television operations are carried on the local cable system?

Mr. PADDEN. First, if I could say just one more thing about the charging element. Our position would be, so long as the law prevents any flow of consideration from the cable system to the local broadcasters, I mean, by law we are foreclosed from seeking that flow of consideration, it just seems to us fundamentally unfair to have the flow of consideration back from the broadcaster to the cable operator. If there is going to be money changing hands, we think that both of the parties ought to have an even shot at being on the receiving end.

Now, as far as 1995, I would like to——

Mr. KASTENMEIER. This may be a matter of definition. What is an independent television transmission system?

Mr. PADDEN. I would like to restrict my answer to full-power stations, if I could, because our testimony is in the context of full-power stations licensed by the FCC to serve an area.

Unless I am very wrong about the table of allocations, there are only 100-and-some channels left that are un-applied-for and only a couple of hundred CP's [construction permits] currently in the mill for the whole country. So, I don't really think we are ever going to get to the point where we have so many local full-power stations that we would have this kind of very narrow specialization that you suggest.

Most of our members program for the rating books. That is how they are judged. That's how the advertisers decide where to put their advertising money. And they have to seek as wide a segment of the community as possible.

So, putting that thought together with the fact that cable systems are rapidly growing, we're told by the cable industry to hundreds of channels of capacity, I don't really think that a local carriage obligation tied to the privilege of carrying local signals for free is ever likely to be a substantial burden to the cable industry. And if it is, there's plenty of room to make adjustments around the edges to make sure that it doesn't become such a burden.

Mr. EFFROS. Mr. Chairman, may I point out one thing? We don't carry local broadcast stations for free. We are required to pay copyright whether we carry distant signals or not. Therefore, the shibboleth about carrying local stations for free is one that should be taken out of our vocabulary.

Mr. KASTENMEIER. My last question—and in this respect you are somewhat in agreement—goes to the nature of the landscape if the cable compulsory license did not exist and if must-carry was not restored. The Frank bill is a modification of that, but is not a pure elimination of either. Assuming a pure elimination of both, what would be the interrelationship of the local cable operator to the local television station? Would there be any liability on the part of a cable operator to a local station for 6 o'clock and 10 o'clock news, or whatever is locally produced, as opposed to the other copyrighted works carried by such a station? What would the relationship be?

Both of you do tend to agree that it would be conceivable that you could have organizations such as performing rights societies have for clearance purposes and for accounting purposes in terms of whatever liability would be agreed to. But where do we go from there? What sort of relationship would there be particularly between, let's say, local broadcasters and the local cable system under such a set of circumstances? Mr. Effros.

Mr. EFFROS. Well, as I tried to point out in my testimony, I think that in all likelihood we would wind up roughly in the same place we are now. We would have to go through the courts and the Justice Department re-creation of policy. But, you know, it fascinates me that the broadcasters can talk about the antitrust, the anticompetitive efforts of the cable industry, and yet they are combining together to try to force us to carry them. I mean, if you want to talk about antitrust, we can talk lots about antitrust.

I truly believe that eventually, after all the battles were over, and all the pain that we went through getting up to 1976, we would be back at 1976. And we would refine a compulsory license type of mechanism. It would be unfortunate, I suspect, for the independent broadcasters more than anybody else. And here's the reason why. Unlike the cable industry, which has had to pay for its programming and its carriage of product, the broadcast industry has developed for many years where the local broadcaster got paid to carry product. The local network affiliates get paid by the network. They don't pay the network. They get paid by the network.

So far in the cable industry, we have supported the creation of new product, particularly satellite-delivered product, by paying for that product. And there is a process going on right now where the arguments are going back and forth as to how much we should pay for advertiser-supported product, and shouldn't it be the other way

around? Shouldn't they be paying us for the distribution of that product?

It may very well be by 10 years from now that these new program sources which we have helped nurture over the last 10 years will be on their feet to the point where whatever channel it happens to be, whether it's a news network or a sports network or a Spanish network or a political science network, are strong enough that they pay the local cable operator for channel space. If that is the case, then the local independent broadcaster is in a position where they would almost be forced into the same economic mold as everybody else who is seeking access to the cable system, and would be forced to pay the cable operator.

Under the compulsory license the way we have it now, it is likely that we would continue in the future to carry local broadcasting for free.

So, I think that, if they push their luck a little bit too far, they may find that the competitive marketplace out there that they seek is not one that is going to be friendly to them.

Mr. KASTENMEIER. Would an option be a return to a sort of blackout situation where you might carry a local television affiliate in terms of network programming for which you have clearance. But, if you can't make an adjustment with them in terms of local programming, such as local news, could you just black them out?

Mr. EFFROS. Yes; we could do that, but I don't see that happening, frankly. We are already dealing with local television stations.

Just recently, just 2 weeks ago, NBC, Larry Grossman, had a meeting with cable officials here in Washington. He was outlining the structure of what they hope will become the second all-news channel for cable operators. And one of the pieces of that structure was that there would be a local news slot for local operators. And if the local operator didn't want to fill that slot himself or herself, the local NBC affiliate would have the option of doing that.

So, I see in the main a great deal more cooperation between local cable operators and local television stations, not fighting. I mean, they want their product seen by as many homes as they can possibly get it seen by. We want to provide that product which our subscribers want to see. So, we have a mutuality of interest.

I just don't think that, after all of this rhetoric is over, we are going to be in the great battleground that is portrayed by the independent broadcasters. I think there will be some who aren't carried. There is no question that there will be some who aren't carried. But in the main, the broadcast industry is going to survive very well, and it will survive with carriage on cable television.

Mr. KASTENMEIER. Thank you.

Mr. PADDEN. As I said before, our preference would be for the Frank bill approach, which ties a local carriage obligation to a continued free compulsory license. But if both the compulsory license and the must-carry rules are eliminated never to return, then I think you have a situation where some stations may be in a position to be paid by the cable system for carriage. Other stations may be in some kind of a middle position where there would be no consideration passing hands. And some other stations may be in a position where they would have to pay for carriage.

All I know is that John Bailie has to pay for carriage now, and the cable operator is protected by the compulsory license from the possibility that he would have to pay anybody. That's the disequilibrium we believe is fundamentally unfair.

Mr. KASTENMEIER. Thank you.

Mr. SWINDALL. I just had one topic I would like to broach a little bit more, and that is Mr. Bailie's situation. Mr. Effros, it is obvious that there is an availability in the Savannah market in that particular cable market for Mr. Bailie's channel.

Mr. EFFROS. I don't understand your statement.

Mr. SWINDALL. Well, given the fact that, if he pays $24,000, he can be on that cable system——

Mr. EFFROS. Are you saying the cable channel—the operator has capacity——

Mr. SWINDALL. Correct. Is that an accurate statement? Or would he have to bump somebody——

Mr. EFFROS. I would assume so, since he's being carried, that he has capacity.

Mr. SWINDALL. What would be the explanation then for not allowing him to be on that, except for that fee? I mean, it's not a situation where you have to bump someone apparently.

Mr. EFFROS. No, no, no. I don't know that I would concede that at all. I don't know the details of the market, No. 1. But since we have—well, why don't we ask?

I mean, what is the channel capacity of the system? If it's a 35- or 50-channel capacity, it could carry 50 channels without carrying Mr. Bailie, and would have to bump him. So, that's not the point.

Mr. SWINDALL. Well, my point is you don't need to know how many channels, because it's available for $24,000.

Mr. EFFROS. But the point is that it is an editorial discretionary judgment on the part of the cable operator as to what he is going to do with his channel capacity. One of the things he is required to do by law is have some leased channel capacity available. So, yes, there is channel capacity available. But as to the operator's discretionary judgment under the law of saying, well, I'm going to select these channels for my viewers as opposed to some other, I don't think that editorial discretion needs justification.

Mr. SWINDALL. Well, I think that it lends a great deal of credibility, though, to the charge that an entrepreneur like Mr. Bailie is being leveraged with a leverage that Congress has given the cable industry that I am not at all comfortable with.

Mr. EFFROS. I question that, frankly. What you're saying there, from the cable operator's perspective, is: so long as I go to the Government and get a license for a broadcast facility, regardless of what I put on it, regardless of who I am, regardless of anything, I therefore have a predetermined benefit with regard to any negotiation for channel space on a cable system. And clearly the courts have said, that's not true——

Mr. SWINDALL. Let me get to the heart of it.

It's obvious that what at least the broadcasters are saying is, that it's not fair for them to be limited to a very precise compulsory license fee, the consideration being limited and precise, whereas local cable groups can pretty much come back with whatever they want to set the fee at, with very little or no restrictions. And I

think that does smack a bit of a monopolistic situation that we have created.

Mr. EFFROS. The compulsory license is not a fee, sir. The compulsory license merely says to us that we have the right to carry that which the broadcasters have put in the air in a local community for people to see.

Mr. SWINDALL. Let's call it consideration then. It is a consideration, to use——

Mr. EFFROS. No.

Mr. SWINDALL [continuing]. Mr. Padden's vocabulary, he says there is fixed consideration flowing in one direction, and there is no provision for this same type of consideration in the other.

Mr. EFFROS. You are correct that's Mr. Padden's statement, but that's not——

Mr. SWINDALL. And I am asking you to correct that if it is not true.

Mr. EFFROS. It's not consideration. The copyright law granted certain rights, specialized rights to the owners of copyrights. It left the rest to the public. In other words, if we could take it out of the air. We have the right to use it.

It also said in 1976, if you use certain ones of these, that is, the distant ones, we are going to charge you a fee for that use.

What Mr. Padden is suggesting is that they want an additional right. And that additional right is: you may not use any of these signals unless you agree to use all of these signals or, to put it another way, you must pay negotiated on our basis rather than a flat fee or a structured fee market, unless you agree that you are going to carry every one of us that has this magic piece of paper called a broadcast license.

Now, Mr. Turner, if he were here, would be jumping up and down saying: wait a minute, I paid one heck of a lot more to build Cable News Network, and the people in that community want to see Cable News Network a heck of a lot more than they want to see Mr. Bailie's channel, for instance. And the cable operator, according to the court——

Mr. SWINDALL. Wait, wait. The people have nothing to say about this issue.

Mr. EFFROS. They certainly should.

Mr. SWINDALL. What I am saying is, when you're saying to Mr. Bailie the people will have the right to see it if you pay us $24,000, it is, I think, a spurious argument to say that the people will demand and determine what's on there.

Mr. EFFROS. Mr. Bailie has a broadcast signal, sir. Everybody in his market is supposed to be able to see that broadcast signal without cable television. That's what he was given the license——

Mr. SWINDALL. As a practical matter——

Mr. EFFROS [continuing]. For by the Federal Government.

Mr. SWINDALL. As a practical matter, you and I both know that, if the subscriber subscribes to cable, he is not going to want to be in a situation where he has to walk over to his AB switch three to four times a day.

I am trying basically to find your justification for Mr. Bailie's situation in Savannah, GA.

Mr. EFFROS. I don't need—what I am saying to you, sir, is that an editorial judgment by the editor of a newspaper or a cable system or indeed a broadcaster is not subject to my—first of all, I can't second-guess the justification that a given operator, editor, selects which channels he is going to carry. I don't—this particular operator may carry, for instance, C-Span or may not; that's his judgment. It's not something that I can justify, and I don't know that an editorial judgment needs justification.

Mr. SWINDALL. The point is, Congress has established this playing field, where you have that editorial license, on the one hand. But on the other hand, you do not want a totally free marketplace. I mean, you can't argue total freedom of marketplace, let the strongest survive, on one hand, and then come in on the other hand and say we are satisfied with the compulsory license vis-a-vis the broadcasters, but we are dissatisfied with it vis-a-vis the consumer, the independent, and so on and so on and so forth.

Mr. EFFROS. We never said we were dissatisfied with the compulsory license.

Mr. SWINDALL. No, sir. I am saying that you, under the circumstances as they now exist, are satisfied with it. But they're, on the other hand, saying let's have a totally free marketplace where you must negotiate with all of the various——

Mr. EFFROS. If we are going to have a totally free marketplace, it would mean that the broadcaster would have to pay for his distribution system. We don't have that, sir.

They don't pay for their broadcast facility—well, of course, they pay for the facility. They don't pay for the license——

Mr. SWINDALL. Semantically, I think you get into some trouble with that argument. I think that they are not broadcasting for free.

Mr. EFFROS. Well, one station just sold for $510 million in the Los Angeles market. The public didn't get any of that money. The Government didn't get any of that money. Yet, something was sold. What was it?

Mr. SWINDALL. My point is, you are not arguing that they do not pay to put their signal out there, are you?

Mr. EFFROS. I am arguing that they get a Government license for free that is far in excess of anything you can imagine——

Mr. SWINDALL. What about the capital cost?

Mr. EFFROS [continuing]. With regard to a compulsory license for a cable operator. So, if you are going to talk about symmetry, if the argument is, gee, it appears we no longer have symmetry, then I would suggest to you, sir, that the only way to get symmetry, to see whether we're both in the free marketplace where we pay for our transmission system and they pay for theirs, and then we pay for our product and they pay for theirs, the way to do it would be to eliminate or to require that licenses for broadcast stations be auctioned off.

Mr. SWINDALL. Where is Mr. Bailie's remedy in this situation?

Mr. EFFROS. He's on the system.

Mr. SWINDALL. For $24,000.

Mr. EFFROS. He's on the system. He is competing—the real question might be: where is C-Span's remedy? They may not be on the system because Mr. Bailie was able to buy his way on the system.

It's an editorial judgment, sir. It's not something that this Congress should get involved in.

Mr. SWINDALL. We are involved in it.

Mr. EFFROS. Well, I would suggest to you, sir, that, with respect to the editorial judgment part of it, the courts have said the Constitution says that's our right.

Mr. SWINDALL. I yield back.

Mr. KASTENMEIER. This concludes today's hearing. I thank both Mr. Effros and Mr. Padden for their testimony.

Doubtless, we will want to hear from them at some time in the future as this matter develops within the committee. I appreciate their coming here today.

Mr. EFFROS. Thank you.

Mr. PADDEN. Thank you.

Mr. KASTENMEIER. The committee stands adjourned.

[Whereupon, at 11:50 a.m., the committee was adjourned, subject to the call of the Chair.]

June 12, 1985

Mike Synar

Rep. Mike Synar

COPYRIGHT ROYALTY TRIBUNAL SUNSET ACT

MR. SPEAKER, today Rep. Patricia Schroeder and I introduced the Copyright Royalty Tribunal Sunset Act of 1985. The bill eliminates the disastrous Copyright Royalty Tribunal and freezes copyright rates until Congress establishes a more workable rate-making scheme. The bill requires Congressional action before January 1, 1988.

As Rep. Robert Kastenmeier has said, the CRT is a "broken agency." It was a good experiment in government but has proved to be nothing more than a dumping ground for startlingly inept political appointees. It has failed in its mission to develop the expertise necessary to administer the copyright compulsory licenses. Since its creation in 1976, the CRT has not generated less work for Congress and the courts, but more.

We introduce this measure [redacted] because the public interest demands the CRT's elimination. We hope to begin a debate that will result in a better copyright rate-making system. At a minimum, we should enact this measure to end the wasteful and unnecessary expense of an agency whose $70,000 a year commissioners only randomly show up for work.

Those affected by the CRT have no confidence in it. Several court challenges to its rate-making decisions and procedures have shown how embarrassingly little thought goes into CRT actions. Recently, copyright users and owners subject to two of the compulsory licenses under the CRT's jurisdiction -- public broadcasting and jukebox -- have privately negotiated rates rather than risk the capricious ineptitude of the CRT.

Among its duties, the CRT is responsible for distributing cable copyright royalties. The 1979 fees have not yet been distributed despite the decision of the U.S. Court of Appeals for the D.C. Circuit in Christian Broadcasting Network, Inc. v. CRT 720 F.2d 1295 (1983) which had substantially (althought not without criticism) affirmed the CRT's distribution decisions.

The three items remanded to the CRT in that decision were decided by the CRT again. These are the subject of yet another pending court appeal. Indeed all cable distributions for the years 1979 through 1982 were the subject of appeals pending in the D.C. Circuit as of April 1985.

In Christian Broadcasting, the court was troubled by the near inability of the CRT to explain its distributional decision-making. This was the court's second admonition to the CRT along these lines, the first having been in National Cable Television Association v. CRT 689 F.2d 1077 (1982).

The revelation that former CRT chairperson Marianne Hall was the author/editor of a racist book is only the most recent problem. Many of us were also disturbed by the most recent nomination by President Reagan: a personal aid of his former political director who has no experience in copyright whatsoever.

The two remaining commissioners have little or no experience in copyright. Both have been active politically in Republican organizations. During oversight hearings this year it was disclosed that these $70,000 per year public employees do not regularly show up at work.

The Copyright Royalty Tribunal Sunset Act eliminates the CRT on the date of enactment. Further, it provides that any action taken by the CRT from today forward shall have no effect. I recognize that this is unusual action but it is not unprecedented and, in my opinion, it is necessary.

The CRT in its present form is incapable of giving adequate consideration to the complex issues involved in rate-making. The two sitting commissioners on the five member CRT may not represent a quorum and there is by no means a clear answer to whether or not the CRT can function at all even if this legislation were not enacted.

I do not believe the cable copyright rates in place today are fair. In the past I have introduced legislation to correct an urban/rural bias in the rates and I have supported related legislation to correct this and several other rate inequities. Nevertheless, freezing these rates for two years is the best alternative, given the need for efficient government and the irreparable condition of the CRT.

Under current law, an owner or user of a work subject to the cable copyright compulsory license can initiate a rate proceeding anytime during 1985. As I mentioned, only one proceeding has been intiated so far this year and it is on an extremely narrow question.

This does not mean that cable operators or copyright owners are happy with the status quo. Rather, they are afraid of the CRT because it is irreparably broken and incapable of rendering a sensible decision.

I want to stress that this is only a temporary measure. I strongly support the compulsory license for cable retransmission of copyright materials and I oppose the current rates. But the system is such a mess, this is a necessary first step toward finding a solution. I ask the cable industry to live with the current rates for the time being.

The bill would not affect the recent compromise reached between the performing rights organizations and jukebox operators which was engineered by Rep. Kastenmeier. And present challenges in court regarding interpretations of the cable rate collections would likewise not be affected.

Copyright owners will be affected by this legislation only if Congress fails to act by January 1, 1988. In that circumstance, no distribution system will be in place to distribute the copyright royalties and no distributions will occur.

It is my hope that with the passage of this legislation we can then expeditiously address the substantive issue of correcting the basic inequities which have been identified in the copyright law. We must develop a sensible mechanism for the distribution and collection of royalties well in advance of the sunset date.

3

THE WHITE HOUSE

WASHINGTON

June 24, 1985

Dear Chairman Rodino:

I am responding to your letter of June 12, 1985 inviting me to testify on issues related to the Copyright Royalty Tribunal at a hearing of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. I regret that I must decline that invitation.

From the Administration of George Washington to the present day, it has been a central tenet of the doctrine of separation of powers among the three branches of the Federal Government that the President is not subject to questioning as to the manner in which he formulates Executive policy. Traditionally, this elemental principle has also been applied to members of the President's personal staff, who participate in the deliberative process through which such policies are developed.

This Constitutional privilege of the Chief Executive is founded in practicality as well as tradition and law. The President cannot fulfill his Constitutional duties without the frank and candid advice of his closest associates. Such candor is possible only in an atmosphere that ensures that the advice will remain confidential, so that all options and views will be fully presented, candidly considered and openly expressed as the President develops his policies and programs. Thus, to present testimony would set an undesirable precedent that would seriously inhibit the ability of Presidential advisors, now and in the future, to function effectively in providing support to the Presidency.

Sincerely,

Max

Max L. Friedersdorf
Assistant to the President

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

NATIONAL PUBLIC RADIO

Office of the President

JUL 29 1985

July 25, 1985

Honorable Robert Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U. S. House of Representatives
Washington, D. C. 20515:

Dear Mr. Chairman:

National Public Radio on behalf of itself and its over 300 member stations has filed with the Copyright Royalty Tribunal a Stipulation of Settlement of its claim to the 1983 cable royalty fund. Attached is a copy of the stipulation. It is an agreement among all of the parties to this phase of the proceeding, and it provides that NPR will receive an amount equal to 0.18 percent of the total funds available for the 1983 distribution. The Tribunal stated that it would decide in the next few days whether to accept the Stipulation .

NPR decided to settle in the 1983 claim proceeding because the economics of the proceeding dictated that settlement at a percent of the fund less than it claimed, and a percent less than it has been awarded in past years, was nevertheless in the best interest of the public radio system. This year NPR claimed .5 percent of the total fund; in the past it has been awarded .25 percent of the fund being distributed. From the total amount awarded, we first deduct costs associated with the process, then the award is divided between NPR and its participating stations. Sixty percent of the allotment goes to the stations and forty percent to NPR.

The cost of developing and presenting a case before the Tribunal, including surveys and witness fees, cross-examining witnesses of other parties, having counsel present at the extended proceedings, filing post-hearing briefs, and possibly pursuing the case on appeal to the Court of Appeals, are disporportionate for a claimant like National Public Radio which claims only a small portion of the fund. For the 1983 proceeding, an estimate of the costs of continuing in the proceeding compared to a favorable result that NPR could achieve made plain that settlement for 0.18 percent of the total pool was in this instance the best choice.

2025 M Street NW Washington DC 20036 Telephone 202 822-2000

The cost of the proceeding through settlement will be approximately $50,000. Had we participated in the proceeding to its end, we estimate the cost would have been approximately $90,000. However, as the Stipulation states, the "terms set forth in this stipulation represent a compromise settlement and apply to the 1983 Cable Royalty Distribution Proceeding only; no party concedes that it is not entitled to the full amount claimed and no party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation." Therefore, the 0.18 percent stipulation for NPR does not indicate what NPR should in fact be entitled to in this proceeding if it continued to litigate.

As we have in the past, NPR and its member stations will continue to seek a statutory entitlement of .25 percent of the total pool. Such a statutory provision would save the public radio system the high cost of participating in the proceedings. An example of the cost is the 1983 proceeding where even with the settlement, we will incur approximately $40,000-$50,000 in costs to obtain an award of approximately $125,000.

We appreciate your interest in this matter. We look forward to working with you to achieve our goal of a .25 percent entitlement for public radio.

Sincerely,

Douglas J. Bennet

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of	)	
	)	
	)	CRT Docket No. 84-1
1983 Cable Royalty	)	
Distribution Proceeding	)	

STIPULATION OF SETTLEMENT OF CLAIM OF
NATIONAL PUBLIC RADIO TO 1983 CABLE ROYALTY FUND

The undersigned, who represent all of the parties making claims upon the 1983 Cable Royalty Fund, hereby stipulate and agree that National Public Radio is entitled to and should be awarded by the Tribunal an amount equal to 0.18 percent of the total funds available for the 1983 distribution. In reaching this stipulation and agreement, the undersigned agree that the direct evidence submitted in written form by National Public Radio thus far in the proceeding (with the exception of the testimony of Mr. Boal) shall be accepted into the record by the Tribunal and shall remain a part of the record and shall be sufficient evidence for an award in the above agreed-upon amount, but that National Public Radio need not present any oral testimony or rebuttal evidence, nor cross-examine or submit proposed findings, as part of its case. The terms set forth in this stipulation represent a compromise and settlement and apply to the 1983 Cable Royalty Distribution Proceeding only; no party concedes that it is not entitled to the full amount claimed and

no party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation.

ARTHUR SCHEINER
DENNIS LANE
On Behalf of Program Suppliers

DAVID H. LLOYD
ROBERT A. GARRETT
On Behalf of Joint Sports Claimants

VICTOR E. FERRALL, JR.
JOHN I. STEWART, JR.
On Behalf of the National Association of Broadcasters

I. FRED KOENIGSBERG
CHARLES T. DUNCAN
On Behalf of Music Claimants

GENE A. BECHTEL
On Behalf of Public Broadcasting Service

CLIFFORD M. HARRINGTON
JOHN H. MIDLEN, JR.
On Behalf of Devotional Claimants

DOUGLAS G. THOMPSON
On Behalf of Canadian Claimants

JAMIE S. GORELICK
On Behalf of National Public Radio

Approved:

CHAIRMAN EDWARD W. RAY
Copyright Royalty Tribunal

Date:

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

BERNARD KORMAN By CTD

BROADCAST MUSIC, INC.

CHARLES T. DUNCAN

SESAC, INC.

NICHOLAS ARCOMANO by CTD

On Behalf of Music Claimants

Statement
of
Bruce L. Christensen, President
Public Broadcasting Service

On
Copyright Royalty Tribunal Reform

before the
Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives

September 18, 1985

Public Broadcasting Service (PBS) is a nonprofit membership organization that provides a national program service and other program-related services to over 300 nonprofit public television stations located throughout the United States, Puerto Rico, the U.S. Virgin Islands, Guam and Samoa. Our responsibilities include representation of the stations and other public television program producers in copyright matters, including participation in proceedings before the Copyright Royalty Tribunal (CRT).

Introduction

This nation's noncommerical, educational television stations have the public trust of delivering public service television which Congress said, more than a decade ago, ought to be available to every American citizen. With regard to the matter of reform of the CRT, public television occupies an unusual role

in that we, both as major copyright owners and as significant users of copyrighted works, are directly impacted by two of the areas falling within the jurisdiction of the CRT. As copyright owners, individual public television stations and others produce public television programs. In that regard, there should be continued liability and reasonable compensation for the retransmission of these programs by cable television systems throughout the nation. As users of copyrighted works, our primary concern is the continued availability of and broad access to copyrighted materials at reasonable royalty rates without administratively cumbersome and costly clearance problems that would impair the vitality of public television operations. The provisions of the copyright law administered by the CRT are important to these needs and interests of public television.

Experience before the Copyright Royalty Tribunal

PBS and public television have been actively involved in matters before the CRT with regard to Section 111 and Section 118 of Title 17 of the United States Code since the effective date of those sections (1978).

Prior to the enactment of Section 111, cable television systems retransmitted the signals of television broadcast stations without copyright liability. Section 111 imposed copyright liability for cable retransmissions of copyrighted program materials, provided a compulsory license for such retransmissions upon payment of royalty fees, and provided for

distribution of the royalty fees among copyright owners of certain works included in distant retransmissions by the CRT in the absence of negotiated agreements between the copyright owners. With regard to Section 111, PBS and public television have filed claims with the CRT, participated in hearing proceedings before the CRT concerning distribution of royalty funds for the years 1978, 1979, 1980, 1981, 1982 and 1983, negotiated agreements with certain other groups of copyright owners with regard to portions of the royalty funds for the years 1981, 1982 and 1983, and participated in appeals from CRT decisions relative to royalty funds for the years 1979, 1980 and 1982.

Prior to the enactment of Section 118, the not-for-profit use of copyrighted works was not an infringement, and public broadcasting enjoyed an exemption from the payment of royalties for copyrighted works included in its programming. Section 118 imposed copyright liability, and provided an essential mechanism for negotiating licenses for the use of music, visual works and literary works by public broadcasting, by creating a forum, the CRT, responsible for establishing rates in the absence of negotiated licenses for music and visual works. With regard to Section 118, PBS and public television have participated in the successful negotiation of license agreements with ASCAP, BMI, SESAC, the Harry Fox Agency and other music rights organizations. We have also participated in proceedings before the CRT to establish rates for the use of music not covered by the negotiated license agreements and rates for the use of visual

works. In the initial proceedings (1978), there was litigation before the CRT between public broadcasting and ASCAP, also with regard to visual works, because of the absence of negotiated agreements. In the second and most recent proceedings (1982), the mechanism had become established and there was limited litigation before the CRT, with regard to certain music rights not covered by the agreements and with regard to visual works as to which negotiations have not been feasible because of the absence of organizations having the ability to negotiate for broad groups of copyright owners. There has been no Court of Appeals litigation regarding these CRT proceedings.

Comments on CRT Reform

When the Government Accounting Office several years ago conducted a study of the CRT at the request of Congress, PBS was pleased to cooperate with GAO officials and offered its evaluation of the CRT. We are also pleased to offer our evaluation to this Subcommittee in response to its request for comments.

1. Much time, energy and litigation costs have been expended with regard to the Section 111 mechanism. However, litigation over the royalty funds during the period of 1978-1982 has been completed, CRT decisions have been upheld by the Court of Appeals (with only minor exceptions) on three occasions, and the recent Court opinion has been a clear sign to all parties that future appeals will likely be rejected on a per curiam

basis. Hopefully, the vast majority of the time, energy and litigation expense to "shake down" this new statutory mechanism has already been expended.

2. The implementation of Section 118, imposing for the first time copyright liability on public broadcasting, has been accomplished without major controversy, and this mechanism is solidly in place and functioning effectively. The mechanism is a sound one. It takes into account the fact that individually-negotiated licenses for each copyrighted work used by public television are not practicable, and that public broadcasting has a special and unique mission to develop program services drawing upon the widest available resources of music, art and literature. Section 118 enables public television stations and other producers of public television programs to gain full access to copyrighted music, visual works and literary works for inclusion in their programs, while providing reasonable compensation to the owners for this use of their copyrighted works.

3. The proposal in H.R. 2784 to establish a three-judge panel to carry out the functions of the CRT would transfer certain adjudicative functions to a judicial forum with a panel of judges whose qualifications are established in the rigorous process of appointment of Article Three judges under the United States Constitution. However, there may be drawbacks to that proposal: (a) The work of the CRT includes ongoing regulatory functions (receiving and processing claims, reviewing and setting rates, promulgation and revision of regulations concerning the

programs administered by it). These regulatory functions, also the acquisition of growing expertise with regard to those functions, are customarily and ideally ongoing activities of a regulatory agency which the judiciary is not equipped or designed to handle. (b) It would appear that transferring jurisdiction over these functions to the judiciary is likely to lessen the ability of Congress to maintain direct and effective oversight of the current CRT functions.

4. An alternative, that would strengthen the adjudicative capacity within the existing agency's structure, would be to provide for the use of a federal Administrative Law Judge. Over the past several decades many steps have been taken to improve the quality of the federal Administrative Law Judge corps in Washington, particularly ALJ's at the upper-grade levels. As is the case in most federal agencies, the function of the Administrative Law Judge would be to hear and receive evidence, to prepare proposed findings and conclusions, and then to present the entire record with the ALJ's proposed findings and conclusions to the Tribunal members for their review and final decision. Although the Tribunal members would give weight to the proposed findings and conclusions of the Administrative Law Judge, their review would be of the entire record (a "de novo" review rather than an appellate-type of review restricted to reversal for serious errors). Under this format, the duties and responsibilities of the CRT members may no longer require their full-time services. If so, this would significantly change the composition of the agency in that appointments would shift from

persons willing to enter full-time government service to persons with other professional or business interests willing to render part-time government service in Washington.

5. In the event the Subcommittee should consider a radical change in the structure of the copyright law -- such as to eliminate the CRT -- such a change should be undertaken only after careful consideration of all of the complex and diverse issues and interests that would be involved and affected by such a major change in the statutory framework only a few years after adoption of the landmark Copyright Act of 1976. Public television would be vitally affected by any such legislative undertaking and would like the opportunity to address that wide-ranging subject matter.

6. We understand the current legislative interest is to improve and strengthen the existing statutory scheme. Whether the CRT is retained as such*, or a new federal agency were to be created, there are several steps that could be taken to strengthen the agency:

(a) The appointments to the agency should be bipartisan, i.e., no more than a simple majority of the members should be from the same national political party. This vehicle is used in other federal agency appointments such as the FCC. It guards

* While there have been questions raised as to the effectiveness of the CRT, as stated in my letter to Congressman Synar, dated June 27, 1985, which is a part of the record of the Subcommittee's proceeding, public television has entered into settlement agreements with other parties, both with respect to Section 118 and Section 111, in fulfillment of the statutory objectives, which encourage voluntary agreements, employing the mechanisms administered by that agency.

against the appearance of partisanship in the decision-making process. It guards against wide fluctuation of policies geared to political election results on the part of a government agency whose business is quasi-judicial and should not be politically sensitive.

(b) We are ambivalent on the issue of whether a three-member or five-member agency is the more suitable size. A three-member agency will reduce administrative costs, still provide for a range of contrasting views by the members of the agency, and a parallel may be drawn to three-judge panels that are normally convened in appellate courts throughout the nation. On the other hand, a five-member agency would be less susceptible to being dominated by the views or personality of a single, individual member, would probably be less likely to experience the absence of a quorum, and may well provide a sounder, more diverse forum for evaluating the subjective types of issues that come before the CRT.

(c) The rate-making and royalty fund distribution functions under Section 111, and the rate-making functions under Section 118, are best served by a multi-member decision-making body rather than by placing those functions in an administrative division of the Library of Congress, as proposed in H.R. 2752. That would place the ultimate decision-making power in a single individual, the Register of Copyrights, and would lose the advantages of diversity resulting from a three or five member

agency.*

(d) The agency chair should have administrative powers, as are customary at most federal government agencies.

(e) As is true of all Presidential appointments, the most qualified available candidates should be selected. It is very desirable for CRT members to have significant experience in the fields of copyright, broadcasting and/or the performing arts.

(f) Support staff at the agency should be expanded. For several years the CRT functioned only with secretarial and administrative assistant personnel for the Tribunal members. The CRT has recently added a general counsel and several legal assistants. It should probably also have an economist (on a full or part-time basis), an accountant or accounting service (on a full or part-time basis), and an officer serving the function of the clerk of court to oversee the litigation dockets. As Members of Congress are aware, non-lawyers can moderate hearing proceedings fairly and effectively. Several non-lawyer members of the CRT have done so, in our experience and judgment. However, it is essential to have staff counsel to assist in that process and deal with "technical" legal questions and issues. The recent addition of a general counsel has enabled the CRT to address legal questions and issues in a much quicker and sounder

* H.R. 2752, in Section 3(c)(2), appears to rule out any future rate-making activity, except by enactment of Congress. If so, this would be a far-reaching change that would freeze the existing rates under Section 111 and would alter the essence of the negotiated license system under Section 118. As indicated previously, such a far-reaching change should be given careful study, as to which we would like the opportunity to comment further.

way than was the case in earlier periods of the CRT's history.

(g) The agency should have subpoena power, which the CRT does not currently possess. This is needed in order to reach documents that are relevant to the cases as presented to the agency. This is also needed to permit parties and the CRT itself to secure the testimony of witnesses having an important bearing on the cases who are unwilling to appear and testify voluntarily, thus giving to the Tribunal the full range of potential evidence (all relevant evidence that is not privileged) which is customarily available in federal agency litigation.

(h) The agency should have its own hearing room. While this may seem like a small matter, the CRT's current practice of convening sessions in half a dozen different hearing rooms in Washington, depending on vacancies at other agencies, often changing from day to day, is disruptive and inefficient. The facilities should be spacious enough to handle the very substantial number of attorneys and witnesses who frequently attend the hearings.

* * *

We appreciate this opportunity to comment, and will be happy to furnish additional information and comments, should the Subcommittee wish us to do so.

* * *

Office of the Commissioner

September 17, 1985

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on
Courts, Civil Liberties and
The Administration of Justice
United States House of
Representatives
Washington, D.C. 20515

RE: H.R. 2752, "Copyright Royalty Tribunal Sunset Act of 1985;" H.R. 2784, "Copyright Dispute Resolution and Royalty Court Act of 1985"

Dear Chairman Kastenmeier:

H.R. 2752 and H.R. 2784, which are pending before your Subcommittee on Courts, Civil Liberties and the Administration of Justice, would abolish the Copyright Royalty Tribunal ("CRT") and transfer its functions, with certain modifications, to other government bodies. The purpose of my letter, which I request that you include in the hearing record on H.R. 2752 and H.R. 2784, is to present Major League Baseball's views on these bills.

Baseball believes that H.R. 2752 and H.R. 2784, if enacted, would stand as an obstacle to the voluntary settlement of cable royalty distribution and rate adjustment issues and likely would renew extensive litigation on matters that are now close to resolution among affected parties. Accordingly, we do not now support enactment of these bills but urge consideration of certain less drastic proposals (discussed below) which, we believe, will improve the administration of the cable television compulsory license by the CRT.

I. Reasons For Baseball's Opposition To H.R. 2752 and H.R. 2784

As you know, Mr. Chairman, the CRT's creation was the product of long and arduous deliberations. You and your Subcommittee in particular undertook an extraordinary effort to fashion a system for administering cable's compulsory license. Throughout, Baseball has not supported the cable compulsory license or the concept of a CRT. Our position has been that the marketplace -- and not the CRT or any other governmental body -- should determine the amount of compensation which we receive for cable's extensive use of our copyrighted telecasts. Notwithstanding our differences on this broader issue, since the decision was made to vest the CRT rather than some other governmental entity with cable royalty distribution and rate adjustment responsibilities, and given that the CRT has exercised that authority for several years, the CRT should not now be replaced.

No party has spent more time before the CRT than has Baseball; we have actively participated in every one of the CRT's cable-related proceedings since passage of the Copyright Act in 1976. To be sure, we have on several occasions disagreed with the CRT and have been critical of certain of its rulings. But nothing in our extensive experience supports the move to abolish the CRT in favor of another governmental body. In our opinion, Mr. Chairman, the CRT has dealt with the very complicated issues which you entrusted to it in an impartial and conscientious manner. Appointing dedicated and qualified individuals to serve on the CRT -- not abolishing the CRT -- will ensure continuation of this record.

Furthermore, Mr. Chairman, we strongly believe that any cable compulsory licensing system should be one which minimizes government involvement and costly litigation and promotes voluntary agreements among affected parties to the maximum extent possible.

There is reason to believe that, by virtue of the CRT's efforts, we are finally on the threshold of achieving this objective. Nearly a decade of litigation has produced a body of precedent and a corresponding awareness by the parties as to what they can reasonably expect from the CRT. These developments have recently prompted certain agreements

among not only copyright owners, but also between copyright owners and the cable industry. Such agreements have been encouraged and made possible by the CRT. Baseball is thus hopeful that we are now close to the point where the major cable royalty distribution and rate adjustment issues can be resolved voluntarily without the need for protracted litigation before the CRT or any other body.

We are concerned, however, that the abolition of the CRT and the transfer of its functions to another governmental body, as proposed in H.R. 2752 and H.R. 2784, will effectively negate all that has been accomplished. Our experience before the CRT and in dealing with the other affected parties leaves no doubt that uncertainty breeds dispute. Uncertainty about whether or to what extent a new administrative body with new decisionmakers might alter past precedent, developed at substantial costs over an extended period, will inevitably spawn another decade of litigation over cable royalties.

To get to the point that we are today, Baseball itself has expended several millions of dollars and countless hours of effort embroiled in numerous compulsory-licensing related controversies before the CRT, the Copyright Office, the courts and the Congress. The inequities inherent in the cable compulsory licensing system should not be compounded by effectively requiring us to relive the last decade of disputes. In our judgment, enactment of H.R. 2752 and H.R. 2784 would likely have such an effect.

II. Baseball's Recommendations

Baseball believes that certain amendments to the Copyright Act would improve the CRT's administration of the cable compulsory license.

First, the cable royalty distribution proceedings should be conducted only once every three to five years and not annually as now required by the Copyright Act.

The distribution proceedings have been enormously expensive and time consuming and necessarily delay the receipt of royalties by copyright owners. No sooner does the CRT end one such proceeding than it must start a new one --

even before the judicial appeals process has been completed. Over the long run, the variations in awards resulting from this series of successive proceedings have had only minor significance. Thus, we believe that requiring the CRT to conduct a new full-blown distribution proceeding every year is wasteful of the CRT's and the parties' resources and serves no useful purpose.

It may be necessary to conduct a limited proceeding each year to resolve disputes among copyright owners within a particular claimant group. However, we believe that the royalty allocations to the major claimant groups (known as "Phase I" allocations) should not have to be reconsidered by the CRT more frequently than once during each three to five year period. As you will recognize, Mr. Chairman, this proposal is generally consistent with the approach to rate-making proceedings which you took in the Copyright Act; such proceedings are not held annually but every five to ten years.

Second, the CRT should be required to distribute any cable royalties not subject to dispute at least semi-annually within sixty to ninety days after they have been paid by the cable industry.

The current system has resulted in substantial and unnecessary delays in the period between royalty collection and royalty distribution. In large measure these delays are the inevitable result of controversies which must be resolved in an annual proceeding by the CRT. They also are the product of various administrative requirements in the Copyright Act. Cable operators deposit their royalties semi-annually. However, the CRT may not distribute any funds earlier than the August following the year in question -- about one year after the first-half royalties are collected. During this period, copyright owners are deprived of the use of funds which are rightfully theirs and which earn only minimal interest. We believe this is wrong and that the steps identified above (including elimination of annual proceedings) should be adopted to minimize the time between royalty collection and royalty distribution.

In conclusion, Mr. Chairman, Baseball deeply appreciates your taking the time to consider our views on these matters. We would welcome the opportunity to discuss any questions that you or other members of your Subcommittee may have, and to present for your consideration draft language implementing the proposals discussed above.

Sincerely,

Edwin M. Durso

Edwin M. Durso
Executive Vice President
For Legal and Administrative
Affairs

cc: Members of the House
Subcommittee on Courts, Civil
Liberties and the Administration
of Justice

Senator Charles McC. Mathias, Jr.
Chairman, Senate Subcommittee on
Patents, Copyrights and Trademarks

Members of the Copyright Royalty
Tribunal

APPENDIXES

APPENDIX 1

99TH CONGRESS
1ST SESSION

H. R. 2752

To terminate the Copyright Royalty Tribunal and transfer its functions to the Register of Copyrights.

IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 1985

Mr. SYNAR (for himself and Mrs. SCHROEDER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To terminate the Copyright Royalty Tribunal and transfer its functions to the Register of Copyrights.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty Tribunal Sunset Act of 1985".

SEC. 2. TERMINATION OF COPYRIGHT ROYALTY TRIBUNAL.

The following provisions of title 17, United States Code, shall cease to be in effect on the date of the enactment of this Act:

(1) ESTABLISHMENT OF COPYRIGHT ROYALTY TRIBUNAL.—Subsections (a) and (c) of section 801.

(2) MEMBERSHIP OF TRIBUNAL.—Section 802.

(3) PROCEEDINGS OF TRIBUNAL.—Subsections (a), (b), and (c) of section 804.

(4) STAFF OF TRIBUNAL.—Section 805.

(5) ADMINISTRATIVE SUPPORT OF TRIBUNAL.—Section 806.

(6) REPORTS.—Section 808

SEC. 3. TRANSFER OF FUNCTIONS OF COPYRIGHT ROYALTY TRIBUNAL TO REGISTER OF COPYRIGHTS.

(a) TRANSFER OF CERTAIN FUNCTIONS.—There are hereby transferred to the Register of Copyrights all functions of the Copyright Royalty Tribunal under the following provisions of title 17, United States Code:

(1) AUTHORITY TO MAKE, DISTRIBUTE, AND DETERMINE CONTROVERSIES REGARDING ROYALTY FEES.—Paragraphs (1), (2), and (3) of section 801(b).

(2) PROCEDURES.—Section 803.

(3) NOTICE OF PROCEEDINGS; FINAL DECISIONS.—Subsections (d) and (e) of section 804.

(4) DEDUCTION OF COSTS OF PROCEEDINGS.—Section 807.

(b) GENERAL TRANSFER.—All functions of the Copyright Royalty Tribunal which are not terminated under sec-

tion 2 of this Act on or before the date of the enactment of this Act and are not otherwise transferred under this section are hereby transferred to the Register of Copyrights.

(c) LIMITATIONS.—

(1) PENDING MATTERS.—The functions transferred under this section may be exercised by the Register of Copyrights only to the extent necessary to dispose of matters pending before the Copyright Royalty Tribunal on the date of the enactment of this Act.

(2) RATES.—The Register of Copyrights may not increase, decrease, or in any other manner change the royalty rates—

(A) established by the Copyright Royalty Tribunal under sections 111, 115, 116, 118, and 801(b), of title 17, United States Code, and

(B) in effect on the date of the enactment of this Act.

(d) EFFECTIVE DATES.—Any function transferred under this section shall be effective for the period beginning on the date of the enactment of this Act and ending on January 1, 1988.

SEC. 4. FINAL DETERMINATIONS; JUDICIAL REVIEW.

(a) EFFECTIVE DATE OF FINAL DETERMINATIONS.—Section 809 of title 17, United States Code, relating to the effective date of any final determination by the Copyright

Royalty Tribunal, shall apply under the same terms and conditions and to the same extent to any final determination by the Register of Copyrights made after the date of the enactment of this Act.

(b) JUDICIAL REVIEW.—Section 810 of title 17, United States Code, relating to judicial review of any final decision of the Copyright Royalty Tribunal, shall apply under the same terms and conditions and to the same extent to final decisions of the Register of Copyrights made after the date of the enactment of this Act.

SEC. 5. TRANSITIONAL AND SAVINGS PROVISIONS.

(a) TRANSFER AND ALLOCATIONS OF APPROPRIATIONS.—The assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with, any function transferred by section 3 of this Act, subject to section 1531 of title 31, United States Code, shall be transferred to the Register of Copyrights for appropriate allocation. Unexpended funds transferred under this subsection shall be used only for the purpose for which the funds were originally authorized and appropriated.

(b) EFFECT ON PERSONNEL.—All commissioners, employees, and other personnel of the Copyright Royalty Tribu-

nal shall be terminated from employment 60 days after the date of the enactment of this Act.

(c) INCIDENTAL TRANSFERS BY OFFICE OF MANAGEMENT AND BUDGET.—The Director of the Office of Management and Budget, in consultation with the Copyright Royalty Tribunal and the Copyright Office, shall—

(1) make such determinations as may be necessary with regard to the functions transferred under this Act; and

(2) make such additional incidental dispositions of personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with, such functions,

as may be necessary to resolve disputes between the Copyright Royalty Tribunal and the Register of Copyrights in carrying out the purposes of this Act.

(d) TRANSITION.—The Chairman of the Copyright Royalty Tribunal and the Register of Copyrights shall, beginning as soon as practicable after the date of the enactment of this Act, jointly plan for the orderly transfer of functions under section 3 of this Act.

(e) SAVINGS PROVISIONS.—(1) Subject to section 6 of this Act, all orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges—

(A) which have been issued, made, granted, or allowed to become effective by the Copyright Royalty Tribunal, any authorized official, or a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Register of Copyrights, and

(B) which are in effect on the date of the enactment of this Act,

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Register of Copyrights, any other authorized official, a court of competent jurisdiction, or by operation of law.

(2) Subject to section 6 of this Act, the transfers of functions under this Act shall not affect any proceedings or any application for any license, permit, certificate, or financial assistance pending at the time such transfers take effect before the Copyright Royalty Tribunal; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not

been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this paragraph shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

SEC. 6. CERTAIN FUNCTIONS OF TRIBUNAL EXERCISED AFTER JUNE 12, 1985, TO HAVE NO EFFECT.

Any functions exercised by the Copyright Royalty Tribunal after June 12, 1985, under any provision transferred under section 3 of this Act shall not be effective.

SEC. 7. DEFINITION.

For purposes of this Act, the term "function" means any duty, obligation, power, authority, responsibility, right, privilege, and activity, or the plural thereof, as the case may be.

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99TH CONGRESS
1ST SESSION

H. R. 2784

To amend title 17, United States Code, to create a Copyright Royalty Court, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 1985

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

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A BILL

To amend title 17, United States Code, to create a Copyright Royalty Court, 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. SHORT TITLE.

This Act may be cited as the "Copyright Dispute Resolution and Royalty Court Act of 1985".

SEC. 2. ESTABLISHMENT OF COPYRIGHT ROYALTY COURT.

(a) ESTABLISHMENT.—Section 801 of title 17, United States Code, is amended—

(1) by amending the section heading and subsection (a) to read as follows:

"§ 801. Copyright Royalty Court: Establishment and purpose

"(a) There is hereby created a court of the United States to be known as the Copyright Royalty Court.";

(2) in subsection (b)—

(A) by striking out "Tribunal" each time it appears and inserting in lieu thereof "court",

(B) in the second sentence of paragraph (2)(B) by striking out "In" and all that follows through "users:" and inserting in lieu thereof the following: "In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, and any subsequent adjustment to those rates under section 804(b), the court shall consider the objectives set forth in clause (1) of this subsection, and shall also consider, among other factors, the extent to which television broadcast stations compensate copyright owners for the secondary transmission of their signals by cable systems located outside their respective local service areas, the extent to which the value to cable systems of additional distant signals decreases or increases as such signals are carried, the impact of the rates on cable subscribers both as to the availability and cost of receiving copyrighted materials,

and the impact of the rates on competition with television broadcast stations:",

(C) in paragraph (2)(C) by adding at the end the following new sentence: "In determining the reasonableness of such rates, and any subsequent adjustment to those rates under section 804(b), the court shall consider the objectives set forth in clause (1) of this subsection and the factors set forth in subclause (B) of this clause.", and

(D) by striking out paragraph (3) and inserting in lieu thereof the following:

"(3) to determine, in cases where controversy exists, the distribution of royalty fees deposited with the Register of Copyrights under sections 111 and 116."; and

(3) by striking out subsection (c).

(b) DESIGNATION OF JUDGES.—Section 802 of such title is amended to read as follows:

"§ 802. Designation of Judges.

"(a) The court shall consist of three judges, who shall be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals who are judges in regular active service or who are senior judges. No more than two of the judges may be senior judges.

"(b) Each judge designated under this section shall serve for a term of six years and shall not be eligible for redesignation, except that the judges first designated shall be designated for terms of two, four, and six years.

"(c) The Chief Justice of the United States shall designate one of the judges as the chief judge of the Copyright Royalty Court. The chief judge shall serve as chief judge for a term of two years.

"(d) Any vacancy in the court shall not affect its powers and shall be filled, for the unexpired term of the designation, in the same manner as the original designation was made.".

(c) PROCEDURES OF THE COURT.—Section 803 of such title is amended to read as follows:

"§ 803. Procedures of the Court

"(a) The court shall adopt rules governing its procedures and methods of operation. The court shall have a seal and shall hold sessions at such places as it may specify.

"(b) Every final judgment of the court shall be published. Such judgment shall state in detail the criteria that the court determined to be applicable to the particular proceeding, the various facts that it found relevant to its judgment in that proceeding, and the specific reasons for its judgment.".

(d) INSTITUTION AND CONCLUSION OF PROCEEDINGS.—Section 804 of such title is amended—

(1) in subsection (a) by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) the chief judge of the court cause to be published in the Federal Register, or in such other publication that the court considers to be an effective means of notice, notice of commencement of proceedings under this chapter; and";

(2) in subsections (a)(2) and (d) by striking out "in the Federal Register";

(3) in subsection (a)(2) and each subsection that follows by striking out "Tribunal" each time it appears and inserting in lieu thereof "court", and by striking out "Chairman" each time it appears and inserting in lieu thereof "chief judge"; and

(4) in subsection (e) by striking out "decision" and inserting in lieu thereof "judgment".

(e) STAFF OF THE COURT.—Section 805 of such title is amended to read as follows:

"§ 805. Staff of the Court

"(a) The court may hire and prescribe functions and duties of such personnel, including a chief staff attorney, as it considers necessary or proper to carry out the provisions of this chapter.

"(b) The court may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5.".

(f) ADMINISTRATIVE SUPPORT OF THE COURT.—Section 806 of such title is amended to read as follows:

"§ 806. Administrative support of the Court

"The Administrative Office of the United States Courts shall provide the court with necessary administrative services, including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement.".

(g) SECTION ON DEDUCTION OF COSTS REPEALED.—Section 807 of such title is repealed.

(h) REPORTS OF THE COURT.—Section 808 of such title is amended to read as follows:

"§ 807. Reports

"In addition to its publication of the reports of all final judgments under section 803(b), the court shall make an annual report to the President and the Congress concerning the court's work during the preceding fiscal year, including a detailed fiscal statement of account. This report may be included as part of the annual report submitted to the Congress and the Attorney General by the Director of the Administrative Office of the United States Courts under section 604 of title 28.".

(i) EFFECTIVE DATE OF FINAL JUDGMENTS.—Section 809 of such title is amended to read as follows:

"§ 808. Effective date of final judgments.

"Any final judgment by the court under this chapter shall become effective 30 days following its publication as provided in section 803(b), unless before the end of that 30-day period an appeal has been filed under section 809 to vacate, modify, or correct such judgment, and notice of such appeal has been served on all parties who appeared before the court in the proceeding in question. Where the proceeding involves the distribution of royalty fees under section 111 or 116, the court shall, upon the expiration of such 30-day period, distribute any royalty fees not subject to an appeal filed under section 809.".

(j) JUDICIAL REVIEW.—Section 810 of such title is amended to read as follows:

"§ 809. Judicial review

"Any final judgment of the court in a proceeding under section 801(b) may be appealed by an aggrieved party to the United States Court of Appeals for the District of Columbia within 30 days after its publication. No court shall have jurisdiction to review a final decision of the Copyright Royalty Court except as provided in this section.".

(k) DISPUTE RESOLUTION.—Chapter 8 of such title is further amended by adding at the end the following new section:

"§ 810. Dispute resolution.

"(a) After commencement of a proceeding under this chapter, the court shall provide the parties to the proceeding with an opportunity to decide, within a reasonable time as determined by the court, on a dispute resolution procedure through mediation, negotiation, arbitration, appointment of a special master, or otherwise. If the parties agree on such a procedure, the court shall enter an order setting forth that procedure.

"(b) If the parties to a proceeding are unable to agree on a dispute resolution procedure under subsection (a), the court may enter an order providing for such a procedure.

"(c) Any proceeding conducted pursuant to a procedure under subsection (a) or (b) shall be completed not later than 6 months after the commencement of the proceeding.".

(l) AUTHORIZATION OF APPROPRIATIONS.—Chapter 8 of such title is further amended by adding at the end the following new section:

"§ 811. Authorization of Appropriations

"There are authorized to be appropriated for fiscal years beginning after September 30, 1985, such sums as may be necessary to carry out the purposes of this chapter.".

(l) TABLE OF SECTIONS CONFORMING AMENDMENT.—The table of sections for chapter 8 of such title is amended to read as follows:

"CHAPTER 8—COPYRIGHT ROYALTY COURT

"Sec.
"801. Copyright Royalty Court: Establishment and purpose.
"802. Designation of Judges.
"803. Procedures of the Court.
"804. Institution and conclusion of proceedings.
"805. Staff of the Court.
"806. Administrative support of the Court.
"807. Reports.
"808. Effective date of final judgments.
"809. Judicial review.
"810. Arbitration.
"811. Authorization of appropriations.".

SEC. 3. CONFORMING AMENDMENTS RELATING TO FUNCTIONS OF THE COPYRIGHT ROYALTY COURT AND THE COPYRIGHT OFFICE.

(a) SECONDARY TRANSMISSIONS.—Section 111 of title 17, United States Code, is amended—

(1) in subsection (d) by striking out ", after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted)" each place it appears in paragraphs (1) and (2);

(2) in subsection (d)(3)—

(A) in the second sentence by striking out "Royalty Tribunal" and inserting in lieu thereof "Office", and

(B) in the third sentence by striking out "Tribunal" and inserting in lieu thereof "Court"; and

(3) in subsection (d)(5)—

(A) by striking out "Royalty Tribunal" each place in appears and inserting in lieu thereof "Office" and by striking out "Tribunal" each place it appears and inserting in lieu thereof "Office", and

(B) by striking out the last sentence of subparagraph (B) and inserting in lieu thereof "If the Office determines that such a controversy exists, the Office shall petition the Copyright Royalty Court to conduct a proceeding under chapter 8 of this title to determine the distribution of royalty fees.".

(b) PHONORECORD PLAYERS.—Section 116 of title 17, United States Code, is amended—

(1) in subsection (b)(1)(A) by striking out ", after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),";

(2) in subsection (c)(1)—

(A) in the second sentence by striking out "Royalty Tribunal" and inserting in lieu thereof "Office", and

(B) in the third sentence by striking out "Tribunal" and inserting in lieu thereof "Court";

(3) in subsection (c)(2)—

(A) in the first sentence by striking out "Royalty Tribunal" and inserting in lieu thereof "Office" and by striking out "Tribunal" and inserting in lieu thereof "Office", and

(B) in the second sentence by striking out "810" and inserting in lieu thereof "809" and by striking out "Tribunal" and inserting in lieu thereof "Court";

(4) in subsection (c)(3)—

(A) in the first sentence by striking out "Royalty Tribunal" and inserting in lieu thereof "Office",

(B) in the second sentence by striking out "Tribunal" and inserting in lieu thereof "Office", and

(C) by striking out the last sentence and inserting in lieu thereof "If the Office determines that such a controversy exists, the Office shall petition the Copyright Royalty Court to conduct a proceeding under chapter 8 of this title to determine the distribution of royalty fees. During any such proceeding, the court shall allow adequate

opportunity to the parties involved in the controversy to present factual evidence to the court.";

(5) in subsection (c)(4)(C), by striking out "Tribunal" and inserting in lieu thereof "Court"; and

(6) in subsection (c)(5)—

(A) by striking out "Royalty Tribunal" both places it appears and inserting in lieu thereof "Office", and

(B) by striking out "United States District Court for the District of Columbia" and inserting in lieu thereof "Copyright Royalty Court".

(c) NONCOMMERCIAL BROADCASTING.—Section 118 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) by amending the first two sentences of subsection (b) to read as follows:

"(b) The chief judge of the Copyright Royalty Court shall publish in the Federal Register, or in such other publication that the court considers to be an effective means of notice, notice of the initiation of proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified in subsection (d) with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works. Copyright owners and public broadcasting entities shall negotiate in good faith

and cooperate fully with the court in an effort to reach reasonable and expeditious results.",

(B) by striking out "Tribunal" each place it appears and inserting in lieu thereof "Court",

(C) in paragraph (3) by striking out "in the Federal Register", and

(D) by striking out paragraph (4);

(2) by amending subsection (c) to read as follows:

"(c) The procedure specified in subsection (b) shall be repeated at 5-year intervals in accordance with rules prescribed by the Copyright Royalty Court."; and

(3) in subsection (d)—

(A) by striking out "the transitional provisions of subsection (b)(4), and to", and

(B) by striking out "Tribunal" and inserting in lieu thereof "Court".

SEC. 4. EFFECTIVE DATE.

This Act shall take effect 60 days after the enactment of this Act.

SEC. 5. EFFECT ON PENDING CASES.

Any petition pending before the Copyright Royalty Tribunal on the date of the enactment of this Act shall be transferred to the Copyright Royalty Court. The reversal or remand for further proceedings of any matter relating to the Copyright Royalty Tribunal pending before any Federal

court on the date of the enactment of this Act shall be forwarded to the Copyright Royalty Court for appropriate action.

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99TH CONGRESS
1ST SESSION

H. R. 3339

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions; to amend the Communications Act of 1934 respecting retransmission of programs originated by broadcast stations; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 1985

Mr. FRANK introduced the following bill; which was referred jointly to the Committees on the Judiciary and Energy and Commerce

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A BILL

To amend the copyright law respecting the limitations on exclusive rights to secondary transmissions; to amend the Communications Act of 1934 respecting retransmission of programs originated by broadcast stations; and for other purposes.

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

SEC. 1. LIMITATIONS ON EXCLUSIVE RIGHTS IN CERTAIN SECONDARY TRANSMISSIONS AND DELETION OF COMPULSORY LICENSES.

(a) AMENDMENT TO SECTION 111 OF TITLE 17.—Section 111 of title 17 of the United States Code is amended to read as follows:

"§ 111. Limitations of exclusive rights: secondary transmissions

"(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—Notwithstanding the provisions of section 106, the secondary 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 consist 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, in the absence of a negotiated license, 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.

"(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 made by a cable system 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—

"(A) the cable system serves fewer than 2,500 subscribers; or

"(B) the cable system is located in whole or in part within the local service area of the pri-

mary transmitter and the cable system does not have the capacity to carry more than 12 channels; or

"(C) the cable system is located in whole or in part within the local service area of the primary transmitter and—

"(i) the cable system is not a cable system to which subclause (A) or (B) of this clause applies, and

"(ii) the cable system carries, as part of the basic tier of cable service regularly provided to all subscribers at the minimum charge, in full and in their entirety the signals of every broadcast television station within whose local service area the cable system is located in whole or in part; or

"(D) the primary transmission is of a network television station and—

"(i) the cable system is not located in whole or in part within the local service area of a station affiliated with the same network, and

"(ii) the primary transmission is from the most proximate network television station affiliated with the same network.

"(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 or by an appropriate governmental authority of Canada or Mexico 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.

"(3) Clause (2) does not apply to the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research if—

"(A) the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the televi-

sion station broadcasting that commercial advertisement, and the cable system performing the secondary transmission; and

"(B) 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 by any device or process of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a 'cable system' not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however*, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission.

"A 'cable system' has the meaning given such term under regulations of the Federal Communications Commission which existed on January 1, 1985, and July 1, 1985. A system is covered by such term if it would be a cable system under such regulations as existed on either such date. For purposes of determining the exemption under subsection (c)(1)(A), two or more cable systems in contiguous communities, 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, is the area within a 50-mile radius of the reference point in the community to which that station is licensed or authorized by the Federal Communications Commission, as such reference point is defined under regulations of such Commission as in effect on July 1, 1985.

"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 station' is a broadcast station owned or operated by, or affiliated with one of the

three national commercial television broadcast networks or the Public Broadcasting Service."

(b) EFFECTIVE DATE.—The amendment made by subsection (a) of this section shall take effect on the first January 1 or July 1 occurring more than 180 days after the date of enactment of this Act.

SEC. 2. AMENDMENT TO THE COMMUNICATIONS ACT OF 1934.

(a) PROHIBITION OF MUST-CARRY OR OTHER REGULATION BY THE FCC OR STATES OF RETRANSMISSIONS.—Section 325 of the Communications Act of 1934 is amended by inserting after subsection (c) the following new subsection:

"(d) Except as otherwise provided in subsections (a), (b), and (c), the Commission shall not have any authority to establish or enforce any restriction, requirement, or other rule or regulation relating to the retransmission by any person of any program or portion of a program originated by a broadcast station. No State or unit of general local government shall have any authority to establish or enforce any such restriction, requirement, or other rule or regulation.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of enactment of this Act.

SEC. 3. TECHNICAL AND CONFORMING AMENDMENTS.

(a) SUSPENSION OF AUTHORITY TO PETITION COPYRIGHT ROYALTY TRIBUNAL FOR ADJUSTMENTS IN RATES

FOR RETRANSMISSIONS UNDER COMPULSORY LICENSES DURING 1985.—(1) Section 804(a)(2) 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.

(2) Section 804 of title 17 of the United States Code is amended by striking out the last sentence of subsection (b).

(b) CONFORMING AMENDMENTS TO PROVISIONS RELATING TO REMEDIES FOR COPYRIGHT INFRINGEMENT.—(1) Section 501(c) 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".

(2) Section 501(d) of title 17 of the United States Code is amended by striking out "section 111(c)(3)" and inserting in lieu thereof "section 111(c)(2)".

(3) Section 510(a) of title 17 of the United States Code is amended by striking out "section 111(c)(3)" and inserting in lieu thereof "section 111(c)(2)".

(4) Section 510(a) 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.

(5) Section 510 of title 17 of the United States Code is amended by striking out subsection (b).

(c) TERMINATION OF AUTHORITY OF COPYRIGHT ROYALTY TRIBUNAL TO ADJUST RATES FOR RETRANSMIS-

SIONS UNDER COMPULSORY LICENSES.—(1) Section 801(b) of title 17 of the United States Code is amended—

(A) by striking out subparagraph (2) and redesignating subparagraph (3) as subparagraph (2); and

(B) by striking out "sections 111 and" in such redesignated paragraph (2) and inserting in lieu thereof "section".

(2) Section 804(a) 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 (D)".

'(3) Section 804 of title 17 of the United States Code is further amended—

(A) by striking out subsection (b) and redesignating subsections (c), (d), and (e) as subsections (b), (c), and (d) respectively; and

(B) by striking out "sections 111 or" in subsection (c) (as so redesignated) and inserting in lieu thereof "section".

(4) Section 809 of title 17 of the United States Code is amended by striking out "sections 111 or" and inserting in lieu thereof "section".

(d) EFFECTIVE DATE.—(1) The amendments made by subsection (a) of this section shall take effect on the date of enactment of this Act.

(2) The amendments made by subsections (b) and (c) of this section shall take effect on the first January 1 or July 1 occurring more than 180 days after the date of enactment of this Act.

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APPENDIX 2.—MISCELLANEOUS

[From the Washington Post, May 29, 1985]

END THE PLAGUES OF COPYRIGHT LAW

(By Daniel Toohey and Noel Gunther)

The Copyright Royalty Tribunal has gotten a lot of publicity lately, all of it bad. Marianne Mele Hall, the chairman, was forced to resign after working on a book that says blacks in America "insist on preserving their jungle freedoms."

The two remaining commissioners—Edward Ray and Mario Aguero—are Republican Party activists with no previous experience in copyright law. President Reagan's most recent nominee, Rose Marie Monk, has nothing in her background to suggest she knows the difference between a copyright and a trademark. For most of the last six years, she has been an aide to the president's long-time political adviser, Lyn Nofziger.

It would therefore be comforting to report that these appointees are supported by an expert staff. The Tribunal, after all, is charged with a specialized mission: setting royalty fees for cable systems and then dividing the royalties among copyright holders, such as movie companies, TV producers and sports interests. Unfortunately, the CRT has never hired an accountant or an economist and only recently hired its first staff lawyer.

The U.S. Court of Appeals has chastised the CRT for its poorly reasoned opinions. Hall conceded, in congressional testimony, that her fellow commissioners often failed to show up for work. Sen. Charles Mathias has said that the White House considers the CRT a useful place to put some otherwise embarrassing applicants for jobs.

The problems at CRT are symptomatic of the plagues of copyright law. The Copyright Act tries to provide economic incentives to creators, while protecting the public's interest in the widest possible dissemination of ideas. Though copyright law was devised to deal primarily with writers, composers and artists, major industries are growing up around new forms of expression—video cassettes, computer programs, data bases and microprocessors. Each industry presents special problems that should be resolved quickly, so the creative process can continue in a stable, precedent-based legal atmosphere. Yet copyright law lags far behind these technological changes.

The main problem is that responsibility for copyright law is widely dispersed. The CRT shares authority with Congress, which is preoccupied with admittedly larger issues; the courts, which are too slow; and the Copyright Office, which like the CRT has too little power. We believe that responsibility for copyright should be vested in a new Federal Copyright Agency.

Right now, major copyright issues are battled back and forth between Congress and the courts. For Congress the challenge is to write an enduring statute despite all the other demands on a legislator's time. The sponsor of a copyright bill attracts a little media attention and probably no popular support for reelection back home. Yet the legislator who undertakes the job must become expert in one of the most tangled areas of law, all the while contending with aggressive special interests.

The difficulty is compounded by Congress' belief that it must write a painstakingly detailed statute. The Copyright Act, for example, prescribes the exact fee that jukebox owners must pay when they submit their annual copyright applications. This kind of arcana is usually found in footnotes to the Federal Register.

Predictably, Congress rarely gets around to revising the copyright statute. Despite rapid change in the nature of copyrighted works, the most recent statute was enacted in 1976; the previous statute was enacted in 1909.

The courts, meanwhile, must apply an antiquated statute to products that did not even exist when the law was written. If you pick up a New York Mets game on your home satellite dish, should you also pick up part of Dwight Gooden's salary? If you rent "The Godfather" at your local video store, should Mario Puzo receive royalties?

Since the Copyright Act was written when your video store was still a laundromat, the courts are in a quandary. The slow pace of litigation exacerbates the problem.

Congress could improve matters by writing a single law. The law would create a Federal Copyright Agency with all-encompassing jurisdiction over copyright. The new agency would have broad adjudicative and administrative powers, like the Federal Communications Commission. Since creating the FCC in 1934, Congress has had to make only moderate revisions to the Communications Act. The act has survived radical innovation in communications and technology—the same changes that are now paralyzing copyright law.

The Federal Copyright Agency would relieve Congress of the need to pass detailed legislation. By adopting new rules, the agency could address specialized problems more quickly than either Congress or the courts. By issuing declaratory opinions, before a dispute arises, the FCA could reduce the number of infringement lawsuits. And with the aid of an experienced staff, the FCA could handle routine regulatory issues, freeing Congress to set policy. Congress could safeguard its policy by overseeing the FCA and by enacting corrective legislation when needed.

The FCA should have the power to adopt compulsory licensing when negotiations between creators and distributors would be impractical. Compulsory licensing, for example, would allow cable TV systems to carry "The Cosby Show" without having to negotiate with the producers, writers and musicians who create the show. Instead, each cable system would pay a semi-annual fee to cover all of the copyrighted programs it carried over the previous six months.

Finally, the FCA would be authorized to resolve individual copyright disputes. Today, every controversy over copyright law winds up in federal court. The high cost of litigation keeps many legitimate products out of the marketplace, since entrepreneurs are afraid of being sued. At the same time, some copyright holders, such as college professors or struggling screenwriters, cannot afford to assert their legitimate rights. By giving the FCA first crack at deciding copyright cases, disputes could be settled more quickly and economically.

These days, it is more fashionable to abolish a federal agency than to create one. But given the weaknesses of the current system, we believe that an expert agency is needed to meet the demand for rapid innovation in the administration of copyright law.

The Only Copyright Law We Need

by Daniel Toohey

Samuel Clemens once said that the only thing God couldn't do was to find any sense in the copyright law. Mr. Clemens lived in fairly active times for copyright laws. When he was born in 1835, this country's second copyright law was four years old. By 1910 when he died, Congress had revised the law twice more, once in 1870 and again in 1909. This writer doesn't know which particular statute prompted the sarcasm, but most people who have any contact with the cumbersome law of copyright leave the experience dissatisfied if not completely undone.

Fewer distant signals

Authors are not the only people who might share Sam Clemens's sentiment. We commoners puzzle over copyright notices posted over photocopiers, we videotape at home while four Supreme Court justices believe that we infringe, we see fewer distant signals on our cable systems because of unexplainable copyright rate increases. Our teachers labor under peculiarly exotic standards for copying classroom materials, standards of "brevity and spontaneity," and "cumulative effect." Librarians display warnings and keep a watchful eye out for "systematic reproduction or distribution" of "related or concerted" copies. We may be fined for "innocent" infringement, and the much relied upon doctrine of "fair use" turns out to be not fair at all, but a pusillanimous doctrine with narrow, grudging application.

Well-intentioned industry groups meet under the sponsorship of Congress to develop "fair use" guidelines that attempt to resolve competing interests informally, and having done so must admit that those who rely upon their conclusions do so perilously.[1]

Nothing in the underlying purposes of copyright prepares one for such a complex, vexatious law. Copyright simply strives to balance two principles: that authors should enjoy a monopoly on their works for a limited time in order to preserve their livelihood in such activities and thereby spur them on to further creation, and that their works should be accessible for people to use them as part of the artistic treasury of the nation.[2] The middle ground between the propositions of monopoly and accessibility is the battlefield where cases are fought in the federal courts and where special interests are lobbied in Congress.

Struggling in vain

The need to balance accessibility with the rights of ownership is increasingly critical as the communications revolution gains speed. Copyright now affects not only large sectors of our economy, but the everyday lives of people, as the librarian on sentry duty at the copying machine well knows. As new technologies enter the marketplace and new economic relationships among users and creators are formed, the traditional administrators of copyright law, Congress and the courts, struggle in vain to keep up. Generally, because of the time it takes for them to act and a backlog of other duties, they fall far behind.

When the United States' first copyright law was enacted in 1790 (called by Congress "An Act for the encouragement of learning"), it protected little more than printing and engraving. A satisfactory protective balance between ownership and use was achieved with periodic legislative review and it occasioned interpretations of the statute by the courts. Technological and economic change occurred more slowly then today and comprehensive revisions to the copyright laws were enacted only every forty years or so until 1909.

Pulled and twisted

When the 1909 statute was superseded in 1976, the old law was exhausted from having been pulled and twisted to fit applications never dreamed of by its authors. Revision was delayed by the impossibility of writing a law specific enough for the problems at hand and general enough to protect new forms of communication as they appeared. The 1976 Copyright Act occupies two and one-half times as many pages as the older law. While the 1909 law defined only two terms, the new law defined more than fifty. These two simple comparisons give only a hint of the statute's complexity. While most statutes lean on legislative intent to assist in interpreting their provisions, the 1976 law actually incorporates sometimes inconsistent documents from House and Senate proceedings. It also incorporates certain FCC

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rules which were in effect at the time but have since been repealed, leaving the law—assuming Sam Clemens was wrong—God knows where.

In spite of Congress' exertions, the 1976 statute lived up to no one's hopes. Only two years after its enactment, various parties were clamoring for major revision. Today the tumult continues. Omnibus legislation is once more in Congress, with little hope of passage. The rapid obsolescence of copyright law is not an indictment of Congress; it demonstrates that the widening scope of property rights under copyright protection cannot be contained in a static federal law. Technology easily outruns Congress's ability to provide adequate protection.

The judiciary, the other principal actor in administering copyright law, fares little better than Congress in maintaining pace with demands for protection. The well-known "Betamax" case is a good example.[3] In January 1984, the U.S. Supreme Court held, by a vote of five to four, that the sale of video recorders is not per se an act of infringement. There are other elements to the decision, but for our purposes, two important aspects of this case stand out.

Stale facts

First, the Supreme Court's opinion rested on fairly stale facts. The case began with the filing of an infringement action in 1976; the Court based its opinion on surveys of video recorder use during a 1978 sample period. As any reasonably alert person will have noticed, video recorder use has expanded dramatically between 1976 and 1984, and "time-shifting" (programs recorded off-the-air for later viewing) was the only issue before the Court, not such practices as private "dubbing" of rented items, black-market rentals and so forth.

Second, the justices repeatedly alluded to a lack of direction from Congress. The majority noted that "one may search the Copyright Act in vain for any sign that [Congress] has made it unlawful to copy a program for later viewing at home" or prohibited selling recorders. Justice Stevens, writing for the majority, said, "It is not our job to apply laws that have not yet been written."[4] The four dissenting justices had words for Congress as well. Besides regarding the majority opinion as a disincentive for Congress to patch the Betamax hole in the law, Justice Blackmun observed in his final paragraph for the minority that, like so many problems created by the interaction of copyright law with a new technology, there can be no really satisfactory solution until Congress acts.[5]

The sound one hears is that of the copyright ball being batted back and forth between two branches of government, with no need yet to awaken the President.

For the judiciary, the responsibility is to determine whether existing law has any currency to the facts at hand. If it does not, courts have two choices. They can apply a statute inadequate to the task, risking an unjust result but one which nonetheless observes the legislature's prerogative to write laws. Alternatively they may despair of Congress ever dealing legislatively with the issue before them and do some judicial lawmaking, behaving as an "activist" court.

In a hailstorm of change

For Congress, the responsibility is to write intelligible, lasting law in a hailstorm of change, with so many other demands upon its time. The author of an omnibus copyright bill wins few votes and is rewarded with few television news interviews. Yet the hapless member who undertakes that assignment must become expert in one of the most tangled, bedeviling areas of law as well as the various sciences and arts it protects, all the while facing some of the nastiest special interests in the halls of Congress. The legislators' reluctance, the long period between statutes, is not surprising. In fact, the present demand for administering copyright is probably beyond Congress's abilities and exceeds the abilities of not a few judges as well.

As a consequence, communications and data processing industries continually produce new forms of copyrightable intellectual property and new methods of exploiting existing works, with no reliable assurance that protection is available under the copyright law[6] or that the process or device is not itself an infringement.[7] The strict penalties imposed by the present law make it very risky to venture into the many "gray areas" of the copyright law, yet technological progress is almost impossible to stop. Usually it will roll right over an outmoded law.

This frustrating state of affairs results from Congress's belief that it must write a painstakingly specific statute. Instead it writes nothing at all and no workable system is at hand to balance, with the force and effect of law, the rights of creators and users of copyrighted materials as those materials become available.

An enormous difficulty

Congress could extricate itself from this enormous difficulty by writing a single law, one which creates a federal administrative agency with all-encompassing jurisdiction over copyright. Unlike the present federal agencies which have jurisdiction limited to a part of the present copyright law, such as the granting and recording of copyrights (the U.S. Copyright Office) or the collecting and dispensing of royalties (the Copyright Royalty Tribunal), the new agency would have broad administrative and adjudicative powers like the Federal Communications Commission (FCC). Fifty years ago Congress passed a law creating the FCC. The Communications Act of 1934 has undergone only moderate revision during the half-century of its regime and yet has survived radical changes in communications and technology. It has enabled the FCC to keep rela-

tively close regulatory pace with many of the same changes in communications technology which have outdistanced the copyright law.

Today federal agencies are more likely to be abolished rather than created in favor of the marketplace as a more effective regulator. But, the marketplace has its limits; its rough and tumble cannot achieve the delicate, shifting balance between protection of ownership and creation on one side and access by legitimate users on the other. An agency, let us call it the Federal Copyright Agency (FCA), could design standards for application of fair copyright principles through regulation and adjudication. The mere act of consolidating the critical government supervision of copyright into a single federal agency would bring immediate practical benefits to the public and to the industries affected by copyright.

"As new technologies enter the marketplace and new economic relationships among users and creators are formed, the traditional administrators of copyright law, Congress and the courts, struggle in vain to keep up."

Problems of narrow scope

The FCA could clarify much of the present confusion about copyright by issuing policy statements and opinions. In the rule-making process, part of which includes public comment, the agency can deal specifically with problems of narrow scope. Through these regulatory devices, the agency could respond more speedily than Congress to strike the important balance between creators and users. By centering rule-making in such an agency, the need for exactingly specific legislation by Congress would be avoided. Congress could do what it is best able to do, set general policy by statute and safeguard implementation through its oversight power, enacting corrective legislation only when necessary.[8]

By means of any federal agency's well-recognized power to waive its own rules, the FCA could recognize special circumstances while promoting uniformity. Occasionally, strict application of a rule produces an inequitable result. In such cases, agencies can waive or suspend the rule without generally repealing it. Congress can achieve a similar result but only in a cumbersome, plodding process involving special legislation.

The FCA might employ compulsory licensing when it is needed to maintain an equitable balance between public use and authors' compensation. More and more, we encounter circumstances where such a system might work well. For example, compulsory licensing might offer a simpler, more easily enforceable method of achieving a balance between the modern library and the authors whose works it stores in so many different formats. Somewhere in the many manifestations of storage, retrieval, book preservation, copying, and format transference there is an opportunity for the compulsory license to simplify in a way which fairly compensates authors and yet allows libraries room to modernize. The ability to apply such compensation schemes to fit unique circumstances, even on a temporary basis, should reduce substantially the need for countless exceptions, provisos, and guidelines in either the agency's rules or its governing statute. But only an administrative agency is equipped to do the constant fine tuning that such a scheme requires.

Promoting consistency

The FCA could be given the power to adjudicate disputes arising under the copyright law, relieving federal courts of the obligation to administer it. Today every litigated controversy under the copyright law is an expensive, federal lawsuit. The fear of such litigation and the inevitable costs and delay undoubtedly chill many legitimate uses of copyrighted works. Through the legal doctrine of primary jurisdiction (which gives the agency first crack over the courts at deciding cases falling within its regulatory ambit) the FCA could promote consistency in the law and avoid the present difficulties flowing from conflicting district court opinions from various jurisdictions. More streamlined administrative proceedings would also permit speedier resolution of claims at less cost to the litigants. Any subsequent judicial review would take place on the basis of a record developed by the agency and doctrines which limit the reviewing court's ability to review the case.

A copyright agency could become expert in the copyright and its subject matter, promoting consistent administration of the law. By consolidating the functions now separately performed by the courts, Congress, the Copyright Office, and the Copyright Royalty Tribunal (CRT), the disharmonies resulting from the independent actions of these entities could end. Thus, for example, the agency could administer the functions performed by the CRT with full authority to interpret

and enforce copyright rules and the underlying statutes. Moreover, the agency's continuing participation in these related functions will produce a staff that is thoroughly expert in these matters, reducing the time it now takes government to decide copyright cases.

An agency's ability to develop statistical data on the industries it regulates is also useful, enabling it to anticipate and respond to the demands of new technologies rather than to react to problems already out of control. The need to completely understand the market of copyrightable works and their economic milieu underlies many established doctrines in the field. For example, in administering the doctrine of "fair use," the FCA could monitor developments in affected industries and identify those elements of use that unfairly limit authors' rights or inequitably restrict public benefits. A realistic fairness is the ideal this doctrine has pursued, but it requires attentive experts to make it work.

A stitch in time

A congressional stitch in time to establish a permanent, effective agency of experts will ultimately save countless hours of futile legislative and judicial work. Congress's present functions force it beyond its proper role which is that of an overseer, a creator of broad policy. Historically, social and economic forces have demanded agency regulation of commerce, communications, trade, and the environment when Congress could no longer keep pace with the level of specificity demanded in order to govern effectively. That same situation exists now in the copyright area and recommends a similar result. The day the idea for the FCA came to me was cloudless, brilliant, with exceptionally low humidity, and a gentle southerly breeze. God likes the idea or He would have made it rain. Besides, it means no more wisecracks from Clemens.

"Historically, social and economic forces have demanded agency regulation of commerce, communications, trade, and the environment when Congress could no longer keep pace with the level of specificity demanded in order to govern effectively."

FOOTNOTES

1. For example, Congressman Robert Kastenmaier, Chairman of the House Subcommittee on Courts, Civil Liberties, and Administration of Justice appointed a negotiating committee in March 1979 to establish specific guidelines for off-air recording by educators. The committee met and adopted a set of guidelines, but two of its members dissented, the Motion Picture Association of America and the Association of Media Producers. A member of Congressman Kastenmaier's staff was asked what weight the guidelines would carry. The response made two points: 1) the subcommittee would stand behind the guidelines and make clear that it is Congress's intent that the guidelines represent the appropriate policy behind "fair use," and 2) if educators are sued, and they end up losing, Congress will undoubtedly consider that the courts have not construed the law properly and change it. This information comes from a memorandum sent by the Public Broadcasting Service to all of its managers on January 15, 1982. It is cold comfort indeed to the educator who relies upon these guidelines and is a classic example of the frustration industry groups encounter in their attempts to devise informal standards.

2. Article I, section 8, clause 8 of the U.S. Constitution grants Congress the power to promote the progress of "science and the useful arts" by giving authors and inventors exclusive rights to their writings and discoveries for limited times.

3. Sony Corporation of America *et al.* v. Universal City Studios, Inc. *et al.*, 104 S. Ct. 774 (1984).

4. *Id.* at 796.

5. *Id.* at 819.

6. Until 1980, when the 1976 Copyright Law was amended, much debate centered around the question of whether computer software could be protected by copyright. In Apple Computer, Inc. v. Franklin Computer Corp., 714 F. 2d 1240 (3rd Cir. 1983), decided after the 1980 amendments, the issues included technical questions of whether certain forms of computer programs could be copyrighted.

7. In the Betamax case, *supra* n. 3, the question was whether the sale of Sony's video recorder was itself an infringement because the device did the allegedly illegal recording.

8. When the FCC's comparative hearing process became too protected and cumbersome for deciding among competing applicants for low power television and certain nonbroadcast services, Congress simply authorized the use of a lottery to decide the winner.